Can a Man Head the Women's Bureau at the Department of Labor?

The Unconstitutionality of Congressional Class Limitations on Presidential Nominations

*By Donald J. Kochan**

Introduction

Can a man become the Director of the Women's Bureau at the Department of Labor? According to Congress, the answer is no. In 1920, as the States were ratifying the Nineteenth Amendment to guarantee nondiscriminatory suffrage, Congress created the Women's Bureau. Ironically, in establishing the position of its Director, Congress *discriminated on the basis of sex*—requiring that the Director be "*a woman* . . . appointed by the President, by and with the advice and consent of the Senate."[1] Policy concerns regarding equal protection may themselves justify voiding this 80-year old quota; however, this essay raises a more fundamental issue regarding the constitutional separation of powers: whether Congress may, by statute, limit the class of persons the President may nominate under his Appointments Clause power.

Whether a woman *should* be appointed to head the Women's Bureau is outside the scope of this essay. There are probably many compelling policy reasons why a President would choose to appoint a woman to direct the Bureau, but the question of this essay is whether Congress may constitutionally remove the President's discretion to choose his nominees, regardless of their sex, racial class, or other characteristics.

Although the Senate may refuse its advice and consent to anyone named by the President, the Constitution clearly prohibits Congress from placing restrictions on who the President may present to the Senate for appointment. This essay uses the Women's Bureau statute as a case study for the examination of this conclusion

I. The Women's Bureau and the Appointment of Its Director

According to its website, "the Women's Bureau is the single unit at the Federal government level exclusively concerned with serving and promoting the interests of working women."[2] The provision for the appointment of the Director of the Women's Bureau provides that "[t]he Women's Bureau shall be in charge of a director, a woman, to be appointed by the President, by and with the advice and consent of the Senate."[3]

By its plain terms, this provision creates the Director position but precludes the President from appointing a male to run the Women's Bureau.[4] It disqualifies all men from holding the position. And, as one would expect from that text, there have been fifteen Directors, all women, since the Bureau was created in 1920.[5]

II. The Appointments Clause and An Unconstitutional Intrusion on Presidential Powers By the Senate

"[W]ith admirable clarity,"[6] the text of the Appointments Clause bifurcates the roles of the President and Senate and vests the choice of a nominee for a position as an Officer of the United States solely with the President. The Appointments Clause of the Constitution 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.[7]

The text is clear—the Senate and the President have separate and distinct, yet interdependent roles in the appointment of Officers.

Moreover, the Framers knew how to limit the President's nomination power when they wanted to do so. A second argument for concluding that the President has discretion in choosing a nominee for an Officer derives from a time-honored principle of statutory construction, *expressio unius est exclusio alterius*—the expression of one is the exclusion of others. The Constitution itself creates one limit on the President's power to choose a nominee in the Emoluments and Incompatibility Clauses. They state:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.[8]

This enumeration of one limitation on the class of eligible nominees as Officers of the United States excludes the presumption that any other limitations exist on the President's choice in making nominations.[9]

Substantial history from the drafting of the Appointments Clause indicates that the President was not to be constrained in his choice of persons to nominate—just as the Senate could, constitutionally, reject any nominee without constraint. Alexander Hamilton explained in *Federalist No. 66* that the Senate has no role in restricting the President's choice of nominees for an Officer position created by Congress:

> It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, of the president.[10]

The Senate could defeat every man that the President might nominate as an Officer, including every man nominated to become director of the Women's Bureau, but they cannot invade the province of the Executive by statutorily prohibiting the nomination of a man. As Professor John Yoo has stated, "[w]hile the Senate may reject nominees . . . it is quite clear that the Senate cannot choose them, contrary to suggestions made by some scholars."[11] Similarly, Senators could informally express their view that a woman should be appointed for a position, but they cannot statutorily require it.

By placing class restrictions in a statute authorizing an Officer position, the Senate is unconstitutionally exerting the type of choice that Hamilton explained was prohibited. In *Federalist* No. 76, Hamilton continued:

> In the act of nomination [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. . . . [E]very man who might be appointed would be in fact his choice.
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> But might not [the President's] nomination be overruled? I grant it might, yet this could only be to make place for another nomination by [the President]. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree.[12]

The President must have full control of, and accountability for, his exercise of the nomination power granted to him in the Constitution. Statutes such as the one creating the Director of the Women's Bureau unconstitutionally trespass upon the President's exercise of that power.[13]

III. An Unconstitutional Intrusion by the House of Representatives and Ex-Presidents

Another troubling separation-of-powers concern that arises from congressional limitations on the pool of Officer nominees results from the intrusion of the House of Representatives and past Presidents into the purely senatorial function of "Advice and Consent."[14] Establishing an Office "by Law"[15] requires a bicameral act and presentment to the President. Therefore, the Appointments Clause clearly contemplates the act of bicameralism and presentment in the *creation of an Office*. In contrast, *Advice and Consent* is clearly limited to only one entity—the Senate.

By allowing Congress, as a whole, to place limitations on the President's choice of a nominee for an Office, the House of Representatives intrudes upon senatorial prerogative by itself engaging in pre-nomination advice. Even if the Senate could be said to have some role in offering pre-nomination advice,[16] certainly the House does not. Duties committed solely to one house of Congress cannot be exercised by the other. For example, the Origination Clause, which requires that all bills for raising revenue must originate in the House of Representatives, makes invalid any bills for raising revenue that originate in the Senate.[17] The Appointments Clause similarly limits the advice and consent function to the Senate and provides no room for formal House involvement.

The same is true of the President who signs the legislation creating an Office with a restricted pool of eligible nominees and binds, therefore, future Presidents to that nomination restriction. It is the sole power of the President that actually makes the appointment to choose his nominee, and a prior President can have no role in limiting that future President's class of potential nominees.

Conclusion

Even absent the statutory restriction, one might expect that the position of Director of the Women's Bureau has been, and likely always will be, filled by a woman. But, far from being "harmless error," the Women's Bureau appointment provision reflects a fundamental encroachment on presidential prerogatives established in the Constitution, sets poor precedent, and should be amended by Congress.[18] As the concurring Justices of the Supreme Court concluded in *Public Citizen*, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch."[19] It should not be tolerated for the appointment of the Director of the Women's Bureau.

The invalidity of the Women's Bureau statute has implications beyond just the Department of Labor. Just imagine the havoc Congress might try to wreak if it believed it had the power to broadly restrict presidential nominations to certain sexes or other classes of persons. Admittedly, this is not the only instance where Congress has tried to limit the pool of prospective nominees by statute or placed "qualification" requirements in appointment statutes,[20] and other situations should also be addressed.

Congress should take action to remove this restriction from the Women's Bureau statute and any similar laws that run afoul of the Constitution's limitation on the congressional role in the appointments process. Not only is it Congress's constitutional obligation, but it would also provide an opportunity to underscore an important principle regarding the separation of powers.

Because political pressures and policy reasons will likely compel future Presidents to nominate a woman to head the Women's Bureau, the probable policy supporting the Sixty-Sixth Congress's decision to create the unconstitutional mandate—ensuring that a female runs the Bureau—is likely to go undisturbed by an amendment removing the gender restriction from the appointments provision. As Hamilton wisely observed, placing the sole power of nomination in the hands of the President will also constrain him, for "[t]he possibility of rejection would be a strong motive to care in proposing."[21] The policy objective can be achieved while cleansing the statute of its constitutional infirmities.

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Footnotes

1. 29 U.S.C. § 12 (2000) (emphasis added). The Director appointment provision was first passed in the statute establishing the Women's Bureau, and it has never been amended. *See* Pub. L. No. 66-259, 41 Stat. 987 (June 5, 1920).

2. Women's Bureau, U.S. Dep't of Labor, The Women's Bureau: An Overview, *at* http://www.dol.gov/wb/info_about_wb/interwb2.htm (last visited Dec. 2, 2002); *see also* 29 U.S.C. § 13 (2000) (setting out the statutory powers and duties of the Women's Bureau).

3. 29 U.S.C. § 12.

4. Interestingly, Congress placed no gender restriction on the Assistant Director of the Women's Bureau, an inferior position filled through appointment by the Secretary of Labor. *See* 29 U.S.C. § 14 (2000).

5. Women's Bureau, U.S. Dep't of Labor, Director's Gallery, *at* http://www.dol.gov/wb/edu/gallery.htm (last visited Dec. 2, 2002).

6. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring) ("The President's power to nominate principal officers falls within the line of cases in which a balancing approach is inapplicable. . . . The President has the sole responsibility for nominating these officials, and the Senate has the sole responsibility of consenting to the President's choice.").

7. U.S. Const. art II, § 2, cl. 2.

8. U.S. Const. art. I, § 6, cl. 2.

9. *See Pub. Citizen*, 491 U.S. at 484 (Kennedy, J., concurring) (making a similar argument).

10. The Federalist No. 66, at 449 (Jacob E. Cooke ed. 1961).

11. John C. Yoo, *Criticizing Judges*, 1 Green Bag 2d 277, 284 (1998).

12. The Federalist No. 76, at 512 (Jacob E. Cooke ed. 1961).

13. It is worthwhile to note that another set of commentators reached a similar conclusion in relation to statutory limitations on nominees in the Anti-Nepotism Statute, 5 U.S.C. § 3110 (precluding the nomination of a relative), the Solicitor General Statute, 28 U.S.C. § 505 (requiring that the Solicitor General be "learned in the law"), and the Federal Communications Commission authorizing statute, 47 U.S.C. § 154 (restricting the number of commissioners who may be of the same political party). *See* Richard P. Wulwick & Frank J. Macchiarola, *Congressional Interference with the President's Power to Appoint*, 24 Stetson L. Rev. 625 (1995).

14. U.S. Const. art II, § 2, cl. 2.

15. *Id*.

16. For an excellent discussion of why the Senate has no constitutional pre-nomination role in advice on judicial candidates, see generally John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 Tex. L. Rev. 633 (1993).

17. *See generally* Flint v. Stone Tracy Co., 220 U.S. 107 (1911) (noting the requirement of the Origination Clause that revenue bills originate in the House); United States v. Munoz-Flores, 863 F.2d 654 (9th Cir. 1988) (same; invalidating law).

18. One might argue that the position itself, as currently constituted, is unconstitutional. Of course, the courts might very well find that the unconstitutional component, the words "a woman," is severable from the remainder of the position. Especially because it is unlikely anyone would ever have standing to challenge the statute, it is Congress's responsibility to correct its error.

19. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring); *see also id.* at 487 (noting that the three branches need not be "entirely separate and distinct . . . . [b]ut as to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them.").

20. *See* Wulwick & Macchiarola, *supra* note 13, at 626 & n.5 (listing statutes that attempt to place restrictions on the President's Appointment Clause power). This Author is not, however, aware of any other appointment statutes that create sex or class limitations.

21. The Federalist No. 76, at 513 (Jacob E. Cooke ed. 1961).