THE SENATE ACTION ON WILLIAM LUCAS: STRETCHING THE BOUNDS OF ADVICE AND CONSENT

"The presidency is on the verge of losing control of its own appointment power" warns the recent book *The Imperial Congress: Crisis in the Separation of Powers* (Pharos Books, 1989). The battle over George Bush's nomination of William Lucas as Assistant Attorney General for Civil Rights confirms this.

In response to the Senate Judiciary Committee's August 1 rejection of Lucas, Bush should move immediately to reassert the President's prerogative to choose his own executive branch staff. Bush has two options: First, he could force the full Senate to vote on the Lucas nomination. The Constitution requires that the full Senate, not a single committee, give its advice and consent to presidential appointments. Bush's second option is to appoint Lucas to the civil rights post despite the Judiciary Committee's 7-7 tie vote that torpedoed the nomination. Such a "recess appointment" would allow Lucas to serve at the President's discretion until January 1990. At that time, Bush could resubmit the nomination for Senate confirmation. Whichever option Bush chooses, immediate action is required to reverse the steady and significant erosion of the President's appointment power.

Enormous Probe. Not long after Bush named Lucas as his choice to head the civil rights division of the Justice Department, the Senate Judiciary Committee responded in a way that is becoming standard operating procedure on Capitol Hill. On June 1, the Committee demanded that Lucas submit more than 70,000 pages of documents pertaining to his professional and personal background. Although some of the documents were routine and appropriate, the enormity of the probe surely was motivated by a single purpose: to derail the nomination by unearthing allegations that would make Lucas appear "controversial."

Article II of the United States Constitution grants to the President the power to appoint, "with the advice and consent of the Senate," the senior officers of his executive staff. The Senate for two centuries respected the President's wide discretion in selecting his executive branch officers, refusing its consent only in rare cases where the nominee was patently an inferior choice. Rarer still were inquisitions prompted by complaints from special interest

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groups, which now figure prominently in Senate confirmation hearings. As increasing numbers of presidential appointees are being designated "controversial" by personal or political opponents, extraordinary background research is becoming the norm.

Rooted in Policy Differences. William Lucas is the most recent executive branch nominee to be tagged with the "controversial" label. The reason: Lucas, who is black and a former Democrat, does not fully subscribe to the anti-discrimination remedies favored by some civil rights groups and their Senate supporters. Although Lucas's opponents have framed their opposition as an issue of the nominee's "fitness to serve," it is rooted in their differences with the nominee over what public policy solutions best will achieve racial equality. Lucas thus becomes the latest example of the Senate using policy criteria rather than fitness to judge presidential nominees.

The Senate's role in the confirmation process has changed dramatically, beginning with the 1987 battle over Ronald Reagan's nomination of Judge Robert Bork to the U.S. Supreme Court. The Bork battle established a new rule: Judicial nominees, even though highly qualified and without ethical problems, could be defeated for ideological reasons. Senate Judiciary Committee Chairman Joseph Biden, the Delaware Democrat, delayed the hearings 71 days after the nomination, clearly to give Bork's opponents time to mobilize special interest opposition and to research his record. This was unprecedented. For the previous 16 nominees to the U.S. Supreme Court, hearings began, on average, 18 days after nomination. Bork's opponents justified the rules change by citing the importance of the Supreme Court seat at stake. A few months after the Senate's refusal to confirm Bork, however, the new rules were applied to the nomination of University of San Diego Professor Bernard Siegan to the Ninth Circuit Court of Appeals; it too was rejected on ideological grounds. The rules were altered yet again with Bush's 1989 nomination of former Senator John Tower as Secretary of Defense. The Tower battle established the principle that a nominee could be rejected on the basis of largely unsubstantiated allegations concerning his personal life. Another change was to impose on cabinet level appointees the heightened scrutiny that recently had been applied to judicial nominees. This standard, however, has changed once again, in the battle over Lucas's nomination to the sub-cabinet position of Assistant Attorney General for Civil Rights.

Restoring the Boundary. Where are the boundaries to the Senate's role in confirming executive branch appointments? This much is clear: the Senate's constitutional duty of "advice and consent" is not the power to decide. Consent means more than advice, but it does not mean primary decision-making power. "It's called the President's cabinet, not the Congress's cabinet," said Senator Howell Heflin, the Alabama Democrat and former judge, as he announced his support for the Tower nomination on March 6, 1989.

The Senate has a legitimate role to play in the confirmation of the President's appointments to the executive branch. Unrestrained inquisition, however, threatens to transform the confirmation process from one of advice and consent to a criminal show-trial of executive nominees who are deemed guilty until proved innocent. A reasonable boundary needs to be restored if the confirmation process is to retain its constitutional validity. With the Senate having stretched the bounds once again in its August 1 rejection of William Lucas, immediate and strong action by the President is required to preserve his constitutional authority as chief executive.

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