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The Independent Payment Advisory Board
PPACA's Anti-Constitutional and Authoritarian Super-Legislature

by Diane Cohen and Michael F. Cannon

Executive Summary

When a member of Congress introduces legislation, the Constitution requires that legislative proposal to secure the approval of the House of Representatives, the Senate, and the president (unless Congress overrides a presidential veto) before it can become law. In all cases, either chamber of Congress may block it.

In 2010, the Patient Protection and Affordable Care Act (PPACA) created the Independent Payment Advisory Board, or IPAB. When the unelected government officials on this board submit a legislative proposal to Congress, it *automatically* becomes law: PPACA requires the Secretary of Health and Human Services to implement it. Blocking an IPAB "proposal" requires at a minimum that the House *and* the Senate *and* the president agree on a substitute. The Board's edicts therefore can become law without congressional action, congressional approval, meaningful congressional oversight, or being subject to a presidential veto. Citizens will have no power to challenge IPAB's edicts in court.

Worse, PPACA forbids Congress from repealing IPAB outside of a seven-month window in the year 2017, and even then requires a three-fifths majority in both chambers. A heretofore unreported feature of PPACA dictates that if Congress misses that repeal window, PPACA prohibits Congress from *ever* altering an IPAB "proposal." By restricting lawmaking powers of future Congresses, PPACA thus attempts to amend the Constitution by statute.

IPAB's unelected members will have effectively unfettered power to impose taxes and ration care for all Americans, whether the government pays their medical bills or not. In some circumstances, just one political party or even one individual would have full command of IPAB's lawmaking powers. IPAB truly is independent, but in the worst sense of the word. It wields power independent of Congress, independent of the president, independent of the judiciary, and independent of the will of the people.

The creation of IPAB is an admission that the federal government's efforts to plan America's health care sector have failed. It is proof of the axiom that government control of the economy threatens democracy.

IPAB may be the most anti-constitutional measure ever to pass Congress, and it is therefore tempting to dismiss IPAB as an absurdity that the body politic will soon reject. Until that occurs, IPAB will potentially empower just one unelected government official to impose any tax or regulation, to appropriate funds, and to wield other lawmaking powers.

Diane Cohen is senior attorney at the Goldwater Institute and lead counsel in Coons v. Geithner, *a lawsuit challenging the constitutionality of IPAB. Michael F. Cannon is director of health policy studies at the Cato Institute.*

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According to defenders of government-run health care, the problem is not government, but *democratic* government.

Introduction

Decades of centralized economic planning, through the federal Medicare program and other government interventions, have led to excessive health care spending in the United States and suppressed the quality of medical care.[1] For example, Congress has proven incapable of containing wasteful Medicare spending. Medicare purchases medical care on behalf of 46 million elderly and disabled U.S. residents[2] and is placing enormous strain on the federal budget.[3] Annual Medicare spending is currently $555 billion,[4] and the best evidence suggests that one-third of Medicare spending is pure waste.[5] Yet Medicare spending per enrollee typically grows at an unsustainable 2.5 percentage points faster than U.S. gross domestic product (GDP), to say nothing of growth in enrollment.[6]

Even Medicare's defenders acknowledge it penalizes high-quality care and encourages low-quality care. Peter Orszag, former director of the federal Office of Management and Budget under President Barack Obama, notes that Medicare literally encourages unnecessary hospital readmissions by penalizing hospitals if they deliver high-quality care that reduces readmissions:

> Reimbursement from Medicare is still primarily based on how many services hospitals perform rather than on how well they care for patients, so hospitals are often financially penalized for improving value and quality. The Mount Sinai [Medical Center] program to reduce readmissions, for example, is costly for the hospital both because of the extra expense of running it and because fewer readmissions means less revenue. Ken Davis, the president and chief executive officer of Mount Sinai, says the hospital won't be able to afford continuing the successful program if [Medicare's] financial incentives remain so skewed against it.[7]

As the largest purchaser of medical care in the nation, Medicare's perverse incentives shape the delivery of care to all Americans, even those with private health insurance.

These and other government failures seem impervious to reform. Medicare spending grows uncontrollably because, as one journalist puts it, "Congress has a record of ignoring or voting down many proposals to save money in Medicare."[8] According to Orszag and many other defenders of government-run health care, the fault is not in government itself, but in the fact that government is too accountable to the people.[9] The problem is not government, but *democratic* government.

"Enter the Platonic Guardians"[10]

In March 2010, Congress and President Obama enacted the Patient Protection and Affordable Care Act (PPACA, or "the Act"), which attempts to sidestep the obstacles the U.S. Constitution puts in the way of government officials seeking to direct the economy's health care sector. The Act authorizes approximately $1 trillion of new federal entitlement spending. Congress financed roughly half of this new spending through provisions designed to reduce the projected growth in Medicare spending, including cuts in payments to health care providers that serve Medicare enrollees.

Since Congress frequently rescinds such cuts under political pressure from providers and Medicare enrollees, Obama, Orszag, and others prevailed on Congress to create a new government agency called the Independent Payment Advisory Board, or IPAB. The Act authorizes IPAB to cut Medicare payments even further than PPACA itself does. More importantly, Congress designed IPAB so that its decisions would automatically take effect, even in the face of popular resistance that would prevent Congress itself from enacting the same measures. Orszag describes IPAB as an attempt "to take some of the politics out" of government direction of the health care sector.[11]

Instead, IPAB is an admission that gov-

ernment has badly mismanaged health care. It's also an effort to solve that problem by giving unfettered power to unelected government officials. The Act literally bypasses the constitutionally prescribed manner by which proposed legislation becomes law, the separation of powers between the executive and legislative branches, and the related checks and balances between those branches. The Act empowers IPAB's unelected government officials to propose legislation that can become law without congressional action, meaningful congressional oversight, and without being subject to a presidential veto, administrative review, or judicial review. The Act even attempts to prevent future Congresses from repealing IPAB.

The Independent Payment Advisory Board is worse than unconstitutional—it is *anti*-constitutional. Congress's legislative powers do not include the power to alter the constitutional procedure required for the passage of laws. Nor does it include the power to entrench legislation by preventing it from being altered by future Congresses.

IPAB's Structure

When fully empanelled, IPAB will consist of 15 voting members appointed by the president and confirmed by the Senate.[12] Board members may nominally serve up to two consecutive six-year terms. If a board member reaches the end of his term and the president declines to appoint (or the Senate fails to confirm) a successor, however, he may serve indefinitely.[13] Board members will be executive-branch employees, with each earning upward of $165,000 per year.[14] PPACA automatically funds IPAB in perpetuity, with an initial budget of $15 million.[15]

PPACA does not require the board to be bipartisan, as is required for most other independent agencies.[16] The president could therefore use his power to make recess appointments to stack the board entirely with members of his own party.[17] If recent history is any guide, the president could even make "recess" appointments while the Senate is not in recess.[18]

An Economic Dictator

In some circumstances, PPACA vests IPAB's vast powers in the hands of just a few unelected government officials. Though the Act allows as many as 15 voting board members, the board may conduct business whenever half of its appointed members are present, and may act upon a majority vote by all members present.[19] When there are no vacancies, therefore, the board will reach a quorum whenever as few as eight members gather, and any five members could wield IPAB's considerable powers. When vacancies do exist—before the president and the Senate put the initial 15 members in place, or when board members resign or die in office—an even smaller cadre of unelected officials could wield the full range of the board's powers.

In some cases, PPACA vests IPAB's powers in just one individual. If there are 14 vacancies on the board, the Act allows the sole appointed member to constitute a quorum, conduct official business, and issue "proposals." The greater danger, then, is not that a president might pack the board with multiple party loyalists, but that he might appoint only one. Or none: if the president fails to appoint any board members (or the Senate fails to confirm the president's appointments, or a majority of the board cannot agree a proposal) the Act authorizes the Secretary of Health and Human Services to exercise the board's powers unilaterally. These powers include the ability to appropriate funds to her own department to administer her own directives (see Box 1).

IPAB's Mission

IPAB's stated mission is to prevent per-enrollee Medicare spending from growing faster than a specified target rate. Through 2017, that rate will be the average of medical inflation and overall inflation. Beginning in 2018, it will be the rate of growth of

IPAB is an admission that government has badly mismanaged health care and an effort to solve that problem by giving unfettered power to unelected government officials.

1. IPAB Gives HHS the Power of the Purse

In certain circumstances, PPACA grants the Secretary of Health and Human Services the power to appropriate funds to that department, and empowers either the president or a minority of the Senate to trigger that grant of power. The Act requires that every IPAB proposal "shall include recommendations with respect to administrative funding for the Secretary to carry out the recommendations contained in the proposal," and "shall include . . . a legislative proposal that implements the recommendations."[20] Absent congressional action, that "legislative proposal" becomes law. The act then transfers that appropriations power to the Secretary under certain circumstances:

> If . . . the Board is required, but fails, to submit a proposal to Congress and the President by the deadline . . . the Secretary shall develop a detailed and specific proposal that satisfies the requirements of subparagraphs (A) [i.e., the power to appropriate funds to the Secretary] . . . and contains the information required paragraph (3)(B) [including the "legislative proposal that implements" those appropriations]).[21]

As noted nearby, the president could give the Secretary that power simply by refusing to appoint any IPAB members. A minority of the U.S. Senate could also do so by refusing to end debate on the confirmation of IPAB nominees.

the economy per capita plus one percentage point.

Whenever the federal government projects that per-enrollee spending in traditional Medicare (Parts A, B, and D) will grow faster than that target growth rate, IPAB must make, by January 15 of the preceding year, a "detailed and specific" "legislative proposal" that is "related to the Medicare program."[22] The Act requires the board to issue a "proposal" every year with only two exceptions: (1) when projected Medicare spending is less than its target growth rate, or (2) when medical inflation is less than overall inflation.[23] The Act requires that those proposals "shall . . . result in a net reduction in total Medicare program spending . . . that is *at least equal* to the applicable savings target."[24] The savings target is generally 1.5 percent of total Medicare spending, but this is a minimum. The Board may "propose" even greater reductions in projected Medicare expenditures.[25]

If historical trends persist, IPAB will likely issue a proposal every year. Per-enrollee Medicare spending has historically grown an average of 2.6 percentage points faster than per capita GDP.[26] The Obama administration claims IPAB might not issue any proposals at all, because the Congressional Budget Office projects that "the rate of growth in Medicare spending per beneficiary [will] remain below the levels at which the IPAB will be required to intervene to reduce Medicare spending" through 2021.[27] Nevertheless, Congress appropriated $15 million per year for IPAB in perpetuity, reflecting Congress' presumption that IPAB will act; the relevant projections will change from year to year; and those projections rest on the dishonest accounting required by the Act.[28] Moreover, the Congressional Budget Office projects that IPAB will begin issuing proposals after 2021.[29] Supporters further claim that IPAB may not issue a single proposal, because the mere threat of IPAB acting could motivate Congress to restrain Medicare spending. However, as we explain below, the Constitution does not grant Congress either the authority to endow an agency with IPAB's vast lawmaking powers,

In certain circumstances, PPACA grants the Secretary of Health and Human Services the power to appropriate funds to that department.

or the authority to bind future Congresses. Both components of this strategy—creating IPAB, and using it to force future Congresses to act—are therefore unconstitutional. The Constitution is not a hostage that one Congress can threaten to shoot in order to control the behavior of future Congresses.

IPAB's Powers

The Independent Payment Advisory Board faces almost no limitations on its power to limit Medicare spending, reallocate Medicare spending, or regulate health care broadly. Beginning in 2015, PPACA gives IPAB the power to impose price controls and other regulations, to impose taxes (see Box 2), and—despite disclaimers to the contrary—to ration care for all Americans, whether the government pays their medical bills or not.

PPACA explicitly authorizes IPAB to cut Medicare payments to health care providers and private insurers participating in Medicare (including private drug plans), and to restructure the terms of Medicare payments from "fee for service" payment (where providers profit from providing more services) to "capitated" payments (where providers profit by providing fewer services) or some hybrid.[30] Yet IPAB's powers go further.

IPAB's defenders note that PPACA explicitly prohibits IPAB's proposals from directly rationing health care, raising certain Medicare revenues, increasing Medicare beneficiary cost sharing, restricting Medicare benefits, or modifying Medicare eligibility criteria.[31] These restrictions, however, are not what they seem.

First, by carving out a discrete list of limitations on the board's delegated powers, the Act implicitly gives IPAB otherwise unlimited power to exercise any enumerated congressional power with respect to any governmental body, industry, property, product, person, service, or activity. Aside from these limitations, nothing in the Act prevents IPAB from proposing any kind or magnitude of regulation or tax that is within the power of Congress to enact (see Box 2). Nor does PPACA preclude IPAB from proposing the appropriation of federal funds or the imposition of conditions on the receipt of such funds. The Board could propose, for instance, to require states to implement federal laws or to enact new state laws in order to receive federal funding. The Board need only demonstrate that its proposals and recommendations relate to Medicare in some undefined way.[32]

Second, the explicit restrictions that PPACA imposes on IPAB's proposals are illusory. For example, while the Act prohibits IPAB from rationing care, the Act does not define rationing. It instead leaves that task to IPAB and the Secretary of Health and Human Services and shields their definition from any meaningful review (see below). If IPAB and the Secretary adopt a narrow definition of rationing—say, that rationing only occurs when Medicare flatly refuses to pay for a given service—then IPAB could deny access to care as it sees fit simply by setting Medicare's prices for certain treatments and procedures so low that no providers will offer them. This is hardly an abstraction. Under current law, by the end of the century Medicare's prices for hospital and physician services will fall from roughly 66 percent and 80 percent of what private insurers pay (respectively) to roughly one-third of what private insurers pay.[33] These current-law price controls could result in "a serious decline in the availability and/or quality of health services for Medicare beneficiaries," according to Medicare's actuaries.[34] As many as 15 percent of hospitals "might end their participation in the program" before the end of the decade.[35] (For further discussion, see Box 2.) As discussed below, IPAB can impose such rationing measures even when Congress would not approve them and would otherwise rescind them.

IPAB's Scope

The Independent Payment Advisory

IPAB can raise taxes as surely as it can alter Medicare payments.

2. Can IPAB Tax?

IPAB's poorly constrained legislative powers raise a troubling question: could IPAB increase taxes? The answer is yes.

PPACA states that IPAB's proposals "shall not include any recommendation to ration health care, raise revenues or Medicare beneficiary premiums under section 1818, 1818A, or 1839, increase Medicare beneficiary cost-sharing (including deductibles, coinsurance, and copayments), or otherwise restrict benefits or modify eligibility criteria."[36] Rather than a flat prohibition on raising revenue, this restriction appears only to prevent IPAB from proposing to increase revenues under those specific sections of the Social Security Act, which cover premium revenue under Medicare Parts A and B. Even if IPAB were subject to judicial review, federal courts likely would defer to IPAB's and the Secretary's permissive interpretation of that language.[37] But PPACA specifically states that the Secretary's implementation of IPAB's proposals is not judicially reviewable.

Yet assume, for the sake of argument, that this language does prohibit IPAB from proposing higher Medicare premiums, or an increase in the Medicare payroll tax, or a tax on Medicare-participating providers (on the theory that it would reduce Medicare spending), or any other tax. What if IPAB proposed one of these revenue enhancements anyway? What would stop it from becoming law? Put differently, is there an enforcement mechanism behind PPACA's prohibition on such proposals?

There is not. The Act exempts the Secretary's implementation of IPAB proposals from administrative and judicial review, so no one could sue to block it. The president could not shelve it, because IPAB submits its proposals directly to Congress. If the Secretary submits a proposal in IPAB's stead, PPACA requires the president to submit the proposal directly to Congress. The Act allows Congress and the president to block that tax increase by offering a substitute or by mustering a three-fifths majority in the Senate—but that merely shows that IPAB's tax increases and spending cuts are on an equal footing.[38] If Congress and the president fail to reject IPAB's tax increase or to enact on a substitute, the Act requires the Secretary to implement it, with the help of funds that IPAB may itself appropriate.

Indeed, to enforce PPACA's prohibition on IPAB increasing taxes, the president or Congress would have to violate PPACA. If the president refused to submit IPAB's tax increase to Congress, or Congress and the president enacted a law with less than a three-fifths majority in the Senate that simply blocked the tax increase, or if a federal court chose to review the tax increase and struck it down, or if the Secretary chose (possibly at the president's direction) not to implement it, then those government officials would be violating the law by ignoring the various statutory rules protecting IPAB's proposals.

Consider another implication of the potential claim that federal officials can ignore the rules protecting IPAB proposals whenever they determine, in their judgment, that IPAB has violated limitations on its own powers. If that were true, then those officials could also block *each and every* IPAB proposal merely by declaring that, in their judgment, the proposal achieves savings by limiting Medicare enrollees' access to care, and therefore violates the prohibition on IPAB rationing care. If Congress and the courts can block an IPAB tax, in other words, then they can block any IPAB proposal. That is inconsistent with the clear meaning and intent of IPAB's authorizing statute.

IPAB can raise taxes as surely as it can alter Medicare payments. The Act creates an unaccountable lawmaking body, and leaves elected officials with little to stop it.

Board's defenders typically speak of the Board as if it will only affect the Medicare program.[39] On the contrary, IPAB will have the power to ration or reorganize care even for those who are not enrolled in government programs. The Act grants IPAB the power to regulate non-federal health care programs and private health care and health insurance markets, so long as such action is "related to the Medicare program," "improv[es] health care outcomes," and serves IPAB's other stated goals.[40] IPAB's ability to regulate private health care markets comes from the sweeping powers discussed above. Numerous provisions of the Act show this was also the clear intent of IPAB's architects.

First, IPAB has a statutory obligation to "coordinate" its proposals and recommendations with studies of private markets and non-federal delivery systems.[41] For example, the Act requires IPAB to produce a "public report" containing "standardized information on system-wide health care costs, patient access to care, utilization, and quality-of-care that allows for comparison by region, types of services, types of providers, and both private payers and the program under this title."[42] The Act requires IPAB to include in its reports "[a]ny other areas that the Board determines affect overall spending and quality of care in the private sector."[43] The Act then requires IPAB to rely on these reports when formulating its proposals.[44]

Second, PPACA requires IPAB to submit to Congress and the president recommendations to "slow the growth in national health expenditures" and "Non-Federal Health Care Programs."[45] These include recommendations that may "require legislation to be enacted by Congress in order to be implemented" or that may "require legislation to be enacted by State or local governments in order to be implemented."[46]

Third, PPACA presumes that IPAB's proposals will include areas of the health care sector that lie beyond the Senate Finance Committee's jurisdiction, which encompasses Medicare, Medicaid, the State Children's Health Insurance Program, and even the tax treatment of private health insurance and medical expenses. The Act alters Senate rules so that, when considering an IPAB legislative proposal, the Senate Finance Committee may approve legislative matters outside the committee's jurisdiction "if that matter is relevant" to an IPAB proposal.[47] If the requirement that IPAB proposals be related to the Medicare program meant that they would be confined to the Medicare program or even confined to the Finance Committee's jurisdiction, then it would be unnecessary to alter this Senate rule. This language instead indicates IPAB's proposals will affect matters outside of Medicare, and even outside the Finance Committee's expansive jurisdiction.

Fourth and most importantly, the Act provides that if the Medicare actuaries project that the growth rate of national health expenditures will exceed that of per-enrollee Medicare spending, IPAB's "proposal shall be designed to help reduce the growth rate [of national health expenditures] while maintaining or enhancing beneficiary access to quality care under [Medicare]."[48] This is a clear mandate to reduce both government and private-sector health care spending. Indeed, the simplest way to reduce overall health care spending while maintaining access to care for Medicare enrollees is to limit spending on patients outside of Medicare.

PPACA's authors had originally named IPAB the Independent *Medicare* Advisory Board. The reconciliation bill that amended PPACA changed the name to the Independent *Payment* Advisory Board, suggesting the law's authors made a deliberate choice to grant IPAB the power to regulate beyond Medicare.[49] Timothy Jost, a leading expert on and defender of PPACA, has written that it may not be possible to curb Medicare expenditures without addressing private expenditures, and that the board is likely to end up setting prices for all medical services.[50]

A New Legislative Process

IPAB's proposals are not mere propos-

IPAB will have the power to ration care even for those who are not enrolled in government programs.

als. Orszag, who is perhaps the foremost advocate of IPAB, explains that the Act vests IPAB with "an enormous amount of potential power"[51]—in effect, the unilateral power to make law:

> President Obama fought hard for IPAB, over strong opposition from Congress, which saw the board as *usurping its power*. When IPAB starts up in 2014, it will comprise an independent panel of medical experts charged with devising changes to Medicare's payment system. In each year that Medicare's per capita costs exceed a certain threshold, IPAB will be responsible for making proposals to reduce this projected cost growth to the specified threshold. The policies will then take effect automatically unless Congress specifically passes legislation blocking them and the president signs that legislation. In other words, the default is that [IPAB's] policies . . . will take effect.[52]

Orszag notes that thanks to IPAB, "the default is now switched in a very important way."[53] The default has indeed shifted so significantly that it is misleading to call IPAB's edicts "proposals."

IPAB's proposals will have force of law. The reasons for this are twofold. First, PPACA requires the Secretary of Health and Human Services to implement them. Second, it severely restricts Congress' ability to block their implementation by rejecting them or offering a substitute proposal. These provisions will effectively make IPAB's proposals law without the approval of Congress or the signature of the president.[54]

PPACA does not require IPAB to hold hearings, take testimony, or receive evidence from the public.

Lack of Checks and Balances

Anticipating that voters would resist having 15 unelected officials ration care to 300 million Americans, PPACA's authors included several provisions designed to prevent future Congresses, presidents, and courts from blocking IPAB's proposals. These provisions have the effect of insulating IPAB from any meaningful accountability to the people whose lives its decisions will affect.

First, PPACA exempts the development of the board's proposals from the administrative rulemaking requirements that Congress imposes on other executive-branch agencies.[55] Such requirements are essential to representative government because they are the only way the public can provide input, data, and analysis on whether an agency should reject, approve, or modify a proposed regulation. Congress passed the Administrative Procedures Act for this very purpose.[56] However, PPACA does not require IPAB to hold hearings, take testimony, or receive evidence from the public.[57]

Second, PPACA authorizes IPAB to submit its proposals directly to Congress in a "legislative proposal." When the Secretary develops a proposal in IPAB's stead, PPACA states the president "shall within 2 days submit such proposal to Congress."[58] This requirement restricts the president's authority under the Constitution's Recommendations Clause, which states the president may "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[59] For example, in 2009, President Obama invoked the Recommendations Clause with regard to provisions of the Omnibus Appropriations Act:

> Several provisions of the Act . . . effectively purport to require me and other executive officers to submit budget requests to Congress in particular forms. Because the Constitution gives the President the discretion to recommend only 'such Measures as he shall judge necessary and expedient' . . . I shall treat these directions as precatory.[60]

PPACA unconstitutionally attempts to deny the president his constitutional prerogative to use his own discretion as to what measures he submits to Congress.

Third, once a legislative proposal arrives in Congress, the Act protects it by codifying changes to the Senate's parliamentary rules that limit the ability of the Senate—and thereby the House of Representatives, which must reach agreement with the Senate—to modify or reject the proposal before it automatically becomes law. These statutorily entrenched parliamentary rules include, but are not limited to, the following:

- The Act imposes parliamentary rules that limit each chamber's ability to make any changes to a legislative proposal that would result in greater Medicare spending.[61] To prevent an IPAB proposal from becoming law, then, Congress must offer a substitute piece of legislation that achieves the same budgetary result.
- The Act requires a three-fifths vote of all of the members of the Senate to waive the foregoing Senate rules.[62]

If Congress and the president do not enact a substitute that reaches the same budgetary result, or waive the foregoing rules with a three-fifths majority in the Senate, then

After 2019, IPAB may legislate without any congressional interference.

3. In 2020, Congress Loses All Power to Control IPAB

PPACA requires the Secretary of Health and Human Services to enact all IPAB proposals with only three exceptions. The first exception is that the Secretary shall not implement proposals issued before the year 2020 if Congress supersedes them, which requires Congress either to enact an equivalent substitute or to muster a three-fifths majority in the Senate to block a proposal.[63]

The second is that the Secretary shall not implement any IPAB proposal after the year 2019 if Congress repeals IPAB in 2017 through the highly restrictive process described below. If, however, Congress fails to repeal IPAB through that process, this exception prevents Congress from rejecting or altering any IPAB proposal after 2019. The Act clearly states that the Secretary must implement IPAB proposals issued after 2019, unless Congress both repealed IPAB in 2017 and supersedes the proposal at hand.[64] That structure may appear odd, in that it seems to imply that after 2020, a board that Congress has already repealed might nevertheless issue a proposal for Congress to supersede. The structure of this exception makes more sense, however, in the light of IPAB's overarching purpose. If Congress fails to repeal IPAB through the prescribed process, then Congress loses its ability to alter or reject IPAB proposals, and the Secretary must implement all such proposals. This plain-meaning interpretation of the statute is consistent with PPACA's goal of limiting Congress' ability to interfere with IPAB's lawmaking powers.

The combined effect of these first two exceptions is that Congress may amend or reject IPAB proposals, subject to stringent limitations, but only from 2015 through 2019. If Congress fails to repeal IPAB in 2017, then after 2019, IPAB may legislate without any congressional interference. The Secretary must implement all IPAB proposals as written, subject to the third exception, below.

The third exception applies in 2019 and thereafter. The Act directs the Secretary not to implement an IPAB proposal if the chief Medicare actuary projects the growth rate of per capita national health expenditures will exceed the growth rate of per-enrollee Medicare expenditures. This exception may not apply in two consecutive years.[65] In all other cases, the Act requires the Secretary to implement all IPAB proposals.

IPAB's legislative proposal automatically becomes law, and the Act requires the Secretary of Health and Human Services to implement it.[66]

Worse, if Congress fails to repeal IPAB through the restrictive procedure laid out in the Act, then after 2020, Congress loses the ability even to offer substitutes for IPAB proposals. As explained in Box 3, in that case the Act requires the Secretary to implement IPAB's proposals even if Congress does enact a substitute. To constrain IPAB at all after 2020, Congress must repeal it between January and August in 2017.

Finally, PPACA gives IPAB and the Secretary the sole authority to judge their own actions by prohibiting administrative or judicial review of the Secretary's implementation of an IPAB proposal.[67]

If Congress fails to follow these precise steps, then PPACA states the American people's elected representatives may never repeal IPAB, ever.

Shielding IPAB from the People

Consistent with their attempts to protect individual IPAB proposals, Congress and President Obama went to extraordinary, unconstitutional, and even absurd lengths to try to protect IPAB from itself being repealed by future Congresses. The Act states that Congress may only repeal IPAB if it follows these precise steps:

1. Wait until the year 2017.
2. Introduce a specifically worded "Joint Resolution" in the House and Senate between January 1 and February 1.
3. Pass that resolution with a three-fifths vote of all members of each chamber by August 15.[68]

The president must then sign that joint resolution.

Whereas Congress can repeal any other federal statute at any time with just a majority vote in each chamber and the president's signature, under PPACA Congress has only about 15 business days in the year 2017 to propose this joint resolution of repeal. Otherwise, the Act forever precludes repeal. Congress must then pass that resolution with a three-fifths supermajority by August 15, 2017, or the Act forever precludes repeal. Even if a repeal resolution should clear these hurdles, IPAB would retain its power to legislate through January 15, 2018.[69] If Congress fails to follow these precise steps, then PPACA states the American people's elected representatives may never repeal IPAB, ever.

An Implausible Reinterpretation

The Obama administration has argued in federal court that the language concerning a repeal resolution merely "establishes *one* way for Congress to repeal the Board *if* Congress wishes the repeal effort to qualify for the expedited procedures established by that provision."[70] That interpretation does not square with the plain meaning or the structure of the statute.

First, the administration ignores the clear language of the Act, which states a "Joint Resolution [Is] Required To Discontinue the Board."[71] Not optional, but required. Only in Washington, D.C., could a statute stating that a "Joint Resolution [Is] Required To Discontinue the Board," mean that a joint resolution is *not* required to discontinue that board.

Second, the anti-repeal provisions cannot plausibly be described as creating an "expedited procedure." While PPACA does exempt a repeal resolution from some of Congress's procedural hurdles, it also sets a higher bar for approval: a three-fifths majority in both chambers. Moreover, those exemptions cannot be invoked until 2017 and would have no force until 2020. (Box 4 explains the differences between "fast track" congressional rules, and the rules protecting IPAB.) Only in Washington could a provision that prevents Congress from introducing a resolution for seven years, and then prevents that resolution from taking effect for an additional three years, be described as an "expedited" procedure.

Third, the structure of PPACA clearly shows it attempts to deny Congress the

4. Far Beyond "Fast-Track" Authority

PPACA's defenders claim that the Act's limitations on Congress's ability to alter and reject IPAB proposals, or to repeal IPAB, are no different from "fast-track authority," where Congress provides for expedited procedures for committee and floor action on specifically defined types of bills or resolutions.[72] The administration defends IPAB by likening it to the Defense Base Closure and Realignment Commission (BRAC)[73] and the Congressional Review Act (CRA),[74] both of which established fast-track procedures for Congress's disapproval of agency regulations.

In reality, neither BRAC nor CRA has anything in common with IPAB in terms of purpose, policy, procedure, or the creation of a lawmaking entity independent from Congress and the courts. Moreover, both the BRAC and CRA statutes included provisions for congressional oversight and constraint, which IPAB lacks.

The Defense Base Closure and Realignment Commission

Congress established BRAC and charged it with issuing recommendations regarding the closure and realignment of military installations, through what the Supreme Court has described as an "elaborate process."[75] BRAC's task did not even begin until after the Secretary of Defense prepared closure and realignment recommendations, based on statutorily set selection criteria, which he established after notice and an opportunity for public comment. Congress required BRAC to hold public hearings and prepare a report on those recommendations before issuing its own recommendations.[76] The president retained the authority to decide whether to submit BRAC's recommendations to Congress. Congress then had the opportunity to enact a resolution to disapprove the recommendations and bar the closures, under normal congressional rules and without any further action.[77] PPACA contains no similar requirements for public input or presidential review of IPAB's proposals before they become law, and it does not permit a simple congressional disapproval. Peter Orszag approvingly notes that Congress and the president will have less power to stop IPAB's proposals than they had to stop BRAC's proposals.[78]

The Congressional Review Act

The CRA is also entirely different from IPAB's enabling legislation. The CRA establishes expedited procedures allowing Congress to disapprove agency regulations. While it establishes a fast-track procedure for review of regulations, it does nothing to alter the administrative rulemaking process or judicial review of regulations; nor does it entrench regulations from repeal or amendment; nor does it condition Congress's power to strike down a regulation on Congress enacting a statute that achieves an equivalent result.

The difference in the substance of the two statutes is no less stark. While the CRA protects Congress's lawmaking power from encroachment by the executive branch, IPAB encroaches on that very power.

power to repeal IPAB outside of the "joint resolution" procedure. As explained in Box 3, the Act requires the secretary to implement IPAB proposals with only three exceptions: (1) if, in years prior to 2020, Congress supersedes an IPAB proposal; (2) if, in 2020 and thereafter, Congress has already approved the specifically worded and time-limited joint resolution of repeal *and* supersedes IPAB's proposal; and (3) if, in 2019

Congress and the president will have less power to stop IPAB's proposals than they had to stop BRAC's proposals.

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.

and thereafter, Medicare's actuaries project that national health expenditures will grow more rapidly than per-enrollee Medicare spending.[79] If the Act merely "establishes *one* way for Congress to repeal the Board," then there would have been no need to list the second exception, because *any* method of repeal would relieve the Secretary of her duty to implement IPAB proposals. Alternatively, the Act would have to include a fourth exception explaining that any method of repeal *other than* the specifically worded joint resolution would also relieve the Secretary of this duty. Yet the Act clearly requires the Secretary to implement IPAB proposals unless Congress enacts the specifically worded repeal resolution within the statutory time limits.

The Obama administration's reinterpretation of IPAB's anti-repeal provisions is absurd on its face. Those provisions can have no other meaning than to prohibit Congress from repealing IPAB through any other process. If PPACA's authors had their way, IPAB would be the most unrepealable provision in federal law. 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.

IPAB versus the Constitution

As the foregoing analysis suggests, IPAB's constitutional infirmities are numerous.

An Unconstitutional Delegation of Legislative Power

Congress's attempt to delegate its legislative powers to IPAB lies beyond the legislative power that the people delegated to Congress through the U.S. Constitution. Article I, Section 1, of the Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . "[80] The Supreme Court has explained that Congress may not "abdicate, or . . . transfer to others, the essential legislative functions with which it is vested."[81]

The Court has held that, while Congress may create administrative agencies and commissions, it may not yield to another authority the ultimate power to make law. The Supreme Court has indicated that the "true distinction" between legitimate and illegitimate delegations of authority is that an agency may not exercise the power to make law, but may be given the "authority or discretion as to its execution, to be exercised under and in pursuance of the law."[82] This is a distinction "of degree,"[83] and "varies according to the scope of the power congressionally conferred."[84] In other words, the broader the authority conferred on an agency, the more tightly it must be bound by legislative, judicial, or executive oversight, and the more precise and narrow its instructions from Congress must be.

Accordingly, the Supreme Court has held that the legislative power of Congress does not include the power to delegate legislative authority to an executive agency unless Congress provides an "intelligible principle" that constrains the exercise of such authority.[85] This intelligible-principle test is one that examines the totality of the circumstances, "standards, definitions, context, and reference to past administrative practice" in the statute empowering the agency in order to determine whether the agency's decisionmaking is properly guided and confined.[86]

Congress's unprecedented delegation of legislative power to IPAB fails this test. The Act provides almost no limit on IPAB's legislative powers, and no intelligible standard constraining the exercise of those powers. While the absence of judicial review and rulemaking requirements do not in themselves make IPAB unconstitutional under the intelligible principles test, they are factors the Supreme Court has used to analyze the constitutionality of congressional delegation. In *J. W. Hampton v. United States*, the Court upheld a delegation to the Tariff Commission in part because the agency is-

sued recommendations only after giving notice and an opportunity to be heard.[87] Likewise, in *Mistretta v. United States*, the Court emphasized that the Sentencing Commission engaged in Administrative Procedures Act notice-and-comment rulemaking and was fully accountable to Congress, "which can revoke or amend any or all of the [Commission's] Guidelines as it sees fit either within the 180-day waiting period . . . or at any time."[88] The Independent Payment Advisory Board need not engage in notice-and-comment rulemaking, and PPACA constrains Congress's ability to revoke or amend IPAB's edicts.

Not long ago, Supreme Court Justice Antonin Scalia predicted that, unless courts rigorously enforce the constitutional prohibition on delegations of legislative power, Congress could create:

> "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.s, with perhaps a few Ph.D.s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals. The only governmental power the Commission possesses is the power to make law; and it is not the Congress.[89]

What Justice Scalia foresaw now exists in IPAB.

Separation of Powers Doctrine Protects Liberty

The Separation of Powers doctrine also denies Congress the authority to establish IPAB. The Constitution's system of checks and balances among the legislature, the executive, and the judiciary exists to protect freedom.[90] As the Supreme Court recently wrote, "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."[91]

The following factors exhibit an unprecedented violation of that doctrine. The Independent Payment Advisory Board is an executive agency that possesses legislative powers. The Act delegates these legislative powers to IPAB, and potentially to a single individual, without an intelligible standard. The Board's legislative powers are subject neither to the Administrative Procedures Act's rulemaking requirements, nor to administrative or judicial review, nor to any meaningful congressional review. Congressional review is not meaningful because PPACA severely limits Congress' ability to alter or amend IPAB's proposals. The Act curtails the president's constitutional authority to recommend only such measures as he considers expedient. The Act requires the Secretary of Health and Human Services to implement these legislative proposals without regard for congressional or presidential approval. Congress may only stop IPAB from issuing self-executing legislative proposals if three-fifths of all sworn members of Congress pass a joint resolution to dissolve IPAB during a short window in 2017. Even then, IPAB's enabling statute dictates the terms of its own repeal, and it continues to grant IPAB the power to legislate for six months after Congress repeals it. If Congress fails to repeal IPAB through this process, then Congress can never again alter or reject IPAB's proposals.

These factors in their totality reveal an unprecedented delegation of legislative, executive, and judicial authority in violation of the Separation of Powers doctrine.

Amending the Constitution by Statute

The Independent Payment Advisory Board's anti-repeal provisions are so unconstitutional as to be absurd. They would deny future Congresses their basic legis-

IPAB's an unprecedented delegation of legislative, executive, and judicial authority in violation of the Separation of Powers doctrine.

lative powers, and thereby diminish Congress's constitutional authority by statute.

It is a maxim of representative government that Congress does not have the power to bind the hands of a subsequent Congress by statute. Thomas Jefferson noted that if a present legislature were to "pass any act, and declare it shall be irrevocable by subsequent assemblies, the declaration is merely void, and the act repealable, as other acts are."[92] The Supreme Court has long held that "a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature."[93]

There is one lawful way for one Congress to bind future Congresses: the amendment process of Article V.[94] Anyone who wishes to deny future Congresses the legislative powers granted by the Constitution, or to limit the discretion of future presidents to recommend to Congress only those measures they consider necessary and expedient, must employ Article V's amendment process, which requires the consent of two-thirds of the members of each chamber of Congress, and three-fourths of state legislatures. That Congress may not supersede the Constitution by statute was recognized by Justice John Marshall as being "one of the fundamental principles of our society."[95] Charles Black writes that this "most familiar and fundamental principle" has long been perceived as "so obvious as rarely to be stated."[96] Yet PPACA attempts to sidestep the inconveniences of Article V by amending the Constitution through simple congressional majorities and the president's signature.

As the Obama administration now concedes, "Nothing prevents Congress from repealing the Board via ordinary legislation."[97] This welcome admission that IPAB's anti-repeal provisions cannot do what their authors hoped does not change the clear language and intent of those provisions, nor can it absolve Congress and President Obama from attempting to amend the Constitution via statute.

A Milestone on the Road to Serfdom

The federal government's attempts to direct America's health care sector, up to and including IPAB, closely track the predictions Nobel laureate economist Friedrich Hayek made in his 1944 book *The Road to Serfdom*. Hayek explained how government planning of the economy leads to frustration with democracy and support for authoritarian forms of government such as IPAB:

> It may be the unanimously expressed will of the people that its parliament should prepare a comprehensive economic plan, yet neither the people nor its representatives need therefore be able to agree on any particular plan. The inability of democratic assemblies to carry out what seems to be a clear mandate of the people will inevitably cause dissatisfaction with democratic institutions. Parliaments come to be regarded as ineffective "talking shops," unable or incompetent to carry out the tasks for which they have been chosen. The conviction grows that if efficient planning is to be done, the direction must be "taken out of politics" and placed in the hands of experts—permanent officials or independent autonomous bodies . . .
>
> The delegation of particular technical tasks to separate bodies, while a regular feature, is yet only the first step in the process whereby a democracy which embarks on planning progressively relinquishes its powers.[98]

Nearly eight decades before Peter Orszag argued that IPAB would "take some of the politics out" of government-run health care, Hayek presaged Orszag's argument almost verbatim.[99]

Hayek then explained why authoritarian lawmaking bodies will do no better a job of directing the economy than democratic ones:

In his 1944 book *The Road to Serfdom*, Hayek explained how government planning of the economy leads to authoritarian forms of government such as IPAB.

> The expedient of delegation cannot really remove the causes which make all the advocates of comprehensive planning so impatient with the impotence of democracy . . . [A]greement that planning is necessary, together with the inability of democratic assemblies to produce a plan, will evoke stronger and stronger demands that the government or some single individual should be given powers to act on their own responsibility. The belief is becoming more and more widespread that, if things are to get done, the responsible authorities must be freed from the fetters of democratic procedure.
>
> The cry for an economic dictator is a characteristic stage in the movement toward planning.[100]

Those cries, Hayek wrote, will sometimes carry the day.[101] Advocates of government direction of the economy turn against democracy precisely because democracy "is an obstacle to the suppression of freedom which the direction of economic activity requires."[102]

Modern Authoritarianism

Compare Hayek's predictions to current proposals offered by advocates of government direction of the economy. In 2008, former Senate Majority Leader Tom Daschle (D-SD) proposed an unelected "Federal Health Board" similar to IPAB, whose "recommendations would have teeth."[103] Such a board is necessary because:

> [While] there is a general agreement on basic reform principles . . . the traditional legislative process has failed to deliver . . . Professional expertise and trustworthiness—these are qualities that Congress lacks when it comes to health care . . . In Congress, every decision is political . . . There is a strong argument to be made that appointed experts, proceeding in a deliberate, sometimes plodding way, would make better health-care decisions than politicians . . . [H]ealth-care policy shouldn't be subject to the whims of subcommittee chairmen and special interests . . . After nearly a century of failure, it's time to try another way."[104]

Under Daschle's proposal, Congress could overturn Federal Health Board decisions or abolish the board at any time. In other words, IPAB is more authoritarian—has more "teeth"—than even Daschle recommended.

University of Chicago public health professor Harold Pollack sees IPAB as progress because "we must reduce congressional micromanagement of Medicare policy" in favor of "a more centralized approach." Pollack concludes, "Despite many reasons for caution . . . I'm becoming more of a believer in an imperial presidency in domestic policy. Congress seems too screwed up and fragmented to address our most pressing problems."[105] Note that it would be easier to remove an "imperial president" that IPAB's members.

In an article titled, "Why We Need Less Democracy," Peter Orszag writes, "What we need . . . are ways around our politicians."[106] Like Daschle and Pollack, Orszag does not mean that we, the people should have more freedom to make our own decisions. Orszag's *we* refers to government "experts," who should have more power to impose their decisions on the people without the people's desires getting in the way. The problem with representative government, in Orszag's estimation, is the *representative* part:

> In other words, radical as it sounds, we need to counter the gridlock of our political institutions by making them a bit less democratic . . . I believe that we need to jettison the Civics 101 fairy tale about pure representative democracy and instead begin to build a new set of rules and institutions that would make legislative inertia less detrimental to our nation's long-term health.[107]

These new rules include "creating more in-

Compare Hayek's predictions to current proposals offered by advocates of government direction of the economy.

The Patient Protection and Affordable Care Act and the Independent Payment Advisory Board are not merely unconstitutional—they are *anti*-constitutional.

dependent institutions" that can impose taxes and other laws without representation. Orszag writes, "Proposals abound for expanding this type of process. In the late '90s, economist Alan Blinder proposed shifting responsibility for tax policy to a Fed-like institution of experts." He continues, "Perhaps the most dramatic example of this idea is the Independent Payment Advisory Board." Orszag "wish[es] it were not necessary" to vest so much power in unelected and unaccountable government officials. Alas, "certain aspects of representative government can end up posing serious problems. And so, we might be a healthier democracy if we were a slightly less democratic one."[108]

Governor Bev Perdue (D-NC) made an equally radical proposal during a discussion of how Congress might better manage the economy:

> You have to have more ability from Congress, I think, to work together and to get over the partisan bickering and focus on fixing things. *I think we ought to suspend, perhaps, elections for Congress for two years* and just tell them we won't hold it against them, whatever decisions they make, to just let them help this country recover. I really hope that someone can agree with me on that.[109]

Thankfully, this proposal did not catch fire.[110] Nevertheless, Purdue's comments illustrate the danger Hayek identified.

The federal government's attempts to plan the health care sector of the economy have been a failure. The creation of IPAB is proof of that failure and demonstrates that government direction of the economy is a threat to democracy. This is in no small measure because, as Hayek's analysis suggests, IPAB's inevitable failures will generate support for even more authoritarian measures. Not that we will need to wait for IPAB to fail: President Obama proposed expanding IPAB's powers before he even appointed a single member to the board.[111]

Conclusion

The Patient Protection and Affordable Care Act and the Independent Payment Advisory Board are not merely unconstitutional—they are *anti*-constitutional. The Board is an unelected and unaccountable lawmaking body. It possesses unprecedented power to make laws free of any meaningful oversight. It is "independent" in the worst sense of the word: independent of Congress, independent of the president, independent of the judiciary, and independent of the will of the people. Through this Act, Congress and President Obama attempted to rewrite multiple provisions of the Constitution, to deny future Congresses their powers under the Constitution, to deny current and future voters their right to alter and abolish unjust laws, and to deny the judiciary its role as a check against unjust laws. If IPAB survives—if Congress and President Obama succeed in amending various provisions of the U.S. Constitution by statute—then the United States will have a Constitution in name only. The United States will have become a *de facto* majoritarian democracy or worse, in which the majority always has the option of surrendering even more power to unelected bureaucrats, but not necessarily the option of reclaiming it. Congress, not the Constitution, will define the limits of its own power. Congress will vest whatever powers its majorities choose in whatever individuals they deem fit. The Independent Payment Advisory Board poses a threat to the U.S. Constitution and representative government that transcends party and ideology, and that has earned IPAB opponents of all political stripes.

Among the many legal challenges to PPACA is *Coons v. Geithner*, a lawsuit challenging IPAB as an unconstitutional delegation of Congress's lawmaking authority.[112] But Congress need not wait for the courts to strike down IPAB. It can assert the powers that PPACA purports to deny it by repealing IPAB. Legislation to repeal the board has garnered 235 cosponsors in the House

of Representatives—a majority of the House, including 20 Democrats.[113] A modified version of that bill passed the House with 223 votes (including seven Democrats), and the House has voted to repeal PPACA in its entirety.[114]

It is tempting to dismiss IPAB as an absurdity that the body politic will soon reject. Unless and until that occurs, IPAB will empower as few as one unelected government official to ration health care to all Americans; to impose any tax or regulation; to appropriate funds; and to wield many other lawmaking powers.

Notes

We would like to thank Nick Dranias, director of the Center for Constitutional Government, and Christina Sandefur, attorney, both with the Goldwater Institute.

1. See generally, Michael F. Cannon and Michael D. Tanner, *Healthy Competition: What's Holding Back Health Care and How to Free It* (Washington: Cato Institute, 2007).

2. U.S. Congressional Budget Office, *The Long-Term Budget Outlook*, August 2010, p. 29, http://www.cbo.gov/ftpdocs/115xx/doc11579/06-30-ltbo.pdf.

3. Ibid., p. iii.

4. U.S. Congressional Budget Office, *The Budget and Economic Outlook: An Update*, August 24, 2011, http://cbo.gov/ftpdocs/123xx/doc12316/08-24-BudgetEconUpdate.pdf.

5. Elliott S. Fisher, "Expert Voices: More Care Is Not Better Care," National Institute for Health Care Management 7, January 2005, http://nihcm.org/pdf/ExpertV7.pdf.

6. U.S. Congressional Budget Office, *The Long-Term Budget Outlook*, August 2010, p. 33.

7. Peter R. Orszag, "Medicare Spending Slows as Hospitals Improve Care," Bloomberg, August 23, 2011, http://www.bloomberg.com/news/2011-08-24/medicare-spending-slows-as-hospitals-improve-care-peter-orszag.html. Orszag serves on the board of the Mount Sinai Medical Center in New York.

8. Jennifer Haberkorn, "The Independent Payment Advisory Board," Health Affairs/Robert Wood Johnson Foundation Health Policy Brief no. 59, December 15, 2011, p. 3, www.healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_59.pdf.

9. See Peter R. Orszag, "Too Much of a Good Thing: Why We Need Less Democracy," *New Republic*, September 14, 2011, http://www.tnr.com/article/politics/magazine/94940/peter-orszag-democracy, discussed further below in notes 74, 99, and 106–108.

10. Timothy S. Jost, "The Independent Medicare Advisory Board," *Yale Journal of Health Policy, Law and Ethics* 11, no. 1 (2011): 21–31.

11. Orszag, "Medicare Spending Slows as Hospitals Improve Care."

12. The Secretary of Health and Human Services, the Administrator of the Center for Medicare & Medicaid Services, and the Administrator of the Health Resources and Services Administration will "serve ex officio as nonvoting members of the Board." H.R. 3590 (as modified by H.R. 4872) §3403 (42 U.S.C. § 1395kkk(g)(1)(A) (i) and (ii) (2010)).

13. 42 U.S.C. § 1395kkk(g)(2).

14. Jennifer Haberkorn, "The Independent Payment Advisory Board," Health Affairs/Robert Wood Johnson Foundation Health Policy Brief no. 59, December 15, 2011, p. 2, www.healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_59.pdf.

15. 42 U.S.C. § 1395kkk(m).

16. Such agencies include the Sentencing Commission, the Federal Communications Commission, the Equal Employment Opportunity Commission, the Federal Elections Commission, the Federal Trade Commission, the Securities and Exchange Commission, the Commodities Futures Trading Commission, the International Trade Commission, and the National Transportation Safety Board.

17. Christopher M. Davis and Henry B. Hogue, "Independent Payment Advisory Board Membership: The President's Recess Appointment and Removal Authorities," Congressional Research Service Memorandum, March 18, 2011, http://coburn.senate.gov/public//index.cfm?a=Files.Serve&File_id=3fe9e198-fe6c-4fb2-9777-88c69ff72356.

18. See, for example, Jonathan Turley, "Is the Cordray Recess Appointment Constitutional?" *JonathanTurley.org* (blog), January 6, 2012, http://jonathanturley.org/2012/01/06/is-the-cordray-

recess-appointment-constitutional/. ("I like [Richard] Cordray, but circumventing the Constitution is no solution to a political stalemate.")

19. 42 U.S.C. § 1395kkk(h).

20. 42 U.S.C. § 1395kkk(c)(2)(A)(v) and 42 U.S.C. § 1395kkk(c)(3)(B)(iv).

21. 42 U.S.C. § 1395kkk(c)(5).

22. 42 U.S.C. § 1395kkk(b)(1)(3); (c)(1)(A) and (c)(2)(A)(vi); (d)(1)(A), (B), (C), (D); and (e)(1) and (3).

23. 42 U.S.C. § 1395kkk (c)(3)(A)(ii).

24. H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk(c)(2)(A)(i) (2010)). Emphasis added.

25. Others have erroneously reported that the savings target is a ceiling rather than a floor. See, for example, Jennifer Haberkorn, "The Independent Payment Advisory Board," Health Affairs/Robert Wood Johnson Foundation Health Policy Brief no. 59, December 15, 2011, p. 3, www.healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_59.pdf.

26. Chapin White and Paul B. Ginsburg, "Slower Growth in Medicare Spending—Is This the New Normal?" *New England Journal of Medicine* 366 12 (2012): 1073–75, http://www.nejm.org/doi/full/10.1056/NEJMp1201853.

27. Nancy-Ann DeParle, "The Facts about the Independent Payment Advisory Board," White House Blog, April 20, 2011, http://www.whitehouse.gov/blog/2011/04/20/facts-about-independent-payment-advisory-board; and Douglas W. Elmendorf, Director, Congressional Budget Office, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*, testimony before the Subcommittee on Health, House Committee on Energy and Commerce, 112th Cong., 1st Sess., March 30, 2011, p. 26, http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf.

28. As required by PPACA, this CBO projection makes unreasonable assumptions about future Medicare spending on physician services. The Act provides that if the current-law formula for calculating Medicare's physician payments (the so-called "sustainable growth rate" or SGR formula) would yield a cut in those payments, then for purposes of determining whether IPAB must issue a proposal the chief Medicare actuary should assume no change in Medicare payments to physicians. See 42 U.S.C. § 1395kkk(c)(6)(B)(ii)(I). As it has for the past decade, the SGR formula currently mandates sizeable cuts to physician payments. Yet Congress typically replaces such cuts with increases in physician payments. See Centers for Medicare and Medicaid Services, Office of the Actuary, "Estimated Sustainable Growth Rate and Conversion Factor, for Medicare Payments to Physicians in 2012," November 2011, Table 6, p. 8, https://www.cms.gov/SustainableGRatesConFact/Downloads/sgr2012f.pdf. The required assumption of zero increases is thus unrealistic.

More importantly, the IPAB "trigger" also requires the chief Medicare actuary to incorporate unreasonable assumptions about Medicare payments to hospitals and other facilities. The Act reduces the rate of growth in Medicare payments to such providers to a degree that the CBO diplomatically says "might be difficult to sustain." Congressional Budget Office, *Selected CBO Publications Related to Health Care Legislation, 2009–2010* (Washington, DC: Government Printing Office, December 2010), p. 24, http://cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12033/12-23-selectedhealthcarepublications.pdf. Medicare's chief actuary likewise says those payment levels "may be unrealistic" because pressure from Medicare patients and providers will likely force Congress to increase them in the future. Centers for Medicare and Medicaid Services, Office of the Actuary, "Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended," April 22, 2010, p. 9, https://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf. Yet the Act requires the Medicare actuary to use those unrealistically low spending levels when making its determination of whether IPAB must issue a "proposal."

29. Congressional Budget Office, *CBO's 2011 Long-term Budget Outlook*, June 2011, p. 38, http://cbo.gov/sites/default/files/cbofiles/attachments/06-21-Long-Term_Budget_Outlook.pdf.

30. 42 U.S.C. § 1395kkk(c)(2)(A) and (c)(2)(B).

31. See H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk(c)(2)(A) (2010)).

32. H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk(c) (1)(A) and (2)(C) (2010)).

33. Centers for Medicare and Medicaid Services, Office of the Actuary, "Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Medicare Providers," May 13, 2011, pp. 6–8, https://www.cms.gov/ReportsTrustFunds/downloads/2011TRAlternativeScenario.pdf.

34. Ibid., p. 9.

35. Centers for Medicare and Medicaid Services,

Office of the Actuary, "Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended."

36. 42 U.S.C. § 1395kkk(c)(2)(A).

37. See, for example, Robert A. Levy and William Mellor, *The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom* (New York: Sentinel, 2008). "*Chevron U.S.A., Inc. v. Natural Resources Defense Council* [is] a 1984 case in which the Court established a two-part test for reviewing agency interpretation of statutes. First, the court determines whether Congress has spoken directly to the question at issue. If so, the court adopts the express provisions of the statute. But if the statute is 'silent or ambiguous,' as is frequently the case, then the court examines whether the agency's regulations are 'based on a permissible construction of the statute.' In practice, the *Chevron* test has been highly deferential; the vast majority of agency interpretations have been deemed 'permissible.'" (Internal citations omitted.)

38. If anything, Congress's ability to enact a substitute proposal would *encourage* IPAB to propose tax increases. The Independent Payment Advisory Board members would know that they could force Congress to enact alternative tax increases or other measures that would achieve the same budgetary result.

39. DeParle, "The Facts about the Independent Payment Advisory Board."

40. See, generally, 42 U.S.C. §1395kkk(c)(2)(B) (i-vii) and (n).

41. H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk (c)(2)(B), (n), (o)(1), and (2) (2010)).

42. 42 U.S.C. § 1395kkk(n)(1).

43. 42 U.S.C. § 1395kkk(n)(1)(E).

44. 42 U.S.C. § 1395kkk(c)(2)(B)(vii).

45. 42 U.S.C. § 1395kkk(o)(1).

46. 42 U.S.C. § 1395 (o)(A)-(E).

47. 42 U.S.C. § 1395kkk(d)(2)(C).

48. 42 U.S.C. § 1395kkk(c)(2)(A)(vii). Section 1395kkk(e)(3) states that starting in 2019, the secretary shall not implement an IPAB proposal if the projected growth in national health expenditures exceeds the projected growth in per-enrollee Medicare spending. However, that exception cannot apply in two consecutive years.

49. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 952 (2010).

50. Timothy S. Jost, "The Independent Medicare Advisory Board," *Yale Journal of Health Policy, Law and Ethics* 11, no. 1 (2011): 21–31.

51. Peter R. Orszag, "Obama's Budget Director: Powerful Rationing Panel (Not Doctors) Will Control Health Care Levels," Video of Remarks at the Economic Club of Washington, D.C., 1:53, Breitbart.tv, April 26, 2010, http://www.breitbart.tv/obamas-budget-director-powerful-rationing-panel-not-doctors-will-control-health-care-levels/.

52. Peter R. Orszag, "How Health Care Can Save or Sink America," *Foreign Affairs*, July/August 2011, http://www.foreignaffairs.com/articles/67918/peter-r-orszag/how-health-care-can-save-or-sink-america. Emphasis added.

53. Orszag, "Obama's Budget Director: Powerful Rationing Panel (Not Doctors) Will Control Health Care Levels."

54. 42 U.S.C. §1395kkk(e)(1).

55. Administrative rulemaking requirements apply, for example, to all agencies listed in note 11. The Act permits but does not require IPAB follow rulemaking procedures. "The Board may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Board considers advisable . . ." 42 U.S.C. § 1395kkk(h)(i)(1).

56. 5 U.S.C. § 552.

57. 42 U.S.C. §1395 (h)(i)(1). Likewise, the Act permits, but does not require, the Secretary to engage in "interim final rulemaking" when implementing IPAB recommendations. See 42 U.S.C. § 1395kkk(e)(2)(B).

58. 42 U.S.C. § 1395kkk(c)(4).

59. U.S. Const. art. I (article 2), § 3.

60. See Barack Obama, "Statement on Signing the Omnibus Appropriations Act, 2009," March 11, 2009, http://www.gpo.gov/fdsys/pkg/PPP-2009-book1/pdf/PPP-2009-book1-Doc-pg216.pdf; see also, William J. Clinton, "Statement on Signing the Oceans Act of 2000," August 7, 2000, http://www.gpo.gov/fdsys/pkg/WCPD-2000-08-14/pdf/WCPD-2000-08-14-Pg1805.pdf. ("The Recommendations Clause . . . protects the President's authority to formulate and present his own recommendations [to Congress].") President Clinton construed the statute so as not to extend to proposals or responses that he did not wish to present.

61. H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk(d)(3) (2010)).

62. H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk(d)(3)(C), (D), (E) (2010)).

63. 42 U.S.C. § 1395kkk (e)(3)(A)(i).

64. The relevant language is:

> "(3) EXCEPTIONS.
> "(A) IN GENERAL.—The Secretary shall not implement the recommendations contained in a proposal submitted in a proposal year by the Board or the President to Congress pursuant to this section if—
> "(i) prior to August 15 of the proposal year, Federal legislation is enacted that includes the following provision: 'This Act supercedes [sic] the recommendations of the Board contained in the proposal submitted, in the year which includes the date of enactment of this Act, to Congress under section 1899A of the Social Security Act.'; and
> "(ii) in the case of implementation year 2020 and subsequent implementation years, a joint resolution described in subsection (f)(1) is enacted not later than August 15, 2017.

42 U.S.C. § 1395kkk (e)(3)(A). The first exception derives from clause (i) and applies only through the year 2020. The second exception emerges from the interaction of clauses (i) and (ii). The key term is the "and" that joins the two clauses. Both conditions must hold for the second exception to relieve the Secretary of her duty to implement an IPAB proposal issued in 2020 of thereafter.

65. 42 U.S.C. § 1395kkk (e)(3)(B).

66. H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk(e)(1) (2010)).

67. 42 U.S.C. §1395kkk(e)(5).

68. H.R. 3590 (as modified by H.R. 4872) § 3403 (42 U.S.C. § 1395kkk(f) (2010)); but see, due to an apparent scrivener's error, § 1395kkk(f)(1) should cross-reference subsection (e)(3)(A), not (e)(3)(B).

69. 42 U.S.C. § 1395kkk(e)(3)(A).

70. *Nick Coons et al. v. Timothy Geithner et al.*, Motion to dismiss, CV-10-1714-PHX-GMS, at 45, (D. Ariz. May 31, 2011), http://aca-litigation.wikispaces.com/file/view/U.S.+motion+to+dismiss+%2805.31.11%29.pdf. Emphasis in original.

71. 42 U.S.C. § 1395kkk (f).

72. Several IPAB provisions are designated "fast track." See 42 U.S.C. § 1395kkk (d)(3)(A)-(E) and (d)(4)(A)-(F).

73. 10 U.S.C. § 2687.

74. 5 U.S.C. §§ 801–808.

75. See *Dalton v. Specter*, 511 U.S. 462, 464–465 (1994).

76. Ibid.

77. Ibid.

78. Peter R. Orszag, "Too Much of a Good Thing."

79. 42 U.S.C. § 1395kkk (e)(3).

80. U.S. Const. art. I, § 1.

81. *Currin v. Wallace*, 306 U.S. 1, 15 (1939).

82. *Loving*, 517 U.S. 748, 758–59 (1996).

83. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J. dissenting).

84. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001).

85. *J. W. Hampton v. United States*, 276 U.S. 394, 409 (1928).

86. See *Bowsher v. Synar*, 478 U.S. 714, 720 (1986).

87. *Hampton*, 276 U.S. at 405.

88. *Mistretta*, 488 U.S. at 393–94.See also *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991) (the lack of judicial review in the Sentencing Reform Act was offset by "ample provision for review of the guidelines by the Congress and the public" and, thus, "no additional review of the guidelines as a whole is either necessary or desirable"); Sentencing Act, 28 U.S.C. § 994(p).

89. *Mistretta*, 488 U.S. at 422.

90. *Loving v. United States*, 517 U.S. at 756.

91. *Bond v. United States*, 2011 WL 2369334 *8 (June 16, 2011).

92. Thomas Jefferson, *Notes on the State of Virginia* (Boston, MA: Wells and Lilly, 1829), p. 126,

http://books.google.com/books?id=Nbw9AAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

93. *Manigault v. Springs*, 199 U.S. 473, 487 (1905); see also *Street v. United States*, 133 U.S. 299, 300 (1890) (holding that an act of Congress "could not have . . . any effect on the power of a subsequent Congress"); and *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) (stating that "the will of a particular Congress . . . does not impose itself upon those to follow in succeeding years").

94. "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. Const. art. V.

95. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

96. Charles L. Black, Jr., "Amending the Constitution: A Letter to a Congressman," *Faculty Scholarship Series*, Paper 2597, December 1972, http://digitalcommons.law.yale.edu/fss_papers/2597.

97. *Nick Coons et al. v. Timothy Geithner et al.*, Motion to dismiss.

98. F. A. Hayek, *The Road to Serfdom*, 50th Anniversary Edition (Chicago: University of Chicago Press, 1994), pp. 69–70. This dynamic obviously holds whether government attempts to direct the entire economy or just one-sixth of it.

99. Peter R. Orszag, "Medicare Spending Slows as Hospitals Improve Care." Compare with Hayek's "taken out of politics" quote, above.

100. Hayek, *The Road to Serfdom*, pp. 74, 75.

101. Ibid., p. 75. It is a myth that Hayek claimed government planning of the economy inevitably leads to dictatorship (see pp. 3, 6): "Nor am I arguing that these developments are inevitable. If they were, there would be no point in writing this."

102. Ibid., pp. 69–79. Hayek clarified that the government intervention in the economy is dangerous not because it threatens democracy *per se*, but the freedoms that democracy exists to protect: "The fashionable concentration on democracy as the main value threatened is not without danger. It is largely responsible for the misleading and unfounded belief that, so long as the ultimate source of power is the will of the majority, the power cannot be arbitrary . . . Democratic control *may* prevent power from becoming arbitrary, but it does not do so by its mere existence. If democracy resolves on a task which necessarily involves the use of power which cannot be guided by fixed rules, it must become arbitrary power." Hayek, p. 79.

103. Tom Daschle, Scott S. Greenberger, and Jeanne M. Lambrew, *Critical: What We Can Do about The Health-Care Crisis* (New York: Thomas Dunne Books, 2008), p. 179.

104. Ibid., pp. 107, 108, 115, 134–36.

105. Harold Pollack, "The Real Problem with the Independent Payment Advisory Board," *Tapped* (The American Prospect blog), April 23, 2011, http://prospect.org/csnc/blogs/tapped_archive?month=04&year=2011&base_name=the_real_problem_with_the_inde.

106. Orszag, "Too Much of a Good Thing: Why We Need Less Democracy."

107. Ibid.

108. Ibid.

109. J. B. Frank, "Perdue Jokes about Suspending Congressional Elections for Two Years," *Charlotte News-Observer* (blog), September 27, 2011, http://projects.newsobserver.com/under_the_dome/perdue_suggests_suspending_congressional_elections_for_two_years_was_she_serious. "The comment—which came during a discussion of the economy—perked more than a few ears. It's unclear whether Perdue, a Democrat, is serious—but her tone was level and she asked others to support her on the idea." A Perdue spokesman said the governor was using "hyperbole." Emphasis added.

110. Even a prominent left-wing blog took issue with this "breathtaking" and "blatantly unconstitutional" proposal: "it's a dangerous precedent to set to suggest we simply suspend democracy every time unemployment goes above 9 percent." Marie Diamond, "North Carolina Governor Proposes Ignoring Constitution And Suspending Congressional Elections For Two Years," *Think Progress Justice* (blog), September 27, 2011, http://thinkprogress.org/justice/2011/09/27/330060/north-carolina-governor-proposes-ignoring-constitution-and-suspending-congressional-elec

tions-for-two-years/.

111. U.S. Office of Management and Budget, "Living within Our Means and Investing in the Future: The President's Plan for Economic Growth and Deficit Reduction," September 2011, pp. 39–40, http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/jointcommitteereport.pdf.

112. See Goldwater Institute, "*Coons v. Geithner* (Federal Health Care Lawsuit)," goldwaterinstitute.org, August 12, 2010, http://goldwaterinstitute.org/article/coons-v-geithner-federal-health-care-lawsuit.

113. See, for example, Jennifer Haberkorn, "Democrats Split on Independent Payment Advisory Board," *Politico*, July 10, 2011, http://www.politico.com/news/stories/0711/58655.html. And see the *U.S Library of Congress: Thomas*, "Bill Summary & Status, 112th Congress (2011–2012), H.R.452, Cosponsors," 2012, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00452:@@@P.

114. United States House of Representatives, Office of the Clerk, "Final Vote Results for Roll Call 126," March 22, 2012, http://clerk.house.gov/evs/2012/roll126.xml. United States House of Representatives, Office of the Clerk, "Final Vote Results For Roll Call 14," January 19, 2011, http://clerk.house.gov/evs/2011/roll014.xml; *U.S. Library of Congress: Thomas*, "Bill Summary and Status, 112th Congress.

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