

Testimony of Diane Cohen

Senior Attorney

Goldwater Institute

Phoenix, Arizona

Before the

United States House of Representatives

Committee on Energy and Commerce

Subcommittee of Health

“IPAB: The Controversial Consequences for Medicare and Seniors”

July 14, 2011

Summary

I appreciate the opportunity to discuss the unprecedented constitutional issues raised by Congress's establishment of the Independent Payment Advisory Board (IPAB) and the real world consequences that this unprecedented independent agency will have on the lives of citizens and particularly seniors.

The Goldwater Institute's legal challenge to the "Patient Protection and Affordable Care Act," is unique among the lawsuits challenging the Act because ours is the only one that challenges the constitutionality of IPAB. We believe the creation of IPAB represents the most sweeping delegation of congressional authority in history, a delegation that is anathema to our constitutional system of Separation of Powers and to responsible, accountable, democratic lawmaking.

IPAB is insulated from congressional, presidential and judicial accountability to a degree never before seen. It is the totality of the factors insulating IPAB from our nation's system of checks and balances that renders it constitutionally objectionable. Specifically, IPAB is an unelected board of bureaucrats, whose proposals can become law without approval of Congress and the President, and are insulated from rulemaking, administrative and judicial review, and any meaningful congressional oversight. Far from representing Medicare reform, IPAB is abdication of what historically has been a congressional responsibility. Indeed, it is an unconstitutional delegation of Congress's legislative duties and responsibilities to an agency that is unaccountable to the electorate and immune from checks or balances.

IPAB is "independent" in the worst sense of the word: it is independent of Congress, independent of the President, independent of the judiciary and independent of the will of the people.

INTRODUCTION

Good afternoon Chairman Pitts, Ranking Member Pallone, and Members of the Subcommittee. Thank you for inviting me here today. My name is Diane Cohen and I am Senior Attorney at the Goldwater Institute in Phoenix, Arizona. The Goldwater Institute is an independent government watchdog organization supported by people who are committed to expanding free enterprise and protecting liberty. The Institute develops innovative, principled solutions to pressing issues facing the states and enforces constitutionally limited government through litigation. The Institute focuses its work on expanding economic freedom and educational opportunity, bringing transparency to government and protecting the rights guaranteed to Americans by the federal and state constitutions. I represent plaintiffs Nick Coons and Dr. Eric Novack, in a lawsuit now pending in the federal district court for Arizona that challenges the constitutionality of PPACA and specifically the Independent Payment Advisory Board (IPAB), which is the subject of today's hearing.

I appreciate the opportunity to appear before you today to discuss this legal challenge.¹ Dr. Eric Novack is an orthopaedic surgeon from Glendale, Arizona, who treats Medicare patients. He is challenging IPAB on Separation of Powers grounds, arguing that PPACA vests IPAB with authority to legislate changes to Medicare policy – not merely to “recommend,” a euphemism the statute uses – and

also to legislate changes to an undefined sector of the American health care market. Specifically, the statute creates and empowers IPAB to reduce – but not to increase – physician Medicare reimbursements in order to achieve a net reduction in total Medicare spending. This agency enjoys an unprecedented power to make public policy free of meaningful oversight by the legislative, executive or judicial branches. As the Supreme Court reminded us last month, “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 [such as Dr. Novack] as well.”² This system of checks and balances is critical to our constitution as a precaution against tyranny.³ Here I want to explain how IPAB enjoys lawmaking power; how congressional, presidential and judicial oversight are lacking; and how IPAB’s enabling legislation purports to be unrepeatable.

The Supreme Court has explained that Congress may not “abdicate, or . . . transfer to others, the essential legislative functions with which it is vested.”⁴ Likewise, the Court has recognized that while Congress may create administrative agencies and commissions, it may not yield to another authority the ultimate power to make law. Determining whether Congress has illegitimately given up its lawmaking role or simply delegated power to a subordinate agency is not always

easy, but 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.”⁵ This is a distinction “of degree,”⁶ and “varies according to the scope of the power congressional conferred.”⁷ 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 held that unless Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is . . . a forbidden delegation of legislative power.”⁸ This “intelligible principles” 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.⁹

IPAB fails this test. This agency is an unelected, unaccountable independent authority, which is “independent” in the worst sense of the word: it is independent of Congress, independent of the President, independent of the judiciary and independent of the will of the people.

IPAB is composed of fifteen members appointed by the President with the advice and consent of the Senate.¹⁰ The statute does not require the Board to be bipartisan in make-up, as is required for other independent agencies, such as the Sentencing Commission, Federal Communications Commission, Equal Employment Opportunity Commission, Federal Elections Commission, Federal Trade Commission, Securities and Exchange Commission, Commodities Futures Trading Commission, International Trade Commission, and National Transportation Safety Board.

Beginning on January 15, 2014, and every year thereafter, IPAB must make “detailed and specific” “*legislative proposals*” that are “*related to the Medicare program.*”¹¹ It is wrong, however, to call these “proposals” or “recommendations,” because with one virtually insurmountable exception I will describe shortly, the Secretary of Health and Human Services is required to implement these proposals, effectively making them law without the approval of Congress or signature of the President.¹²

There are few limitations on the scope of IPAB’s authority to legislate. The Act provides that Congress is prohibited from amending IPAB’s proposals to “ration health care, raise revenues or increase Medicare beneficiary cost sharing (including deductibles, coinsurance, and copayments), or otherwise restrict benefits or modify eligibility requirements.”¹³ But although the Act specifically prohibits

“rationing,” *de facto* rationing is what may in fact result as the practical impact of what IPAB will do: cut physician (and in 2020 hospital) reimbursement rates.

PPACA also strictly constrains the Senate’s ability to alter IPAB proposals, such as requiring a 3/5 super-majority to change the Board’s proposals or otherwise consider any bill, resolution, amendment or conference report that would repeal or otherwise change a recommendation of the Board, if that change would fail to meet the Act’s requirements.¹⁴ Thus, Congress lacks any authority within the Act to alter or reverse IPAB’s proposals.

The only way an IPAB proposal does not become law is if 1. Congress successfully amends an IPAB proposal pursuant to the truncated legislative rules and procedures allowed by the statute;¹⁵ or 2. the implementation year is 2020 and a joint resolution described in the Act is enacted not later than August 15, 2017.¹⁶ IPAB’s anti-repeal provision is not merely an internal house procedure, but a statute passed by both houses and signed by the president. IPAB’s anti-repeal provision is not consistent with fast-track legislation, either from procedural or conceptual standpoints. As my panel colleague Christopher Davis, Congressional Analyst on Congress and the Legislative Process can more fully explain, “fast-track” legislative procedures provide for expedited procedures for committee and floor action on specifically defined types of bills or resolutions. But certainly, a statutory provision that prohibits the introduction of a resolution until 2017, and

then only during a fifteen-day window in that year, and further provides that even if the resolution is passed and signed into law by the President, it would not take effect until 2020, cannot be described as an “expedited” or fast-track procedure under any stretch of the imagination.

Augmenting IPAB’s striking degree of autonomy, PPACA expressly prohibits administrative and judicial review of IPAB’s legislative proposals that become law.¹⁷ IPAB is also exempt from administrative rulemaking requirements (which are present in the other aforementioned independent agencies).¹⁸ However, rulemaking requirements are essential to the democratic process because they are the only means whereby members of the public can provide input, data and analysis on whether the agency should reject, approve or modify a proposed rule. Indeed, Congress passed the Administrative Procedures Act¹⁹ for this very purpose.

While the absences of judicial review and rulemaking requirements do not in themselves mean IPAB is unconstitutional under the intelligible principles test, they are factors the Supreme Court has used to analyze the constitutionality of congressional delegation. In *Hampton*, the Court noted that the Tariff Commission issued recommendations only *after giving notice and an opportunity to be heard*.²⁰ Likewise, in *Mistretta*,²¹ the Court emphasized that the Sentencing Commission engaged in APA 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.”²² None of these compensating forms of constraint are present in PPACA.

Although IPAB purports to regulate only Medicare expenditures, it actually goes much further. IPAB has the potential to regulate private health care markets. 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.”²³ IPAB must include in its report “[a]ny other areas that the Board determines affect overall spending and quality of care in the *private sector*.”²⁴ But these are not merely reports, because IPAB is *required* to rely on them when formulating its so-called proposals.²⁵

Additionally, PPACA requires IPAB to submit to Congress and the President recommendations to “slow the growth in national health expenditures” in “Non-Federal Health Care Programs,”²⁶ which includes 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.”²⁷

In other words, IPAB has broad powers to regulate *private* health care and insurance markets, so long as such action is “related to the Medicare program” and

“improv[es] health care outcomes,” and serves IPAB’s other stated goals.²⁸

Timothy Jost, a leading expert on PPACA, has recently written that it may not be possible to cap Medicare expenditures as IPAB is required to do without addressing private expenditures, and that IPAB is likely to end up setting prices for *all* medical services in the private health care market.²⁹

Moreover, in creating IPAB, Congress yields its historic role in legislating Medicare reimbursement rates. The *Bowsher* Court examined Congress’s historical view of the Comptroller General as an officer of the legislative branch in determining whether enforcement powers delegated to him were a violation of the Separation-of-Powers doctrine.³⁰ The Court looked to prior statutes that discussed the role of the Comptroller General, showing that the Comptroller was part of the legislative branch and an “agent of Congress.”³¹

Far more than was the case in *Bowsher*, PPACA gives this independent agency autonomous lawmaking power over subjects traditionally legislated upon by Congress. Over the last two decades, Congress has set Medicare reimbursement rates. Yet PPACA transfers this traditionally congressional power to the autonomous jurisdiction of IPAB.³²

It is true, of course, that Congress has at times transferred some of its traditional powers to independent agencies, subject only to lenient congressional

oversight, but none of those precedents even approach the extreme degree of independence that IPAB enjoys.

Some have compared IPAB to the Defense Base Closure and Realignment Commission (BRAC),³³ for example, and to the Congressional Review Act (CRA),³⁴ both of which establish “fast track” procedures for Congress’s “disapproval of agency regulations.” However, like the Sentencing Commission, both of these statutes included provisions for congressional oversight and constraint, which IPAB lacks. Further, neither BRAC nor CRA contain anti-repeal provisions.

BRAC was established to issue recommendations regarding the closure and realignment of military installations, through what the Supreme Court has described as an “elaborate process.”³⁵ But unlike IPAB, 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. BRAC was required to hold public hearings and prepare a report on those recommendations and then issue its own recommendations for base closures and realignments.³⁶ The Commission then submitted its report to the President, who could approve or disapprove them. If the recommendations were approved, they were submitted to Congress but Congress then had the opportunity to enact a resolution to disapprove the

recommendations and bar the closures.³⁷ PPACA contains no similar mechanisms for presidential or congressional review of IPAB's "recommendations" before they become law.

The CRA is also entirely different from IPAB's enabling legislation. It 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 administrative rule-making or judicial review of regulations, nor does it entrench regulations from repeal or amendment. Neither BRAC nor CRA shares anything in common with IPAB, in terms of purpose, policy, procedure or scope of independence from Congress and the Courts.

Indeed, several provisions, subsections (d) and (f)(2), are designated "fast track" because they contain numerous limitations on congressional debate and consideration of IPAB proposals.³⁸ These so-called "fast tracks" are the only provisions specifically enacted as an exercise of Congress' rulemaking power. The anti-repeal provision (contained in subsections (f) and (f)(1)), is *not* one of these two subsections. Furthermore, IPAB's anti-repeal provision is designed to *decrease* Congressional control, not to increase it.

IPAB is not only immune from meaningful congressional oversight and judicial review, it is also insulated from executive control. By mandating that the President "*shall*" submit IPAB proposals to Congress,³⁹ PPACA unconstitutionally

restricts the President's powers to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."⁴⁰ Indeed, Presidents have routinely asserted their authority under the Recommendations Clause, including President Obama.⁴¹

PPACA also entrenches IPAB from repeal. In order to repeal IPAB pursuant to the Act, Congress is *required* to enact a Joint Resolution to that effect,⁴² but is prohibited from even introducing such a resolution until 2017, *and* no later than February 1, 2017, *and* the Resolution must be enacted no later than August 15, 2017, or Congress is foreclosed from repealing the Board.⁴³ If such a resolution is introduced, the Act mandates an unprecedented super-majority vote to pass the resolution: *3/5 of all elected members of Congress*, a more severe supermajority requirement than any of which I am aware in the history of American law.⁴⁴ And even in the event such a resolution could clear these hurdles, the dissolution would not become effective until 2020.⁴⁵

It is a maxim of representative government that one Congress does not have the power to bind the hands of a future Congress, which is precisely what IPAB's anti-repeal provision does. The Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States."⁴⁶ IPAB's anti-repeal provision denies future congresses these basic legislative powers, thereby diminishing Congress' constitutional powers via statute. That Congress may not

supersede the Constitution by statute was recognized by the great Justice John Marshall as being “one of the fundamental principles of our society.”⁴⁷ Although scholars throughout history have addressed the notion of entrenchment, this “most familiar and fundamental principle[.]” has long been perceived as “so obvious as rarely to be stated.”⁴⁸ 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.”⁴⁹

Indeed, the Supreme Court has long recognized that “a general law . . . may be repealed, amended or disregarded by the legislature which enacted it,” and “is not binding upon any subsequent legislature.”⁵⁰ To be sure, there are times when Congress may bind its successors by entering into contracts whose duration outlives the current legislature. But this does not undermine the underlying rationale against entrenchment; rather, it strengthens it.

A closer look at IPAB exposes its virtually limitless powers to legislate. In sum, the following factors in their totality reveal an unprecedented delegation of legislative authority in violation of the Separation-of-Powers doctrine:

- IPAB’s “legislative proposals” are insulated from the APA notice and comment requirements;
- The Secretary is required to implement these “legislative proposals” without regard for congressional or presidential approval;
- PPACA prohibits administrative and judicial review of IPAB proposals;

- Congress is restricted from meaningful oversight through fast-track procedures that limit consideration and debate of IPAB’s legislative proposals;
- PPACA prevents Congress from altering or amending IPAB’s proposals in any way except to add provisions that IPAB could have itself added but for some reason failed to do;
- Congress may only bar IPAB’S “legislative proposals” from automatically becoming law if 3/5 of all sworn members of Congress pass a joint resolution to dissolve IPAB during a short window in 2017; and
- PPACA curtails the presidential constitutional power to recommend such measures as he considers expedient pursuant to Article II, sec. 3.

Not long ago, Justice Scalia predicted that, unless the constitutional prohibition on delegations of legislative power was rigorously enforced, 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.⁵¹

Unfortunately, the “Medical Commission” Justice Scalia warned of now exists: its name is IPAB.

Respectfully submitted,

Diane Cohen
Senior Attorney
Goldwater Institute
500 E. Coronado Rd.
Phoenix, Arizona 85004
www.Goldwaterinstitute.org

¹PPACA was amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (“HCERA”). All citations are to PPACA as amended by HCERA.

²*Bond v. United States*, 2011 WL 2369334 *8 (June 16, 2011).

³*Loving v. United States*, 517 U.S. 748, 756 (1996).

⁴*Currin v. Wallace*, 306 U.S. 1, 15 (1939).

⁵*Loving*, 517 U.S. at 758-59.

⁶*Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J. dissenting).

⁷*Whitman v. Am. Trucking Ass’ns, Inc.*, 531 US. 457, 475 (2001).

⁸*J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928).

⁹*Bowsher v. Synar*, 478 U.S. 714, 720 (1986).

¹⁰42 U.S.C. § 1395kkk(g)(1)-(4).

¹¹§ 1395kkk(b)(1)(3); (c)(1)(A) and (c)(2)(A)(vi); (d)(1)(A), (B), (C), (D); and (e)(1) and (3) (emphasis added).

¹²*See*, §1395kkk(e)(1).

¹³§ 1395kkk(d)(3)(A).

¹⁴§ 1395kkk(d)(3)(A)-(E).

¹⁵§ 1395kkk(e)(3)(A) (i).

¹⁶§ 1395kkk(e)(3)(A)(ii).

¹⁷§ 1395kkk(e)(5).

¹⁸IPAB merely *permits* the Secretary to engage in *interim final* rulemaking. *See* § 1395kkk(e)(2)(B). Likewise, the Act *permits* but does not require IPAB to hold hearings, take testimony and receive such evidence as the Board considers advisable. §1395 (h)(i)(1).

¹⁹5 U.S.C. § 552, *et seq.*

²⁰*Hampton*, 276 U.S. at 405.

²¹488 U.S. at 394.

²²See 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).

²³§ 1395kkk(n)(1).

²⁴§ 1395kkk(n)(1)(E) (emphasis added).

²⁵See § 1395kkk(c)(2)(B)(vii).

²⁶§ 1395kkk(o)(1).

²⁷§ 1395 (o)(A)-(E).

²⁸See generally § 1395kkk(c)(2)(B)(i-vii).

²⁹Timothy Jost, *The Independent Medicare Advisory Board*, 11 YALE J. HEALTH POL’Y L. & ETHICS 21, 43 (2011).

³⁰*Bowsher*, 478 U.S. at 731.

³¹*Id.*

³²See, e.g., the 1989 Omnibus Budget Reconciliation Act (PL 101-239), which introduced the resource-based relative value scale fee schedule (RB-RVS) and was the first change to the original Medicare Part B system that paid physicians based on usual, customary, and reasonable charges; the 1997 Balanced Budget Act (PL 105-33), which introduced the sustainable growth rate (SGR) that was designed to act as a restraint on Medicare spending and sets a “sustainable” growth rate for spending on Medicare services starting in April 1996; the 2003 Consolidated Appropriations Resolution of 2003 (108-7), which resulted in a 1.4% increase in reimbursement rates, when the scheduled reduction was 4.4%; the Medicare Modernization Act of 2003 (PL 108-173), which resulted in a 1.5% increase in reimbursement rates, when the scheduled reduction was 4.5%; the 2010 Department of Defense Appropriates Act (PL 111-118), which canceled a 21.3% decrease in the reimbursement rate; and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, which resulted in 2.2% increase in reimbursements.

³³10 U.S.C. § 2687.

³⁴5 U.S.C. §§ 801-808.

³⁵See *Dalton v. Specter*, 511 U.S. 462, 464-465 (1994).

³⁶*Id.* at 465.

³⁷*Id.*

³⁸See § 1395kkk (d)(3)(A)-(E) and (d)(4)(A)-(F).

³⁹§ 1395kkk(c)(4).

⁴⁰U.S. Const. art. I § 3.

⁴¹See, Statement by President Obama on H.R. 1105, Omnibus Appropriations Act, March 11, 2009 (“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.”); *see also*, Statement by President Clinton on S. 2327, Oceans Act of 2000, Aug. 7, 2000 (“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.

⁴²§ 1395kkk(f)(1)(C) and (D).

⁴³See § 1395kkk(f)(3).

⁴⁴By comparison, only two-thirds of Senators *present* need to vote to remove a sitting president, U.S. Const. art. I, § 4, or to make a treaty the supreme law of the land. U.S. Const. art. II, § 2.

⁴⁵§ 1395kkk(e)(3)(A); but *see*, due to an apparent scrivener’s error, § 1395kkk(f)(1) should cross-reference subsection (e)(3)(A), not (e)(3)(B).

⁴⁶U.S. Const. art. I, § 1.

⁴⁷*Id.*

⁴⁸Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189, 191 (1972).

⁴⁹Thomas Jefferson, Notes on the State of Virginia 126 (Wells and Lilly 1829)(ckjt).

⁵⁰*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”).

⁵¹*Mistretta*, 488 U.S. at 422 (Scalia, J. dissenting).