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CONGRESS

A Look Ahead

As the Congress returns from its week-long recess on March 27, the Senate will take up two highly controversial issues. Majority Leader Bill Frist (R-TN) intends to bring up his Securing America's Borders Act (S.2454), which would enact immigration reforms primarily focused on increased border security and enhanced interior enforcement of immigration laws. Frist introduced his bill on March 17 and invoked Senate Rule 14 which kept the bill at the Presiding Officer's desk rather than being referred to the Judiciary Committee. He used this procedure in part to encourage an accelerated pace for consideration of comprehensive immigration reform legislation, which the Judiciary Committee had been marking up for some time. The Chairman of the Judiciary Committee, Arlen Specter (R-PA), plans to have the Committee vote on the final version of his immigration reform bill early in the week of March 27 so that his bill can be offered as a substitute amendment to the Frist legislation. Senator Frist will not object to that substitution.

The Specter bill will address not only enforcement issues but also institute a new guest worker program and allow undocumented aliens to become permanent residents if they meet certain conditions. The final product may also provide a path to citizenship for immigrants who fulfill specific standards. The immigration reform legislation is expected to be on the Senate Floor for about two weeks and will most likely attract numerous amendments. The House passed an immigration reform bill (H.R.4437) in December that was primarily devoted to border security.

The Senate also intends to return the Legislative Transparency and Accountability Act (S.2349) to consideration, which would subject earmarks in bills originating in a Conference Committee to a point of order, deny Senate Floor privileges to former Senators who are registered lobbyists, prohibit former senior Senate staff from lobbying the Senate for one year after they leave Senate service, and place additional restrictions on lobbying activities for immediate family members of Senators and senior Senate staff. In the course of its previous debate on the Floor, the Senate adopted an amendment to the bill to include meals in a ban on gifts from lobbyists and was in the process of considering other amendments to the bill when Senator Charles Schumer (D-NY) offered an unrelated amendment barring the culmination of a controversial agreement providing for the operation of several U.S. ports by a company owned by the United Arab Emirates (U.A.E.). Majority Leader Frist filed a Cloture Motion, which if adopted, would have made non germane amendments, such as Senator Schumer's, out of order. On March 9 the Senate failed to invoke Cloture by a vote of 51-47 and Senator Frist pulled the lobbying bill from the Senate Floor. However, with the announcement that the U.A.E. company will not pursue the port operations agreement, the Majority Leader will bring the lobby reform bill back for further consideration by the full Senate.

The House Republican Leadership has also introduced their version of lobbying reform. H.R. 4975 would require public disclosure of earmarks and identification of Members who are sponsoring them, limit the pensions of former Members convicted of certain felonies, and restrict the amount of campaign spending by groups organized under §527 of the Tax Code.

This flurry of activity by both the Senate and the House on ethics and lobbying reform was prompted by a series of news reports involving alleged wrongdoing by Members of Congress and certain lobbyists including the guilty plea of a House Member to the charge of taking bribes in exchange for inserting earmarks in legislation. Serious as these matters may be, such activities are not a recent development in Congress and certainly don't exceed the somewhat more direct approach to Congressional self-enrichment employed by one of the legends of the Senate, Daniel Webster of Massachusetts. In 1833, the Senate was involved in a spirited controversy over whether it should renew the Charter of the Second Bank of the United States. President Andrew Jackson did not support the Bank and was firmly opposed to the renewal of its Charter by the Senate. Senator Webster took the occasion to write a letter to the Director of the Bank, Nicholas Biddle, noting that his retainer with the Bank had not been renewed and advised that, "If it be wished that my relation to the Bank should be continued, it may be well to send me the usual retainer." Mr. Biddle promptly forwarded the "usual retainer" and Senator Webster continued his efforts on behalf of the renewal of the Bank's Charter.

The House Republican Leadership has informed the Members of its caucus that bills concerning health care, education, taxpayer protection, homeland security and American competitiveness will be on the agenda after the Recess. As the first item of business, the Leadership will bring up the College Access and Opportunity Act (H.R.609), which is intended to expand access to higher education for low and middle income students.

Recent Developments

Since the beginning of the year the House had been in session for only 47 hours on 19 days before it left for the Recess on March 17. In the interim between the end of the President's Day Recess, the House passed the USA Patriot Act Additional Reauthorizing Amendments Act (S.2271), which modified several provisions of the recently reauthorized Patriot Act concerning the Federal Government's access to business records. The bill also provides for judicial review of certain orders under the Foreign Intelligence Surveillance Act of 1978. The President signed this measure into law (P.L.109-178) on March 9.

The House also passed the Children's Safety and Violent Crimes Reduction Act (H.R.4472) concerning sex offenders, violence against judges, and gang crimes; the National Uniformity for Food Act (H.R.4167) authorizing the Food and Drug Administration to set national standards for food safety; and the Stop Counterfeiting in Manufactured Goods Act (H.R.32) which would subject any goods bearing counterfeit markings, the equipment used to produce the markings, and proceeds from their sale to forfeiture. The anti-counterfeiting bill was signed into law (P.L.109-181) on March 16. In the last action before leaving for the mid March Recess, the House passed the Emergency Supplemental Appropriation Act for Defense, the Global War on Terror and Hurricane Recovery Act (H.R.4939), which provided more than $90 billion in additional spending for these activities.

Before leaving for its Recess, the Senate passed H.J.Res.47 by a vote of 52-48 increasing the debt limit of the United States Government by $781 billion to $8.965 trillion. The House had approved the increase in 2005. The Senate also passed a budget resolution for FY2007 (S.Con.Res.83) by a vote of 51-49, establishing total Federal spending at almost $3 trillion and projected revenues at approximately $2.5 trillion.

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ELECTORAL COLLEGE REFORM

On January 10, 1977, I introduced S.J.Res.1, a proposed Amendment to the Constitution to abolish the Electoral College and provide for direct election of the President and Vice President of the United States. As Chairman of the Senate Subcommittee on Constitutional Amendments, I held five days of hearings on this and related proposals that year, receiving testimony from 38 witnesses and hundreds of pages of additional statements and academic studies. In fact, since the Subcommittee held its first hearing on this topic in 1966, we had amassed a record of over 3,000 pages of testimony on the problems fostered by the Electoral College and the benefits which would accrue from the direct election of the President and the Vice President.

At the end of this process, I was even more firmly convinced that the Electoral College had outlived whatever positive role it once played as a choice of convenience and compromise. Long overdue, the President and Vice President should be chosen by the same method every other elective office in this country is filled – by citizen voters of the United States in a system which counts each vote equally. In 1979 we came close to getting S.J.Res.1 through the Senate but in the end we could not get enough votes to end the filibuster blocking the Resolution. Our effort, like many before it, was relegated to the Congressional history books.

Unfortunately, Congress has continued to block this basic reform that has long-standing, overwhelming public support. Gallup polls have shown strong public support for nationwide popular election of the President for over five decades. Numerous other polls have confirmed a high level of public support for this reform. Polls consistently show 60-80% of Americans believe they should be able to cast votes in the direct election of the President. That is why I was glad to assist in the efforts of the National Popular Vote organization to propose a new strategy for the direct election of the President and Vice President. This new approach is consistent with the Constitution but does not rely on the arduous process of a Constitutional amendment.

The major shortcoming of the current state-by-state system for electing the President is that voters in two thirds of the states are effectively disenfranchised because they don't live in the closely divided 16 or 17 "battleground" states. The reason that presidential candidates focus on states such as Wisconsin and Ohio and ignore states such as Illinois and Indiana is the winner-take-all rule. Under this rule (which is in effect in almost every state), the candidate who wins each particular state gets all of that state's electoral votes. As a result, presidential candidates concentrate their organizational efforts, advertising, polling, public appearances, and policy attention on the closely divided battleground states. Candidates do not campaign in states in which they are far ahead – because they do not receive any additional electoral votes by winning such states by a larger margin. Similarly, they ignore states where they are far behind since any popular votes they would garner would do no good if they lost the statewide vote. Republican, Democratic, and Independent voters are reduced to being spectators in the states that are not competitive in presidential elections. The non-competitive states include six of the nation's 10 most populous states (California, Texas, New York, Illinois, New Jersey, and North Carolina); 12 of the 13 least populous states; and the majority of medium-sized states.

Indeed, we can identify the battleground states by simply "following the money" in Presidential elections. An astounding 99% of the $237 million in reported advertising expenditures in the last month of the 2004 Presidential campaign was spent in only 17 states. Fully 92% of the 307 campaign events attended by Presidential or Vice Presidential candidates in the last month of the 2004 campaign were concentrated in just 16 states. Not only are voters ignored in non-competitive states but voter turnout is also diminished. Diminished voter turnout, in turn, weakens the candidates for state and local offices of the state's minority party making the state even less competitive in the future.

A second shortcoming of the current system is that there are large disparities in the value of a person's vote. For example, in the 2000 campaign Gore won five electoral votes by carrying New Mexico by 365 popular votes, whereas it took President Bush 312,000 popular votes in Utah to earn the same five electoral votes – an 855-to-1 disparity in the value of a vote.

In addition, under this system a candidate can win the Presidency without winning the most popular votes nationwide. This has occurred in one in 14 presidential elections, and a shift of a handful of votes in one or two states would have elected the second-place presidential candidate in five of the last 12 elections. This has the potential to penalize both Republicans and Democrats under different circumstances. A shift of 60,000 votes in Ohio in 2004 would have made Kerry President, despite President Bush's lead of 3,500,000 votes nationwide. In 1976 Jimmy Carter won a nationwide popular vote victory of 1.7 million votes. However, a change of only 25,579 votes in Ohio and Mississippi would have reelected President Gerald Ford in the Electoral College.

The simplest way of resolving these problems and inequalities with our current system would be to institute a system of direct popular vote in which every citizen's vote would be counted equally with their fellow citizens. The electoral advantage of people in certain states or particular parts of the country would be replaced with a system in which every voter is equally counted and equally weighed. In addition, it would provide the basic fairness of an election in which the candidate with the most votes wins the election.

Since the Congress has not been able to garner sufficient votes to send a Direct Election Constitutional Amendment to the States for ratification, the National Popular Vote organization is proposing the Equal Vote Plan whereby the States would institute direct popular election under the Constitution without the need of the burdensome process of adopting a Constitutional Amendment.

Under Article II of the Constitution, each State is given the authority to determine how their electors are appointed in Presidential elections. Section 1 of Article II states, "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." Article I Section 10 of the Constitution contains the "Compact Clause" which allows States to enter into binding agreements with other States.

Through the use of these provisions of the Constitution, the States on their own may create and implement an electoral system which will provide for the direct popular vote in Presidential elections. The Equal Vote Plan is based on the authority of a State to determine the method for appointing electors under Article II and the power of a State to enter into agreements with other States under Article I.

The Plan contemplates the following steps for implementation:

1. Individual states would adopt Compacts, either through popular initiatives or by action of the state legislatures, requiring that after a Presidential election the chief election official of each state in the Compact should obtain an official statement of the total number of popular votes nationwide.

2. Pursuant to the terms of the Compact, the chief election official of each state in the Compact would be required to cast the state's slate of electors for the Presidential candidate who receives the most popular votes nationwide.

3. The Compact would not become effective until it is approved by states having a majority of the electoral votes; i.e. 270 electoral votes.

Traditionally, Congress has voted to consent to the Compact among the states as required by Article I, Section 10 of the Constitution. These Compacts are quite common. In fact, there are several hundred interstate Compacts in existence, covering a wide variety of subjects. Some have been agreed to by all of the states, while others involve only a few. The Congressional approval of the Compact requires a simple majority in each chamber and the signature of the President.

The Equal Vote Plan has attracted some initial support since we proposed it at a press conference on February 23rd. Legislation to implement it has been introduced in Illinois and will soon be introduced in California. In a March 14th editorial, *The New York Times* called it an "innovative new proposal" and "an ingenious solution" to the inability of Congress to adopt a direct election Constitutional Amendment. I don't know if the Equal Vote Plan is "ingenious," but I do think it is worthy of a close look by legislatures across the country.

Birch Bayh is a Partner in Venable's Legislative Practice Group, and is on the Advisory Board of the National Popular Vote group, which advocates the Equal Vote Plan. He served three terms in the United States Senate representing Indiana, and is the author of the 25th Amendment to the Constitution concerning Presidential disability, and the 26th Amendment which lowered the voting age to 18. Senator Bayh can be reached at 202-344-4705, or at bbayh@venable.com.

VENABLE IN THE NEWS

Our Partner, Tom Quinn, was featured in an article in the March 20, 2006 issue of *Business Week* on lobbying and government relations as practiced in the Nation's capital.

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