

Gail R. Wilensky

the challenges of ‘repeal and replace’

“Repeal and replace” served as a successful rallying call for Republican politicians from when the Affordable Care Act (ACA) was passed in 2010 until the November 2016 election saw Republicans capturing the White House, the House, and the Senate. Despite that victory, however, Republicans have found that delivering on their promise is far more challenging than most had anticipated.

GOP party members and advocates of an ACA repeal among the public in general have been frustrated—and even angered—at Congressional Republicans’ inability to pass replacement legislation. In 2016, House Republicans had developed a general legislative strategy under House Speaker Paul Ryan’s leadership called “A Better Way,” which contained proposed changes in several areas of public policy, including health care. They also had passed “repeal and delay” legislation multiple times, including in late 2015, which President Obama predictably vetoed.

Despite this history, Ryan had to work very hard to get a healthcare bill passed. The American Health Care Act was passed this past May but only by a narrow margin (217-213)—unexpectedly close given the sizable Republican majority in the

House (240-194). However, the bill wasn’t conservative enough for some more conservative House Republicans, and an estimated increase in the uninsured by 22 million dismayed many moderate Republicans. The bill also was unpopular with the public: A June poll jointly conducted by NBC and the *Wall Street Journal* found that Americans opposed the Republican plan by a 3:1 margin.^a Ironically, but not surprisingly, with the ACA under serious threat of replacement, a simple majority of Americans now support the legislation—the first time that has happened since it was passed.

Challenges Facing Senate Republicans

Unlike the House, the Republican-controlled Senate didn’t have a history of developing healthcare reform legislation that would appeal to a majority. The narrow majority that Republicans retained in the Senate—52 to 48—also made passing legislation very challenging. The ideological divide between the conservatives and the moderates is substantial, and unlike in the House, the Senate Republicans’ slim majority allowed for only two defections. Sens. Susan Collins (R-Maine) and Lisa Murkowski (R-Alaska) were

a. Murray, M., “NBC News/WSJ Poll: Public Overwhelmingly Disapproves of House Health Care Bill,” NBC News, June 22, 2017.

expected to vote against the Senate's bill, but the unanticipated vote by Sen. John McCain (R-Ariz.) against the latest legislation doomed these efforts at passing any type of repeal and replace legislation.

The challenges for Republicans in the Senate were not just the closeness of their majority but also the reliance on using a budget reconciliation strategy, which was attractive because it requires only a simple majority for passage rather than the 60 votes otherwise required. Yet there are major constraints on what can be included with such an approach. Only legislative provisions that have a direct impact on the budget are permissible in a reconciliation bill, and the legislation must also produce savings of an impact specified in the budget.

These constraints make it difficult to craft legislation that is internally consistent and that also meets the requirements of reconciliation. The various insurance rules that are present in the ACA, for example, are difficult or impossible to change within a reconciliation context, but their continuation in a different legislative environment can have undesirable and unintended consequences. For example, new legislation passed in this manner could not include provisions regarding exclusion of preexisting conditions, required purchase of insurance, and penalties for lack of insurance.

It is clear that that reliance on only Republican support not only limits the Senate to legislation that can be supported by the reconciliation process—a problem in terms of internal consistency—but also would produce the same type of political instability that the country experienced when the ACA was passed with only Democratic support.

The Possibility of Bipartisan Approach

The obvious solution is to consider only the types of legislation that could get bipartisan support. This approach not only would allow the Senate to consider legislation not necessarily subject to reconciliation rules but also, more important,

might produce legislation that is more sustainable politically than the ACA. A coalition of 40 House Republicans and Democrats, called the Problem Solvers Caucus, led by Reps. Tom Reed (R-N.Y.) and Josh Gottheimer (D-N.J.), has been engaged in an effort to create strategies that would stabilize exchange markets. The Problem Solvers Caucus also has reached out to groups of moderate House members from each party. They have focused on continuing funding for the cost-sharing subsidies that reduce out-of-pocket costs for the lowest-income individuals purchasing insurance in the exchanges and on limiting the employer mandate to firms with more than 500 employees.

Sen. Chuck Schumer (D-N.Y.) has said the Democrats are prepared to work with Republicans in “reforming and repairing” the ACA so long as Republicans cease efforts to repeal and replace the legislation. However, when Sens. Bill Cassidy (R-La.) and Collins introduced legislation that included, as a first option, allowing states to keep the ACA but with a 5 percent reduction in funding, Schumer and others in the Democratic leadership refused to discuss the bill, undermining their claims of interest in bipartisan solutions.

There continue to be pockets of Republicans and Democrats in both houses of Congress who understand the need to address some of the market instabilities and failings associated with the ACA and who seem willing to work in a bipartisan way. The challenge to date is that neither the Republican nor the Democratic leadership seems to be interested in developing a bipartisan solution, and it seems unlikely that legislation would have any chance of passage without the active involvement of leadership from both sides. We can only hope that situation will change over time. ■

Gail R. Wilensky, PhD, is a senior fellow at Project HOPE; a former administrator of the Health Care Financing Administration, now CMS; and a former chair of the Medicare Payment Advisory Commission (gwilensky@projecthope.org).