

**MEMORANDUM**

March 18, 2011

**To:** Senator Tom Coburn

**From:** Christopher M. Davis, Analyst on Congress and the Legislative Process  
Henry B. Hogue, Analyst in American National Government

**Subject:** **Independent Payment Advisory Board Membership: The President's Recess Appointment and Removal Authorities**

---

This responds to your request for a memorandum identifying the President's options with regard to several aspects of membership on the Independent Payment Advisory Board (IPAB). Specifically, you asked

1. Could the President appoint members of the IPAB using his recess appointment authority?
2. If so, could he recess appoint enough members of his own political party to give the board a working majority without appointing any members of a party other than his own? and
3. What authority does the President have to remove IPAB members?

## IPAB Membership Provisions

The Independent Payment Advisory Board was established by Sections 3403 and 10320 of the Patient Protection and Affordable Care Act.<sup>1</sup> The IPAB is charged by that law with developing proposals to "reduce the per capita rate of growth in Medicare spending."<sup>2</sup>

Under the terms of the Act, the IPAB is to be composed of 15 members appointed by the President with the advice and consent of the Senate.<sup>3</sup> The Act requires the President to consult with the Speaker of the House, the House minority leader, and the Senate majority and minority leaders, each on the appointment of three IPAB members. Although not specified by the Act, the remaining three IPAB appointments are presumably the selections of the President alone. The Chairman of the IPAB is appointed by the President from among the 15 members of the Board and the position is also subject to Senate confirmation. In addition to the President's 15 IPAB appointments, the Secretary of Health and Human Services, the

---

<sup>1</sup> P.L. 111-148. 124 Stat. 489, 125 Stat 949.

<sup>2</sup> For more information on the duties of the IPAB and associated health policy issues, see: CRS Report R41511, *The Independent Payment Advisory Board*, by David Newman and Christopher M. Davis.

<sup>3</sup> §3403(g)(1). This citation and similar citations in this section are citations to the text of P.L. 111-148, as amended.

Administrator of the Center for Medicare and Medicaid Services (CMS), and the Administrator of the Health Resources and Services Administration (HRSA) serve as *ex-officio* nonvoting members of the Board.<sup>4</sup>

The Act requires the appointed membership of the IPAB to include individuals who enjoy “national recognition” in several stated aspects of health policy, including health finance and economics, and further stipulates occupations which should be represented on the Board including physicians and “experts in pharmaco-economics.” The Act specifies that the appointed IPAB members have broad geographic representation and that the Board be balanced between urban and rural representatives. In order to preclude conflicts of interest, the Act stipulates that a majority of the appointed members of the IPAB are not be persons “directly involved” in the provision or management of the delivery of items and services covered by Medicare.<sup>5</sup>

Each individual appointed to the IPAB will hold office for a term of six years, except that the President’s initial appointments to the IPAB have staggered terms: Five are appointed for a term of one year, five are appointed for a term of three years, and five for a term of six years.<sup>6</sup> With the exceptions noted below, an IPAB member may not serve more than two full consecutive terms. Members appointed to fill a vacancy occurring prior to the expiration of the term for which that Member’s predecessor was appointed shall be appointed for the remainder of that term. Members appointed to complete the remaining term of a vacancy in this way are eligible to serve two additional consecutive full terms. Additionally, members appointed to the IPAB may continue to serve beyond the expiration of their term until their successor has taken office.

Under the terms of the Act, a majority of the 15 appointed members of the IPAB constitute a quorum for the transaction of business, although a lesser number may hold hearings. The statute further stipulates that no vacancy on the Board will impair the right of the remaining IPAB members to exercise all of the powers of the Board.<sup>7</sup>

## Recess Appointment Authority and IPAB Membership

Under the Constitution, the President and the Senate share the power to make appointments to the highest-level politically appointed positions in the federal government. It states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>8</sup>

The Constitution also empowers the President unilaterally to make a temporary appointment to such a position if it is vacant and the Senate is in recess, by providing that “The President shall have Power to fill

---

<sup>4</sup> Ibid.

<sup>5</sup> §3403(g)(1)(B).

<sup>6</sup> §3403(g)(2).

<sup>7</sup> §3403(g)(4).

<sup>8</sup> Article II, Section 2, clause 2.

up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>9</sup>

There is no constitutional or statutory qualification on the President’s “Power to fill up all Vacancies ....” Because the President’s recess appointment authority is unqualified, it appears that he could fill member positions on the IPAB by recess appointment during any period when he could otherwise make such appointments. Under certain circumstances, such appointments might be subject to pay restrictions, but the analysis of such a possibility is beyond the scope of this memorandum.<sup>10</sup>

Were the President to make recess appointments to the IPAB, he could fill whichever positions on the board he chose to, consistent with the statutory requirements described above with regard to consultation, qualifications, and term specifications. He need not ensure that the result of his appointments is a politically balanced board. It is possible that he could, in fact, make recess appointments only to those membership slots that are likely to be filled by members of his own party: the three filled in consultation with the Senate majority leader, the three filled in consultation with the House minority leader, and the three filled without consultation. If the President were to make such recess appointments, 9 of the 15 member positions would be filled, and this number would be, as noted above, sufficient to provide a quorum for the board to conduct business. In addition, he could use his recess appointment power to appoint one of these nine members as chair. Inasmuch as the chair is empowered to “exercise all of the executive and administrative functions of the Board,” this act would facilitate the managerial activities, such as the hiring of personnel and expenditure of funds, that would be necessary to start up the agency.<sup>11</sup>

In general, recess appointments made during a recess within the current session of the Senate would expire when the Senate adjourns *sine die* at the end of the second session of the 112<sup>th</sup> Congress, most likely in the Fall of 2012.

It might be noted that political considerations could decrease the likelihood of the President taking the action described above. Such an action might be perceived by Senators as a circumvention of the advice and consent process or of the statutory board design for political balance. In the past, under such circumstances, Senators have sometimes reacted by placing holds on other nominations or legislation important to the President, or by attempting to prevent the Senate from adjourning into a recess of sufficient duration for further recess appointments. It may also be worth noting that under the terms of the Act, if the IPAB is required in a given year to develop a proposal and fails to do so, the Secretary of Health and Human Services shall do so.

## Removal of IPAB Members

Unless otherwise specified in law, appointees to executive branch positions usually serve at the pleasure of the President. That is, they serve for an indeterminate period of time and can be removed by the President at any time for any reason (or no stated reason).<sup>12</sup> In some cases, however, Congress has

---

<sup>9</sup> Article II, Section 2, clause 3.

<sup>10</sup> Two provisions of law may prevent a recess appointee from being paid. These include 5 U.S.C. § 5503(a), which links recess appointee pay to the submission of a nomination for the position to the Senate, and a provision included the FY2008 Financial Services and General Government Appropriations Act that may prevent a recess appointee from being paid after the rejection by the Senate (P.L. 110-161, Div. D, § 709; 121 Stat. 2021).

<sup>11</sup> See 42 U.S.C. § 1395kkk(g)(3).

<sup>12</sup> It has long been recognized that “the power of removal [is] incident to the power of appointment.” *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

periodically elected either to set a specific term of office for a particular position or to restrict the President's power of removal for a particular position, or both. Fixed terms and removal restrictions are usually intended to reduce the President's influence over particular offices and, thereby, increase their independence. The degree to which this may be accomplished is related to the specific provisions employed. In addition, while such provisions might provide the opportunity for an officeholder to exercise independence from the President, an appointee might still choose to adhere closely to the President's wishes for other political or policy reasons.

As noted above, the IPAB statute provides for members with fixed terms and also for restrictions on the President's power of removal. With regard to the latter, it states: "Any appointed member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause."<sup>13</sup>

Commonly referred to as "for cause" removal provisions, restrictions such as those in the IPAB statute stipulate that incumbents of an office can be removed by the President only when certain grounds are established. Regarding grounds for removal, it should be noted that there is no clear standard clarifying these statutory terms.<sup>14</sup> Congress has stated, however, that a removal for good cause must be based on "some type of misconduct," as opposed to the refusal to carry out a presidential order.<sup>15</sup>

For cause removal provisions are commonly used with regard to the members of independent collegial boards and commissions, particularly those with regulatory or adjudicatory powers. Removal restrictions are explicitly provided for in the cases of, for example, members of the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the Federal Maritime Commission, the Federal Mine Safety and Health Review Commission, the Federal Reserve System Board of Governors, the Federal Trade Commission, National Labor Relations Board, National Transportation Safety Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, and Surface Transportation Board. As a matter of tradition and case law, members of other regulatory and quasi-judicial boards and commissions are generally thought to enjoy protection from removal, even where the enabling statute is silent on such matters. Agencies where this is thought to be the case include the Commodity Futures Trading Commission, the Federal Communications Commission, and the Securities and Exchange Commission.<sup>16</sup>

<sup>13</sup> 42 U.S.C. § 1395kkk(g)(4).

<sup>14</sup> See Marshall J. Breger, Gary J. Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52, 2000, p. 1111, at pp. 1144-45.

<sup>15</sup> See Independent Counsel Reauthorization Act of 1987, S.Rep. No. 100-123, 100<sup>th</sup> Cong., 1<sup>st</sup> sess., pp. 1-3 (1987).

<sup>16</sup> See Office of the Chairman, Administrative Conference of the United States (ACUS), *Multi-member Independent Regulatory Agencies: A Preliminary Survey of Their Organization*, May, 1992, p. 2; and U.S. Congress, Senate Committee on Governmental Affairs, *Study on Federal Regulation: Volume V, Regulatory Organization*, committee print, 95<sup>th</sup> Cong., 1<sup>st</sup> sess., December 1977 (Washington: GPO, 1977), pp. 36-39; *SEC v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677, 681 (10<sup>th</sup> Cir. 1988).