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ARTICLE

Braidwood Management Inc. v. Becerra: Is There a Violation of the Article II Appointments Clause?

Gregory Curfman[1] and Marcia M. Boumil[2]

[1]JAMA Executive Editor, Solomon Center for Health Law & Policy, Yale Law School, Harvard Medical School
[2]Tufts University School of Medicine
Corresponding author: Gregory Curfman; Email: Gregory.curfman@jamanetwork.org

Abstract
Since 1984, the U.S. Preventive Services Task Force (USPSTF) has issued recommendations to the public regarding preventive health services. The recommendations have substantially benefited public health. With the passage of the Affordable Care Act in 2010, recommendations assigned the highest ratings (A and B) must be covered by most private health insurers without consumer cost-sharing. This statutory requirement has been challenged in *Braidwood Management Inc. v. Becerra*, a case centered on the plaintiffs' argument that USPSTF members are officers of the United States but were not appointed in accordance with the Appointments Clause of the Constitution. The Appointments Clause requires that principal officers of the United States must be appointed by the President and confirmed by the Senate. This article contends that members of the USPSTF are not principal officers of the United States, but instead serve as advisors to Congress in making preventive health recommendations. Congress established the coverage policy, not the USPSTF members. On this basis, the defendants should prevail in the case, but if they do not, the court should apply severability to permit the Secretary of Health and Human Services to directly oversee the USPSTF in the assignment of ratings for preventive health recommendations. The important work of the USPSTF should not be abridged.

Keywords: Preventive Medicine; U.S. Preventive Services Task Force; Affordable Care Act; Appointments Clause; Officers of the U.S; Severability

Introduction

Braidwood Management, Inc. v. Becerra[1] was decided by the U.S. District Court for the Northern District of Texas and is now under appeal at the Court of Appeals for the Fifth Circuit. The dispute involves a provision that intentionally "repurposes" the ongoing work of the U.S. Preventive Services Task Force (USPSTF) as to recommended preventive services to inform insurance coverage under the Patient Protection and Affordable Care Act (ACA).[2] The plaintiffs include: a for-profit, Christian corporation that provides health insurance for its employees, a second for-profit corporation, and six individuals.[3] The Defendants are the Secretaries of the Departments of Health and Human Services (HHS), Treasury, and Labor, each of whom is named in their official capacities as tasked with enforcing the law.[4]

At issue in this litigation is the legitimacy and scope of USPSTF authority and the ability of Congress to utilize its recommendations to make coverage decisions pursuant to the ACA. Plaintiffs argue that USPSTF members function as "principal officers" of the United States, who were not properly appointed

[1]*See* Braidwood Mgmt. v. Becerra, 666 F. Supp. 3d 613 (N.D. Tex. 2023).
[2]*See id.* at 617-18.
[3]*Id.* at 618-20.
[4]*Id.* at 620.

to their "officer" positions.[5] The counterargument, which we will discuss in this article, is that the law has never recognized USPSTF members as principal officers or officers of any nature, and plaintiffs seek to disqualify the health promotion work they have done for more than four decades to achieve the narrow goal of excluding preventive measures from insurance coverage.[6]

This article addresses the question of whether USPSTF, an administrative body that has functioned solely to educate the public about useful preventive health care measures for nearly forty years,[7] is a legitimately constituted body, and whether Congress can use the USPSTF's public health recommendations for a separate legislative purpose. The plaintiff's original complaint also claimed that the Advisory Committee on Immunization Practices ("ACIP") and the Health Resources and Services Administration ("HRSA") were also not appropriately appointed,[8] but those are beyond the scope of this article. Likewise, the plaintiffs claimed a nondelegation doctrine violation, but since the district court dismissed this claim,[9] we will not discuss it in this article (the plaintiffs have preserved this claim for the Supreme Court).

One of USPSTF's preventive health care recommendations was that persons at risk of acquiring HIV infection take pre-exposure prophylaxis ("PrEP") drugs to prevent becoming infected.[10] Congress thereafter sought to adopt that recommendation and require most health plans pursuant to the ACA to cover those preventive drugs without cost-sharing.[11] Plaintiffs, who object to PrEP measures, brought this action based on the Appointments issue set forth above, and the Religious Freedom Restoration Act, seeking to be exempt from such a requirement.[12] Because other participants in this Symposium will cover the latter aspect of the case, we will not provide an analysis of this matter.

The U.S. District Court for the District of Northern Texas held, among other things, that the USPSTF was constituted in violation of Article II, § 2, of the U.S. Constitution in that its members serve as principal officers of the United States without being duly appointed by the President and confirmed by the Senate, as is required for the appointment of principal officers.[13] Thus, the district court held that the use of the USPSTF recommendations as the basis for mandating coverage for PrEP and more than fifty other preventive services, pursuant to the ACA, are unconstitutional.[14] The Appointments Clause question will be the principal focus of this article.

On this question, the district court's finding that USPSTF members are officers of the United States is, in our view, incorrect. There is no justification in law or precedent for dismantling the entire forty-year-old USPSTF (and the important work it does) to achieve the narrow end goal of denying insurance coverage for preventive services. Furthermore, statutory construction would require the court to either (1) construe the statutory language in a manner that presumes it to be constitutional or (2) sever any constitutionally-offending provision to uphold the intent of the law (here, the legitimacy of the USPSTF). Relevant to this litigation is the background, authority, and legitimacy of the USPSTF and its role in recommending preventive services pursuant to the ACA's cost-sharing mandates.

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[5] *See* Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624, 639 (N.D. Tex. 2022).

[6] *See* Brief for Defendant in Support of Response to Plaintiff's Motion for Summary Judgment & Cross-Motion for Summary Judgment at 39-45, *Braidwood Mgmt.*, 666 F. Supp. 3d 613 (No. 4:20-cv-00283-O), ECF No. 64 (arguing that members of the USPSTF are not "officers" for purposes of the Appointments Clause).

[7] *See About the USPSTF*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf [https://perma.cc/AY46-864E].

[8] Complaint at 13, *Braidwood Mgmt.*, 666 F. Supp. 3d 613 (No. 4:20-cv-00283-O), ECF No. 1.

[9] *See Braidwood Mgmt.*, 627 F. Supp. 3d at 652.

[10] *See id.* at 632.

[11] Affordable Care Act, 42 U.S.C. § 300gg-13(a) (requiring coverage, without cost-sharing requirements, of all "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force").

[12] *See* First Amended Complaint at 13-18, 25, *Braidwood Mgmt.*, 666 F. Supp. 3d 613 (No. 4:20-cv-00283-O), ECF No. 14.

[13] *Braidwood Mgmt.*, 627 F. Supp. 3d at 645-46.

[14] *Braidwood Mgmt.*, 666 F. Supp. 3d at 633.

A. United States Preventive Service Task Force

Established in 1984 with congressional authorization, the USPSTF is a sixteen-member volunteer body "with appropriate expertise" to make recommendations as to preventive health care including recommended screenings, behavioral interventions, and preventive health care measures including particular drug therapies.[15] The USPSTF is "convened" by the Director of the HHS Agency for Healthcare Research and Quality (AHRQ) and is supported administratively by the AHRQ.[16] "The director of AHRQ … appoints new USPSTF members, with guidance from the [USPSTF] [c]hair," and "its work does not require AHRQ or HHS approval."[17] The function of the USPSTF is to "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations."[18] The recommendations are published on the USPSTF website and in the *Journal of the American Medical Association* to ensure wide distribution.[19]

Over the past forty years, the USPSTF has issued evidence-based recommendations on preventive health services to promote the health of the general public. Previously, health care professionals directed much of their effort to treating established illnesses rather than preventing their occurrence.[20] The work of the USPSTF has modified those priorities by increasing awareness of effective illness preventive measures. This was the original purpose of the USPSTF, and it remains so today.[21]

B. The Patient Protection and Affordable Care Act (ACA)

The ACA, enacted by Congress in 2010, includes a provision[22] (hereafter referred to as § 2713 of the ACA) that certain "preventive care" measures be covered by most private health insurance companies without imposing cost-sharing.[23] The ACA looks to three agencies under the auspices of HHS (USPSTF, ACIP, and HRSA) to provide assistance in determining the scope of services that fall within the categories of preventive services.[24] The ACA requires that most private health insurers cover certain services identified by the USPSTF,[25] but the USPSTF is not tasked with making or enforcing law. The USPSTF continues to operate in an advisory capacity as it always has.

In 2010, Congress chose to use some of the USPSTF recommendations to operationalize its own ACA legislative initiative.[26] Specifically, Congress determined that those recommendations given an A or B rating by the USPSTF, as defined below, must be covered by insurers without cost-sharing.[27] The USPSTF was not involved in formulating § 2713 of the ACA, which was completely in the hands of Congress. Congress may at any time modify or eliminate this provision of the ACA. Although the congressional mandate carries the force of law, the question we will address is whether individual

[15] 42 U.S.C. § 299b-4(a)(1).

[16] *Id.*

[17] *U.S. Preventive Services Task Force*, Agency for Healthcare Rsch. & Quality (June 2021), https://www.ahrq.gov/cpi/about/otherwebsites/uspstf/index.html [https://perma.cc/7HWU-LF8H].

[18] 42 U.S.C. § 299b-4(a).

[19] *See U.S. Preventive Services Task Force*, *supra* note 17; *see also United States Preventive Services Task Force*, JAMA Network, https://jamanetwork.com/collections/44068/united-states-preventive-services-task-force [https://perma.cc/VK2C-JBGX].

[20] *See* Gregory Curfman & Kirsten Bibbins-Domingo, *US Preventive Services Task Force Challenged in Federal Court*, 329 JAMA 1743, 1743 (2023).

[21] *See id.*

[22] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 131 (2010) (codified as amended at 42 U.S.C. § 300gg-13).

[23] 42 U.S.C. § 300gg-13.

[24] *See id.* § 300gg-13(a).

[25] *Id.*

[26] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 131 (2010) (codified as amended at 42 U.S.C. § 300gg-13).

[27] *Id.*

USPSTF members, by virtue of their role in assigning the A and B ratings, have sovereign authority for a part of United States law and therefore effectively function as and should be regarded as principal officers. We will argue that they should not. In the next section, we examine the 1998 Public Health Services Act, which defines the activities of the USPSTF.

C. The 1998 Public Health Services Act

The 1998 Public Health Services Act and the 2010 Patient Protection and Affordable Care Act[28] directed the AHRQ, which operates within HHS, to convene the USPSTF. It is noteworthy, as we will discuss subsequently, that a provision about the independence of the USPSTF (Paragraph 6) was added to the statute in 2010 as part of the ACA.[29] It was Congress's intent to ensure that the USPSTF functioned as an independent administrative body, free from political influence, "to the extent practicable."[30] The USPSTF members are scholars with knowledge of preventive medicine and expertise in the analysis and evaluation of data relevant to preventive interventions.[31] The USPSTF had no role in Congress's decision to "repurpose" their work for application to the ACA.[32] Principal officers of the United States, such as members of the President's cabinet, possess sovereign authority over a portion of U.S. law, but we do not believe that the USPSTF members have such authority and surely should not be placed in the same category as members of the President's cabinet.

Congress, in deciding to utilize the USPSTF recommendations to inform mandated insurance coverage under the ACA, limited required coverage without cost-sharing to those preventive services given an A or B rating by the USPSTF. Specifically, the USPSTF assigns a grade to each recommendation based on the quality of the medical and scientific evidence associated with the recommendation.[33] A and B grades indicate that the USPSTF recommends the service because the net benefit is either substantial (A) or moderate (B).[34] A grade of C indicates that the USPSTF recommends the service selectively based on a physician's professional judgment about the individual patient's needs.[35] A grade of D indicates that the service is not recommended by the USPSTF, while a grade of I indicates that the evidence is insufficient for the USPSTF to make a judgment about the service.[36] In all cases, the USPSTF bases its recommendations on in-depth reviews of the available published scholarship on the preventive intervention.[37] The USPSTF's evidence-based recommendations on the respective benefit of preventive interventions fall into one of three categories:

[1] Screening, such as a mammography for breast cancer and a colonoscopy for colon cancer.
[2] Counseling, such as methods of smoking cessation or approaches to weight loss.
[3] Preventive medications, such as aspirin in the prevention of myocardial infarction.[38]

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[28] *AHRQ's Support of the USPSTF*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/task-force-resources/ahrqs-support-uspstf [https://perma.cc/8QKR-LEH2] (last updated February 2021).

[29] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4003(a)(6), 124 Stat. 541 (2010) (codified as amended at 42 U.S.C. § 299b-4).

[30] 42 U.S.C. § 299b-4(a)(6).

[31] *Our Members*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/current-members [https://perma.cc/3DQ6-RPMJ].

[32] *See* 42 U.S.C. § 300gg.

[33] *Grade Definitions*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/grade-definitions [https://perma.cc/Y36R-QB94] (last updated June 2018).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *USPSTF: An Overview*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/task-force-resources/uspstf-overview [https://perma.cc/9SVD-5CWT] (last updated Apr. 2021).

The USPSTF must submit yearly reports to Congress that present new recommendations and updates of previously issued recommendations.[39] To reiterate a central point the USPSTF makes its recommendations based solely on the strength of the medical evidence— evaluating the evidence is the substance of the work it does. The USPSTF has never had the authority to make policy regarding coverage decisions, and there is no text in § 2713 of the ACA that grants such authority.[40] Thus, the fact that USPSTF A and B ratings mandate zero-dollar coverage and carry the force of law is a requirement formulated by Congress, not by the USPSTF. The USPSTF, of course, has no authority to legislate. Since its inception and up to the present time, the USPSTF has focused solely on science, not policy or law. The USPSTF's recommendations have always been intended as a preventive health guide for physicians and their patients. It would be overreaching to claim that the subsequent use of the recommendations by Congress for coverage decisions suddenly transformed the USPSTF members into principal officers of the United States. Health care professionals who are familiar with the USPSTF and understand its work would be perplexed that the members would be considered officers of the United States.

Compare, for example, the USPSTF members to another group of agency officials, the administrative patent judges (APJs) that serve in the United States Patent and Trademark Office (USPTO). The APJs form a body within the USPTO referred to as the Patent Trial and Appeal Board (PTAB),[41] which will be discussed in greater detail later in this article. The purpose of the PTAB is to review the validity of patents that have previously been granted, and the APJs have the authority to adjudicate patent disputes between parties, administer the adjudication proceedings, and render decisions about whether or not patents have been validly issued.[42] As we will discuss subsequently, given the extent of their authority over matters of law, the APJs are indisputably officers of the United States.[43] In contradistinction, the USPSTF members do not have such authorities and, we believe, do not meet the necessary criteria to be officers of the United States. We will now examine the Appointments Clause in relation to principal and inferior officers.

I. The Purpose and Breadth of the Appointments Clause

The U.S. Constitution, Article II, § 2, sets forth the framework for appointment of "Officers of the United States."[44] It calls for the nomination of "principal Officer[s]" by the President and confirmation by the Senate.[45] The *Braidwood* plaintiffs initially argue that individuals serving on the USPSTF are not properly appointed as officers of the United States and thus have no authority to set forth guidelines for mandated coverage under the ACA.[46] In defense of their position, they argue that the USPSTF members were not appointed by the President nor confirmed by the Senate, as is required of principal officers under Article II, § 2, of the U.S. Constitution.[47] We contend, however, that the plaintiffs' characterization of USPSTF appointees as officers is incorrect and that there is no constitutional infirmity in the manner in which the members of the USPSTF are selected or otherwise operate. Indeed, the USPSTF is fully authorized to act in the capacity set forth in its enabling legislation, namely, to provide preventive services recommendations for primary care physicians and their patients.

The district court erred when it identified the USPSTF members as Officers of the United States. USPSTF members are specifically not political appointees of any nature. After decades of work by the

[39] Affordable Care Act, 42 U.S.C. § 299b-4(a)(2)(F).
[40] *See id.* § 300gg-13(a).
[41] *About PTAB*, U.S. Patent & Trademark Off., https://www.uspto.gov/patents/ptab/about-ptab [https://perma.cc/85NN-6PBP].
[42] *Id.*
[43] *See* discussion *infra* Section I.A.
[44] U.S. Const. art. I, § 2, cl. 2.
[45] *Id.* art. I, § 2.
[46] *See* Braidwood Mgmt., 627 F. Supp. 3d at 639.
[47] *Id.*

USPSTF members, there is no support for challenging their legitimacy as agency appointees (i.e., employees). The judgment of the district court is mistaken and should be reversed.

A. Who Are Officers of the United States?

Officers of the United States are subject to the Appointments Clause of Article 2, § 2, of the U.S. Constitution:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[48]

There are two essential features of Officers of the United States, both of which must be applicable to an individual designated as an officer.[49] One is that a federal officer involves "[a] position to which is delegated by legal authority a portion of the sovereign powers of the federal government."[50] This text clearly states that there must be a specific delegation of legal authority, and anything less than a clear delegation would not meet the definition of an officer. This criterion is similar to that established subsequently in *Lucia v. SEC.*[51]

The second feature is that the federal office must be "continuing," meaning that either it be "permanent" or even "temporary" but that it not be "personal, 'transient,' or 'incidental.'"[52] The USPSTF has existed continuously since 1984.[53] It has operated as set forth by Congress, carrying out its mission capably and without interruption. It does important work despite the voluntary, part-time status of its members. That is a hallmark of federal office.

The means by which an individual is appointed has sometimes been relied upon as an indication of whether the person is an officer.[54] For example, a person who was not appointed by the President alone, a Court of Law, or a Head of a Department must not qualify as an inferior officer.[55] Although this rationale might be criticized as being circular, it nonetheless may reflect whether the appointment was intended to establish an office. The fact that USPSTF members were not so appointed may be taken as a signal that Congress did not consider them to be officers.

B. Task Force Members Are Not Officers of the United States

The classification of the USPSTF appointees as officers is critical to this analysis because it affects whether there has been a violation of the Appointments Clause of Article II. If the USPSTF members were, in fact, intended by Congress to be principal officers of the United States but were not appointed by the President and confirmed by the Senate, there is a constitutional violation. But USPSTF members are specifically not officers of any nature; they are volunteers, and there is no history or text to support the claim that members were intended by Congress to be officers.[56] Since they are appointed for four-year

[48] U.S. Const. art. I, § 2, cl. 2.

[49] Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73 (2007) [hereinafter Meaning of the Appointments Clause].

[50] *Id.*

[51] Lucia v. SEC, 585 U.S. 237, 241-45 (2018).

[52] Meaning of the Appointments Clause, *supra*note 49, at 77.

[53] *See About the USPSTF*, *supra*note 7.

[54] Meaning of the Appointments Clause, *supra*note 49, at 115.

[55] *Id.* at 74-75.

[56] *See Our Members*, *supra*note 31.

terms with the possibility of a 1-year extension, they do fulfill the second requirement for a federal office, namely the "continuing" requirement.[57] Their work is not transient or incidental. As a general matter, advisors are not officers, and as stated by the Office of Legal Counsel in the Department of Justice:

> … an individual who occupies a purely advisory position (one having no legal authority), who is a typical contractor (providing goods or services), or who possesses his authority from a state does not hold a position with delegated sovereign authority of the federal government and therefore does not hold a federal office.[58]

The central question is the first requirement of a federal office, i.e., whether the USPSTF has been "delegat[ed] by legal authority a portion of the sovereign powers of the federal government."[59] When the USPSTF was initially formed, the development of recommendations regarding the prevention of disease was not intended to be a sovereign power that carried the force of law. On the contrary, the recommendations were made for primary care physicians to discuss with their patients and implement in their practice in keeping with their own professional judgment and patients' preferences.[60] The recommendations, based on the best available evidence, were intended to be guidance for physicians to apply with individual patients and not requirements that must be applied in all cases subject to a penalty. In other words, the application of the USPSTF recommendations in clinical medicine do not, and never have, carried the force of law. The recommendations are not regulations, and their implementation is solely at the discretion of physicians and patients.

Since it is known that cost-sharing —out-of-pocket payments, including copayments and coinsurance —may discourage the use of medical services,[61] the purpose of § 2713 of the ACA was to encourage members of the public and their physicians to adhere to A and B recommendations from the USPSTF, with the objective of promoting public health. Because coverage of A and B recommended services is mandated for most insurance plans according to § 2713 of the ACA,[62] this requirement was afforded the force of law by Congress (but not by the USPSTF).

The more complicated question is whether this sovereign power of the federal government carries the force of law because Congress or the USPSTF dictated it. Even though the USPSTF has the authority to assign the A and B ratings, it does not do so with the specific purpose of influencing insurance coverage. It was Congress that codified the statutory requirement that USPSTF A and B recommendations receive coverage without cost-sharing, not the USPSTF. The fact that the USPSTF assigns A and B ratings is a separate matter, and the assignments of the ratings do not intrinsically carry the force of law. USPSTF members are not policymakers, nor does the USPSTF have enforcement authority in the instance of violations by health insurance companies. The A and B ratings only carry legal significance because Congress, pursuant to the ACA, stipulated this requirement. In the district court proceedings, the government pursued this same argument.

However, on appeal at the Fifth Circuit, the government modified its position and now contends that USPSTF members are inferior officers.[63] If the USPSTF members are inferior officers, then they need to be appointed and supervised by a principal officer such as the Secretary of HHS.[64] Yet there is no

[57] *Procedure Manual Section 1. Overview of U.S. Preventive Services Task Force Structure and Proces*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/procedure-manual/procedure-manual-section-1 [https://perma.cc/DH2G-E2MW]; Meaning of the Appointments Clause, *supra*note 49, at 77.

[58] Meaning of the Appointments Clause, *supra*note 49, at 77.

[59] *Id.* at 78.

[60] USPSTF: An Overview, U.S. Preventive Servs. Task Force (2021), https://www.uspreventiveservicestaskforce.org/uspstf/sites/default/files/inline-files/uspstf-overview-fact-sheet-2021.pdf [https://perma.cc/5BFE-2XLV].

[61] Brian Schilling, *Hitting the Copay Sweet Spot*, The Commonwealth Fund, www.commonwealthfund.org/publications/newsletter-article/hitting-copay-sweet-spot [https://perma.cc/H8MZ-7TXZ].

[62] Affordable Care Act, 42 U.S.C. § 300gg-13.

[63] Opening Brief for the Federal Defendants at 14, Braidwood Mgmt. Inc. v. Becerra, No. 23-10326 (5th Cir. June 20, 2023).

[64] *See* U.S. Const. art. I, § 2, cl. 2.

statutory language that would allow the Secretary to appoint USPSTF members or to review their preventive service recommendations. Still, the government argues that "…if it is constitutionally necessary for the Secretary to have additional supervisory authority, nothing in the statutory scheme prevents the Secretary from declining to give a Task Force recommendation with an 'A' or 'B' rating legally binding effect."[65] The government also contends that the Secretary may ratify the extant USPSTF recommendations and assume the responsibility of appointing the current USPSTF members retroactively and new members prospectively (via the Secretary's supervision of the Director of AHRQ, who convenes the USPSTF).[66] The *Braidwood* plaintiffs, however, argue that there is nothing in the law that would give the Secretary this authority.[67] We will examine these conflicting arguments in the following section.

II. *Braidwood Management v. Becerra*: District Court Opinion

The district court ruled that the USPSTF does function as Officers of the United States, finding as follows:

> Defendants try to avoid that conclusion by insisting that PSTF makes "recommendations," not law. "PSTF's recommendations," Defendants argue, "are not exercises of the Executive or Legislative Power. They are 'evidence-based' scientific recommendations about the contemporary standard of care in preventive medicine." Defs.' Summ. J. Br. 56, ECF No. 64. But Defendants rely on a false dichotomy. That PSTF makes "scientific recommendations" says nothing about whether it exercises legislative power. Before Congress enacted the ACA, PSTF's recommendations were *merely* recommendations. Now, those recommendations have the force and effect of law.[68]

Despite its disagreement, however, the district court would have permitted "cure" of this issue via ratification of USPSTF recommendations by the Secretary of HHS had the court not found other constitutional infirmities that precluded such cure.[69] As noted previously, in its Fifth Circuit briefing and oral argument, the government suggests that the Secretary of HHS does have the prerogative to ratify USPSTF recommendations.[70] The legitimacy of USPSTF is an essential issue in the appeal of this matter.

The plaintiffs' allegations that USPSTF are officers include the "independence" of USPSTF and specifically the inability of the Secretary of HHS to "direct" the issuance of its ratings.[71] The plaintiffs observe that the Secretary of HHS, a political appointee, may not unilaterally or independently issue ratings, and conclude therefrom that such independence also precludes the Secretary from, after-the-fact, ratifying USPSTF recommendations to give them the force of law.[72] Congress directed the Secretary of HHS to select the time of implementation under the ACA of new A and B recommendations—no sooner than one year after the USPSTF issues them.[73] The selection of the timing of mandated coverage without cost-sharing, however, does not constitute the authority by the Secretary to review, amend, modify, or withdraw the USPSTF's recommendations.

The trial court in this matter held that USPSTF members are, in fact, principal officers, "'convene[d]' by the AHRQ Director"[74] in violation of the Appointments Clause of the U.S. Constitution. As officials

[65]Federal Defendants' Response and Reply Brief at 17, *Braidwood Mgmt.*, No. 23-10326 (5th Cir. Sept. 29, 2023).
[66]*Id.* at 25-28, 49.
[67]*Id.* at 26.
[68]*See* Memorandum Opinion & Order at 23, Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (No. 4:20-cv-00283-O).
[69]*Braidwood Mgmt.*, 627 F. Supp. 3d at 641, 645-48.
[70]Federal Defendants' Response and Reply Brief, *supra* note 65, at 2, 25.
[71]Brief of Appellees/Cross-Appellants Braidwood Management Inc., et al. at 17, *Braidwood Mgmt.*, No. 23-10326 (5th Cir. Aug. 7, 2023).
[72]*Id.* at 20-23.
[73]Affordable Care Act, 42 U.S.C. § 300gg-13(b).
[74]*Braidwood Mgmt.*, 627 F. Supp. 3d at 646 (alteration in original).

not appointed by the President nor confirmed by the Senate, the court held they fail to meet the status required to make coverage decisions under the ACA.[75] Despite acknowledging that their function is primarily to make medical recommendations, in this application those recommendations were found to carry the weight of law.[76] Finally, with respect to ratification by the Secretary of HHS, the district court held that "[b]ecause the Secretary lacks authority to determine or direct what services receive an 'A' or 'B' rating, he cannot ratify [US]PSTF's decisions on that subject."[77]

We contend that both the district court and the government in its Fifth Circuit argument are mistaken as to the definition of "officers." The USPSTF is an advisory body whose authority is to develop medical recommendations. It is not unusual for members of government advisory councils to work independently, and doing so pursuant to specific charge, does not make the members "officers." As already set forth above, statutory construction of "appointment" and "inferior officers" operating "under the supervision and direction of the Secretary,"[78] is inconsistent with the USPSTF's role as independent appointees assigned a specific task. They are nothing more than a task force, irrespective of how their task might eventually be implemented. When Congress first formulated § 2713 of the ACA, if Congress believed there was an Appointments Clause violation, Congress could have avoided the problem by including language in the statute, thus making the USPSTF recommendations reviewable by the Secretary. Congress did not see the need to take that action, most likely because Congress did not foresee an Appointments Clause violation. This is the most logical interpretation of the statute.

A. The Doctrine of Constitutional Avoidance

As an initial matter, a basic principle of statutory construction is that courts are urged to interpret statutes in a manner consistent with the Constitution. In this case, interpretation of the statute as consistent with the U.S. Constitution favors recognizing USPSTF members as exactly what they have always been held to be: convened by the AHRQ and tasked with making preventive health recommendations. The legal doctrine known as "constitutional avoidance" directs courts to make every effort to avoid ruling on the constitutionality of a statutory or regulatory issue if the matter can be resolved without doing so.[79] Justice Brandeis, in his concurring opinion in the U.S. Supreme Court decision *Ashwander v. Tennessee Valley Authority*, famously noted that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[80] Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[81] This principle is now well-established in the law.

B. The Independence Provision

With respect to *Braidwood* and the ACA, it is significant that the provision requiring that USPSTF members be independent and "to the extent practicable, free from political pressure," was added in 2010 at the time the ACA was enacted.[82] The "independence provision" was not present in the original 1998 version of the statute (Title IX), which sets forth the governing principles of the

[75] *Id.*

[76] *Id.* at 644.

[77] *Id.* at 641 (citing Consumer Fin. Prot. Bureau v. Gordon, 819 F. 3d 1191 (9th Cir. 2016)).

[78] U.S. Const. art. I, § 2, cl. 2.; 42 U.S.C. § 202.

[79] *Constitutional Avoidance*, Legal Info. Inst., https://www.law.cornell.edu/wex/constitutional_avoidance [https://perma.cc/5DRS-YUWX] (last updated Aug. 2022).

[80] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[81] *Id.*

[82] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4003, 124 Stat. 543 (2010) (codified as amended 42 U.S.C. § 299b-4).

USPSTF.[83] A comparable provision that was present in Title IX was the "Operation" provision, which states the following: "In carrying out its responsibilities under paragraph (2), the Task Force is not subject to the provisions of Appendix 2 of Title 5, United States Code."[84] Title 5, Appendix 2, details the statutory provisions for the Federal Advisory Committee Act (FACA). Provision (b)(3) of FACA reads as follows:

> Any [legislation establishing an advisory committee] shall … contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment.[85]

Thus, not only did the original statute, the Public Health Service Act,[86] not include the independence provision, but the original statute explicitly *excluded* application to the USPSTF of a comparable FACA "independence" provision.

It is especially meaningful that the independence provision was first applied to the USPSTF in 2010 when it was included in § 2713 of the ACA, which also mandated coverage without cost-sharing of the USPSTF A and B recommendations. Congress specifically formulated the independence provision to accompany the coverage mandate. Congress intended members of the USPSTF to be independent advisors, not "Officers of the United States." Congress was explicit that the USPSTF must be free of political influence in making its recommendations.[87] This is compatible with other task forces. Congress could then have greater confidence in the reliability of the A and B recommendations, which it then used for the purpose of determining which preventive services should be covered without cost-sharing. The most logical conclusion, consistent with the principles of constitutional avoidance, is that Congress explicitly did not appoint USPSTF members to be officers, instead opting for their independence from influence. The *Braidwood* plaintiffs argue that the independence provision confirms that USPSTF members are not inferior officers, since they are effectively unsupervised, but instead are principal officers.[88] We believe this argument goes too far and is not consistent with the statutory scheme, which was intended to provide independence for the USPSTF "to the extent practicable."[89] The independence provision was not intended by Congress to be a signal that USPSTF members became principal officers of the United States in 2010.

Congress ultimately has authority over the USPSTF and its recommendations. Congress could modify or even eliminate at its discretion any particular coverage mandate. For example, Congress could add grade C recommendations to those recommended for mandated coverage, or remove grade B recommendations from those recommended for mandated coverage. Congress could also remove the mandated coverage provision from §2713 altogether. Congress could also replace the USPSTF A and B recommendations as a basis for the coverage mandate with recommendations from another source. The most natural reading of the independence provision of § 2713, and the one that is consistent with the doctrine of constitutional avoidance, is that Congress wanted the USPSTF to function independently and not be politically influenced in making its A and B recommendations. Earlier in this article, we made the argument that USPSTF members are not principal officers, since they were not explicitly delegated a portion of the sovereign powers of the federal government.[90] To reiterate, Congress intended for this

[83]Healthcare Research and Quality Act of 1999, Pub. L. No. 106-129, § 915, 113 Stat. 1659-60 (codified as amended at 42 U.S.C. § 299b-4).

[84]*See id.*

[85]Federal Advisory Committee Act, Pub. L. No. 92-463, § 5(b)(3), 86 Stat. 771 (1972).

[86]Public Health Service Act, H.R. 5961, 117th Cong. (2022).

[87]*E.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4003(a)(6), 124 Stat. 543 (2010) (codified as amended 42 U.S.C. § 299b-4(a)(6)).

[88]Brief of Appellees/Cross-Appellants Braidwood Management Inc., et al., *supra* note 71, at 6-7.

[89]Affordable Care Act, 42 U.S.C. § 299b-4(a)(6).

[90]*See* discussion *supra* Section I.B.

advisory body to function with a level of independence "to the extent practicable"[91] in developing its preventive services recommendations. Congress deemed that the independence provision became necessary in 2010 to protect the integrity of the USPSTF's A and B recommendations, which Congress then began to utilize for the purpose of making coverage decisions.

If the Fifth Circuit Court of Appeals nevertheless sides with the *Braidwood* plaintiffs and rules that the USPSTF members are officers of the United States, the government argues that severability may be applied a remedy, and we will now examine this potential solution.

C. The Court Can Sever the Independence Provision if Necessary

In the alternative, if the Fifth Circuit were to find that USPSTF actions, absent formal supervision and oversight by the Secretary, were constitutionally deficient, a remedy would be to sever the sections[92] of the ACA that are objectionable. Recent precedent favors having an "unconstitutional provision … severed unless the statute created in its absence is legislation that Congress would not have enacted."[93] In so doing, the court would enforce any constitutional provisions that function independently and are compatible with the intent of Congress in enacting the statute. There are numerous examples of courts severing subordinate provisions of a statute when doing so enables the intent of Congress to be carried out.

One such example is *United States v. Arthrex, Inc.*,[94] which concerns the Patent Trial and Appeal Board (PTAB), a board comprising administrative patent judges (APJs) who hear challenges to patents previously granted by the Director of the US Patent and Trademark Office (USPTO).[95] Arthrex, a medical device company, had one of its patents reviewed and ruled invalid by the PTAB. The company brought suit claiming that APJs were in violation of the Appointments Clause because their patent rulings were not reviewable by the Director (even though the Director is a principal officer who is responsible for signing off on all issued patents).[96]

The Supreme Court, with Chief Justice Roberts writing for the majority, agreed that there was an Appointments Clause violation but employed a remedy for the constitutional violation.[97] The PTAB was established by the Leahy-Smith America Invents Act,[98] and the statutory text[99] indicated that only the PTAB could grant re-hearings of previously granted patents (without review of the decision by the Director). The Court's remedy consisted of severing this portion of the text to allow the Director of the USPTO to have the discretion to review the PTAB's decisions.[100]

In *Braidwood*, a comparable remedy by means of severance would "cure" the alleged constitutional infirmity. Under Title IX of the Public Health Service Act,[101] the AHRQ convenes the USPSTF, with the proviso that the recommendations of the USPSTF will be formulated independently (independence provision):

> All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.[102]

[91] 42 U.S.C. § 299b-4(a)(6).
[92] *Id.*
[93] United States v. Bonilla-Romero, 984 F.3d 414, 418 (5th Cir. 2020) (citing Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209 (2020)).
[94] United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).
[95] *About PTAB*, *supra* note 41.
[96] *Arthrex, Inc.*, 141 S. Ct. at 1978.
[97] *Id.* at 1986-87.
[98] Leahy-Smith America Invents Act, Pub. L. No. 112–29, §7, 125 Stat. 313 (2011) (codified as amended at 35 U.S.C. § 6).
[99] 35 U.S.C. § 6(c).
[100] *Arthrex, Inc.*, 141 S. Ct. at 1987.
[101] H.R. 5961.
[102] *Id.* at § 299b-4(a)(6).

Should the court find that the recommendations of the USPSTF must be reviewable by the Secretary, the text of the independence provision may be severed to permit the Secretary's review. Such a ruling by the court would accord with the court's authority to sever unconstitutional text from statutes and would follow the precedential ruling in *Arthrex*, in which a similar remedy was applied. Further, since the statutory language is modified by the language "to the extent practicable," the spirit of the provision is honored even if the Secretary is able to review USPSTF's recommendations.

In light of the important principle directing courts to construe statutes consistent with constitutionality, and the ready availability of severance by the court, as needed, there is no reason to find that the USPSTF or the Secretary did not act within its authority or, if necessary, to extend that authority. The parties cite numerous cases in which administrative agencies adjudicate claims and make independent judgments that carry the force of law.[103]

The district court was clearly troubled by the result in this matter: unelected USPSTF members who were appointed to make evidence-based recommendations about preventive health measures suddenly found themselves making decisions that "will bind insurance providers as forcefully as any law or regulation. And as the Supreme Court said of HRSA, [US]PSTF 'has virtually unbridled discretion to decide what counts as preventative care.'"[104] Indeed, the district court made clear its contempt for a process that ultimately allowed the USPSTF to wield significant power, even with Congress authorizing it:

> PSTF is tasked with determining the rating of individual preventive services, not decreeing what ratings are covered by insurance. Congress made the decision to give PSTF's recommendations the *effect* of required coverage. In other words, what matters are PSTF's "purposes," not the "incidental" effects of PSTF carrying out those purposes…. Whatever PSTF's assigned functions are (or whatever PSTF *thinks* its assigned functions are) is secondary to the power it wields in carrying out those functions. And that power is nothing short of dictating what preventive services insurance providers *must* cover. It is more troubling, not less, that Defendants insist the agency wielding that power is apparently not even cognizant of doing so. An officer is no less an officer because he is oblivious to the power he wields.[105]

If Congress shares the plaintiffs' or the district court's concern that administrative appointees, whose recommendations are not reviewable by the Secretary of HHS, are able to recommend preventive care coverages that may thereafter carry the force of law, it has full authority to modify that process. On the other hand, it is more likely that Congress intended to do just what it did: rely on an independent agency with the expertise of USPSTF in making such recommendations free of political influence "to the extent practicable" to achieve exactly the result as set forth in the legislation.

Although severance is not the preferred option in *Braidwood*, if the independence provision is severed, it must be done in a manner to preserve the intent of the statute for the members of the USPSTF to work independently in developing preventive services recommendations. Severance should be limited to permitting the Secretary of HHS to review A and B recommendations at the Secretary's discretion, but reviewability should stop there. Otherwise, there is the risk that the USPSTF recommendations will no longer be free of political influence, in conflict with Congress's original intent.

Conclusion

The USPSTF was established in the 1980s, long before passage of the ACA. Its function is to make recommendations about important preventive health services. Congress made the decision in 2010 to

[103] *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954) (Board of Immigration Appeals); Snead v. Barnhart, 360 F.3d 834, 838 (8th Cir. 2004) (Social Security Administrative Law Judges).

[104] Memorandum Opinion & Order, *supra* note 68, at 23 (quoting Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020)).

[105] *Id.* at 23-24.

repurpose its recommendations for use in the ACA and to ensure that the USPSTF's work was undertaken independently and without political influence. That is Congress's prerogative. However, doing so does not transform the USPSTF into officers of the United States. If Congress had wanted members of the USPSTF to serve as officers, it certainly could have done so. It did not. Of course, Congress ultimately has authority over the USPSTF and its recommendations, and it could modify or even eliminate the use of the USPSTF recommendations as a basis for health insurance coverage policy.

Braidwood is now under review by the U.S. Court of Appeals for the Fifth Circuit.[106] Although we side with the government in this case, it is not our purpose in this article simply to reiterate the government's argument, as we believe the argument we have formulated is more compelling. Still, in other recent cases dealing with federal agencies, the Fifth Circuit appears to have a negative view of the administrative state and seems intent on ruling against the role of federal agencies. If this trend continues, the court may rule against the government in *Braidwood*, which would have significant adverse consequences for public health. A different outcome is possible, based on the arguments presented in this article, and both the law and society would be well served.

[106]Braidwood Mgmt. v. Becerra, 104 F.4th 930 (5th Cir. 2024).

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