



Legislative Bulletin.....March 3, 2005

Contents:

H.R. 841—Continuity in Representation Act

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 3

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 841—Continuity in Representation Act (Sensenbrenner)

Order of Business: The bill is scheduled to be considered on Thursday, March 3rd, subject to a structured rule (H.Res. 125), which makes two amendments in order. [See “Amendments Made in Order under the Rule” section below.]

Summary: H.R. 841 would require that states hold special elections to fill vacancies in the U.S. House of Representatives “in **extraordinary circumstances.**” [*emphasis added—see “Additional Background” section below*]

Current law (2 U.S.C. 8) regarding the filling of House vacancies is as follows:

The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused

by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

H.R. 841 would add a new section to require that, in “extraordinary circumstances,” the executive authority of any state which has a vacancy for the House of Representatives issue a writ of election to fill such vacancy by special election within 45 days of the U.S. House Speaker’s announcement of the vacancy (unless a regularly-scheduled election or other special election for the vacant office is already due to occur within 75 days of the Speaker’s announcement). Within ten days of the Speaker’s announcement of the vacancy, the political parties of the state that are authorized by state law to nominate candidates could each nominate one candidate to run in the special election—or the state could choose another method (including holding primary elections), as long as the above deadlines are met.

“Extraordinary circumstances” occur when the U.S. House Speaker announces that House vacancies exceed 100 (not counting any vacant Delegate or Resident Commissioner seats).

The states would be directed to ensure (“to the greatest extent practicable”) that absent uniformed services voters and overseas voters receive absentee ballots within 15 days of announced vacancies. A state would have to accept and process any otherwise valid ballot or other election material from such voters, so long as the materials are received by the appropriate state election official not later than 45 days after the state transmits the materials to the voter.

H.R. 841 would also provide for extremely expedited procedures for challenging an announced vacancy in federal court. Specifically:

- Within two days of the Speaker’s vacancy announcement, any challenge would have to be filed in the U.S. District Court having jurisdiction in the district of the vacancy and would be heard by a three-judge panel convened pursuant to 28 U.S.C. 2284;
- A copy of the complaint would have to be delivered “promptly” to the Clerk of the House of Representatives;
- The court would have to make a non-reviewable, final decision in the case within three days of the filing of such case; and
- The executive authority of the state that contains the district of the vacancy would have the right to intervene either in support of or opposition to the position of a party to the vacancy case.

The provisions of this bill would apply to the District of Columbia and the U.S. territories as well.

Additional Background: The House passed a nearly identical bill, H.R. 2844, on April 22, 2004, by a vote of 306-97: <http://clerk.house.gov/evs/2004/roll130.xml>. The only major differences in H.R. 841 are: 1) an increased flexibility for the states to decide how nominees in special elections are chosen, and 2) the application of this bill to the District of Columbia and the U.S. territories.

Alexander Hamilton, in Federalist #59, when discussing how the Constitutional Convention approached the power over federal elections, wrote:

...there were only three ways in which this power [over federal elections] could have been reasonably modified and disposed, that it must either have been lodged wholly in the National Legislature, or wholly in the States Legislatures, or primarily in the latter and ultimately in the former. The last mode has with reason been preferred by the Convention. They have submitted the regulation of elections for the Federal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever **extraordinary circumstances** might render that interposition necessary to its safety. *[emphasis added]*

Nothing can be more evident than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs....

The natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members....I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation*....It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. *[emphasis in original]*

In short, and consistent with the right of the people to choose their own representatives to the U.S. House, the Founders explicitly considered Congress' power to require expedited special elections as the solution to potential discontinuity in government in emergency situations.

The provisions of H.R. 841 depend largely on announcements from the Speaker. Should the Speaker be physically unable to perform his duties, Speaker succession is provided for in House Rule I(8)(b)(3), which states that, "In the case of a vacancy in the office of Speaker, the next Member on the list [provided by the Speaker] shall act as Speaker pro tempore until the election of a Speaker or a Speaker pro tempore. Pending such election the Member acting as Speaker pro tempore may exercise such authorities of the Office of Speaker as may be necessary and appropriate to that end....[A] vacancy in the office of Speaker may exist by reason of the physical inability of the Speaker to discharge the duties of the office."

Amendments Made in Order under the Rule (H.Res. 125):

Millender-McDonald: Extends the timeframe for holding special elections from 45 days to 60 days. *Last year, a similar amendment (extending the timeframe to 75 days) failed by a vote of 179-229: <http://clerk.house.gov/evs/2004/roll128.xml>*

Jackson-Lee: Extends from two to five days the timeframe for filing a challenge to a vacancy announcement in federal court, provides that a final decision on such a case should “[take] into account an opportunity for an expedited appeal of the initial decision” (but does not strike the language in the bill saying that the final decision is non-reviewable), and allows any citizen of the vacant district and any political party in the state of the vacancy to intervene either in support of or opposition to the position of a party to the vacancy case. The underlying bill would allow just the executive authority of the state to intervene in such cases. *Last year, this identical amendment failed by voice vote.*

Committee Action: On February 16, 2005, the bill was referred to the Committee on House Administration, which reported the bill to the full House on February 24th. On the 24th, the bill was referred to the Judiciary Committee, which immediately discharged it.

Possible Conservative Concerns: There are no known conservative concerns.

Cost to Taxpayers: H.R. 841 would have no significant impact on the federal budget.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: The bill contains several mandates on state governments, but they are well within Congress’ constitutionally granted power to “at any time by Law make or alter [regulations regarding ‘The Times, Places and Manner of holding Elections for Senators and Representatives’].” CBO reported for last year’s bill (H.R. 2844) that the special elections mandate would require 40 states to hold special elections more quickly than they currently would in the event of a vacancy that does not coincide with a regularly scheduled election.

Constitutional Authority: Although no statement of constitutional authority is available for H.R. 841, the Judiciary Committee, in House Report 108-404 for H.R. 2844 last year, cited constitutional authority in:

- Article I, Section 4, Clause 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”);
- Article I, Section 5, Clauses 1 and 2 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members...” and “Each House may determine the Rules of its Proceedings...”); and
- Article III, Section 2, Clauses 1 and 2 (“The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States...” and “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have

appellate Jurisdiction...with such Exceptions, and under such Regulations as the Congress shall make.”

Outside Organizations: The Election Center, a national non-partisan, nonprofit organization that represents the nation’s voter registration and election officials and administrators at the state and local levels, testified last year before the House Administration Committee that “elections administrators [from combined responses nationwide] feel that they can conduct an election within as few as 45 days.” <http://www.house.gov/cha/2844Lewis.doc>

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