



## Obamacare's Super-Legislature

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by Michael F. Cannon and Diane Cohen

The individual mandate isn't Obamacare's only unconstitutional provision, or even its most unconstitutional provision. That distinction belongs to the Independent Payment Advisory Board. A heretofore unreported feature of this super-legislature makes it even more authoritarian and dangerous than anyone knew.

IPAB consists of up to 15 unelected government "experts." Its stated purpose is to restrain Medicare spending. If projected spending exceeds certain targets, Obamacare requires IPAB to issue "legislative proposals" to reduce future spending. Those proposals could include drastic cuts that jeopardize seniors' access to care, leading some critics to label IPAB a "death panel."

But the really dangerous part is that these are not mere "proposals." Obamacare *requires* the secretary of Health and Human Services to implement them — which means they become law automatically — unless Congress takes certain steps to head them off. Congress may replace the Board's proposal with its own cuts, at least initially. But Obamacare requires a three-fifths vote in the Senate to pass any replacement that spends more than the Board's proposal. In other words, to override IPAB's proposal completely, opponents must assemble a simple majority in the House *and* a three-fifths majority in the Senate *and* the president's signature.

That makes IPAB more than an advisory board. It's a super-legislature whose members are more powerful than members of Congress. If eight members of Congress propose a bill, all that's necessary to block it is a majority of either chamber, or one-third of either chamber plus the president.

Worse, Obamacare forbids Congress to repeal IPAB outside of a brief window in the year 2017 — and even then requires a three-fifths supermajority in both chambers plus a presidential signature. Under Obamacare, after 2017 Congress could repeal Medicare, but not the board it created to run Medicare. Congress and the states could repeal *the Bill of Rights* — but not IPAB.

What kind of laws will these super-legislators impose? Obamacare supposedly prohibits these super-legislators from raising taxes or rationing care. Yet those restrictions are unenforceable and meaningless. For instance, the statute lets IPAB define "rationing" and protects that definition — along with the secretary's implementation of IPAB's edicts — from administrative or judicial review. The prohibition on raising taxes is likewise toothless. IPAB can raise taxes as surely as it can cut Medicare spending.

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In effect, Obamacare gives IPAB the power to raise taxes, spend money, place conditions on federal grants to states, and exercise other powers the Constitution reserves solely to Congress. If the Supreme Court upholds Obamacare's mandated Medicaid expansion, states may soon see IPAB imposing similar mandates on states. And if President Obama fails to appoint any IPAB members, all these powers fall to Secretary of Health and Human Services Kathleen Sebelius.

As if all this weren't bad enough, we discovered a heretofore unreported feature of Obamacare. According to the statute, if Congress fails to repeal IPAB during that short window in 2017, then in 2020 Congress loses any and all power to restrain these super-legislators.

The Congressional Research Service and others have reported that Congress will always retain some (limited) power to block IPAB's edicts, but they misread a crucial part of the statute. They thought they saw the word "or" where the statute actually says "and." The difference is dramatic.

As we explain in our new report, under the statute as written, if Congress fails to repeal IPAB in 2017, the secretary must implement IPAB's edicts *even if Congress votes to block them*. Nancy Pelosi was right: We needed to pass Obamacare to find out what was in it. We're still finding out.

Obamacare is so unconstitutional, it's absurd. It delegates legislative powers that Congress cannot delegate. It creates a permanent super-legislature to supplement — and when conflicts arise, to supplant — Congress. It tries to amend the Constitution via statute rather than the amendment procedure of Article V.

Obamacare proves economist Friedrich Hayek's axiom that government direction of the economy threatens both democracy and freedom. After decades of failing to deliver high-quality, low-cost health care through Medicare, Congress struck upon the "solution" of creating a permanent super-legislature — or worse, an economic dictator — with the power to impose taxes and other laws that the people would reject.

Fortunately, one Congress cannot bind future Congresses by statute. If the Supreme Court fails to strike down Obamacare, Congress should exercise its power to repeal IPAB — and the rest of Obamacare with it.

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