

Election Results Bring Change in Health Priorities

November 2018

On November 6, 2018, the nation went to the polls in what was perhaps the most closely watched midterm election in recent history.

Democrats will take control of the House of Representatives in January 2019. Republicans will retain control of the Senate, widening their margin slightly. Split control of Congress will have important consequences for healthcare policy. This article takes a closer look at how the election is likely to impact the health policy agenda.



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The 2018 midterm elections changed the balance of power in Washington, DC, with important implications for health policy. In the House of Representatives, Democrats picked up at least 28 seats (with several races still too close to call when this article was published), gaining control of the chamber. In the Senate, Republicans held their majority, with at least 51 Senate seats going to Republicans.

At the state level, Democrats picked up seven governorships, which could have important implications for the future of Medicaid and implementing the Administration's agenda.

The article below examines the effect of the election on a number of high priority issues for health care stakeholders. Overall, we expect a fair amount of gridlock in Washington and a significant ramp of House Democrats' oversight activity aimed at the Trump administration. However, there are a few areas of potential compromise that could emerge.

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ACA REPEAL AND REPLACE

Issue: In 2017 and 2018, Republicans pursued a variety of approaches aimed at reshaping the Affordable Care Act (ACA). While congressional Republicans succeeded only in repealing the tax penalty associated with the individual mandate, the Trump administration reshaped a number of ACA policies, including offering coverage alternatives, such as short-term, limited duration plans; association health plans; and reforms to health reimbursement accounts. The past year also brought numerous legal challenges, including a lawsuit still pending in a federal district court in Texas challenging the ACA's constitutionality that put pre-existing conditions protections back in the spotlight, and formed a central campaign theme for Democrats.

Analysis: The Administration likely will continue its efforts to redesign the ACA, as illustrated by another ACA-related waiver rule issued by the Centers for Medicare and Medicaid Services (CMS) the day after the midterms. Democrats will internalize the priorities expressed by voters in newly-won districts, and emphasize support for the ACA. Expect Democrats to use their victory in the House to continue to make health care coverage and patient protections a central issue in the lead-up to the 2020 presidential election. House Democrats will use their oversight authority to challenge the administration's efforts to reform ACA coverage and to push coverage expansion legislation, including some version of Medicare for All, a Medicare buy-in or a public plan option. Even if such a plan could get through the House, these proposals almost certainly would fail in the Senate or be met by a presidential veto. Nonetheless, these proposals and efforts will shape the Democrats' agenda heading into 2020, so stakeholders should take note of which ACA support and coverage expansion proposals emerge to better forecast potential policy directions two years hence.



Wild Card: The Texas case and other ACA-related lawsuits will continue to make their way through the court system, challenging the legality of new coverage options and the constitutionality of the ACA. Expect appeals to draw these challenges out over the next year and possibly longer, but to potentially create critical need for congressional or administrative intervention should a court fundamentally undermine the ACA.

MEDICAID

Issue: The ACA's option for states to expand Medicaid coverage has become a hot button political issue, with a sharp divide in approach among red and blue states. In general, most Democratic-leaning states have expanded Medicaid, while most Republican-leaning states have not. There are some notable exceptions given the Trump administration's flexibility allowing states to add work requirements through a looser waiver process. Democrats in Congress have introduced legislation to give states the option to further expand Medicaid coverage using a so-called Medicaid Buy-in.

Analysis: Democrats may attempt to limit the administration's authority as it relates to restrictions on eligibility and enrollment (e.g., work requirements). In addition, in states where Democrats picked up control of governor's mansions and/or state houses, (e.g., Kansas, Maine, Wisconsin), or where the electorate approved ballot measures expanding Medicaid passed (e.g., Idaho, Nebraska and Utah), Medicaid expansion could be pursued.



Wild Card: As Democrats evolve their thinking on single payer, Medicaid buy-in has emerged as a potential alternative or complementary policy strategy. With more states potentially embracing Medicaid expansion, House Democrats could lead an effort to move a Medicaid buy-in option through Congress. These efforts would primarily be about defining the party for 2020, as these kinds of proposals would not be likely to pass the Senate or garner support from President Trump.

PREScription PRICING

Issue: On the 2016 campaign trail, then-candidate Trump promised to lower the cost of prescription drugs. As President, Mr. Trump has made prescription drug costs a top health policy priority. In May 2018, the Trump administration released the [American Patients First Blueprint](#), a plan to lower drug prices and reduce beneficiary out-of-pocket spending on drugs. Congress held hearings on the topic, and the Administration released requests for information, proposed rules and notices to implement aspects of the Blueprint. Just before the midterms, the Administration released an advanced notice of intent to regulation using an International Price Index (IPI) model, [intended](#) to reduce the price Medicare pays for certain Part B drugs by using the prices other countries pay as a proxy and ceiling.

Analysis: Expect the pressure on prescription drug pricing to continue. The Trump administration will continue to roll out policies included in its Blueprint and other related policies. While it is unclear whether the IPI model can withstand the political pressure that ultimately tanked a similar proposal from the Obama administration, additional proposals are expected. Prescription drug pricing is one of a handful of areas of potential bipartisan agreement, since both parties agree on a common goal – lowering prescription drug costs – if not on specific policies to achieve that goal. Expect House Democrats to use oversight authority to draw more attention to this issue, with a particular focus on how manufacturers determine initial cost and make decisions to increase the price (e.g., EpiPen).



Wild Card: Senior Democrats on the House Energy and Commerce Committee have long sought changes to give the Secretary of Health and Human Services negotiating power under Medicare Part D—changes that President Trump supported in the past, signaling that this could be an area of bipartisan action.

340B

Issue: Within the broader prescription drug pricing debate, the Administration and Republican-led Congress set their sights on the 340B program as an area for potential cuts and reforms. The Republicans held numerous hearings this past year scrutinizing the 340B program. These hearings highlighted, among other things, the lack of consensus among lawmakers on what changes may be necessary. While Congress continues its examination of the program, the administration has systematically changed the value proposition of 340B through various payment-related changes.

Analysis: With Republicans holding the Senate, expect the Senate Health, Education, Labor & Pensions (HELP) Committee to continue its inquiry under the health care cost umbrella. The House, now under Democratic control, may shift focus away from the 340B program and toward more broadly lowering the costs of prescription drugs.



Wild Card: If the Senate makes progress on bipartisan legislation, House Democrats may seriously engage and advance legislation.

PRICE TRANSPARENCY

Issue: The Trump Administration and Congress have undertaken concerted efforts to empower consumers through improved consumer access to information about health care costs. At a congressional level, this has included a bipartisan draft bill to address surprise hospital bills and numerous hearings on how to use transparency to tackle the health care cost problem. At the administration level, there have been a series of requests for information on how to improve transparency and empower consumer choice. In 2018, the administration finalized a requirement that hospitals publicly post standard charges online.

Analysis: Expect transparency efforts to continue with possible movement on bipartisan legislation and continued regulatory focus in 2019. In particular, the issue of surprise hospital bills has potential to gain steam as a bipartisan priority. Bills introduced in working draft form in the 115th Congress are the most likely to advance, at least initially, in the 116th Congress.



Wild Card: Most health care issues have limited potential for agreement between the House, Senate and White House. Price transparency, however, seems to be an area ripe for progress and compromise between the chambers and the Administration, especially as pressure from the media increases and consumer stories about sticker shock continue to grab headlines.

DELIVERY TRANSFORMATION

Issue: For several years and across party lines, Congress and the Administration have focused on delivery transformation as a mechanism to control health care costs. CMS continued to implement the Medicare Access and CHIP Reauthorization Act (MACRA) Quality Payment Program (QPP), which was intended to begin to transform Medicare payments from volume to value. In addition, the CMS Innovation Center has continued to develop alternative payment models at a more modest pace in recent years.

Analysis: Despite calls for repeal, the QPP continues to ramp up in 2019. The Administration has indicated that it plans to roll out new models that continue to shift financial risk from Medicare to provider organizations and health plans. In a [speech](#) just days after the election, Department of Health and Human Services Secretary Alex Azar stated that the Administration would be rolling out a capitated primary care model and would bring back mandatory bundles. Other examples could include direct contracting models that offer more financial risk and increased regulatory flexibility. Delivery system reforms have largely enjoyed bipartisan support and interest from Congress. Depending on the new direction, Democrats could use their oversight authority to investigate the use of funding to pursue new models. However, in light of other high-priority issues, from immigration to corruption, delivery system reforms may not rise to a sufficient level of importance to justify congressional oversight.



Wild Card: MACRA legislated stable payment updates to the physician fee schedule. In 2020, those updates go to zero percent for five years. Expect heavy stakeholder pushback seeking a positive update for payment rates.

REGULATORY RELIEF

Issue: Reducing regulatory burden has been a signature issue for the Trump administration, and priority for many Republicans on the Hill. Earlier in 2018, the administration announced the Regulatory Sprint to Coordinated Care, which included requests for information on potential changes to the Stark Law and Anti-Kickback Statute intended to reduce burdens and encourage care coordination. In addition, CMS has undertaken Patients over Paperwork and Meaningful Measures initiatives to identify and reduce administrative burden on clinicians. The House Ways and Means Committee has been pursuing the Red Tape Relief Project and hosted a series of roundtables with different stakeholder groups to explore burden reduction, culminating in a [report](#) on reducing burdens in the Medicare program.

Analysis: Expect administration efforts to reduce regulatory burden to continue. In addition, expect to see the reduction of burden associated with provider willingness to take on higher levels of performance-based risk. With Democrats taking the House, we may see less focus on burden reduction on the Hill, as prior efforts were largely spearheaded by Republicans, including Rep. Peter Roskam (R-IL), who formerly chaired the Ways and Means Health Subcommittee, but who lost his bid for re-election.



Wild Card: Analysis and recommendations stemming from the requests for information on the Stark Law and Anti-Kickback Statute may require legislation (not just regulatory action). In this case, the House may look to continue the efforts on reducing burden.

RURAL HEALTH

Issue: The Trump administration and several congressional committees have recently expressed growing concern over the unique health care challenges faced by rural communities. The Senate Finance Committee and the Senate HELP Committee, for example, have held hearings exploring provider and patient issues in rural communities, including access to care and hospital closures. The House Ways and Means Committee has also explored rural health challenges through its deregulatory Red Tape Relief Project, and recently sent a letter to CMS highlighting regulatory burdens specific to providing health care in rural areas. CMS released a Rural Health Strategy focusing on steps the agency intends to take to be more sensitive to the impact of broader policies on rural communities.

Analysis: The work in the Senate likely will continue, and in a bipartisan fashion, potentially culminating in legislative activity perhaps as soon as mid-2019.



Wild Card: Democrats flipped some traditionally red seats that represent more rural areas. As positions on coveted committees (such as the House Energy and Commerce and Ways and Means Committees) shake out in the new Congress, there may be a bipartisan push for rural issues to see more attention through hearings and legislation.

IMMIGRATION

Issue: Immigration issues overlap significantly with health policy. For example, immigrants with certain status are currently eligible for limited public benefits, including Medicaid, Medicare and food stamps. In October 2018, the Trump administration proposed a rule that would redefine how use of these public benefits is considered when an individual applies for permanent residency in the United States. The proposal would consider current and past receipt of public benefits above a certain threshold as a heavily weighted negative factor. While the final rule has not been published, observers have noted that this policy could discourage the use of public benefits, including reduced use of preventive care services and potential increases in emergency department use. In addition, changes in immigration policy can have important implications for health system and hospital labor forces.

Analysis: The Democrats have long advocated and campaigned on comprehensive immigration reform. Expect some action in the House. However, with a slim majority, the Democrats may need to reach across the aisle in an attempt at a bipartisan approach. The Democrats may also seek legislation to block or prohibit the Administration's authority to consider or limit the use of public benefits for certain immigrants.



Wild Card: Given that immigration can be a bipartisan issue, this may be an opportunity for the House to strike a deal with the President.

CONSOLIDATION

Issue: Vertical and horizontal integration and consolidation in the health industry continued apace in 2018 with some notable combinations, including Aetna/CVS, Cigna/ExpressScripts and Catholic Health Initiatives/Dignity Health. Despite regulatory approvals, some in Congress cast a skeptical eye on these transactions. The House Energy and Commerce Oversight Subcommittee held a hearing examining consolidation trends in the health care sector, the reasons behind those trends, and the effects they have on the cost and quality of care. Three leaders of the House Energy and Commerce Committee (including the chairman of the Oversight Subcommittee) asked the Medicare Payment Advisory Commission to look

into the impact of hospital consolidation and hospital-physician integration. And Senator Charles Grassley (R-IA), chairman of the Senate Judiciary Committee, asked the Federal Trade Commission to assess “potentially anticompetitive contracting practices between insurers and hospital systems.”

Analysis: This scrutiny is likely to continue and maybe increase in 2019, especially as concern over transparency and provider surprise billing mounts. While some of the congressional inquiries in 2018 were Republican-led, these issues tend to be nonpartisan, and concern is shared comparably by Republicans and Democrats. As such, this is an issue that could be ripe for legislative action in 2019.



Wild Card: Senator Grassley is next in line to take the helm of the Senate Finance Committee (Senator Hatch is retiring). He could use his perch as chairman to lead bipartisan investigations into the consolidation issue, potentially leading to legislative proposals.

BUDGET

Issue: Budget issues will be prominent and contentious both during the upcoming lame duck session, when Congress and the Administration must complete work on fiscal year 2019 appropriations, as well as later in 2019, when Congress again must fund the federal government for fiscal year 2020. While much of the US Department of Health and Human Services was funded through the end of the current fiscal year, the US Food and Drug Administration was not, and is operating under the short-term, soon-to-expire continuing resolution. While Republicans will retain control of Congress for the balance of 2018, resolving the remaining fiscal year 2019 funding gaps will nonetheless be difficult and divisive. More drama should be expected in 2019 with respect to fiscal year 2020 funding. The Bipartisan Budget Act of 2018, enacted earlier this year, set spending levels for all federal agencies through fiscal year 2019. This means Republicans and Democrats will once again be faced with negotiating a new budget agreement early next year, as well as actually providing the funding.

Analysis: Democrats in both chambers are likely to push for higher spending limits and more funding for domestic priorities, and to run headlong into incompatible Senate Republican and Trump Administration priorities. These divides could lead to a government shutdown and eventually to a budget compromise that makes neither side happy. In these environments, Medicare is often a target for spending reduction.



Wild Card: The Joint Select Committee on Budget and Appropriations Process Reform is expected to release bipartisan, bicameral recommendations by the end of November 2018. These recommendations could include adopting a biennial budget resolution and changing the start and end dates of the fiscal year. These and other recommendations could change the political dynamics around the budget and annual appropriations processes.

COMMITTEE LEADERSHIP

Issue: Retirements, change in power and a few unexpected Republican losses will shift the makeup of several key health committees. This means health policy priorities and political dynamics will also change.

Analysis: Current Senate Finance Chairman Orrin Hatch (R-UT) is retiring. Either Senator Chuck Grassley (R-IA) (more likely) or Senator Mike Crapo (R-ID) (less likely) is expected to take over the gavel of the powerful committee with broad health policy jurisdiction. Senator Grassley is no stranger to the Committee, having led it on two occasions in the early and mid-2000s. On the Republican side, Dean Heller's (R-NV) loss means an additional open seat. On the Democratic side, Senator Claire McCaskill's (D-MO) loss makes room for a new Democrat to join the Committee.

Expect to see little change in the Senate HELP Committee, with Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) staying in the leadership positions.

On the House side, the Energy and Commerce Committee will be led by Rep. Frank Pallone (D-NJ). With the retirement of Rep. Gene Green (D-TX), there will be a new leader of the Health Subcommittee: Anna Eshoo (D-CA) is expected to take this slot. With the Democrats taking over, there will also be more slots on the committee for other or newly elected members. On the Republican side, Rep. Leonard Lance (R-NJ), an active member on health issues, lost his re-election bid.

The House Ways and Means Committee will be led by Rep. Richard Neal (D-MA). With Rep. Sander Levin's (D-MI) retirement, Rep. Mike Thompson (D-CA) is next in line for the Health Subcommittee. However, Thompson has not indicated his intentions. On the Republican side, Rep. Peter Roskam lost his race, which means a new Republican leader for the Health Subcommittee. Erik Paulsen (R-MN) and Mike Bishop (R-MI) also lost their re-elections and were both active members on health policy.



Wild Card: There are many freshman members of Congress that campaigned heavily on health policy issues. Expect some intense jockeying for positions on these health committees.

CONCLUSION

2019 promises to be a busy year in health care policy. While we expect a fair amount of gridlock in Washington, we are also bracing for surprises in the form of unexpected compromises and new issues that could change the landscape for the health care industry.

For more election insights, join McDermott Will & Emery on Monday, November 12, [for a complimentary webcast](#).

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