

ObamaCare IPAB 2017-Only Repeal Seen Unconstitutional

By DAVID HOGBERG – October 23rd, 2012

Mitt Romney has vowed to repeal ObamaCare should he win on Nov. 6 and if Republicans control the House and Senate.

But the health law makes it virtually impossible to get rid of its Independent Payment Advisory Board — so much so that critics say that the wording violates Congress' constitutional powers.

ObamaCare's IPAB will recommend changes to Medicare payments in years that the mammoth health care program exceeds spending targets. Congress can override IPAB decisions, but only if it comes up with equivalent savings.

IPAB cuts likely will generate major opposition from seniors, doctors and others, but lawmakers could only repeal the unelected panel in a tiny window in 2017. Many say that imposes unconstitutional restraints on Congress.

"IPAB is unconstitutional for a number of reasons and one of them is that the statute limits the ability of future Congresses to repeal IPAB by saying that the only way Congress can repeal it is with a special procedure in 2017," said Michael Cannon, director of health policy studies at the libertarian Cato Institute. "Congress cannot bind a future Congress like that. Only the Constitution can."

IPAB, which will consist of 15 members appointed by the White House and Senate, is key to making ObamaCare's budget math work. The law assumes unprecedented curbs in per-patient spending growth. Medicare actuaries suggest that would create major disruptions in access to care. IPAB would step in if and when major health care productivity gains fail to materialize.

ObamaCare expressly forbids IPAB from "rationing" health care. What it can do is cut Medicare payments for services and procedures. Critics charge that is rationing by a different name.

But Congress is only able to repeal IPAB during a roughly seven-month window in 2017. First, both the House and Senate must in 2017 introduce a joint resolution for the purpose of repealing IPAB. However, they have to introduce the resolution no later than Feb. 1, 2017.

Since Congress doesn't usually begin its legislative business until mid-January, that, in effect, gives them two weeks to introduce the resolution.

After that the House and Senate must vote on the resolution by Aug. 15, 2017. ObamaCare requires a three-fifths super-majority of both chambers. If the House and Senate have not voted to repeal IPAB by that date, then the law precludes Congress from ever repealing the body.

It would take a court case to decide if this restriction is constitutional, but Supreme Court precedent suggests it is doubtful.

The 1905 case *Manigault v. Springs* states that anything that "is not a constitutional provision, but a general law enacted by the legislature ... may be repealed, amended, or disregarded by the legislature which enacted it." Furthermore, such a law "is not binding upon any subsequent legislature."

In *Reichelderfer v. Quinn* (1932), the Court said "the will of a particular Congress ... does not impose itself upon those to follow in succeeding years."

The Court has made similar arguments in several other cases.

The Obama Administration has countered that the law doesn't restrict future Congresses. Rather, the "provision establishes one way for Congress to repeal (IPAB) if Congress wishes the repeal effort to qualify for the expedited procedures established by that provision."

Cannon responded, "Only in Washington, D.C., could a statute stating that a joint resolution is required mean that it is not required."