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IPAB: "The Roach After the Nuclear Blast."

ObamaCare's Medicare cost-control panel may be unworkable, unconstitutional, and a barrier to real reform. It's also very difficult to repeal.

Peter Suderman | July 13, 2011

A small army of health policy wonks helped Democrats pack ObamaCare full of big ideas that they hoped would transform American health care, making it less expensive and more effective. Perhaps the biggest of those ideas is IPAB, the Independent Payment Advisory Board, a 15-member panel of bureaucrats appointed by the president and tasked with holding total Medicare spending to predetermined spending targets. The panel's name suggests it's merely an advisor to Congress, which has traditionally been in charge of Medicare spending, but its "recommendations" have the force of law unless Congress holds down spending enough to meet the target or eliminates the board, which it can only do with a supermajority vote in the Senate.

Rather than serve in an advisory capacity, IPAB is really designed to take over Congress's job. Indeed, that's the primary point. Over the years, Congress has repeatedly failed to hold Medicare spending in check—the program is speed walking towards insolvency in 2024—overriding scheduled payment reductions again and again under political pressure. IPAB is intended to take tough decisions about Medicare spending out of the purview of politically motivated legislators and turn those decisions over to a board of independent, unelected bureaucratic experts. Health wonks, in other words, convinced Congress to put a panel of health wonks in charge of the nation's biggest health insurance program.

In a major speech on the federal debt earlier this year, President Barack Obama took this big idea and proposed to make it bigger by tightening IPAB's official spending targets. Spending control and reduced political liability for Medicare cuts—what's not to like?

Plenty. Aside from the individual mandate, IPAB is arguably the law's most controversial provision, and it faces a host of hurdles. To name a few: It may not work. It might be unconstitutional. And it could block other reforms.

Obama may have invested a lot in IPAB, but many of his fellow Democrats aren't enthusiastic. New Jersey Rep. Frank Pallone, a Democrat on the Energy and Commerce health care subcommittee, told *Politico* earlier this week that "I've never supported it, and I would certainly be in favor of abolishing it." Rep. Allyson Schwartz (D-PA) recently sent her fellow Democratic representatives a letter imploring them to repeal the law entirely.

The government's own top budgeting officials, meanwhile, have expressed skepticism that the law will successfully restrain Medicare's spending growth. In 2009, Congressional Budget Office director Douglas Elmendorf told Congress that "in CBO's judgment, the probability is high that no savings would be realized...but there is also a chance that substantial savings might be realized." Medicare's chief actuary has warned that it may be difficult to achieve the efficiency gains the panel hopes to exploit.

Meanwhile, just like the mandate, there's a brewing constitutional challenge. The Goldwater Institute, an Arizona-based think tank, has filed a lawsuit against the board, arguing that that Congress cannot delegate its responsibilities away to an unelected, executively appointed board.

Diane Cohen, Goldwater's lead attorney on the case, tells me that "the creation of the board violates the separation of powers doctrine. Congress cannot delegate away its legislative responsibilities under the Constitution."

Congress does have the power to create independent agencies that make rules and regulations. But those agencies and their authority are required to be based on what's known as an "intelligible principle." If Congress is going to create an independent body to do its work, it needs clear marching orders rather than a vague directive.

"It can't just be a self-starting thing that sets policy," explains Ilya Shapiro, a Senior Fellow in Constitutional Studies at the Cato Institute. "With IPAB, all Congress says is do your thing and control spending." Still, both Cohen and Shapiro admit that courts have interpreted the intelligible principle standard loosely, deferring to Congress in every delegation of powers case in the last 70 years.

But according to Cohen, IPAB's mandate is so broad, and the checks on it so few, that it tests the

limit of even the most deferential standard. "It's like the perfect storm of bad elements," she says. Among the problems? "Overly broad delegating authority language, no judicial review, no administrative review, no rule-making. There's no meaningful congressional oversight and it's not repealable except for under the most draconian and limited circumstance."

That's the other catch: ObamaCare doesn't just create IPAB. It also sets in place a series of barriers designed to make it extremely difficult to repeal. So if Congress wants to get rid of IPAB, it will have to jump through a complex set of hoops first.

That means acting swiftly and with great unity. The health care overhaul contains a provision labeled Joint Resolution Requirements to Dissolve the Board that lays out exactly the steps that Congress must follow if it wants to take down IPAB. The provision lays out in great detail what a joint resolution to dissolve IPAB would have to look like, and then sets out a further requirement that it must be introduced between January 1 and February 1, 2017—meaning Congress would have to act in just a few working days.

Following the introduction of the legislation, Congress would have to pass the joint resolution with a supermajority of sworn members by August 15 of the same year. "If you don't do that," Cohen says, "Congress has no option, at all, to repeal the board." Meanwhile, even if the board were successfully dissolved, IPAB would keep issuing its recommendations, which would still have the force of law, until 2020.

The protections erected around IPAB make it all but impossible to repeal. "We kind of joke about that," says Cohen, "the idea that the whole bill comes down but the only thing that stays is IPAB, like the roach after the nuclear blast."

But what about nuclear-strength Medicare reform? Regardless of whether the rest of the law comes down, IPAB's built-in protections may be strong enough to prevent other types of reform to the seniors' health program.

Barring a supermajority vote in the Senate, the only way Congress can override IPAB's recommendations is to provide similar-sized cuts in a prescribed form and in a limited time frame. The way the law is written, Cohen says, "Congress is prohibited from offering an alternative if it doesn't meet the requirements of the statute." It gives IPAB a directive on what it must do, but limits Congressional options.

That could mean that other types of reforms—like a voucher system or the premium-support plan included in GOP Rep. Paul Ryan's budget plan—might not make the cut. "You can't do anything different that might actually be real reform," says Cohen. "It definitely is a reform killer."

So even as skepticism abounds that IPAB will fail to restrain Medicare spending, it may put the kibosh on other mechanisms designed to rein in the program's growth.

IPAB isn't Congress's first attempt to reduce large-scale deficits through an independent spending-restraint mechanism. In 1985, Congress faced a budget crisis and a mounting debt. In response, it passed the Balanced Budget and Emergency Deficit Control Act of 1985, which came to be known as Gramm-Rudman-Hollings (GRH), after Sens. Philip Gramm (R-Texas), Warren Rudman (R-N.H.), and Ernest Holling (D-S.C.), the three primary authors. Like IPAB, the law used a trigger system, setting target figures for deficit reduction. If Congress failed to meet its deficit targets, then an automatic process known as sequestration—blind, across-the-board spending reductions—was supposed to occur.

But as soon as the law passed, it was challenged in court. And in the summer of 1986, Gramm-Rudman-Hollings's sequestration mechanism was ruled unconstitutional. GRH granted budget authority to the Comptroller General, an officer of Congress, who was found to have been illegally granted executive powers.

In 1987, Congress revisited the law, passing an updated version designed to avoid legal challenge. It didn't violate the Constitution, but it didn't work very well either. In 1986, the law's deficit target was $172 billion. The actual deficit was slightly over $221 billion. In 1987, the deficit came within a horse shoe's distance of hitting its $144 billion deficit target, clocking in at $149.8 billion. But by 1988, the gap had widened once again: The initial target was set at $108 billion, but the actual deficit hit $155 billion.

The program wasn't just a failure. It may also have encouraged gimmicky budgeting. According to Robert Lee, Philip Joyce, and Ronald Johnson's primer on public budgeting systems, not only did the 1980s finish without Gramm-Rudman-Hollings having "appreciably affected the overall budget deficit situation," its rules resulted in both the president and Congress attempting to meet the prescribed deficit targets by basing their budget plans on "unrealistically optimistic economic assumptions."

One danger to IPAB then, is that it will work through means of dubious constitutionality. But another danger is that it just won't work at all—leaving the country with the burden of rising Medicare spending and perhaps even more limited means by which to reform it. When Gramm-Rudman-Hollings passed, Sen. Rudman reportedly called it a "bad idea whose time has come." If Goldwater's challenge is successful, IPAB may be a big idea whose days are numbered.

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