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Washington, D.C. Fall Preview

The heat of the summer has arrived in Washington, and with it, much of the focus of the political world has shifted over the past few weeks to Cleveland and Philadelphia for the Republican and Democratic conventions. This break in the congressional calendar provides us the opportunity to shift perspective for this month's Washington Update to Congress' return after the Labor Day holiday and a potential post-election lame duck session. We'll examine issues and the various proposals on the fall agenda, and their chances of success.

Before Congress left town for the seven-week recess, Congress was able to avoid a July 15 shutdown of the Federal Aviation Administration (FAA) by passing legislation reauthorizing FAA programs and aviation trust fund tax authority through September 2017 (P.L. 114-190). The FAA had been subject to a series of short-term extensions over the last year as House Transportation Committee Chairman Bill Schuster (R-PA) pushed forward with his so-far unsuccessful legislation to privatize the FAA's air-traffic control system.

The issues Congress has yet to address are numerous, and we expect the September and possible post-election lame duck sessions of Congress to be busy. In this month's Washington Update, we include:

- Three Questions with General Carrol "Howie" Chandler (USAF-Ret.), Strategic Advisor, Government Relations and Public Policy, Baker Donelson – Former Vice Chief of Staff and Commander of Pacific Air Forces, United States Air Force;
- Uncertain End Game Faces FY17 Appropriations in the Fall;
- Trans Pacific Partnership Off the Table Until After the November Election;
- Zika Funding Remains Unsettled;
- 2016 Tax Extenders Package Significantly Smaller Than in Past Years;
- Legislation to Fight Opioid Addiction Passes, But Funding Levels Remain Outstanding;
- Options Dwindling for 21st Century Cures;
- MACRA Implementation Rule May Be Pushed Back Beyond January 2017;
- Chronic Care Legislation Possible as Soon as This Fall; and
- Comprehensive Energy Bill Still on the Table

Additionally, here's what we're reading this month:
- Losing Our Edge: Pentagon Personnel Reform and the Dangers of Inaction – Bipartisan Policy Center
- Options for Federal Privatization and Reform Lessons from Abroad – CATO Institute
- Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy – Center for American Progress

Please feel free to reach out to me for additional information on these topics or other issues of importance.

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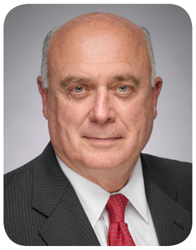

Three Questions with General Carrol "Howie" Chandler (USAF-Ret.), Strategic Advisor, Government Relations and Public Policy, Baker Donelson – Former Vice Chief of Staff and Commander of Pacific Air Forces, United States Air Force

1. What are the particular international challenges of note that you expect to be important in the coming presidential administration?

Over the past eight years, we've seen a resurgence in nation state actors seeking to challenge the U.S. economically, politically and militarily. The transition to the new administration comes at a crucial point in time for U.S. foreign policy. In Europe, Russian actions in Crimea have set the continent on edge. In Asia, Chinese actions in the South China Sea have threatened the fragile peace in the region. Our challenge in the coming years will be to work with our partners in Europe and Asia to enhance stability in the regions, helping our allies and protecting U.S. national interests globally. This will most likely require increasing the resources we dedicate internationally to reassure our allies and partners that we are there to stay.

2. In January 2015 the Military Compensation and Retirement Modernization Commission released its extensive recommendations for steps to be taken to protect the long-term viability of the U.S. military. What future do you foresee for these recommendations? Should we expect them to continue to set the agenda for legislative and administrative actions going forward?

The recommendations of the Military Compensation and Retirement Modernization Commission (MCRMC) have been met with varying levels of support, both within Congress and the military services, with some of the recommendations having been received more positively than many others. That said, it's important to remember that while the all-volunteer force has been a success, it is also an expensive proposition, and the U.S. military will need to make significant changes to how it pays and supports members of the military and their families if it wants to be able to meet its professed goal of maintaining benefits while cutting costs.

The MCRMC contains a number of suggestions on military pay structures, retirement benefits, health benefits and housing issues that should be taken seriously. In particular, Congress and the military services must consider the recommendations as an attempt to craft an approach to meet their obligations to current members of the military while simultaneously ensuring the military remains an attractive place to serve out a full career for future service members.

3. What is the future for BRAC in the coming year? Do you think we will have another round of closures? If so, how can military communities engage the process?

Timing is right for a lame duck Congress to approve a framework for a new round of the Base Closure and Realignment Commission (BRAC). The Department of Defense has been asking Congress to initiate this process for a number of years and has publically stated that the military currently has between 20 and 25 percent more infrastructure than it needs. If a new BRAC round were to occur, we can expect 2017 to be dedicated to data collection, with an agreement reached in 2018, and closures to occur in 2019.

Communities that host military installations should be realistic about the potential for the closure of an installation and should engage with the process sooner rather than later. This means reaching out to their federal representatives and building the support necessary within the military and Congress to either keep the base open or to receive adequate levels of support to counteract an installation's closure. At this point most – if not all – of the expected or easy closure targets have already been closed, and the sites that may appear as part of the next BRAC round will surprise a lot of people.

Uncertain End Game Faces FY17 Appropriations in the Fall

FY17 appropriations legislation tops the list of must-pass legislation that congressional leaders need to finish before the 114th Congress adjourns *sine die*. The legislation, which funds the daily operations of the federal government from October 1, 2016 to September 30, 2017, is the principal legislative vehicle for carrying policy preferences and priorities advanced by both political parties and individual members. However, with none of the 12 bills signed into law and Congress out until September, the October 1 deadline will not be met. Instead, when Congress returns in September, an interim stop-gap funding bill (called a Continuing Resolution, or CR) will be needed to temporarily fund the government to give Congressional leaders time to formulate and implement a plan for finalizing the regular FY17 bills before Congress adjourns.

At least three endgame scenarios are possible at this time.

Scenario One: In September, the House and Senate pass a temporary CR to keep the government operating past October 1 through late November/early-to-mid December. They then return on November 14 for the post-election lame duck session to negotiate and finalize some or all 12 bills as part of a catch-all "Omnibus" spending package. Nearly all Republicans on the House and Senate Appropriations committees support this option. This scenario is not unlike what happened with the FY15 legislation following the 2014 mid-term election.

Scenario Two: The House and Senate return in September, pass a temporary CR through March 2017 and wait for the new Congress and President to decide the fate of appropriations bills for the balance of the 2017 fiscal year. This option is supported by an influential bloc of House Republican fiscal conservatives and by some in the Senate Republican leadership. A similar scenario played out in the run up to the 2012 presidential election when the political parties were divided over whether to replace sequestration-imposed discretionary spending cuts with a new budget framework. In the end, the FY13 sequestration spending caps did not change, and the House and Senate were only able to agree on five of the 12 bills, with the rest funded at FY12 levels for the balance of the fiscal year through September 30.

Scenario Three: The House and Senate return in September, pass a temporary CR into November/December and decide at that time to delay final FY17 spending decisions for the new President and Congress. Under this scenario, a CR would either be in effect through the early part of next year, or, depending on the level of disagreement between the two parties after the election, for the rest of the 2017 fiscal year through September 30, 2017.

Although variations among the three scenarios are possible, none of the scenarios were supposed to happen in the first place. Last fall's budget agreement, which increased the FY17 discretionary spending caps, was intended to facilitate agreement on FY17 so Congress would not find itself in this type of situation. Since last fall's budget agreement, several variables emerged that helped derail the FY17 spending process:

1. The shortened election-year legislative calendar;

2. House Republican fiscal conservatives who oppose the new FY17 spending caps negotiated in last fall's budget agreement and are aggressively pushing House floor leaders for a floor vote on a CR through next March after the new President and Congress take power; and

3. Partisan divisions that overtook Congress in June, first in the wake of the Orlando shootings and calls for attaching gun control language to appropriations bills, and then over funding offsets and family planning provisions included in the emergency Zika spending measure, which derailed the FY17 Military Construction-Veterans Affairs appropriations bill used to carry Zika funding. Senate Democrats are blocking floor consideration of all FY17 bills – including the highly popular defense bill – until Republicans reaffirm their support for the FY17 spending caps enshrined in last fall's budget agreement and oppose "poison pill" policy riders blocking the Obama Administration's regulatory agenda.

With the presidential general election in full swing, the current deadlock over FY17 spending is expected to persist at least until the November 8 election.

Takeaway: Despite the current impasse and the influence of GOP fiscal conservatives in the House, there is extraordinary pressure on Congressional leaders to complete a FY17 Omnibus before the year is out. Leaders are being urged not to waste the extraordinary feat of the House and Senate Appropriations Committees in reporting all 12 of their FY17 spending bills to the floor of their respective chambers before the annual summer recess – a first in recent memory. But much depends on which party wins the White House and Senate in November and the precise nature of the "electoral mandate" invoked by the winner. A victory by Democrats might justify completing an Omnibus in December without policy riders that target outgoing Obama Administration regulatory initiatives. A victory by Republicans might justify calls for new fiscal policy and repudiation of the budget framework under which the FY17 spending bills have been drafted. Still others argue that a "clean slate" for a new Republican administration could mean wrapping up FY17 bills before the new Congress convenes and negotiating a brand new budgetary framework starting with FY18 spending.

Trans Pacific Partnership Off the Table Until After the November Election

After President Obama signed the Trans Pacific Partnership (TPP) in February, many expected Congress to move forward on the agreement sometime between March and April. This did not happen. Initially, Senate Republican leadership was reticent to support the agreement because of concerns over issues such as the proposed two-tier protection of data exclusivity for biologic pharmaceuticals and regulations concerning the sale of tobacco. However, as the 2016 election has drawn closer, the debate over U.S. trade policy, generally, and the value of trade agreements, specifically, has taken center stage. Both the Democratic and Republican presidential nominees have come out against the TPP as it is currently written.

According to Senate Majority Leader Mitch McConnell (R-KY), "The biggest problem right now is the political environment to pass a trade bill is worse than any time I've been in the Senate because we're right in the middle of this presidential election year, [and] the candidates are all against what the President has negotiated." However, Senator McConnell went on to point out that the trade promotion authority approved by Congress lasts until 2018, which means the next president will have the authority to fast track another agreement to the Congress for ratification.

Takeaway: Though the Obama Administration is aggressively pushing for Congress to consider it this fall, it is extremely unlikely the House and Senate will consider the TPP before the election in November. It is possible that the agreement may be included in a post-election lame duck session, but the chances remain exceedingly slim. Expect intense lobbying on both sides of the issue if Congress considers the agreement in the lame duck.

Zika Funding Remains Unsettled

Made part of the House-Senate conference agreement to the FY17 Military Construction, Veterans Affairs, and Related Agencies Appropriations bill, the Zika Response Appropriations Act and the Zika Vector Control Act are currently in limbo. Although the legislation passed the House, it is subject to a White House veto threat and failed to overcome a Senate Democratic filibuster.

Democrats oppose the Republican-backed measure, complaining about inadequate funding levels and language that would severely limit access to contraceptives in Puerto Rico. The bill provides for $1.1 billion ($750 million of which is offset through other spending cuts) for the fight against Zika, $800 million less than the $1.9 billion requested by the Obama Administration.

Following the July 14 vote, in which Senate Democratic opposition scuttled passage of the conference report for a second time, House Appropriations Chairman Hal Rogers (R-KY) and Senate Appropriations Chairman Thad Cochran (R-MS), as well as chairs of the House and Senate Labor, Health and Human Services, Education, and Related Agencies appropriations subcommittees and chairs of the House and Senate State-Foreign Operations appropriations subcommittees, sent a letter to the Obama Administration asking the administration to "aggressively use funds already available to mount a strong defense against the virus."

Takeaway: It remains unclear whether Congress can break the current impasse over how much to spend in the fight against Zika and whether to offset that spending with cuts elsewhere. Senate Majority Leader Mitch McConnell (R-KY) has already scheduled a third procedural vote on the conference agreement when the Senate reconvenes on September 6, but it is difficult to see what will have changed in the meantime. Look for questions surrounding Zika funding to remain throughout the fall and winter appropriations process.

2016 Tax Extenders Package Significantly Smaller than in Past Years

At the end of 2015 as part of the broad bipartisan agreement, Congress passed a wide-reaching package of tax breaks for individuals and businesses. Known collectively as the "Tax Extenders," the legislative package temporarily extended a number of popular tax breaks that at various times has included the alternative minimum tax, the renewable energy tax credit, and the research and development (R&D) tax credit. The most recent package, valued at $680 million, was significantly broader than past tax extender packages, incorporating more than 50 tax breaks and making permanent the R&D tax credit, as well as a dozen other tax credits.

This year's package is expected to be more difficult to pass than in years past because the package is without a marquee tax break to drive the process forward. Additionally, the 36 temporary provisions set to expire at the end of this year are considered somewhat small in value (accounting for a relatively small $17.7 billion in federal revenue) and primarily affect industries without significant bipartisan backing. This year's package includes 16 renewable energy incentives, including provisions for electric vehicles, biodiesel and residential energy equipment. It also includes a provision exempting some homeowners from being taxed on the amount they receive in mortgage loan forgiveness; a provision allowing homeowners to count mortgage insurance premiums towards their mortgage interest deductions; and 18 tax provisions that are a grab bag of incentives for different economic interests ranging from railroad companies to rum producers.

On top of these challenges, a number of previously temporary tax breaks that were favored by one party and not the other (such as bonus depreciation and a wind energy tax credit) were extended for five years, meaning that of the remaining non-permanent tax credits, fewer expire in any given year, lessening the incentive to pass a broad-based tax extension bill. This raised the possibility that Congress may elect to ignore the tax extender debate, allowing the credits to expire, and instead move toward a broad tax reform agenda sometime in 2017.

Takeaway: The fall debate over the tax extenders will be markedly different than in past years. Without a must-pass measure and a number of past tax extenders made permanent, Congress is less likely to expend significant energy on tax extender legislation. Add to this the shortened congressional calendar, and the fate of tax extender language looks uncertain. However, the prevalence of energy and environment-related tax credits means that companies affected by credits have a strong incentive to push to have the credits extended.

Legislation to Fight Opioid Addiction Passes, But Funding Levels Remain Outstanding

On July 22, President Obama signed into law S. 524, the Comprehensive Addiction and Recovery Act of 2016 (CARA) (P.L. 114-198). CARA represents the culmination of significant negotiations between Democrats and Republicans over how best to respond to a sharp rise in opioid abuse. Though the bill passed both the House and Senate with overwhelming bipartisan support, Democrats expressed frustration with the final language of the House-Senate conference report that they hoped would include some $600 million in emergency funding. When signing the legislation, President Obama said "This legislation includes some modest steps to address the opioid epidemic ... Given the scope of this crisis, some action is better than none."

Republicans, who had pushed for the funding of the programs to be included in the regular appropriations legislation, applauded passage of the bill and noted its authorization of $900 million in spending to combat the epidemic. According to Senate Republicans, the appropriations bills currently under consideration are poised to more than double funding for this epidemic since Republicans took control of the Senate.

Takeaway: Even though the CARA has been signed into law, the exact funding levels remain in flux along with the broader congressional appropriations process. Democrats may attempt to move forward with dedicated funding for the effort outside of the appropriations process, but that remains unlikely. We expect the debate around appropriations to be the primary forum for determining the levels of funding available to fight against the opioid epidemic.

Options Dwindling for 21st Century Cures

A bill to accelerate the development of lifesaving cures developed by House Energy and Commerce Committee Chairman Fred Upton (R-MI), the 21st Century Cures Act, is itself in dire straits despite having passed, the House more than a year ago. When the bill initially passed it was offset by roughly $9 billion in spending cuts from other programs and departments. However, in the intervening year many of those offsets have disappeared and been used to offset legislation that has since become law. The momentum for 21st Century Cures may have been further diminished in June when Senate appropriators approved a FY17 spending bill that would give the National Institute of Health (NIH) its second $2 billion boost in two years (the House version would increase NIH funding levels by $1.25 billion over the FY16 enacted level).

Senate backers of similar legislation, including Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA), continue to push for consideration of the legislation, but the HELP Committee lacks jurisdiction over programs that would generate needed offsets. Senate Finance Committee Chairman Orrin Hatch (R-UT) is not optimistic about finding a solution, saying "I'd like to find the money for them, but it's easier said than done."

Takeaway: The 21st Century Cures legislation is at risk and unlikely to move forward in its current form. However, backers continue to push for a funding agreement that may be addressed as part of the broader post-election lame duck budget and appropriations negotiations.

MACRA Implementation Rule May Be Pushed Back Beyond January 2017

On April 27, the Center for Medicare and Medicaid Services (CMS) released its long-awaited proposed regulation implementing the Medicare Access and CHIP Reauthorization Act (MACRA). The proposed rule, which sets forth new physician payment models for Medicare reimbursement, is set to be finalized in November. The actual implementation of the law is scheduled for January 2017. The proposal received mixed reviews from various stakeholder groups. Even organizations that were cautiously supportive about the regulation suggested a number of changes, including delaying the implementation of quality tracking measures, lowering the number of Medicare Part B patients necessary to participate in the merit-based incentive pay system and opening up additional opportunities to advanced practice registered nurses.

Given the mixed reaction to the proposal, during July 13 testimony before the Senate Finance Committee, CMS Acting Administrator Andy Slavitt seemed open to delaying implementation of the law beyond the announced January 2017 target. "We're putting in an awful lot of change," Slavitt told the committee. "Too much change on top of an already burdened physician practice is not where we should be going." Administrator Slavitt's comments were applauded by Senate Finance Committee Chairman Orrin Hatch (R-UT) who proposed that CMS publish an "interim" final rule this fall that would allow for additional stakeholder feedback.

Takeaway: CMS Administrator Slavitt's suggestion that the MACRA implementation may be pushed back means that stakeholder groups will have additional time to make their views known to CMS. Look for Congress to hold additional hearings on the proposed rule and announcements by CMS regarding its future rulemaking intentions.

Chronic Care Legislation Possible as Soon as This Fall

Although Senate Finance Committee Ranking Member Ron Wyden (D-OR) has said chronic care legislation would likely be delayed until 2017, members of the Committee's Working Group on Chronic Care said they still plan to introduce a bill this fall. However, they are still waiting for CMS to provide the Congressional Budget Office (CBO) the information necessary for CBO to score how much the legislation would cost.

The Working Group's legislation is expected to include many of the suggestions from a policy options paper they released in December, including making Medicare's home health pilot a permanent program, expanding the types of services that Medicare Advantage and accountable care organizations cover, expanding telehealth services eligible for payment, improving behavioral health services and changing risk adjustment so Medicare pays plans more for chronically ill patients.

Takeaway: Although timing of the legislation remains uncertain, expect chronic care to be a pressing issue this fall or in early 2017.

Comprehensive Energy Bill Still on the Table

In July, the Senate agreed to go to conference with the House on comprehensive energy legislation (H.R. 8/S. 2012). Before the Senate agreed to a conference, the chairmen and ranking members from the House and Senate committees of jurisdiction negotiated a framework that would guide conference negotiations, including exclusion of several provisions in the House-passed version of the legislation subject to a presidential veto threat. Removing those provisions may pave the way for a final conference agreement in the fall. Among other things, the House and Senate bills include provisions that would expand energy efficiency programs in residential, commercial and government buildings; authorize Department of Energy (DOE) research, development, demonstration and commercialization activities related to advanced civilian nuclear technologies and advanced vehicle transportation technologies; enhance grid efficiency and security; foster energy workforce development; promote development of strategic and critical raw materials; and authorize and expand DOE basic energy R&D and other America Competes Act provisions.

Takeaway: Although the House and Senate committee leaders were able to remove the most controversial provisions from the negotiating table, negotiators may still have to balance conflicting energy priorities of both political parties, with some Republicans pushing for more oil and gas friendly provisions and Democrats emphasizing the need for greater renewable-based clean energy.