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Speed Up Nominations and Confirmations, But Do Not Enact S. 679

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On March 30, 2011, Senator Charles Schumer (D–NY) with 15 cosponsors, including the Senate Majority and Republican Leaders, as well as six other Democratic Senators, six other Republican Senators, and an Independent Senator,[1] introduced in the Senate the Presidential Appointment Efficiency and Streamlining Act of 2011 (S. 679). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The bill reduces the number of presidential appointments that require the consent of the Senate and establishes within the executive branch a Working Group on Streamlining Paperwork for Executive Nominations. Individuals nominated to senior executive offices suffer slow and detailed background investigations and mounds of duplicative paperwork before a President sends their nominations to the Senate. After nomination, many nominees suffer time-consuming inaction or time-consuming and excruciating action as the Senate proceeds (or does not) with consideration of the nomination. The sponsors of S. 679 have identified a valid problem, but proposed the wrong solution. Congress should not enact S. 679.

The Senate Should Preserve, But Speed Up, Its Role in Senior Presidential Appointments. 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.

The Appointments Clause of the U.S. Constitution provides that the President:

> …shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

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> 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.[2]

The Appointments Clause is "among the significant structural safeguards of the constitutional scheme"[3] and "is a bulwark against one branch aggrandizing its power at the expense of another branch."[4]

For principal officers of the United States, such as the heads of executive departments, the President nominates an individual for the office, the Senate consents (or not), and after the Senate consents the President appoints the individual to the office. The same three-step process applies in appointing the inferior officers, unless Congress by law vests the appointment of an inferior officer in the President alone, in a court of law, or in the head of a department. If enacted, S. 679 would vest in the President alone the appointments to several hundred inferior offices in executive agencies that now require Senate consent.

The Congress should not decide by law to relinquish the Senate role in filling a federal office and leave filling the office to the President alone, unless the Congress concludes for each such office that the Senate's checking influence on the President is of no value because the office is of little or no authority or consequence. Generally, each time Congress by law removes the Senate from a role in the appointment to a federal office, the institutional influence of the Senate diminishes by a marginal amount and the influence of a President increases by a marginal amount. If the office is of little or no authority or consequence, the shift in influence may be immaterial, but if the office wields power that affects the American people, the Congress should not abdicate the Senate checking function.

It does not appear that the sponsors of S. 679 have determined that each of the offices the bill converts from appointments made by the President with Senate consent to appointments made by the President alone is an office of little or no authority or consequence.[5] Instead, it appears that the principal sponsors simply concluded that the Senate is too slow in performing its duty to consider and consent (or not) to presidential nominations and hope to accelerate the Senate process by simply reducing the number of such nominations the President must make.

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1. The 15 cosponsors are the two Senate leaders (Harry Reid of Nevada and Mitch McConnell of Kentucky), as well as Senators Lamar Alexander (R–TN), Jeff Bingaman (D–NM), Richard Blumenthal (D–CT), Scott Brown (R–MA), Tom Carper (D–DE), Susan Collins (R–ME), Richard Durbin (D–IL), Mike Johanns (R–NE), Jon Kyl (R–AZ), Joseph Lieberman (I–CT), Richard Lugar (R–IN), Jack Reed (D–RI), and Sheldon Whitehouse (D–RI).
2. U.S. Constitution, Article II, Section 2.
3. *Edmond v. United States*, 520 U.S. 651, 659 (1997).
4. *Ryder v. United States*, 515 U.S. 177, 182 (1995).
5. For example, S. 679 would convert to appointments by the President alone assistant secretaries for congressional relations in executive departments, upon whom both the executive branch and the Congress rely to ensure clear and accurate communications and smooth interaction between the executive branch and Congress. The bill similarly converts assistant secretaries for public affairs, upon whom the executive branch and Congress rely to ensure truthful explanations to the public of what goes on in executive departments. Further, the bill similarly converts assistant secretaries of financial management for the military departments, who supervise the spending of and accounting for many billions of dollars appropriated for the Army, Navy, Air Force, and Marine Corps. Also, the bill similarly converts the Assistant Secretary for Budget and Programs and Chief Financial Officer of the Department of Transportation, even though that officer is the senior officer of the department focused on spending and accounting for the department's appropriations. The legislation contains many more examples of offices of significant authority or consequence that would no longer require Senate consent for appointments. If the Congress concludes that an office is truly of insufficient authority or consequence to merit Senate participation in the appointments process, the Congress may also want to consider carefully whether the office should even exist.

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.[6] 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,[7] while S. 679 requires approval by both Houses of Congress.

The Executive Branch Should Speed Up Its Own Process. The executive branch has a slow and tortuous process that a candidate must undergo before the President nominates an individual for office. Typically, the head of an agency and an Assistant to the President for Presidential Personnel run paperwork-intensive and time-consuming processes for consideration of candidates for a Senate-confirmed presidential appointment at an agency, leading ultimately to agreement by the agency head and presidential assistant on a candidate for the President to nominate. Then the candidate must complete and submit extraordinarily detailed paperwork concerning his or her background to get in the queue for a time-consuming background investigation, usually by the Federal Bureau of Investigation (FBI). Various government offices scrutinize especially carefully the candidate's finances and relationships, for potential ethical concerns. All of these processes have a significant function, but over time they have grown more burdensome, less efficient, and more time-consuming.

In an effort to help the executive branch improve its process leading to nominations to the Senate for appointments, S. 679 would establish within the executive branch a Working Group on Streamlining Paperwork for Executive Nominations. The President would designate a chairman for the working group and representatives from the Office of Personnel Management, the Office of Government Ethics, and the FBI, and the Working Group chairman would designate as members individuals from other government agencies and individuals with relevant experience who previously served in government.

The legislation requires the Working Group to study and submit a report to the President and two congressional committees within 90 days on how to streamline the executive branch paperwork required for nominations. The Working Group must consult the leadership of the two congressional committees in conducting the study. The report must include recommendations for an electronic system for collecting by a single form and distributing all necessary background information about candidates and nominees, to reduce the burden on nominees and to speed delivery of the information among agencies and to the Congress. The legislation also requires the Working Group to review the impact on the appointments process of background investigations and to report within 270 days to the President and two congressional committees on whether agencies other than the FBI could be used to conduct background investigations on presidential nominees and whether the scope of that background investigation should vary depending upon the nature of the office involved in the appointment.

The sponsors of the legislation have identified some appropriate objectives with respect to the nominations process: simplify executive branch nominations paperwork, facilitate sharing of the information with appropriate officials in the executive branch, tailor the requirements of background investigations to the nature of the offices involved in the appointment, and increase the efficiency of, and thereby accelerate, each element of the process. The President should direct his subordinates to work together to plan how to accomplish these objectives,

6. Senate Resolution 116, introduced on March 30, 2011, by Senator Schumer and referred to the Committee on Rules and Administration, provides for somewhat expedited consideration of Senate confirmed appointments to a number of specified boards, but does nothing to address the slow Senate process for the consideration of other nominations.
7. U.S. Constitution, Article I, Section 5 ("Each House may determine the Rules of its Proceedings ….").

execute the plan, and report regularly to him on progress until they achieve all the objectives. The Congress, however, should not mandate by S. 679 that the President do so, for the manner by which a President decides whom to nominate to federal office is beyond the power of Congress to regulate.[8]

The authors of S. 679 have correctly identified serious problems in the process by which the President nominates individuals for federal office and the process by which the Senate considers such nominations. The President and the Senate, respectively, should exercise their existing, ample authority to correct their respective processes. Enactment of S. 679 is not a proper solution to the problems.

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8. "Common Legislative Encroachments on Executive Branch Authority," 13 U.S. Op. Office of Legal Counsel 248, 250 (July 27, 1989)("The only congressional check that the Constitution places on the President's power to appoint 'principal officers' is the advice and consent of the Senate. As Justice Kennedy recently wrote for himself and two other members of the Court:

> By its terms, the [Appointments] Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment.

Public Citizen v. Department of Justice, 491 U.S. 440, 483 (1989)(Kennedy, J. concurring).").