When Will CMS “Pull the Trigger?” The Independent Payment Advisory Board and the Future of Medicare Cost-Containment Policy: A Coming Constitutional Clash

Nicholas Sumski*

Introduction

Although Congress enacted the Patient Protection and Affordable Care Act (“ACA” or “the Act”) on March 23, 2010, the Act’s numerous provisions, many of which promise to make fundamental changes to the American healthcare system, just began implementation in January 2014.¹ Some provisions have been delayed in their entirety, while still others have yet to be fully implemented.² The Independent Payment Advisory Board (“IPAB” or “the Board”) serves as an example of one of the Act’s provisions that will not be fully implemented until 2015.³ Though the Board has yet to


² See, e.g., Nather, supra note 1 (referencing Justice Sotomayor’s removal of contraceptive coverage requirement from ACA).

be established, the IPAB has already been described as one of the Act’s “most intriguing and controversial provisions” with an “authority [that] is nothing short of remarkable” and it once again raises the specter of “death panels” into the lexicon of healthcare reform.\(^4\)

The ACA’s drafters introduced the IPAB as a means to delegate tough cost-


[the America I know and love is not one in which my parents or my baby with Down Syndrome will have to stand in front of Obama’s ‘death panel’ so his bureaucrats can decide, based on a subjective judgment of their ‘level of productivity in society,’ whether they are worthy of health care.

cutting decisions concerning the Medicare program from Congress to the Board. The IPAB is designed to consist of a fifteen-member panel of healthcare policy and economic experts. As detailed in its enabling statute, the implementation of the Board's recommendations will not be subject to either administrative or judicial review. The statutory language provides Congress a very short time frame to consider amendments to the Board's recommendations. Furthermore, should Congress be dissatisfied with the Board's recommendations, the Act mandates that either Congress or the Secretary of the Department of Human Health and Services ("the Secretary") must implement their own savings recommendation, which will comply with the savings formula articulated in the statute. The Board's controversial provisions have already attracted litigation challenges over the constitutionality of such an entity.

By constraining judicial oversight and delegating legislative authority to the executive branch, the Board seemingly runs roughshod over the separation of powers principle between the three branches of government.

This Note will explore whether the IPAB, as currently established by the ACA, is constitutional. Part I will discuss the history and role of judicial review and the separation of powers doctrine, with a specific focus on the delegation of legislative authority to executive agencies. While the policy arguments for and against the existence of the Board are beyond the scope of this Note, Part I will also address the failures of Medicare cost-control reform to date, thus illuminating the potential reasons why such a powerful entity was implemented in the first place. Part II will discuss the

5 See Furrow et al., supra note 4, at 457 (introducing Board's isolation from Congress). See also Ezra Klein, Can We Control Costs Without Congress?, WASH. POST (Mar. 26, 2010, 2:46 PM), available at http://voices.washingtonpost.com/ezra-klein/2010/03/can_we_control_costs_without_c.html (discussing possibility of controlling healthcare costs without Congressional oversight). The vast powers of the Board did not escape notice of members of the Obama administration, including Peter Orszag, the Director of the Office of Management and Budget. Id. Klein comments on the powers of the IPAB and includes a quote from by Orszag, one of the Board's chief supporters: "I believe this commission is the largest yielding of sovereignty from the Congress since the creation of the Federal Reserve." Id.

6 See infra note 103 and accompanying text (detailing composition of Board).


8 See infra notes 125-32 and accompanying text (detailing timeline and limitations on Congressional consideration).

9 See infra note 131 and accompanying text (discussing these requirements).

10 See infra note 45 and accompanying text (discussing district court and subsequent U.S. Court of Appeals decision including constitutionality of Board).

11 See infra Part III (criticizing removal of multiple branches of government protections).
extensive powers of the IPAB to make massive changes to the healthcare system, and the controversy stemming from such powers. Part III will analyze the arguments regarding the constitutionality of the Board. Though the earliest the IPAB will potentially act is not until 2017, a critical discussion of the powers of this Board and its potential to dictate Medicare cost-containment policy is a worthwhile endeavor. Part III will argue that the Board, as it currently exists, is most likely constitutional and would survive further appellate review at the Supreme Court. Despite the likelihood of the constitutionality of the Board, however, the structure of the IPAB represents a potentially problematic degree of legislative and judicial deference to the executive branch to make far reaching cost cutting decisions. It is hoped that this paper’s analysis of the IPAB, a rarely discussed provision of the ACA, will contribute to the ongoing national discussion of this important issue.

I. History

A. Judicial Review

The Board’s recommendations are precluded from judicial review. The term “judicial review” refers to the power federal courts wield in interpreting federal statutes, reviewing statutes' constitutionality, and the power to ultimately strike down any statute violating the Constitution. However, there is no explicit provision in the United States Constitution that authorizes judicial review. Despite the lack of a Constitutional provision authorizing judicial review, many of the Founding Fathers argued in favor of the concept. Still, this absence of explicit authorization of judicial review in the

---

12 See infra note 122-24and accompanying text (explaining why the earliest possible time the Board will act is 2017).
13 See Patient Protection and Affordable Care Act, 42 U.S.C. § 1395kkk(e)(5) (2010). See also Marbury v. Madison, 5 U.S. 137 (1803) (establishing bounds of judicial review). Federal courts have the authority to review statutes as enacted by Congress, a primary tenant of the United States’ system of government as articulated in Marbury v. Madison. Id.
15 Id. at 890.
16 See Alexander Hamilton, James Madison & John Jay, THE FEDERALIST No. 78, 467 (John Harvard Library 2009) (eliciting agency principles in defense of judicial review); Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 CORNELL L. REV. 393, 503 – 05 (1996) (noting Hamilton's arguments in favor of judicial review); Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L. J. 1425, 1434 (1987) (articulating that the Founders recognized judicial review was permissible). Pushaw, Jr. notes, however, that even Hamilton acknowledged some scenarios in which the government could rebut the presumption of judicial review, most notably when situations arise where the need for efficiency gives political actors unchecked power to make decisions. Pushaw, 81 CORNELL L. REV. 503-05.
Constitution has led some critics to suggest that the Founders did not contemplate that the judicial branch’s powers would include the ability to strike down laws, and thus argue that the practice should be abandoned. Others have argued that shifting political landscapes have led the Supreme Court, at times, to be particularly active in striking down laws through judicial review. Most scholars, however, agree that judicial review is an important and properly construed power of the judicial branch of government that is, in fact, derived from a textual analysis of Article III of the Constitution, in particular Section 2’s “arising under the Constitution” language.

The Supreme Court’s decision in *Marbury v. Madison* is credited with establishing a precedential foundation for judicial review. After losing the 1800 presidential

---


18 See, e.g., Kramer, supra note 17, at 115-16 (noting Court’s affirmatively active role in rapidly evolving political climate during 1857 Dred Scott decision).

19 See generally U.S. CONST. art. III, § 2, cl. 1. “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .” Id. (emphasis added). The Constitution declared that the federal judiciary had the power over all types of cases through the “arising under the Constitution” language in section 2 of Article III. Prakash and Yoo, supra note 14, at 901. “Indeed, numerous members of the founding generation understood that this language expressly authorized the federal courts to measure the constitutionality of federal statutes against the Constitution.” Id. While it is often assumed that the judicial branch, and specifically the Supreme Court, is the sole interpreter of the Constitution, the Framers envisioned that the President would also have an independent and important power to interpret and defend the Constitution. Akhil Reed Amar, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 179 (2005). During the ratifying debates in Pennsylvania, it was understood that Article II’s executive review followed and mirrored Article III’s judicial review. Id. at 181.

20 See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (noting judicial branch is responsible for declaring laws of United States); Graber, supra note 17, at 4-5 (discussing precedent established by *Marbury* for judicial review). While precedent existed in state courts and lower federal courts where judges refused to uphold laws that they thought were in contradiction of the state or federal constitution, Chief Justice John Marshall’s *Marbury* opinion was the first statement of the doctrine of judicial review by the Supreme Court of the United States. *THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS* 204 (Kermit L. Hall & James W. Ely Jr. eds. Oxford University Press 2nd ed. 2009) [hereinafter “*THE OXFORD GUIDE*”). The issue in *Marbury* concerned President John Adam’s infamous appointment of the Federalist “midnight judges” in the weeks after Adams lost the 1800 Presidential election to Republican Thomas Jefferson. Id. at 203. In order to increase the influence of the Federalists, President Adams appointed a large number of Federalist partisans after he lost the election to Jefferson, but before Jefferson took office. Id. One of the appointments included William Marbury as a justice of the
election to Republican Thomas Jefferson, Federalist President John Adams infamously appointed several federalist-leaning justices, dubbed "the midnight judges," in his final days in office to ensure continued Federalist influence in the Jefferson administration. To decide the issue at bar, Chief Justice John Marshall compared Article III's text with Section 13 of the Judiciary Act of 1787. Marshall ruled that Section 13 conflicted with the federal Constitution, holding that Marbury was an appointed justice of the peace and thus had a vested legal right in the commission from that appointment. Notably, Marshall declared, "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

In constructing his opinion, Marshall relied heavily on Publius's arguments in The Federalist No. 78. Marshall noted the special role the judiciary holds in nations that use written constitutions and articulated the argument that judges must not only interpret the law, but also judge whether or not the law itself is constitutional. Though precedent for judicial review existed in state courts and lower federal courts prior to the Marbury decision, Chief Justice Marshall's opinion in Marbury represented the first articulation of the doctrine by the Supreme Court of the United States. The Court did not again consider the issue of judicial review until 1857's Dred Scott v. Sanford decision.

peace. *Id.* James Madison, as the newly appointed secretary of state for President Jefferson, refused to deliver Marbury's signed and sealed commission for his justice of the peace appointment. *Id.*

*21 Id.*

*22 See Marbury, 5 U.S. at 155.*

*23 See THE OXFORD GUIDE, supra note 20, at 204 (describing Chief Justice Marshall's legal and historical analysis of judicial review).*

*24 See Marbury, 5 U.S. at 162.*

*25 Id. at 180.*


*27 See Marbury, 5 U.S. at 177 (for Marshall's explanation of the relationship between society and written constitutions). "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id.* at 177.*

*28 See generally THE OXFORD GUIDE, supra note 20, at 204 (describing prior historical instances establishing judicial review).*

*29 See THE OXFORD GUIDE, supra note 20, at 205 (detailing role and application of judicial review as a rarely litigated concerned after Marbury). But see AKHIL REED, supra note 19, at 229-32.*
Marshall's *Marbury* opinion laid the framework for judicial review, but as case law developed after the 1803 *Marbury* decision, the doctrine evolved into many different principles of judicial review. The more common usage of judicial review in the federal courts occurs when the substantive content of statutes and judicial decisions created in the states are reviewed for conflicts with the federal Constitution. While examples abound of substantive judicial review, the Supreme Court has been much more hesitant to entertain judicial review of the legislative process itself. Despite the fact that these principles of judicial review vary slightly in their application, the doctrine nonetheless serves an important purpose in a government of limited powers: judicial review reduces the likelihood that important fundamental rights will be infringed upon.

Imaginative legislatures have sought to restrict judicial review to reduce the potential that an active judiciary will overzealously strike down legislation. Congress and the courts have been involved in a centuries-long tug of war between permitting and restricting judicial review. A recent iteration of this phenomenon is exemplified by the

---

(asking that *Marbury*’s importance is overblown); Graber, *supra* note 17, at 610 (arguing Judiciary Act of 1789 did more than *Marbury* to establish bounds of judicial power).

30 *See* Ittai Bar-Siman-Tov, *The Puggling Resistance to Judicial Review of the Legislative Process*, 91 B.U.L. REV. 1915, 1921-26 (2011) (defining three variations on judicial review). The author posits discussions of judicial review are confusing because terms sometimes overlap, describing the same model of judicial review, while other times the very same term might refer to a dissimilar approach. *Id.* The author distinguishes the variations by suggesting there are three approaches: “judicial review of the legislative process,” “substantive judicial review,” and “semi-procedural judicial review.” *Id.*

31 *See* The Oxford Guide, *supra* note 20, at 204. This type of judicial review is called “substantive judicial review.” *Id.* Bar-Siman-Tov, *supra* note 30, at 1923. “In its ‘pure form,’ substantive judicial review is not interested in the way in which the legislature enacted a law; it is interested merely in the result or outcome of the enactment process.” *Id.*

32 *See* Bar-Siman-Tov, *supra* note 30, at 1917. “The prevalent view is that judicial review of the legislative process is somehow less legitimate than the classic model of judicial review, which grants courts power to scrutinize the content of legislation and to strike down laws that violate fundamental rights.” *Id.* at 1918.

33 *See* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1699 (2008) (commenting on arguments in favor of, and against, judicial review). “If judicial review reduces the likelihood that important rights will be infringed upon, then it may actually enhance, rather than undermine, a governmental regime’s overall political legitimacy.” *Id.* The author notes that the courts have a “distinct perspective” that makes them more suited to identify potential risks of rights violations than the legislature. *Id.* at 1700.


35 *See* Paul R. Vekuil, *Congressional Limitation on Judicial Review of Rules*, 57 TUL. L. REV. 733 (1983) (describing persistent questions regarding Congressional limitation of judicial review). The author describes the “cat and mouse game” played between Congress and the courts on this
Department of Justice’s (“DOJ”) efforts in attempting to insulate immigration decisions from scrutiny by the federal courts. In the wake of the September 11, 2001 terrorist attacks, then Attorney General John Ashcroft announced “streamlining” reforms to immigration proceedings at the agency’s Board of Immigration Appeals, which drastically limited the federal court’s judicial review power. The DOJ argued that its decision to streamline a case should be viewed as a discretionary “resource-allocation decision,” arguing that it is one of the narrow exceptions to the traditional presumption that agency decisions are subject to judicial review. These streamlining reforms exemplify the growing tension between federal agency deference and judicial review.

Some critics have argued that aggressive judicial review unduly burdens the functions of agency administration. Such burdens include an increase in agency regulation costs and resource misallocation because agencies are compelled to implement excessively detailed procedural structures in an attempt to proactively address the judiciary, rather than focusing their time and efforts on addressing the particular problems under the agency’s purview. Particularly in the case of highly technical or scientific fields, giving unspecialized judges the power to attack and strike down agency-created regulations, which are composed of experts in the field in question, is arguably a questionable policy decision. Indeed, an overactive judiciary can be seen as disrupting an agency’s larger agenda because judges focus on limited facts or issues of the particular point, acknowledging that the court sometimes will accept preclusion on review while other times they will fight such a preclusion. Id. at 737. “The proposition these situations pose is that judicial review may be severely circumscribed or terminated altogether when there are compelling countervailing interests in swift and final administrative resolution.”


37 See id. The most controversial of these procedures was the “affirmance without opinion” procedure, which allowed individual Board members the power to affirm immigration judges’ decisions without writing any opinion or explanation for the holding. Id.

38 Id. at 835. The author fears that these streamlining reforms, if left unchecked, threaten to undermine judicial review. Id. at 837. “The DOJ’s pursuit of absolute discretionary authority via streamlining has spawned untenable conflicts between the principles of judicial review and agency deference in the federal courts.”

39 See Rana, supra note 36, at 876–78.


41 Id. at 1019–20. “Aggressive judicial review ‘can impose a burden of proof on an agency that is extremely difficult – read extremely expensive – or impossible to meet.’” Id. at 1022 (citing John S. Applegate, Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control, 9 YALE J. ON REG. 277, 297 (1992)).

42 Id. at 1029. “The judicial process purposely isolates judges from the real-world effects of their decisions.” Id.
case without necessarily questioning the long-term consequences and impact of their decisions.43

B. Non-delegation Doctrine & Separation of Powers Doctrine

When statutes include a prohibition on judicial review, further constitutional objections arise, including the non-delegation doctrine and the separation of powers doctrine.44 Critics of the IPAB also argue that the Board represents an impermissible delegation of Congressional law-making authority to politically unaccountable executive branch appointees, thus representing a violation of the basic tenants of the United States’ separation of powers doctrine.45 To appreciate these criticisms of the Board’s authority, one must examine the tenants of the non-delegation doctrine, which establish when and in what circumstances Congress may delegate some of its legislative powers to the executive branch.46

43 See id. at 1032.
44 Vekuil, supra note 35, at 736.

The constitutional source of objections to denial of judicial review comes not only from the judicial power described in article III, but also from the doctrine of separation of powers and the fifth amendment due process clause. These three provisions interrelate to form the limits upon Congress’ power to restrict judicial review of agency decisionmaking.

Id.
45 Coons v. Lew, 762 F.3d 891 (9th Cir. 2014). In Coons v. Lew, the Ninth Circuit Court of Appeals refused to review the non-delegation issue because it did not satisfy Article III’s requirement of ripeness. Id. at 897. Coons v. Lew was an appellate review of an Arizona district court’s dismissal of a constitutional challenge against the IPAB. Coons v. Geithner, 2012 U.S. Dist. LEXIS 124196 (Ariz. Dist. Ct. 2012). See Bagley, supra note 4, at 570 (describing IPAB’s potential separation of powers issue); Timothy Stoltzfus Jost, Focus on Health Care Reform: The Independent Medicare Advisory Board, 11 YALE J. HEALTH POL’Y L. & ETHICS 21, 22 (2011) (eliciting non-delegation critiques of IPAB); Coons v. Geithner (Federal Health Care Lawsuit), GOLDWATER INSTITUTE, (posted on Aug. 12, 2010), http://goldwaterinstitute.org/article/coons-v-geithner-federal-health-care-lawsuit (last visited Oct. 2, 2014) (arguing that IPAB exemplifies an impermissible and thus unconstitutional delegation of legislative authority). Jost noted that the delegation of authority by Congress to the IPAB may be challenged as violating separation of powers principles. Indeed, the Goldwater Institute filed a lawsuit against the ACA, specifically arguing that the Act’s creation of the IPAB is an unconstitutional delegation of Congressional powers to an unelected and unaccountable body. Id.
46 Jost, supra note 45, at 30-31. The Supreme Court first addressed issue of permissible versus impermissible Congressional delegations in its decision in Wayman v. Southard. See 23 U.S. 1 (1825) (finding necessary and proper clause of Constitution gives delegation right to Congress); David M. Richardson, Note: American Trucking Associations v. EPA: The Phoenix (“Sick Chicken”) Rises from the Ashes and the Nondelegation Doctrine is Revived, 49 CATH. U.L. REV. 1053, 1059 (2000) (recalling the facts of the Wayman decision). Chief Justice Marshall held that the Congress’ delegation to the federal judiciary the power to establish rules governing practice within the
1. **Doctrine defined:** Panama Refining Co. v. Ryan, A.L.A. Schecter Poultry Corp. v. United States, and the "intelligible principle" standard

The non-delegation doctrine originates from Article I, section 1 of the U.S. Constitution. While the language of Article I appears to preclude any delegation of power by Congress, scenarios exist where Congress can permissibly delegate legislative power, so long as such delegations are based on an "intelligible principle." Even though the non-delegation doctrine can be traced back to the Founding Fathers' era, the Supreme Court did not strike down any laws pursuant to this rationale until two notable decisions in 1935, both of which nullified provisions of the National Industrial Recovery Act ("NIRA"). The NIRA gave the President broad authority — an impermissible degree of authority, as ultimately decided by the Court — to revitalize the national economy in the wake of the Great Depression. In *Panama Refining Co. v. Ryan*, the Court struck down a provision of the NIRA which granted the President power to

---

federal court system was a permissible delegation. *Id.* The Chief Justice wrote, “it will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. *Id.* But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.” *Wayman*, 23 U.S. 1 at 43.

47 U.S. CONST., art. I, § 1. “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” *Id.* See Evan J. Criddle, *Article: When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 119-20 (2011). The Founding Fathers, who were “steeped in classical republican theory,” framed Articles I and II of the Constitution with an express system of checks and balances to prevent any single branch of the government from enacting arbitrary laws. *Id.* These legislative checks and balances were implemented to promote transparency between both houses of Congress and the Executive. *Id.* at 133. This system was introduced to also force deliberation of public policy goals and to prevent the potential of a particular branch hijacking the legislative process. *Id.*

48 Richardson, *supra* note 46, at 1057-58. Chief Justice William Howard Taft wrote a very clear articulation of the non-delegation doctrine in *J.W. Hampton, Jr. & Co. v. United States*, which has guided non-delegation doctrine jurisprudence to this day. 276 U.S. 394, 409 (1928). “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *Id.* The “intelligible principle” standard has survived as “one of the doctrine’s best articulations.” Richardson, *supra* note 46, at 1057. *But see* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?,* 83 MICH. L. REV. 1223, 1224 (1985) (criticizing intelligible principle test as impermissibly vague). “[The intelligible principle test] has allowed the interpretation of the delegation doctrine to swing like a pendulum with the changing politics of the Court and the times.” *Id.*


restrict the transportation of "hot oil" petroleum and petroleum products. Noting the lack of guidelines and parameters in the particular statute to guide the President's decision-making, the Court struck down the provision as an unconstitutional delegation of authority from Congress to the President.

A.L.A. Schechter Poultry Corp. v. United States questioned a different provision of the NIRA, in which the Court considered whether Section 3 was an impermissible delegation of legislative power to the President of the United States. The proposed entrustment of regulatory powers in Schechter was even broader than in Panama Refining Co., for the President could impose his own conditions in adding or removing what was proposed "as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the Act." The Court concluded that the NIRA provision lacked any "intelligible

51 See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The statute in question was § 9(c) of the NIRA, which provided, in part:

The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State.

Id. at 406; Criddle, supra note 47, at 138.

52 See Panama Refining Co., 293 U.S. at 415, which stated in part:

Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action...it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

Id.

"The question of whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute."

Id. at 420.


54 Id. at 538-39. The Court noted that the NIRA provision's use of "codes of fair competition" language was vague and feared that the President might use the language to justify a broad range
principle” to guide the President and thus, the provision in question was an unconstitutional delegation.\textsuperscript{55}


For approximately fifty years after \textit{Panama Refining Co.} and \textit{Schechter}, the Supreme Court refused to strike down a single federal statute on the grounds of the non-delegation doctrine and, in fact, upheld several delegations of lawmaking authority to administrative agencies.\textsuperscript{56} Though the Court entertained several challenges regarding non-delegation, the Court refused to strike down any statutes through an application of the doctrine.\textsuperscript{57} Indeed, in a dissenting opinion in \textit{Mistretta v. United States}, Justice Antonin Scalia noted in passing that the Court was cognizant of its tenuous justification to utilize the non-delegation doctrine to strike down Congress’ delegation of authority to administrative agencies as he outlined his reasons for disagreeing with the majority’s holding.\textsuperscript{58} However, due to the growing power and vast discretionary abilities wielded of potential actions. \textit{Id.} at 531. The Court held that without any rules to govern Presidential conduct, other than the general aims of rehabilitation, correction, and expansion provided in section 1 of the act, the discretion of the President in approving codes for regulating trade and industry throughout the country would be virtually unfettered. \textit{Id.} at 541. The Court thus struck down the statute as unlawful because it represented an unconstitutional delegation of legislative power to the Executive. \textit{Id.} at 541-42.

\textsuperscript{55} Driessen, \textit{supra} note 49, at 17-18.

\textsuperscript{56} See Criddle, \textit{supra} note 47, at 142. “By the late 1970s, the nondelegation doctrine was close to becoming, if it had not already, an antiquated constitutional principle.” \textit{See also} Richardson, \textit{supra} note 46, at 1064-65, (quoting William F. Fox, Jr., \textit{Understanding Administrative Law} 34, 38 (3d ed. 1997)); Lisa A. Cahill and J. Russell Jackson, \textit{Nondelegation after Mistretta: Phoenix or Phaethon?} 31 WM & MARY L. REV. 1047, 1049 (1990) (confirming that \textit{Schechter} continues to be “good law”).

\textsuperscript{57} \textit{See}, e.g., Yakus \textit{v.} United States, 321 U.S. 414 (1944); Mistretta \textit{v.} United States, 488 U.S. 361, 373 (1989); Touby \textit{v.} United States, 500 U.S. 160 (1991); Loving \textit{v.} United States, 517 U.S. 748 (1996); \textit{See also} Bressman, \textit{supra} note 50, at 1405.

\textsuperscript{58} \textit{See} \textit{Mistretta}, 488 U.S. at 413. Justice Antonin Scalia’s dissent in \textit{Mistretta} perhaps elucidates the reluctance of the Court to utilize the non-delegation doctrine. \textit{See id.} Scalia articulates that no statute can be entirely precise in its construction, “and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.” \textit{Id.} at 415. He continued, noting:

[I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago. . . . What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we
by modern executive agencies, several judges and scholars have urged the Supreme Court to revive the doctrine.\textsuperscript{59} The Court acknowledged these pleas and resurrected the doctrine in \textit{Industrial Union Department v. American Petroleum Institute}, commonly known as "the Benzene case."\textsuperscript{60} The point at issue in the Benzene case revolved around a regulation the Secretary of Labor promulgated regarding the acceptable level of occupational exposure to benzene, a chemical that had been shown to cause leukemia when individuals were exposed to high levels of the substance.\textsuperscript{61} Noting the lack of any causal evidence to show that reducing benzene exposure to the arbitrarily instituted level would lower the risk of leukemia, the Supreme Court upheld the Court of Appeal's judgment that the statute was unconstitutional.\textsuperscript{62} In a concurring opinion, Justice Rehnquist revived the non-delegation doctrine in his reasoning to support striking down the statute.\textsuperscript{63} 

\textit{Id.} at 416.


\textsuperscript{60} See \textit{Industrial Union Dep't v. API}, 448 U.S. 607 (1980); Richardson, \textit{supra} note 46, at 1066 (providing Court's reasoning in Benzene case).

\textsuperscript{61} See \textit{Industrial Union}, 448 U.S. at 607, 612-14, 639. The Occupational Safety and Health Act of 1970 promulgated a standard, which reduced the permissible exposure level of benzene in the workplace from 10 parts benzene per million parts of air ("ppm") to 1 ppm. \textit{Id.} at 613. Implementing this standard would have required a large capital investment for new equipment, training procedures, and recurring annual costs of $34 million. \textit{Id.} at 628-29. The Supreme Court had to determine whether the Court of Appeals was correct in refusing to enforce the 1 ppm exposure limit on the grounds that this limit was not based on appropriate evidence. \textit{Id.} at 630.

\textsuperscript{62} \textit{Id.} at 662.

In the end OSHA's rationale for lowering the permissible exposure limit to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of benzene and that it will \textit{not} be caused by exposure to 1 ppm, but rather on a series of assumptions indicating that some leukemias might result from exposure to 10 ppm and that the number of cases might be reduced by reducing the exposure level to 1 ppm.

\textit{Id.} at 634 (emphasis in original).

\textsuperscript{63} See \textit{Industrial Union}, 448 U.S. at 685-86.

We ought not shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era. . . . Indeed, a number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators.
Shortly after the Benzene decision, the non-delegation doctrine was featured prominently in *American Trucking Associations v. United States EPA* ("American Trucking").64 In *American Trucking*, a three-panel judge for the Court of Appeals for the D.C. Circuit struck down newly enacted Environmental Protection Agency ("EPA") regulations that established stringent air quality standards for many communities which were found to have unacceptable levels of smog.65 The court reasoned that the EPA's standards were unconstitutionally vague delegations of legislative power.66 Not only did the reasoning in the *American Trucking* opinion cite the rarely invoked non-delegation doctrine, but the decision also represented a fundamental shift in non-delegation reasoning.67 The courts had, until the *American Trucking* case, used the non-delegation doctrine as a restraint on Congress.68 In *American Trucking*, however, the D.C. Circuit focused its analysis almost exclusively on the particular regulation put forward by the EPA itself rather than on the statute enabling the delegation of legislative authority from Congress to the EPA.69

In the landmark *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("Chevron") decision, the question posed to the Supreme Court was which standard of review should be applied to the EPA's interpretation of certain statutes within the Clean Air Act Amendments.70 The Court articulated a "now familiar two-step approach" with

*Id.* at 686–87.

If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essence of legislative authority under our system.

*Id.* at 687.


66 Am. Trucking Assn's, 195 F.3d at 6. But see Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) (reversing non-delegation finding of D.C. Circuit on appeal to Supreme Court). The Supreme Court found that protecting the public health was a sufficient "intelligible principle" upon which to guide the regulations and that it fit within the non-delegation jurisprudence. *See id.* at 475-76.


68 See *id.* at 1028.

69 *Id.* at 1030. The court utilized non-delegation as a means to limit agency action, not Congressional legislation. *Id.* This shift has enabled some commentators to label the approach as "the New Non-Delegation doctrine." *Id.* at 1031 (*citing* Bressman, *supra* note 50, at 1402).

which to analyze how executive agencies interpret a statute administered by that agency. In reaching the conclusion that the EPA's interpretation of the Clean Air Act was a permissible interpretation of the statute, the Supreme Court adopted a fundamentally different approach regarding judicial deference than what had previously existed. After the Court's ruling in *Chevron*, agencies were given the power to interpret, a new standard which "radically – and perhaps unintentionally – shifted interpretative power from the judiciary to the executive" branch. The principle justification of the *Chevron* decision rested upon the supposed "implied delegation doctrine," rather than agency expertise, which holds that courts should presume Congressional intent to give agencies the powers to write regulations with the force of law. Noting this fundamental change, the Court retreated after *Chevron* and began limiting this implied delegation doctrine in a number of cases.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If...the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43.

The Court recognized that federal judges, who have no expertise in the particular fields and are not held accountable to the political system, must at times defer to agency constructions of the law. *Id.* Before *Chevron*, agencies could only legitimately make law when Congress expressly delegated the authority to do so by statute. *See also Jellum, supra* note 71, at 160-61. "In effect, agencies faced a balancing test: the more consistent, thorough, and considered their interpretations were, the more deference they earned. As noted, deference was appropriate because of agency expertise and experience... [P]rior to the Court's decision in *Chevron*, the judiciary held most, if not all, interpretive power." *Id.* at 161-62. After *Chevron*, interpretative power shifted and agencies were permitted to create law when a statute was merely ambiguous, regardless of whether Congress had expressly delegated legislative authority. *Id.*

*Jellum*, supra note 71, at 171.


The Court's reluctance to enforce the non-delegation doctrine has drawn intense criticism from those who believe elected members of Congress are responsible for making tough policy choices, rather than delegating these important and difficult decisions to administrative agencies. Some commentators argue the opposite, believing agency lawmaking reinforces the democratic spirit and promotes accountability through presidential oversight. The Supreme Court has recently permitted increasingly broad delegations of power, but only when such delegations would be subject to independent judicial review.

C. Delegation in the Health Law Context

The Court's decision in Chevron demonstrates the tension and competing interests between Congressional accountability and delegation to administrative agencies for the practical purposes of completing policy objectives. Professor and noted administrative law commentator Richard Pierce, Jr. explains this tension and simplifies the conversation, observing that all delegations by Congress can be reduced to "one basic policy decision—that the market could not be trusted to produce acceptable results without several forms of regulatory intervention." This understanding is readily apparent in the field of health law, where proponents of greater regulations and proponents of increased market competition have debated for decades about which

---


76 See Bressman, supra note 50, at 1406. Bressman cites David Schoenbrod's arguments that "delegation violates the principles of democratic governance: [it] allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those benefits." Id. at 1406-07.

77 Id. at 1407.

78 See Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) (reasoning preserving judicial review rights prevent otherwise unlawful delegation of law-making authority). In Justice Marshall's concurring opinion he stated that preservation of judicial review was necessary in preserving the constitutionality of the Controlled Substances Act's delegation of legislative powers. Id. See Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969, 997 (1992) (warning judicial review is only effective way to prevent arbitrary agency actions).

79 See Pierce, Jr., supra note 59, at 495.

80 Id.
approach is most effective to control healthcare costs, while also improving quality and access to more Americans.\footnote{Furrow et al., supra note 4 (discussing how free market left unattended utterly failed in regulating and controlling health care sector). In many instances, competition through the free market serves as an effective means to allocate resources in the economy. \textit{Id.} at 165. As Furrow articulates, for a market to function effectively, consumers must have a certain level of information about the products at their disposal, characteristics of those products, and information about their prices. \textit{Id.} Unfortunately in the health care context, consumers do not have the requisite information. \textit{See id.} at 165-68. \textit{See also} Barry R. Furrow, \textit{Symposium: Under the Knife: Health Law, Health Care Reform, and Beyond: Cost Control under the Affordable Care Act: CRAMPing Our Health Care Appetite}, 13 NEV. L.J. 822, 839-40 (2013) (extrapolating idea that health care is not a marketplace).}

The federal government began allocating millions of federal dollars to health care spending as a result of the creation of the Medicare program in 1966, which in turn has led to spending increasingly higher percentages of the gross domestic product ("GDP") on healthcare costs.\footnote{See Furrow, supra note 81, at 823. For example, in 2011 the Centers for Medicaid and Medicare Services announced that healthcare costs consumed about 17.9 percent of the GDP. \textit{See also Health Care Costs to Reach Nearly One-Fifth of GDP by 2021}, KAISER HEALTH NEWS, (June 13, 2012), http://www.kaiserhealthnews.org/daily-reports/2012/june/13/health-care-costs.aspx (providing various predictions regarding the growth of health care costs in the coming years).} Despite the increasing percentage of GDP spent on healthcare services, Americans do not have better health outcomes as compared to other developed western countries.\footnote{See Kurth, supra note 81, at 420. "By 2037, Medicare will be responsible for the health care of eighty million Americans, compared to 48 million today. By 2050, moreover, there will be 2.3 workers for every Medicare beneficiary compared to 2010's 3.4 to one ratio." \textit{Id.}} In 2011, the program covered nearly 48.7 million people, nearly one in six Americans.\footnote{See Health Care Costs to Reach Nearly One-Fifth of GDP by 2021, KAISER HEALTH NEWS (June 13, 2012), http://www.kaiserhealthnews.org/daily-reports/2012/june/13/health-care-costs.aspx. \textit{How is Medicare Funded?}, MEDICARE.GOV, http://www.medicare.gov/about-us/how-medicare-is-funded/medicare-funding.html.} A greater burden will be placed upon the federal government to fund the Medicare program in the coming years.\footnote{Furrow, supra note 4, at 420. "By 2037, Medicare will be responsible for the health care of eighty million Americans, compared to 48 million today. By 2050, moreover, there will be 2.3 workers for every Medicare beneficiary compared to 2010's 3.4 to one ratio." \textit{Id.}} Increasing numbers of baby boomers will become eligible for Medicare benefits within the first half of the twenty-first century, while simultaneously exiting the work force and ceasing to provide
funding toward the program.\textsuperscript{86}

Perhaps one of the biggest drivers of healthcare costs though, is paradoxical in nature: as medicine improves and more care becomes available, Americans continue to live longer, and thus require more Medicare funding to cover their medical expenses.\textsuperscript{87} Cost reform in the healthcare system has introduced the potential for rationing, with a specific focus on elderly Americans.\textsuperscript{88} Conversations that involve rationing of care are politically dangerous however, for Medicare beneficiaries, primarily the elderly, are one of the biggest political forces in the American political system.\textsuperscript{89} Proponents of such age-based rationing in the allocation of healthcare resources draw their philosophy from a utilitarian position: society as a whole would derive a greater overall benefit from distributing limited healthcare resources to the younger generations rather than on extending the lives of elderly people beyond their natural life-span.\textsuperscript{90}

The ACA’s IPAB was hardly the first attempt by American lawmakers to constrain the exploding cost of healthcare expenditures, particularly in the Medicare

\textsuperscript{86} Id.

\textsuperscript{87} Id. at 843. Furrow argues that cost problems for end-of-life care is more attributable to the poor coordination of care, with not enough attention paid to the over-prescribing of medication with insufficient attention paid to the side effects. \textit{Id}.

\textsuperscript{88} See Karen DeBolt, Comment, \textit{What will Happen to Granny? Ageism in America: Allocation of Healthcare to the Elderly \& Reform through Alternative Avenues}, 47 CAL. W. L. REV. 127 (2010) (presenting arguments of advocates and opponents of age-based rationing, proposing alternate solutions for cost control). The author notes that there is no universally accepted definition for rationing. \textit{Id.} at 131. "Rationing has been defined as ‘denying individuals what all would agree is beneficial healthcare – albeit what is judged from some larger social point of view to be marginally beneficial, non-cost worthy healthcare.’ Rationing or allocation has also been described as ‘withholding beneficial interventions for cost reasons.’” \textit{Id.} at 131-32.


\textsuperscript{90} DeBolt \textit{supra} note 88, at 135-36.

Proponents of age-based allocation also argue that healthcare is currently skewed toward the elderly with roughly $9,000 spent on every elderly person per year and only $900 spent per child each year in the U.S. This reasoning contends that by the age of seventy and beyond, people have lived out their natural life spans and therefore should be excluded from treatments that would extend their lives at the expense of the young who have not yet lived out a normal life span.

\textit{Id.} at 136-37. The author cites to a description of this issue by Euripides, a famous Ancient Greek tragedian: “I hate the men who would prolong their lives; by foods and drinks and charms of magic art; perverting nature’s course to keep off death. They ought, when they no longer serve the land; to quit this life, and clear the way for youth.” \textit{Id.} at 128.
program. Congress created an independent agency under the Balanced Budget Act of 1997 called the Medicare Payment Advisory Commission ("MedPAC" or "the Commission"). This agency’s primary responsibility is to advise Congress on issues, particularly policy payment problems, affecting the Medicare program. Decisions affecting the administration of Medicare have historically been, and will continue to be, subjected to intense political pressures. While it was hoped that the Commission’s recommendations from expert members would help Congress make informed decisions regarding complex pricing problems in Medicare, the Commission has failed in many ways to sway Congressional members into enacting their recommendations. With no coercive powers in the enabling statute, the Commission's recommendations are too often simply ignored by Congress. Though MedPAC's expertise is often overlooked, the Commission is retained in the IPAB's creation; the Board's enabling statute includes

91 See Nicholas Bagley, Bedside Bureaucrats: Why Medicare Reform Hasn’t Worked, 101 GEO. L.J. 519, 521 (2013) (providing brief look at various attempts at controlling Medicare costs). The author lists peer review organizations, prospective payment, Medicare managed care, and coverage limitations as four of the most prominent attempts to reform Medicare, and discusses the various factors contributing to their failures to institute lasting reform. Id. at 534-54.


93 See Medicare Payment Advisory Commission, 42 U.S.C. § 1395b-6(b)(1). The statute also gives MedPAC the power to oversee the interaction with the Medicare program in general and the delivery of health care services. Id. § 1395b-6(b)(2)(c). The Commission is composed of seventeen members, appointed by the Comptroller General, who are nationally recognized for their expertise in a broad range of fields, including but not limited to health finance and economics, health facility management, and integrated delivery systems. Id. § 1395b-6(c)(1)-(c)(2)(A). See also About MedPAC, MEdPAC.GOV, http://www.medpac.gov/-about-medpac- (last visited Nov. 16, 2014). The Commission is composed of members from diverse segments of the healthcare industry, including healthcare delivery and healthcare financing experts. Id.


95 Id. MedPAC is only an advisory body lacking any real authority to implement its recommendations. Id. "When push comes to shove, those whom its recommendations would disadvantage have lobbied Congress, and its recommendations for Medicare system rationalization and cost saving have not been implemented." Id. at 94-95.

96 See 42 U.S.C. § 1395b-6 (2012). The statute provides that the Commission shall review payment policies, make recommendations based upon their review, and that the Commission may secure any data it may need to conduct a thorough Review. Id. § 1395b-6(b)(1), (c). Nowhere in the enabling statute, however, gives the Commission the authority to enact its recommendations. Id. See also John Reichard, Washington Health Policy Week in Review, The Medicare Payment Advisory Commission: Will it Matter Anymore?, THE COMMONWEALTH FUND (May 14, 2010) http://www.commonwealthfund.org/Newsletters/Washington-Health-Policy-in-Review/2010/May/May-17-2010/The-Medicare-Payment-Advisory-Commission-Will-It-Matter-Anymore.aspx (explaining lawmakers often swayed by powerful lobbyists to act in opposition to Commission's recommendations). Senator John D. Rockefeller, a chief architect of the IPAB model, "said he largely views the two bodies as having the same review authority, but added that IPAB has power and MedPAC doesn't." Id.
a provision stating that it will consult with MedPAC as the Board prepares its recommendations.  

The concept of an independent body that could make Medicare policy and payment decisions was not new at the time health care reform legislation was debated. President Obama originally advocated that MedPAC should be given the authority beyond mere advisory capabilities to implement their recommendations. Peter Orszag, the former director of the Office of Management and Budget for the Obama administration, also endorsed the creation of a separate independent board, which was introduced by President Obama in July 2009 and termed the Independent Medicare Advisory Council. The West Virginia Democrat, Senator Jay Rockefeller, was a key supporter of this independent review board; he feared that Congress alone would be unable to make tough payment decisions to slow the growth in Medicare spending due to the influence of special interests and lobbyists.  


II. Facts

The Independent Payment Advisory Board's primary purpose is to work with other agencies, notably the Centers for Medicare and Medicaid Services, to create detailed proposals to Congress and the President, which aim to reduce the per capita growth rate in Medicare spending. The Board is designed to include fifteen full-time members, selected from a range of professions, with five members serving one-year terms, five members serving three-year terms, and the remaining five members serving six-year terms. While the President appoints the Board members, the Senate must

96 (discussing limited powers of MedPAC as an example of the rationale for creation of IPAB). "Rockefeller said he largely views the two bodies as having the same review authority, but added that IPAB has power and MedPAC doesn't." Id.


103 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (codified as amended in scattered sections of 26, 42 U.S.C. (2013)). The statute provides that the Board shall be composed of "individuals with national recognition for their expertise in health finance and economics, actuarial science, health facility management, health plans, and integrated delivery systems, reimbursement of health facilities, allopathic and osteopathic physicians, and other providers of health services. . ." Id. The statute also provides that there should be "... broad geographic representation, and a balance between urban and rural representatives." Id. The enabling statute further details that members of the Board "shall include. . . physicians and other health professionals, experts in the area of pharmaco-economics or prescription drug benefit programs, employers, third-party payers, individuals skilled in the conduct and interpretation of biomedical, health services, and health economics research and expertise in outcomes and effectiveness research and technology assessment. . . [and] representatives of consumers and the elderly." Id. Care providers cannot constitute a majority of the Board's membership. Id. Timothy Stoltzfus Jost notes that membership on the IPAB, like members of other federal regulatory boards like the Federal Trade Commission or the Securities and Exchange Commission, is a full-time job, unlike service on MedPAC or other commissions established by the ACA. See Jost, supra note 100, at 25. Jost continues, noting that it will be a "challenge. . . [to staff] the IPAB with fifteen leading experts, who are willing to face a congressional confirmation as well as give up research, practice, and teaching for six years for a relatively modest salary. . ." Id. at 29. See also Hahn & Davis, supra note 100, at 26 (discussing potential problems with staffing IPAB with qualified individuals). The Board's members will be compensated pursuant to Level III of the Executive Schedule as established by U.S. Office of Personnel Management, for 2013 was equivalent to $165,300. U.S. Office of Personnel Mgmt, Salary Table No. 2010-EX: Rates of Basic Pay for the Executive Schedule (2013), http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/executive-senior-level/ex.pdf (last visited Nov. 12, 2014) (listing 2013 executive schedule pay rates, frozen at 2010 levels). Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (codified as amended in scattered sections of 26, 42 U.S.C. (2013)).
also confirm the appointments.\textsuperscript{104} Of these fifteen full-time members, the President will confirm twelve of them through consultation with the majority and minority speakers in the House of Representatives and the Senate.\textsuperscript{105} The President’s consultations with members of Congress for membership appointments could prove problematic, at least in the immediate future, as the Republican controlled House of Representatives voted to repeal the IPAB in March 2012 and have since refused to confirm members to the Board.\textsuperscript{106}

The IPAB does not work in a vacuum; the Board will work in tandem with several other bodies, including the Secretary for the Department of Health and Human Services, MedPAC, CMS, and the newly created Center for Medicare and Medicaid Innovation (“CMMI”) within CMS.\textsuperscript{107} In spite of the Board’s far-reaching powers, its mandate to act can only be triggered through calculations made by the Chief Actuary of CMS, when forecasting that projects per capita Medicare expenditures will exceed certain target levels.\textsuperscript{108} The determination process of whether or not the Board must submit proposals is structured around a recurring three-year cycle, based on a projected five-year average growth in Medicare spending per enrollee.\textsuperscript{109} The three-year cycle

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{104}Ebler et al., \textit{supra} note 101, at 5.
\item \textsuperscript{105}Independent Payment Advisory Board, 42 U.S.C., § 1395kkk(E)(i)-(iv) (2010).
\item \textsuperscript{106}Furrow, \textit{supra} note 4, at 458; Nadia-Elysse Harris, Republicans Refuse to Appoint Members to New Healthcare Panel, Suggest Repeal of All Healthcare Reforms, MEDICAL DAILY (May 9, 2013), http://www.medicaldaily.com/republicans-refuse-appoint-members-new-healthcare-panel-suggest-repeal-all-healthcare-reforms-245716 (explaining John Boehner and Mitch McConnell’s refusal to appoint IPAB members because they oppose IPAB and ACA).
\item \textsuperscript{107}See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), \textit{amended by} Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (codified as amended in scattered sections of 26, 42 U.S.C. (2013)). The Secretary reviews Board’s recommendations and if the Board fails to create recommendations, the Secretary must submit proposal conforming with statutory mandate. \textit{Id. See also} Ebeler, \textit{supra} note 101, at 11-13 (detailing relationships between these various government bodies and IPAB).
\item \textsuperscript{109}See Michael Cook, Note and Comment, Independent Payment Advisory Board: Part of the Solution for Bending the Cost Curve?, \textit{4 J. HEALTH \& LIFE SCI.} L. 1, 102 (October 2010). The year for which the five-year projection is made is called the implementation year. \textit{Id.} This projection therefore takes into account past and future years; for example, the growth rate calculated for the three-year cycle beginning with determination year 2013 is the average of the actual and projected growth rates from 2011 - 2015. \textit{Id. See also} Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), \textit{amended by} Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (codified as amended in scattered sections of 26, 42 U.S.C. (2013)). By September 1 of every determination year, the Board must submit a draft of
\end{itemize}
\end{footnotesize}
begins with the "determination year," the cycle's second year is called the "proposal year," and its third is termed the "implementation year." If, during the determination year, the projected Medicare per capita growth rate under subsection (c)(6)(A)(i) (hereinafter "the projected Medicare per capita growth rate for the implementation year") exceeds the projected Medicare per capita target growth rate under subsection (c)(6)(A)(ii) (hereinafter "the projected Medicare per capita target growth rate for the implementation year") then the Chief Actuary shall establish an applicable savings target for said implementation year. The Board's recommendations to reduce Medicare program spending in the implementation year must be at least equal to the applicable savings target.

The ACA establishes several restrictions on the recommendations the Board is statutorily permitted to produce, most significant of which is that the recommendations' cuts must come solely from the Medicare program. Furthermore, the Board's
recommendations may not increase the total amount of Medicare spending relative to the total amount of net Medicare program spending that would have occurred without the implementation of the IPAB proposal. In addition, the ACA mandates that recommendations in the first five determination years of the IPAB up to 2019 cannot include payment cuts to “inpatient or outpatient acute hospitals, long-term care hospitals, inpatient rehabilitation hospitals, psychiatric hospitals, and possibly hospice care.” Commentators have expressed concern that exempting hospitals from the Board’s recommendations within the Board’s first five determination years will unfairly concentrate the Board’s recommendations on cuts in payments to physicians. Similarly, the calculation of the Medicare per capita target growth rate is different in the first five years of the Board’s existence and will change in years after 2018. While the

deductibles, coinsurance, and copayments), or otherwise restrict benefits or modify eligibility criteria.” Id. Note, though, that the enabling statute does not actually define what “rationing” means. See id. (lacking definition of “rationing” in definition section). However, after 2015 the Board will also be given the power to submit recommendations to Congress and the President to slow the growth of national healthcare expenditures in general, beyond just the Medicare program. 42 U.S.C. § 1395kkk(o)(1) (2012).

The statute provides:

Each proposal submitted under this section shall be designed in such a manner that implementation of the recommendations contained in the proposal would not be expected to result, over the 10-year period starting with the implementation year, in any increase in the total amount of net Medicare program spending relative to the total amount of net Medicare program spending that would have occurred absent such implementation.

Id.

Jost, supra note 100, at 26.

See DeBolt, supra note 88, at 155. While the Board’s enabling statute prohibits its recommendations from rationing care, there is fear that recommendations that lower payments to physicians will cause some physicians to refuse to take Medicare patients. Id. These potential refusals would ultimately ration healthcare resources to seniors by decreasing their access to care. Id. Legislation to repeal IPAB began in the House in 2012, garnering support from trade groups who represent device manufacturers, doctors, and drug companies fearing they will be the subject of unfair cuts in the Board’s initial years. Furrow, supra note 4, at 458. Several organizations that provide services to Medicare beneficiaries sent a letter to Senator Harry Reid and Speaker Nancy Pelosi in January 2010 voicing their opposition to the creation of the IPAB under the ACA. See, e.g., Letter from AIDS Action Baltimore et al., to Senate Majority Leader Harry Reid and Speaker of the House Nancy Pelosi (Jan. 11, 2010), http://www.aaoms.org/docs/govt-affairs/issue_letters/ipab.pdf (expressing service provider opposition to Board).

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (codified as amended in scattered sections of 26, 42 U.S.C. (2013)). In determination years prior to 2018, the projected five-year average will be an “average of the projected percentage increase . . . in [the implementation year in] the Consumer Price Index ["CPI"] for All Urban Consumers . . . and the medical care expenditure category of the [CPI] for All Urban Consumers.” Id. In determination years after 2017, the calculation for the
Board is primarily tasked to make recommendations which will lower the growth in Medicare spending, the Act also mandates a limit on how much savings the recommendations can achieve, deemed the “applicable percent,” based on a percentage of the Medicare program’s total payments.  

As outlined in the statute, April 30, 2013 was the first statutorily provided determination year deadline for the Chief Actuary to submit his projections regarding whether or not the actual Medicare per capita growth rate exceeds the five-year projected Medicare per capita growth rate. Paul Spitalnic, CMS’s Chief Actuary in 2013, concluded that there is no applicable savings target for the 2015 implementation year because the projected Medicare per capita growth rate did not exceed the Medicare per capita target growth rate. Despite media attention, ongoing litigation, and critical

projected five-year average in the implementation year will be based on the percentage increase in “the nominal gross domestic product per capita plus 1.0 percentage point.” 

The differentiated formula for determination years after 2017 will tie increases in Medicare spending to the growth of the economy, while allowing Medicare spending to grow at a slightly higher rate, due to the added one percentage point. See Hahn & Davis, supra note 100, at 9 (describing target growth rate for determination years beginning in 2018).
discussion decries the creation of this all-powerful Board since the passage of the ACA in 2010, the Board has yet to propose a recommendation because Chief Actuary Spitalnic did not initiate action during the Board's first determination year in 2013.121 Because the Board was not convened in determination year 2013 and thus there will be no IPAB recommendations for implementation year 2015, the Board will not create and implement a proposal in implementation year 2016 until this determination year's deadline on April 30, 2014.122 Though the determination was made on July 28, 2014—three months behind the statutorily mandated deadline—the projected 5-year Medicare per capita growth rate did not exceed the target growth rate and thus there is no applicable savings target for implementation year 2016.123 In theory, the Chief Actuary will conduct the statutorily mandated calculations by this year's determination year deadline, April 30, 2015, which will determine whether or not the Board will draft, and subsequently enact, its proposals in implementation year 2017.124

The true controversy surrounding the IPAB's recommendations concerns the significant insulation from Congressional consideration and amendments.125 Peter Orszag, as one of the IPAB's chief architects and supporters, described the IPAB as

121 See Kliff, supra note 120 (reporting on lack of IPAB action in 2013). The three-year cycle beginning with 2013 has passed and the calculation was low enough that, as provided by statute, the IPAB will not act for the remainder of the year. Id. See also Hahn and Davis, supra note 100 (for historical development of the IPAB). Pursuant to statute, the Chief Actuary of CMS must determine by April 30, 2014 whether the growth rate (the projected five year average growth in Medicare program spending per enrollee) will exceed the target growth rate (adding together the percent increase in each year for the consumer price index for all items and the consumer price index for medical inflation, dividing by two, and using the average for each year in the five year period to calculate the average annualized rate of growth for the entire five year period). Id. As of April 1, 2013, the first determination year of the IPAB's existence, the growth rate was determined to not exceed the target growth rate, and thus the IPAB remains dormant. Kliff, supra note 120; CMS Office of the Chief Actuary, supra note 120.

122 CMS Office of the Chief Actuary, supra note 120. As mandated by statute, the Chief Actuary of CMS will determine as of Wednesday, April 30, 2014, whether the IPAB will come alive and implement its proposals during implementation year 2016. Id. But see, Robert Pear, Burwell Wins Confirmation as Secretary of Health, N.Y. TIMES (June 5, 2014), available at http://www.nytimes.com/2014/06/06/us/politics/sylvia-mathews-burwell-confirmed-as-health-secretary.html?_r=0 (noting Sylvia Burwell has served as Director of Office of Management and Budget since April 2013).

123 Letter from Spitalnic to Tavenner, supra 120. In the letter, Paul Spitalnic presents his findings and concludes that the Board will not draft a recommendation in proposal year 2015. Id.

124 Id.

"the largest yielding of sovereignty from the Congress since the creation of the Federal Reserve."\textsuperscript{126} Two committees in the House and one in the Senate will consider any IPAB recommendations and return the proposal with amendments by no later than April 1 of any proposal year, giving these committees two and a half months to draft their amendments.\textsuperscript{127} However, the committees are highly constrained in the type of amendments that can be proposed; any amendments must satisfy the same requirements for fiscal savings as articulated in subparagraphs (A)(i) and (C) of subsection (c)(2), which lists the requirements of the Board’s recommendations.\textsuperscript{128} The Board’s recommendation must be introduced to Congress by January 15 of any proposal year and specific Congressional committees are required to report out legislative language implementing the Board’s recommendations by April 1 of that year.\textsuperscript{129}

Another controversial aspect of the Board’s enabling statute relates to the Secretary’s obligation to act in the absence of an IPAB drafted recommendation.\textsuperscript{130} On a particular determination year, if the Board concludes that the per capita growth rates exceeds the projected per capita growth rate and the Board fails to devise a recommendation by January 15 of the proposal year, then the Secretary must submit his or her own proposal to Congress and the President, which will satisfy the same cost cutting requirements by no later than January 25 of the proposal year.\textsuperscript{131} The enabling statute also makes it very difficult to discontinue the Board: pursuant to Section 1395kkk(f), a technically worded joint resolution supported by a three-fifths vote of all members of the House and Senate is required to discontinue the Board, and such a resolution may only be introduced within the first fifteen days of 2017 and must be passed by August 15, 2017.\textsuperscript{132}

\textsuperscript{126} Klein, \textit{supra} note 5.

\textsuperscript{127} Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), \textit{amended by} Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (codified as amended in scattered sections of 26, 42 U.S.C. (2013)). The three Committees that are permitted to review the Board’s recommendations are the Committee on Finance in the Senate; the Committee on Energy and Commerce; and the Committee on Ways and Means in the House of Representatives. \textit{Id.}

\textsuperscript{128} \textit{Id.} This provision seeks to bar Congress from considering any legislation that changes the Board’s recommendations that fails to at least meet the financial savings met by the Board’s original recommendations. \textit{See} Hahn \& Davis, \textit{supra} note 100, at 19.


\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} Unless this joint resolution is passed within this time limit, the Board will continue to exist. \textit{Id.}
Finally, and perhaps most significantly, the statute bans judicial and administrative review of the recommendations contained in a given Board proposal. Limitations on judicial review in various Medicare provisions are common, but the IPAB's absolute ban on judicial review seems to be an unprecedented move to insulate the Board's recommendations from judicial scrutiny and to ensure that the recommendations go into effect. The IPAB is not the only provision of the ACA in which judicial review is altogether precluded. The Act also creates a Center on Medicare and Medicaid Innovation within the existing CMS and all of the Innovation's activities are similarly precluded from judicial review. The total preclusion from judicial review raised constitutional objections in the courts against the Board's existence. Both challenges resulted in upholding the Board as constitutional.

III. Analysis

Both critics and advocates can agree that the IPAB's powers are immense. Despite the enormity of the IPAB's powers, commentator and Wonkblog contributor Sara Kliff has speculated that it is possible that CMS will not initiate action by IPAB anytime soon. Thus, both sides will have to continue their discussions in a purely

133 Id.
134 See Jost, supra note 100, at 28. Jost notes that provisions of Medicare laws often limit judicial review, but fears that the IPAB's unprecedented total ban on judicial review could pose problems in monitoring the limitations that the statute imposes on the Board. Id. "If, for example, the IPAB were to recommend a cut in benefits contrary to the law, would the decision be unreviewable?" Id.
135 See Timothy Stoltzfus Jost, The Real Constitutional Problem with the Affordable Care Act, 36 J. HEALTH POL'Y, POL'Y & L. 501, 503 (2011) (explaining that sections 3021 and 3022 prohibit judicial review of most HHS decisions under those programs).
136 See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (codified as amended in scattered sections of 26, 42 U.S.C. (2013)). See also Bagley, supra note 4, at 571-73 (describing creation of this Innovation Center under ACA). Bagley notes the vast authority that this Innovation Center has, commenting that the "delegation is jaw dropping." Id. at 571. The author further notes that, while the IPAB has come under intense scrutiny, this provision of the ACA hasn't garnered as much discussion. But see Jost, supra note 135, at 503-06 (articulating concerns regarding the constitutionality of the Innovation Center because HHS decisions will be unreviewable).
137 See Coons v. Geithner, No. CV-10-1714-PHX-GMS, 2012 U.S. Dist. LEXIS 124196 at *3 (D. Ariz. 2012) (arguing that prohibition on judicial review is unconstitutional). The court held that the board was not an unconstitutional delegation of law-making power. Id. at 5-6. On appeal, the Court of Appeals for the Ninth Circuit dismissed the non-delegation challenge as not satisfying Article III's demands for ripeness. Coons v. Lew, 762 F.3d 891, 897-99 (9th Cir. 2014).
138 Id.
139 See Jost, supra note 135 (indicating support and opposition to Board's powers).
140 See Kliff, supra note 120.
hypothetical realm, one devoid of actual IPAB action or inaction on which to base their arguments, until CMS makes an affirmative decision in a given determination year. Critics of the Board fear that, despite the Board’s apparent statutory prohibition on rationing health care, a disproportionate amount of the burdens of the Board’s cuts will be at the expense of physicians, which may lead to de facto rationing of care. The thought of enabling an executive agency, especially one so insulated from judicial oversight with the power to drastically cut costs of the Medicare program, is jarring to many and the inherent problems created by such an entity have in fact been considered for some time. It seems likely that, though the IPAB is statutorily prohibited from rationing care, prohibitions on cuts to certain groups in the initial years of the IPAB’s existence will lead to de facto rationing.

Even though the Board’s recommendations are prohibited from judicial review, it is unlikely that the Board will be struck down as unconstitutional for this reason because precedent exists for the removal of judicial review of decisions. Precedent has been established for an administrative agency’s rule-making decisions to be unreviewable through judicial review, as exemplified by the DOJ’s streamlining reforms in immigration proceedings. Some have criticized the Circuit Courts that have held

And that's the reason that, at least in its first year, the Independent Payment Advisory Board won't be doing much at all. And it's possible this could persist for a few years, as the Center for Medicare and Medicaid Services projects relatively low growth in per-enrollee spending for the next few years (those projections should, however, be taken with a grain of salt — they assume that Congress does not shore up Medicare doctor payments, which they near certainly will).

Id.
141 Id.
142 See DeBolt, supra note 88, at 155. “It is feared that lowering payments to physicians will cause some of them to refuse to take new Medicare patients — resulting in rationing healthcare to seniors.” Id.
143 Pierce, Jr., supra note 59, at 493-94. The author, writing in 1985, imagines a scenario where Congress will create a health and safety statute that would require an agency “to ensure that the benefits of each regulation are commensurate with its costs. Congress still has left the agency complete discretion to qualify the benefits of a potentially life-saving regulation . . . how should human life be valued when agencies are required to balance the value of lives against economic costs?” Id.
144 See supra notes 117-118 and accompanying text(indicating future changes in target growth rate, which lowering spending growth will not match).
145 See, e.g., supra notes 36-39 (discussing DOJ’s restricting judicial review in immigration decisions).
146 See Rana, supra note 36, at 856-59. Professor Rana discusses a split in the circuit courts regarding the availability of judicial review over streamlined immigration cases. Id. at 862. Both
that streamlining decisions should not be subject to judicial review, and have criticized
the DOJ's attempts to modify its regulations to definitively declare that federal courts do
not have jurisdiction to review its streamlining decisions as an attempt to "further erode
the rule of law." Other commentators have appropriately added their voices to
address this growing concern and have provided warnings of the possible consequences
of unfettered exercises of agency discretion in a world absent of judicial review.

A further cause for concern regarding the Board's ban on substantive judicial
and administrative review, according to these critics, is the fact that courts have
historically refused to engage in judicial review of the legislative process itself. The
courts have been precluded from reviewing the substance of the Board's proposals by
statute and it seems unlikely that the courts would review the procedure behind the
creation of those proposals. These concerns are well founded, for by removing the
right to judicial review, the courts will not be able to interject and prevent potential
executive overreach. Affected providers will not be able to resort to the justice
system to argue biased allocation of cuts to their practices, while certain other providers' will be precluded from being subjected to cuts. The Marbury court properly assessed
the role of judiciary and judicial review as an important constitutional limitation on the

the Eighth and Tenth Circuit, for example, have determined that the DOJ's Board of
Immigration Appeals' decision to streamline cases is within the internal discretionary authority of
the agency, a decision which the federal courts have no power to review. Id. at 863. See also id. at
n. 174 (noting two cases determining that streamlining is unreviewable by courts). But see, id. at n.
175 (noting First, Third, and Ninth Circuits have ruled DOJ's decision to streamline is subject to
judicial review). See also supra note 34-39 and accompanying text (detailing existence of restricted
judicial review).

147 See Rana, supra note 36, at 859.
148 See Pierce, Jr., supra note 59, at 489 (arguing judicial review serves as important protection
against excessive agency action). "Rigorous judicial review of agency exercises of discretion can
provide part of the solution to the problem of the enormous discretionary powers of agencies to
make political decisions." Id.
149 See Bar-Siman-Tov, supra note 30 and accompanying text (noting strange resistance to judicial
review in legislative process). Judicial review of the legislative process is seemingly less justified
because this variation of judicial review does not strive to protect individual rights, which is the
most common justification behind the more prominent form of judicial review, substantive
judicial review. Id. at 1926. Another common argument against judicial review of the legislative
process is based on a violation of the separation of powers doctrine, because judicial review over
perceived deficiencies in the legislative process "evinces lack of respect due to a coequal branch." Id.
at 1927.
150 Id. at 1924.
151 See supra notes 17-19 and accompanying text (recognizing judicial review as essential balancing
independent powers).
152 See supra notes 17-19 and accompanying text (declaring judicial review as recourse for
measuring federal statute constitutionality).
executive and legislative branches. The Board's drafters have seemingly eviscerated the judicial branch's historic importance in a government of limited powers; but then again, perhaps that is exactly what the drafters' intended. Judicial review can also be seen as a hindrance on an agency's attempts to achieve its policy objectives. The judiciary's role in reviewing administrative action is devoid of the external political pressures and practical considerations behind the proposed regulations, rules, or legislation considered by the agency. Judicial decisions are often abstract and commonly dwell on the wording of a particular element of a statute without considering the overall purpose behind the statutory scheme in question. Thus, isolated judicial decisions that so often turn on interpretations of the minutiae can send far-reaching and unintended impact on future agency agendas. Furthermore, judges' lack of expertise in specialized and highly technical fields, such as health law, makes them particularly ill-suited to review specialized agency decisions. The "shadow of judicial review" also serves to undermine agency action because it "necessarily compels agencies to devote considerable resources to surviving that review process...and, concomitantly, fewer resources to substantive research and analysis.

The threats of judicial review therefore force agencies not only to strive to meet the policy objectives under the stated law, but also to imagine how a reviewing court might interpret and apply the language at issue. Even with the deferential Chevron test in place, which grants a broad degree of deference to an agency's determination of an ambiguous statute, agencies still would have to spend more important resources – time and money – on legal analysis rather

153 See supra notes 26-34 and accompanying text (noting prior historical instances establishing judicial review as necessary limitation on powers of government).
154 See supra notes 34-44 and accompanying text (discussing negative implications of judicial review).
155 See Schoenbrod, supra note 48, at 1239-40 (articulating connections between judicial review and non-delegation doctrine).
156 See Cross, supra note 40, at 1039 (explaining unlike agencies considering every decision's effect on agenda, judiciary's only consideration is interests of litigants at issue).
157 Id. at 1039-40.
158 Id.
159 Id. at 1032. Cross laments how agencies' agendas can be disrupted through judicial interference. Id. at 1028. He cites to a highly technical case from the D.C. Circuit involving an Occupational Safety and Health Administration ("OSHA") regulation in which the court set the agency's agenda by assuming that considering the issue of ethylene oxide was more important than other pending agency actions. Id. at 1030-31. "The opinion is striking for its arrogance. The court was confident somehow that it better understood occupational risk than did OSHA. Subsequent research has proven the court wrong." Id. at 1031.
160 Cross, supra note 40, at 1036 (discussing resource misallocation applied to judicial review process; describing how limiting these resourced results in litigation instead of writing in newer regulations.)
161 Id. at 1037.
than on policy development and implementation.\textsuperscript{162}

Given the politicized atmosphere concerning health care and Medicare cost-containment policies, perhaps it is not only constitutional but also a wise policy decision to preclude judicial review of IPAB recommendations.\textsuperscript{163} Reforming Medicare cost-containment schemes certainly appears to be a compelling governmental interest, one that arguably justifies the removal of judicial review due to the countervailing interest of administrative resolution of the issues at stake.\textsuperscript{164} Well-represented special interest groups that wield excessive degrees of power and influence can pressure the courts to use judicial review to frustrate administrative regulatory schemes.\textsuperscript{165}

Considering the Supreme Court's history with non-delegation challenges, it is also unlikely that the Court would rule that the Board represents a violation of the delegation doctrine in future litigious challenges regarding the constitutionality of the IPAB.\textsuperscript{166} Many critics argue that it is a Congressional duty to create the law and that they should not be permitted to simply delegate this responsibility to a different agency.\textsuperscript{167} Furthermore, criticisms of broad delegations of authority by Congress to administrative agencies often charge that Congressional members are simply attempting to shift the burden of making politically dangerous policy decisions to other bodies, and thus increasing their chances to secure reelection or other political gains.\textsuperscript{168} While there may be a degree of truth in such a cynically broad assumption, it is hyperbole to believe that all legislators act in such a way.\textsuperscript{169} Indeed, due to the complexities of the modern

\textsuperscript{162} Id. at 1037-38 (citing Nicholas S. Zeppos, Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives, 44 DUKE L.J., 1133, 1147 – 48 (1995)). See Schoenbrod, supra note 48 at 1242-43 (describing an additional test used for analysis, the "intelligible principle test").

\textsuperscript{163} See Molot, supra note 75, at 1272 (discussing how judges' political affiliations may impact decisions affirming or reversing an agency's decision).

\textsuperscript{164} See Verkuil, supra note 35, at 737 (suggesting that certain "compelling countervailing interests" limit or preclude judicial review as determined by Congress).

\textsuperscript{165} See Cross, supra note 40, at 1060 (noting judicial review can be used as tool to purposefully frustrate government agendas).

\textsuperscript{166} See discussion supra, Part I.b.ii and accompanying notes (discussing the infrequent success of challenges to the non-delegation doctrine). See, e.g., Coons v. Lew, 762 F.3d 891 (9th Cir. 2014) (rejecting non-delegation principle for lack of ripeness under Article III).

\textsuperscript{167} See, e.g., supra note 63 (detailing Justice Rehnquist's critique of unnecessary Congressional delegations). In his concurring opinion in the Benzene case, Justice Rehnquist described the process of making tough policy choices as "the very essence of legislative authority under our system." Id. at 687.

\textsuperscript{168} Pierce, supra note 59, at 497. Pierce challenges these contentions as extreme. Id. at 496.

\textsuperscript{169} See id. at 497. Pierce attacks the assumption that all lawmakers shift the burden of difficult decision-making for the purpose of political gain by noting, "even the most cynical observer of the legislative process cannot actually accept such a single-minded description of legislators." Id.
American administrative state, many Congressional members see the benefit in abandoning control over regulatory regimes to experts in the particular fields.\textsuperscript{170} The Board's enabling statute sets forth a detailed and highly technical framework discussing when the Board must make recommendations.\textsuperscript{171} In light of this, it seems unlikely that the Supreme Court, should it ultimately review the constitutionality of the Board further, would find that the IPAB lacks an intelligible principle upon which to guide its rule-making discretion.\textsuperscript{172}

There are four final controversies surrounding the IPAB: the responsibility of the Secretary or Congress to implement a proposal that meets the applicable savings target should they be dissatisfied with the Board's proposals; the severe restrictions imposed on Congressional amendments to the Board's recommendations; the limited time frame in which Congress can propose these amendments; and the fact that there is only a single opportunity with specific procedural hurdles should Congress decide it wants to eliminate the Board.\textsuperscript{173} It seems that the Board's drafters anticipated efforts of those who might attempt to discontinue the Board's existence through litigation and thus sought to limit other avenues through which IPAB opponents could attempt to dismantle the Board or derail the Board's purpose.\textsuperscript{174}

Broad, generalized public interest rationale has been construed as a sufficient principle by which to allow legislative delegations in the past.\textsuperscript{175} It seems plausible that a court could be persuaded by an important interest articulated in a broad way, such as saving the Medicare program from financial insolvency, to rule the Board's role as constitutional, despite the prohibition of judicial review and Congressional delegation of

\textsuperscript{170} See id. at 499, 507 (arguing non-delegation doctrines influences Congress to abandon regulatory matters rather than make policy decisions).
\textsuperscript{171} See supra notes 108-112 and accompanying text (discussing five-year determination cycles).
\textsuperscript{172} See supra note 48 (discussing intelligible principle standard regarding non-delegation challenges). But see Jost, supra note 100, at 31 (fearing that without judicial review, difficult to determine whether intelligible principles actually limit IPAB's discretion). See also supra note 137 (explaining lower court decisions regarding constitutionality of IPAB).
\textsuperscript{173} See supra notes 130-132 and accompanying text (describing obligations of Secretary and Congress under statute). Because the savings targets must be met, as dictated by the enabling statute, by the Board's proposals or in absence of the proposal then through action by the Secretary or by Congress, it seems to be a misnomer to term the Board's proposals as "recommendations." Id. See also supra notes 108-113, 132 and accompanying text (discussing controversies).
\textsuperscript{174} See Coons v. Geithner (Federal Health Care Lawsuit), supra note 45 (describing power held by IPAB, characterized by lack of governmental and societal checks and balances).
law-making authority. One need only look to Justice Scalia's dissenting opinion in *Mistretta* to see, in retrospect, an oddly prophetic enunciation of today's debate concerning the wisdom of a body like the IPAB. In Justice Marshall's relatively recent concurring opinion in *Touby*, he wrote that legislative delegations of power could be acceptable, so long as there is a degree of judicial review in place. In the case of a hypothetical future review of the IPAB by the Supreme Court, though, the Court would be presented with a broad delegation of legislative authority coupled with a ban on judicial scrutiny. Precedent suggests that delegations of legislative authority in the absence of judicial review can be permissible, while at the same time holding that judicial review is an important doctrine that must be preserved in the face of delegated legislative authority. It would therefore be intriguing to see how the Court will ultimately address this constitutional issue, should the Board's constitutionality be further litigated in such future proceedings.

---

176 See *id.* (noting judicial branch rarely questions Congressional delegation of policy-making authority to specialized bodies). See also supra notes 34-44 and accompanying text (discussing lack of judicial review in immigration proceedings); supra Part I.b(ii) and accompanying text (discussing unlikelihood of successful delegation challenge in court).

177 *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting). In *Mistretta*, the Court upheld the Sentencing Guidelines dictated by the United States Sentencing Commission as created through the Sentencing Reform Act of 1984. *Id.* at 379. The Court rejected the arguments that the statute impermissibly delegated legislative authority, holding that the Act had set forth sufficient intelligible principles to guide decision-making. *Id.* Justice Scalia was concerned at the breadth of delegation of legislative authority, however:

> By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set...

*Id.* at 422.


179 See *supra* notes 102–138 and accompanying text (discussing statutory construction of Board).

180 See *supra* notes 36–40 (articulating lack of judicial review in immigration proceedings). But see *Touby*, 500 U.S. at 170 (arguing judicial review is important when legislative power delegated to another authority); *supra* note 78 and accompanying text (discussing importance of preserving judicial review).

181 *Touby*, 500 U.S. at 170.
IV. Conclusion

The IPAB represents a remarkable judicial and legislative yielding to an independent executive body tasked with controlling the significantly increasing costs of the Medicare program. The IPAB follows the overall statutory scheme of the ACA by making drastic changes to the underperforming American healthcare system. It similarly also mirrors other provisions that seek to limit the abilities of future administrations to gut or disable its proposals, because the Board can only be struck down by a technically worded joint resolution that can only be introduced in the first month of 2017.\(^{182}\) Despite this rather remarkable statute, it does not seem likely that the Board will be struck down as unconstitutional in the coming years. It is plausible that the Board will continue to be upheld as constitutional in any future challenges. Precedent exists to support all of the IPAB’s most controversial provisions. Though this Board is likely a constitutional creation, it has yet to be seen whether such a powerful executive body represents a wise policy decision as a means to control Medicare spending.

\(^{182}\) See supra note 132 and accompanying text (explaining limited time period for Congressional action to pass legislation that would deconstruct IPAB).