

4-17-2014

Congress, Interest Groups, and the Strategic Use of Judicial Review

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CONGRESS, INTEREST GROUPS, AND THE STRATEGIC USE OF JUDICIAL REVIEW:
A CASE STUDY OF THE AFFORDABLE CARE ACT AND THE INDEPENDENT
PAYMENT ADVISORY BOARD

By

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An Honors Project Submitted in partial fulfillment
of the Requirement for Honors
in
The Department of Political Science

School of Arts and Sciences

Rhode Island College

2014

Abstract

Prior research suggests that political actors use judicial review for politically strategic purposes in order to achieve policy goals. Depending upon institutional considerations, members of Congress and interest groups will either seek to allow or preclude judicial review of agency actions. This study seeks to test these claims using the Patient Protection and Affordable Care Act of 2010 and focuses on the creation of the Independent Payment Advisory Board. The findings provide some support for the claims, but show less than expected concern over judicial review, particularly among interest groups. The study then provides four explanations for these findings.

Introduction

Congress has increasingly delegated vast amounts of executive and independent power to agencies. Government agencies possess the authority to promulgate, enforce, and to adjudicate disputes over policy. As a consequence, many issues have arisen over how Congress is able to maintain control over the policy outcomes.

While much of the literature concerns congressional oversight, several scholars have highlighted the role that judicial review may play in controlling delegation. Most notably, Charles Shipan (1997, 2000) has shown how political actors decide whether agencies may be reviewable by courts and do so for politically strategic purposes. Depending upon their preferences, Congress has the ability to allow judicial review of agencies or to preclude it altogether. In addition, Shipan (2000) has provided a theoretical model that hypothesizes under what conditions judicial review will be favored by legislators and when they will not.

This paper applies Shipan's theory of judicial review as a strategic tool to achieve policy goals to the Patient Protection and Affordable Care Act of 2010.¹ In particular, it focuses on the creation of the Independent Payment Advisory Board to determine the level of interest on

¹ P.L. 111-148.

judicial review by members of Congress and to what extent the provisions were influenced by interest groups.

Controlling Delegation and Policy Outcomes

Relations between Congress and agencies that receive policy-making power from Congress have been described in terms of a principal-agent arrangement. Congress is the principal who delegates policy making to its agent, which is the agency. Acting as an agent, the agency is charged with implementing the “nuts and bolts” of legislation passed by Congress (Lowi et al. 2010). Krause has suggested several reasons why legislators benefit from delegation, including taking advantage of the policy expertise of agencies, transferring blame when policy choices become unpopular, and allowing the time and resources of Congress to be spent on other matters rather than micromanaging policy implementation (2010). Additional incentives for Congress to delegate policy-making to agencies may also be created by pressures from constituencies and interest groups (Lowi 1979, Lemos 2010).

Once Congress delegates policy-making to agencies, issues arise with regard to ensuring that implementation stays in line with statutory objectives. Central to controlling delegation is the role of uncertainty in policy outcomes. Congress is always faced with changes in policy preferences among political actors, particularly after the replacement of the executive, and thus agency staffs, after an election. This potential for future policy deviations from the original enacting coalition’s preferences has been referred to as “bureaucratic” or “coalition” drift (McNollgast 1987, Horn and Shepsle 1989, Shepsle 1992). As a result, Congress attempts to reduce the likelihood of unfavorable policy outcomes through a variety of mechanisms.

Several important works have highlighted these principal-agent problems and have examined the ways in which Congress attempts to control bureaucracy (McCubbins and

Schwartz 1984, McCubbins 1985, McNollgast 1987, 1989). Two models of Congressional oversight have been proposed, the “police patrol” and “fire alarm” models (McCubbins and Schwartz 1984). “Police patrol” oversight is characterized as centralized, active, and directly initiated by Congress. Under this form of oversight, Congress will regularly hold hearings and request information from agencies. “Fire alarm” oversight relies on individuals and interest groups to sound warnings signs of violations by publicly challenging agency actions. This may be done through various actions, including lobbying efforts (Hall and Miler 2008), launching information campaigns, or initiating complaints or lawsuits against agencies.

McCubbins and Schwartz (1984) have argued that “fire alarm” forms of oversight are favored over the “police patrol” model. The establishment of procedures, rules, and practices that encourage “fire alarms” are preferred because they are a rational choice for a Congress that cannot possibly spend all of its time and resources on attempting to ensure the bureaucracy fulfill policy objectives. Nonetheless, when possible, congressional committees do take active steps to engage in direct oversight by relying on complex information networks (Aberbach 1990, as cited by Shipan 1997).

In addition to oversight mechanisms, Congress may seek to control policy outcomes through the design of agency structures and procedures (McNollgast 1987). The Administrative Procedure Act, passed by Congress in 1946, provides standards for how agencies should conduct various procedures such as rule-making and adjudication. These procedural requirements serve the purpose of combating the effects of future coalitions gaining hold of agencies and threatening the original enacting coalition’s policy preferences (McNollgast 1987). Thus, when designing agency structures and procedures, Congress can create a policy-making environment that makes it easier or harder for an agency stray away from legislative mandates.

Appointments made to Congressional oversight committees may also serve as a potential mechanism for controlling the policy outcomes of agencies. Shipan (2004) has found that under certain conditions, Congressional committees who are charged with oversight of an agency may also undermine the enacting coalition's policy objectives. Analyzing policy outcomes from the FDA, Shipan (2004) found that the agency was more responsive to the jurisdictional committee's policy preferences than to those of the Congress generally.

Judicial Review of Agency Action

The seminal works discussed above highlight ways in which Congress attempts to control agency action. Another set of actors that influences agency action is the judiciary. Courts can and have played a major role in the policy-making process. The ability of courts to review agency action can alter the course of policy and may result in the upholding, altering, or rescinding of regulation promulgated by agencies (Strauss, Rakoff, and Farina 2003). Thus, through constitutional and statutory interpretation, the courts can restrict or expand the scope of agency authority.

Of course, courts have no power to issue orders *sua sponte*; they may do so only in the course of deciding a lawsuit that has been begun by someone outside the courts. Prospective litigants may have different objectives that include forcing, altering, or undoing agency action. For example, an interest group may wish to sue an agency with the goal of enforcing a legislative mandate. Conversely, a regulated party may seek review to challenge a particular regulation in order to block its implementation, arguing that the agency has exceeded either its statutory or constitutional authority.

It follows from the above that members of Congress will have preferences regarding the scope of judicial review. If members see that litigation is likely to block their preferences, it may

prefer that judicial review not be available. On the other hand, if members are concerned that a hostile administrative regime may interfere with the realization of those preferences, they may support potential litigation and the intervention of courts to force the agency to fulfill its legislative mandate.

While the courts' authority to act derives from the Constitution and various Judiciary Acts, Congress also has the opportunity to influence the availability of judicial review of administrative agencies' actions. In drafting regulatory legislation, it may preclude review by giving agencies exclusive jurisdiction over policy, or it may include the possibility of court review. While future outcomes in the court are never a complete certainty, Congress nonetheless may opt to include review in legislation if it believes that courts may be sympathetic to their particular policy preferences (Shipan 1997, 2000). However, allowing review also runs the future risk of interests that are in opposition to such preferences to take advantage of courts to stymie agency action. Thus, Congress will utilize the available knowledge of the political and legal climate and attempt to discern whether review of particular agency actions may yield favorable outcomes in the future (Shipan 1997). In essence, Congress may see its ability to control the possibility of litigation as a way to control the policy outcomes of agencies.

The New Deal and the Passage of the Administrative Procedure Act

The emergence of the modern administrative state in the New Deal era, characterized by the creation of new agencies and wide grants of delegated policy-making, presented Congress with a fundamental dilemma: to what extent should agencies be left to their own discretion and free from judicial intrusion? In addition to the question of whether judicial review should be available at all was that of the proper criteria for Courts to follow when deciding whether an agency action would be ruled unlawful.

As a result of the rise of the administrative state, Congress became concerned with how to cope with the increasing number of agencies. Facing Pressure from Republicans in Congress to increase accountability of agency discretion, President Roosevelt established the Attorney General's Committee on Administrative Procedure in 1939 (Gellhorn 1986, McNollgast 1999). The committee charged judges and academics with the task of creating standardized agency procedures for rule-making and adjudication. Shortly before the Committee's final report was issued, however, the American Bar Association successfully pushed Congress to pass its proposal for procedural reform in the Walter-Logan Bill, which Roosevelt subsequently vetoed (Gellhorn 1986). President Roosevelt said that his veto was due to the uncompleted work of the Attorney General's committee, as well as stating that the bill represented, "repeated efforts by a combination of lawyers who desire to have all the processes of government conducted through lawsuits and of interests desiring to escape regulation" (Bryer et al. 2006). It was not until May of 1946 that Congress would pass the Administrative Procedure Act (APA), which President Truman signed on June 11th.

The passage of the APA marks the most important piece of legislation in the history of federal administrative law and agency policy-making. Often referred to as the constitution of administrative agencies, the act provides guidelines on how agencies shall conduct rule-making and adjudicatory actions. It also provided courts with a guide on how to review agencies. According to its legislative history,

"The twin goals of procedural justice and agency control were noted in the Report of the Senate Judiciary Committee accompanying the proposed act: "is designed to provide...fairness in administrative operation" and "to assure the effectuation of the declared policy of Congress" (U.S.Congress, 1946: 252, as cited by McNollgast 1999).

Several reasons have been put forth for the passage of the APA. First, was the concern over separation of powers. With the rise of a “fourth branch” composed of agencies, the administrative process would lack a proper check on its power and therefore, standardized procedures and review could serve as ways to hold agencies accountable. A second reason was the concern over the unfairness of an agency as prosecutor and judge. Third, administrative agencies are an off-shoot of the political branches, and therefore are prone to political pressures. Thus, administrative agencies may lack judicial impartiality. Fourth, because Congress delegates policy making authority to agencies, their actions required proper control and restrictions. Lastly, Congress had created numerous agencies but did not offer any standardization of procedures (Sherwood 1947).

While normative concerns like fairness and procedural due process are cited as reasons for the APA, some scholars have highlighted political motivations behind its passage. McNollgast (1999) argue that although demands for were framed in terms of concern for fairness, efficiency, and individual justice, political preferences over the emerging administrative state were also influential. Throughout the 1930’s, Republicans saw their attempts to prevent the expansion of the New Deal fail and as a result, Republicans and southern Democrats began to introduce legislation that would limit the policy discretion in agencies (McNollgast 1999). This anti-New Deal coalition saw the imposition of procedural constraints and judicial interference as a way of undoing or limiting the New Deal. Because the executive and Congress were both dominated by a New Deal coalition, Republicans saw courts as their only allies in rolling back the New Deal (McNollgast 1999).

While proposals for administrative reform received no support from New Deal Democrats throughout the 1930’s and early 1940’s, this group eventually switched their position

and developed a “grand coalition” with Republicans to pass a bill (McNollgast 1999). With the resurgence of the Republican Party after Roosevelt’s death in 1945, Democrats faced the potential of a Republican president who would staff agencies with administrators that would be less than enthusiastic about advancing and maintaining New Deal programs. Democrats now sought to protect the New Deal by supporting administrative reforms that allowed more judicial review and more standardized procedures for agencies. Procedural constraints and increased opportunities for review were seen as methods of controlling agencies that would fall under control of a Republican presidency (McNollgast 1999). Additionally, by 1946, Democrats were more willing to allow such reforms because court appointments made by Roosevelt through his time in office made courts no longer opponents, but supporters of the New Deal.

In short, McNollgast (1999) showed that motivations for the APA’s passage were not only normative, but politically strategic as well. Central to the strategy was Congress’ view of how favorable courts would be in advancing certain policy outcomes. With the emergence of new agencies and the frequent delegation of policy discretion in the early 1930’s, Republicans saw courts as their only support for dismantling the New Deal, while Democrats favored no judicial interference in agency action. With Roosevelt appointees and the potential loss of the presidency, by 1946, Democrats were comfortable with increased judicial review and saw courts as protecting the New Deal from an adversarial executive in the future.

Judicial Review under the APA

Chapter Seven of the APA provides a broad avenue for judicial review of agency action. While courts have disagreed about what exactly constitutes “agency action” APA review makes virtually every agency action subject to judicial review (Gellhorn and Levin 2006). Sec. 702 allows the right of a review to, “A person suffering a legal wrong because of agency action, or

adversely affected or aggrieved by agency action within the meaning of the relevant statute.” In addition, Sec. 704 entitled “Actions Reviewable” states that “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” Finally, questions of sovereign immunity and jurisdiction have largely become a non-issue for those seeking review.²

Important exceptions, however, limit the possibility of obtaining judicial review under the APA. Sec. 701 of the Act, entitled applications and definitions, states that APA review is not available when (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law.

Despite Section 701’s exceptions, courts have nonetheless followed a presumption of reviewability and have gone great lengths to narrowly construe statutes that preclude review (Gellhorn and Levin 2006). The most prominent example of the court’s expression of a presumption of reviewability is in *Abbott Laboratories v. Gardner* (1967), which held that review of final agency action would not be precluded unless there was “clear and convincing evidence” of congressional intent to do so.³ Thus, even statutes that contain preclusion provisions have been interpreted in ways that have allowed review. In particular, if constitutional claims can be made, courts have been willing to override preclusion and grant review to parties.⁴

Bryer et al. (2006) cite several sources for this presumption of reviewability and the narrow construction of provisions barring judicial review. First is the APA itself. For example, in *Abbott* the Court stated that, “the Administrative Procedure Act embodies the basic presumption

² “The APA itself does not confer subject matter jurisdiction to courts” *Califano v. Sanders* (1977). This obstacle has been overcome by pleading 28 U.S.C. Sec. 1331, the general federal question statute. Sovereign immunity issues were also overcome by a 1976 amendment to Sec. 702 of the APA, although parties seeking monetary damages still face sovereign immunity concerns.

³ *Abbott Laboratories v. Gardner*, 387 U.S. (1967)

⁴ *Johnson v. Robison* (1974) is a landmark case in this respect. Courts however, have never challenged Congress’ power to preclude review.

of judicial review to one suffering legal wrong because of agency action within the meaning of the relevant statute.” (Bryer et al. 2006). The Court noted that, although the APA does not expressly provide for the presumption, the legislative history of the Act provides evidence of congressional intent,

The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the APA’s “generous review provisions” must be given hospitable interpretation (*Abbott Laboratories v. Gardener*, as cited by Bryer et al. 2006).

A second view is that the source of presumption is the Constitution of the United States. Bryer et al. (2006) state that considerations of legislative supremacy, embodied in Article I, and the rule of law, embodied in the Due Process clause, all lead to a strong presumption of reviewability and can be seen as a form of “constitutionally inspired federal common law.”

Lastly, the presumption can be seen as a method of curbing costs in decision making. Providing judicial review may help to prevent erroneous action by agencies and therefore, increase efficiency in the overall process (Bryer et al. 2006). Judicial review can be seen as a deterrent to engage in faulty agency actions and will thus minimize legal mistakes before they occur (Bryer et al. 2006).

Generally, statutes that contain review provisions for particular agency action have preempted review under the APA’s standards (Strauss, Rakoff, and Farina 2003). When statutes contain alternative provisions to the APA, this form of review is often referred to as “special statutory review.” As Sec. 703 states, “the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or in absence or inadequacy thereof, any applicable form of legal action.” Thus, APA review is often used by parties only when an organic statute has been silent on the matter of review, or when the

“agency action” in question has not been expressly defined or included in an organic statute (Strauss, Rakoff, and Farina 2003).

Congress and the Drafting of Judicial Review

Although the APA provides an extremely broad route to review, its exceptions still allow Congress to form alternate forms of review, or even preclude it altogether. Absent constitutional claims, Congress has the power to decide if particular agencies and particular actions may or may not be brought to courts. As stated above, Sec. 703 of the APA states, “the form of proceeding for judicial review is the special statutory review proceeding.” Congress can therefore decide the structure of judicial review of administrative action, which is typically found in the organic acts of agencies. Through various parameters of justiciability, Congress can affect the level of judicial involvement by making it easier or harder for groups and individuals to obtain review.

These parameters include reviewability, standing, scope of review, burdens of proof and jurisdiction. Congress may decide whether certain agency actions can be reviewed and others may be precluded. Provisions may specify who is eligible to be granted standing and under what cause of action(s). Congress can determine the scope of review by providing courts with standards to follow when proceeding to the merits of a case. In addition, the burden of proof can be designated, placing it more or less heavily on certain parties (Shipan 1997). Congress may also choose which courts have jurisdiction over suits and which do not.⁵

Along with these traditional parameters, statutes may include enforcement provisions. These provisions require agencies to have courts review their decisions and grant a court order before issuing penalties on regulated parties (Strauss, Rakoff, and Farina 2003). Other ways in

⁵ Typically review of administrative agencies has been placed in Appeals courts. Because district courts are seen primarily as “finders of fact,” much of this process has been accomplished by agencies and their record keeping already and is therefore not necessary for the court to engage in again.

which Congress can influence review is through shaping statutory interpretation (Melnick 1994). Because Congress knows that courts look to legislative history for establishing intent, Congress may insert certain language into the record that will influence the outcome of review (Shipan 1997).

Judicial Review as a Political Variable: Shipan's Theoretical Model

As a result of Congress' ability to alter judicial review of agencies, a number of scholars have provided accounts that demonstrate that Congress uses such provisions strategically in order to advance and secure policy outcomes (Rabin 1975, Melnick 1983, Cogavin 1988, Cass 1989, Light 1992, Shipan 1997, 2000, Spiller and Tiller 1997, Smith 1998, 2005, 2006). By regulating who, where, and what agency actions are subject to court review, Congress can decide the amount of interference judges may play in the policy making process. Thus, judicial review in the administrative realm has been viewed as a political tool that can be utilized to ensure preferences and outcomes (Shipan 1997, 2000, Smith 2005, 2006).

Shipan has pointed out that studies of judicial review have traditionally focused on normative issues and have missed the important role of legislatures in shaping the availability and scope of review, especially in administrative law (1997, 2000). These studies frequently assume that courts are the only force in determining whether review exists and what forms it will take (Shipan 2000), and neglect the ability of the legislature to decide on provisions of judicial review of administrative action. This ability to shape review affects policy outcomes, as courts can overrule, alter, or uphold an agency's policy choice.

As noted above, the original enacting coalition is likely to view judicial review favorably or not depending on the configuration of political forces at the time of the enactment. Thus, Shipan has developed a formal model on the strategic use of judicial review, the central thesis of

which is *that judicial review is not only a legal variable, but a political variable as well: it is a choice made by legislative actors who consider how judicial review will affect future policy outcomes* (1997,18, 2000, 271).

Employing a game-theoretical analysis, Shipan (2000) demonstrates under what conditions legislatures will prefer to include review provisions and when they will not. In its simplest form, the model indicates that a legislature’s choices on judicial review are conditioned by the relative locations of the judiciary and agency in ideological space.⁶ Shipan introduces the concepts of “agency sympathetic” and “judiciary sympathetic” regimes. Under an “agency sympathetic” regime, the legislature’s policy preferences will be closer to the agency than to the judiciary. Therefore, the legislature decides that allowing review will not be beneficial. Conversely, under a “judiciary sympathetic” regime, the judiciary’s policy preferences are more closely aligned with the legislature’s and farther from those of the agency. In this case, the legislature will choose to include judicial review provisions as an attempt to bring policy outcomes closer to its preferred point. Thus, while the subject of judicial review has traditionally been viewed as the domain of courts, Shipan’s model provides a general framework to begin to view how legislatures may utilize the courts to further policy objectives.



Interest Groups and Judicial Review

Interest groups are concerned with policy outcomes and seek to influence them in a variety of ways. One method is to influence legislation. By testifying at congressional hearings,

⁶ Also considered in the analysis is the important role and positions of committees and court types (i.e. activist or restrained courts). However, the basic point remains in that the committee and the floors choices are conditioned by the locations of the agency and the judiciary.

lobbying, and contributing to the reelection campaigns, groups act as information providers and exert pressure on members of Congress and their staff to support their goals. In particular, groups target specific congressional committees that have jurisdiction over their areas of interest and do so for several reasons. First, committees possess “gate keeping” power and can decide what types of provisions will or will not be included in statutes (Lowi et al. 2010). Second, committees oversee agencies charged with implementing statutes. Thus, interest groups lobby not only to influence the contents of legislation, but also lobby to encourage the intervention of congressional oversight of agencies (Hall and Miler 2008).

Interest groups also look to influence agency action directly. Interest groups are heavily involved in the rule-making process, the most active participants being business and trade associations (Golden 1998, Furlong and Kerwin 2005). Among the methods most used by groups are forming coalitions with other organizations, having informal contacts with agency staff, and providing testimony at public hearings (Furlong and Kerwin 2005). Groups are also aware that coalitional and bureaucratic drift can occur and may support ways to minimize deviations from an enacting coalition’s preferences (Moe 1989). Thus, groups are driven by some of the same concerns of legislators when facing the potential of policy outcomes that are contrary to their preferred choices.

Interest groups may also look to courts as a way to further their policy preferences. When dealing with an agency that is unresponsive or even hostile to their goals, groups may favor, as Moe put it, “an active, easily triggered role for the courts in reviewing agency decisions” (1989, as cited by Shipan 1997, 18) in order to force agencies to enforce regulations. On the other hand, anti-regulatory groups that prefer less regulation and lax enforcement may wish to use judicial review to overturn agency action. As Shipan’s model suggests, an interest group’s preference for

review provisions depends upon the group's assessment of the relative preferences of the agency and the judiciary.

As a result of the problems of coalitional and bureaucratic drift, interest groups may anticipate taking their battles to courts in the future.⁷ Depending upon regime arrangements, groups with different goals may therefore take interest in influencing the availability of review in regulatory statutes that can assist them in advancing their preferred policy outcomes.

Previous Studies

Environmental Policy

Shipan has applied his theoretical model to the area of environmental policy (2000). The Clean Air Act Amendments of 1970, 1977, and 1990 created the Environmental Protection Agency (EPA) and delegated policy-making to it. Shipan (2000) points out that with each amendment, Congress successfully expanded judicial review of EPA decisions, and thus the opportunities for litigation by public interest groups. In 1970 and 1990, Democrats controlled Congress, but not the executive. During both years the executive, and thus the EPA, were under Republican control. As a result, Congress saw the judiciary as an ally of environmental interests and the executive as adversarial to them. The years of 1970 and 1990 are thus examples of the "sympathetic judiciary" regime, in which expanding the authority of courts was seen as a way to ensure that environmental regulation was adequately promulgated and enforced by the EPA.

In 1977, however, Congress and the executive were under the control of Democrats, while the partisan makeup of the judiciary was split. Pro-industry groups such as the Council of Shopping Centers and the Manufacturing Chemists Association began to view courts as a

⁷ Melnick (1994) examined welfare legislation and how groups paid close attention to the language inserted into the congressional record, anticipating the use of its legislative history in the courts.

potential ally and supported major changes expanding judicial review (Smith 2005).⁸ While Congress did expand some opportunities for groups to challenge EPA decisions at this time, such review was limited to the D.C. Circuit. Legislators felt that court was more aligned with its preferences and would increase the chance of pro-environmental outcomes.

Reaching conclusions similar to those of Shipan, Smith has provided detailed accounts of the preferences for judicial review provisions in Congress during the Passage of the Clean Air Act amendments (1997, 1998, and 2005). Smith shows how Congress can use judicial review even in the face of a judiciary dominated by appointees made by the opposite party (2005). It did this by allowing suits for stricter enforcement of regulations but not suits challenging them effectively limiting the ability of conservative judges to move policy away from environmental groups.

Lastly, Smith (2005) points out that Congress' use of courts is similar to its use of agencies. Delegation to courts becomes less likely when the executive and Congress are similar in preferences, and vice versa. In addition to the Clean Air Act Amendments, Smith (2006) found that congressional committees have viewed citizen-suit provisions, which allow interest groups and individuals to force agencies to act on their legislative mandates, as instruments for controlling the outcome of environmental regulation.

These works demonstrate Congress' awareness of institutional arrangements and their potential effects on policy outcomes. Pro-environmental Democrats in control of Congress expanded opportunities for judicial intervention most aggressively during the divided government scenarios of 1970 and 1990. In both years, courts were seen as allies that would uphold strong regulation and enforcement, whereas the Republican controlled executive was

⁸ The 1977 amendments changed the EPA's rule-making process that was previously under the APA (Smith 2005). The new procedure required the EPA to permit oral presentations of data, views, and arguments that allowed interest groups to place information into the record that could be used in courts in the future.

viewed as a threat to those preferences. In 1977, a Democratically controlled Congress expanded, but also limited review to one court as a result of a judiciary comprised of more Republican appointees made under Nixon's administration.

Veteran's Affairs

Political battles over the preference for judicial review provisions have been highlighted in several works (Rabin 1975, Cogavin 1988, Light 1992). Most notably, Light (1992) has provided an in-depth account of why the preclusion of review of benefits decisions made by the Veteran's Administration, which had been in place since 1887, ended in the Judicial Review Act of 1988. Prior to the Act, claims that were denied were appealed within the Veteran's Administration with no possibility of appealing to courts. This internal process was favored by the largest veteran interest groups, who benefitted from representing clients, and provided an immediate vehicle to recruit new members. Congress and, in particular, veterans' committees, also favored preclusion, claiming that it prevented frivolous claims from clogging the courts. Its members also continued to receive the support of veterans' groups.

Despite years of opposing preclusion, the Judicial Review Act of 1988 was reluctantly supported by these groups due to its greater interest in the passage of a bill that elevated the Veteran's Administration to cabinet status (Light 1992). The Senate Veterans' committee threatened to vote down the cabinet proposal if preclusion remained in place, effectively linking the two bills. Thus, having a greater interest in establishing the VA to a cabinet department, Veterans groups supported the end of preclusion.

Shipan (1997) has stated that although interest groups were benefitting from a policy outcome (i.e. granting of benefit claims), they were directly benefitting in other ways from preclusion (i.e. through representing clients and increasing membership). By keeping the process

internal, veterans' groups benefitted from publicizing their services directly to veterans. Whether courts were allowed to review claims was not the issue, but rather the veterans' groups concern over maintaining a monopoly on the claims process.

Other Areas

Cass (1989) and Shipan (1997) have focused on the Communications Act of 1934 and how interest groups showed preferences over judicial review provisions. Far from being "procedural" details that do not receive much attention, Shipan (1997) showed that groups such the National Association of Broadcasters pressured Congress to adopt particular review provisions. In addition, Congress had its own motivations for review, which were seen as a way to monitor the uncertainty in the future actions of the FCC.

Spiller and Tiller (1997) have shown that proposed amendments to the APA in the early 1980's were driven by political concerns. Referred to as the "Bumpers Amendments," these provisions would direct courts to decide all questions of law and not to grant a "presumption of validity" on an agency's interpretation of its statutory duties (Spiller and Tiller 1997). If passed, the amendments would have made agency action subject to more judicial scrutiny and review. Thus, the Bumpers Amendments were driven by a concern over Reagan appointees who would push for deregulatory policies. Directing courts to use a standard of review that disfavor agency deference, and hence less discretion, was seen by Democrats as a way to prevent deregulation. In terms of Shipan's model, the "Bumpers Amendments" is a demonstration of a "judiciary sympathetic" regime, in which liberals attempted to check agency discretion through the use of the courts.

Judicial Review and the Affordable Care Act: Introduction

Thus far, this paper has discussed Congressional delegation to agencies and the ability of Congress to control subsequent policy outcomes. It has also provided a brief account of how, despite the Administrative Procedure Act's generous provisions for granting judicial review of agency actions, Congress remains able to shape judicial review of agency action or preclude judicial review altogether. Congress may choose to make agency actions subject to judicial scrutiny or deny access to courts to parties seeking to challenge agency decisions. Legislators can accomplish this by deciding who has standing, what particular agency decisions may be reviewed, and which courts will have jurisdiction to hear cases. As a result, Congress is able to control how much judicial interference is allowed in agency policy making.

Next, Shipan's game-theoretic theoretical model was introduced. Shipan's model provides a framework consisting of two regime types that determine whether legislators favor judicial review or not. To reiterate, Shipan's model suggests that under an agency-sympathetic regime, Congress sees itself as more closely aligned with the preferences of the agency and will not see any need for judicial review of the agency's actions. Under a judiciary-sympathetic regime, on the other hand, Congress sees itself more closely aligned with the preferences of the courts and will favor judicial review of the agency as a way to achieve more favorable policy outcomes. Shipan's case studies that demonstrate support for his model were then reviewed. Other works by scholars highlighting the political nature of judicial review were also discussed.

In the second half of this paper, I apply Shipan's theoretical model to the Patient Protection and Affordable Care Act of 2010.⁹ Specifically, I will examine one aspect of the law, the creation of the Independent Payment Advisory Board (IPAB), an entity charged with drafting proposals to reduce Medicare expenditures. I begin by explaining the IPAB's purpose and

⁹ Referred to from here as the Affordable Care Act (ACA).

structure. I then describe the political environment at the time of the passage of the ACA, in order to determine whether it is best described as an agency sympathetic or judiciary sympathetic regime. Based on this analysis, I hypothesize the type of congressional and interest group activity regarding judicial review provisions that should be expected if Shipan's model is correct. Finally, I examine the legislative history both before and after the law's passage to determine whether Shipan's model does, in fact, apply.

To anticipate the results of this investigation, I conclude that there is support for Shipan's model and that there was some activity by Congress and interest groups surrounding the IPAB's judicial review provisions at the time of the passage of the Affordable Care Act, but not as much as expected. I provide three explanations why this result might have occurred, and why it does not necessarily invalidate Shipan's model. I then provide evidence that shows Republicans and interest groups opposed to the ACA having expressed more concern over judicial review following the passage of the law.

The Independent Payment Advisory Board: Purpose and Structure

The Affordable Care Act has turned out to be one of the most politically contentious laws passed in the past several decades. The law's most controversial provisions, such as the individual mandate and the expansion of Medicaid, ignited a firestorm of opposition from conservative legislators, think tanks, activist groups, as well as from the general public. It has survived over 50 attempts by House Republicans to repeal major provisions and, played a central role in the recent government shutdown of October 2013, and has continued to polarize the political parties. In 2012, the constitutionality of the act was upheld by a sharply divided Supreme Court.¹⁰

¹⁰ *National Federation of Independent Business v. Sebelius*, 567 U.S. (2012).

One of major controversies surrounding the law involved the creation of the IPAB. In August 2009, former vice presidential candidate Sarah Palin coined the term “death panel” to denote early proposals for end of life counseling that would consist of bureaucrats rationing care for seniors (Corn, 2009). Since then, conservative legislators, pundits, and activists have adopted the phrase “death panel” to defame the Board.

Section 3403(b) of the Affordable Care Act directs the Board to “reduce the per capita rate of growth in Medicare expenditures.”¹¹ Once the Chief Actuary of the CMS sets an “applicable savings target” the Board is authorized to develop proposals that will reduce Medicare spending to a level at least equal to the Chief Actuary’s target (Congressional Research Service 2013, 4). The proposal is required to include methods to ensure Medicare solvency, make changes to reimbursement policies, improve the overall delivery of healthcare and health outcomes for Medicaid recipients, and discuss administrative funding for enacting the proposal. The Board must also take into consideration the effects the proposal will have on Medicare beneficiaries, as well as providers and suppliers.

The IPAB is comprised of fifteen members who are appointed by the President with the advice and consent of the Senate.¹² Each member is appointed for a six year, staggered term and may be reappointed for an additional term. When deciding on the nominations of at least three appointees, the President must consult with both the majority and minority leadership in both chambers. Along with the President’s appointees, the board also includes the Secretary of Health and Human Services, the Center for Medicare and Medicaid (CMS) administrator, and the Health Resources and Services administrator who serve as non-voting members (U.S. Congressional Research Service 2013, 5)

¹¹ Section 3403(b)

¹² Section 3404(g)(1)

The IPAB's proposal may only affect the Medicare program and may not include recommendations that ration care, raise revenues or increase cost sharing, restrict benefits, or change eligibility.¹³ In addition, the Board may not reduce payments to providers and suppliers that are already scheduled to receive reductions, which are included in other sections of the ACA. Once the Board adopts a proposal by a simple majority vote, however, the promulgation of regulations for its implementation remains under the authority of the CMS (U.S. Congressional Research Service 2010, 7).

In order for the Board's proposal to be implemented, it must first be submitted to both Congress and the President by January 15 and passed by August 15. The ACA includes expedited or "fast track" congressional procedures that set strict deadlines and limitations on debate times and on the introduction of amendments. The implementing bill is to be introduced and submitted to committees by April 1, by which date Congress may amend or draft an alternative proposal. However, Congress is still required to achieve the same reduction target initially set by the Board, and if it does not enact any changes or alternatives the Board's proposal will automatically go into effect on August 15.¹⁴

Most significantly for this study as part of the section creating the IPAB, the ACA includes a provision precluding judicial and administrative review of the IPAB's decisions. Sec. 3403(e) (5) reads as follows:

"LIMITATION OF REVIEW—There shall be no administrative or judicial review under section 1869, section 1878, or otherwise of the implementation by the Secretary under this subsection of the recommendations contained in a proposal."

¹³ Section 3403(C)(2)(a)(ii)

¹⁴ Section 3403(e)(1)

While the ACA includes 12 similar provisions limiting judicial review elsewhere, the creation of the IPAB and its insulation from judicial and administrative review has proven to be one of the most contentious parts of the law.¹⁵ The Board's exemption from review has presented issues regarding separation of powers and the proper interpretation of the provisions establishing and governing IPAB.

The Political Regime during the Enactment of the ACA

Under Shipan's model, the most important factor in determining whether an enacting coalition will favor the availability of judicial review of agency actions is the type of political regime in place at the time of a law's enactment. Under an agency sympathetic regime, the enacting legislative coalition sees itself closely aligned with the policy preferences of the agency to which it seeks to delegate policy-making power and will favor insulating the agency's actions from judicial review. Opponents of the law, on the other hand, will see themselves as more aligned with the judiciary rather than the agency and will favor judicial review in order to limit the scope of the agency's actions.

Conversely, under a judiciary sympathetic regime, the enacting coalition is faced with a potentially hostile or unresponsive agency and will favor the availability of judicial review as a way to achieve or enforce favorable policy outcomes. The enacting coalition sees the judiciary as more aligned with its policy preferences and as an ally in ensuring those preferences are put into effect. Opponents of the enacting coalition, however, will prefer the agency be insulated from judicial intervention and will not favor judicial review of the agency's actions.

¹⁵ The Citizens Council on HealthCare compiled a list of all the Act's provisions, <http://www.cchfreedom.org/pr/ObamaCareDeniesRelief.pdf>

Thus, in order to apply Shipan's model to the ACA, it is important to establish what regime type was in place when the law was enacted. This can be accomplished by examining the relative political positions of the enacting coalition, the executive, and the judiciary.

The passage of the ACA occurred in 2010 under a Democratically controlled Congress. The Senate passed the bill with 58 Democrats voting yay and 39 Republicans voting nay. On the day in which the law was enacted, the House was comprised of 253 Democrats and 178 Republicans. The final vote of the ACA was 219 to 212, of which 219 Democrats voted for the bill, with 178 Republicans and 34 Democrats voting against it. Thus, the ACA's enacting coalition was overwhelmingly Democratic and its opposing coalition Republican.

With the election of President Barack Obama in 2008, the executive branch was also under Democratic control. President Obama was thus in a position to appoint heads of cabinet departments and other agencies that would be more favorable Democratic policy preferences. With regard to the enactment of the ACA, the most important agency appointment was the Secretary of the Department of Health and Human Services. During early discussions on health reform in the beginning of 2009, President Obama's first choice, Tom Daschle, was quickly dropped after allegations of tax delinquency surfaced. President Obama then nominated Kathleen Sebelius who was confirmed by the Senate on April 28, 2009

In contrast to this dominance of the Democrats in the Congress and executive, The ACA was passed at a time when the judiciary was relatively conservative. By March 2010, the Supreme Court was comprised of 6 justices appointed by Republican Presidents and 3 appointed by Democratic Presidents.¹⁶ Out of the 178 total Circuit Court judges, the appointments were 56% Republican, 37% Democratic and 7% vacant.¹⁷ The makeup of District Courts was

¹⁶ <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>

¹⁷ http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=132x8102330

strikingly similar with 55% Republican appointments, 39% Democratic appointments, and 6% vacant.¹⁸

Given a Democratically controlled Congress, a Democratically controlled executive, and a relatively conservative judiciary, the ACA qualifies as being enacted within an agency-sympathetic regime. With an agency sympathetic regime established, it is now possible to move forward to discuss the theoretical expectations and examine whether Shipan's claims are present in the case of the ACA. Thus, under Shipan's model we would not expect to see judicial review provisions to be favored by the enacting coalition. Conversely, we would expect to see the opposing coalition favoring judicial review provisions in order to challenge the agency's decisions.

Data and Methodology

In order to determine whether Shipan's theory is supported in the case of the Affordable Care Act, I examined the legislative history of the Independent Payment Advisory Board (IPAB). Committee hearings, reports, legislation, and the Congressional Record were examined using fdsys.gov, which is the digital archive of federal government documents. I also examined letters authored by various executive officials, legislators, and interest groups to determine the level of interest they expressed regarding the issue of judicial review. To identify relevant documents, I searched for the phrases and words "judicial review," "courts," "interest groups," and "Independent Payment Advisory Board."

In total, sixty-six hearings on healthcare reform and the implementation of the ACA were examined. Fifty of these occurred between January 20 2009 and March 25, 2010 when the ACA was signed into law and sixteen took place between March 2010 to February 2014, after the

¹⁸ *Ibid.*,

Act's passage. Lastly, floor statements and letters submitted into the Congressional Record from January 2009 to February 2014 were analyzed.

Legislative History of the IPAB: Competing Proposals

The concept of establishing a new independent entity charged with addressing major health care issues was introduced prior to the introduction of health care proposals in 2009. Former Senator and Health and Human Services (HHS) Secretary nominee, Tom Daschle, became an early proponent of the concept of an independent entity and put forth the idea of a "Federal Health Board" that would be modeled after the Federal Reserve Board (Daschle, Lambrew, and Greenberger, 2008). Daschle saw the need for an independent entity in healthcare policy that would be insulated from political influence and advocated that the Board be granted the authority to make decisions on a variety of policy issues such as the regulation of the health insurance market and the delivery and quality of care (Congressional Research Service 2010, 2).

Following Daschle's call for more politically insulated policy making, Senator Jay Rockefeller (D-WV) became a leading proponent of the establishment of an independent Medicare entity during the 2009 health reform debate, and introduced the Medicare Payment Advisory Commission Reform Act on two separate occasions.¹⁹ These proposals called for the elevation of MedPAC from merely an advisory commission to Congress to an executive agency that would possess policymaking authority beginning in 2012. Under Sen. Rockefeller's proposal, MedPAC would consist of 11 members appointed by the President with advice and consent of the Senate and its policy decisions would be precluded from judicial review.

Support for the creation of an independent entity also came directly from the Obama administration. On July 17th, 2009, the administration submitted the Independent Medicare

¹⁹ The first piece of legislation, S. 1110 was introduced on May 20th, with a duplicate bill, S. 1380 following on June 25th. Rep. Jim Cooper (D-TN) introduced the House version, H.R. 2718 on June 4, 2009.

Advisory Council (IMAC) Act to House members.²⁰ Perhaps surprisingly, and unlike the Rockefeller proposal, the IMAC proposal included a judicial review provision that made the prospective Council's recommendations subject to court intervention. However, the bill limited jurisdiction to the D.C. Circuit and required suits to be filed within 30 days of the President's approval of the Council's recommendations.²¹

The proposal that ultimately succeeded in creating the IPAB was introduced by the Senate Finance committee in November 2009.²² By this time, the House had already passed its health care reform bill (H.R. 3962), without adopting the IMAC proposal and support for the creation of an independent Medicare entity now remained alive only in the Senate. After six months of testimony and several days of bipartisan sessions, the Senate Finance committee began a seven day mark up of its health care reform bill, S.1796. The bill's provisions establishing the IPAB went even further than Sen. Rockefeller's proposal, exempting the board's decisions from both judicial and administrative review.²³ The committee passed the bill 14 to 9, with only one Republican voting in favor of the proposal.

In June of 2009, the U.S. Chamber of Commerce emerged as one of the first opponents of Daschle's Federal Health Board. According to their testimony in front of the Senate Health, Education, Labor and Pensions Committee, the establishment of an independent advisory board modeled after Daschle's Federal Health Board would be, "disastrous and possibly unconstitu-

²⁰ Letter to Speaker Nancy Pelosi (D-CA) from OMB director Peter Orzag, http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_letters/Pelosi_071709.pdf

²¹ Section 18 (5)(j)

²² The original name of the board in the Senate's health care bill was the "*Independent Medicare Advisory Board*." Majority Leader Harry Reid (D-NV) later introduced an amendment that renamed the board to the "*Independent Payment Advisory Board*", Sec. 10320 of the ACA.

²³ S. 1796 later became an amendment to H.R. 3590, and floor debate began on November 21 with final Senate passage on December 24, 2009.

tional.”²⁴ The Chamber of Commerce went on, stating, “No new bureaucracy should be given the power to impose law without proper checks and balance,” and that, “advisory bodies should advise and make suggestions, not make law.”²⁵ Finally, once Daschle’s concept was realized with the introduction of the IPAB, a letter to Majority Leader Harry Reid signed by state and national medical specialty societies representing over 92,000 physicians also expressed how the new Board would be “largely unchecked by Congress or the courts” and that it would be able to arbitrarily reduce a physician’s payments.²⁶

Concerns over the board’s preclusion from judicial review were expressed by House members as well. A July 31st letter to Speaker Pelosi signed by 75 House members expressed concerns over the IMAC and Rockefeller proposals that transferred Medicare policy authority to the executive branch with, “no congressional oversight or judicial review.”²⁷

As a response to the lack of accountability seen by Republicans, Sen. Crapo (R-ID) introduced an amendment to the judicial review provisions of sec. 3403.²⁸ Had the amendment succeeded, the board would have been subject to more procedural constraints. Sen. Crapo’s amendment added language that created exceptions to the preclusion of judicial review, allowing suits if the board failed to comply with procedural requirements or if it violated the prohibitions on rationing care, restricting benefits, raising insurance costs, or modifying eligibility. In addition, the amendment gave courts instructions for determining whether the Board’s recommendations were unsupported by “substantial evidence,” under Sec. 706 of the Administrative Procedure Act.

²⁴ U.S. Congress. Senate. Committee on Health, Education, Labor, and Pensions. *Healthcare Reform Roundtable I*, 11 June 2009. (Washington, DC: Government Printing Office) pg. 27.

²⁵ *Ibid.*, pg. 27

²⁶ Sen. John McCain (R-AZ) “Physician Organizations that Oppose Patient Protection and Affordable Care Act,” *Congressional Record*. (10 Dec. 2009) S12857-S12858.

²⁷ Letter to Speaker Nancy Pelosi, <https://www.aamc.org/download/97386/data/073109nealimaclettertopelosi.pdf>

²⁸ “Text of Amendments: SA 3242,” *Congressional Record* (16 Dec. 2009) S13326-13327.

This legislative history provides some support for Shipan's theory. On the one hand, supporters of the Board successfully worked to insulate the Board's decisions from judicial review. While the Obama administration proposal did contradict this, the review that it allowed was very limited in scope. As Shipan's theory also suggests, interest groups and members of Congress opposed to the delegation of power to the Board also opposed its insulation from judicial review on several occasions leading up to passage of the Affordable Care Act, and on at least one occasion they unsuccessfully sought to amend the law to allow review.

The evidence supporting Shipan's theory is not as strong as we might expect, however. Especially given the contentious nature of the Affordable Care Act, and the IPAB in particular, it seems that, if Shipan's theory is correct, there should have been a more vigorous and extended effort by opponents to create avenues to use the courts to limit the Board's actions. In the following section, I attempt to offer several explanations on why the expectations for the legislative history of the ACA generated from Shipan's theory were less-than-fully realized.

Explanations of Findings

The ACA was passed under an agency sympathetic regime and as Shipan's model predicts, no judicial review of the IPAB was favored by Democrats. However, the evidence presented above has shown that discussions over the IPAB's judicial review provisions by both legislators and interest groups were fairly limited. With the exception of Sen. Crapo's amendment, Republicans did not make any effort to overturn the IPAB's exemption from judicial review. Interest groups opposed to the IPAB also did not express many concerns about its exemption from judicial review. Thus, while one amendment was introduced to provide for judicial review and there was minimal expression by interest groups on judicial review, the case did not reveal as much evidence as expected.

There are four explanations why Shipan's theory is not supported as clearly as we might expect in the case of the IPAB. The first is that most of the efforts by Republicans and interest groups were put towards preventing the creation of the IPAB altogether. Rather than accept the establishment of the Board, and attempt to limit the Board through judicial review provisions, Republicans introduced several amendments that would have repealed and eliminated funding for the IPAB.²⁹

The reasons for this can be seen by looking at the difference between the political contexts of the ACA and the Clean Air Act. The Clean Air Act, which was the case study Shipan initially used to demonstrate his model, passed the House with a vote of 375 to 1 and was approved unanimously by the Senate. In contrast, the ACA was passed with no bi-partisan support. It passed the Senate with 58 Democrats and 39 Republicans voting no, while the House saw no Republican support for the bill. Thus, in the case of the Clean Air Act amendments of 1970, 1977 and 1990, judicial review provisions can be seen as "damage control" by legislators and interest groups trying to gain an upper hand on future policy outcomes through the courts. In the case of the ACA, Republican hopes and efforts were focused on defeating the bill entirely.

A second explanation pertains to the legal regime in which political actors operate. Most of the events that Shipan has applied his theory to occurred before the Supreme Court case of *Chevron v. Natural Resources Defense Council* (1984).³⁰ As one of the most important administrative law cases of all time, *Chevron* established a two-step test that favored deference to an agency's interpretation of statutes which Congress has empowered to administer. The first

²⁹ Sen. Kyl (R-AZ) and Cornyn (R-TX) introduced an amendment during the mark-up of S. 1796, U.S. Senate. Committee on Finance. *Providing affordable, quality health care for all Americans and reducing the growth of health care spending and for other purposes together with additional and minority views (to accompany S. 1796)* (S. Rpt. 111-89). pg. 412. Washington: Government Printing Office, 2009. During floor debate, Sen. McCain (R-AZ) submitted a motion to recommit H.R. 3590 with instructions that included defunding the enactment of the board, *Congressional Record* (30 November 2009) S11997.

³⁰ *Chevron, U.S.A, Inc. v. Natural Resources Defense Council Inc.* 467 U.S. (1984).

step of the test that upholds agency deference is if congressional intent is clear and present in a statute. In cases where intent is found to be ambiguous, the second step of the test is whether the agency interpretation is found to be “reasonable” and not “arbitrary and capricious,” and if not, the court will defer to the agency’s interpretation. Thus, *Chevron* has established a legal regime that has made judicial review of agency action a less attractive means for political actors to ensure policy outcomes.

Several studies have shown the impact of *Chevron* deference as strengthening the decisions of agencies. Shuck and Elliot (1990) showed how *Chevron* increased agency deference in Circuit Courts from 71% to 81% between the six months before *Chevron* and six months period in 1985. Kerr’s (1998) study revealed that 73% of agency interpretations were upheld in Circuit Court cases between 1995 and 1996. Additional studies have also highlighted strong deference to agencies as a result of *Chevron* (Smith and Tiller 2002, Richards, Smith and Kritzer 2006). Thus, after *Chevron* courts have upheld agency deference about three-quarters of the time.

In light of the courts’ post-*Chevron* preference to defer to agency decisions, it is easier to understand why opponents of the Board did not expend as much energy on judicial review provisions as did opponents of the Clean Air Act. The Clean Air Act of 1970 and Amendments of 1977 and 1990, upon which most of Shipan and Smith’s work was based, occurred pre-*Chevron* and was passed in an entirely different legal environment. With pre-*Chevron* courts more willing to overturn agency actions, judicial review provisions were seen as more worthy of attention by legislators and interest groups as a way to challenge the decisions made by the EPA.³¹

³¹ Several seminal works arguing this view were published during this period. See Stewart (1975), Horowitz (1977), Melnick (1983).

It is worth noting here that the courts' willingness to defer to agency decisions has been particularly strong in Medicare policy.³² This deference regime has been accomplished in two ways. First, higher courts have actively sought to restrict lower courts from hearing CMS challenges. For the first decade and a half of Medicare's existence, lower courts were willing to grant review on Medicare policy and even went as far as often waiving requirements for the exhaustion of administrative remedies in statutes governing Medicare. By the early 1980's, the Supreme Court issued a series of decisions that restricted judicial review by requiring lower courts to adhere to exhaustion requirements and by the 1990's, the amount of Medicare disputes declined significantly.

Second, In addition to restricting judicial review by higher courts, *Chevron* has played a strong presence in Medicare cases. Jost (1999) has explained the particularly strong adherence to *Chevron* in Medicare disputes due to the courts lack of interest in involving itself in highly technical policy matters that are often inconsequential for anyone other than providers. The adherence to *Chevron* by the Courts in Medicare challenges has also been coupled with a series of Supreme Court cases that have deferred interpretations of regulations as well.

A third explanation for the lack of evidence of efforts to use judicial review provisions to limit agency action in the case of the IPAB may be that it may be premature to expect to see those efforts. The laws that Shipan used to develop his theories occurred over a substantial period of time. The Clean Air Act Amendments of 1970, 1977 and 1990 occurred over a period of two decades, while the Communications Act of 1934 examined legislative history dating back to 1927. Thus, Shipan's theories examined cases where judicial review gained the attention of political actors well after the initial passage of legislation. The IPAB, in contrast, has only been

³² This Section draws heavily on Jost (1999)

in place for a couple of years. Efforts to impose judicial review on the IPAB may yet be forthcoming.

A final explanation for the lack of interest in judicial review may be in part due to the provisions of the ACA itself. As stated above, Republicans have been more focused on attempting to repeal the Board rather than on altering the Board's exemption from judicial review. According to the law, Congress will have one chance to repeal the board in 2017 if a resolution is passed by a super-majority in both houses (Congressional Research Service 2013, 21-24). Therefore, judicial review may become more important to Republicans and interest groups opposed to the IPAB if the resolution fails to pass.

Legislative History of the IPAB: Post Enactment

While there was little interest in pushing judicial review provisions during the enactment of the IPAB, Republicans and interest groups have expressed more concern over the Board's exemption from judicial review since the law's passage. Once Republicans gained control of the House after the midterm elections, several hearings exclusively on the IPAB were held. While no formal proposals amending judicial review provisions were introduced, this activity indicates that opponents of did indeed have a strong interest in this matter.

The first hearing was held by the House Budget Committee. Rep. Tim Huelskamp (R-KS) asked HHS Secretary Kathleen Sebelius, "because IPAB decisions are not subject to judicial and administrative review, does that mean that Medicare patients who may be denied care because of an IPAB reimbursement decision in the future have no access to the federal grievance process?"³³ Secretary Sebelius replied that the board is restricted from making proposals that would ration health care, raise revenues or Medicare beneficiary premiums, increase beneficiary

³³ U.S. Congress. House. Committee on the Budget. *Medicare's Future: An Examination of the Independent Advisory Board*, 12 July 2011. (Washington: Government Printing Office) pg. 82.

cost sharing, or restrict benefits or modify eligibility criteria. The Secretary went on to state that while HHS could not offer advice on hypothetical cases, she believed that the statute did not completely preclude judicial review, and cited case law that could support a legal challenge if the Board violated one or more of the statute's restrictions.³⁴

Grace-Marie Turner of the Galen Institute spoke out against the IPAB's exemption from administrative and judicial review. In her testimony, she highlighted the Goldwater Institute's constitutional challenge of the IPAB, quoting the Institute's litigation director who stated, "No possible reading of the Constitution supports the idea of an unelected, standalone federal board that's untouchable by both Congress and the courts."³⁵

The second hearing was held by the Energy and Commerce Subcommittee on Health on July 13, 2011. Several Republican members raised questions about the limits on the Board's powers and whether an individual or group would be allowed to challenge the Board's decisions. This concern was seen through an exchange between Subcommittee Chairman Joseph Pitts (R-PA) and Secretary Sebelius,

Mr. PITTS. Are there any provisions in the law that explicitly state IPAB cannot reduce access to the treatments like that?

Ms. SEBELIUS. They may not by law ration care. And I think anyone would suggest that a reduction or an elimination of a treatment is rationing care. That is forbidden by law.

Mr. PITTS. Suppose someone believes that IPAB has, in fact, rationed care. What redress does that person have to challenge the board's decisions?

Ms. SEBELIUS. A court challenge.

³⁴ *Ibid.*, pg. 83.

³⁵ *Ibid.*, pg. 48.

Mr. PITTS. Are the board's recommendations exempt from judicial or administrative review?

Ms. SEBELIUS. The judicial oversight that is limited is really, I think, regarding my or any future Secretary of HHS implementation of recommendations when they have followed the law. I don't think anyone—certainly our general counsel feels very strongly that nothing in that language is consistent with language that is currently in the Medicare statutes as they move forward. Nothing would certainly give either the IPAB board or a future Secretary of HHS or the current Secretary of HHS any ability to violate the law, and that would always be subject to judicial review.³⁶

Rep. Michael Burgess (R-TX) commented that individuals would have a difficult time obtaining standing to challenge the board, because no IPAB proposal has been implemented yet.³⁷

Comments about judicial review were also seen in the testimony of representatives of several interest groups present at the hearing. Teresa Morrow, a cofounder of Women against Prostate Cancer stated concerns about the IPAB's exemption from judicial and administrative review.³⁸ In addition, Diane Cohen, a senior attorney at the Goldwater Institute challenged the Secretary's interpretation of the IPAB's preclusion of review,

“I just want to follow up on what the Secretary testified about earlier this morning. Let us be clear, Section (e)(5), the act specifically prohibits judicial review. And what that means is that the act prohibits judicial review. If the Secretary acts outside the law, there is no judicial review. There is no accountability for her actions. Secondly, these are not mere proposals or recommendations. These are legislative proposals that can become law. We also heard talk about while one provision says there is no judicial review but we are not supposed to believe that, another provision says a joint

³⁶ U.S. Congress. House. Subcommittee on Health of the Committee on Energy and Commerce. *IPAB: The Controversial Consequences Medicare and Seniors*, 13 July 2011. (Washington DC: Government Printing Office) pg. 54.

³⁷ *Ibid.*, pg. 56. In addition, when I questioned Rep. Paul Ryan (R-WI) on the IPAB, he also expressed similar concerns over groups obtaining standing.

³⁸ *Ibid.*, pg. 285.

resolution is required to dissolve the board, but we are not supposed to believe that, and then another provision prohibits rationing, but we are supposed to believe that... In creating IPAB, Congress provided effected patients, providers, and product developers with no mechanism for appealing the board's decisions."³⁹

Discussions over the IPAB's judicial review provisions also occurred in March of 2012 in the House Ways and Means Committee. David Penson, an M.D. representing the Health Policy Council and the American Urological Association, and Dr. Scott Gottlieb of the American Enterprise Institute, derided the Board's exemption from judicial and administrative review. When Rep. Vern Buchanan (R-FL) asked what the full consequences of the preclusion would be, Dr. Gottlieb responded that sponsors, product manufacturers, and provider groups affected by a decision of the board would not have legal standing to challenge a decision in court, nor have any other available routes to appeal.⁴⁰

Several letters signed by dozens of healthcare interest groups and associations were also sent to Congress that included concerns about the lack of judicial review. On March 7, 2012, a letter signed by hundreds of national and state associations across the entire healthcare industry took issue with IPAB's exemption from judicial and administrative review.⁴¹ The Health Care Freedom Coalition, a group representing medical industry, conservative and health professional groups sent A letter sent on March 19, 2012, stating issues with the Board's decisions being free from court challenges.⁴² The concern over IPAB's preclusion from review was again stated in an April, 25, 2013 letter signed by 500 organizations, including the American Medical Association.⁴³

³⁹ *Ibid.*, pg. 132.

⁴⁰ U.S. Congress. House. Committee on Ways and Means. *The Independent Payment Advisory Board*, 6 March 2012 (Washington DC: Government Printing Office) pg. 46-47.

⁴¹ Submitted by Rep. Dave Camp (R-MI), *Congressional Record* (21 Mar. 2012) H1468-H1469.

⁴² *Ibid.*, H1469-H1469-1470.

⁴³ http://www.aaoms.org/docs/govt_affairs/issue_letters/coalition_letter_ipab.pdf

To sum up, post- enactment evidence reveals an increase in concerns over judicial review by interest groups and Republicans. Once Republicans gained control of the House, they used their power to schedule hearings. Interest groups opposed to the IPAB used these opportunities to express their opposition to the lack of judicial oversight of the Board. However, no proposals to amend the IPAB's preclusion from judicial review were introduced, and Republicans continued their attempts to dismantle the IPAB rather than on gaining access to courts. More, legislation was introduced to repeal the board and defund it, House rules were passed that waived certain parliamentary procedures for the congressional approval process, and Republican leadership also expressed their unwillingness to consult the president on appointments to the board.⁴⁴

Conclusion

This study has been an attempt to apply the work of Charles Shipan to the passage of the Affordable Care Act and the creation of the Independent Payment Advisory Board. According to Shipan, judicial review is treated as a political variable by political actors who consider how courts may affect future policy outcomes. In particular, members of Congress attempt to shape the degree to which agency actions may or may not be subject to judicial scrutiny. Shipan also argues that interest groups take active steps to influence judicial review provisions that will work to ensure favorable policy outcomes.

Shipan's theory represents a significant contribution to the literature on the separation of

⁴⁴ Repeal legislation was first introduced in 2011 included H.R 452 introduced by Rep. Phil Roe (R-TX) and H.R. 5 introduced by Rep. Paul Ryan (R-WI). Sen. Cornyn (R-TX) introduced S. 668 that also repealed the IPAB. H.R. 3070, section 529 introduced by Rep. Rehberg (R-MT) rescinded funding for the Board's operations for FY 2012. A Letter signed by several Republican House members to the subcommittee chairs urged them to defund IPAB for FY 2014 <http://roe.house.gov/news/documentsingle.aspx?DocumentID=329651>. The House adopted rules on January 3, 2013 that eliminated the ACA's provisions setting limits on congressional consideration on IPAB's proposal for 2013 and 2014. Speaker John Boehner (R-OH) and Senate Minority Leader Mitch McConnell (R-KY) declined to recommend any appointments the President, http://westmoreland.house.gov/images/user_images/gt/5-9-13%20Boehner%20Letter%20to%20President.pdf.

powers. It demonstrates an important, yet under examined way in which the three branches of American Government fight over the control of policy. Treating judicial review as a political variable shows us that Congress is aware of its institutional surroundings and how it attempts to deal with the uncertainty of future policy outcomes. In addition, Shipan's works also shows us the political nature of courts. Far from being merely guardians of justice and fairness that mechanically apply precedent, Shipan's works demonstrates how Courts can be used by Congress as a tool to achieve policy goals.

Shipan's theory was used to examine the passage of the ACA and the creation of the IPAB. While the evidence shows some support for Shipan's theory, the evidence was not as strong as expected. The ACA was passed by a Democratically controlled Congress and executive who were faced with a relatively conservative judiciary. As Shipan's model predicts, judicial review was not favored by most Democrats. However, the findings show that attempts to impose judicial review by legislators and interest groups opposed to the IPAB were rather limited during the enactment of the ACA. This lack of interest in judicial review by political actors in the case of the IPAB was explained by four reasons: the focus of Republicans and interest groups on repealing the Board altogether, a legal regime that favors agency deference, the fact that the IPAB was only recently enacted, and the ACA's provision that allows Congress to pass a resolution to dissolve the board in 2017.

The post-enactment evidence revealed more discussion by Republicans and their interest-group allies on the IPAB's exemption from judicial review, as Shipan's theory predicts. Yet, no formal proposals however were introduced to amend the provisions. Rather than accept the existence of the IPAB, Republicans and the interest groups supporting them continue their attempts to repeal the Board entirely.

While the evidence presented here does not support Shipan's theory as strongly as one might predict, this paper does offer moderate support for his argument that judicial review may be used as a strategic tool by political actors to achieve policy outcomes. It also suggests that factors that Shipan did not consider, such as the degree of bipartisan support for legislation and the effects of the legal regime, may affect the degree to which interest groups and members of Congress fight over judicial review provisions. Future research along these lines in other policy areas could possibly yield more solid results for Shipan's basic claims, or suggest the need for further refinement of his theory.

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A CASE STUDY OF THE AFFORDABLE CARE ACT AND THE INDEPENDENT
PAYMENT ADVISORY BOARD

By

Gary Pascoa

An Honors Project Submitted in partial fulfillment

of the Requirement for Honors

in

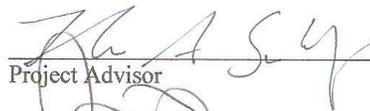
The Department of Political Science

School of Arts and Sciences

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2014

Approved:


Project Advisor

4/17/14
Date


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4/17/14
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