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Legal Sidebar

Preventive Services Access Heads to the Supreme Court: *Kennedy v. Braidwood*

April 11, 2025

On April 21, 2025, the Supreme Court is set to hear oral argument in *Kennedy v. Braidwood*, a constitutional challenge to a federal requirement on private health plans to cover clinical preventive services for millions of privately insured individuals. Established by the Patient Protection and Affordable Care Act (ACA; P.L. 111-148), this requirement generally compels most private-sector health plans and insurers to cover certain preventive services without cost-sharing (i.e., out-of-pocket costs) to their enrollees. Covered preventive services include certain services (such as various cancer screenings) recommended by the U.S. Preventive Services Task Force (Task Force), a body comprising a volunteer group of 16 national experts in preventive medicine and primary care. In *Braidwood*, the Supreme Court will consider whether the coverage requirements based on Task Force recommendations violate the Appointments Clause of the Constitution. This Sidebar provides an overview of the relevant background and the parties' arguments before the Supreme Court, and it highlights certain considerations for Congress.

Background

The Task Force and ACA's Preventive Services Coverage Requirement

First convened by the Department of Health and Human Services (HHS) in 1984, the Task Force is a volunteer group of national experts in fields such as internal medicine, pediatrics, geriatrics, behavioral health, obstetrics/gynecology, and nursing. In 1999, Congress enacted the Task Force's governing statute at Public Health Service Act (PHSA) Section 915, which authorized the Director of the Agency for Healthcare Research and Quality (AHRQ), an agency within HHS, to "periodically convene" the Task Force to "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services" to develop and update recommendations "for the health care community." The provision further directed AHRQ to provide "ongoing administrative, research, and technical support" to the Task Force, whose recommendations are generally reflected in one of five letter grades (A, B, C, D, or I). Services rated "A" or "B" are those recommended by the Task Force to be offered or provided on a routine basis to patients meeting certain criteria. PHSA Section 901 generally

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LSB11284

directs the HHS Secretary to "carry out" provisions including Section 915 by "acting through the Director" of AHRQ.

In 2010, Congress enacted the ACA, which in part established numerous market reforms designed to expand access to private health insurance, including a provision that linked Task Force recommendations to federal private health insurance coverage requirements. Under the ACA's preventive services coverage requirement (at PHSA Section 2713; 42 U.S.C. § 300gg-13), most private health plans and insurers must cover certain preventive health services with no out-of-pocket costs (such as a deductible or a co-pay) to insured individuals. The provision generally requires coverage of the following categories of services: (1) "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the [Task Force]"; (2) vaccines recommended by the Advisory Committee on Immunization Practices (ACIP); and (3) pediatric and women's preventive care and screenings specified in guidelines supported by the Health Resources and Services Administration (HRSA). The provision expressly requires the HHS Secretary to establish a minimum interval of no less than one year between when a relevant Task Force or ACIP recommendation is issued and when plans and insurers must begin to offer coverage of such service. It also authorizes the Secretary to develop guidelines to permit plans and insurers to utilize value-based insurance designs. In addition, the provision is subject to PHSA Section 2792 (42 U.S.C. § 300gg-92), which authorizes the Secretary to promulgate "necessary or appropriate" regulations "to carry out" the private health insurance requirements in PHSA Title XXVII.

In addition, the ACA amended the Task Force's governing statute, PHSA Section 915 (42 U.S.C. § 299b-4). Among the changes, the ACA broadened the intended audience for Task Force recommendations to include entities and individuals beyond the health care community, including policymakers, employers, and organizations developing national health objectives. The ACA also required (rather than authorized) the AHRQ Director to convene the Task Force and specified the Task Force's duties, including (1) reviewing and updating recommendations related to existing topic areas at least once every five years; and (2) submitting yearly reports to Congress and related agencies identifying gaps in relevant research. The ACA added a subsection entitled "Independence," which provides that "[a]ll 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." As amended, Section 915 does not specify how members of the Task Force should be appointed or removed. As implemented by AHRQ, Task Force members are selected to serve four-year terms. While an older Task Force procedure manual stated that members are selected by the AHRQ Director, the current manual states that members are selected by the HHS Secretary.

The Appointments Clause

The Appointments Clause—Article II, Section 2, Clause 2 of the Constitution—provides the method of appointment for "Officers of the United States." As interpreted by the Supreme Court, the Clause requires *principal officers* to be appointed by the President with the advice and consent of the Senate while authorizing Congress to vest the appointment of *inferior officers* in "the President alone, in the Courts of Law, or in the Heads of Departments." As the Supreme Court has stated, a basic purpose of the Clause is to ensure political accountability to elected officials for appointees' actions. Accordingly, the Supreme Court has held that individuals who "occupy a continuing position created by law" and "exercise[] significant authority pursuant to the laws of the United States" are "officers" subject to the appointment methods specified in the Appointments Clause.

To determine whether an officer is a principal or inferior officer, the Supreme Court has not set forth a defining standard, but it has identified several relevant factors. These factors include whether the officer's work is "directed and supervised" by a duly appointed principal officer, whether the officer is subject to removal at will (i.e., without specific cause) by the appointing official, and whether the officer's duties and tenure are limited in nature. The Court has indicated that where an officer decides matters involving

significant authority, adequate supervision requires, at a minimum, that a principal officer within the executive branch is authorized to review those decisions. An Appointments Clause problem could arise, for instance, when a statute directs an individual who is not appointed by the President and confirmed by the Senate to make final decisions on important matters that are binding on the executive branch.

Where the Supreme Court has identified an Appointments Clause violation, the Court may, depending on the specific statutory scheme, consider whether the violation could be cured by severing the unconstitutional portion. In *United States v. Arthrex*, for instance, a majority of Justices agreed that the authority exercised by administrative patent judges (APJs)—who, under the Leahy-Smith America Invents Act, are authorized to render final decisions regarding patent validity in certain proceedings—was inconsistent with their appointment as inferior officers. A different majority of Justices, however, declined to hold the entire statutory scheme unconstitutional, opting to sever a statutory provision precluding review of these APJ decisions by the Director of the Patent and Trademark Office, a principal officer. Because APJs are inferior officers "[i]n every respect save the insulation of their decisions from review within the Executive Branch," the Court reasoned, the proper course was to allow the Director to review final APJ decisions. In addition to severance, several appellate courts have held that in some circumstances, a duly appointed officer's ratification (i.e., independent approval) of a decision made by an improperly appointed official remedies the appointment defect for purposes of that decision.

The *Braidwood* Litigation

In *Braidwood*, a group of individuals and businesses with financial or other objections to insurance coverage of some or all currently required preventive services sued the HHS Secretary and other federal officials in March 2020, generally arguing that the preventive services requirement is unconstitutional and unenforceable. Among their claims, the plaintiffs asserted that the manner in which covered benefits are "unilaterally determined" based on Task Force, ACIP, and HRSA recommendations or guidelines violates the Appointments Clause. While the litigation was pending before the district court, then-HHS Secretary Xavier Becerra issued a January 2022 memorandum, "out of an abundance of caution," ratifying all preventive services coverage requirements, including those based on the Task Force's recommendations. In September 2022, the district court rejected the Appointments Clause challenge as to ACIP and HRSA but held that the coverage requirements based on Task Force recommendations violate the Appointments Clause. In June 2023, while the government's appeal was pending, then-Secretary Becerra also sought to ratify the appointments of the Task Force members.

On appeal, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) affirmed the district court's decision with respect to the Task Force. The court held that Task Force members are "principal officers" under the Appointments Clause because they wield the "indisputably significant" power to "promulgat[e] preventive-care coverage mandated for private insurers" and exercise this power "without any review by a higher-ranking officer." In the court's view, the HHS Secretary lacks the authority to review or revise the Task Force's recommendations because PHSA Section 915 "contemplates complete autonomy" by the Task Force. Section 915(a)(6)'s "Independence" provision, the court reasoned, evidenced "a clear and express directive from Congress that the Task Force be free from any supervision" because the Task Force "cannot be 'independent' and free from 'political pressure' on the one hand, and at the same time be supervised by the Secretary, a political appointee, on the other." For this reason, the court continued, the Appointments Clause problem also cannot be addressed through ratification by the Secretary, nor by severing Section 915(a)(6) because Congress did not bestow on the Secretary a fallback provision allowing him to exercise supervisory power. Based on this conclusion, the Fifth Circuit affirmed the district court's order enjoining the government from enforcing the coverage requirements based on Task Force recommendations against the plaintiffs. The government petitioned the Supreme Court for review of the Fifth Circuit's decision regarding the Task Force, and the Court granted the petition on January 15, 2025.

Parties' Arguments Before the Supreme Court

The government argues that the preventive services coverage requirements based on Task Force recommendations do not violate the Appointments Clause because Task Force members are inferior officers appointed by the HHS Secretary. In particular, the government argues that Task Force members are inferior officers because they are subject to constitutionally adequate supervision and control by the Secretary, a principal officer, because the Secretary can (1) remove Task Force members at will and (2) review and deny binding effect to the Task Force's "A" and "B" recommendations with respect to the preventive services coverage requirements.

In the government's view, Section 915 "imposes no limitations on removal," and the Secretary—through his authority to supervise AHRQ—is authorized to appoint Task Force members while "acting through the Director" of AHRQ. Accordingly, the government argues, the Secretary has "unfettered" power to remove Task Force members at will, given that "the power of removal of executive officers is incident to the power of appointment." This unfettered removal power, the government asserts, "ensures that [Task Force members] cannot exercise significant power free from control" by the Secretary. As examples, the government asserts that this removal authority allows the Secretary to "remove and replace Task Force members" if they decline to take up a proposal requested by the Secretary or to modify or rescind a recommendation as requested by the Secretary. In addition, the government argues that the Secretary's authority under PHSA Section 2713 to establish a minimal interval for when Task Force's "A" and "B" recommendations become effective as coverage requirements authorizes him to review and deny binding effect to those recommendations. This authority, the government asserts, allows the Secretary to "control[] whether and when the recommendations have binding legal effect" by "set[ting] a longer interval for a recommendation about which he has concerns and request that the Task Force study that recommendation further."

The government also argues that the Secretary has general regulatory authority under Section 2792 to prescribe additional supervision over the Task Force. The combination of these review authorities and the Secretary's removal authority, in the government's view, ensures that Task Force members are subject to sufficient control by the Secretary to render them inferior officers. In the government's view, Section 915(a)(6)'s "independence" requirement does not alter this conclusion because that requirement "does not address the relationship of the Task Force to HHS at all" and merely "clarifies that members must exercise their own medical and public-health judgments." To the extent this independence requirement precludes supervision by the Secretary, the government argues that the Court may, using the remedy it employed in *Arthrex*, sever the provision to cure any Appointments Clause violation.

The respondents, on the other hand, primarily argue that Task Force members are principal officers who cannot be subject to supervision and control by the HHS Secretary under Section 915(a)(6)'s independence requirement. This requirement, in the respondents' view, prevents the HHS Secretary from removing Task Force members at will because protection from such removal "is the very essence of an 'independent' officer." The requirement's specific direction that Task Force members and their recommendations be "not subject to political pressure," the respondents argue, meant that the provision does not merely shield Task Force members from external influences, but protects them from the Secretary's use of at-will removal power to, for instance, "browbeat" them into issuing recommendations they would otherwise be unwilling to confer. In addition, the independence requirement, the respondents argue, also precludes a higher-level officer from reviewing the Task Force recommendations for purposes of the preventive services coverage requirement. In the respondents' view, no provision—including in either PHSA Section 2713 or Section 915—empowers the Secretary to overrule the Task Force members' recommendations or direct their decisions. The Secretary's authority under PHSA Section 2713 to establish minimal intervals, the respondents argue, is limited to just that function and does not authorize the Secretary to approve or review the Task Force's recommendations. Because no provision authorizes

the Secretary to review and modify the preventive services coverage requirements based on Task Force recommendations, the respondents argue that severing the Section 915's independence provision would not cure the Appointments Clause violation. As a result, the respondents argue that because the relevant, legally binding coverage requirements are made by Task Force members who are not appointed by the President and confirmed by the Senate, such coverage requirements violate the Appointments Clause and cannot be enforced.

Considerations for Congress

The Supreme Court could reach a few possible outcomes in *Braidwood*. The Court, for instance, could affirm the Fifth Circuit and hold that PHSA Section 2713's preventive services coverage requirements based on Task Force recommendations violate the Appointments Clause and that the violation cannot be cured without further legislative action by Congress. Such a holding may render the relevant portion of Section 2713 unenforceable, meaning that private health plans and insurers would not be obligated to cover Task-Force-recommended benefits without cost-sharing, although insurers could continue to provide such benefits voluntarily or potentially in accordance with any applicable state law requirements. Alternatively, the Court could find an Appointments Clause violation, but determine that the violation could be cured. The Court could find, for instance, that the Secretary may promulgate regulations under PHSA Section 2792 to prescribe a process for reviewing and modifying coverage requirements based on Task Force recommendations and remand the matter to HHS accordingly.

It is also possible that the Court could adopt the government's argument and find that there is no Appointments Clause violation because Task Force members are adequately supervised and controlled by the HHS Secretary. Such a decision may address the degree to which the HHS Secretary may exercise such control over the Task Force and the recommendation process. One possible way to characterize the Task Force's recommendations is that they serve two distinct purposes: (1) the entirety of the recommendations covering all five letter grades are intended to provide nonbinding guidance to a broad audience, including the health care community, policymakers, and community organizations, regarding whether and to whom certain clinical preventive services should be offered; and (2) a subset of those recommendations—that is, services rated "A" and "B"—are also legally binding coverage requirements on private health plans and issuers. Under the government's view of the relationship between the HHS Secretary and the Task Force, the Secretary's control of Task Force members would appear to apply throughout the recommendation development process, from the consideration of proposals to the making of final recommendations. If so, the Secretary's control may potentially affect both the binding and nonbinding aspects of the Task Force's work.

Congress, to the extent it determines appropriate, may consider various legislative actions that may affect or respond to any potential outcome in *Braidwood* case. For instance, federal lawmakers could clarify in PHSA Section 2713 whether the HHS Secretary is authorized to review and modify coverage requirements based on Task Force recommendations. Congress could also clarify the manner of Task Force members' appointment and removal, and the process by which their recommendations may be used for different purposes.

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