New American

Written by **Joe Wolverton, II, J.D.** on April 15, 2011

Obama and Senate Rewriting Article II

On March 30, Senator Chuck Schumer (D-N.Y., picture, left) and 15 co-sponsors (including Republican leaders) introduced S. 679, the "Presidential Appointment Efficiency and Streamlining Act." The measure would remove the "advice and consent" requirement for many executive branch appointments, giving the President unchecked power to fill key administration positions.

Ostensibly, the bill enjoys bipartisan support because its sole purpose is to relieve the backlog of unconfirmed appointees by eliminating the confirmation requirement for about 200 offices.

The process by which heads of executive branch departments are appointed and confirmed is set forth by Article II, Section 2 of the U.S. Constitution. The "Appointments Clause" provides that the President:

> … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

If this bill passes, the checks and balances established by our Founding Fathers as a protection against tyranny will be eliminated, as well as the concept of enumerated powers.

This history of the delicate system created by our Founders was synopsized in an article published by The Heritage Foundation:

> When the delegates of the states gathered in Philadelphia in the summer of 1787 and wrote the Constitution, they distributed the powers of the federal government among two Houses of Congress, a President, and a judiciary, and required in many cases that two of them work together to exercise a particular constitutional power. That separation of powers protects the liberties of the American people by preventing any one officer of the government from aggregating too much power.
>
> The Framers of the Constitution did not give the President the kingly power to appoint the senior officers of the government by himself. Instead, they allowed the President to name an individual for a senior office, but then required the President to obtain the Senate's consent before appointing the individual to office. Thus, they required the cooperation of the President and the Senate to put someone in high office.
>
> Many of the Framers had practical experience with government and recognized that not every office would be of sufficient authority and consequence as to merit the attention of both the

> President and the Senate to an appointment to the office. Therefore, they provided a means by which the Congress by law could decide which of the lesser offices of government could be filled by the President alone, a court, or a department head.

If enacted, S. 679 would erase these barriers between the branches and shift the powers of appointment in such a way that the very foundation of our Republic would be weakened under the crushing weight of a powerful executive branch.

In light of this impending imbalance, it must be inquired as to what could compel Congress to legislate away its own power? Why would the Senate willingly abdicate its role as bulwark against executive despotism?

Arguably, the answer is a desire to reduce its workload and improve the efficiency of government.

To exchange rightful power for a more streamlined appointment process seems like a ripoff. As The Heritage Foundation says:

> The Congress should not reduce the number of Senate-confirmed appointments as a means of dealing with its cumbersome and inefficient internal process for considering nominations. Doing so gives away Senate influence over a number of significant appointments, does nothing to improve the Senate process, and still leaves nominees whose offices require nominations mired in the Senate process. The proper solution to the problem of a slow Senate is to speed up the Senate rather than to diminish the role of the Senate. The Senate should look inward and streamline its internal procedures for considering all nominations. The proper solution also is the faster one, as the Senate can accomplish the solution by acting on its own in the exercise of its power to make Senate rules, while S. 679 requires approval by both Houses of Congress.

The following lawmakers have appended their names to the bill as co-sponsors:

Sen. Lamar Alexander (R-Tenn.), Sen. Jeff Bingaman (D-N.M.), Sen. Richard Blumenthal (D-Conn.), Sen. Scott Brown (R-Mass.), Sen. Thomas Carper (D-Del.), Sen. Susan Collins (R-Maine), Sen. Richard Durbin (D-Ill.), Sen. Mike Johanns (R-Neb.), Sen. Jon Kyl (R-Ariz.), Sen. Joseph Lieberman (I-Conn.), Sen. Richard Lugar (R-Ind.), Sen. Mitch McConnell (R-Ky.), Sen. John Reed (D-R.I.), Sen. Harry Reid (D-Nev.), and Sen. Sheldon Whitehouse (D-R.I.).

Assuming for the sake of argument that there is a bottleneck in the nomination and confirmation pipeline, one solution is for the executive and legislative branches to work within the framework of enumerated powers to remove the blockage.

Alternatively, however, the Congress could obviate the problem by reducing the size of the bureaucracy through an absolute refusal to sign off on the creation of any department, program, or agency that isn't specifically authorized by the powers granted to the federal government in the Constitution. That would eliminate the number of executive offices for which appointments would be necessary, thereby dissolving the confirmation clog by the application of the undiluted principles of constitutional liberty.