

## **IPAB, Beginning a Journey to Extinction (we hope)**

I have talked a lot for over two years about the Independent Payment Advisory Board (IPAB), one of the most onerous parts of Obamacare. I have been very outspoken on the need to repeal this part of Obamacare before it can harm older Americans and now, I am glad to report, I've witnessed the first step on what I hope is its journey to extinction. On February 29<sup>th</sup>, I attended the Energy and Commerce Health Subcommittee markup of HR 452, the Medicare Decisions Accountability Act. This bill will repeal the IPAB. The subcommittee voted 17 to 5 to pass the bill to full committee, where it should go this week, and hopefully be voted on by the full House by the end of March. It is our hope that this is IPAB's first step on the road to a well-deserved extinction.

The IPAB is a 15-member presidentially-appointed panel charged with reining in Medicare costs. The panel's job is to propose reductions in payments to providers such that Medicare outlays don't exceed a pre-determined level. I've discussed before the draconian, short-sighted and indiscriminate nature of this board, a board of appointed bureaucrats virtually without judicial or legislative oversight, an entity with a power and function not defined in the Constitution and without precedence in any branch of government. It is this last area on which I will focus my message. My discussion concerning the IPAB will go above Medicare, patients, doctors, hospitals and even above health care; it will focus on the basic procedural and constitutional problems with the IPAB's legislative birth and its operational powers.

The process by which the IPAB became law was dubious. It is important to remember that at the time the Patient Protection and Affordable Care Act (PPACA) legislation was introduced, the Democrats controlled both Houses of Congress. The PPACA bill was passed in the House without any IPAB language, and then sent to the Senate. The Senate traditionally makes their changes to the bill and then votes on that version of the legislation. The next traditional step after the Senate passed their version of the bill would have been to form a conference committee made up of House and Senate members to hash out a final bill (from the two separate versions) that could then pass both houses. The insidious birth of IPAB began when the language creating the IPAB was inserted in the bill --literally in the dark of night. Late in the evening, as the Senate was finishing its PPACA changes just before the Senate floor vote, the IPAB language was inserted as one of the debatable "pay-for" provisions. Even at this late hour some Senators (or their staff) read the IPAB language and voiced concerns, but were still convinced to vote for the bill anyway, to move it forward. With the IPAB language intact to satisfy the Democrat leaders, the reluctant Democrat Senators voted for it with the knowledge that the bill could be altered during the House-Senate conference committee where the offending IPAB language could be eliminated. IPAB wasn't removed, they could still vote against the final PPACA bill when it came back to the Senate floor in the form of a conference

report. The Senate passed the bill (with IPAB) and sent it back to the House where, in a surprise move, the Democratic Majority Leader convinced enough House members to vote for the Senate's version of the bill. It passed without a House-Senate conference committee being formed. The IPAB was born as a last minute addition to PPACA without the knowledge of most Members of Congress and without any substantial review or debate. Any addition to legislation with that pedigree has to come under suspicion.

The powers assigned to the IPAB are without constitutional precedent and go against the Constitution's template of checks and balances. For instance, the IPAB legislative language:

- Is essentially written such that the IPAB may make any changes in any Medicare policy "notwithstanding any provision of law . . ." it seems that the IPAB is above the law.
- Does not limit the IPAB to changes to policies under specific sections of Medicare statute; they can make changes to any part of our health care system to find their money.
- Does not include provisions that would allow Congress to alter or limit the scope of the IPAB's proposals.
- Doesn't limit the IPAB to cutting costs just to the target of that year; they can exceed those limits without oversight.
- Provides that no IPAB changes in Medicare law is subject to judicial review. The IPAB is above the judicial branch of our government.
- Does not specify what constitutes a quorum. While the law dictates a 15 member board, if only 11 have been confirmed, it could take only six votes to pass the IPAB's policies.
- Puts the IPAB's proposal process completely independent from and inconsistent with the Congressional budget process.
- Dictates that the final word on scoring the IPAB's cost cutting proposals is the Chief Actuary of CMS, an official in the executive branch, rather than the Congressional Budget Office actuaries.
- Directs the IPAB to prepare detailed legislation for introduction in Congress. Did the founding fathers fashion the constitution with the hopes that someday a Presidential appointed bureaucratic entity would be authoring detailed legislation - legislation that cannot be amended by the Congressional Member who would introduce it in the House or the Senate?
- Provides one opportunity to discontinue the IPAB in 2017 with an unprecedented super-majority of three-fifths vote in both the House and the Senate.
- Dictates that Congress can only vote to accept or reject the proposal without amending parts of the proposal.

- Forces any replacement legislation, in the case where Congress rejects the IPAB's proposal, to be passed on an unprecedented three-fifths, super-majority vote.

As you can see, the IPAB is an egregious affront to our accepted process of government, but more importantly it circumvents the very checks and balances that have allowed our constitutional based government to survive. The IPAB is not the solution to rising health care costs, nor is it a solution to any problem faced by our nation. It is a serious attack on the basic tenets of our Constitution. For this reason alone, Congress should quickly pass legislation to repeal this last minute, late-night-inserted virus that now threatens to infect our time-tested form of government.