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Dear Postal Regulatory Commission:

With this letter I submit an R Street Institute policy study by myself and Daniel Richardson to PRC Docket PI2016-3. The PRC notes its invitation for submissions to the docket:

"[The] PRC must make recommendations for any legislation or other measures necessary to improve the effectiveness or efficiency of the postal laws of the United States.... The Commission identified 13 areas of interest on which the public may focus its comments in addition to any other issues of interest related to the operation of the amendments of the PAEA."

This study assesses Title 39's provisions concerning the USPS board of governors, its composition, and the quorum requirement. It urges Congress to clarify the statute, which USPS currently reads to permit it to operate with a 1-person board.

Thank you for consideration of this submission.

Regards,

Kevin R. Kosar, Ph.D.
Senior Fellow, R Street Institute



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R STREET POLICY STUDY NO. 51
February 2016

THE U.S. POSTAL SERVICE'S GHOST SHIP BOARD

Kevin R. Kosar and Daniel J. Richardson

INTRODUCTION

To appreciate democratic dysfunction, one need look no further than the U.S. Postal Service. That single agency is home to all of the defining fights of modern politics, with all of the usual symptoms.

Postal policy currently is embroiled in disputes over how to define the agency's role with respect to private industry;¹ how to adjust public services to an evolving market;² how to provide retirement security to postal employees;³ and how to manage the USPS' long-term operating deficit.⁴ The service's

1. An example is the recent debate over "postal banking," a proposal to expand the postal product line to include services for which there is a broad private market. See Kevin R. Kosar, "Return to Sender: Postal Banking is an idea whose time has come and gone," *Weekly Standard*, June 22, 2015. <http://www.weeklystandard.com/return-to-sender/article/969654>

2. The most recent financial reports continue to show declining demand for products over which the USPS has a statutory monopoly, including first-class mail, while demand for competitive products like package delivery has not increased sufficiently to offset these losses. USPS, "Report on Form 10-K," p. 15, Sept. 30, 2015. <http://about.usps.com/who-we-are/financials/10k-reports/fy2015.pdf>

3. The 2015 annual report also shows the USPS was unable to meet its retirement health-benefit prefunding obligations in FY2015, leading to total defaults of \$28.1 billion since 2011. *Ibid.*, p. 27.

4. *Ibid.*, p. 14.

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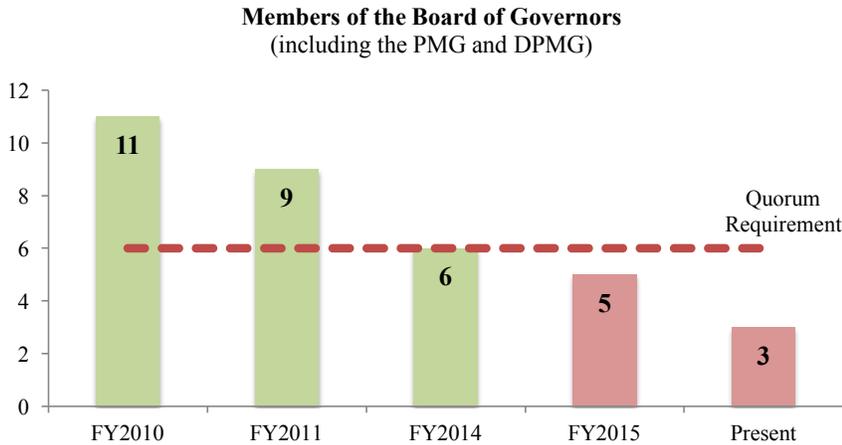
day-to-day operations are "off budget," meaning the perennial deficits that result from these policy stalemates cannot be hidden in the broader federal budget. Despite years of media coverage highlighting the USPS' financial crisis and other challenges, Congress remains divided on how to reform the Postal Service for the future.

Given this reality, perhaps it's not surprising the USPS has become another front in the lasting conflict between the White House and Congress over the appointment process. The recent gridlock in the confirmation of both judicial and executive-branch appointments is well-documented.⁵ In most cases, the outcome of this gridlock is predictable. Judges take on heavier caseloads or hear cases outside their judicial district.⁶ Agencies function with acting executives and delegate authority to officers further down the organizational

5. Theodor Meyer, "Under Obama, More Appointments Go Unfilled," *ProPublica*, Feb. 27, 2013. <http://www.propublica.org/article/under-obama-more-appointments-go-unfilled>

6. A complete list of "judicial emergencies" at the federal level is provided by the Administrative Office of the U.S. Courts. <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies>.

FIGURE I: USPS BOARD MEMBERS, 2010-2016



Source: Data from USPS Annual Reports (FY2010-FY2015)

chart.⁷ Boards and commissions can conduct business absent a member or two, often for years at a time. The machinery of government goes on, if a little slower. The agencies and their advocates complain about the inefficiencies and unsustainable burdens, but a crisis sufficient to change the status quo rarely comes to fruition.

However, there does come a point beyond which congressional inaction to seat officers truly becomes paralyzing. For boards of directors, this point is the quorum requirement. If a multimember board cannot gather enough members to form a quorum, it cannot exercise its legitimate authority. Such currently is the case with the U.S. Postal Service.

THE USPS' GHOST SHIP BOARD

The USPS Board of Governors was established by statute to include 11 members: nine governors, the postmaster general (PMG) and deputy postmaster general (DPMG). The PMG and DPMG vote alongside with the other board members on most issues. Governors are term-limited, serving staggered nine-year terms such that one member's term expires Dec. 8 each year. In the event a new member is not confirmed, the law permits a governor to serve for one additional year. The board must maintain a quorum of six members to exercise its statutory authority.

President Barack Obama has nominated five individuals to serve on the board. The Senate Homeland Security and Governmental Affairs Committee, which has jurisdiction over

the Postal Service, voted to approve all five appointees last year,⁸ but the full Senate has yet to take a vote on any of the nominees. There are reports that Sen. Bernie Sanders, I-Vt., has placed a hold on one or more of the nominees,⁹ which stifles further Senate action.¹⁰

In December 2014, the Board gathered to discuss the impending loss of a quorum that resulted from the expiring term of Mickey Barnett. In preparation for this event, the board voted on two resolutions, which were published as a notice in the Dec. 16, 2014 edition of the *Federal Register*.¹¹ One resolution provides that the powers vested solely in the governors themselves — such as the ability to remove the PMG and make pricing decisions for postal products — would not be affected by the absence of a board quorum. The resolution further states that no specific number of governors is required to exercise these powers, meaning they conceivably could be vested in a single governor.¹²

8. Al Urbanski, "Postal Board of Governors Is Down to One Member," *DMM News*, Dec. 9, 2015. <http://www.dmnews.com/postal/postal-board-of-governors-is-down-to-one-member/article/458578/>

9. Sanders has not stated publicly whether he has holds on the nominees and the Senate does not require holds to be disclosed publicly. See Bill McCallister, "U.S. Postal Service Board of Governors Shrinks to One Member," *Linn's Stamp News*, Dec. 7, 2015. <http://www.linns.com/en/news/postal-news/2015/12/u-s--postal-service-board-of-governors-shrinks-to-one-member.html>

10. On holds, see Mark J. Oleszek, "Holds in the Senate," Congressional Research Service, report R43563, March 19, 2015. <https://www.scribd.com/doc/294906154/Mark-Oleszek-Holds-in-the-Senate-03-19-2015>

11. The various authorities of the governors are enumerated in statute and regulations. See U.S. Postal Service, "Exercise of Powers Reserved to the Governors and Board of Governors," 79 *Federal Register* 74780, Dec. 16, 2014. <https://www.gpo.gov/fdsys/pkg/FR-2014-12-16/pdf/2014-29344.pdf>

12. See also U.S. Postal Service, "Matters reserved for decision by the Governors," 39 *Code of Federal Regulations* 3.4. <https://www.gpo.gov/fdsys/pkg/CFR-2009-title39-vol1/pdf/CFR-2009-title39-vol1-sec3-4.pdf>

7. A well-known case involved the Bureau of Alcohol, Tobacco, and Firearms, which went without a confirmed director from 2007 until 2013. See Erica Goode and Sheryl Gay Stolberg, "Legal Curbs Said to Hamper A.T.F. in Gun Inquiries," *New York Times*, Dec. 25, 2012. <http://www.nytimes.com/2012/12/26/us/legislative-handcuffs-limit-atfs-ability-to-fight-gun-crime.html>

The second resolution relates to the powers of the whole Board of Governors. Before losing a quorum, the board voted to delegate “certain” board powers to a Temporary Emergency Committee (TEC). What specifically these powers are is anybody’s guess. The *Federal Register* notice states the authority of the TEC includes any powers “necessary for operational continuity.”

The TEC does not have a specified number of members; it is instead composed of any board members holding office at the time.¹³ When asked by the authors of this paper, a USPS representative affirmed the TEC includes any sitting governor, the PMG and the DPMG.¹⁴ While the resolution stated that the TEC would remain in existence only until a quorum could be formed, it also contemplates this committee as a permanent solution: “[t]his delegation would also apply in emergency circumstances in which death, incapacity, or disruption of transportation or communications reasonably prevent a Board quorum from being assembled.”

On the one hand, the TEC solution can be understood as an effort by well-meaning governors to maintain operations in an unprecedented environment. The USPS is an agency with annual revenues of roughly \$70 billion that employs more than 600,000 workers and serves every home and business in the country. A shutdown of Postal Service operations would have had far-reaching economic consequences. The TEC’s establishment has forestalled that scenario by enabling the remaining board members to exercise their responsibilities.¹⁵

It is certainly possible that the absence of a quorum could persist for some time.¹⁶ As a result, it’s easy to imagine a scenario in which an inability to adjust prices could cause a severe liquidity crisis. Particularly relevant to this concern is the forthcoming expiration of the temporary price increase the USPS secured in 2013, which is expected to end in April 2016.¹⁷ A failure to confirm additional governors also conceivably would prevent removal of the PMG or DPMG for poor performance or raise objections to the propriety of

USPS signing new labor contracts with postal unions.¹⁸ No doubt other bad scenarios could erupt as the USPS never before has had a ghost ship board.

Nonetheless, there are aspects of the USPS action and accompanying justification that are problematic and set a troubling precedent for agencies that face similar challenges.

IMPLICATIONS FOR AGENCY GOVERNANCE

The board’s resolution establishing the TEC looks inconsistent with congressional intent when it established the board. In the resolution, the board defended the TEC’s creation by citing directly to the delegation language of its authorizing statute. The relevant provision states:

[T]he Board may establish such committees of the Board, and delegate such powers to any committee, as the Board determines appropriate to carry out its functions and duties.

If that were the entirety of the text, it’s unlikely the broad grant of authority embodied in the TEC would be problematic. But additional language of that title limited board delegations. The provision states that any delegation “shall not relieve the Board of full responsibility for the carrying out of its duties and functions and shall be revocable by the governors in their exclusive judgment.”

The statute also limits delegation authority by specifying that it must be “consistent with other provisions of [Title 39].” As it happens, 39 U.S.C. § 205 not only states that six members are necessary to form a quorum, but also declares that “[v]acancies in the Board, *as long as there are sufficient members to form a quorum*, shall not impair the powers of ‘the Board’” (emphasis added).¹⁹ The corollary to this provision is that, if vacancies resulted in the board being unable to form a quorum, it would impair the board’s powers.

These provisions of the law suggest that delegations must be limited in some way. If there is no power the board could exercise before the resolution that the TEC cannot exercise now, it’s not clear how this is consistent with these provisions, which are the only two that specifically reference the issues of quorums and delegations.¹⁹

18. The labor contract between American Postal Workers Union and the USPS expired in May 2015. It remains in effect, as the parties have entered arbitration to reach a new contract. Al Urbanski, “Postal Workers’ Contract to go to Arbitration in February,” *Direct Marketing News*, Jan. 13, 2016, <http://www.dmnews.com/postal/postal-workers-contract-to-go-to-arbitration-in-february/article/464797/>

19. The legislative history that preceded the board’s creation supports this conclusion. The initial House version of the legislation referred to what eventually became the board as the “Commission on Postal Costs and Revenues.” The section analysis in the report accompanying the bill included similar restrictions of delegations and specifically held that the commission was allowed to act only “as long as sufficient members are in office to form a quorum.” U.S. Congress, *Committee on Post Office and Civil Service, Postal Reorganization and Salary Adjustment Act of 1970*, H. Rep. 91-1104, p. 25 (1970).

13. The resolution reads: “During the time in which the Board is unable to form a quorum, those powers needed to provide for continuity of operations would be delegated to a Temporary Emergency Committee composed of the remaining members of the Board.” Note the use of the term “members,” not “governors.”

14. Email to authors from David A. Parteneimer, manager of media relations, U.S. Postal Service, Jan. 17, 2016.

15. Were the last governor to die, resign or have his term expire, the TEC — comprised solely of the PMG and DPMG— presumably would continue to operate so long as the PMG or the DPMG remain.

16. All five Obama nominees to the Board of Governors were re-nominated early in the 114th Congress, with none approved to date.

17. United States Postal Service, “2015 Report on Form 10-K,” p. 2, Sept. 30, 2015. <http://about.usps.com/who-we-are/financials/10k-reports/fy2015.pdf>

Regarding the powers of the governors, it's also unclear whether Congress contemplated such a structure. In support of its determination that the remaining governors retain their authority in the absence of a quorum, the USPS highlights the statute's provision specifying that seven governors are needed to remove the inspector general. The USPS argues that, by explicitly stating that a specific number of governors is required to make that decision, the statute's silence on other matters means that no predetermined number of governors is required to exercise other powers.²⁰

While this is a reasonable way to understand the statute, it does undermine the statute's requirement that the board possess a quorum. The seven-member threshold for IG-related decisions suggests a higher bar for a specific issue. To read this elevated number as removing any threshold for other decisions invites questions about why Congress included other provisions in the authorizing statute.

Admittedly, it is not clear that the legislative drafters imagined a ghost ship board. The statute defines the term "governors" to mean "the 9 members of the Board of Governors appointed by the Senate." When the statute speaks of the governors' powers, it clearly assumes a context of collective decision-making. This conclusion is further supported by the statutory qualifications for the governors, which require that at least four have experience in managing large organizations and that no more than five be from the same political party.

The USPS' TEC resolution does not offer any limitation that would prevent power from being exercised by only one governor. If the full power of the governors ultimately were exercised by a single governor, then Congress' objectives in establishing a board – including collegiality and a diversity of views – would be rendered inapplicable and superfluous.²¹

It's also unclear where exactly the TEC's line of authority stops and that of the remaining governors begins. The USPS resolution states the TEC may exercise "those powers...that are necessary to provide for continuity of operations." This raises the question of which of the board's functions truly are essential to the Postal Services' daily operations. For instance, imagine that a capital plan called for major investments to renovate the postal vehicle fleet. Would the TEC have authority to move forward on such an action, even if

20. The TEC, in effect, abolished the difference between governors, the PMG and DPMG. As members of the TEC, the PMG and DPMG exercise authority that the statute limited to the governors. Should the last of the governors die, resign or have his term expire, the PMG and DPMG would comprise the TEC.

21. The report accompanying the House legislation does provide some support for the USPS position. It states that "the Commission shall act by a majority of those present, and that six members shall constitute a quorum, except... a favorable vote of the absolute majority of the Presidentially appointed Commissioners shall be required for appointment or removal of the Postmaster General." U.S. Congress, Committee on Post Office and Civil Service, *Postal Reorganization and Salary Adjustment Act of 1970*, H. Rep. 91-1104, p. 25 (1970).

the Postal Service was able to meet its day-to-day operating requirements with the fleet as is?

To date, the TEC's functions appear very similar to those of the full board that preceded and created it. For instance, a recent public notice of a TEC meeting listed fairly specific agenda items for the session open to the public, such as consideration of the financial plan, appropriations requests and annual reports. However, for the portion of the meeting closed to the public, the public notice simply listed broad topics such as "pricing" and "compensation and personnel matters," which could include any number of contentious issues.²² The statutory authority of the full board includes a wide range of functions, but most of the TEC functions in the recent notices stem from the broad language of 39 U.S.C. § 205, which authorizes the board to "direct and control" USPS finances.

TABLE I: STATUTORY POWERS OF THE USPS BOARD

39 U.S.C. § 202	<ul style="list-style-type: none"> Established the Board of Governors.
39 U.S.C. § 204	<ul style="list-style-type: none"> Provides the board with authority to set the number of assistant postmasters general.
39 U.S.C. § 205	<ul style="list-style-type: none"> Requires the board to direct and control the expenditures and review the practices and policies of the Postal Service. Establishes board procedures, including quorum requirements and standards for certain actions.
39 U.S.C. § 414, 416	<ul style="list-style-type: none"> Authorizes the board to set the price of the breast cancer research postage stamp and other fundraising stamps.
39 U.S.C. § 402	<ul style="list-style-type: none"> Establishes delegation authority for powers vested in the board.
39 U.S.C. § 1011	<ul style="list-style-type: none"> Provides the board with power to designate USPS employees to administer oaths of office.
39 U.S.C. § 2402	<ul style="list-style-type: none"> Requires the board to approve the USPS annual report and submit the report to the president and Congress.
39 U.S.C. § 3686	<ul style="list-style-type: none"> Provides the board with authority to approve requests for bonus compensation for USPS employees.

Moreover, the TEC's delegated authority could cause a problem if and when there are a sufficient number of confirmations to establish a quorum. While the resolution was adopted when the TEC had five members, there is nothing in the resolution that provides a floor for the size of the TEC; in fact, the structure allows for "necessary" board functions to be vested in a single member if only one remained.

As a result, the actions of a few TEC members could have consequences even after there are six confirmed board

22. U.S. Postal Service, "Temporary Emergency Committee of the Board of Governors, Sunshine Act Meeting," 80 *Federal Register* 63849, Oct. 21, 2015. <https://www.gpo.gov/fdsys/pkg/FR-2015-10-21/pdf/2015-26889.pdf>

members. For example, imagine that a four-member TEC votes 3 to 1 to take a certain action. Shortly thereafter, two new members are confirmed to the board and the TEC is no longer operational. These two new members would appear to be stuck with the TEC's decision, even if they joined the lone dissenter in disagreeing with it, as they would be unable to muster the necessary majority to change course. As this shows, the board's delegation to the TEC might change defaults in place for the full board, requiring four votes to reverse a TEC action, rather than four votes to take the action in the first place.

While concerns about the concentration of authority in a few members may have been hypothetical at the time of the resolution in 2014, the expiring terms of two additional governors in December 2015 have made the concern a reality. Currently, the TEC is comprised of one governor, James Bilbray, along with the PMG and DPMG. Given that the resolution also allows an absolute majority of the governors to appoint or remove the PMG and to exercise all powers reserved solely to the governors, it's difficult to see how functional control of the USPS is not currently in the hands of a single administrator.²³ As a result, the USPS' emergency actions blur the distinction between the commission and single-administrator models of agency governance. As both the statute authorizing the USPS and recent debates over the Consumer Financial Protection Bureau demonstrate, the debate between these competing models often is an important issue for Congress in agency oversight.²⁴

The USPS' legal argument for employing the "emergency committee" also sets a precedent that, if left unchallenged, could invite political maneuvering. If the board can operate irrespective of how many members it has, then the president gains an incentive to withhold making appointments. A Democratic president, for example, might be happy with a board with a single Democratic member, who had sole authority to hire and fire the PMG and wield the agency's authorities.²⁵

Finally, it's unclear whether creation of the TEC represents sound policy on the part of the USPS itself or serves as a

23. For purposes of illustration, one power that is vested solely in the governors is the authority to seek an exigent price increase, as specified in 39 U.S.C. § 3622(d)(1) (E). As demonstrated by the most recent application of this authority, such a decision involves highly contentious issues with partisan views on either side. If such a decision were to arise under the present leadership, Chairman Bilbray alone would make the choice, as opposed to the bipartisan group envisioned by the statute.

24. H.R. 1266, the Financial Product Safety Commission Act of 2015, which would convert the Consumer Financial Protection Bureau from a single administrator model to a bipartisan commission, provides an example of this concern. This legislation was reported out of the House Financial Services Committee in September 2015. <https://www.congress.gov/bills/114th-congress/house-bill/1266>

25. Plainly, such an arrangement runs counter to the spirit of the statutory direction that the board be bipartisan. Congressional postal policy is exceedingly political. Members of Congress represent diverse constituencies and have had great difficulty in finding agreement on postal-reform legislation, as evidenced by the fact that USPS' statute has been revised significantly just once (2006) over the past four decades.

TABLE 2: UNCONFIRMED USPS BOARD NOMINEES

Nominee	Renomination date
Stephen Crawford	March 11, 2015
Mickey Dee Barnett	Feb. 25, 2015
David S. Shapira	Jan. 8, 2015
James C. Miller	March 11, 2015
David Michael Bennett	Feb. 12, 2015

Source: WhiteHouse.gov

* Data from the "Nominations and Appointments" database maintained at Whitehouse.gov. Data accessed on Jan. 13, 2016. <https://www.whitehouse.gov/briefing-room/nominations-and-appointments>

good model for similarly situated agencies in the future. The USPS is by no means the only agency ever to employ a delegation structure like the TEC. For instance, the three-member National Mediation Board delegated its authority to a lone board member when it anticipated being unable to form a two-member quorum in the early 1980s.²⁶

Nonetheless, the USPS' actions, just like those of other agencies that previously have taken similar actions, is premised on Congress acting promptly to address the issue. Given that two more members have left the board since the resolution initially was adopted, it's unclear whether such a governance structure is truly sustainable. Governor Bilbray's term ends in less than a year (Dec. 8, 2016). Unfortunately, the USPS' creation of the TEC has not goaded Congress to address the problem. The TEC seems to have allowed the Senate to neglect its duty to confirm appointees. Additionally, the USPS' ongoing operations under the TEC could raise more fundamental concerns about what, precisely, the Board of Governors does in the first place.²⁷ If the business keeps running without direction from the board, Congress may have grounds to revisit the institution's role.

26. The decision to uphold this delegation of authority turned on a careful reading of the statutory text, 45 U.S.C. § 154. *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, at 1339-41 (D.C. Cir. 1983). The language of this section is quite different from the language of Title 39 and directly approves of the delegation of any board function to a single member.

27. Kevin R. Kosar, "Does the USPS Even Need a Board?" Word on the Street blog, Jan. 11, 2016. <http://www.rstreet.org/2016/01/11/does-the-usps-even-need-a-board-of-governors/>

CONCLUSION

Changes to the USPS governing structure that stemmed from the TEC resolutions thus far have had limited discernable impact on postal operations. As the USPS is adamant to demonstrate, problems that hinder the long-term viability of the agency will require congressional action before they can be resolved.²⁸

Nonetheless, the USPS experience does provide a case study of how breakdown of the appointment process can create instability for agencies and undermine congressional prerogatives. The extent to which this solution is seen as problematic should inform our understanding of these fights in the future. The Senate's unwillingness to confirm presidential appointments is usually justified on grounds that the nominees are unacceptable or that the confirmation must be accompanied by a separate policy concession.

The USPS experience serves as a useful reminder of the unanticipated consequences that can accompany this conflict. Instead of a failure to confirm producing new nominees or policy victories, the result has been an administrative solution that centralizes executive functions in fewer hands. The danger is that this solution provides a blueprint to other agencies faced with similar pressures. Moreover, the board's further reduction to include only a lone governor has transformed that individual into a de facto administrator, without congressional approval to shift to such a structure.

For the Postal Service, it's difficult to discern how this situation may play out. Perhaps a party dissatisfied with the TEC's actions will challenge its structure in court. The issue may simply be resolved by new appointees to the board, although there are no signs that such action is likely in the Senate any time soon.

In either event, Congress would be well-served by clarifying just what it meant by the quorum requirements and delegation provisions that were passed into federal law. In fact, Congress has provided this clarity in other cases in the past. For instance, the statute governing the Consumer Product Safety Commission (CSPC) provides language adjusting the quorum requirement for any number of potential vacancies, providing a floor of two members to take official action and setting a six-month time limit for activities when only two members are present.²⁹

While this specific issue of agency delegation arose in the context of postal policy, nothing would prevent Congress from settling the issue through government-wide

legislation.³⁰ Absent such action, these delegations will have to be resolved on a case-by-case basis, driven by the specific statutory language at issue and the arguments of individual litigants. This leaves Congress on uncertain footing in negotiations with the executive branch over the impact of appointment decisions and forces agencies to make contentious choices just to maintain their operations.

ABOUT THE AUTHORS

Kevin R. Kosar is the director of the governance project and a senior fellow at the R Street Institute. His research currently focuses on Congress and its operation within the American constitutional system, and a variety of oversight issues. Before joining the R Street Institute, Kevin was a researcher at the Library of Congress' Congressional Research Service, where he served as lead postal analyst.

Daniel J. Richardson currently is a student at the University of Virginia School of Law. He is a graduate of James Madison University and formerly served as a research assistant at the Congressional Research Service and an analyst of the U.S. Judiciary.

28. The USPS' 2015 financial report included legislative requests related to delivery standards and Medicare availability for USPS retirees, as well as more comprehensive legislation. See USPS, "Report on Form 10-K," pp. 46, 65, Sept. 30, 2015. <http://about.usps.com/who-we-are/financials/10k-reports/fy2015.pdf>

29. 15 U.S.C. § 2053(d).

30. While many delegation provisions in federal law are agency-specific, Congress has previously passed government-wide delegation provisions that are function-specific, applying across the federal government. For instance 5 U.S.C. § 302 permits all agency heads to delegate responsibilities related to personnel and employment matters. Through a functional approach, Congress could create universal provisions stating which type of decisions full commissions and boards must retain.