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# *Governmental and Semi-Governmental Federal Charitable Entities*

Professor Ellen Aprill

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*Articles*

# Governmental and Semi-Governmental Federal Charitable Entities

ELLEN P. APRILL[†]

*The standard view of the relationship between government and the nonprofit charitable sector treats them as separate and distinct. But they are not. Numerous federal agencies have statutory authority to receive tax-deductible charitable deductions. Their ability to do so, however, undermines the oversight accomplished through the constitutionally mandated appropriations process. Congress has also created many nonprofit tax-exempt organizations. These entities enjoy flexibility as to fundraising, investment, and spending that government agencies lack. However, they avoid the accountability that various federal statutes impose on government agencies, on the one hand, and that state nonprofit laws accomplish for private nonprofit organizations, on the other. At the same time, these congressionally established nonprofits retain significant governmental ties, such as service by government officials on their boards and reliance on appropriations. These practices produce at best a precarious balance between the governmental and non-governmental. Moreover, Congress has bestowed honorific charters on dozens of preexisting nonprofit tax-exempt organizations, a practice that can erroneously imply congressional endorsement and oversight of these groups.*

*For the first time in the scholarly literature, this Article examines all of these types of entities and the issues they raise under tax law, nonprofit law, constitutional law, and administrative law. As one example, the Smithsonian Institution, the first and arguably the most prominent congressionally created nonprofit, engaged an independent review commission in 2007 to investigate widespread reports of inappropriate behavior by its then Secretary. The commission identified failures of governance and management, faulting the lack of federal common law regarding board duties and obligations. It questioned the ability of the Chief Justice and the Vice President to devote the hours required to discharge their fiduciary duties as Smithsonian Institution board members. It called for the Smithsonian, which is funded primarily by*

[†] John E. Anderson Professor of Tax Law Emerita, LMU Loyola Law School. The Author thanks Samuel Brunson, Harvey Dale, Sanford Holo, James Joseph, Leandra Lederman, Lloyd Mayer, and Alexander Reid for comments on earlier versions of the Article. Audrey Gariby and Evelyn Zhang provided excellent research assistance. Special thanks to Laura Cadra, Loyola Law School librarian, for all her help in locating historical sources.



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*appropriations, to adopt procedures for transparency, disclosure, and compensation consistent with statutes governing federal agencies. The Smithsonian accepted some but not all of these recommendations. In particular, no change to its board structure has taken place.*

*Emphasizing issues of governance, this Article makes specific recommendations to increase accountability of both government agencies and congressionally established nonprofit entities, such as urging Congress to curtail the widespread practice of appointing government officials to nonprofit boards. More fundamentally, it calls for acknowledgment of these hybrid entities. It argues for viewing government and charity as resting on a continuum rather than each floating in its own untethered conceptual space. This new approach clarifies our understanding of government, the nonprofit sector, and the relationship between them. Seeing these entities on a continuum reminds us that our nation faces a choice between the private and public—or some mix of the two—in funding activities in which both government and charitable nonprofits engage.*

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## INTRODUCTION

Few American taxpayers know that they can make tax-deductible charitable contributions of cash and property to the federal government itself. If they do, taxpayers cannot earmark these donations; they must be used to reduce the federal budget. In contrast, taxpayers can make deductible donations directly to federal agencies, including gifts for specified purposes, but only if the agency has statutory authority to receive them. For example, the organizers of the GoFundMe campaign to support the Trump Administration's effort to build a wall on the Mexican border learned, to their dismay, that they could not give the funds raised to the Department of Homeland Security without congressional action to authorize acceptance.[1]

At the same time, Congress has often established entities as nonprofit corporations rather than government agencies. Such nonprofit corporations include the Smithsonian Institution ("the Smithsonian") and the American National Red Cross ("Red Cross"). These nonprofit corporations are eligible to receive deductible contributions under various subsections of § 170(c) and § 501(c) of the Internal Revenue Code ("IRC").[2] Such congressionally established § 501(c) organizations, however, differ widely in the extent to which government officials comprise their governing bodies and the extent to which these organizations receive appropriations. In addition, dozens of privately established nonprofits, including the Boy Scouts and the Girl Scouts, have been granted federal charters long after their establishment as nonprofit tax-exempt entities under state and federal law.

The standard view of the relationship between nonprofits and government fails to consider these kinds of examples. It assumes that the two categories are separate and distinct. In 1998, for example, Professor Evelyn Brody wrote an influential paper conceptualizing government and charity as competing sovereigns.[3] Similarly, the introduction to the 2017 essay collection *Nonprofits and Government: Collaboration and Conflict* acknowledged that sometimes governments "set up nonprofit corporations to carry out some public programs."[4] It points to the Corporation for Public Broadcasting as an example, implying that such a choice seldom occurs. Neither of these treatments acknowledges the numerous entities that exhibit characteristics of both government and private charitable nonprofit organizations.

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1. Mihir Zaveri, *GoFundMe to Refund Border Wall Donations After Fund-Raiser Falls Short*, N.Y. TIMES (Jan. 11, 2019), https://www.nytimes.com/2019/01/11/us/gofundme-border-wall-refund.html. The organizers concluded that the Democratic Congress would not enact the needed statutory authority. *Id.*

2. Unless otherwise indicated, references to a "section" or "§" are to a section of the Internal Revenue Code, 26 U.S.C. §§ 1–9834.

3. *See generally* Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998).

4. Elizabeth T. Boris, Brice McKeever & Béatrice Leyider, *Introduction: Roles and Responsibilities of Nonprofit Organizations in a Democracy*, *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 1, 7 (Elizabeth T. Boris & Eugene C. Steuerle eds., 3d ed. 2017).

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This Article acknowledges and examines these hybrid entities. The Internal Revenue Code provides a deduction from income tax for charitable contributions under § 170(c) for taxpayers who itemize deductions.[5] Most discussions of the charitable contribution deduction take into account only gifts to organizations exempt from federal income tax under § 501(c)(3), often referred to as "charities." Section 170(c), however, reaches more broadly. It permits the charitable contribution deduction for gifts to government—whether federal, state, or political subdivisions of states—as well as for those to certain tax-exempt veterans' organizations, certain activities of lodge systems, and even tax-exempt cemetery companies.[6] All of these entities are exempt under subsections of § 501(c) other than § 501(c)(3).[7]

Elsewhere, I have written about the charitable contribution deduction for gifts to states, their political subdivisions, and their charitable affiliates.[8] Here, I focus on those entities affiliated with the federal government able to receive a charitable contribution deductible under § 170. This Article will refer to these § 170-eligible entities as "federal charitable entities."[9] To emphasize, "charitable" in this defined term refers to eligibility for the charitable deduction, not organizations that qualify as charities under state law or the common use of "charity" limited to organizations that offer relief for the poor. The term "congressionally established § 501(c) organizations" will refer to the subset of federal charitable entities that Congress has established as nonprofit organizations eligible to receive deductible charitable contributions under § 170(c).

Under this § 170 definition, a wide variety of federal charitable entities exist, ranging from the federal government through federal agencies and congressionally established § 501(c) organizations to otherwise private tax-exempt nonprofits that Title 36 of the U.S. Code has granted honorific federal charters. This Article offers a detailed typology and examination of the full range of governmental and semi-governmental federal entities eligible to receive tax-deductible contributions.[10] This examination requires consideration not only of

5. *See* Lilian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U. L. REV. 1307, 1320–21 (2012).

6. *See* 26 U.S.C. § 170(c)(3) (certain veterans' organizations); *id.* § 170(c)(4) (certain activities of certain fraternal organizations); *id.* § 170(c)(5) (certain cemetery companies).

7. *See id.* § 501(c)(10) (certain fraternal societies); *id.* § 501(c)(13) (certain cemetery companies); *id.* § 501(c)(19) (certain veterans' organizations).

8. *See generally* Ellen P. Aprill, *Revisiting the Tax Treatment of States, Political Subdivisions, and Their Affiliates*, 23 FLA. TAX. REV. 73 (2019).

9. That is, this category of "federal charitable entities" includes the federal government and federal agencies.

10. As later citations will make clear, Kevin Kosar, when at the Congressional Research Service, wrote about many of the semi-governmental entities covered here, and I am grateful for his work. *See infra* notes 203, 246. He has not, however, written on all of the entities considered here or written about all of them as a group. *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 860 (2014) (considering some of the entities also discussed here in her insightful review of different types of semi-governmental entities, but not focusing on nonprofit and tax-exempt concerns).

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federal tax law and state nonprofit law, but also of constitutional law and administrative law.

If we use deductibility as the test, federal charitable entities, including congressionally established § 501(c) organizations, are more numerous and important—and their relationship with private charities more complicated—than traditional characterizations posit. They play a much larger role in both the governmental and the nonprofit charitable sectors than has been generally recognized. This Article thus supports the statement of the National Academy of Public Administration, itself a congressionally established § 501(c) organization, that "[t]he boundary between the public and private sectors has been blurred so that one cannot say with assurance to which sector many corporations belong or to whom they are accountable."[11]

This Article homes in on both the similarities and differences between federal government agencies and congressionally established § 501(c) organizations. It underscores the importance of accountability for both categories. The appropriations process and myriad federal statutes hold federal agencies accountable. By identifying particular federal statutes that apply to federal government agencies but not to congressionally established § 501(c) organizations, this Article offers a new lens for understanding key characteristics of both kinds of entities.

Privately established charities look to the law of the state in which they are established for rules regarding governance. As William Josephson, a former Assistant Attorney General in charge of the New York Charities Bureau wrote, "[f]undamental to internal corporate affairs matters is the source of law. State-chartered corporations operate under comprehensive statutory and common law rules."[12] In contrast, he continues, "Congress has not provided comprehensive rules of decision for federally-chartered corporations."[13] As a result, congressionally established § 501(c)(3) organizations often confront failures in matters of governance.

This Article examines the consequences, both in practice and in theory, of this federal neglect. Emphasizing issues of governance, the Article makes specific recommendations to increase accountability by both government agencies and § 501(c) organizations established by Congress. More fundamentally, the Article shows that the border between public and private charitable entities is more permeable than usually assumed. It demonstrates that many entities exhibit characteristics of both categories. It argues for viewing government and charity as resting on a continuum rather than in separate spheres.

11. *See* 3 U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 15-87 to -88 (3d ed. 2016).

12. William Josephson, *American Red Cross Governance*, 55 EXEMPT ORG. TAX REV. 71, 74 (2007).

13. *Id.*

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Viewing government and charity as closely related is not without precedent. Professors Kirk Stark and Daniel Hemel have both written about the extent to which the activities of tax-exempt charities resemble the activities of governments.[14] Unlike this Article, their work focuses on the relationship between charity and state or local governments.[15] For state and local governments, the possibility of citizen exit is far more feasible than exit from the federal government.[16] But their scholarship has important parallels to this Article's undertaking.

Professor Stark and Professor Hemel focus on the similarities between state and local governments and charities. Responding to the $10,000 limit on the itemized deduction for state and local taxes introduced by the Taxpayer Cuts and Jobs Act of 2017,[17] they criticize the discontinuity in the federal tax law's current treatment of two methods of funding state and local legislative priorities. On the one hand, federal tax law imposes taxes and appropriates the resulting revenue, while, on the other hand, it provides charitable tax subsidies via deductions, credits, and other devices for transfers made directly by taxpayers to certain legislatively specified organizations. Professor Hemel points out that state and local governments are primarily in the business of providing education, health, and social services and that "public charities are primarily engaged in the same."[18] In the same vein, Professor Stark argues that "taxation and charitable giving ought not to be regarded as sharply distinct types of outlays, but rather simply two different forms of accomplishing the same result."[19] As Stark explains, "both represent transfers made by individuals in support of public-benefiting activities and social investments. Both arise from some unknown (and likely unknowable) mix of self-regarding and other-regarding motivations."[20] Moreover, "the ultimate result of both, at least when done right, is the education of children, the promotion of public health, and the alleviation of human misery in various forms."[21]

My study of federal charitable entities uncovers similar parallels between the national government and national charities. In addition to considering how charity overlaps with government, this Article also does the inverse by asking the extent to which the federal government overlaps with what we have traditionally considered charitable. This overlap serves as a reminder that our nation faces a choice between the private and public—or some mix of the two—when funding matters that both government and charity address.

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14. *See generally* Kirk J. Stark, *The Power Not to Tax*, 69 AM. U. L. REV. 565 (2019); Daniel Hemel, *The State-Charity Disparity and the 2017 Tax Law*, 58 WASH. U. J.L. & POL'Y 189 (2019).

15. Stark, *supra* note 14, at 655–69; Hemel, *supra* note 14, at 189–92.

16. Stark, *supra* note 14, at 577–78.

17. *See* 26 U.S.C. § 164(b)(6).

18. Hemel, *supra* note 14, at 193.

19. Stark, *supra* note 14, at 588.

20. *Id.*

21. *Id.* at 588–89.

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In short, the Article categorizes and clarifies our understanding of both the government and the nonprofit sectors as well as the relationship between them. Professor Anne Joseph O'Connell in her thorough study of what she calls "bureaucracies at the border" has suggested that "efficiency may not always trump accountability in these alternative agency structures."[22] Supporting her insight, this Article details not only efficiencies in hiring, fundraising, investment, and spending, but also the loss of accountability and thus of democratic legitimacy that semi-governmental, congressionally established § 501(c) organizations display. It suggests that Congress has too frequently valued efficiency over accountability and argues for changes to strike a different balance. For example, the Article urges Congress to review gift acceptance policies of government agencies that can receive gifts and to curtail the practice of naming government officials to the boards of congressionally established § 501(c) organizations.

Part I gives an overview of federal tax and state law oversight of nonprofit organizations. Part II explains how the federal government and its agencies qualify as federal charitable entities. Part III discusses, in varying detail, six well-known congressionally established § 501(c)(3) organizations. Part IV considers the odd mix of congressionally chartered nonprofit organizations found in Title 36, Subtitle B of the U.S. Code. Part V offers recommendations to improve the operation and oversight of these entities. Finally, this Article provides concluding thoughts.

## I. OVERSIGHT OF NONPROFIT TAX-EXEMPT ORGANIZATIONS

### A. FEDERAL TAX LAW

Federal tax laws have an important, perhaps dominant, role in the oversight of nonprofit tax-exempt organizations. Most nonprofits eligible to receive deductible charitable contributions are exempt from federal income tax under § 501(c)(3). The Internal Revenue Service ("IRS"), in enforcing this and other applicable IRC provisions, operates as the key regulator of tax-exempt nonprofits.

Section 170 governs the charitable contribution deduction. The deduction, subject to various limits, is available to taxpayers who itemize rather than take the standard deduction on their income tax returns.[23] Section 170(c)(2) permits the deduction for organizations organized and operated for "religious, charitable, scientific, literary or educational purposes[;] . . . to foster national or international amateur sports competition[;] . . . or for the prevention of cruelty

22. O'Connell, *supra* note 10, at 842.

23. For tax year 2023, the standard deduction is $27,700 for married persons filing jointly and $13,850 for single taxpayers or married persons filing separately. *See* Press Release, IRS, IRS News Release IR-2022-182 (Oct. 18, 2022), https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2023.

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to children or animals,"[24] all categories of § 501(c)(3). The public often refers to all organizations in this list as "charities." As noted above, other provisions of § 170(c) authorize charitable contribution deductions beyond gifts to § 501(c)(3) organizations. Importantly for this Article, § 170(c)(1) authorizes a charitable contribution deduction for "a contribution or gift to or for the use of . . . the United States . . . if the contribution or gift is made for exclusively public purposes."[25]

Although the current size of the standard deduction has reduced the percentage of taxpayers who itemize from over 30% to about 12%,[26] the conceptual framework of § 170 is crucial to understanding the meaning of "charitable."[27] For purposes of this analysis, what matters most is whether a contribution could qualify for a deduction, rather than which taxpayers in fact take the deduction—an important but quite different issue.

Donations to § 501(c)(3) organizations are deductible under § 170(c)(2).[28] Section 501(c) lists some twenty-nine categories of entities exempt from federal income tax,[29] only a few of which are eligible to receive deductible contributions.[30] Organizations exempt under § 501(c)(3), however, far exceed those in other categories of § 501(c).[31]

Section 501(c)(3) organizations are subject to a variety of requirements.[32] The statute forbids insiders from using the entity's income or assets for personal

24. 26 U.S.C. § 170(c)(2)(B).

25. The IRS interprets the phrase "exclusively public purposes" to mean no more than incidental private benefit. *See* Aprill, *supra* note 8, at 126.

26. *SOI Tax Stats-at-a-Glance*, IRS, https://www.irs.gov/statistics/soi-tax-stats-tax-stats-at-a-glance (Mar. 3, 2023); *see* Scott Eastman, *How Many Taxpayers Itemize Under Current Law*, TAX FOUND. (Sept. 12, 2019), https://taxfoundation.org/standard-deduction-itemized-deductions-current-law-2019/. Nonetheless, the charitable contribution deduction remains one of the two largest of individual itemized deductions. *See* Martin A. Sullivan, *Economic Analysis: TCJA Downsized Deductions Dramatically*, TAX NOTES FED. (Sept. 14, 2020).

27. *See* FRANK SAMMARTINO & ERIC TODER, TAX POL'Y CTR., TAX EXPENDITURE BASICS 3 (2020), https://www.taxpolicycenter.org/sites/default/files/publication/158324/tax_expenditure_basics.pdf.

28. § 170(c)(2)(B) (defining the organizations for which a charitable contribution deduction is allowed, and which, for the most part, tracks the exempt purposes listed in § 501(c)(3)). It does not, however, include testing for public safety. *See id.*

29. *Id.* § 501(c)(1)–(29).

30. *See id.* § 501(c)(10) (certain fraternal societies); *id.* § 501(c)(13) (certain cemetery companies); *id.* § 501(c)(19) (certain veterans' organizations).

31. According to the 2021 IRS Data Book, § 501(c)(3) organizations that have applied for and received tax exemptions or are recognized as exempt under tax treaty number 1,431,226. IRS, 2022 INTERNAL REVENUE SERVICE DATA BOOK: OCTOBER 1, 2021 TO SEPTEMBER 30, 2022, at 30 tbl.14 (2023), https://www.irs.gov/pub/irs-pdf/p55b.pdf. The total number of organizations exempt under § 501(c) number 1,828,187. *Id.*

32. Organizations exempt under § 501(c)(3) must comply with a variety of additional tax requirements, such as a tax on unrelated business income and payment of payroll taxes, in addition to those discussed in this paragraph. *See The Life Cycle of a Public Charity*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/life-cycle-of-a-public-charity (June 30, 2023).

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gain[33] and the entity from intervening in any campaign for public office.[34] Under § 501(c)(3), organizations can lobby to some limited extent, whether under the amorphous "no substantial part" of their activities test found in § 501(c)(3) itself or pursuant to an election under § 501(h), which sets out dollar limits on a sliding scale depending on the organization's budget.[35]

With some exceptions, in particular churches and other houses of worship, exempt entities described in § 501(c) must annually file with the IRS a version of Form 990, the Return of Organization Exempt from Tax.[36] The full Form 990 consists of a core form and eighteen schedules. The core form asks a variety of questions, including the organization's mission, accomplishments, compensation of officers, director and key employees, revenues, expenses, and balance sheet. The required schedules vary with the nature and operations of the entity. There is, for example, a special schedule for schools and another for hospitals.[37] The Form 990 is available to the public,[38] except for the names and addresses of certain large donors on Schedule B, which only § 501(c)(3) organizations must include. Potential donors, reporters, academics, and other interested parties, as well as the IRS, use Form 990s. Although charities closely affiliated with governments—whether state, local, or federal—are generally

33. Section 501(c)(3) requires that "no part of the net earnings" of the organization "inure[] to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(3). Enactment of § 4958, known as intermediate sanctions, has softened the absolute self-dealing prohibition in § 501(c)(3) by substituting in most cases an excise tax on self-dealing, including unreasonable compensation, by insiders. *See id.* § 4958.

34. *Id.* § 501(c)(3). This prohibition has come to be known as the Johnson Amendment. It is a frequent target of attack, and IRS enforcement of it is uncertain at best. *See generally* Roger Colinvaux, *The Political Speech of Charities in the Face of* Citizens United*: A Defense of the Prohibition*, 62 CASE W. RSRV. L. REV. 685 (2012).

35. The "no substantial part" test seems to have been adopted out of concern regarding lobbying activity by private foundations. *See* Lloyd Hitoshi Mayer, *What Is This Lobbying That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 499–501 (2008).

36. Some other categories of exempt organizations are also exempt from the Form 990 filing requirement; certain entities affiliated with state or local governments do not need to file the form. *See* Aprill, *supra* note 8, at 116. The IRS guidance establishing this filing exception, Rev. Proc. 95-48, 1995-47 I.R.B. 13, includes some organizations described in § 170(c)(1) and some in § 170(c)(2). The congressionally established § 501(c)(3) entities discussed in this Article rely on § 170(c)(2), the provision that permits deductible contributions for § 501(c)(3) entities. *See* 26 U.S.C. § 170(c)(2). These entities were established as nonprofit entities, rather than as part of the U.S. government, and are not charitable affiliates of state or local governments and do file Form 990s.

37. *See* DEP'T OF THE TREASURY, IRS, OMB NO. 1545-0047, FORM 990, SCHEDULE E (2022), https://www.irs.gov/pub/irs-pdf/f990se.pdf (schools); DEP'T OF THE TREASURY, IRS, OMB NO. 1545-0047, FORM 990, SCHEDULE H (2022), https://www.irs.gov/pub/irs-pdf/f990sh.pdf (hospitals).

38. Data from Form 990s of particular entities later in this Article are taken from the most recent publicly available document. The source for that document varies. Some entities post Form 990 on their websites. GuideStar and ProPublica are good sources for finding Form 990s. *See* GUIDESTAR, https://www.guidestar.org/search (last visited Aug. 23, 2023); PROPUBLICA, https://projects.propublica.org/nonprofits (last visited Aug. 23, 2023). The IRS Form 990 is unusual in being named by the beginning rather than the end of the fiscal year, in contrast to, for example, identification of fiscal years for the U.S. budget. Thus, for clarity and to make comparison easier, I identify the Form 990 of particular entities by indicating both calendar years covered by a fiscal year, i.e., FY 2019–2020 Form 990.

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exempt from the Form 990 filing requirement,[39] congressionally established § 501(c) organizations are not.

As a recent study by the Treasury Inspector General for Tax Administration for Fiscal Year ("FY") 2019 demonstrated,[40] the IRS makes surprisingly little use of Form 990 in enforcement and oversight; of the more than 1.5 million Form 990s filed, the Exempt Organization Division examined approximately 2,000, or 0.13%.[41] In comparison, the IRS examined 0.64% of corporate returns and 0.44% of individual returns.[42] Moreover, during that period, 20% of tax-exempt organization returns selected for examination for potential noncompliance were closed without a completed examination.[43]

The IRS has authority only over federal tax laws. Nonetheless, it considers good governance essential to adherence to the federal tax laws. Because of this belief, the Form 990 includes a section of some twenty questions devoted to governance.[44] Among the questions are those asking about the size of the governing body, the number of independent members, and whether there is a conflict-of-interest policy. Although they provide useful information about the tax-exempt sector, none of these questions go directly to requirements for tax exemption. These additions to the Form 990 have met criticism for usurping and muddling the role of state nonprofit law.[45] States, not the federal government, have responsibility for nonprofit governance matters, as discussed below in Subpart B.

### B. STATE NONPROFIT LAW

The vast majority of nonprofit organizations operating in the United States are creatures of state law. With some exceptions, such as congressionally established § 501(c) organizations discussed here and foreign charities that apply for federal tax-exempt status, most nonprofit organizations come into being and are subject to regulation under state authority.[46] Charitable trusts, with a history stretching back to before the fifteenth century in England, are now governed by several state statutory provisions as well as common law.[47] State

39. Rev. Proc. 95-48, 1995-47 I.R.B. 13 sets forth the requirements for charities affiliated with state or local governments to be exempt from filing Form 990.

40. *See generally* TREASURY INSPECTOR GEN. FOR TAX ADMIN., REPORT NO. 2021-10-013, OBSTACLES EXIST IN DETECTING NONCOMPLIANCE OF TAX-EXEMPT ORGANIZATIONS (2021), https://www.treasury.gov/tigta/auditreports/2021reports/202110013fr.pdf.

41. *Id.* at 6.

42. *Id.*

43. *Id.* at 9.

44. *See* DEP'T OF THE TREASURY, IRS, OMB NO. 1545-0047, FORM 990, PART VI: GOVERNANCE, MANAGEMENT, AND DISCLOSURE (2022), https://www.irs.gov/pub/irs-pdf/f990.pdf.

45. *See* James J. Fishman, *Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545, 546 (2010).

46. *See* RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 1.01 cmts. a–b (AM. L. INST. 2023).

47. *Id.*

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nonprofit corporations, the predominant organizational form,[48] are formed under state corporate law codes, which govern such matters as internal governance procedures, the election and removal of directors, and the obligations of directors and corporate boards.[49]

State nonprofit corporations are subject to what Professor Henry Hansmann has called a "nondistribution constraint."[50] As he has explained, a nonprofit organization is "an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it."[51] Instead, any net earnings "must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide."[52] To qualify as charitable, nonprofit corporations must pursue religious, charitable, scientific, literary, educational, and other purposes beneficial to the community.[53]

The governing board of a charity holds "ultimate responsibility for the affairs of a charity" and must "adopt policies to advance the purposes of the charity it governs and oversee implementation of those policies."[54] Members of these governing boards act as fiduciaries and owe the twin fiduciary duties of care and loyalty to the organization.[55] The ALI Restatement explains that the duty of care "is fundamentally a statement about a fiduciary's duty to oversee the charity[,] . . . is sometimes known as the duty of attention, and . . . is often characterized as including a duty to be adequately informed when making important decisions for the charity."[56] Violations of the duty of loyalty "ordinarily encompass fraud, self-dealing, and improper diversion of corporation assets or corporate opportunities."[57]

Governing bodies of nonprofit organizations also have responsibility for financial oversight. Forty-nine states (all except Pennsylvania), as well as the District of Columbia, have adopted the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), which "provides a modern articulation of

48. *See* JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, NONPROFIT ORGANIZATIONS: CASES & MATERIALS 53 (6th ed. 2021); RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 1.02 cmt. a (AM. L. INST. 2023).

49. *See* MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 187–237 (2004); RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 1.02 cmt. a (AM. L. INST. 2023). *See generally* REVISED MODEL NONPROFIT CORP. ACT ("RMNCA") (AM. BAR ASS'N 1987).

50. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

51. *Id.*

52. *Id.*

53. RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 1.01(a) (AM. L. INST. 2023).

54. *Id.* § 2.05.

55. *Id.* §§ 2.02–.03.

56. *Id.* § 2.03 cmt. a. More than half of the states have adopted the RMNCA. *Id.* § 1.02, cmt. b(12). RMNCA requires a director to discharge his or her duties "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." REVISED MODEL NONPROFIT CORP. ACT § 8.30(a)(2) ("RMNCA") (AM. BAR ASS'N 1987).

57. RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 2.02 cmt. a (AM. L. INST. 2023).

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the prudence standards for the management and investment of charitable funds and endowment spending."[58] For example, under UPMIFA, charities must diversify investments, except in unusual circumstances.[59]

States grant power to their attorneys general, who represent the interests of the public, to enforce the laws applicable to charities.[60] As the ALI Restatement summarizes, "[t]he state attorney general . . . has the authority to protect charitable assets and interests within the jurisdiction of the state."[61] The prefatory note to the Model Protection of Charitable Assets Act explains: "[T]he attorney general may enforce the use of charitable assets for the purposes for which the assets were given; may take action to prevent or correct breach of fiduciary duty . . . ; and may intervene in an action brought to correct a misapplication of charitable assets."[62] In fact, "[i]n most states only the attorney general has the power and standing to intervene and investigate misappropriations of charitable funds, breaches of fiduciary duty and self-dealing by directors, and fraud in charitable solicitations."[63]

The powers of the attorney general extend to requiring an accounting of an organization's assets.[64] They may also "investigate transactions and relationships of directors and trustees to determine whether property held or used by them has been allocated to charitable purposes."[65] Moreover, the attorneys general may enjoin or impose restitutionary duties on an organization's officers and managers, may remove directors or trustees chosen by the organization, and may even require the organization's dissolution.[66] The IRS has none of these powers.[67]

Not every state attorney general has the staff or the interest in enforcing state laws regarding charitable nonprofit organizations. "Enforcement is often episodic."[68] Even in states with low levels of enforcement, however, state laws provide guidance to organizations subject to them—guidance that is lacking for many congressionally established § 501(c)(3) organizations. Many attorneys general have the authority to regulate solicitation in their states by charitable nonprofit entities organized elsewhere, but most provide an exception from such

58. FISHMAN ET AL., *supra* note 48, at 207–08.

59. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 3(e)(4) (UNIF. L. COMM'N 2006).

60. RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 5.01 (AM. L. INST. 2023).

61. *Id.*

62. MODEL PROT. OF CHARITABLE ASSETS ACT, prefatory note (UNIF. L. COMM'N 2011).

63. *See generally* Robert Carlson & Caitlin Carter, *Protection and Regulation of Nonprofits and Charitable Assets*, *in* STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 215 (Emily Myers ed., 4th ed. 2018).

64. FISHMAN ET AL., *supra* note 48, at 225.

65. *Id.*

66. *Id.*

67. *See* RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 5.03 (AM. L. INST. 2023).

68. FISHMAN ET AL., *supra* note 48, at 226. California, New York, and Massachusetts are known as vigorous enforcers. *Id.*

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oversight for governmental entities, including congressionally established § 501(c)(3) organizations.[69]

## II. THE FEDERAL GOVERNMENT AND ITS AGENCIES

Because contributions to the federal government and certain federal agencies are deductible under § 170(c)(1), they qualify as federal charitable entities for purposes of this Article. They are subject to a regulatory regime very different from the state and federal laws applicable to most tax-exempt nonprofits.

The authority of the federal government to accept voluntary donations from private persons has been characterized as "inherent."[70] The Bureau of Fiscal Services explains that "[c]itizens who wish to make a general donation to the U.S. government may send contributions to a special account called 'Gifts to the United States.'"[71] This account, which dates back to 1843, was established "to accept gifts, such as bequests, from individuals wishing to express their patriotism to the United States."[72] These contributions are considered unconditional gifts to the government as part of the general fund of the Treasury.[73] A provision of the U.S. Code enacted in 1982 requires that these donations be devoted to reducing the national debt.[74]

A different set of rules regarding gifts applies to federal government agencies. However, as the Congressional Research Service ("CRS") has observed, "Congress has not provided one all-encompassing definition of an agency. Instead, the term 'agency' can mean different things in different contexts, depending on what statute is at issue."[75] That is, what counts as a federal agency is uncertain. Consider this unhelpful statutory definition from Title 18 of the U.S. Code (Crimes and Criminal Procedure): "The 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 contest shows that such term was intended to be used in a more limited sense."[76] The definition

69. Josephson, s*upra* note 12, at 73 ("[Federally chartered corporations] are exempted from registration and annual disclosure filings by most, if not all, of the 39 states that have those requirements for charities that have assets or fundraise in their states." (footnotes omitted)); *see, e.g.*, CAL. CODE REGS. tit. 11, div. 1, ch. 4, § 300.2 (2020).

70. Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1368 (1988); *see* United States v. Burnison, 339 U.S. 87, 90 (1950) ("Uninterrupted usage from the foundation of the Government has sanctioned [the acceptance of donations].").

71. *Gifts to the U.S. Government*, BUREAU OF THE FISCAL SERV., https://fiscal.treasury.gov/public/gifts-to-government.html (Jan. 31, 2023).

72. *Id.*

73. *Id.*

74. 31 U.S.C. § 3113(a)(2) (1982).

75. *See* JARED P. COLE & DANIEL T. SHEDD, CONG. RSCH. SERV., R43562, ADMINISTRATIVE LAW PRIMER: STATUTORY DEFINITIONS OF "AGENCY" AND CHARACTERISTICS OF AGENCY INDEPENDENCE 1 (2014).

76. 18 U.S.C. § 6.

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of "agency" in the Administrative Procedure Act[77] differs from that in the Freedom of Information Act ("FOIA"),[78] the Paperwork Reduction Act,[79] and the Federal Records Act.[80] Some of these provisions include in their definitions agencies within the legislative and judicial branches, but others do not.[81]

By statute, agencies cannot augment congressional appropriations. The Miscellaneous Receipts Act provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[82] As Professor Kate Stith wrote, the Miscellaneous Receipts Act "articulates the Principle of the Public Fisc: All monies of the federal government must be claimed as public revenues, subject to public control through constitutional processes."[83] The statute, moreover, "derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause,"[84] which provides that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."[85] The House and Senate have elaborate rules and procedures regarding the appropriations process.[86]

Despite the seemingly absolute language of the U.S. Constitution and the Miscellaneous Receipts Act, government agencies are permitted to accept gifts of money or other property when—and to the extent—they are given explicit statutory authority.[87] Examples of government agencies with authority to accept gifts that carry out the agency's purposes include the Department of State,[88] the Library of Congress, [89] the Department of Health and Human Services,[90] and the Department of Justice ("DOJ").[91] Among the largest donees, according to the FY 2023 Appendix to the United States Budget, are the Agency for International Development of the Department of State, with anticipated gifts of $40 million

77. 5 U.S.C. § 551(1)(A)–(H).
78. *Id.* § 552.
79. 44 U.S.C. § 3502(1).
80. *Id.* § 3301.
81. COLE & SHEDD, *supra* note 75.
82. 31 U.S.C. § 3302n.
83. Stith, *supra* note 70, at 1364.
84. Schedule Airlines Traffic Offs., Inc. v. Dep't of Def., 87 F.3d 1356, 1361 (D.C. Cir. 1996).
85. U.S. CONST. art. I, § 9, cl. 7.
86. In the Red Book, the GAO takes four volumes to describe the appropriations process. Volumes I and II are cited at various points in this Article. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 11.
87. *See* 2 U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-223 (3d ed. 2006), https://www.gao.gov/assets/210/202819.pdf (stating that a government agency cannot accept a gift of money or other property "in the absence of specific statutory authority").
88. *See* 22 U.S.C. § 2697(a).
89. *See* 2 U.S.C. § 156.
90. *See* 42 U.S.C. § 238(a).
91. *See* 28 U.S.C. § 524(d)(1).

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to its gift trust fund,[92] and the Library of Congress, with an anticipated $33 million in contributions to its gift and trust fund accounts in FY 2023.[93]

Government agencies authorized to receive gifts adopt gift acceptance policies, which vary in detail and in substance. The policy of the Centers for Disease Control ("CDC") offers one example.[94] It contains a series of provisions designed to determine "whether acceptance of a gift would compromise the integrity of the CDC or any of its employees" or "require the CDC to undertake activities unrelated to its mission or exert influences over its priorities."[95] The policy lists prohibits sources for gifts, including any person "seeking official action by the CDC, that does business or seeks to do business with CDC, or conducts activities regulated by CDC."[96]

In comparison to that of the CDC, the gift acceptance policy of the State Department is more elaborate because, unlike the CDC, it may solicit gifts in a wide variety of situations.[97] The State Department policy includes specific rules for gifts from foreign governments and international organizations, as well as gifts of real property, embassy refurbishment, and Fourth of July events abroad, to name just a few of the many categories covered.[98] The Library of Congress also has special procedures related to its purpose, directing would-be donors of books and manuscripts to check the library's online catalog to determine whether the items are already in the collection.[99] If not, the Library of Congress asks the potential donor to fill out a form offering the gift for its staff to assess.[100]

None of these policies, however, have been updated to address issues that private charities are now facing, such as whether to accept gifts of cryptocurrency or monies from crowdfunding sites.[101] Some potential gift acceptance issues have particular importance for governmental agencies. The CDC, for example, states that it "considers the identity of the immediate donor

92. OFF. OF MGMT. & BUDGET, APPENDIX TO THE BUDGET OF THE UNITED STATES 831 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/03/appendix_fy2023.pdf.

93. *Id.* at 31–33.

94. *See generally* CDC, ADMINISTRATION OF GIFTS TO CDC (2016), https://www.cdc.gov/partners/pdf/policy505.pdf.

95. *Id.* at 2.

96. *Id.* at 7.

97. *See generally* DEP'T OF STATE, SOLICITATION AND/OR ACCEPTANCE OF GIFTS BY THE DEPARTMENT OF STATE (2022), https://fam.state.gov/fam/02fam/02fam0960.html.

98. *See id.* at 2 FAM 962.3–.4, 962.6, 962.8.

99. *Frequently Asked Questions About Acquisitions*, LIBR. OF CONG., https://www.loc.gov/acq/acqfaq.html#6 (last visited Aug. 23, 2023).

100. *See Donations/Gifts of Library Material*, LIBR. OF CONG., https://www.loc.gov/acq/donatex.html (last visited Aug. 23, 2023).

101. Recently, however, the Department of State's Office of Global Partnership established "a public-private partnership with GoFundMe.org to direct funds to organizations that are helping to address the humanitarian needs of those impacted by the Kremlin's aggression against Ukraine." *Department of State Partners with GoFundMe.org*, U.S. DEP'T OF STATE: OFF. OF THE SPOKESPERSON (Mar. 9, 2022), https://www.state.gov/department-of-state-partners-with-gofundme-org/. As of August 23, 2023, this fund had raised more than $2.5 million. *See Ukraine Humanitarian Fund*, GOFUNDME, https://www.gofundme.com/f/ukraine-humanitarian-fund (last visited Aug. 23, 2023).

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and may consider the identity of any entity that funds the donor."[102] With such a requirement, gifts made through Facebook, from sponsors of donor-advised funds, or from other sources where the ultimate donor is unknown could pose difficulties for government agencies.[103] In addition, as discussed below, agency efforts to establish gift acceptance policies can be undermined by gifts to agencies from congressionally established charities that support particular government agencies.

A 1980 report from the General Accounting Office,[104] which has never been updated, took a comprehensive view of gifts to government agencies. "During fiscal 1979, 41 government agencies received a total of $21,631,000 classified as gift revenue."[105] The report criticized agency gift funds:

> We . . . found that agencies' ability to finance activities with gifts dilutes congressional oversight of agency operations. Because gift funds are financed by private sources, they do not go through the appropriation process as would other agency funds. Thus, the Congress is not involved in setting funding limits or priorities for gift fund activities. In addition, the Congress receives only minimal information about gift fund activities in the yearly Federal Budget Appendix[—]thus diluting another opportunity for congressional oversight.[106]

The Red Book, the name given to the GAO's explication of the principles of federal appropriations, notes that while "donated funds may not be subject to all the restrictions applicable to direct appropriations," such funds "constitute appropriated funds unless Congress provides otherwise and . . . are still 'public funds' in a very real sense."[107] That is, "funds available to agencies are considered appropriated, regardless of their sources, if they are made available for collection and expenditure pursuant to specific statutory authority."[108]

As Professor Stith wrote more than thirty years ago, "[w]here broad executive discretion is inherent in our constitutional scheme, the most questionable form of spending authority is open-ended authority to receive and spend donations and gifts."[109] She continued:

> As long as the executive agency is prepared to accept the donation, Congress loses effective control over the contours of authorized government activity . . . . [W]here Congress cannot significantly circumscribe an agency's purposes and powers, to allow the agencies to spend all contributions would

102. CDC, *supra* note 94, at 2.

103. Donor-advised funds involve funds or accounts from a particular donor or donors but are owned and controlled by a sponsor. *See* 26 U.S.C. § 4966(d). The recipient charity does not know the identity of the donors to the underlying accounts. *Id.*

104. The office is now called the General Accountability Office. I will refer to it as "the GAO."

105. COMPTROLLER GEN. OF THE U.S., FGMSD-80-77, REVIEW OF FEDERAL AGENCIES' GIFT FUNDS 1 (1980).

106. *Id.* at 2.

107. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 87, at 6-226.

108. *Id.*

109. Stith, *supra* note 70, at 1384.

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> be to permit private power, subject only to executive discretion, to influence the contours of government and government policy.[110]

More recently, Professors Margaret H. Lemos and Guy-Uriel Charles, in a comprehensive examination of the many forms of "patriotic philanthropy," warned that, "to the extent that private giving can fill in gaps in the government's own provision of services, citizens become less willing to contribute tax dollars toward initiatives that primarily benefit others."[111]

Although donations are not subject to the appropriations process and avoid the congressional oversight that the process entails, agencies authorized to accept charitable gifts must comply with numerous federal laws. These include, to give a few examples, government contracting and procurement rules,[112] the Federal Privacy Act,[113] and the Federal Advisory Committee Act.[114] As the next Part explains, in part because of these restrictions, dozens of federal and federally affiliated entities have been established to operate not as government agencies but as tax-exempt organizations eligible to receive both congressional appropriations and tax-deductible contributions.

The Constitution presupposes "a distinction between the public sphere and the private sphere and permits expansion of the public sphere only with legislative approval."[115] As this Part has reviewed, the public sphere expands into the private sphere through congressionally authorized charitable gifts to the federal government and its agencies. The next Part of the Article considers the reverse. It discusses expansion of the private sphere into the public sphere through congressionally established § 501(c)(3) organizations with a variety of governmental traits.

## III. CONGRESSIONALLY ESTABLISHED § 501(C)(3) ORGANIZATIONS

The U.S. Constitution authorizes Congress to pass all laws "necessary and proper" to implement its expressly enumerated powers.[116] *McCulloch v. Maryland* made clear that the Necessary and Proper Clause empowers Congress to charter corporations, entities separate from the government and government agencies, through a written grant from the government specifying the entities'

110. *Id.* at 1384–85.

111. Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 107 CALIF. L. REV. 1129, 1158 (2018).

112. *See generally* L. ELAINE HALCHIN, CONG. RSCH. SERV., RS22536, OVERVIEW OF THE FEDERAL PROCUREMENT PROCESS AND RESOURCES (2012).

113. 5 U.S.C. § 552(a).

114. *Id.* §§ 1–14.

115. Stith, *supra* note 70, at 1345.

116. U.S. CONST. art. I, § 8, cl. 5.

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rights, privileges, and purposes.[117] This chartering power extends to for-profit organizations, such as federal banks,[118] as well as to nonprofit organizations.[119]

Congress has established a number of corporations exempt under § 501(c)(3), all of which can accept tax-deductible contributions under § 170(c).[120] Some of them also qualify for exemption under § 501(c)(1), which exempts certain federal instrumentalities from income tax.[121] Many of the organizations exempt under § 501(c)(1), however, lack any of the charitable purposes required under § 501(c)(3) or § 170(c). Such noncharitable § 501(c)(1) entities include the Federal Deposit Insurance Corporation, the Federal Reserve Banks, and the Pension Benefit Guarantee Corporation.[122]

This Part considers prominent congressionally established organizations recognized as exempt under § 501(c)(3). As discussed below, some—but not all—of these congressionally established § 501(c)(3) organizations are considered federal instrumentalities for certain purposes, regardless of whether they are instrumentalities under § 501(c)(1). As the GAO has observed, "[e]ven when Congress has been quite specific in declaring that a corporation is not a federal instrumentality, it may still take on that status for constitutional purposes."[123]

For purposes of this Article, a key distinction between various categories of congressionally established § 501(c) organizations is whether they regularly receive congressional appropriations. As discussed in Part II, the appropriations process is essential to our constitutional structure. To review briefly, appropriated funds receive at least some direct presidential and congressional oversight. The process begins with the President requesting appropriation in a proposed budget. Federal entities submit written appropriation requests to

117. 17 U.S. (4 Wheat.) 316, 323–24 (1819).

118. *See* 31 U.S.C. § 9101(1)–(2) (government corporations).

119. *See* HENRY B. HOGUE, CONG. RSCH. SERV., R47236, TITLE 36 CHARTERS: THE HISTORY AND EVOLUTION OF CONGRESSIONAL PRACTICES (2022) [hereinafter HOGUE, TITLE 36 HISTORY AND EVOLUTION]; CONG. RSCH. SERV., RL30340, CONGRESSIONALLY CHARTERED NONPROFIT CORPORATIONS: WHAT THEY ARE AND HOW CONGRESS TREATS THEM (2011); *see also* HENRY B. HOGUE, CONG. RSCH. SERV., IF11973, TITLE 36 CONGRESSIONAL CHARTERS (2021).

120. Part IV *infra* discusses Title 36 of the U.S. Code, which includes additional congressionally established organizations exempt under § 501(c)(3).

121. Section 501(c)(1) exempts corporations organized under an act of Congress if such corporations are instrumentalities of the United States, and if it is specifically provided in the IRC or "under such Act as supplemented before July 18, 1984" that such corporations are exempt from federal income taxes. 26 U.S.C § 501(c)(1); BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 500 (9th ed. 2007). As Bruce R. Hopkins explains, Congress amended the Internal Revenue Code in 1984 "to stipulate that tax exemption for United States instrumentalities must be specified in the Code or in a revenue Act. Under prior law (and for pre-1984 instrumentalities), it was sufficient to have tax exemption provided in any act of Congress." HOPKINS, *supra*. Depending on their date of establishment and the language of their charter, some federal charities qualify for exemption under § 501(c)(1). *See* § 501(c)(1). What is important for the purposes of this Article is whether they have applied for and received exemption under § 501(c)(3).

122. *See* HOPKINS, *supra* note 121. *See generally* DEP'T OF THE TREASURY, IRS, NO. 5780, EXEMPT ORGANIZATIONS TECHNICAL GUIDE (2023).

123. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 11, at 15-67.

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Senate and House appropriations subcommittees. These subcommittees hold hearings on these requests. Eventually, Congress produces and votes on an appropriations bill for the President to sign.[124]

One prominent rationale for the existence of the nonprofit sector is known as "government failure"—that is, the failure "of government to provide collective good because much government action requires majority (or median voter) support."[125] Such a theory would seem to have limited traction here, where congressional majorities must vote to create these charitable entities. At the same time, however, GAO has characterized congressionally established charitable organizations as those "with missions and goals dedicated to promoting a public purpose to which private individuals and nonfederal partners are drawn."[126] To that extent, at least for those entities not dependent on appropriations, they may well demonstrate government failure to attract sufficient government support to fund their missions, a failure Congress itself has recognized by creating § 501(c)(3) organizations. As the GAO Report notes, congressionally established § 501(c) organizations offer "unique legal authorities and management flexibility."[127]

Two of the most well known of congressionally established § 501(c)(3) organizations, the Smithsonian and the Red Cross, illustrate the contrast regarding appropriations.[128] The Smithsonian receives and relies on regular appropriations,[129] while the Red Cross does not.[130] Both categories of congressionally established § 501(c)(3) organizations, however, blur the lines between public and private.

The story of these two old and prominent congressionally established § 501(c)(3) organizations demonstrates how fortuitous and contingent the creation of such entities can be. Given the language of the bequest from Smithson that funded the Smithsonian, Congress had little choice but to establish the Smithsonian as a charity.[131] Clara Barton had tried and failed to establish the Red Cross as a government agency; she was forced to create a private nonprofit organization prior to action by the federal government.[132]

For many congressionally established § 501(c)(3) organizations, including the Smithsonian and Red Cross, the applicable law regarding standards for

124. *See generally* JAMES V. SATURNO & MEGAN S. LYNCH, CONG. RSCH. SERV., R47106, THE APPROPRIATIONS PROCESS: A BRIEF OVERVIEW (2023).

125. FISHMAN ET. AL., *supra* note 48, at 31; *see* Miranda Perry Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 168–69 (2008).

126. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-549, CONGRESSIONALLY CHARTERED ORGANIZATIONS: KEY PRINCIPLES FOR LEVERAGING NONFEDERAL RESOURCES 1 (2013).

127. *Id.*

128. Even those that do not receive appropriations may well receive grants from or enter into contracts with federal agencies. Grants and fees for services, however, are distinct from appropriations; many entirely private § 501(c)(3) organizations receive government grants.

129. *See infra* text accompanying note 166.

130. *See infra* text accompanying note 208.

131. *See infra* text accompanying note 134.

132. *See infra* text accompanying notes 214–15.

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nonprofit governance is uncertain. Organizations with charters that fail to specify applicable nonprofit law lack the guidance that enforcement by state attorneys general, even if sporadic, provides.[133] Such a gap can discourage compliance with good governance practices, as examination of not only the Smithsonian and the Red Cross but also other congressionally established § 501(c)(3) organizations demonstrates.

The following Subparts begin with detailed discussions of the Smithsonian and the Red Cross because of their prominence, their issues regarding their funding and governance, and their fascinating histories. Discussion of six other congressionally established § 501(c)(3) organizations follows.

### A. THE SMITHSONIAN INSTITUTION

The Smithsonian began as a surprise to the federal government when an Englishman named James Smithson died in 1829 and bequeathed a large amount of money "to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase & diffusion of knowledge among men."[134] George Brown Goode, a famous ichthyologist and museum administrator as well as Smithsonian historian,[135] has written:

> Motives which actuated Smithson to mention the United States as his residuary legatee, rather than any other government or institution, must remain in doubt, for he is not known to have had any correspondent in America, nor are there in his papers any reference to it or its distinguished men.[136]

Congress passed a statute in 1836 to collect the bequest, which was then worth more than $500,000.[137] Because of disputes over the appropriate nature of the institution,[138] however, the legislation establishing the Smithsonian was not passed and signed by President Polk until ten years later, in 1846.[139] John Lankford, a prominent historian of philanthropy, has written that the Smithsonian's establishment "marked a turning point in the history of American philanthropy."[140] For Lankford, the Smithsonian "proved to be the first of the great foundations, even though it operated as a ward of the government."[141]

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133. *See supra* text accompanying notes 68–69.

134. David P. Currie, *The Smithsonian*, 70 U. CHI. L. REV. 65, 65–66 (2003) (quoting THE SMITHSONIAN INSTITUTION, 1846-1896 V1: A HISTORY OF ITS FIRST HALF CENTURY 19–20 (George Brown Goode ed., 1897)).

135. *George Brown Goode*, WIKIPEDIA, https://en.wikipedia.org/wiki/George_Brown_Goode (last visited Aug. 23, 2023). His works include *The Principles of Museum Administration*, which is considered a classic.

136. Currie, *supra* note 134, at 66 n.6.

137. *Id.*

138. Senator John C. Calhoun believed it "was beneath the dignity of the United States to receive presents of this kind from anyone." JOHN LANKFORD, CONGRESS AND THE FOUNDATIONS IN THE TWENTIETH CENTURY 3 (1964). Rhode Island Senator Asher Robbins proposed a university, and President John Quincy Adams proposed an observatory. Currie, *supra* note 134, at 66.

139. Act of Aug. 10, 1846, 9 Stat. 102 (establishing the Smithsonian Institution).

140. LANKFORD, *supra* note 138, at 5.

141. *Id.*

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Today, the Smithsonian describes itself as "the world's largest museum, education, and research complex, with 21 museums and the National Zoo."[142] As discussed further below, although the Smithsonian is an organization exempt from taxation under § 501(c)(3) and thus subject to the same provisions of the IRC as a fully private § 501(c)(3) organization, it is sometimes treated as a governmental entity and sometimes not.

In Lankford's view, the enacted charter "was a strange piece of legislation" because "[t]he wide divergence of Congressional opinion made compromise imperative, and in the end the lawmaker simply decided what the Smithsonian was not and left the administrators to decide on a positive program."[143] The legislation adopted Smithson's language without change, decreeing that the purpose of the Smithsonian would be the broad promotion of "the increase and diffusion of knowledge among men."[144] It specified that the monies from Smithson's bequest be lent to the Treasury at 6% annual interest, but that other monies received by the Smithsonian could be invested at the managers' discretion.[145]

The statutes governing the Smithsonian set forth the membership of its governing body, the Board of Regents.[146] Those named as members of the Board of Regents in the original charter included the Vice President of the United States, the Chief Justice of the United States, three members of the Senate, three members of the House of Representatives, and the Mayor of Washington, as well as six citizen Regents.[147] One member of the Board of Regents was to be elected Chancellor.[148] The Board of Regents was empowered to appoint a Secretary to serve as the head of the Smithsonian.[149] Although some federal charters specify a place of incorporation and which set of nonprofit statutory and common laws apply, the Smithsonian charter does not.[150]

The Smithsonian describes itself as a "trust instrumentality of the United States" and "unique in the Federal establishment" because it is "not an executive branch agency" or "an agency or authority of the Government."[151] This statement proves to be true sometimes, but not always. The U.S.

142. *About the Smithsonian*, SMITHSONIAN, https://www.si.edu/about (last visited Aug. 23, 2023).

143. LANKFORD, *supra* note 138, at 4–5.

144. 9 Stat. 102; Currie, *supra* note 134, at 66.

145. 9 Stat. 102.

146. *Id.*

147. Currently, the Board of Regents has seventeen members: the Chief Justice, the Vice President, three members of the Senate, three members of the House of Representatives, and nine citizen members appointed by joint resolution of Congress. 20 U.S.C. § 42(a).

148. The Chief Justice of the United States has traditionally been the Smithsonian's Chancellor. Linda St. Thomas, *The Smithsonian Board of Regents*, SMITHSONIAN INST. (Feb. 9, 2023), https://www.si.edu/newsdesk/factsheets/smithsonian-board-regents.

149. 20 U.S.C. § 46.

150. *See id.*

151. *Legal History*, SMITHSONIAN, https://www.si.edu/ogc/legalhistory (last visited Aug. 23, 2023).

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Government Manual lists the Smithsonian as one of only a handful of "Quasi-Official Agencies."[152]

Other federal agencies, in particular the DOJ, cannot quite decide how to characterize the Smithsonian. The Office of Legal Counsel ("OLC") in the DOJ has called it a "historical and legal anomaly."[153] It concedes that "[t]he Smithsonian has long been regarded as having a special relationship with the federal government" distinct from the three constitutional branches, although the "precise nature of that relationship . . . is the subject of some disagreement."[154] As the OLC concludes, "the hybrid and anomalous character of the Smithsonian is proverbial."[155] In 1997, however, the OLC found the Smithsonian to be "best regarded as an instrumentality of the United States that is 'imbedded in the structure of government'" for purposes of intergovernmental immunity, including immunity from state insurance laws and licensing agreements.[156]

As a result of this hybrid and anomalous character, some laws applicable to government agencies apply to the Smithsonian while others do not. *Expeditions Unlimited Aquatic Enterprises v. Smithsonian*, an en banc decision of the D.C. Circuit, concluded that the Smithsonian was a federal agency for purposes of the Federal Torts Claims Act.[157] In contrast, a panel of the same court in *Dong v. Smithsonian Institution*[158] decided that the Smithsonian was neither an "establishment in the executive branch of the Government"[159] nor "an authority of the Government of the United States" within the meaning of the Privacy Act.[160] The OLC, however, concluded that the Smithsonian was "an independent establishment in the Executive Branch" for purposes of the Federal Property and Administrative Services Act.[161] The OLC has also advised that the Smithsonian is not covered by the FOIA, Federal Advisory Committee Act, or Administrative Procedure Act,[162] but that it is entitled to intergovernmental immunity from various state laws and regulations.[163]

The Smithsonian has two sources of funding: federal appropriations and income generated from gifts, revenue-generating activities, and investments

152. *The United States Government Manual*, THE U.S. GOV'T MANUAL, https://www.usgovernmentmanual.gov/ (last visited Aug. 23, 2023). In the company of almost exclusively government agencies, it must appoint an Inspector General pursuant to the Inspector General Act. *See* 5a U.S.C. § 8G(a)(2).

153. The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act, 12 Op. O.L.C. 122, 123 (1988) [hereinafter Smithsonian Status OLC Opinion].

154. *Id.*

155. *Id.*

156. Immunity of Smithsonian Institution from State Insurance Laws, 21 Op. O.L.C. 81, 86 (1997).

157. 566 F.2d 289, 294–95 (D.C. Cir. 1977) (rehearing en banc).

158. 125 F.3d 877 (D.C. Cir. 1997).

159. *Id.* at 878 (quoting 5 U.S.C. § 551(1)).

160. *Id.* at 879 (quoting 5 U.S.C. § 552(f)).

161. Smithsonian Status OLC Opinion, *supra* note 153, at 125 (quoting 39 U.S.C. § 201).

162. Memorandum on Coverage of the Smithsonian Institution by Certain Federal Statutes from Leon Ulman, DOJ, OLC, Deputy Assistant Att'y Gen., to Peter Powers, Gen. Couns., The Smithsonian Inst. (Feb. 19, 1976), https://www.justice.gov/media/878861/dl?inline.

163. *Id.*

Electronic copy available at: https://ssrn.com/abstract=4031074

(referred to as Smithsonian "trust funds").[164] Per the Smithsonian's Form 990 for FY 2020–2021, it received $1,128,227,740 in government grants and $372,954,377 in contributions, gifts, and other grants (including federated campaigns).[165] That is, government funds dwarf donations.[166] The Smithsonian requested $1,174,500,000 in appropriations for FY 2023,[167] and the President's budget included that amount.[168] It ultimately received somewhat less than $1.15 billion, but $82 million above the FY 2022 enacted level.[169]

The unique structure of the Smithsonian both enhances and complicates its operations. The Smithsonian has two categories of employees, "federal" and "trust," as determined by the sources of funds used to pay an employee's salary.[170] As a 2013 GAO Report explains, its status outside the three branches of government enables it to make extensive use of volunteers, which federal agencies are not permitted to do.[171] The 2013 GAO report urged the Smithsonian (along with the National Gallery and U.S. Holocaust Museum, two other congressionally established § 501(c)(3) organizations that receive appropriations) to "leverage" further nonfederal resources.[172]

The Smithsonian's anomalous, hybrid nature has also complicated and, arguably, undermined governance. In 2006, Senator Grassley, as Chair of the Senate Finance Committee, began questioning the Smithsonian's governance practices under the leadership of its eleventh Secretary, Lawrence Small.[173] In light of issues regarding compensation, lavish perks, and other transactions involving Small,[174] the Smithsonian set up an independent review commission under the leadership of a former Comptroller General, Charles Bowsher.[175] The commission issued a lengthy report ("the Bowsher Report"). The Bowsher

164. *See Legal History*, *supra* note 151.

165. Smithsonian Inst., FY 2020–2021 IRS Form 990, pt. VIII, l. 1, https://www.si.edu/sites/default/files/about/si-2020-form-990-public-copy-final.pdf. The Smithsonian also reported $26,150,117 in membership dues. *Id.*

166. CHARLES A. BOWSHER, STEPHEN D. POTTS & A.W. SMITH JR., A REPORT TO THE BOARD OF REGENTS OF THE SMITHSONIAN INSTITUTION 55 (2007), https://www.si.edu/content/governance/pdf/IRC_report.pdf ("As private contributions have receded in recent years, the Smithsonian has come to rely more heavily on the Federal government for its funds. In 1999 federal appropriations and grants constituted approximately fifty-four percent of the Smithsonian's revenue. By 2006, this proportion of federal funds had increased to about two-thirds.").

167. SMITHSONIAN INST., FY 2023 BUDGET JUSTIFICATION TO CONGRESS 7 (2022), https://www.si.edu/sites/default/files/about/smithsonianfy2023budgetrequestcongress.pdf.

168. OFF. OF MGMT. & BUDGET, *supra* note 92, at 1324.

169. STAFF OF H. COMM. ON APPROPRIATIONS, 117TH CONG., SUMMARY OF APPROPRIATIONS PROVISIONS BY SUBCOMMITTEE (Comm. Print 2023).

170. BOWSHER ET AL., *supra* note 166, at 97.

171. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 126, at 9–10.

172. *Id.* at 2–3.

173. *See* Adriane Quinlan, *GOP's Grassley Faults Small's Smithsonian Stewardship*, WASH. POST (June 10, 2006), https://www.washingtonpost.com/archive/lifestyle/2006/06/10/gops-grassley-faults-smalls-smithsonian-stewardship/a4c4f8d3-942e-4c53-ad3a-8d172e3e2cd4/.

174. Mr. Small resigned on March 26, 2007, after Senator Charles E. Grassley put a freeze on a $17 million increase in the Smithsonian's funding. Elizabeth Olson, *Embattled Smithsonian Official Resigns*, N.Y. TIMES (Mar. 27, 2007), https://www.nytimes.com/2007/03/27/arts/27museum.html.

175. BOWSHER ET AL., *supra* note 166, at 24.

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Report identified a variety of problems, including excessive benefits to executives, a board not adequately engaged in oversight, and inadequate financial disclosures.[176]

According to the Bowsher Report, "[t]he root cause of the Smithsonian's . . . problems c[ould] be found in failures of governance and management."[177] It recommended that the Smithsonian establish a governing board smaller than the full Board of Regents to take on fiduciary responsibility for overseeing the Smithsonian.[178] It questioned the role of the Chief Justice, explaining that "it is not feasible for the Chief Justice of the United States to devote the hours necessary to serve as a fiduciary Regent."[179] The Bowsher Report also asked "if it is appropriate for the Chief Justice to have fiduciary obligations to a separate entity, even if that entity is closely linked to the government."[180] It took the same position regarding service of the Vice President. The report urged that the Smithsonian increase the number of citizen Regents by two.[181] The Board of Regents has not adopted these recommendations,[182] although it did create the position of Chair of the Board of Regents in 2007 and the position of Vice Chair in 2008.[183]

The Smithsonian's anomalous structure muddles its governance. Legislation did not establish the Smithsonian in any state nor in the District of Columbia, and thus no set of statutory or common laws involving nonprofits apply. As the Bowsher Report noted, "[u]nlike the vast majority of nonprofit organizations whose governance is informed by applicable state statutes and common law of fiduciary duties, there is no developed body of federal common law setting forth the duties and obligations of the Board."[184]

The Report of the Governance Committee that followed the Bowsher Report encouraged the Smithsonian to follow best nonprofit practices.[185] It recommended holding at least four regular meetings of the Board of Regents each year, giving the general counsel and the CFO direct access to the Board of Regents, and setting up procedures to approve travel and other reimbursable

176. The Bowsher Report states: "Unfortunately, the problems at the Smithsonian are not unique. As the media and Congressional oversight committees have made clear, there have been similar problems at several large tax-exempt organizations, including major museums and universities . . . ." *Id.* at 22.

177. *Id.* at 2.

178. *Id.* at 16–18.

179. *Id.* at 18.

180. *Id.*

181. *Id.* at 19.

182. *See generally* SMITHSONIAN INST., BYLAWS OF THE BOARD OF REGENTS AND CHARTER PROVISIONS OF THE SMITHSONIAN INSTITUTION (2023), https://www.si.edu/sites/default/files/unit/regents/approved_bylaws_and_charter_2023.pdf.

183. *The Smithsonian Board of Regents: Media Fact Sheet*, SMITHSONIAN INST. (Feb. 9, 2023), https://www.si.edu/newsdesk/factsheets/smithsonian-board-regent.

184. BOWSHER ET AL., *supra* note 166, at 29.

185. SMITHSONIAN INST., REPORT OF THE GOVERNANCE COMMITTEE TO THE BOARD OF REGENTS 8 (2007), https://www.si.edu/content/governance/pdf/Governance_Committee_Report.pdf.

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expenses.[186] That is, the Board of Regents of the Smithsonian, one of the oldest and largest § 501(c)(3) organizations in the country, had lost sight of basic principles of corporate governance. But it did not have an applicable set of nonprofit law, and the demanding jobs of the eight government officials made it unlikely that they could devote the time that oversight of the Smithsonian required.

The Bowsher Report expressed concern "about the tendency of the [Smithsonian] to embrace those federal regulations it finds convenient while ignoring others."[187] As a particular example of the complications introduced by the Smithsonian's dual status, the Bowsher Report observed that most of its employees "are treated as federal employees with all the protections, benefits, and restrictions applicable thereto," but that "a limited number of employees are considered to be employed by the Smithsonian trust."[188] In light of the Smithsonian's increasing reliance on private funding, the Bowsher Report recommended "one comprehensive salary structure for all Smithsonian employees, rather than having a separate structure for trust employees."[189]

The Smithsonian adopted the recommendation regarding the salary structure for trust employees.[190] At the same time, as a tax-exempt nonprofit, the Smithsonian has more flexibility regarding salaries for its management than do government agencies subject to civil service limitations.[191] The Smithsonian's FY 2020–2021 Form 990 reports W-2 income for Secretary Burch of $726,156.[192] In comparison, U.S. Cabinet Secretaries will have a salary in 2023 of $235,600.[193]

The Bowsher Report also recommended that the Smithsonian adopt policies "consistent with federal regulations, such as FOIA, the Privacy Act of 1974, the Chief Financial Officer Act of 1990, the Sunshine Act, personal financial disclosure requirements, the Ethics in Government Act and conflict of interest rules."[194] Further, it called for appropriate legislation if the Smithsonian did not so act.[195]

The Smithsonian adopted some of these recommendations. It now follows procedures like those in the FOIA.[196] It has adopted conflict-of-interest procedures, including disclosure statements, for members of the Board

186. *Id.*
187. BOWSHER ET AL., *supra* note 166, at 14.
188. *Id.* at 28.
189. *Id.* at 15.
190. *Frequently Asked Questions*, SMITHSONIAN, https://www.si.edu/ohr/faq (last visited Aug. 23, 2023).
191. *See* BOWSHER ET AL., *supra* note 166, at 15.
192. Smithsonian Inst., FY 2020–2021 IRS Form 990, *supra* note 165, at pt. VII.
193. *See* 5 U.S.C. § 5312; Exec. Order No. 14,090, 87 Fed. Reg. 79,985, 79,990 (Dec. 23, 2022).
194. BOWSHER ET AL., *supra* note 166, at 96–97.
195. *Id.* at 97.
196. SMITHSONIAN INST., SMITHSONIAN DIRECTIVE 807: REQUESTS FOR SMITHSONIAN INSTITUTION INFORMATION (2016), https://www.si.edu/Content/Pdf/About/Records-Requests/SD807.pdf.

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of Regents.[197] Congress, however, did not adopt legislation that would have applied the FOIA, the Privacy Act, and the Sunshine Act to the Smithsonian.[198]

The Smithsonian illustrates the blurring of the line between nonprofits and government agencies. It demonstrates the strengths of such dual status, but even more so its complications and confusions. Its size and its importance to our nation underscore the importance of acknowledging and examining the place of congressionally established § 501(c)(3) organizations within the nonprofit sector.

### B. THE AMERICAN NATIONAL RED CROSS

The Red Cross, in the words of one of its historians, has "no counterpart in other humanitarian or charitable organizations in this country."[199] It stands alone in Subtitle II of Title 36 (Treaty Obligations).[200] As noted earlier, the Red Cross is among the congressionally established § 501(c)(3) organizations that do not depend on appropriations.[201] It relies instead on grants from government agencies, charitable contributions, and exempt function income.[202]

Like Red Cross societies in other nations, the Red Cross shoulders both wartime and peacetime duties.[203] Its wartime duties involve family communication and other support to the U.S. military, as well as treaty obligations under the Geneva Convention to protect victims of conflict.[204] Its peacetime duties require it to maintain a system of domestic and international disaster relief.[205] Today, the Red Cross describes itself as a "federal instrumentality" having a "unique" relationship with the federal government, but also as an independent nonprofit tax-exempt charitable institution and not a federal agency.[206]

Kenneth Kosar, writing for the CRS, has called the Red Cross a quasi-governmental entity "occupying that area between the private and public sectors."[207] Although it shares that conceptual space with the Smithsonian, it does so for a quite different set of reasons. Unlike the Smithsonian, the Red

197. SMITHSONIAN INST., BOARD OF REGENTS ETHICS GUIDELINES 2 (2023), https://www.si.edu/Content/Governance/pdf/EthicsGuidelinesandAnnuaDisclosureStatement.pdf.

198. Open and Transparent Smithsonian Act of 2016, H.R. 3387, 114th Cong. (as reported by Comm. of Oversight & Gov't Reform, Dec. 12, 2016). It was introduced in the House of Representatives but proceeded no further. *Id.*

199. FOSTER RHEA DULLES, THE AMERICAN RED CROSS: A HISTORY 1 (1950).

200. *See* 36 U.S.C. §§ 300101–300113.

201. *See supra* text accompanying notes 128–33.

202. *See supra* text accompanying notes 128–33.

203. KEVIN R. KOSAR, CONG. RSCH. SERV., RL33314, THE CONGRESSIONAL CHARTER OF THE AMERICAN NATIONAL RED CROSS: OVERVIEW, HISTORY AND ANALYSIS 5 (2006), https://www.everycrsreport.com/files/20060315_RL33314_5fe5d0aa0b4b87649635a9350cc300f9642f3371.pdf.

204. AM. RED CROSS, OUR FEDERAL CHARTER: HOW THE AMERICAN RED CROSS ACHIEVED ITS CURRENT ROLE 2 (2023), https://www.redcross.org/content/dam/redcross/National/history-federal-charter.pdf.

205. *Id.*

206. *Id.*

207. KOSAR, *supra* note 203, at 6.

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Cross is not subject to the annual appropriations process and whatever congressional oversight that process produces.[208] At the same time, the Red Cross has direct governmental responsibilities that the Smithsonian does not. It has treaty responsibilities under the Geneva Convention and is assigned a key role in national disaster relief.[209]

As prominent a role as it now has in the American psyche, the Red Cross in fact had a less-than-auspicious start. It was a latecomer to the International Red Cross movement and to the Geneva Convention. As historian Foster Rhea Dulles wrote, "[t]he major European countries adopted in 1864 the principles underlying the International Red Cross, concluded the Treaty of Geneva providing for neutralization of all aid to the wounded in time of war, and set about establishing their own national Red Cross societies."[210] Clara Barton learned about both the Geneva Convention and the Red Cross movement during travel in Europe from 1869 to 1873.[211] When she returned, she worked for the United States to ratify the Geneva Convention.[212] Her efforts with President Rutherford B. Hayes failed, and President James Garfield was assassinated before her overtures to him could prove successful.[213] Seemingly thwarted, she and others formed the American Association of the Red Cross ("American Association") in 1881, a private District of Columbia nonprofit.[214] Its goals included the ratification of the Geneva Convention as well as providing a system of national relief.[215]

To the surprise of Clara Barton and the American Association,[216] President Garfield's successor, Chester Arthur, called for the ratification of the 1864 Geneva Convention in December of 1881.[217] He signed the Convention on March 1, 1882, and the Senate ratified it on March 16, 1882.[218] In order for the American Association (reincorporated and renamed the American National Red Cross in 1893) to be officially recognized in Geneva, however, it needed to receive a federal charter.[219] It achieved this goal on June 6, 1900.[220]

As with the Smithsonian, the Red Cross is sometimes treated as governmental and sometimes not. As Kosar of the CRS has recognized, the

208. As Kosar has written, "because the charters do not authorize annual appropriations for the [Red Cross], Congress's power to use the 'purse' to encourage the [Red Cross's] compliance is limited." *Id.* at 8.

209. *Id.* at 4. Kosar described the Red Cross as "the only non-governmental entity designated as a primary support agency in the NRP," or National Response Plan, established by the Department of Homeland Security. *Id.*

210. DULLES, *supra* note 199, at 2.

211. AM. RED CROSS, *supra* note 204, at 3.

212. *Id.*

213. *Id.*

214. *Id.*; DULLES, *supra* note 199, at 15–16.

215. AM. RED CROSS, *supra* note 204, at 3.

216. *Id.* at 4.

217. *Id.*

218. KOSAR, *supra* note 203, at 3 n.14.

219. AM. RED CROSS, *supra* note 204, at 5; DULLES, *supra* note 199, at 17–18.

220. KOSAR, *supra* note 203, at 3 (citing Act of June 6, 1900, ch. 784, 31 Stat. 277).

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"'ambiguous public-private nature' of the Red Cross has led to legal conflicts requiring adjudication by the courts."[221] In 1966, the Supreme Court recognized the Red Cross as a federal instrumentality in *Department of Employment v. United States*.[222] There, the Red Cross had brought suit in a three-judge federal district court to enjoin enforcement of a Colorado unemployment compensation tax and for a refund based on its status as a federal instrumentality.[223] The Court wrote: "Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality."[224] The opinion pointed to the Red Cross's congressional charter, its audit by the Defense Department, the presidential appointment of its principal officer and seven of its governors, as well as its obligations under the Geneva Convention and for disaster relief. The Court recognized that the Red Cross was not a "usual Government agency" in that "its employees are not employees of the United States, and that government officials do not direct its everyday affairs."[225] But, the Court concluded, "the Red Cross is like other institutions—e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute."[226] In a more recent case, the Court held that the "sue and be sued" language of the Red Cross's 1947 charter "confers original jurisdiction [on federal courts] over all cases to which the Red Cross is a party."[227]

At other times, however, the Red Cross lacks governmental status. In *Irwin Memorial Blood Bank of San Francisco Medical Society v. American National Red Cross*,[228] the Ninth Circuit held the Red Cross exempt from FOIA.[229] There, the appellant had relied on a 1974 amendment of FOIA, which defined "agency" to include "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."[230] The Ninth Circuit looked at the degree of government control over the Red Cross to address this issue.[231] While acknowledging factors that figured into the Supreme Court's instrumentality decision—financial reporting and auditing requirements, and the President's appointment power—the Ninth Circuit also considered the open

221. *Id.* at 7.

222. 385 U.S. 355, 358–59 (1966); *see* United States v. City of Spokane, 918 F.2d 84, 90 (9th Cir. 1990) (immunity from city tax on gambling activities).

223. *Dep't of Emp.*, 385 U.S. at 356.

224. *Id.* at 358–59.

225. *Id.* at 360.

226. *Id.*

227. Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 247 (1992).

228. 640 F.2d 1051 (9th Cir. 1981); *see* Josephson, *supra* note 12, at 73 ("[A]pparently when the Red Cross wishes to invoke a federal shield, it is represented by the United States. When it wishes to blunt a federal sword, it is privately represented.").

229. *Irwin Mem'l Blood Bank of S.F. Med. Soc'y*, 640 F.2d at 1057.

230. *Id.* at 1053 (quoting 5 U.S.C. § 552(f)(1)).

231. *Id.* at 1055–57.

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membership of the organization, the work of its volunteers, the absence of congressional appropriations, and the relatively low percentage of income from government contracts and grants.[232] Most important for the court was the purpose of the Red Cross: "[A] dominant concern of the Red Cross is that it be viewed by the peoples of the world as an institution which owes its primary allegiance, not to any nation or group of nations, but to the alleviation of human suffering."[233] The Ninth Circuit thus concluded that the Red Cross, while "undoubtedly a close ally of the United States government," was not subject to sufficient federal control or supervision for it to be an agency for purposes of FOIA.[234]

In other cases, the Red Cross was distinct enough from the federal government for the United States to sue it. To settle suits regarding handling of the domestic blood supply, the Red Cross entered two decrees in the early 2000's. "[I]t entered the second . . . only after the United States moved in federal court to punish it for contempt for the first decree."[235] It paid a fine of $3.4 million in June 2005 and a $4.2 million fine in September 2006.[236] Moreover, FDA fines did not end in 2006. The Red Cross paid a fine of $4.6 million in 2008[237] and yet another $9.6 million in 2012.[238] The consent decree requiring federal government oversight ended only in 2015.[239]

The Red Cross blood program began during World War II and, after the war, expanded into a national civilian blood program that now supplies more than 40% of the blood and blood products in the United States.[240] According to its FY 2020–2021 Form 990, it had revenue of $1,888,841,638 from biomedical products and services.[241] Biomedical services, however, represented only one of the program's several sources of revenue. On its FY 2020–2021 Form 990, it reported government grants of $170,199,595 and contributions (including federated campaigns) of $784,197,661.[242] Thus, contributions are many times greater than funds from the government.

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232. *Id.* at 1057.

233. *Id.* at 1056.

234. *Id.* at 1057–58.

235. Josephson, *supra* note 12, at 72.

236. *Id.*

237. *FDA Fines Red Cross Another $4.6 Million*, NBC NEWS (Feb. 7, 2008, 6:50 AM), https://www.nbcnews.com/health/health-news/fda-fines-red-cross-another-4-6-million-flna1c9449573.

238. Gergana Koleva, *American Red Cross Fined $9.6 Million for Unsafe Blood Collection*, FORBES (Jan. 17, 2012, 4:01 PM), https://www.forbes.com/sites/gerganakoleva/2012/01/17/american-red-cross-fined-9-6-million-for-unsafe-blood-collection/?sh=4ed117e570ec.

239. *Red Cross Gets Blood Consent Decree Lifted*, NONPROFIT TIMES (Dec. 15, 2015), https://www.thenonprofittimes.com/npt_articles/red-cross-gets-blood-consent-decree-lifted/.

240. AM. RED CROSS, A BRIEF HISTORY OF THE RED CROSS 3 (2023), https://www.redcross.org/content/dam/redcross/National/history-full-history.pdf.

241. Am. Red Cross, FY 2021–2022 IRS Form 990, pt. VIII, l. 2, https://www.redcross.org/content/dam/redcross/about-us/publications/2022-publications/FY21-Red-Cross-Form-990.pdf.

242. *Id.* at pt. VIII, l. 1.

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Congress rechartered the Red Cross in 1905, 1947, and 2007, changing its governance structure each time.[243] The 1900 federal charter established no governance structure, although it authorized the Red Cross to adopt its own bylaws.[244] The 1905 federal charter dissolved the private nonprofit, and the federally chartered organization succeeded to all the rights and property held by the private nonprofit. Its charter named a long list of incorporators creating the organization as a "body politic and corporate in the District of Columbia."[245]

The 1905 charter also addressed "complaints regarding [the Red Cross's] handling of funds."[246] Enactment of this new charter followed a congressional investigation and the resignation of Clara Barton, after the dismissal of charges against her alleging financial mismanagement.[247] The 1905 charter established a central committee composed of eighteen people: six appointed by the President, one of the six to be Chair, and the other five to be representatives of the Departments of State, War, Navy, Treasury, and Justice.[248] "Another six members were appointed by the 55 incorporators of the [Red Cross]."[249] The final six members were chosen by representatives of state and territorial Red Cross societies.[250]

Congress rechartered the Red Cross once again in 1947.[251] The considerable changes made reflected concerns "that the management of the [Red Cross] was insufficiently attentive to the preferences of the early 500 local Red Cross chapters, which collected from donors a considerable portion of the [national Red Cross's] funds and whose members were on the front line in disaster and war relief duties."[252] The Red Cross itself had created a commission that recommended making the governance of the national organizations "more democratic."[253] The commission drafted the proposal for revisions to its charter.[254]

The 1947 charter revisions replaced the central committee of eighteen persons with a board of governors of fifty persons. The President had authority

243. *See generally* KOSAR, *supra* note 203.

244. *Id.* at 8–9.

245. *Id.* at 16. Josephson suggests this language is insufficient to make it a District of Columbia nonprofit corporation subject to District of Columbia nonprofit laws. *See* Josephson, *supra* note 12, at 74.

246. KEVIN R. KOSAR, CONG. RSCH. SERV., RL 33910, THE CHARTER OF THE AMERICAN NATIONAL RED CROSS: CURRENT ISSUES AND PROPOSED CHANGES 2 (2007); *see* Act of Jan. 5, 1905, ch. 23, 33 Stat. 599.

247. DULLES, *supra* note 199, at 73–81. Barton had "personalized management practices" that "allowed her critics to mobilize under the banner of professionalism." ELISABETH S. CLEMENS, CIVIC GIFTS: VOLUNTARISM AND THE MAKING OF THE AMERICAN NATION-STATE 108 (2020). Mabel Boardman led the anti-Barton faction and, prior to Barton's resignation, had demanded a congressional investigation. *Id.*

248. KOSAR, *supra* note 203, at 9.

249. *Id.*

250. The 1905 charter empowered the central committee to establish an executive committee of seven persons. *Id.*

251. Act of May 8, 1947, ch. 50, 61 Stat. 80.

252. KOSAR, *supra* note 203, at 10.

253. *Id.* at 4.

254. *See* S. REP. NO. 80-38, at 1 (1947); H.R. REP. NO. 80-337, at 1 (1947).

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to appoint eight of the governors, while local chapters appointed thirty at the annual convention of the Red Cross.[255] These thirty-eight members then had the responsibility to elect twelve "members-at-large" charged with representing "the national interests which the corporation serves."[256] Kosar observed that a "board of this size for a federal or federally affiliated entity may be without precedent"; so large a board, he feared, could include members who do not understand the need to engage in oversight rather than management and decrease the ability of the board to "make coherent decisions and plans" for the entity.[257]

Congress rechartered the Red Cross again in 2007; that charter remains in effect today. Congress enacted this new charter following congressional hearings held in 2001 in connection with the Red Cross's response to 9/11 and those held in 2006 in connection with its response to Hurricane Katrina.[258] Criticism of the Red Cross after 9/11 centered on the Red Cross failing to devote all money raised for 9/11 relief for that promised purpose,[259] while the hearings after Hurricane Katrina questioned the effectiveness of its response to that disaster.[260] All these issues, as serious as they were, reflected operational rather than governance problems.

In both 2005 and 2006, however, Senator Chuck Grassley, then Chairman of the Senate Finance Committee, raised questions about Red Cross governance, as he had with the Smithsonian and the Nature Conservancy.[261] He wrote letters to the Chair of the Red Cross's board of governors questioning its governance practices.[262] The Red Cross established an independent advisory panel in March of 2006; in October of 2006, the Red Cross Board of Governors issued a report of over 150 pages, titled *American Red Cross Governance for the 21st Century* ("Report").[263] The Report reviewed current best practices for governance of both for-profit and nonprofit corporations, including, in particular, considerations

255. KOSAR, *supra* note 203, at 10.

256. *Id.* at 10–11 (quoting the 1947 charter).

257. *Id.* at 11.

258. *Id.* at 1.

259. *See Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse: Hearing Before the Subcomm. on Oversight & Investigation of the H. Comm. on Energy & Com.*, 107th Cong. (2001).

260. *See* KOSAR, *supra* note 246, at 5–7 (listing hearings and reports).

261. The Nature Conservancy is not a federally chartered entity, but rather a large private entity. *See* THE NATURE CONSERVANCY, https://www.nature.org/en-us/ (last visited Aug. 23, 2023). Senator Grassley characterized its problematic practices as common to large charities. *See The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Hearing Before the S. Comm. on Fin.*, 109th Cong. (2005) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on Fin.).

262. *See Grassley Questions Red Cross Board on Its Practices, Effectiveness*, U.S. SEN. COMM. ON FIN.: CHAIRMAN'S NEWS (Dec. 29, 2005), https://www.finance.senate.gov/chairmans-news/grassley-questions-red-cross-board-on-its-practices-effectiveness; *see also Grassley Urges Red Cross to Improve Governance, Respond to Volunteers' Concerns*, U.S. SEN. COMM. ON FIN.: CHAIRMAN'S NEWS (Feb. 27, 2006), https://www.finance.senate.gov/chairmans-news/grassley-urges-red-cross-to-improve-governance-respond-to-volunteers-concerns.

263. *See generally* BD. OF GOVERNORS, AM. RED CROSS, AMERICAN RED CROSS GOVERNANCE FOR THE 21ST CENTURY (2006), https://www.redcross.org/content/dam/redcross/atg/PDF_s/Governance/BOG GovernanceReport.pdf.

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regarding the size of boards.[264] As Kosar of the CRS observed, the Report favored making changes to Red Cross bylaws, rather than amendments to its charter, although "[t]he rationale for this approach was not stated in the [R]eport."[265] Of course, changes to bylaws are far easier to make than changes to a federal statutory charter.

Nonetheless, the Report did endorse a variety of charter changes. They included reducing the size of the board to between twelve and twenty-five members, as determined by the board of governors; establishing a single category of board members to be elected by members at an annual meeting; establishing a presidentially appointed Cabinet Counsel from various government agencies to offer advice to the board, but not as members of the board; and having the board recommend candidates for Chair to be appointed by the President.[266]

Congress accepted all these recommendations in the charter enacted on May 11, 2007. The legislation also identified a long list of issues not addressed in the statute, but presumably to be covered in bylaws.[267] The 2007 legislation did include an innovation not specifically recommended in the report—establishment of Office of the Ombudsman, with duties to be provided in the Red Cross bylaws, but specifically tasked in the statute with submitting an annual report to appropriate congressional committees as to matters confronting the Red Cross.[268] Congress addressed some concerns regarding the Red Cross only in a section of the legislation named in part the "Sense of Congress," not in the legislative charter itself.[269] For example, Congress called upon the Red Cross to "maintain appropriate communications with State regulators of charitable organizations and [to] cooperate with them as appropriate in specific matters as they arise from time to time."[270]

The "Findings" section of the legislation enacting the 2007 charter states: "The United States Supreme Court held The American National Red Cross to be an instrumentality of the United States, and it is in the national interest that the Congressional Charter confirm that status."[271] Such confirmation, however, does not resolve the question of the extent to which the Red Cross is a governmental entity and to what extent it is a private entity. Its structure and purposes straddle these categories, making the boundaries of both indistinct.

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264. *See generally id.*

265. KOSAR, *supra* note 246, at 10.

266. *See* BD. OF GOVERNORS, *supra* note 263, at 149–56.

267. *See* Act of May 11, 2007, Pub. L. No. 110-26, 121 Stat. 103, 105.

268. 36 U.S.C. § 300112. The governance report recommended that the Red Cross consider establishing an ombudsman position. *See* BD. OF GOVERNORS, *supra* note 263, at 155.

269. § 2, 121 Stat. at 103–05.

270. *Id.* § 2(b)(4), 121 Stat. at 105.

271. *Id.* § 2(a)(7), 121 Stat. at 104–05.

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### C. OTHER CONGRESSIONALLY ESTABLISHED § 501(C)(3) ORGANIZATIONS

The Smithsonian Institution and the American Red Cross have particularly long and complicated histories. Each has reasons to claim uniqueness. But many other congressionally established § 501(c)(3) organizations also exist. In this Subpart, I review six other prominent congressionally established § 501(c)(3) organizations with charters codified at various places in the U.S. Code.

#### *1. National Gallery of Art and Holocaust Museum*

As noted earlier, a 2013 GAO Report[272] urged not only the Smithsonian Institution but also the National Gallery of Art and the U.S. Holocaust Museum—all of which receive appropriations and thus at least some minimal level of government oversight—to better "leverage" nonfederal resources.[273] This report noted that these congressionally established § 501(c)(3) organizations can not only "solicit and accept private funds," but also "retain and use these funds without fiscal year limitations or further congressional approval."[274] Moreover, they can accept gratis services from volunteers and enjoy exemptions from some federal hiring and procurement requirements.[275] At the same time, they derive "intangible benefits" from their federal status, as well as federal government immunity from state and local requirements.[276] The GAO also pointed to the failure of these entities to keep Congress informed about their nonfederal resources so that Congress and the President have a complete picture to "select among competing demands for federal funds."[277]

The National Gallery began in 1936 when Andrew W. Mellon, then Secretary of the Treasury, offered the country his art collection as well as a trust fund to finance, among other items, what is now the West Building,[278] and President Franklin D. Roosevelt accepted the gift.[279] A joint resolution of Congress signed in 1937 established the National Gallery and authorized the government to provide the land for it, as well as reserved adjoining land for a future addition and funds for the upkeep, administrative expenses, and costs of operations.[280] In 1968, legislation authorized the National Gallery trustees to construct an additional building paid for by the National Gallery Trust Funds.[281] A 1977 GAO Report explained: "Although formally established as a bureau of the Smithsonian Institution, the National Gallery functions as an autonomous

272. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 126.
273. *Id.* at 2–3.
274. *Id.* at 9.
275. *Id.* at 10.
276. *Id.* at 11.
277. *Id.* at 15.
278. *See National Gallery History*, NAT'L GALLERY OF ART, https://www.nga.gov/about/gallery-history.html (last visited Aug. 23, 2023). The statutory provisions applicable to the National Gallery of Art are found at 20 U.S.C. §§ 71–75.
279. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 126, at 6.
280. Act of Mar. 4, 1937, ch. 50, 50 Stat. 51.
281. Act of July 5, 1968, Pub. L. No. 90-376, 82 Stat. 286 (codified at 20 U.S.C. § 71a).

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and separately administered organization."[282] For FY 2023, the National Gallery of Art requested, the President's budget included, and Congress appropriated $170,240,000 as well as an additional $39 million, primarily to build a new storage facility.[283] Its FY 2019–2020 Form 990 lists the Chief Justice of the United States, the Secretary of State, the Secretary of the Treasury, and the Secretary of the Smithsonian as ex officio trustees.[284] It reports $176,245,822 in government grants and $22,239,390 in other gifts, grants, etc.[285]

The 1980 GAO Report also examined the U.S. Holocaust Museum.[286] Its governing legislation declares it to be "an independent establishment of the United States Government."[287] The Government Manual lists it as a "Quasi-Official Agency"; gifts to it are deemed gifts to the United States and not appropriated funds.[288] For FY 2023, the U.S. Holocaust Museum requested, the President's budget included, and Congress appropriated $65,231,000—an increase of $2,615,000 above the FY 2022 request.[289] Its FY 2020–2021 Form 990 reported net assets of $751,850,260; government grants of $59,572,524; membership dues of $13,819,603; and other contributions, grants, and gifts of $55,528,119.[290] Once again, congressionally established § 501(c)(3) organizations blur the distinction between private and public.

### 2. *The John F. Kennedy Center for the Performing Arts*

The John F. Kennedy Center for the Performing Arts ("the Kennedy Center") did not begin as a memorial to President Kennedy. Bipartisan legislation to create a National Cultural Center in the District of Columbia had been enacted in 1958 during Eisenhower's presidency.[291] In November of 1962,

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282. ELMER B. STAATS, U.S. GOV'T ACCOUNTABILITY OFF., GGD-78-26, POLICIES AND PRACTICES ON THE USE OF FEDERAL AND PRIVATE FUNDS, NATIONAL GALLERY OF ART 3 (1977).

283. *FY 2023 Budget Request*, NAT'L GALLERY OF ART 1-1, 3-1, https://www.nga.gov/content/dam/ngaweb/notices/Financial%20Reports/national-gallery-art-FY2023-budget-request.pdf (last visited Aug. 23, 2023); OFF. OF MGMT. & BUDGET, *supra* note 92, at 1326–27; Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. at 357–85.

284. Nat'l Gallery of Art, FY 2019–2020 IRS Form 990, pt. VII, https://www.guidestar.org/profile/53-6001666.

285. *Id.* at pt. VIII, l. 1.

286. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 126.

287. 36 U.S.C. § 2301. The statutes establishing the Holocaust Museum are found in Title 36, Subtitle I, Part B: U.S. Government Organizations Involved with Observances and Ceremonies. This Subtitle is different from those of either the Red Cross or the Title 36 corporations discussed *infra* Part IV.

288. 36 U.S.C. § 2307.

289. *See* U.S. HOLOCAUST MEM'L MUSEUM, FISCAL YEAR 2023: PRESIDENT'S BUDGET REQUEST 1 (2022), https://www.ushmm.org/m/pdfs/USHMM-FY2023-Presidents-Request.pdf; OFF. OF MGMT. & BUDGET, *supra* note 92, at 1341–42; STAFF OF H. COMM. ON APPROPRIATIONS, 117TH CONG., SUMMARY OF APPROPRIATIONS PROVISIONS BY SUBCOMMITTEE (Comm. Print 2023); Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. at 357–58.

290. U.S. Holocaust Museum, FY 2020–2021 IRS Form 990, pt. I, VIII, l. 1, https://www.ushmm.org/m/pdfs/04062022-IRS-990-FY21.pdf.

291. *Our Story*, THE KENNEDY CTR., https://www.kennedy-center.org/our-story/ (last visited Aug. 23, 2023).

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President Kennedy launched a fundraising campaign for it.[292] Two months after his assassination in November of 1963, an Act of Congress designated the cultural center as a living memorial to President Kennedy.[293] Its board currently consists of sixty members, twenty-four of whom are governmental officials, including the Secretary of Health and Human Services, the Librarian of Congress, the Secretary of State, the Director of the National Park Service, the Secretary of Education, and various members of Congress.[294]

Congress established the Kennedy Center as a "bureau" of the Smithsonian Institution.[295] As with the Smithsonian, whether it is to be considered a federal entity is unclear. In connection with the John F. Kennedy Center Act Amendments of 1994, which granted the Kennedy Center increased autonomy, a House Report described it as an "entity within the federal government structure," albeit a unique one.[296] It is a "federal entity" under the Inspector General Act;[297] an agency with authority to publish regulations in the Federal Register;[298] and a federal agency under the Federal Torts Claims Act.[299] In addition, the Second Circuit has found that the Kennedy Center benefits from sovereign immunity as an "undisputed" entity of the U.S. government.[300]

At the same time, it is a tax-exempt § 501(c)(3) organization. Its FY 2019–2020 Form 990 lists its net assets at $504,970,495.[301] Gifts, grants, etc. were listed as $45,410,549, and government grants were $77,484,636.[302] Tickets for its programs are an important source of revenue, amounting to $48,342,278.[303] Its congressional funding has drawn scrutiny. For example, the Kennedy Center's receipt of $25 million as part of the 2020 $2.2 trillion CARES Act produced controversy,[304] especially after it furloughed hundreds of

292. *Id.*

293. *Id.*

294. 20 U.S.C. § 76h(a)(2).

295. *Id.* § 76h(a)(1).

296. H.R. REP. NO. 103-453, pt. 1 (1994) (citing U.S. OFF. OF GOV'T ETHICS, THE KENNEDY CENTER FOR THE PERFORMING ARTS, DO-09-030 (2009)).

297. 20 U.S.C. § 76*l*(d).

298. 40 U.S.C. § 6304.

299. 20 U.S.C. § 76*l*.

300. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).

301. John F. Kennedy Ctr. for the Performing Arts, FY 2019–2020 IRS Form 990, https://www.guidestar.org/profile/53-0245017. This Form 990 declares that it is a "trust instrumentality of the United States, and pursuant to the supremacy clause of the US Constitution, the Kennedy Center is not subject to either state or District of Columbia regulation of the organization's fundraising activities." *Id.* at sched. D, pt. XIII.

302. *Id.* at pt. VIII, l. 1.

303. *Id.*

304. *See* Elizabeth Blair, *Emergency Relief Package Provides Tens of Millions in Funds to Help the Arts*, NPR (Mar. 26, 2020, 6:26 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822215614/emergency-relief-package-provides-for-tens-of-millions-in-funds-to-help-the-arts; Karen Tumulty, Opinion, *Why the Kennedy Center Got Money in the Bailout Bill*, WASH. POST (Mar. 27, 2020, 2:50 PM), https://www.washingtonpost.com/opinions/2020/03/27/why-kennedy-center-got-money-bailout-bill/.

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employees.[305] In the wake of this furlough, the $1.2 million compensation of Deborah Rutter, its president and CEO, drew criticism.[306] She first reduced it by 50%, and then, in March 2020, announced she would forgo it altogether for that year.[307]

Separate from CARES Act funds, Congress appropriated $40.4 million to the Kennedy Center for FY 2021.[308] In light of the CARES Act controversy, the Kennedy Center in December of 2020 issued a clarification that the money it received as part of the appropriations bill was exactly what the President had requested in his FY 2021 budget submission to Congress "to support capital repairs and operations and maintenance" for the Kennedy Center's congressionally mandated role as the living memorial to President John F. Kennedy, and "not part of the Covid relief package."[309] Its FY 2023 appropriation was $45.38 million—$5 million above the FY 2022 enacted level but the same amount it had requested and that the President had included in his budget.[310]

Like other congressionally established § 501(c)(3) organizations, the Kennedy Center operates as a public-private hybrid, with both governmental and nongovernmental characteristics. More than a third of its board consists of government officials with all the issues already noted about such membership.[311] At the same time, its status as a § 501(c)(3) entity rather than a governmental

305. *See* Peggy McGlone, *Congress Gave $25 Million to Help the Kennedy Center Weather the Coronavirus. Now Some Politicians Want It Back*, WASH. POST (Apr. 3, 2020, 3:57 PM), https://www.washingtonpost.com/entertainment/theater_dance/congress-gave-25-million-to-help-the-kennedy-center-weather-the-coronavirus-now-some-politicians-want-it-back/2020/04/03/5e5746f0-7525-11ea-85cb-8670579b863d_story.html.

306. *See* Adam Andrzejewski, *Kennedy Center Received $270 Million from Congress and Paid Their President $5+ Million Since 2016*, FORBES (Jan. 31, 2021, 11:00 PM), https://www.forbes.com/sites/adamandrzejewski/2021/01/31/kennedy-center-received-270-million-from-congress-and-paid-their-president-5-million-since-2016/?sh=426968b036d6.

307. Peggy McGlone, *The Kennedy Center Is Facing Hard Choices. Its President Explains Why She Is Forgoing Her Salary*, WASH. POST (Mar. 26, 2020, 5:20 PM), https://www.washingtonpost.com/entertainment/museums/the-kennedy-center-is-facing-more-hard-choices-its-president-explains-why-shes-forgoing-her-salary/2020/03/26/2cc86ae4-6f97-11ea-a3ec-70d7479d83f0_story.html.

308. Press Release, House Appropriations Comm., Appropriations Committee Releases Fiscal Year 2021 Interior-Environment Funding Bill (July 6, 2020), https://appropriations.house.gov/news/press-releases/appropriations-committee-releases-fiscal-year-2021-interior-environment-funding. Its request for FY 2023 is $45.38 million. *See* KENNEDY CTR. FOR THE PERFORMING ARTS, 2024 FISCAL YEAR BUDGET JUSTIFICATIONS TO CONGRESS 1, 2–4 (2022), https://www.kennedy-center.org/globalassets/our-story/mission/kennedy-center-fy24-budget-justification-to-congress.pdf.

309. Press Release, Kennedy Ctr., Clarification on Federal Funding for the John F. Kennedy Center for the Performing Arts (Dec. 23, 2020), https://www.kennedy-center.org/press-releases/clarification-on-federal-funding/.

310. KENNEDY CTR. FOR THE PERFORMING ARTS, *supra* note 308, at 1330–31; STAFF OF H. COMM. ON APPROPRIATIONS, 117TH CONG., SUMMARY OF APPROPRIATIONS PROVISIONS BY SUBCOMMITTEE (Comm. Print 2023); Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. at 358.

311. *See* 20 U.S.C. § 76h.

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agency frees it from various constraints, allowing it, for example, to pay more than $1 million in compensation to its president and CEO.[312]

### 3. *Corporation for Public Broadcasting, NPR, and PBS*

Congress created the Corporation for Public Broadcasting ("CPB") as a nonprofit corporation, "not an agency or establishment of the United States Government," in the Public Broadcasting Act of 1967.[313] It describes itself as a "private corporation funded by the American people" and a "steward of the federal government's investment in public media."[314] Unlike other congressionally established § 501(c)(3) organizations, the nonprofit law to which it is subject is clear: The legislation specifies that it is to be established under and subject to the District of Columbia Nonprofit Corporation Act.[315] Its founding legislation explains that Congress chose a private corporation "to afford maximum protection from extraneous interference and control."[316] Its board of nine is to be appointed by the President, with the advice and consent of the Senate, and no more than five of its members can be members of the same political party.[317] Thus, the board is subject to some indirect government control but does not have government officials as ex officio members.

CPB relies on appropriations and grants from other government agencies to conduct its operations,[318] although a GAO Report reminds us that, "as a nonprofit corporation," it "is not subject to the same federal fiscal controls as are government agencies."[319] As a CRS report explains, "CPB's principal function is to receive and distribute federal appropriations" in order to support public radio and television stations.[320] Some 90% of its appropriation must be allocated to public broadcasting stations or program producers, and, of this 90%, 75% must go to television grants and 25% to radio grants.[321] According to the CRS,

312. Applicable tax law requires such compensation to be reasonable, based on comparison to comparable institutions, whether nonprofit or for-profit. *See* 26 U.S.C. § 4958.

313. Act of Nov. 7, 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. § 396).

314. *About CPB*, CORP. FOR PUB. BROAD., https://www.cpb.org/aboutcpb (last visited Aug. 23, 2023).

315. 47 U.S.C. § 396(b), (c)(4).

316. *Id.* § 396(a)(10).

317. *Id.* § 396(c).

318. CPB's FY 2019–2020 Form 990 reports revenues from government grants of $555,987,323 and $1,920,840 in other gifts, grants, and contributions. Corp. for Pub. Broad., FY 2019–2020 IRS Form 990, pt. VIII, l. 1, https://projects.propublica.org/nonprofits/display_990/132607374/download990pdf_09_2021_prefixes_01-20%2F132607374_202009_990_2021090318818043.

319. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-669R, PUBLIC RADIO AND THE ROLE OF FEDERAL FUNDING 11 (2011), https://www.gao.gov/assets/gao-11-669r.pdf. The report explains that several federal controls are not applicable to CPB. The controls that do not apply include 31 U.S.C. § 1341 (the Antideficiency Act, prohibiting agencies from spending or obligating themselves to spend in advance or in excess of appropriations), *id.* § 13041(a) (the Purpose Statute, providing that appropriations may be used only for their intended purpose), and *id.* § 1502(a) (the Bona Fide Needs Statute, providing that appropriations made for a definite period of time may be used only for obligations properly incurred during that time).

320. GLENN J. MCLOUGHLIN & LENA A. GOMEZ, CONG. RSCH. SERV., RS22168, THE CORPORATION FOR PUBLIC BROADCASTING: FEDERAL FUNDING AND ISSUES 1 (2017).

321. 47 U.S.C. § 396(k)(3)(A)(v).

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"[a]pproximately 15% of public television funding and 10% of radio broadcasting funding comes [from] federal appropriations that CPB distributes."[322] As CPB explained in its most recent appropriations request,

> [a]s steward of the federal appropriations, CPB supports 1,190 public radio stations and 356 public television stations serving nearly 99 percent of the American population living in rural, small town, and urban communities in all 50 states, the District of Columbia, and four commonwealths and territories . . . . CPB's funding flows through a statutory formula, which apportions approximately 71 percent of funding directly to stations. CPB's administrative expenses are capped at 5 percent.[323]

Under the auspices of CPB, Public Broadcasting Service ("PBS") was organized in 1969 and National Public Radio ("NPR") in 1970 as private nonprofit corporations.[324] PBS operates and manages a "program distribution system interconnecting all the local public television stations."[325] It also provides "a distribution channel for national programs to those public stations."[326] Moreover, it "aggregates funding for the creation and acquisition of programs by and for the stations."[327] NPR is a "news-gathering, production, and program-distribution company."[328] It is "authorized to produce radio programs for its members as well as to provide, acquire, and distribute radio programming through its satellite distribution system."[329]

Since 1976, to have a "firewall that protects public media's independence from political influence,"[330] CPB has received a two-year advance appropriation.[331] For example, in FY 2022 it requested $475 million for FY 2024; Congress approved an advance appropriation of $525 million.[332] For FY 2025, it requested $565 million,[333] as did the President's budget.[334] Congress

322. MCLOUGHLIN & GOMEZ, *supra* note 320, at 1.

323. CORP. FOR PUB. BROAD., APPROPRIATION REQUEST AND JUSTIFICATION FOR FY 2023/FY 2025, at 6 (2022), https://www.cpb.org/sites/default/files/appropriation/FY-2023-2025-CPB-Budget-Justification.pdf.

324. MCLOUGHLIN & GOMEZ, *supra* note 320, at 2. That is, here a nonprofit corporation established by Congress has in turn established § 501(c)(3) organizations to help carry out its mission. The revenue of PBS and NPR includes private donations as well as the funds allotted by CPB. NPR's FY 2019–2020 Form 990 reports $210,000 in government grants and $84,412,546 in other contributions, gifts, etc. Nat'l Pub. Radio, FY 2019–2020 IRS Form 990, pt. VIII, l. 1, https://www.guidestar.org/profile/52-0907625. PBS's FY 2019–2020 Form 990 reports $21,296,905 in government grants and $ 267,961,223 in contributions, gifts, etc. Pub. Broad. Serv., FY 2019–2020 IRS Form 990, pt. VIII, l. 1, https://projects.propublica.org/nonprofits/organizations/520899215.

325. MCLOUGHLIN & GOMEZ, *supra* note 320, at 1.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. CORP. FOR PUB. BROAD., *supra* note 323, at 2.

331. MCLOUGHLIN & GOMEZ, *supra* note 320, at Summary.

332. CORP. FOR PUB. BROAD., *supra* note 323, at 2, 119.

333. *See Federal Appropriations*, CORP. FOR PUB. BROAD., https://www.cpb.org/appropriation/history (last visited Aug. 23, 2023); CORP. FOR PUB. BROAD., *supra* note 323, at 52.

334. OFF. OF MGMT. & BUDGET, *supra* note 92, at 1232.

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gave it $535 million, an increase of $10 million over the FY 2024 enacted level.[335]

In sharp contrast to President Biden, President Trump sought to end the CPB. Trump's FY 2021 budget request recommended $30 million for CPB to enable it to move toward ending its operations.[336] Trump's position reflected longstanding opposition to federal funding of public media from the right.[337] For example, as part of a Knight Foundation series of white papers on the fiftieth anniversary of the 1967 Public Broadcasting Act, Michael Gonzalez of the Heritage Foundation detailed longstanding objections:

> The argument for defunding is that bias exists in public broadcasting . . . . [T]axes should not be coerced from the citizenry to fund expression that is consistently found to lack balance . . . . Cutting CPB subsidies should be the mission not only of conservatives but also of all who care about the health of First Amendment rights and of self-rule.[338]

Such efforts have not succeeded. Congress has continued to support CPB.[339] Despite Trump's $30 million FY 2021 budget request, Congress authorized approximately $445 million for CPB.[340] Donations to NPR increased after Trump's criticisms.[341]

Because CPB receives appropriations, battles over government support for public media are likely to continue. Few appear to realize the different funding sources for CPB, PBS, and NPR. In fact, only CPB receives appropriations. CPB created PBS and NPR as private charities supported primarily by donations. This structure could well protect the ongoing operations of PBS and NPR even if funding for CPB were severely cut.[342] Not relying on appropriations, even indirectly, gives these § 501(c)(3) organizations an advantage over CPB, the congressionally established § 501(c)(3) organization funded by appropriations.

The legislative history of CPB points to the need for insulation from politics as a reason for creating it as a nonprofit.[343] This statement gives more explanation than is usually found as to why Congress created it as a nonprofit

335. STAFF OF H. COMM. ON APPROPRIATIONS, 117TH CONG., SUMMARY OF APPROPRIATIONS PROVISIONS BY SUBCOMMITTEE (Comm. Print 2023); Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. at 443–44.

336. Ted Johnson, *Donald Trump Again Wants to Eliminate Funding for Public Media, but Congress Likely Won't Let Him*, DEADLINE (Feb. 10, 2020, 11:38 AM), https://deadline.com/2020/02/donald-trump-public-media-pbs-npr-1202856498/.

337. *See generally* MICHAEL GONZALEZ, KNIGHT FOUND., IS THERE ANY JUSTIFICATION FOR CONTINUING TO ASK TAXPAYERS TO FUND NPR AND PBS? (2017).

338. *Id.* at 3–4, 7.

339. Rachel Abrams, *Unloved by Trump, NPR Carries On*, N.Y. TIMES (Feb. 16, 2020), https://www.nytimes.com/2020/02/16/business/npr-trump-budget.html.

340. *Federal Appropriations*, *supra* note 333.

341. Abrams, *supra* note 339.

342. *See* Emily St. James, *Defunding the Corporation for Public Broadcasting Won't Kill PBS. It Will Hurt Trump Voters*, VOX (Mar. 17, 2017, 2:00 PM), https://www.vox.com/policy-and-politics/2017/3/17/14951868/trump-defund-pbs-npr.

343. *See supra* text accompanying note 318.

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organization, albeit one funded by appropriations. The creation of PBS and NPR, however, complicates both perception and reality of the federal role. The relationship between CPB, PBS, and NPR and their different sources of funding appear to be misunderstood, by both politicians and the public.

### *4. Legal Services Corporation*

The Legal Service Corporation ("LSC") describes itself as "the single largest funder of civil legal aid" in the nation.[344] Its 1974 congressional charter provides that it is "established in the District of Columbia" and able to "exercise the powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act,"[345] as well as those of a "private nonmembership nonprofit corporation"[346] described in § 170(c)(2) and § 501(c)(3).[347] Its board of directors consists of eleven voting members appointed by the President with the advice and consent of the Senate, with no more than six members of the same political party.[348] It distributes "more than 90 percent of its total funding to 132 independent nonprofit legal aid programs."[349] Its FY 2019–2020 Form 990 reports $492,639,997 in government grants and contributions and $1,325,971 in other contributions and gifts.[350]

It made a budget request of $1.26 billion for FY 2023 because of "decades of chronic underfunding of civil legal aid" and legal needs arising from the COVID-19 pandemic.[351] President Biden endorsed $700 million.[352] Congress, however, approved only $560 million plus an additional $20 million for

344. *Who We Are*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/who-we-are (last visited Aug. 23, 2023). The Legal Services Corporation was modeled on CPB. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-993, LEGAL SERVICES CORPORATION: GOVERNANCE AND ACCOUNTABILITY PRACTICES NEED TO BE MODERNIZED AND STRENGTHENED 48 (2007).

345. 42 U.S.C. § 2996b(a).

346. *Id.*

347. *Id.* § 2996b(c).

348. *Id.* § 2996c(a).

349. *Who We Are*, *supra* note 344.

350. Legal Servs. Corp., FY 2019–2020 IRS Form 990, pt. VIII, l. 1, https://pdf.guidestar.org/PDF_Images/2020/521/039/2020-521039060-202142219349300614-9.pdf.

351. *Fiscal Year 2023 Budget Request*, LEGAL SERVS. CORP., https://www.lsc.gov/our-impact/publications/budget-requests/fiscal-year-2023-budget-request#:~:text=LSC%20requests%20an%20appropriation%20of,million%20from%20last%20year's%20request (last visited Aug. 23, 2023). I note that, as with the CPB, President Trump opposed funding the LSC. His 2018, 2019, and 2020 budgets included funding only for closing down the organizations. *See* Press Release, Legal Servs. Corp., Legal Services Corporation Optimistic About Bipartisan Support in Congress Despite White House Proposal to Defund (Mar. 18, 2019), https://www.lsc.gov/press-release/legal-services-corporation-optimistic-about-bipartisan-support-congress-despite-white.

352. *See* OFF. OF MGMT. & BUDGET, *supra* note 92, at 1240. The CRS has explained: "Each year the LSC submits its own budget request to Congress." CONG. RSCH. SERV., RL34016, LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING 13 n.18 (2016). In most years, the LSC budget request is significantly higher than the amount that appears in the President's annual budget. *Id.*

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emergency legal assistance to underserved individuals and families impacted by natural disasters.[353]

Although its charter states that LSC is not considered "a department, agency, or instrumentality[] of the Federal Government,"[354] it must comply with a number of laws usually applicable only to federal agencies. It is subject to the government in the Sunshine Act[355] and FOIA.[356] It must provide notice and comment for and publish proposed rules, regulations, guidelines, and instructions in the Federal Register.[357] Its officers and employees cannot be compensated in excess of Level V of the Civil Services' Executive Schedule and are considered officers and employees of the federal government for certain specified purposes.[358] Like the Smithsonian, the Government Manual lists it as a "Quasi-Official" agency.[359]

Nonetheless, like other semi-governmental entities discussed in this Article, its hybrid nature has led to failures in governance and accountability. In 2007, the GAO found that "[a]lthough LSC has stronger federal accountability requirements than many nonprofit corporations, it is subject to governance and accountability requirements that are weaker than those of independent federal agencies and U.S. government corporations."[360] In particular, the GAO concluded that "LSC has not kept up with evolving reforms aimed at strengthening internal control over an organization's financial reporting process and systems."[361] Especially because of LSC's heavy reliance on federal funding, the GAO recommended that Congress consider adding additional governance and accountability requirements to its statutory charter or converting LSC to a federal entity.[362] The GAO Report also recommended that the LSC board of directors undertake a variety of actions to improve governance, accountability, and management. The GAO Report recommended establishing audit and compensation committees, establishing charters for the board and committees, engaging in self-assessment, and implementing a risk management program.[363]

Both the LSC board of directors and LSC management disagreed with the recommendations calling for new statutory requirements or conversion to a governmental entity. They argued that the current statutory framework had worked well and that any needed changes could be accomplished through

353. STAFF OF H. COMM. ON APPROPRIATIONS, 117TH CONG., SUMMARY OF APPROPRIATIONS PROVISIONS BY SUBCOMMITTEE (Comm. Print 2023); Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. at 94–95, 748.

354. 42 U.S.C. § 2996d(e).

355. *Id.* § 2996c(g).

356. *Id.* § 2996d(g).

357. *Id.* § 2996g(e).

358. *Id.* § 2996d(d), (f). The latter specifies compensation for work injuries, life insurance, and health insurance.

359. *The United States Government Manual*, *supra* note 152.

360. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 344, at 3.

361. *Id.* at Highlights.

362. *Id.* at 5, 42–43.

363. *Id.* at 25–26.

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actions of the board and LSC management.[364] This view prevailed. No changes to the governance and accountability provisions of the LSC charter have been made since the GAO Report. Instead, LSC itself has undertaken to implement many of the recommendations in the GAO Report.[365]

Congress's findings in creating LSC included the declaration that "to preserve its strengths, the legal services program must be kept free from the influence of or use by it of any political pressures."[366] Perhaps to that end, its charter, unlike any of the others discussed in this Subpart, forbids it from lobbying Congress or any state or local legislature, unless formally requested to do so or in connection with legislation or appropriations directly affecting it.[367] LSC grantees are subject to a long list of restrictions in addition to those on political activities, including prohibitions on litigation involving abortion, class actions, prisoner representation, census, or habeas corpus litigation.[368]

As with CPB, Congress has sought to insulate the LSC from political pressure. That impulse weighs in favor of a nonprofit rather than a governmental entity. But by subjecting LSC to so many provisions usually applicable to governmental agencies, Congress has made LSC into a semi-governmental entity with an unusually large number of governmental features. The many restrictions it and its grantees must observe may serve to insulate it somewhat from political pressure, but their very existence reflects such political pressure. Moreover, the governmental structures that the GAO identified as missing, such as requirements as to internal control systems and control of federal funds,[369] underscore the question of whether Congress has struck the right balance between the public and the private in fashioning this hybrid entity.

### *5. National Park Foundation*

The National Park Foundation is another congressionally established § 501(c)(3) organization with close ties to a government agency—the National Park Service—and significant governmental elements, including occasional appropriations. Congress created the National Park Foundation in 1967 as a successor to the National Parks Trust Fund Board. Its charter declares it to be a

364. *Id.* at 72–75.

365. *See Authorities Governing Board Actions*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/leadership/authorities-governing-board-actions (last visited Aug. 23, 2023) (linking to LSC Code of Ethics, bylaws, committee charters, board resolutions, administrative manual, confidentiality policy, conflicts-of-interest policy, fair-dealing policy, board and committee self-evaluation process, risk management program, etc.).

366. 42 U.S.C. § 2996(5). LSC management, in responding to the GAO Report, wrote: "To change the framework of LSC to that of a government corporation or federal agency would subject the mission of providing civil legal assistance to poor people to the kind of political pressure and operation controls which Congress wisely sought to avoid in 1974." U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 344, at 75.

367. 42 U.S.C. § 2996e(e), (f). Other provisions forbid campaign intervention, but that prohibition duplicates § 501(c)(3).

368. *See LSC Restrictions and Other Funding Sources*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/laws-regulations-and-guidance/lsc-restrictions-and-other-funding-sources (last visited Aug. 23, 2023).

369. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 344, at Highlights.

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charitable and nonprofit corporation that is "[t]o 'encourage private gifts' to support the activities of the National Park Service."[370] The charter does not specify where it is incorporated or which nonprofit laws apply to it. The National Park Foundation's board includes the Secretary of the Interior and the Director of the National Park Service, ex officio and nonvoting, as well as six private citizens appointed by the Secretary of the Interior.[371] Its charter specifies that the "United States shall not be liable for any debts, defaults, acts, or omissions of the Foundation."[372] The charter also provides that "[c]ontributions, gifts, and other transfers made to or for the use of the Foundation shall be regarded as contributions, gifts, or transfers to or for the use of the United States."[373] Moreover, it is authorized to use the services and facilities of the Department of the Interior and the DOJ without reimbursement.[374] It thus has more governmental characteristics than many other congressionally established § 501(c)(3) organizations.

Congress established the National Park Foundation for fundraising even though the National Park Service, a government agency, can itself receive deductible charitable contributions.[375] The relationship between the National Park Service and the National Park Foundation has not always been a smooth one. In 2004, the GAO found that "[t]he Foundation's efforts to assist the Park Service are hampered by poor communication and documentation problems."[376] At the same time, the National Park Foundation is a source of considerable support for the National Park Service and for individual parks. The Foundation's FY 2019–2020 Form 990 reports more than $64 million in contributions to the National Park Service.[377]

The federal government itself supports the National Park Foundation. In 2016, the National Park Service Centennial Act[378] established a National Park Foundation Endowment, which includes $10 million each fiscal year from sales of recreational passes by the National Park Service.[379] The same legislation authorized annual appropriations for the Foundation of $5 million from fiscal

370. 54 U.S.C. § 101111.

371. *Id.* § 101112(a).

372. *Id.* § 101119.

373. *Id.* § 101118(c).

374. *Id.* § 101114(c).

375. *Id.* § 101101. For the National Park Service Gift Acceptance policy, see *Reference Manual 21 – Chapter 4*, NAT'L PARK SERV. (Sept. 6, 2019), https://www.nps.gov/subjects/partnerships/rm-21-chapter-4.htm.

376. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-541, NATIONAL PARK FOUNDATION: BETTER COMMUNICATION OF ROLES AND RESPONSIBILITIES IS NEEDED TO STRENGTHEN PARTNERSHIP WITH THE NATIONAL PARK SERVICE 3 (2004). Problems identified included lack of a "comprehensive written agreement to describing the Foundation's fund-raising strategy and clarifying the roles and responsibility of each partner," verbal rather than written fundraising agreements, and disagreement about fundraising strategy. *Id.* at Highlights.

377. Nat'l Park Found., FY 2019–2020 IRS Form 990, pt. VIII, l. 1, https://www.guidestar.org/profile/52-1086761.

378. National Park Service Centennial Act, Pub. L. No. 114-289, 130 Stat. 1482 (2016).

379. *Id.* § 402, 130 Stat. at 1488 (codified as amended at 54 U.S.C. § 101122).

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years 2017 through 2023.[380] The 2023 Appropriations Act increased that amount to $15 million and extended the time period to 2030.[381]

Even though the National Park Service is a government agency that is itself authorized to receive charitable contributions,[382] Congress felt the need for the National Parks Foundation—a § 501(c)(3) organization, not a government agency, but with many governmental aspects—to further support the mission of the National Park Service. In addition, more than 450 private § 501(c)(3) organizations have been established to support individual parks.[383] The existence of these private organizations also raises the question of the extent to which private largesse should supplement the level of governmental funding as determined by our democratic process. National parks that hold a particular appeal to the wealthy may find themselves richer in resources than those more available to the less well-off.

The entities that support our national parks run the full gamut of federal charitable entities, from a government agency, through a congressionally established § 501(c)(3) organization, to entirely private entities supporting individual parks. This string of entities offers a clear example of a continuum between the public and the private. The history of disputes between the National Park Service and the National Park Foundation offers a particularly vivid example of the complicated relationship between government and charity.

#### 6. *National Foundation for the Centers for Disease Control and Prevention*

The Centers for Disease Control is a federal agency that is itself eligible to receive deductible contributions.[384] Nonetheless, in 1992, Congress established the National Foundation for the Centers for Disease Control and Prevention ("CDC Foundation").[385] The CDC Foundation describes itself as "an independent nonprofit and the sole entity created by Congress to mobilize philanthropic and private-sector resources to support the Centers for Disease Control and Prevention's critical health protection work."[386] The legislation

380. *Id.* § 401, 130 Stat. at 1488 (codified at 54 U.S.C. §§ 101112–101113); *see* Press Release, Nat'l Park Found., National Park Foundation Celebrates Enactment of Fiscal Year 2021 Interior Funding (Dec. 22, 2020), https://www.nationalparks.org/news-and-updates/press-releases/national-park-foundation-celebrates-enactment-of-fiscal-year-2021-interior-funding.

381. Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. at 1158.

382. *See supra* text accompanying note 375.

383. *See Community Partnerships*, NAT'L PARK FOUND., https://www.nationalparks.org/about-foundation/partnerships/community-partnerships (last visited Aug. 23, 2023).

384. 42 U.S.C. § 238 authorizes the Department of Health and Human Services to receive charitable gifts. The Secretary of Health and Human Services has delegated to the Centers for Disease Control the ability to receive charitable gifts. *See Public-Private Partnerships and CDC, Partnering with the CDC, Gifts to CDC*, CDC (Feb. 17, 2022), https://www.cdc.gov/partners/gift-funding.html.

385. Comprehensive Maternal and Early Childhood Health Care Act, Pub. L. No. 102-531, 106 Stat. 3469, 3475 (1992).

386. *Who We Are: Our Story*, CDC FOUND., https://www.cdcfoundation.org/our-story (last visited Aug. 23, 2023).

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establishing the CDC Foundation declares that it is "a nonprofit private corporation" and "not an agency or instrumentality of the Federal Government."[387] It is required to maintain its status as an organization exempt under § 501(c)(3), although the charter does not specify what nonprofit laws apply to it.[388] That is, as with the National Park Foundation and the National Park Service, Congress set up a nongovernmental entity in order to generate support for a governmental entity that itself is authorized to receive deductible contributions.

The CDC Foundation's FY 2019–2020 Form 990 indicates that it is domiciled in Georgia (where the CDC is located).[389] Its revenue includes $55,505,941 in government grants[390] and $197,332,428 in other contributions and grants.[391] It has attracted multimillion-dollar donations from the Bloomberg Family Foundation, the Doris Duke Charitable Foundation, and the Robert Wood Johnson Foundation.[392] The Bill and Melinda Gates Foundation has donated both to the CDC Foundation and directly to the Centers for Disease Control.[393] The FY 2019–2020 Form 990 explains that it undertakes many of its activities in collaboration with the CDC, and its schedule of grants lists numerous grants to various CDC programs.[394] Its website explains that it has hundreds of programs throughout the world, including Healthy Homes, Healthy People on the Navajo Nation and Monitoring E-Cigarette Use Among Youth.[395] Its largest program services for FY 2019–2020, measured by expenses, addressed COVID-19, Opioid Surge Staffing, and Malaria Zero.[396]

The CDC Foundation's crowdfunding site for COVID-19 relief raised more than $51 million,[397] one of the most successful charitable crowdfunding efforts to date.[398] Crowdfunding will surely continue to grow as a source

387. 42 U.S.C. § 280e-11(a).

388. *Id.* § 280e-11(e)(3).

389. Nat'l Found. for the Ctrs. for Disease Control & Prevention, Inc., FY 2019–2020 IRS Form 990, pt. III, l. 1, https://www.guidestar.org/profile/58-2106707.

390. Congress has authorized an annual grant from the Centers for Disease Control and Prevention. § 280e-11(i).

391. Nat'l Found. for the Ctrs. for Disease Control & Prevention, Inc., FY 2019–2020 IRS Form 990, *supra* note 389.

392. Rick Cohen, *Philanthropy Funding Government Work? There's a Foundation for That – Several Actually*, NONPROFIT Q. (Apr. 13, 2012), https://nonprofitquarterly.org/philanthropy-funding-government-work-theres-a-foundation-for-thatseveral-actually/.

393. *Id.*

394. Nat'l Found. for the Ctrs. for Disease Control & Prevention, Inc., FY 2019–2020 IRS Form 990, *supra* note 389, at sched. F.

395. *What We Do: Programs*, CDC FOUND., https://www.cdcfoundation.org/programs (last visited Aug. 23, 2023).

396. Nat'l Found. for the Ctrs. for Disease Control & Prevention, Inc., FY 2019–2020 IRS Form 990, *supra* note 389, at pt. III.

397. *CDC Campaign to Crush Covid*, CDC FOUND., https://give.cdcfoundation.org/campaign/crush-covid-sos/c352372 (last visited Aug. 23, 2023).

398. *See* Lloyd Hitoshi Mayer, *Regulating Charitable Fundraising*, 97 IND. L.J. 1375, 1378 (2022).

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of charitable fundraising.[399] Such fundraising is available to congressionally established § 501(c)(3) organizations, but not to government agencies. Thus, this tremendously successful effort of the CDC Foundation—along with its flexibility regarding fundraising generally—underscores one of the differences between government agencies and congressionally established § 501(c)(3) organizations. This difference also raises the important policy question of the extent to which efforts of disease control should depend on charitable giving. At the same time, such charitable giving permitted both the CDC Foundation and the CDC itself to mount a quick response to the COVID-19 pandemic that might not otherwise have been possible.

The perceived need by Congress to establish the CDC Foundation alongside the CDC is another example of the close but complicated relationship that can exist between government and charity, and the flexibility the nonprofit form can offer.

*7. Implications*

Congress created the entities discussed in this Subpart as nonprofit corporations instead of government agencies. Because they are not government agencies, they can engage in fundraising programs—including, for example, crowdfunding campaigns or hiring professional fundraisers. They can invest their privately raised funds as they choose as well as use them when and how they please.[400] They generally can pay compensation free of civil service limits. Under their congressional charters, all of the organizations discussed in this Subpart, with the exception of LSC, can lobby to the extent permitted to § 501(c)(3) public charities.[401] That is, they differ from government agencies in important ways. At the same time, they also have important governmental indicia, ranging from the composition of their boards to the characterization of contributions to them.

The existence and fundraising success of these congressionally established § 501(c)(3) organizations raise the same policy (but not constitutional) question as did the ability of some government agencies to receive deductible contributions—the extent to which we want private parties rather than the government to fund the activities these congressionally established § 501(c)(3) organizations pursue. Moreover, charitable contributions for governmental activities also raise questions of undue influence and self-interested advantage. Professor Jon Michaels has documented how multimillion-dollar giving by Coca-Cola to the National Park Foundation "reportedly influenced a decision of the Parks Service . . . to rescind [for a brief period] a prohibition on the sale of

399. *Id.*

400. As *supra* note 319 explains, these congressionally established § 501(c)(3) organizations are not subject to the Antideficiency Act, the Purpose Statute, or the Bona Fide Needs Statute.

401. They may, however, choose not to lobby. *See infra* Part V. In contrast, the congressional charters of a number of Title 36 corporations discussed in Part IV *infra* forbid lobbying.

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bottled water in the Grand Canyon."[402] Michaels also reports on giving by Genentech, a maker of testing kits and treatment for hepatitis, to the CDC Foundation "to support the CDC's campaign to encourage greater testing and treatment for viral hepatitis."[403]

The establishment of congressionally established § 501(c)(3) organizations that benefit particular federal agencies undermines agency efforts to establish gift acceptance policies. As noted earlier, the CDC gift acceptance policy seeks to ensure that no gift compromises the integrity of CDC and thus prohibits acceptance of gifts from any person "that does business or seeks to do business with CDC."[404] The examples discussed by Professor Michaels demonstrate that such policies do not extend to § 501(c)(3) organizations related to such agencies.[405]

Such relationships between government agencies and congressionally established nonprofit entities may endanger the nonprofit sector as well. As one commentator wrote:

> If government foundations end up competing with the nonprofits that now serve as partners with government in the design and delivery of programs, the competitive playing field will be hugely tilted against the nonprofit sector—particularly when donors to government foundations might be able to earn access, face-time, and improved relations with decision-makers and legislators.[406]

Government agencies and their related § 501(c)(3) organizations exert influence on each other in ways both good and bad.

### D. CONGRESSIONALLY CHARTERED PRIVATE FOUNDATIONS

For almost twenty years, Congress itself incorporated what we would today call private foundations.[407] Peter Dobkin Hall usefully defines a modern private foundation as "an open-ended endowment devoted 'to the good of mankind,' which carrie[s] out its charitable purposes by giving money to institutions, rather than operating them, and which entrust[s] decisionmaking to staffs of experts."[408] Between 1889 and 1907 Congress incorporated some thirty-four such entities.[409] I treat these entities as a separate category because of their

402. Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 536 (2020).

403. *Id.* at 537.

404. *See supra* note 94 and accompanying text.

405. Michaels, *supra* note 402, at 536–37.

406. Cohen, *supra* note 392.

407. Private foundations stand in contrast to public charities. Under current tax law, private foundations are § 501(c)(3) exempt organizations funded by an individual, family, or corporation rather than § 501(c)(3) organizations that receive broad support from donors and government. *See Public Charities*, IRS (Mar. 6, 2023), https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities.

408. PETER DOBKIN HALL, INVENTING THE NONPROFIT SECTOR 46–47 (1992).

409. Benjamin Soskis, The Problem of Charity in Industrial America, 1883–1915, at 346 (2010) (Ph.D. dissertation, Columbia University) (on file with author).

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importance to the development of private philanthropy, including the story of how such congressional chartering ended more than a century ago.

The private foundations chartered by Congress during those years included those funded by the richest citizens in the United States, John D. Rockefeller and Andrew Carnegie—the Rockefeller-funded General Education Board, the Carnegie Institution of Washington, and the Carnegie Foundation for the Advancement of Teaching. The incorporation bills for all three sailed through both the House and Senate "from what is called the 'unanimous consent calendar,' the parliamentary method of doing business which allows *one* member to stall the passage of legislation."[410] But Congress famously refused to charter the Rockefeller Foundation in 1913.[411] After the Rockefeller dispute, the practice of congressional charters for such private foundations ceased.[412]

According to Lankford, Rockefeller's General Education Board ("GEB") was "the first twentieth-century meeting between organized philanthropy and the federal government."[413] Prior to establishing the GEB in 1903, Rockefeller had been a generous donor to charitable causes, particularly to the Baptist Church and universities founded as Baptist institutions, such as the University of Chicago and Spelman College.[414] The GEB, however, was "[t]he first of the great Rockefeller philanthropies," and Congress chartered it "without controversy."[415] The charter decreed the GEB to be a District of Columbia corporation and declared its purpose to be "the promotion of education within the United States of America, without distinction of race, sex, or creed."[416] Congress retained the authority to alter, amend, or repeal the charter.[417] It did not do so, even in the wake of the enormous controversy surrounding the Rockefeller Foundation's later failed effort to also obtain a congressional charter.[418]

GEB's early endeavors focused on the American South,[419] including building high schools, endowing African-American colleges, and a program of scientific agriculture.[420] Even after the establishment of the Rockefeller Foundation in 1913, the GEB retained its existence as a separate legal entity and "served as the principal Rockefeller philanthropy dealing with race and equal

410. LANKFORD, *supra* note 138, at 11.

411. *See infra* notes 443–54 and accompanying text.

412. *See infra* notes 456–59 and accompanying text.

413. LANKFORD, *supra* note 138, at 9.

414. ROCKEFELLER PHILANTHROPY ADVISORS, THE ROCKEFELLERS: A LEGACY OF GIVING 4 (2023), https://www.rockpa.org/guide/rockefellers-legacy-giving/.

415. ERIC JOHN ABRAHAMSON, SAM HURST & BARBARA SHUBINSKI, DEMOCRACY AND PHILANTHROPY: THE ROCKEFELLER FOUNDATION AND THE AMERICAN EXPERIMENT 48–51 (2013), https://www.rockefellerfoundation.org/report/democracy-philanthropy/.

416. Act to Incorporate the General Education Board of 1903, Pub. L. No. 57-21, 32 Stat. 768.

417. *Id.* § 7, 32 Stat. at 769.

418. *See infra* notes 444–64 and accompanying text.

419. Soskis, *supra* note 409, at 333; ABRAHAMSON ET AL., *supra* note 415, at 48.

420. ABRAHAMSON ET AL., *supra* note 415, at 179.

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opportunity."[421] A research report to the Aspen Institute on Philanthropy and Social Innovation described the GEB as "a pioneer in large-scale educational philanthropy."[422] The study concluded: "Among the numerous initiatives and accomplishments of the GEB, one that stands out exemplary in its magnitude, difficulty, and eventual success was the commitment to nurturing the comprehensive public high school as an integral, widespread institution in American society."[423] After the reorganization of the Rockefeller philanthropies in 1929, however, the decision was made to liquidate the GEB's endowment, and the Rockefeller Foundation took over funding of most of its activities.[424] The GEB was dissolved in 1960.[425]

In 1904, a year after Congress passed legislation establishing the GEB, the Carnegie Institution of Washington approached Congress.[426] Andrew Carnegie, fulfilling his own advice in his essay, *The Gospel of Wealth*, that a man of wealth should be a trustee for the good of society,[427] undertook an enormous range of charitable activities.[428] He is particularly known for the thousands of libraries he established around the world,[429] but he also set up more than twenty separate charitable organizations, including the Carnegie Institution of Washington.

The Carnegie Institution of Washington was originally incorporated in the District of Columbia in 1902 as an independent research institution.[430] It included as ex officio members of the first board of trustees the President of the United States, the President of the Senate, and the Speaker of the House of Representatives.[431] Applicable District of Columbia laws, however, "proved too restrictive,"[432] and Carnegie turned to Congress. The congressional act establishing the Carnegie Institution of Washington described its objectives as "to encourage, in the broadest and most liberal manner, investigation, research,

421. *Id.*

422. JOHN R. THELIN & RICHARD W. TROLLINGER, TIME IS OF THE ESSENCE: FOUNDATIONS AND THE POLICIES OF LIMITED LIFE AND ENDOWMENT SPEND-DOWN: A RESEARCH REPORT TO THE ASPEN INSTITUTE PROGRAM ON PHILANTHROPY AND SOCIAL INNOVATION 14 (2009), https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/Time%20is%20of%20the%20Essence%20FINAL_0.pdf.

423. *Id.*

424. ABRAHAMSON ET AL., *supra* note 415, at 115.

425. THELIN & TROLLINGER, *supra* note 422, at 12.

426. LANKFORD, *supra* note 138, at 10.

427. Carnegie urged "men possessed of this peculiar talent for affairs" to devote their wealth to "institutions of various kinds, which will improve the general condition of the people; in this manner returning their surplus wealth to the mass of their fellows in the forms best calculated to do them lasting good." ANDREW CARNEGIE, THE GOSPEL OF WEALTH 4, 14–15 (Carnegie Corp. of N.Y. 2017).

428. *See generally* CARNEGIE ENDOWMENT FOR INT'L PEACE, A MANUAL OF THE PUBLIC BENEFACTIONS OF ANDREW CARNEGIE (1919).

429. He founded more than 2,500 libraries around the world, of which more than 1,600 were in the United States. *See Andrew Carnegie: Pioneer. Visionary. Innovator*, CARNEGIE CORP. OF N.Y., https://www.carnegie.org/interactives/foundersstory/#!/ (last visited Aug. 23, 2023).

430. *Our History*, CARNEGIE SCI., https://carnegiescience.edu/our-history (last visited Aug. 23, 2023).

431. *Id.*

432. LANKFORD, *supra* note 138, at 10. District of Columbia law at the time limited the annual income of such institutions to $25,000. *See* H.R. REP. NO. 58-2084.

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and discovery, and the application of knowledge to the improvement of mankind."[433] It listed named individuals as trustees and did not include ex officio members.[434] The legislation stated that its principal place of business would be Washington, D.C., but made no mention of its place of incorporation.[435]

The Carnegie Institution of Washington exists to this day. To clarify that it operated beyond Washington, D.C. and to distinguish itself from Carnegie's other philanthropic endeavors, the Carnegie Institution of Washington adopted a new popular name, the Carnegie Institution for Science, in 2007,[436] although its legal name did not change. Today, the Carnegie Institution of Washington qualifies under the IRC as a public charity subject to less onerous tax rules than a private foundation because the IRC considers it a school. Schools, which must have students, faculty, and a curriculum, are per se public charities.[437] Its FY 2019–2020 Form 990 shows net assets of $974,233,954, government grants of $12,253,765, and other contributions of $4,493,085.[438]

In 1906, Congress established a second Carnegie philanthropic institution, the Carnegie Foundation for the Advancement of Teaching.[439] It had one relatively specific purpose, to provide pensions for teachers of colleges and universities, as well as a more general purpose, "to do and perform all things necessary to encourage, uphold and dignify the profession of the teacher and the cause of higher education."[440] This Carnegie Foundation spun off the pension fund as "an independent not-for-profit organization" known as TIAA-CREF (now known as TIAA) in 1918.[441] Over the years, it issued influential reports, including Abraham Flexner's 1910 report, *Medical Education in the United States and Canada*; the 1914 report, *The Common Law and the Case Method in the American University Law School*; and more than one hundred other reports and studies on higher education under the oversight of Clark Kerr.[442] This Carnegie philanthropy also continues to operate. It is now a private operating foundation devoted to promoting "methods of improvement science in education."[443]

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433. CARNEGIE ENDOWMENT FOR INT'L PEACE, *supra* note 428, at 99–100.

434. *Id.*

435. *Id.*

436. *About Us*, CARNEGIE SCI., https://carnegiescience.edu/about (last visited Aug. 23, 2023).

437. *See Public Charities*, *supra* note 407.

438. Carnegie Inst. for Wash., FY 2019–2020 IRS Form 990, pt. I, l. 22; pt. VIII, l. 1, https://www.guidestar.org/profile/53-0196523.

439. CARNEGIE ENDOWMENT FOR INT'L PEACE, *supra* note 428, at 153–55.

440. *Foundation History*, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, https://www.carnegiefoundation.org/about-us/foundation-history/ (last visited Aug. 23, 2023).

441. *Id.*

442. *Id.*

443. CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, CARNEGIE FOUNDATION'S SPOTLIGHT ON QUALITY IN CONTINUOUS IMPROVEMENT (2023), https://www.carnegiefoundation.org/wp-content/uploads/2018/09/Carnegie_Spotlight_Sponsorship.pdf. For a brief description of a private operating foundation, see

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Unlike Carnegie, Rockefeller failed in convincing Congress to incorporate the second of his foundations. The story of the U.S. government's decision not to establish the Rockefeller Foundation has often been told.[444] In June 1909, Rockefeller signed over shares of Standard Oil stock worth about $50 million in trust to fund the endeavor, and in March 1910, Senator Jacob Gallinger of New Hampshire introduced a bill in the Senate to incorporate the Rockefeller Foundation.[445] Concerned about state charters imposing limits on any such foundation's size and purpose, Rockefeller representatives had approached Congress for legislation.[446] As the Senate Report states, the proposed legislation was "along the lines of the statutes incorporating the General Education Board and the Carnegie Foundation," but "wider in scope and designed to give the donor a broader opportunity to dispense his benefactions."[447] Under the proposed charter, the purposes of the Rockefeller Foundation were "to promote the well-being and to advance the civilization of the peoples of the United States and its territories and possessions, and of foreign lands, in the acquisition and dissemination of knowledge; the prevention and relief of suffering; and in the promotion of all the elements of human progress."[448]

The effort was ill-timed; in the words of Peter Dobkin Hall, "the plan ran afoul of political turbulence."[449] The charter bill was introduced a few days prior to lawyers for Standard Oil asking the Supreme Court to invalidate government efforts to dissolve Standard Oil as a monopoly.[450] Moreover, during the course of the dispute, Rockefeller publicly objected to the proposed federal income tax.[451] As Benjamin Soskis has put it, "politicians and progressive journalists competed with one another to denounce his project."[452] Faced with opposition, including from President Taft and Theodore Roosevelt, Rockefeller officials added provisions to answer various criticisms—for example, limiting the endowment to $100 million, requiring the spending of all income, limiting its life, and establishing an oversight board appointed by Congress with a right to veto.[453] After more than three years of trying to achieve a federal charter,

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*Private Operating Foundations*, IRS, https://www.irs.gov/charities-non-profits/private-foundations/private-operating-foundations (last visited Aug. 23, 2023). Its FY 2019–2020 Form 990-PF shows total net assets of $121,962,838. *See* Carnegie Found. for the Advancement of Teaching, FY 2019–2020 IRS 990-PF, pt. III, l. 6, https://www.guidestar.org/profile/13-1623924.

444. *See generally* LANKFORD, *supra* note 138; Soskis, *supra* note 409; ROB REICH, JUST GIVING: WHY PHILANTHROPY IS FAILING DEMOCRACY AND HOW IT CAN DO BETTER (2018).

445. Soskis, *supra* note 409, at 346; S. REP. NO. 61-405 (1909).

446. REICH, *supra* note 444, at 3.

447. S. REP. NO. 61-405.

448. *Id.* at 2.

449. HALL, *supra* note 408, at 47.

450. Soskis, *supra* note 409, at 347.

451. *Id.* at 349.

452. Benjamin Soskis, *The Importance of Criticizing Philanthropy*, ATLANTIC (May 12, 2014), https://www.theatlantic.com/business/archive/2014/05/the-case-for-philanthropy-criticism/361951/.

453. Soskis, *supra* note 409, at 351; REICH, *supra* note 444, at 6; HALL, *supra* note 408, at 47–48.

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Rockefeller and his advisors settled on incorporating in New York and received a New York charter from the New York legislature unanimously in May 1913.[454]

The Rockefeller Foundation remains active today. Its webpage describes its current commitments: Nourish the World, Achieve Health for All, End Energy Poverty, Expand Equity and Economic Opportunity, and Seize Upon Emerging Frontiers.[455] According to its FY 2020 Form 990-PF, its net assets now amount to over $6.3 billion.[456]

After the experience of the Rockefeller Foundation in Congress, philanthropists no longer sought federal charters for their foundations. According to Lankford, who admires private foundations, "[t]he increasingly unfavorable reception accorded to the Rockefeller interests by Congress reverberated through the world of philanthropic entrepreneurs," and that as a result, these entrepreneurs looked to state incorporation.[457] Different observers take different lessons from this tale, of course, with some celebrating and others lamenting the failure of a federal charter. A Carnegie Foundation Centennial publication asserts that, had Congress granted the Rockefeller Foundation its charter, the one-time largest private foundation in the world would have been "a stepchild of the government from the outset," and the philanthropic sector in the United States "might have developed, if it had developed at all, with much less autonomy and freedom."[458] Reich disagrees. He believes that "[h]ad the U.S. Senate passed the House bill to approve the Rockefeller Foundation, it would have created a legal template for the institutional design of foundations with limits on size and time and provisions for clear public oversight."[459]

To understand why Rockefeller failed to obtain a federal charter, Reich emphasizes absolutist objections—the view that any such foundation is troubling as a "deeply and fundamentally *antidemocratic* institution, an entity that would undermine political equality[] [and] convert private wealth into the donor's preferred public policy."[460] Steuerle and Soskis suggest that congressional objections to the federal charter were based primarily on animus against Rockefeller personally.[461] But they also acknowledge what they call the

454. New York had reformed its charities law in 1893 in ways that permitted broad statements of purposes. HALL, *supra* note 408; Soskis, *supra* note 409, at 356; LANKFORD, *supra* note 138, at 19.

455. *Our Commitments*, ROCKEFELLER FOUND., https://www.rockefellerfoundation.org/ (last visited Aug. 23, 2023).

456. *See* Rockefeller Found., FY 2020 IRS Form 990-PF, pt. III, l. 6, https://www.guidestar.org/profile/13-1659629 (the Foundation operates on a calendar-year basis).

457. LANKFORD, *supra* note 138, at 16.

458. *Cf.* ERIC JOHN ABRAHAMSON, BEYOND CHARITY: A CENTURY OF PHILANTHROPY INNOVATION 20 (2013) (ebook) ("[H]ad the U.S. Senate passed the House bill to approve the Rockefeller Foundation, it would have created a legal template for the institutional design of foundations with limits on size and time and provisions for clear public oversight.").

459. REICH, *supra* note 444, at 139–40.

460. *Id.* at 5.

461. C. EUGENE STEUERLE & BENJAMIN SOSKIS, TAXES AND FOUNDATIONS: A 50TH ANNIVERSARY OVERVIEW 15 (2020), https://www.urban.org/sites/default/files/publication/103608/taxes-and-foundations-a-50th-anniversary-overview_3.pdf.

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"absolutist challenge," a view of such private foundations as "unaccountable institution[s] set on establishing a rival center of national power."[462]

This Article's study of congressionally established § 501(c)(3) organizations suggests a different view of this history. The federal charters or proposed federal charters of all the foundations discussed in this Subpart, including that proposed for the Rockefeller Foundation, provided that Congress could alter, amend, or repeal the charter. In contrast, neither the Rockefeller Foundation charter granted by New York in 1913[463] nor the 1911 New York charter for the Carnegie Corporation of New York[464] reserved such powers. In the years since the grant of those charters, however, New York has developed a robust set of laws applicable to nonprofit corporations and enforced them vigorously.[465]

Had these entities been federally chartered, such oversight would have been lacking, although this conclusion is possible only in retrospect. Congress has never acted on provisions in the charters of congressionally established § 501(c)(3) organizations that reserve its right to revoke. At times, in particular when Senator Grassley chaired the Senate Finance Committee, Congress exercised oversight over tax-exempt nonprofits.[466] This oversight, however, did not depend on congressional chartering.

Unlike the federal government, states have a set of laws applicable to nonprofit corporations, as well as state officials charged with enforcement of such laws who exercise oversight of nonprofit organizations. That is, in my view, state chartering of private foundations has likely produced more, not less, oversight of these entities than federal chartering would have done.

The fact, however short-lived, of Congress chartering private foundations demonstrates again how deeply the federal government has been involved in the fundamental structure of the nonprofit sector. Moreover, it also reminds us, again, of the development—and importance—of state laws regarding nonprofit governance and their enforcement by state attorneys general, efforts lacking at the federal level.

462. *Id.*; Soskis, *supra* note 409, at 349.

463. *Charter*, ROCKEFELLER FOUND. (May 14, 1913), https://www.rockefellerfoundation.org/wp-content/uploads/Rockefeller-Foundation-Charter.pdf (An Act to Incorporate the Rockefeller Foundation, May 14, 1913).

464. *Carnegie Corporation of New York Charter, Constitution, and Bylaws*, CARNEGIE CORP. OF N.Y. (June 9, 2011), https://media.carnegie.org/filer_public/a8/01/a801e25b-4e2f-42a8-b580-59ac85a1ab37/ccny_other_19111110_charter.pdf.

465. *See* Press Release, Letitia James, N.Y. State Att'y Gen., AG James Secures Court Order Against Donald J. Trump, Trump Children, and Trump Foundation (Nov. 7, 2019), https://ag.ny.gov/press-release/2019/ag-james-secures-court-order-against-donald-j-trump-trump-children-and-trump; Press Release, Letitia James, N.Y. State Att'y Gen., Attorney General James Files Lawsuit to Dissolve NRA (Aug. 6, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-files-lawsuit-dissolve-nra.

466. *See supra* note 260 and accompanying text.

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## IV. TITLE 36 CORPORATIONS

Subtitle II, Part B of Title 36 of the U.S. Code lists ninety-four patriotic and national nonprofit organizations that have been chartered by Congress ("Title 36 corporations").[467] They include such well-known organizations as the Boy Scouts of America, the Girl Scouts of America, the Future Farmers of America, and the American Olympics Committee. Others, such as the Fleet Reserve Association or the Agricultural Hall of Fame, are not as well known. Many Title 36 corporations sought a congressional charter long after their formation as private tax-exempt nonprofit organizations; others were created by Congress. There is no rhyme or reason to this mix; as discussed above, many congressionally established § 501(c)(3) organizations reside in titles of the U.S. Code that address the substance of their mission.[468]

Discussion and criticism of Title 36 corporations tend to focus on the preexisting private nonprofits found in Title 36.[469] An important CRS report, for example, emphasized the consequences of Title 36 status for preexisting entities.[470] It pointed out that congressional chartering does not transform Title 36 corporations into government agencies, which are subject to a plethora of statutory provisions.[471] The report noted that these organizations "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."[472] Further, the CRS report explained: "The attraction of Title 36 status for national organizations is that it tends to provide an 'official' imprimatur to their activities, and to that extent it may provide them prestige and indirect financial benefit."[473] The CRS report also observed, in language applicable more to preexisting than congressionally established entities:

> In effect, the federal chartering process is honorific in character. This honorific character may be misleading to the public, however, when such organizations feature statements or display logos that they are "chartered by Congress," thus implying a direct relationship to the federal government that does not in fact exist. In addition, there may be an implication that Congress approves of the

467. Eighteen of the congressional charters of Title 36 charters specifically state that the corporation cannot claim "congressional approval or the authority of the United States for any of its activities." *See, e.g.*, 36 U.S.C. § 20207(d) (Air Force Sergeants Association); *id.* § 401707(d) (Catholic War Veterans of the United States of America); *id.* § 150108(e) (National Academy of Public Administration). A few others specify that the corporation is "not an agency or establishment of the United States Government." *See, e.g.*, *id.* § 90101 (Help America Vote Foundation); *id.* § 151701 (National Film Preservation Foundation). Others make no statement regarding their relationship to the U.S. government.

468. *See infra* Part IV.D.

469. *See* O'Connell, *supra* note 10, at 860; CONG. RSCH. SERV., *supra* note 119, at Summary.

470. CONG. RSCH. SERV., *supra* note 119, at Summary; *cf.* HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 3–4, 29–30.

471. *See* CONG. RSCH. SERV., *supra* note 119.

472. *See id.* at 4.

473. *See id.* at Summary.

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> organizations and is somehow overseeing its activities, which is not the case.[474]

For many years, Title 36 corporations had to make an annual report to Congress. As of 2000, however, legislation eliminated even this minimal form of oversight over most Title 36 corporations.[475]

The propriety of congressional chartering of preexisting nonprofit organizations has long been questioned. In 1965, at a time when such charters were granted on a case-by-case basis, President Lyndon Johnson vetoed a bill that would have granted a charter to the Youth Councils on Civic Affairs because of concern about granting such charters "without the benefit of clearly established criteria as to eligibility."[476] In 1969, subcommittees of both the House and Senate set forth a list of five minimum standards for a private organization seeking a federal charter.[477] The criteria include a requirement that the entity already be established and operating under state or District of Columbia law,[478] a requirement that a number of Title 36 corporations established both before and after 1969 fail to satisfy.[479]

The House subcommittee with jurisdiction over Title 36 corporations (which has varied over time) has a number of times announced a moratorium on granting such charters, but that action did not halt the practice.[480] Despite these supposed moratoria,[481] corporations have been chartered and codified as part of Title 36 in the last few decades.[482] They include the Fleet Reserve Association (1996),[483] the Corporation for the Promotion of Rifle Practice and Firearms Safety (1996),[484] American GI Forum (1998),[485] the National Recording Preservation Foundation (2000),[486] and the Korean War Veterans Association, Inc. (2008).[487]

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474. *Id.* at. 4.

475. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, § 3003, 109 Stat. 707, 734–36; *see* 36 U.S.C. § 10101 note.

476. CONG. RSCH. SERV., *supra* note 119, at 7; HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 18–19.

477. CONG. RSCH. SERV., *supra* note 119, at 7. HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 33, raises questions for Congress to consider before resuming the practice of chartering corporations.

478. A number of charters specify that "state" includes the District of Columbia. *See, e.g.*, 36 U.S.C. § 22901 (Army & Navy Union); *id.* § 150101 (National Academy of Public Administration); *id.* § 220701 (U.S. Submarine Veterans of World War II).

479. For example, the Corporation for the Promotion of Rifle Practice and Firearms Safety, *infra* note 484, had been part of the Department of Defense and not a private nonprofit prior to its chartering.

480. CONG. RSCH. SERV., *supra* note 119, at 11–13; HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 25–27.

481. CONG. RSCH. SERV., *supra* note 119, at 11–13; HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 25–27.

482. CONG. RSCH. SERV., *supra* note 119, at 11–13; HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 3–4, 29–30.

483. 36 U.S.C. §§ 70101–70112.

484. *Id.* §§ 40701–40707.

485. *Id.* §§ 21001–21012.

486. *Id.* §§ 152401–152412.

487. *Id.* §§ 120101–120112.

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Title 36 corporations are a motley crew as to both nonprofit governance and federal tax law. Many—but not most—Title 36 corporations existed under state or District of Columbia nonprofit corporation law prior to seeking a congressional charter.[488] For some, the congressional charter declares that the entity is incorporated in the District of Columbia.[489] The language of other Title 36 charters does not address this issue.[490]

Based on my review of Title 36 corporations, twenty-eight of the charters in Title 36 specify that the entity must maintain its exempt status as a condition of the charter.[491] Three charters explicitly reference § 501(c)(3),[492] and two charters reference § 501(c)(19).[493] All of the seventy-six Title 36 corporations for which such current information is available from Form 990 filings or on their websites are tax-exempt under § 501(c), and all but five qualify as charitable under § 170.[494] Fifty-four are exempt under § 501(c)(3) and thus can receive deductible contributions under § 170(c)(2). Fifteen are tax-exempt as veterans' organizations under § 501(c)(19),[495] for which § 170(c)(3) sometimes permits deduction of contributions. Section 501(c)(19) is a particularly generous category of tax-exemption. Contributions to at least some § 501(c)(19) organizations are deductible, as with § 501(c)(3) organizations. Unlike § 501(c)(3) organizations, however, § 501(c)(19) organizations can lobby without limit and face no prohibition on campaign intervention under the IRC.[496]

488. *See, e.g.*, *id.* § 22902 (referencing incorporation of the Army and Navy Union in Ohio); *id.* § 154702 (referencing incorporation of the Non Commissioned Officers Association of the United States in Texas); *id.* § 170502 (referencing incorporation of the Polish Legion of American Veterans, USA in Illinois).

489. *See, e.g.*, *id.* § 150102 (declaring National Academy of Public Administration to be "incorporated in the District of Columbia"); *id.* § 220301 (declaring United States Capitol Historical Society to be "incorporated in the District of Columbia"); *id.* § 240102 (declaring Women's Army Corps Veterans' Association, a nonprofit corporation, to be "incorporated in the District of Columbia").

490. Harris v. Am. Legion, 162 F. Supp. 700, 712 (S.D. Ind.), *aff'd*, 261 F.2d. 594 (7th Cir. 1958) (per curiam) (holding the American Legion to be a citizen of no state for purposes of diversity jurisdiction). Section 29.107.01(c) of the District of Columbia Nonprofit Corporations Act includes a provision targeted at congressionally chartered entities that allows them to elect to come under the D.C. law. *Id.* To make the election, the entity must file required reports and maintain a registered agent. *Id.*

491. *See, e.g.*, 36 U.S.C. § 20708 (American Council of Learned Societies); *id.* § 60108 (82nd Airborne Division Association); *id.* § 70108 (Fleet Reserve Association).

492. *Id.* § 40705 (Corporation for the Promotion of Rifle Practice and Firearms Safety); *id.* § 80101 (General Federation of Women's Clubs); *id.* § 90102 (The Help America Vote Foundation).

493. *Id.* § 120101 (Korean War Veterans Association, Inc.); *id.* § 140401 (Military Officers Association of America).

494. Of the five that do not, two are exempt under § 501(c)(5) as labor, agricultural, or horticultural organizations, and three are small organizations exempt under § 501(c)(4) as social welfare organizations. For a discussion of § 501(c)(4), see generally Ellen P. Aprill, *Examining the Landscape of Section 501(c)(4) Welfare Organizations*, 21 N.Y.U. J. ON LEG. & PUB. POL. 345 (2018).

495. Not all veterans' organizations meet the strict membership requirements of § 501(c)(19). *See id.* at 386–87. HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 10–12, 24–25 discusses the history of chartering veterans' organizations, which until the 1970s had to be recognized by the U.S. Department of Veterans Affairs.

496. *See* IRS, TAX GUIDE FOR VETERANS' ASSOCIATIONS 3 (2018), https://www.irs.gov/pub/irs-pdf/p3386.pdf.

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Congress has placed restrictions in the charters of many Title 36 corporations beyond those that the corporations would face under the applicable exemption provision of the IRC. The charters of a number of Title 36 corporations that are exempt under § 501(c)(3) prohibit not only political campaign intervention—which § 501(c)(3) would do in any case—but also engaging in even insubstantial lobbying, which the IRC permits.[497] Similarly, in 1998, Congress added language to a number of the congressional charters of Title 36 corporations that are exempt under § 501(c)(19) forbidding campaign intervention,[498] although IRC would not so limit them.[499] Whatever benefit that nonprofit tax-exempt organizations receive from inclusion in Title 36, many—but not all—must in exchange pay the price of not being able to engage in any political activity.

Inclusion in Title 36 gives the impression of congressional imprimatur to private nonprofit tax-exempt organizations and blurs the line between public and private. Other Title 36 corporations have features so far beyond those found in private nonprofit exempt organizations such that they become quasi-governmental organizations that particularly resemble government agencies.

The National Recording Preservation Foundation offers one such example. In 2000, Congress established a National Recording Registry in the Library of Congress, managed by the Librarian of Congress under an organization of the Library called the National Recording Preservation Board.[500] The same 2000 statute also provided for the establishment of a National Recording Preservation Foundation as a Title 36 nonprofit corporation.[501] The purpose of the Foundation is to accept and administer private gifts to the Board.[502] Its charter states that it is not to be considered as an agency or establishment of the United States.[503] The members of the board of the Foundation, however, are selected by the Librarian of Congress, who also serves in an ex officio capacity.[504] The Attorney General is authorized to bring a civil suit for equitable relief if the corporation violates its charter.[505] Moreover, the National Recording Preservation Foundation is

497. The charters of more than a dozen Title 36 corporations that are exempt under § 501(c)(3) forbid all lobbying. *See, e.g.*, 36 U.S.C. § 20707(b) (American Council of Learned Societies); *id.* § 70507(b) (Foundation of the Federal Bar Association); *id.* § 150108(b) (National Academy of Public Administration).

498. Pub. L. No. 105-225, 112 Stat. 1308 (1998); *see, e.g.*, 36 U.S.C. § 21706 (American Legion); *id.* § 130306(b) (Legion of Valor); *id.* § 140506(b) (Military Order of the Purple Heart). The Korean War Veterans Association, Inc. was established in 2008, far later than these other organizations. *See* An Act to Grant a Federal Charter to Korean War Veterans Association, Inc., Pub. L. No. 110-254, § 1(a)(2), 122 Stat. 2419, 2419 (2008). Its charter forbids both lobbying and campaign intervention. *See* 36 U.S.C. § 120106(b).

499. *See* IRS, *supra* note 496.

500. National Recording Preservation Act of 2000, Pub. L. No. 106-474, 114 Stat. 2085.

501. 36 U.S.C. §§ 152401–152412.

502. *Id.* § 152402.

503. *Id.* § 152401.

504. *Id.* § 152403.

505. *Id.* § 152409.

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authorized to directly receive appropriated funds.[506] All of these provisions move the organization into a hybrid private-public entity.

The Help America Vote Foundation, established in 2002, has similar provisions and raises similar issues.[507] Its purpose is to mobilize students to serve as poll workers.[508] Under its charter, it is not to be considered as an agency or establishment of the United States.[509] But the members of its board are selected by the President, the Speaker of the House, the House Minority Leader, the Senate Majority Leader, and the Senate Minority Leader.[510] If the corporation violates its charter, the Attorney General is authorized to bring a civil suit for equitable relief.[511] It is also authorized to directly receive appropriated funds.[512] All of these provisions move it away from the private and closer to the public.

The National Foundation on Fitness, Sports, and Nutrition, established during the presidency of Barak Obama, provides a third example. Although the legislation creating it has not been codified as part of Title 36, it appears as a note under Title 36, Subtitle II, Part B.[513] Its charter provides that various government officials serve ex officio on its board and that the Secretary of Health and Human Services appoints other board members.[514] The Attorney General can bring suit on its behalf.[515] Like the National Recording Preservation Foundation and the Help America Vote Foundation, it is quasi-governmental in a way that preexisting Title 36 corporations are not.

As noted, the National Recording Preservation Foundation; the Help America Vote Foundation; and the National Foundation on Fitness, Sports, and Nutrition give the Attorney General authority to bring actions in federal district court for relief if any of these entities fails to act consistently with its purposes and obligations. The provisions establishing the National Fallen Firefighters Foundation and the National Film Preservation Foundation also grant such authority to the Attorney General.[516] However, no other congressionally established corporations housed in Title 36 do so, leaving unclear who could bring suit for violations of those charters that do not specify applicable state nonprofit law.

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506. *Id.* § 152411.

507. Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 36 and 52 U.S.C.).

508. 36 U.S.C. § 90102.

509. *Id.* § 90101.

510. *Id.* § 90103.

511. *Id.* § 90109.

512. *Id.* § 90111.

513. National Foundation on Fitness, Sports, and Nutrition Establishment Act, Pub. L. No. 111-332, 124 Stat. 3576 (2010).

514. *Id.* § 2(b), 124 Stat. at 3576.

515. *Id.* § 6(c), 124 Stat. at 3579–80.

516. *See* 36 U.S.C. § 151309 (National Fallen Firefighters Foundation); *id.* § 151709 (National Film Preservation Foundation).

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In some cases, Title 36 corporations have been made subject to laws that apply to government agencies. In 1997, Congress amended the Federal Advisory Committee Act[517] to include two Title 36 corporations, the National Academy of Public Administration[518] and the National Academy of Sciences,[519] under specific provisions involving the appointment, permissible activities, and reports of corporation committees doing work for executive agencies.[520]

The National Academy of Sciences sounds a particularly odd note in Title 36, given its history. It is far older than any other Title 36 corporation and most other congressionally established § 501(c)(3) organizations; it was established in 1863, at the height of the Civil War "as a private nongovernmental institution to advise the nation on issues related to science and technology."[521] Its charter provides: "On request of the United States Government, the corporation shall investigate, examine, experiment, and report on any subject of science or art."[522] Its website explains that its "service[s] to government [have] become so essential that Congress and the White House have issued legislation and executive orders over the years that affirm its unique role."[523] It testified before Congress more than forty times in 2022 alone on a variety of issues, including traumatic brain injury, the physics of life, and the chemistry of fires.[524]

The U.S. Olympic and Paralympic Committee (renamed to include Paralympic in 2019) also seems misplaced in Subtitle II of Title 36. It has duties to represent the United States in international amateur athletic competitions.[525] Given these duties, it would seem that it should be treated in the same way as the Red Cross; that is, in Subtitle III (Treaty Obligation Organizations) rather than in Subtitle II (Patriotic and National Organizations) of Title 36, as the CRS has noted.[526]

No preexisting private nonprofit organization has received a Title 36 charter since the Korean War Veterans Association, Inc. in 2008. I agree with those who have argued against further congressional charters for private nonprofits.[527] I would also urge that Title 36 be amended so that it includes only preexisting nonprofits that meet the criteria announced by the Senate and House committees in 1969 and—by moving them to titles of the U.S. Code related to

517. Federal Advisory Committee Act Amendments of 1997, Pub. L. 105-153, 111 Stat. 2689.

518. 36 U.S.C. §§ 150101–150113.

519. *Id.* §§ 150301–150304.

520. *See* 111 Stat. 2689.

521. *Organization*, NAT'L ACAD. OF SCIS., http://www.nasonline.org/about-nas/organization/ (last visited Aug. 23, 2023).

522. § 150303.

523. *Mission*, NAT'L ACAD. OF SCIS., http://www.nasonline.org/about-nas/mission/ (last visited Aug. 23, 2023).

524. Off. of Cong. & Gov't Affs., *Briefings to Congress*, NAT'L ACAD. OF SCIS., https://www.nationalacademies.org/ocga/briefings (last visited Aug. 23, 2023).

525. 36 U.S.C. § 220505(c).

526. CONG. RSCH. SERV., *supra* note 119, at 5 n.14.

527. *See supra* note 467 and accompanying text.

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their subject matter—excludes any entities established by Congress.[528] Placing these congressionally established § 501(c) organizations alongside preexisting charities obscures both the governmental features and ties to government agencies of these congressionally established entities.

Title 36 encompasses both organizations that, for all practical purposes, are simply private tax-exempt nonprofits, as well as entities that are hybrid private-public organizations. Some nonprofit tax-exempt organizations established by the federal government, both those that do and those that do not receive appropriations, are housed in Title 36, while others are not. Of course, for any particular organization, what matters is not whether its charter resides in Title 36, but instead its charter's content. Nonetheless, Title 36 exposes not only the confusion and uncertainty as to what is a congressionally established § 501(c) organization, but also the breadth of the category.

## V. RECOMMENDATIONS

As the taxonomy presented here demonstrates, federal charitable entities take many forms. They range from the federal government and its agencies, through congressionally established § 501(c) organizations with various degrees of governmental features and preexisting charities later chartered by Congress, to charities organized by private parties to support a particular government program, such as a single national park.

Congressionally established § 501(c)(3) and § 501(c)(19) organizations avoid a myriad of the constraints that governmental agencies face. These § 501(c) organizations dodge oversight from both the executive and legislative branches that even limited participation in the appropriations process imposes. In addition, they are free to use volunteers, fundraise, invest funds as they like, and spend them when and how they like. Somewhat ironically, listing the constraints such organizations escape underscores how our federal government operates and what being a governmental entity involves.

Charitable contributions to federal agencies also operate outside of the oversight imposed by the appropriations process. However desirable increased disclosure and oversight of such charitable donations in the appropriations process would be, any major changes strike me as unlikely. Calls for such increased oversight of charitable gifts as part of the appropriations process have long gone unanswered, as Professor Stith has detailed.[529]

I urge a number of relatively small but feasible congressional actions to improve oversight for both categories. First, Congress should establish a set of factors for determining which agencies can accept charitable contributions and for deciding to create any new § 501(c) organizations. As noted earlier, the GAO has characterized congressionally established charitable organizations as those

528. *See* HOGUE, TITLE 36 HISTORY AND EVOLUTION, *supra* note 119, at 29–31.
529. *See supra* notes 109–10.

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with "missions and goals dedicated to promoting a public purpose to which private individuals and nonfederal partners are drawn."[530] Donations from the public are particularly important for organizations, whether agencies such as the Library of Congress or a congressionally established § 501(c)(3) such as the Smithsonian, that collect tangible objects. Thus, a need for such donations could be an important consideration. A factor particularly relevant for congressionally established § 501(c)(3) organizations would be a need to protect the organization from political pressure, a factor specifically cited in the cases of CPB and the LSC.[531] The extent to which any congressionally established § 501(c)(3) will rely on appropriations rather than charitable contributions also seems relevant; if appropriations will be the main source of funding, that fact should weigh against Congress creating a § 501(c)(3) or at least requiring the § 501(c)(3) to comply with certain requirements applicable to government agencies—as, for example, the Bowsher Report and the GAO LSC Report recommended.

In deciding whether federal agencies should be able to accept charitable contributions, Congress could also consider a factor that the IRS currently applies to qualify state and local instrumentalities as § 501(c)(3) organizations—the extent to which these agencies are, at least in part, a clear counterpart of a charitable, religious, or similar organization.[532] I also suggest that Congress should require congressionally established § 501(c)(3) organizations related to federal agencies that themselves can accept charitable contributions—such as the CDC Foundation or the National Park Foundation—to meet another set of requirements that the IRC imposes on what are known as supporting organizations.[533] These organizations qualify as § 501(c)(3) organizations because they benefit supported organizations. For one subcategory of supporting organizations, the supported organization must appoint the majority of the supporting organization's board.[534] Such a requirement could be added to the charters of the CDC Foundation, the National Park Foundation, and any similar organization, current or future, that exists to garner donations for a federal agency.

Congress should also review the gift acceptance policies of entities in both categories to ensure that such policies are comprehensive, consistent, and up to date. Ensuring sufficient safeguards to prevent conflicts of interest needs to have a high priority in any such review. Moreover, the gift acceptance policies of § 501(c)(3) organizations related to federal agencies, such as the CDC Foundation and the National Park Foundation, need review to ensure that they mirror the agency's policies. These charitable entities should not accept gifts

530. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 126.

531. *See supra* notes 316 (CPB), 366 (LSC) and accompanying text.

532. *See* Aprill, *supra* note 8, at 108–14.

533. *See* 26 U.S.C. § 509(a)(3).

534. *See Supporting Organizations – Requirements and Types*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/supporting-organizations-requirements-and-types (last visited Aug. 23, 2023).

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that the agency could not accept. Doing so threatens the integrity of the agencies they support.

Other of my recommendations relate only to congressionally established § 501(c) organizations.[535] The practice of having high-level government officials themselves serve on the boards of congressionally established § 501(c) organizations should be curtailed. Members of a charity's governing board have a fiduciary duty to exercise active oversight of the entity. Yet one common characteristic of hybrid, quasi-governmental charters is naming government officials as fiduciary members of the entity's board. Such a practice raises both practical and policy issues, as shown by the Bowsher Report's sharp criticism of the Chief Justice as a Smithsonian fiduciary. The Smithsonian is only one example of government officials sitting on governing bodies of congressionally established § 501(c)(3) and § 501(c)(19) organizations.

To ensure the satisfaction of fiduciary duties, I, like the Bowsher Report, suggest that Congress halt the practice of naming government officials such as the Chief Justice, the Vice President, cabinet secretaries, and members of Congress as fiduciary board members of congressionally established § 501(c)(3) and § 501(c)(19) organizations. A better practice, which some federal charters already specify, would be authorizing government officials with responsibilities that align with the organization's mission to appoint members of governing bodies. That is, such a practice should be adopted beyond those congressionally established § 501(c)(3) entities that resemble supporting organizations, as suggested above.

Most nonprofit entities face the oversight of the comprehensive statutory and common law rules of state nonprofit governance law. The charters of many congressionally established § 501(c)(3) and § 501(c)(19) organizations, however, fail to specify applicable nonprofit laws. This absence invites governance failures, as the stories of the Smithsonian and Red Cross in particular illustrate. In addition, I propose that Congress amend the charters of congressionally established § 501(c) organizations that fail to specify applicable nonprofit law to provide that District of Columbia nonprofit law governs.

Finally, I call upon Congress to reconsider whether it wishes to permit congressionally established § 501(c)(3) and § 501(c)(19) organizations to lobby Congress.[536] Congress asserts its power over charitable lobbying inconsistently in connection with the congressionally established § 501(c)(3) and § 501(c)(19)

535. As noted in Part V *supra*, I also recommend moving congressionally established entities out of Title 36 into the titles of the U.S. Code related to the subject matter they address. *See supra* text accompanying note 528.

536. Section 501(c)(3) organizations can lobby to some limited extent. They must either meet the "no substantial part" of their activities specified in § 501(c)(3) itself or elect a dollar limit based on a sliding scale under §§ 501(h) and 4911. 26 U.S.C. §§ 501(c)(3), (h), 4911. Under the former election, however, the limit on lobbying expenditures is $1 million no matter how large the organization is. *Id.* § 501(c)(3); *see id.* § 4911(c)(2). Section 501(c)(19) organizations can lobby without limit. *See supra* notes 496–98 and accompanying text.

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organizations studied here. Of the charters discussed in Part III, only that of the LSC prohibits lobbying. The most recent publicly available Forms 990 of the Smithsonian, the Kennedy Center, and CPB indicate that they do not engage in lobbying; those of the CDC Foundation, the National Park Foundation, and the Red Cross indicate that they do.[537] But, as discussed in Part IV, Congress has limited the political activities of more than a dozen Title 36 corporations exempt under § 501(c)(3) and eight Title 36 corporations exempt under § 501(c)(19) beyond the limits found in the IRC.[538] Permitting any organization that receives annual appropriations to lobby Congress seems to me inappropriate and unadvisable.[539] I urge that Congress prohibit lobbying by such congressionally established § 501(c) organizations, except in connection with their appropriations requests or upon request from a congressional committee or member.

Currently, both federal agencies that can accept charitable donations and congressionally established § 501(c) organizations skirt the kind of oversight to which both federal agencies and private charities are subject. I reluctantly accept the continued existence of both these kinds of entities. To some extent, efficiency needs to give way to accountability; however, the semi-governmental status, particularly for congressionally established § 501(c) organizations that rely primarily on appropriations, calls for Congress to increase oversight and to subject them to more of the requirements that apply to federal agencies.

## VI. CONCLUSION

This Article brings to light the existence of many entities that are public-private hybrids and thus semi-governmental. It finds that the two categories of private entities and public entities are not always distinct. Thus, I argue for a continuum between the governmental and the charitable, the public and the private.[540] The continuum stretches from the federal government and its agencies, through congressionally established § 501(c)(3) and § 501(c)(19) organizations with some government-like features, to traditional private nonprofit tax-exempt organizations. Seeing all these entities on a continuum

537. Organizations will indicate whether they lobby on Form 990, Part IV (Checklist of Required Schedules), Question 4. Those that do lobby are required to include Schedule C, Political Campaign and Lobbying Activities. The Red Cross's Form 990 states that it lobbies at both the state and federal level on issues related to its mission, such as biomedical services, homeland security, and public health and safety. *See* Am. Red Cross, FY 2020–2021 IRS Form 990, *supra* note 241. Forms 990 of the other organizations that lobby do not give this kind of detail regarding their lobbying activities.

538. *See supra* notes 497–98 and accompanying text.

539. I note that under the "no substantial part" test of § 501(c)(3), lobbying does not include an organization giving expert testimony or technical assistance in response to a formal request from a legislative body. *See* Rev. Rul. 70-449, 1970-2 C.B. 111, § 4911(2)(B).

540. Although my earlier work on states, their political subdivisions, and their affiliated charities does not argue for a continuum, it does disclose the close—indeed, interchangeable—relationship between state and local governments and their governmental charities. State and local governments can choose, and switch back and forth, between treating such governmental units as hospitals, libraries, or universities as integral parts of government or as § 501(c)(3) organizations. *See* Aprill, *supra* note 8, at 97, 113.

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sharpens our perceptions of both their similarities and their differences. It clarifies what we should ask and expect of their operations.

This Article underscores the importance of state nonprofit laws that regulate fiduciary duties, fundraising, investment, and conflict-of-interest policies. More generally, the Article calls for acknowledgment of quasi-governmental entities. Such public-private hybrids, however, should be subject to a regime that ensures adequate governance structures for the particular hybrid, whether the most appropriate provisions have their source in federal law that is applicable to government agencies or state laws applicable to charitable nonprofits. These entities belong on a public-private continuum, not floating in their own untethered conceptual space. Seeing these entities as resting on a continuum deepens our understanding of government, of the nonprofit sector, and of the relationships between them.

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