

Report on the  
Nomination of  
Michael B. Wallace  
to the  
U.S. Court of Appeals  
for the Fifth Circuit



**NAACP LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC.**

September 25, 2006

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## I. INTRODUCTION

With the Supreme Court's review of cases rare, the U.S. Court of Appeals for the Fifth Circuit stands as the last bastion for enforcing the federal rights of residents of Mississippi, Louisiana and Texas. The Fifth Circuit is known to history as the home of the "unlikely heroes"—John Minor Wisdom, Elbert Tuttle, John Brown and Richard Rives—who had the courage to uphold the rule of law in the face of overwhelming resistance and hostility. Today, the court presides over the largest percentage of minority residents (44%) of any circuit.<sup>1</sup> In recent years, it has issued seminal decisions on voting rights, affirmative action, employment discrimination, discriminatory jury selection, and the death penalty. As Hurricane Katrina showed, many living within the court's jurisdiction are struggling on the margins of society, with few resources and even fewer opportunities to insist on justice. Yet they, like all Americans, have the right to expect that their federal judges are committed to the progress made in civil rights.

On February 8, 2006, one day after speaking at the funeral service of Coretta Scott King, President Bush nominated Michael Brunson Wallace of Jackson, Mississippi to the Fifth Circuit. The seat to which Wallace is nominated was vacated by Judge Charles Pickering, after his recess appointment expired in December 2004.<sup>2</sup> The Senate took no action on the Wallace nomination and returned it to the White House at the August recess. President Bush re-nominated Wallace on September 5, 2006.

In both his public and private life, Michael Wallace has a long history of hostility to civil rights laws and their enforcement. In various positions he has held over the years, Mr. Wallace has consistently advocated for restricting federal civil rights laws and narrowing their judicial interpretation. With his outdated views on voting rights in particular, Mr. Wallace is singularly ill-suited to representing the people of Mississippi on the Fifth Circuit. A thorough review by the American Bar Association reveals a judicial nominee bent on imposing his own views rather than following the law. Given his record and the views to which he so strongly adheres, Mr. Wallace's confirmation as judge on the Fifth Circuit would mean less than equal protection of the law for the poor and people of color in general, and African Americans in particular. The NAACP Legal Defense and Educational Fund, Inc. is compelled to ask the Senate to vote against his confirmation.

## II. THE DIVERSITY ISSUE

Apart from the deeply troubling civil rights record of Michael Wallace, the Wallace nomination is problematic from a diversity perspective. President Bush's nomination of Wallace, who is white, underscores the lack of diversity on Mississippi's federal bench.

While Mississippi has the highest percentage of African Americans (36%) of any state in the country,<sup>3</sup> an African American has never been appointed to represent Mississippi on the Fifth Circuit. And, for an entire generation, African-American representation on Mississippi's federal district courts has been limited to one judge. Of the nine district court seats, only one is held by an African American, Judge Henry Wingate.<sup>4</sup> Appointed over twenty years ago, Judge Wingate remains the only African American ever appointed to the federal bench in Mississippi.

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<sup>1</sup> <http://factfinder.census.gov/>

<sup>2</sup> President Bush appointed Pickering after he failed to win Senate confirmation largely due to his civil rights record. Prior to Pickering's appointment, the seat had not been occupied since August 1999, when Judge Henry Politz from Louisiana took senior status.

<sup>3</sup> [http://www.census.gov/hhes/white/black/2000/chart\\_race.html](http://www.census.gov/hhes/white/black/2000/chart_race.html)

<sup>4</sup> <http://www.fjc.gov/history/home.nsf>

President Bush has now nominated eight persons to the federal bench in Mississippi.<sup>5</sup> None is African American. Two Mississippians were nominated to the Fifth Circuit: Charles Pickering and Michael Wallace. Six Mississippians were nominated to federal district courts in Mississippi: Michael Mills, Louis Guirola, Keith Starrett, Daniel Jordan, Leslie Southwick, and Halil Suleyman Ozerden.

Additionally, President Bush has now had the opportunity to nominate five persons to the Fifth Circuit from all three states: Edith Brown Clement, Edward Prado, Priscilla Owen, Charles Pickering and Michael Wallace. None is African-American. As a result, African-American representation on the Fifth Circuit is limited to one of a total of seventeen seats. The only African-American judge is Judge Carl Stewart, a Clinton nominee appointed twelve years ago.

President Bush's nomination of Wallace comes on the heels of his failure to diversify Mississippi's federal district courts despite the availability of a number of eligible African-American lawyers and judges in Mississippi. There are hundreds of African-American lawyers practicing law in Mississippi. There is African-American representation on both the state and local bench; the Mississippi Supreme Court has had three African Americans to serve on that court.<sup>6</sup>

The issue of lack of African-American representation arose during the nomination of Judge Pickering to the Fifth Circuit. The elevation of Judge Pickering would have created a vacancy in the Southern District of Mississippi. In efforts to obtain his father's confirmation, Congressman Chip Pickering (R-MS) promised an African-American nominee for the district court vacancy if Judge Pickering was elevated. The Washington Post reported: "Chip Pickering confirmed that he has also been telling prominent African Americans in the state that if his father is promoted to the appeals court, his replacement on the district court will likely be an [African-American nominee]."<sup>7</sup> The Jackson Clarion-Ledger referred to Congressman Pickering's representations in an article, "*Pickering Vows to Push Diversity*."<sup>8</sup> Deborah Gambrell, an African-American lawyer supporting Judge Pickering, commented, "I would have thought the White House is in a position to consider an African American for this position."<sup>9</sup>

Numerous African-American organizations also requested that an African American be appointed to Judge Pickering's district court seat. The Jackson Clarion-Ledger published an article on their efforts, "*Groups Push for Black Judge on Federal Bench*."<sup>10</sup> The National Bar Association wrote a letter to President Bush, urging him to make "this long overdue appointment at this critical juncture."<sup>11</sup> The Magnolia Bar Association also wrote to President Bush about the "compelling case for appointing an African American to the Southern District."<sup>12</sup> The Mississippi State Conference of the NAACP stated that "appointing an African American to Pickering's seat is simply the right thing to do."<sup>13</sup> The office of Congressman Bennie Thompson (D-MS) noted that nominating an African-American woman "would bring much needed diversity to Mississippi's federal courts," referring to the fact that no woman has ever served on the federal bench in Mississippi.<sup>14</sup>

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<sup>5</sup> <http://www.whitehouse.gov/news/nominations>

<sup>6</sup> *Groups Push For Black Judge On Federal Bench*, CLARION-LEDGER, Feb. 27, 2004.

<sup>7</sup> *Judge's Fate Could Turn On 1994 Case*, WASH. POST, May 27, 2003

<sup>8</sup> *Pickering Vows to Push Diversity*, CLARION-LEDGER, May 28, 2003.

<sup>9</sup> *Starrett Tapped for Court*, CLARION-LEDGER, July 8, 2004.

<sup>10</sup> *Groups Push For Black Judge On Federal Bench*, CLARION-LEDGER, Feb. 27, 2004

<sup>11</sup> Letter from Clyde Bailey to President George W. Bush, Feb. 18, 2004.

<sup>12</sup> Letter from James Henley to President George W. Bush, Feb. 2, 2004.

<sup>13</sup> News Release, Mississippi State Conference, NAACP, Feb. 12, 2004.

<sup>14</sup> *Search Begins for Pickering's Replacement*, CLARION-LEDGER, Jan. 23, 2004

Despite the promises and efforts, President Bush nominated a white man, Keith Starrett, to the seat vacated by Judge Pickering. The failure to make a diverse appointment generated national news attention.<sup>15</sup> Senator Patrick Leahy made a forceful statement about the issue at Mr. Starrett's hearing.<sup>16</sup> After the Starrett nomination, President Bush was provided three additional opportunities to fill vacancies on Mississippi's district courts. But none of President Bush's selections (Daniel Jordan, Leslie Southwick and Halil Suleyman Ozerden) is African-American. With the nomination of Michael Wallace, President Bush has now made eight judicial nominations in Mississippi; none is African-American

### III. A HISTORY OF CONTROVERSIAL NOMINATIONS

In reviewing the record of Michael Wallace, it is important to note this is not the first controversial nomination of Mr. Wallace to a federal appointment. Indeed, Wallace has a troubled nominations history spanning almost twenty-five years.

Mr. Wallace has worked as a lawyer with the Jackson, Mississippi law firm of Phelps, Dunbar since 1986. He received his B.A. from Harvard University in 1973, and a J.D. from the University of Virginia School of Law in 1976. From 1976 to 1977, Wallace served as a law clerk to Justice Harry G. Walker of the Supreme Court of Mississippi. From 1977 to 1978, he was a law clerk to then-Associate Justice William H. Rehnquist on the U.S. Supreme Court. From 1980 to 1983, he served as counsel to then-Congressman Trent Lott from Mississippi, who was the Republican Whip of the House of Representatives. In 1999, Wallace served as special impeachment counsel to then-Senate Majority Leader Lott during the Clinton impeachment trial.

In 1983, President Reagan nominated Wallace to a seat on the Board of the Legal Services Corporation. Established by Congress in 1974, the Legal Services Corporation had more than 300 programs and support centers around the county designed to provide legal assistance to low-income persons in civil cases.<sup>17</sup> Wallace's nomination was viewed as the most controversial of eleven nominees to the Board.<sup>18</sup> The Mississippi Chapter of the NAACP opposed the Wallace nomination, citing his opposition to strengthening the Voting Rights Act, his support for tax-exempt status for schools practicing race discrimination, and his efforts to thwart a federal investigation into safety conditions in Mississippi jails.<sup>19</sup> The resolution found the "conduct and activities of nominee Michael B. Wallace to be repugnant and insensitive to the needs, plight and conditions of the poor and minorities of this country,

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<sup>15</sup> See, e.g., *Mississippi Pick Leads to Protests*, THE HILL, Feb. 24, 2004.

<sup>16</sup> "I have also heard concerns about the President's decision to nominate Keith Starrett to the vacancy created when this President bypassed the Senate to appoint Charles Pickering to the Fifth Circuit without the consent of the Senate. I ask that a letter sent to the Committee just recently by the Magnolia Bar Association, a primarily African-American bar association in Mississippi, be included in the record. The Magnolia Bar's President, Crystal Wise Martin, expresses the group's strong opposition to proceeding with Judge Starrett's nomination, not only because it is so late in the session, but also because, as she writes: '[I]t fails to remedy the egregious problem concerning the lack of diversity on Mississippi's federal bench.' She points out that Mississippi has the highest percentage of African Americans of any State, but only had one African-American federal judge. She explains that the Magnolia Bar and the National Bar Association have both made direct requests to the President that he appoint an African American to this seat." Confirmation Hearings on Federal Appointments, Hearings Before the Committee on the Judiciary United States Senate, (108th Cong., 2nd Sess.) (Sept. 8, 2004) (Opening Statement of Senator Patrick Leahy).

<sup>17</sup> *Jackson Lawyer Takes Reins as Legal Services Corp. Chairman*, CLARION-LEDGER, Jan. 22, 1989.

<sup>18</sup> See, e.g., *Washington News*, UNITED PRESS INT'L, Oct. 13, 1983; Nina Totenberg, *All Things Considered*, NAT'L PUBLIC RADIO, Oct. 13, 1983.

<sup>19</sup> Resolution on Legal Services Corporation, Mississippi State Conference, NAACP, Nov. 12, 1983.

and specifically the State of Mississippi.”<sup>20</sup> Legal aid organizations also called for his rejection.<sup>21</sup>

At his hearing before the Senate Committee on Labor and Human Resources, Wallace was vigorously questioned about his role in the most controversial civil rights issues of the day: his opposition to renewing the Voting Rights Act of 1965, helping the Reagan Administration grant tax-exempt status to Bob Jones University, and preventing the Justice Department from sending federal inspectors into Mississippi jails.<sup>22</sup> In May 1984, the Labor and Human Resources Committee reported Wallace’s nomination to the Senate floor without a recommendation.<sup>23</sup> The nomination was never considered by the full Senate. In November 1984, President Reagan was forced to give Wallace a recess appointment.<sup>24</sup> In 1985, Wallace was renominated to the Board and reported out of the Labor and Human Resources Committee on a party-line vote.<sup>25</sup> Wallace was confirmed by a 62-34 vote.<sup>26</sup>

Wallace served on the Legal Services Board from 1984 until 1990, and spent the last two years as Chair.<sup>27</sup> His tenure was mired in controversy. He prioritized the kinds of cases lawyers could file, telling the Senate that his priority was “child support, wife-beating, and consumer fraud” and that “there are other avenues to deal with reapportionment and jail conditions .... They are called elections.”<sup>28</sup> He told Congress that the quasi-independent agency was unconstitutional and therefore should be abolished.<sup>29</sup> He made repeated requests to Congress to cut the program’s funding.<sup>30</sup> He advised Congress that “no regulations of any agency should take effect until enacted pursuant to Article I,”<sup>31</sup> a position which would require legislative approval for agency regulations. When Wallace became Chair of the Board, the Jackson Clarion-Ledger reported that Wallace “said the agency needs to dump the national and state support centers that ostensibly assist local programs but actually work harder at lobbying legislatures and pleading social causes rather than representing ‘real cases (and) real people.’”<sup>32</sup> Late in his tenure, Wallace was criticized for spending Legal Services funds in support of lobbying efforts to maintain the conservative composition of the Board.<sup>33</sup>

In early 1992, Wallace was considered by President George H.W. Bush for the seat on the Fifth Circuit vacated by Judge Charles Clark of Mississippi. Press reports indicated the Justice Department had settled on Wallace.<sup>34</sup> Columnist Bill Minor reported in the Jackson Clarion-Ledger that “President Bush’s top choice to fill a vacancy on the Fifth Circuit Court of Appeals is a 39-year-old Jackson attorney and former aide to Sen. Trent Lott whose far-right ideology and attitude toward minority rights is certain

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<sup>20</sup> *Id.*

<sup>21</sup> *Legal Services Nominees Oppose Abolishing Agency*, UNITED PRESS INT’L, Nov. 3, 1983.

<sup>22</sup> Nominations, Hearing Before the Labor and Human Resources Committee United States Senate (98th Cong., 1st Sess.) (Nov. 2, 1983) at 109, 168-75 [*hereinafter* 1983 NOMINATIONS HEARING].

<sup>23</sup> Minor, *Jackson Attorney May Get Court of Appeals Nomination*, CLARION-LEDGER, Mar. 29, 1992.

<sup>24</sup> *Reagan Appoints New Members of Legal Services Corp.*, UNITED PRESS INT’L, Nov. 23, 1984.

<sup>25</sup> *Eleven Legal Services Board Nominees Win Approval of Senate Committee*, WASH. POST, May 9, 1985.

<sup>26</sup> *Battle Over Legal Services May Now Begin in Earnest*, N.Y. TIMES, June 16, 1985.

<sup>27</sup> *Impeachment Watch*, ROLL CALL, Jan. 7, 1999.

<sup>28</sup> Nominations, Hearing Before the Labor and Human Resources Committee United States Senate (99<sup>th</sup> Cong., 1<sup>st</sup> Sess.) (Apr. 24, 1985) at 34 [*hereinafter* 1985 NOMINATIONS HEARING].

<sup>29</sup> *Legal Services Chairman Raises Constitutional Questions to Congress*, PR NEWSWIRE, Mar. 15, 1989.

<sup>30</sup> *A Lott of Clout*, LEGAL TIMES, Jan. 27, 1992.

<sup>31</sup> Departments of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriations for 1990, Hearing Before the Senate Subcommittee of the Senate Committee on Appropriations, 101st Cong. 456 (1989).

<sup>32</sup> *Jackson Lawyer Takes Reins as Legal Services Corp. Chairman*, CLARION-LEDGER, Jan. 22, 1989.

<sup>33</sup> *Legal Services Corp.’s Power Struggle*, WASH. POST, Dec. 4, 1989; *Future of Legal Services Corp. Will Hinge on Bush nominees*, WASH. POST, Aug. 22, 1989.

<sup>34</sup> *A Lott of Clout*, LEGAL TIMES, Jan. 27, 1992.

to become an election year hot potato.”<sup>35</sup> Mississippi Senator Thad Cochran admitted “we have to recognize this will be a controversial nomination.”<sup>36</sup> Wallace was never nominated. President Clinton appointed James Dennis from Louisiana to the seat in 1995.

In 1998, Senator Trent Lott and Senator Orrin Hatch proposed Wallace to be one of seven members of the U.S. Sentencing Commission. The Clinton Administration and Senate Democrats strongly objected to Wallace because of his “activist” conservative views.<sup>37</sup> Wallace was not appointed.

#### IV. AMERICAN BAR ASSOCIATION RATING

On May 10, 2006, the American Bar Association (ABA) issued its rating of Michael Wallace in connection with his Fifth Circuit nomination. The rating was a unanimous “Not Qualified.”<sup>38</sup> The rating came from the 15-member Judicial Screening Committee of the ABA, which is composed of persons of diverse backgrounds and beliefs.

The rating was the first unanimous “Not Qualified” for an appellate court nominee in almost a quarter-century. In 1982, Sherman Unger, a Reagan nominee to the Federal Circuit, was unanimously found “Not Qualified.”<sup>39</sup> The last district court nominee to receive a unanimous “Not Qualified” rating was Frederick Rohlfing for the District of Hawaii in 2003.<sup>40</sup> Neither was confirmed.<sup>41</sup>

The ABA rating substantiates the tremendous concern shared by the civil rights community about the Wallace nomination. The ABA’s accompanying report to the Senate Judiciary Committee makes clear that the adverse rating was based upon the conclusion that Mr. Wallace lacks the judicial temperament that is so essential for a lifetime appointment on the federal court.<sup>42</sup> As part of its evaluation of a nominee’s judicial temperament, the ABA considers factors such as open-mindedness, freedom from bias and commitment to equal justice under the law.<sup>43</sup> Through interviewing scores of lawyers and judges about Mr. Wallace, the ABA reported receiving “substantial adverse comments” concerning Mr. Wallace’s judicial temperament.<sup>44</sup>

The ABA reported: “One of the negative comments expressed over and over, and often with great emotion and concern for the system, was that Mr. Wallace had not shown a commitment to equal justice under the law.”<sup>45</sup> The comments were made by lawyers and judges from a cross section of the legal

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<sup>35</sup> Minor, *Jackson Attorney May Get Court of Appeals Nomination*, CLARION-LEDGER, Mar. 29, 1992.

<sup>36</sup> *Id.*

<sup>37</sup> *U.S. Panel Left Memberless by Senate Feud*, N.Y. LAW J., Nov. 9, 1998; Impeachment Watch, ROLL CALL, Jan. 7, 1999.

<sup>38</sup> *Ratings of Article III Judicial Nominees*, 109<sup>th</sup> Congress, American Bar Association, available at <http://www.abanet.org/scfedjud/ratings109.pdf>

<sup>39</sup> *Nominee Rated ‘Unqualified’ by ABA Panel*, WASH. POST, May 11, 2006.

<sup>40</sup> *Ratings of Article III Judicial Nominees*, 108<sup>th</sup> Congress, American Bar Association, available at <http://www.abanet.org/scfedjud/ratings108.pdf>

<sup>41</sup> *Nominee Rated ‘Unqualified’ by ABA Panel*, WASH. POST, May 11, 2006; *Judicial Ratings Get Mixed Reviews*, ABAJOURNAL.COM, May 12, 2006, available at <http://www.abanet.org/journal/redesign/my12wallace.html>;

<sup>42</sup> Statement of Stephen L. Tober, Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace, at 12-17, available at <http://www.abanet.org/scfedjud/statements/wallace.pdf> [hereinafter ABA REPORT].

<sup>43</sup> American Bar Association Standing Committee on Federal Judiciary: What It Is and How It Works (2005) at 3, available at <http://www.abanet.org/scfedjud/>

<sup>44</sup> ABA REPORT at 10.

<sup>45</sup> *Id.* at 12.

community who knew Wallace. The ABA noted in particular Mr. Wallace's involvement in voting rights cases in which he "advanced his own personal views on the interpretation of the Voting Rights Act without regard to the law or the ultimate merits of the litigation and the impact on the African-American citizens of Mississippi."<sup>46</sup> Disturbingly, the ABA wrote that Mr. Wallace is said to have a "blind-spot" with respect to certain issues as they affect minorities.<sup>47</sup> On the issue of open-mindedness, lawyers expressed concern that Wallace "was so entrenched in his own personal views that they did not believe he could put them aside and fairly follow the law."<sup>48</sup> Other lawyers expressed fears that Wallace would prejudice cases "based on personal beliefs and not the law."<sup>49</sup> In considering "freedom from bias," the ABA noted comments by many lawyers and judges indicating that Mr. Wallace would not or could not follow the law, with one judge even remarking, "The law will not get in his way."<sup>50</sup>

## V. VOTING RIGHTS

Michael Wallace has a long history of opposing measures that would ensure African Americans full participation in the electoral process. Opposition early in his career foreshadowed a pattern of aggressive advocacy against majority-minority districts that has been condemned by lower courts and by Justice Scalia in a recent Supreme Court case. The ABA report confirms Mr. Wallace's resistance to progress in this area of the law. This record is particularly disturbing given his nomination from Mississippi to the Fifth Circuit. Mississippi is often considered "ground-zero" when it comes to voting rights. It was Mississippi who led southern states in their "massive resistance" to implementation of the Voting Rights Act after it was passed in 1965.<sup>51</sup> Although the State has the highest percentage of African Americans, it has never elected an African American to a statewide office.<sup>52</sup> With this persistence of racially polarized voting, single-member districts are often the only means by which African Americans can be elected to office. Throughout the Fifth Circuit, there are federal, state and locally elected officials who owe their elections to strong enforcement of the Voting Rights Act. All three states in the Circuit face continual legal challenges to election practices including redistricting and majority-minority districts.

Michael Wallace began a campaign against single-member districts at the beginning of his legal career. In 1978, just months after completing his Supreme Court clerkship and at the very beginning of his practice, he published an op-ed entitled "The Constitutional Question" in the local Biloxi paper.<sup>53</sup>

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<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Id.* at 15.

<sup>48</sup> *Id.* at 17.

<sup>49</sup> *Id.* at 18.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> FRANK R. PARKER, *BLACK VOTES COUNT* (1990) at 1.

<sup>52</sup> Modern Enforcement of the Voting Rights Act, Reauthorization of the Voting Rights Act, Senate Judiciary Committee United States Senate (109<sup>th</sup> Cong., 2<sup>nd</sup> Sess.) (May 10, 2006) (Testimony of Robert McDuff).

<sup>53</sup> Wallace, *The Constitutional Question*, BILOXI SUN-HERALD, Oct. 7, 1978. The op-ed does not appear on Mr. Wallace's list of published writings in response to the Senate Judiciary Committee Questionnaire. Responses by Michael Wallace to Senate Judiciary Committee Questionnaire (Feb. 23, 2006) at 4 [*hereinafter* QUESTIONNAIRE RESPONSES]. Question No. 12 asks the nominee to "[l]ist the titles, publishers, and dates of books, articles, reports or other published material you have written or edited." *Id.* The article does appear on lists he submitted in two responses to the Senate when he was nominated to the Legal Services Board in 1983 and 1984. 1983 NOMINATIONS HEARING at 90; 1985 NOMINATIONS HEARING at 117. When questioned about the article during his confirmation hearing in 1983, Wallace testified that he "strongly supported the single member district form of election ...." 1983 NOMINATIONS HEARING at 111. The record indicates otherwise.

The column extolled the virtues of at-large electoral districts. At-large districts, in which all citizens in a jurisdiction vote for all candidates, usually enable the racial majority to prevail in electing its candidate of choice. In contrast, single-member districts, which divide a jurisdiction geographically and thus by population, were and continue to be the primary means by which African Americans are able to be elected to office.

At the time, Biloxi, Mississippi was holding a referendum on whether to retain its at-large commission system or to adopt a mayor-council system under which only the mayor was elected at-large, with commission members chosen from single-member districts. While Wallace ultimately concluded that the at-large commission system violated separation of powers by granting legislative and executive authority to the mayor and commissioners, he revealed strong views against single-member districts:

Under the current system, the mayor and both commissioners are elected at large, which has led to claims that the commission system ‘dilutes’ minority voting strength. Opponents argue that blacks can never be elected by a predominantly white electorate, and conclude that they are thereby denied representation in the governing body. The United States Court of Appeals for the Fifth Circuit has adopted this theory, approving the imposition of the mayor-council system on cities such as Mobile and Shreveport by federal court decree.

The notion that citizens can only be properly represented by persons of their own race is poor law and poorer philosophy. The Fifth Circuit has never satisfactorily explained either the source of its authority to restructure city governments or the advantages minorities obtain from the Court’s favored system. No simplistic majoritarian system can insure political power for a minority. Minority voting strength is equally ‘diluted’ whether the governing body votes against them 3-0 or 6-3.

For these reasons, the United States Supreme Court may well reject the dilution theory altogether. In June four members of the Court went out of their way to remind the Fifth Circuit that the Court had never determined whether ‘this highly amorphous theory may be applied to municipal governments.’ Just this week, the Court agreed to hear oral arguments in the Mobile case, indicating possible disapproval of the Fifth Circuit’s position.

The great virtue of the at-large system is that it fosters the democratic ideal that elected officials represent all the people, not narrow segments of the population. If the public accepts the Fifth Circuit’s idea that only black officials can represent black citizens, white officials may stop trying to do so. As in so many other areas, the federal courts’ efforts to remedy racial discrimination may succeed only in increasing race consciousness. ...<sup>54</sup>

Only three years later, Michael Wallace became a key player in opposing Congressional amendments to the Voting Rights Act that made it easier to challenge at-large districts as diluting minority voting strength.<sup>55</sup> Indeed, the Supreme Court case to which Mr. Wallace referred in his op-ed—

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<sup>54</sup> Wallace, *The Constitutional Question*, BILOXI SUN-HERALD, Oct. 7, 1978.

<sup>55</sup> The Voting Rights Act was passed in 1965. Certain temporary provisions of the Act were extended by Congress in 1970 and 1975. These provisions faced expiration in 1982.

*City of Mobile v. Bolden*<sup>56</sup>—resulted in the adverse ruling that Congress ultimately reversed by amending the Voting Rights Act.

In 1981, Wallace became counsel to then-Congressman Trent Lott, the Republican Whip. With Wallace as counsel, Lott led the fight in the House of Representatives against renewal of the Voting Rights Act. Opposition to the Voting Rights Act was the minority position as the House overwhelmingly passed the extension of the Voting Rights Act by a vote of 389 to 24.<sup>57</sup> Congressman Lott was the only member in Mississippi to vote against the bill.<sup>58</sup> After the House vote, Wallace assisted Senate opponents of the bill. Ultimately, the Senate voted 85-8 to extend the Voting Rights Act.<sup>59</sup>

Wallace's efforts to oppose renewal of the Voting Rights Act were viewed as pivotal, and his involvement far surpassed that of one staff lawyer working for one member of Congress. When Wallace was nominated for the Legal Services Board one year later, National Public Radio reported: "Wallace was seen as the staff point man in the House of Representatives during the battle over extension of the Voting Rights Act. According to civil rights activists, Wallace bitterly opposed extension of the Act. Indeed, during the Senate hearings on extension, Wallace sat next to the leading opponent of the Act, Utah Senator Orrin Hatch, to provide expertise and advice."<sup>60</sup> The Washington Post reported: "House sources have said that Wallace ... bitterly opposed last year's strengthening and extension of the Voting Rights Act and was instrumental in the House battle against it. Wallace was dispatched as a 'chief strategic adviser' to Senator Orrin Hatch (R-UT), a chief Senate opponent of the legislation, during Senate hearings."<sup>61</sup> Another report indicated that Wallace was "far more adamant in his views than many of the conservative republican congressmen he represented in back-stage negotiations."<sup>62</sup>

Wallace's central disagreement focused on amending Section 2 of the Voting Rights Act. One year earlier, the Supreme Court in *City of Mobile v. Bolden*,<sup>63</sup> had required intentional discrimination to prove a violation under Section 2. Although Mobile was forty percent African-American, no African American had ever been elected under the at-large system established in 1911. The Court found no violation since intentional discrimination in establishing the at-large system could not be proven.<sup>64</sup> To address the *Mobile* decision, Congress amended Section 2 to prohibit actions having the "effect" of abridging the right to vote, not just those intended to abridge that right.<sup>65</sup> The effects test ensured that violations could still be proven even when the discriminatory intent of election officials from previous decades was difficult to discern. The effects test enabled challenges to at-large districts and other measures that diluted minority voting strength. In his seminal book about voting rights in Mississippi, Black Votes Count, Frank Parker summarized the impact of the Section 2 amendment:

Since 1982 Section 2 has been phenomenally successful in eliminating racially discriminatory barriers to equal minority political participation. It has been used by blacks, Hispanics, and American Indians to challenge discriminatory voting laws. It has been applied in both the North and the South to strike down such voting procedures as

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<sup>56</sup> 446 U.S. 55 (1980).

<sup>57</sup> 127 CONG. REC. 23,205 (1981).

<sup>58</sup> Minor, *Jackson Attorney May Get Court of Appeals Nomination*, CLARION-LEDGER, Mar. 29, 1992.

<sup>59</sup> 128 CONG. REC. 14,337 (1982).

<sup>60</sup> Nina Totenberg, *All Things Considered*, NAT'L PUBLIC RADIO, Oct. 13, 1983.

<sup>61</sup> *Battle Seen on Legal Services Nominees*, WASH. POST, Oct. 17, 1983.

<sup>62</sup> Nina Totenberg, *All Things Considered*, NAT'L PUBLIC RADIO, Oct. 14, 1983.

<sup>63</sup> 446 U.S. 55 (1980).

<sup>64</sup> *Id.* at 74.

<sup>65</sup> 42 U.S.C. § 1973(a).

discriminatory congressional redistricting and legislative reapportionment plans, at-large county elections, at-large and gerrymandered city council districting schemes in northern and southern cities, at-large state judicial elections, and discriminatory voter registration procedures that limit black citizens' opportunities to register to vote.<sup>66</sup>

During his tenure with Trent Lott, Wallace not only opposed the effects test in legislation, but may have advocated that the Supreme Court narrowly interpret the standard for proving voting rights violations by at-large districts. In December 1981, Congressman Lott sent a letter to Attorney General William French Smith, with the initials "mbw" behind his own, suggesting Wallace drafted the letter.<sup>67</sup> (As discussed *infra*, in at least one instance in which these initials appeared on letters from Congressman Lott, Wallace admitted the initials were his own.)<sup>68</sup>

The letter thanked the Attorney General for his "stand on the Voting Rights Act, especially on the effects test."<sup>69</sup> The remainder of the letter addressed an upcoming Supreme Court case "which may, unfortunately, render the task of Congress merely academic."<sup>70</sup> The letter stated that it was "absolutely essential" that the Justice Department not endorse a ruling by the Fifth Circuit in *Lodge v. Buxton*,<sup>71</sup> which "construed the stand of proof under *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in such a way as effectively to obliterate the distinction between intent and effect."<sup>72</sup> The letter continued:

It would be a disaster for the United States to tell the Court that it should uphold findings of fact by the District Court and the Court of Appeals. What those courts have done is take the indicia of discriminatory effect rejected by the Supreme Court in *City of Mobile* and, without more, permit therefrom the inference of discriminatory intent. If that sort of sleight of hand passes muster, at-large electoral systems throughout the county will effectively be placed at the mercy of federal judges, no matter what Congress says when the debate over the Voting Rights Act is finally resolved.

I will not review the evidence in detail, but it is indisputable that there is even less evidence of discrimination here than in Mobile. Blacks are a majority in the Georgia County involved in *Lodge*, just as they are today in Indianola, Mississippi. It is inconceivable to me that an at-large system could ever discriminate against the majority.

I applaud your public criticisms of the efforts of federal judges to administer school systems and even sewer systems. It is immeasurably more pernicious for them to seek to administer political systems. For unelected judges to try to determine who should be elected to public office is fundamentally destructive of our democracy. I do not believe it should be permitted under any circumstances, and I do not read the plurality opinion in *City of Mobile* to conclude that it might be. It certainly cannot be permitted in the circumstances of this case.<sup>73</sup>

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<sup>66</sup> FRANK R. PARKER, *BLACK VOTES COUNT* (1990) at 179.

<sup>67</sup> Letter from Rep. Trent Lott to Attorney General William French Smith, Dec. 10, 1981.

<sup>68</sup> Wallace's initials appeared on correspondence from Congressman Lott regarding a federal investigation into Mississippi's prisons. During testimony on his nomination to the Legal Services Board in 1983, Wallace acknowledged his initials but refused to say whether he prepared the letter. 1983 NOMINATIONS HEARING at 169.

<sup>69</sup> Letter from Rep. Trent Lott to Attorney General William French Smith, Dec. 10, 1981.

<sup>70</sup> *Id.*

<sup>71</sup> 639 F.2d 1358 (5<sup>th</sup> Cir. 1981).

<sup>72</sup> Letter from Rep. Trent Lott to Attorney General William French Smith, Dec. 10, 1981.

<sup>73</sup> Letter from Rep. Trent Lott to Attorney General William French Smith, Dec. 10, 1981.

Wallace's aggressive opposition to an effects test in Congress and in the courts is disconcerting enough. However, during testimony before the Senate Labor and Human Resources Committee in 1983, Wallace made clear his personal disagreement with the effects test and even suggested that Congress had adopted an intent test. Wallace testified that the Voting Rights bill in the House "provided an amendment on a nationwide basis that was intended to broaden in an unspecified way the sort of challenges that could be raised to a whole range of election systems."<sup>74</sup> He stated: "When the act emerged from the Senate, I believe it had substantially improved. ... [S]ection 2 was given some specificity in the statute. The meaning of the language used now incorporates the Supreme Court's language in *White v. Register* which ... is in fact an intent test, as the Supreme Court later ruled in the case of *Rogers v. Lodge*."<sup>75</sup> Wallace also testified that "no one was able to define, to my satisfaction, what the results test is. ... I think it is pretty complex, and I would be very disturbed if the Supreme Court could not give better guidance to the question. I think intent is the best result."<sup>76</sup> Thus, one year after Congress passed voting rights legislation including an "effects" test, Wallace told a Senate Committee that the test for voting rights violations under Section 2 was the more difficult "intent" test.

Just two years after the Voting Rights Act was amended to include an effects test, Wallace gave force to this testimony by arguing in federal court that Section 2 prohibited only discriminatory intent. This position was completely contrary to Congress's own intent and legislative record in amending the Voting Rights Act. Wallace represented the Mississippi Republican Party in defending a Mississippi congressional redistricting plan that did not include even one African-American district. Prior to the amendment of the Voting Rights Act, a three-judge court had ruled for the African-American plaintiffs and adopted an interim plan with a majority black district having a black voting age population of only 48.05%. *Jordan v. Winter*.<sup>77</sup> While the case was on appeal, Congress amended Section 2 of the Voting Rights Act. Accordingly, the Supreme Court vacated and remanded the court's ruling for reconsideration in light of the amended Section 2. *Brooks v. Winter*.<sup>78</sup>

Although Wallace had personally worked on Congress's reauthorization of the Voting Rights Act and was in the best position to know what Congress had done, Wallace argued that Section 2 violations could be proven only by showing discriminatory intent. *Jordan v. Winter*.<sup>79</sup> In its opinion, the three-judge court reported that Wallace "argued that amended Section 2 preserves the requirement of proving discriminatory intent."<sup>80</sup> The court flatly dismissed Wallace's position: "We find this argument to be meritless as it runs counter to the plain language of amended § 2, its legislative history, and judicial and scholarly interpretations."<sup>81</sup> The court noted: "The amendment to Section 2 was designed to eliminate the requirement, prescribed in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that a plaintiff demonstrate intentional discrimination to establish a violation of Section 2."<sup>82</sup> The court then found that the interim plan unlawfully diluted black voting strength in violation of amended Section 2.<sup>83</sup>

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<sup>74</sup> 1983 NOMINATIONS HEARING at 109.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 110.

<sup>77</sup> 541 F. Supp. 1135 (N.D. Miss. 1982).

<sup>78</sup> 461 U.S. 921 (1983).

<sup>79</sup> 604 F. Supp. 807, 810 n.5 (N.D. Miss. 1984).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 810.

<sup>83</sup> *Id.*

Remarkably, Wallace also attacked the constitutionality of Section 2 as amended by Congress. He argued that, if Section 2 were construed to reach discriminatory results, it was not within Congress's enforcement power under the Fifteenth Amendment.<sup>84</sup> The court rejected this position as well.<sup>85</sup>

Wallace appealed both issues to the U.S. Supreme Court. His jurisdictional statement included the following arguments: (1) Section 2 prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race; and (2) Section 2, if construed to prohibit anything other than intentional discrimination on the race of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment.<sup>86</sup> The Supreme Court summarily affirmed the decision of the three-judge court, rejecting both arguments. *Mississippi Republican Executive Comm. v. Brooks*<sup>87</sup>

Wallace's tactics were condemned by the court when it awarded attorneys' fees to the African-American plaintiffs who had prevailed. The court noted that the litigation "resulted in the re-creation of Mississippi's historical Delta congressional district with a majority black voting age population after two evidentiary hearings and two appeals to the United States Supreme Court." *Jordan v. Allain*.<sup>88</sup> The court wrote: "Defendants' objections to time expended by plaintiffs' counsel in opposing post-judgment relief in this court have a distinctly hollow ring; in the opinion of the court, these defendants, and particularly the Republican Party, crossed the line separating hard-fought litigation from needless multiplication of proceedings, at great waste of both the court's and the parties' time and resources."<sup>89</sup> The court criticized the position taken by Wallace that the plaintiffs' time spent in pursuit of "pure" Section 2 remedies, without other statutory or constitutional foundation, was not recoverable: "The statutory interpretation urged by the Republican defendants is directly contradictory to the stated purpose of § 1973l(e) and would serve to hinder, rather than encourage, private enforcement of the Voting Rights Act."<sup>90</sup> The court dismissed the Republican defendants' attempts to claim fees, noting that they "vigorously opposed abandonment of the [interim] plan prior to and during the December 1983 evidentiary hearing and ... unsuccessfully attempted to stay implementation of the new plan and reinstate the [interim] plan on at least two occasions following entry of judgment. Nor were these defendants successful either in their attempt to secure a stay pending an appeal in the Supreme Court or on the merits of [that] appeal."<sup>91</sup>

The case is also significant because it was Wallace's first battle to prevent a majority African-American district from being drawn in the State of Mississippi. There were five congressional districts, all of which had majority white voting age populations because of their configuration. The Mississippi legislature's redistricting plan retained the five white districts. Even the Reagan Justice Department had concluded that the configuration constituted an unlawful dilution of minority voting strength.<sup>92</sup> African Americans argued that the redistricting plan was discriminatory because it did not include a district containing a majority black voting age population. Mississippi was thirty-five percent African-American at the time. Despite Wallace's efforts, the federal courts held that Section 2 of the amended Voting Rights Act required the creation of a district with a majority black voting age population. As the court noted in the attorney fee decision: "The end result was promulgation of the first congressional redistricting plan in Mississippi since passage of the Voting Rights Act that contained a district with a

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Jurisdictional Statement, *Mississippi Republican Executive Committee v. Brooks*, (No. 83-1722) at 12-27.

<sup>87</sup> 469 U.S. 1002 (1984).

<sup>88</sup> 619 F. Supp. 98, 102 (N.D. Miss. 1985).

<sup>89</sup> *Id.* at 111.

<sup>90</sup> *Id.* at 105.

<sup>91</sup> *Id.* at 106.

<sup>92</sup> *Jordan v. Winter*, 604 F. Supp. 807, 809 (N.D. Miss. 1984).

majority black voting age population.”<sup>93</sup> Mississippi has had a biracial Congressional delegation ever since. Congressman Mike Espy was elected to the Second Congressional District in 1986. His successor, Congressman Bennie Thompson, will begin his eighth term in January.

In 1992, when Wallace was considered by President George H.W. Bush for the Fifth Circuit, Mississippi voting rights attorney Frank Parker stated that Wallace’s actions in the case showed Wallace “lacks the integrity, judicial temperament and respect for legal proceedings necessary for appointment to the judicial bench.”<sup>94</sup> Indeed, Wallace’s efforts to prevent a majority African-American congressional district became an issue over twenty years ago during his confirmation to the Legal Services Board. In 1984, after already opposing the Wallace nomination, the Mississippi State Conference of the NAACP sent a letter to the Senate Labor and Human Resources Committee, reemphasizing its “vehement and unyielding opposition” to Wallace and citing his work against African-American voting districts:

Since [our] resolution, we have become even more resolved in our opposition due to Mr. Wallace’s involvement in the configuration dispute surrounding the Mississippi Second Congressional District. Blacks comprise a significant portion of the population of that District. In addition, that District is the most poverty stricken area in the poorest state of the nation. Litigation was filed several years ago to redraw this Congressional district to overcome historical inequities toward the Black population and to provide the Black community with a reasonable opportunity to elect a representative of their choice. Where necessary, this would allow the gains secured through the legislative process to be solidified and expanded through the legislative system.

Mr. Wallace’s presence as counsel for the opponents of the redistricting plan reflects his regressive attitude toward full participation of blacks in the electoral and governmental processes. This attitude and position are part of a disturbing pattern of insensitive and obstructive behavior toward the interests, needs, and aspirations of Black and poor people.<sup>95</sup>

Nearly twenty years later, Wallace continued advocating against single-member voting districts by making radical arguments in a redistricting case stemming from Mississippi’s loss of a seat in the House of Representatives after the 2000 Census.<sup>96</sup> When the Mississippi Legislature failed to produce a redistricting plan, Democratic voters asked a state court to draw a plan. Republican voters intervened as defendants. Wallace represented the Mississippi Republican Party, which was joined as a defendant along with the Democratic Party because they administer party primaries. Wallace sought enforcement of an arcane federal law requiring at-large elections in the absence of legislative redistricting to address the

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<sup>93</sup> *Jordan v. Allain*, 619 F. Supp. 98, 106 (N.D. Miss. 1985).

<sup>94</sup> *W Taps Another Throwback For Important Appeals Seat*, HOUSTON CHRONICLE, Feb. 14, 2006.

<sup>95</sup> Letter from Robert M. Walker, Executive Director, Mississippi State Conference, NAACP, to Chairman Orrin Hatch, Senate Committee on Labor and Human Resources, Aug. 1, 1984.

<sup>96</sup> In the interim, Wallace litigated other voting rights cases in which he represented parties defending challenges under the Voting Rights Act. In *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991), *aff’d mem. in part and vacated in part as moot*, 112 S.Ct. 412 (1991), he represented the Mississippi Republican Party which supported relying on a 1982 legislative apportionment plan that had been challenged by African-American plaintiffs as violating the Voting Rights Act. A three-judge court, which included Judge Charles Pickering, upheld the plan although it was malapportioned under the one-person, one-vote principle, in the interests of conducting timely elections. The court declined to decide whether the Voting Rights Act was violated since the plan was for interim use only, and concluded there was no retrogression of minority voting strength. *Id.* at 807.

loss of a seat, which he contended applied under the circumstances.<sup>97</sup> The state court then excluded the political parties as defendants, adopted the plaintiffs' proposed plan, and ordered that it be submitted to the Justice Department for preclearance under Section 5 of the Voting Rights Act.<sup>98</sup> Wallace and the Republican intervenors appealed to the Supreme Court of Mississippi.

While the state court case was pending, other Republican voters filed suit in federal court, naming the State Board of Election Commissioners, the Republican Party, and the Democratic Party as defendants. The Democratic plaintiffs in the state case intervened as defendants. The Republican plaintiffs challenged the state court's authority to conduct congressional redistricting and sought to stay enforcement of any state court judgment until the state plan and procedures for its adoption had been precleared. *Smith v. Clark*.<sup>99</sup> Apparently adopting Wallace's argument, they asked the federal court to enforce state and federal statutes requiring at-large elections or adopt its own plan.<sup>100</sup> The federal court rejected this argument, adopting its own redistricting plan instead of the dramatic remedy of at-large elections.<sup>101</sup> The court enjoined the state court plan due to its failure to be timely precleared,<sup>102</sup> and alternatively, as unconstitutionally usurping the authority of the Mississippi Legislature.<sup>103</sup>

The Democratic voters appealed adoption of the federal court plan to the Supreme Court. Wallace and the Republican plaintiffs cross-appealed, seeking enforcement of the at-large statute, and Wallace argued on behalf of both parties. Wallace's position was that Mississippi's congressional representatives should be chosen at-large by the majority statewide electorate.<sup>104</sup> Wallace made the argument although every other state in the country uses single-member districts. Since Mississippi's only African-American Congressman, Representative Bennie Thompson, is elected from the majority African-American single-member district initially created in the 1980s, at-large elections would virtually ensure that the clock in Mississippi would be turned back to the days of an all-white congressional delegation.

In advocating at-large districts for Mississippi, Wallace invoked an Election Code provision adopted in 1941 relating to Congressional reapportionment, which states that if there is a decrease in the number of Representatives and the number of districts exceeds the number of Representatives, they shall be elected at-large. 2 U.S.C. § 2a(c)(5). In the midst of the voting rights revolution, however, Congress adopted another provision in 1967 that required states entitled to more than one Representative to use single-member districts. 2 U.S.C. § 2c. Wallace argued that § 2c referred exclusively to legislative redistricting and thus did not apply to the court-ordered redistricting in this instance.<sup>105</sup>

In oral argument before the Supreme Court, Wallace had to acknowledge that since the time that § 2c was adopted to require single-member districts, "no court since 1967 has ordered at-large elections in redistricting cases."<sup>106</sup> Wallace was asked to respond to "the fear that one has to have that redistricting by having all the elections at large is precisely what those who were interested in diluting minority vote

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<sup>97</sup> QUESTIONNAIRE RESPONSES at 23 (identifying arguments made in Chancery Court).

<sup>98</sup> *Id.*

<sup>99</sup> 189 F.Supp.2d 503, 506-07 (S.D. Miss. 2002).

<sup>100</sup> *Id.* at 507.

<sup>101</sup> 189 F. Supp.2d 529 (S.D. Miss. 2002).

<sup>102</sup> *Id.*

<sup>103</sup> 189 F. Supp.2d 548 (S.D. Miss. 2002).

<sup>104</sup> 538 U.S. 254, 266 (2003).

<sup>105</sup> *Id.* at 268-273.

<sup>106</sup> Transcript of Oral Argument, *Branch v. Smith* (Nos. 01-1437 & 1596), available at 2002 WL 31838523, \*45 (Dec. 10, 2002).

would like.”<sup>107</sup> He replied that “an act of Congress is not subject to the Voting Rights Act, and would be enforced on its face.”<sup>108</sup> He also stated that “the most common remedy since *Gingles* is to do single-member districts, but it’s not the only remedy.”<sup>109</sup>

In an opinion by Justice Scalia, the Supreme Court flatly rejected Wallace’s position. *Branch v. Smith*.<sup>110</sup> Justice Scalia strongly criticized Wallace’s argument for ignoring judicial developments brought about by the Voting Rights Act and the one-person, one-vote cases at the same time Congress decided to require single-member districts:

The problem with this reconciliation of the provisions is that the limited role it assigns to § 2c (governing legislative apportionment but not judicial apportionment) is *contradicted both by the historical context of § 2c’s enactment and by the consistent understanding of all courts in the almost 40 years since that enactment*. When Congress adopted § 2c in 1967, the immediate issue was precisely the involvement of the courts in fashioning electoral plans. The Voting Rights Act of 1965 had recently been enacted, assigning the federal courts jurisdiction to involve themselves in elections (citations omitted). Even more significant, our decisions in *Baker v. Carr*, 369 U.S. 186 (1962), *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), had ushered in a new era in which federal courts were overseeing efforts by badly malapportioned States to conform their congressional electoral districts to the constitutionally required one-person, one-vote standards. In a world in which the role of federal courts in redistricting disputes had been transformed from spectating ... to directing, the risk arose that judges forced to fashion remedies would simply order at-large elections.

At the time Congress enacted § 2c, at least six District courts ... had suggested that if the state legislature was unable to redistrict to correct malapportioned congressional districts, they would order the State’s entire congressional delegation to be elected at large. ... With all this threat of judicially imposed at-large elections, and (as far as we are aware) no threat of a legislatively imposed change to at-large elections, it is most unlikely that § 2c was directed solely at legislative apportionment.

Nor have the courts ever thought so. To the contrary, *every court that has addressed the issue has held that § 2c requires courts, when they are remedying a failure to redistrict constitutionally, to draw single-member districts whenever possible*. ...

Of course the implausibility (given the circumstances of its enactment) that § 2c was meant to apply only to legislative reapportionment, *and the unbroken unanimity of state and federal courts in opposition to that interpretation*, would be of no consequence if the test of § 2c (and of § 2a(c)) unmistakably demanded that interpretation. But it does not. Indeed, it is more readily susceptible of the opposite interpretation. ...

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<sup>107</sup> *Id.* at \*47.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 538 U.S. 254, 282 (2003). The Court also upheld the federal court’s injunction against the state plan.

We think, therefore, that while § 2c assuredly envisions legislative action, it also embraces action by state and federal courts when the prescribed legislative action has not been forthcoming.<sup>111</sup>

The Court held that § 2a(c) is inapplicable unless the state legislature, and state and federal courts, have all failed to redistrict pursuant to § 2c.<sup>112</sup> In an concurring opinion, Justice Stevens discussed the legislative history that “provide[s] powerful support for the conclusion that, as a literal reading of the text of § 2c plainly states, Congress intended to enact a categorical prohibition of at-large elections.”<sup>113</sup> Justice Stevens continued: “The history of the 1967 statute, coupled with the plain language of its text, leads to only one conclusion—Congress impliedly repealed § 2a(c).”<sup>114</sup>

Mr. Wallace’s radical position in *Branch* is all the more troubling when considered in conjunction with his earlier public statements reflecting his disfavor of both single-member districts and the “one-person, one-vote principle.” In 1986, Wallace appeared on a panel co-sponsored by the Mississippi Humanities Council and the Mississippi State Bar to discuss a new constitution for Mississippi. Bill Minor, a veteran journalist and columnist with the Clarion-Ledger (Mississippi’s largest newspaper), was a fellow panelist. Minor reported on Wallace’s comments at the event in a column when Wallace was under consideration for the Fifth Circuit in 1992:

At one point in the discussion, Wallace made clear he was not in favor of the ‘one-person, one-vote’ doctrine which the Supreme Court had declared in a landmark 1962 Tennessee reapportionment case.

Wallace specifically declared he opposed the principle of single-member legislative districts which Mississippi black citizens for years had fought to win through the federal courts, finally succeeding in 1979. Wallace said he favored restoring the former at-large, multi-member election districts.

Creation of single-member districts in the Mississippi Legislature has vastly increased the number of black people elected to the Legislature.

Now it’s possible that Wallace could sit on the federal bench which could turn back the clock.<sup>115</sup>

In addition to providing further evidence of Wallace’s dislike of majority black districts, the public criticism of the “one-person, one-vote” principle is extremely disturbing. The Warren Court’s reapportionment decisions are a cornerstone in the foundation of our modern democracy. Importantly for the civil rights community, cases such as *Gomillion v. Lightfoot*<sup>116</sup> and *Baker v. Carr*,<sup>117</sup> were significant in barring state legislative schemes that diluted the voting strength of racial minorities by perpetuating inequitably drawn districts. Recognizing the concept of “one person, one vote,” the Court enshrined the principle that every citizen has the right to an equally effective vote, rather than the right to simply cast a ballot. The rulings helped to establish principles for challenging the at-large and multi-member electoral

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<sup>111</sup> 538 U.S. 268-272 (emphasis added).

<sup>112</sup> *Id.* at 275.

<sup>113</sup> *Id.* at 291 (Stevens, J., concurring).

<sup>114</sup> *Id.* at 292.

<sup>115</sup> Minor, *Jackson Attorney May Get Court of Appeals Nomination*, CLARION-LEDGER, Mar. 29, 1992.

<sup>116</sup> 364 U.S. 339 (1960).

<sup>117</sup> 369 U.S. 186 (1962).

systems enacted by southern jurisdictions after passage of the Voting Rights Act in order to dilute the African-American vote. The result was more effective participation in the political process for all voters.

In his article on the Voting Rights Act and judicial elections, Mr. Wallace criticized both the claim of voting dilution and the remedy of single-member districts: “[D]ilution cases boil down to a claim that the likely effect—whether intended or not—of the incumbent system is fewer black officials than some alternative system. Thus, racial gerrymandering is no longer seen as the problem but, as the solution.”<sup>118</sup> Wallace lamented that “[t]he clarification of the proper application of the Voting Rights Act to the judicial branch did not come in time to spare the Mississippi judiciary from the experience of subdistricting.”<sup>119</sup> He wrote that, prior to subdistricting, business interests had helped to elect “good black judges” and that “the elimination of white voters from the new subdistricts may have made their task somewhat harder ....”<sup>120</sup> He noted that “the new black judges have much less legal experience.”<sup>121</sup> He wrote: “The persistence of suspicions of racial politics in such decisions demonstrates the extent to which race-conscious manipulation of the Voting Rights Act has elevated the element of race above all others.”<sup>122</sup> He believed that Justice Clarence Thomas had “cogently described” the impact of this jurisprudence as follows: “[O]ur voting rights decisions are rapidly progressing toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race.... [F]ew devices could better designed to exacerbate racial tensions than the consciously segregated districting system currently being construed in the name of the Voting Rights Act.”<sup>123</sup> Wallace concluded: “The fundamental problem is the premise of dilution cases that elected officials have, and ought to be responsive to, racially defined constituencies. This is problematic for the political branches but equally dubious for the judiciary....”<sup>124</sup>

While on the Legal Services Board, Wallace made it more difficult for others to bring voting rights litigation. In April 1989, while Wallace was Chair of the Board, the Board banned Legal Services programs from handling all voting rights cases involving redistricting. It was the first time that the Board had unilaterally barred its attorneys from handling a particular kind of matter. A press report about the decision stated as follows:

Mike Wallace, who chairs the corporation’s board, says redistricting cases—which make up about 95 percent of Voting Rights Act suits—are not an efficient use of corporation funds. Wallace also claims that other lawyers are willing to take these cases.

‘Any benefit [to the poor] is too remote and too indirect to justify thousands of hours and millions of dollars,’ says Wallace.

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<sup>118</sup> Wallace, *The Voting Rights Act and Judicial Elections*, STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES (National Legal Center for the Public Interest, 1996) at 94 [*hereinafter* JUDICIAL ELECTIONS].

<sup>119</sup> *Id.* at 108. In *Chisom v. Edwards*, Wallace filed an amicus brief arguing that a vote dilution challenge to at-large elections of judges was not subject to Section 2. Brief of Amici Curiae the Washington Legal Foundation *et al.* in Support of Defendants-Appellees, *Chisom v. Edwards*, (No. 87-3463). A Fifth Circuit panel applied Section 2, 839 F.2d 1056 (5<sup>th</sup> Cir. 1988), but was overruled *en banc* in *LULAC v. Clements*, 914 F.2d 620 (5<sup>th</sup> Cir. 1990). The Supreme Court held that the effects test of Section 2 applied to state judicial elections, *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers Association v. Attorney General of Texas*, 501 U.S. 419 (1991).

<sup>120</sup> JUDICIAL ELECTIONS at 117-18.

<sup>121</sup> *Id.* at 112.

<sup>122</sup> *Id.* at 114.

<sup>123</sup> *Id.* at 114 (citing *Holder v. Hall*, 114 S.Ct. 2581, 2598-99 (1994) (Thomas, J., concurring)).

<sup>124</sup> JUDICIAL ELECTIONS at 118.

Some critics suspect Wallace has a personal animus toward voting-rights cases. In 1982, as an aide to then Rep. Trent Lott (R-Miss.), Wallace helped lobby against extending and bolstering the Voting Rights Act. Later, he represented the Mississippi Republican Party against a successful challenge by blacks who contended a congressional redistricting plan was discriminatory. Helping to represent the blacks was North Mississippi Rural Legal Services, an LSC-funded group.

‘It’s a Wallace political judgment,’ says Thomas Smegal Jr., a member of the LSC board’s moderate minority and a partner at San Francisco’s Townsend and Townsend.

Wallace says his push for the restriction on redistricting cases merely reflects his concerns about LSC’s budget, not any political agenda. Wallace does acknowledge, however, his resentment that Mississippi, along with eight other states, must submit its redistricting plans to the Department of Justice for approval.

‘It bothers me that Mississippi is discriminated against,’ Wallace says.<sup>125</sup>

Mississippi lawyer Frank Parker, who headed the Voting Rights Project of the Lawyers’ Committee for Civil Rights, stated at the time: “Their adopting this regulation is a power play to prevent enforcement of the Voting Rights Act.”<sup>126</sup> Representative Don Edwards wrote a letter to the Legal Services Corporation in which he stated, “The rule would seriously undermine the purpose of the [Voting Rights Act,] which is to extend voting rights to disenfranchised minorities.”<sup>127</sup>

## **VI. BOB JONES UNIVERSITY**

Another major area of concern for the civil rights community is Michael Wallace’s involvement in the Bob Jones controversy. Wallace aggressively advocated for tax-exempt status for discriminatory educational institutions and then provided strong affirmation to the Senate that these were indeed his personal views on the matter. With the ABA’s conclusion that Mr. Wallace cannot set aside his strongly held views in the face of law to the contrary, this issue poses tremendous questions about his suitability for an appellate court appointment in the Deep South.

Since 1971, IRS Revenue Ruling 71-447 had provided that a private school that did not have a nondiscrimination policy was not “charitable” within the meaning of § 501(c)(3), and therefore not eligible for tax-exempt status. The Nixon, Ford and Carter Administrations had implemented this policy.

In the late 1970s, Bob Jones University and Goldsboro Christian Schools, which had racially discriminatory admissions policies, sought refunds of taxes. Bob Jones University had denied admission to African Americans during the tax years in question and since 1975, had denied admission to persons in interracial marriages and expelled students who dated outside their race; Goldsboro excluded all African Americans from enrollment.<sup>128</sup> Both appellate courts hearing the cases rejected the schools’ claims for

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<sup>125</sup> *Voting-Rights Cases Declared Off-Limits by LSC*, LEGAL TIMES, Apr. 24, 1989.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Brief of Amicus Curiae In Support of the Judgments Below, *Bob Jones University v. United States* (Nos. 81-3); *Goldsboro Christian Schools v. United States* (81-3) at 41.

tax-exempt status. *Bob Jones University v. United States*,<sup>129</sup> *Goldsboro Christian Schools v. United States*.<sup>130</sup> The schools appealed to the Supreme Court.<sup>131</sup>

In September 1981, the United States filed a brief acquiescing in the granting of certiorari, stating that a definitive decision by the Supreme Court would dispel the uncertainty around the IRS's ruling and would foster compliance by the institutions.<sup>132</sup> The brief stated that the IRS acted within its statutory authority in revoking the schools' tax-exempt status.<sup>133</sup> The Supreme Court granted certiorari.

Congressman Trent Lott aggressively lobbied the Reagan Administration to change the IRS policy against tax-exemptions for racially discriminatory schools *and* to intervene in the Supreme Court case in defense of that position. As press accounts and later Congressional hearings on legislation to ban the tax-exemptions revealed, Congressman Lott's lobbying activities included meetings, correspondence, and telephone conversations with high-ranking officials within the Justice and Treasury Departments and a letter to President Reagan.<sup>134</sup>

Michael Wallace was Lott's counsel at the time. Press reports indicated that Congressman Lott enjoyed more access than usual to the Justice Department because Wallace, who had recently clerked for Justice Rehnquist, had a special pipeline through former Rehnquist clerks at the Department.<sup>135</sup> One clerk identified was Charles Cooper, Special Assistant to Assistant Attorney General for Civil Rights William Bradford Reynolds.<sup>136</sup> Cooper was one of a "band of young zealots" who pressed from within the Department to change the tax-exempt policy,<sup>137</sup> and became only one of two lawyers (with Reynolds) to sign the government's brief supporting the decision to grant tax-exempt status. The National Law Journal identified both Wallace and Cooper as bright lights of the "right-wing legal community," noting that Wallace "has been in the center of controversy surrounding charges that he and Representative Lott have intervened at the Justice Department to change the course of civil rights cases in Mississippi."<sup>138</sup>

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<sup>129</sup> 639 F.2d 147 (4<sup>th</sup> Cir. 1980).

<sup>130</sup> 644 F.2d 879 (4<sup>th</sup> Cir. 1981).

<sup>131</sup> Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit, *Bob Jones University v. United States* (No 81-3); Petition for a Writ of Certiorari to the U.S. Court of Appeals For the Fourth Circuit, *Goldsboro Christian Schools v. United States* (No 81-1).

<sup>132</sup> Brief for the United States, *Bob Jones University v. United States* (No 81-3); *Goldsboro Christian Schools v. United States* (No 81-1) at 17.

<sup>133</sup> *Id.* at 11.

<sup>134</sup> *Reagan Advisers Missed School Case Sensitivity*, WASH. POST, Jan. 17, 1982 ("In mid-December, when the Reagan administration began its reversal of 11 years of federal policy denying tax exemptions to segregated private schools, the lobbying from the political far right had already been intense. As early as April, Rep. Trent Lott (R-Miss.) had pressured the Justice Department in letters and meetings."); *Rep. Lott Forcefully Presents His Views to the Justice Department*, WASH. POST, Feb. 19, 1982 ("[A]fter a mighty lobbying effort by Lott, the Reagan Administration announced a policy shift to grant tax-exempt status to private schools that discriminate on the basis of race."); *Abroad at Home, The Court Says No*, N.Y. TIMES, May 26, 1983 ("Senator Strom Thurmond of South Carolina, chairman of the Senate Judiciary Committee and a trustee of Bob Jones University, had pressed for a change in policy. So had Representative Trent Lott of Mississippi, the House Republican Whip."); *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools*, Hearing before the Committee on Finance United States Senate (97<sup>th</sup> Cong., 2<sup>nd</sup> Sess.) (Feb. 1, 1982) [*hereinafter* TAX EXEMPTION HEARING].

<sup>135</sup> *Rep. Lott Forcefully Presents His Views to the Justice Department*, WASH. POST, Feb. 19, 1982.

<sup>136</sup> *Id.*

<sup>137</sup> *Abroad at Home, The Court Says No*, N.Y. TIMES, May 26, 1983.

<sup>138</sup> *Five of the Top Lawyers for the Right*, NAT'L LAW J., Aug. 9, 1982.

Mr. Wallace was credited with “some of the most fiery prose” reaching the Justice Department over Lott’s signature on various matters.<sup>139</sup> The Washington Post quoted a Department source as saying, “We’ve had a Wallace watch on since early on.”<sup>140</sup> As disclosed during Wallace’s nomination to the Legal Services Board, Wallace helped draft correspondence Lott sent to the Reagan Administration, urging it to side with Bob Jones University.<sup>141</sup> One report cited a letter to President Reagan:

Wallace has also been involved in two major controversies. According to republican sources, he was involved in the drafting of the letter that his boss, Congressman Lott, sent to President Reagan urging the administration to side with segregated private schools in the celebrated Bob Jones Supreme Court case. It was this letter that the President signed off on and in doing so helped set in motion the administration’s reversal of policy on this question.<sup>142</sup>

The Presidential log includes a reference to the Lott letter: “Writes regarding pending cases concerning the tax exempt status of church schools. Indicates that the Supreme Court has now agreed to review the case of “Bob Jones University v. United States,” and urges you to intervene in this particular case.”<sup>143</sup> Reportedly, President Reagan made a notation on the log, stating, “I think we should.”<sup>144</sup>

Indeed, the record of later Congressional hearings on legislation to ban the tax-exemptions includes at least six additional letters from Trent Lott to the IRS, the Treasury Department and the Solicitor General, from October to December 1981. All six letters bear the printed initials of “mbw,” indicating Wallace may have drafted them.<sup>145</sup>

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<sup>139</sup> *Rep. Lott Forcefully Presents His Views to the Justice Department*, WASH. POST, Feb. 19, 1982.

<sup>140</sup> *Id.*

<sup>141</sup> Washington News, UNITED PRESS INT’L, Oct. 13, 1983.

<sup>142</sup> Report by Nina Totenberg, All Things Considered, NAT’L PUBLIC RADIO, Oct. 13, 1983.

<sup>143</sup> TAX EXEMPTION HEARING at 73.

<sup>144</sup> *Id.*; 200 in *U.S. Agency Criticize Decision on Tax Exemptions*, N.Y. TIMES, Feb. 3, 1982.

<sup>145</sup> TAX EXEMPTION HEARING at 48-52, 54, 70 & 72. Portions of several of the letters read as follows:

Letter to Donald Reagan, Secretary of the Treasury, Oct. 30, 1981:

“I am deeply concerned about the Government’s position in this litigation. It is a position which is both legally and politically indefensible. ... I would appreciate your working with the Service to reconsider its position.” *Id.* at 48.

Letter to Rex Lee, Solicitor General, Oct. 30, 1981:

“I am more than a little disturbed that the United States has taken a position on the merits which plainly conflicts with Congressional intent and with a specific pledge of the President’s platform. I strongly encourage your office to reconsider your position. ...

The Government does not even bother to look at the history of this particular section as it was adopted in 1938. Rather, the United States derives its construction from subsequent unrelated Congressional actions against racial discrimination. ...

The Internal Revenue Service’s action in revoking the tax exempt status of these schools is particularly reminiscent of the federal bureaucracy’s activism and usurpation of power during the previous Administration. Mississippians and many of their fellow citizens supported President Reagan simply to end this kind of unwarranted interference.

The last time I read the Constitution, it provided that the Congress is to make the law—not appointed officials. ... Congress has spoken, and its message is clear. It is up to the Government to enforce what Congress has done. I expect your office to reconsider its position and to report its decision to me.” *Id.* at 51-2.

Letter to Roscoe Egger, Commissioner of Internal Revenue, Oct. 30, 1981:

“I am deeply disturbed that the Service is urging a resolution completely contrary to the repeated declarations of the

Trent Lott also filed an *amicus curiae* brief in the Supreme Court, supporting Bob Jones University.<sup>146</sup> He disputed the United States' current interpretation of the law and urged reversal of the Fourth Circuit's ruling.<sup>147</sup> He maintained that Congress had not given the IRS authority to revoke the tax exemption and argued that the Supreme Court "cannot allow the IRS to blatantly usurp Congressional prerogatives."<sup>148</sup> Remarkably, the brief argued there was no basis for implying in this instance a public policy exception to the IRS statute:

There is a general policy against most forms of racial discrimination, but this exemption does not work a complete and direct frustration of any such sharply defined and governmentally declared state or federal policy. ...

Moreover, racial discrimination does not always violate public policy. ... If racial discrimination in the interest of diversity does not violate public policy, then surely discrimination in the practice of religion is no violation."<sup>149</sup>

In January 1982, while the Supreme Court case was pending, the Treasury Department announced that the IRS would no longer deny tax-exempt status to schools for failing to conform with "certain fundamental national policies such as those forbidding discrimination on the basis of race."<sup>150</sup> The Treasury Department's decision was based upon advice from the Justice Department that Congress

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Congress. ... I cannot understand the Services's position. ... No court has ordered the Service to do anything, and you are free to urge your own construction of Section 501c(3) before the Court. The Service is bound neither by the courts nor by the advice of its own lawyers, but you have nevertheless chosen a position clearly contrary to Congressional intent." *Id.* at 49-50.

Letter to Edward Schmults, Deputy Attorney General, Dec. 21, 1981:

"I also wrote the President regarding my concern over the continuing taxation of church schools. I enclose herewith a copy of page from the President's log on which his response is recorded. While it might be argued that his response is ambiguous, it seems to me that he is clearly agreeing that the Administration should intervene on behalf of the church schools.

I believe that it is of the highest importance to resolve this apparent conflict before any brief is filed. I am sure that the regular process of reviewing litigation does not necessarily include the President, but I believe that you should do so in this case. Given the explicit promise of his platform and his apparent intention to stand by that pledge, I do not believe that any brief should be filed which undercuts his position until he has had an opportunity to review the matter." *Id.* at 72.

Letter to Donald Regan, Secretary of the Treasury, Dec. 21, 1981:

"In anticipation of our forthcoming conversation on the taxation of church schools, I thought you might be interested in the enclosed copy of the page from the President's log on which he responds to my letter .... He appears to agree with me that the Administration should be helping these schools, which, of course, is not the position presently held by your Department.

This development makes it especially important that you review this matter before the brief is filed at the Supreme Court in the next few days. The President's platform promise and his apparent intention to stand by that pledge make it imperative that this matter be carefully considered before any position is expressed in public. In fact, I would think you might wish to discuss this matter personally with the President before the brief is filed." *Id.* at 70.

<sup>146</sup> Brief of Congressman Trent Lott *Amicus Curiae*, *Bob Jones University v. United States* (No 81-3); *Goldsboro Christian Schools v. United States* (No 81-1). It is not known who authored the brief.

<sup>147</sup> *Id.* at 11-14, 20.

<sup>148</sup> *Id.* at 19.

<sup>149</sup> *Id.* at 17-18.

<sup>150</sup> Press Release, *Treasury Establishes New Tax-Exempt Policy*, Jan. 8, 1982.

had not acted to prohibit the exemptions, and therefore the IRS lacked the statutory authority to do so.<sup>151</sup>

Numerous officials within the Reagan Administration opposed this drastic change.<sup>152</sup> These included Lawrence Wallace, the Deputy Solicitor General in charge of the Supreme Court case; Roscoe Egger, the head of the IRS; Peter Wallison, General Counsel of the Treasury Department; and Ted Olson, head of the Office of Legal Counsel.<sup>153</sup> Two hundred employees of the Civil Rights Division, including 100 lawyers, signed a letter of protest to Assistant Attorney General William Bradford Reynolds.<sup>154</sup> In response to the outcry, President Reagan did not rescind the policy but merely announced that Congress should enact legislation to deny the tax exemptions.<sup>155</sup>

The government's change in policy caused it to change its position in the Supreme Court. On the same day the new policy was announced, the United States filed a memorandum in the Supreme Court case, abandoning its defense of the policy against tax-exemptions. The memorandum informed the Court that the IRS intended to revoke its policy and reinstate tax-exempt status for the schools.<sup>156</sup>

The United States' brief in the Supreme Court reflected two new positions: (1) that the IRS did *not* have the authority to revoke tax-exempt status and; (2) if the IRS had such authority, the exercise of such authority did not violate the schools' right to freedom of religion under the First Amendment.<sup>157</sup> Appearing on the brief were Lawrence Wallace as Acting Solicitor General, William Bradford Reynolds and Charles Cooper. Lawrence Wallace took the extraordinary step of stating in a footnote that he agreed only with the government's second position.<sup>158</sup> The Wall Street Journal called this development "an unprecedented indication of internal turmoil within the office of the nation's highest advocate."<sup>159</sup> The public disagreement resulted in the creation of a new "principal deputy" position within the Solicitor General's office to ensure the Administration's positions were reflected in the Supreme Court.<sup>160</sup>

Since the government abandoned its earlier position against the tax-exemptions, the Supreme Court took the unusual step of appointing former Transportation Secretary William T. Coleman to argue the case in support of the appellate judgments below. Mr. Coleman filed a brief of *amicus curiae*, stating that "recognition of tax exemption would be utterly inconsistent with federal law and fundamental

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<sup>151</sup> *Id.*

<sup>152</sup> *Abroad at Home, The Court Says No*, N.Y. TIMES, May 26, 1983; 200 in *U.S. Agency Criticize Decision on Tax Exemptions*, N.Y. TIMES, Feb. 3, 1982.

<sup>153</sup> 200 in *U.S. Agency Criticize Decision on Tax Exemptions*, N.Y. TIMES, Feb. 3, 1982.

<sup>154</sup> *Disagreements, But No Rebellion*, N.Y. TIMES, Feb. 12, 1982.

<sup>155</sup> 200 in *U.S. Agency Criticize Decision on Tax Exemptions*, N.Y. TIMES, Feb. 3, 1982;

<sup>156</sup> Memorandum for the United States, *Bob Jones University v. United States* (No 81-3); *Goldsboro Christian Schools v. United States* (No 81-1). The United States first requested that the Bob Jones case be vacated as moot. *Id.* at 2. Before the Supreme Court could rule on the motion, the D.C. Circuit made a ruling in *Wright v. Regan*, No. 80-1124 (Feb. 18, 1982), enjoining the United States from granting tax-exempt status to any school discriminating on the basis of race. *Bob Jones University v. United States*, 461 U.S. 574, 585 n.9 (1983). Based on the D.C. Circuit ruling, the United States then informed the Supreme Court it would not revoke the Revenue Ruling and withdrew the request that the case be dismissed as moot. *Id.*

<sup>157</sup> Brief for the United States, *Bob Jones University v. United States* (No 81-3); *Goldsboro Christian Schools v. United States* (No 81-1) at 12, 42.

<sup>158</sup> *Id.* at I.

<sup>159</sup> *Reagan Conservatives Assail Solicitor General For His Independence*, WALL ST. J. Sept. 6, 1984.

<sup>160</sup> *Id.*

national policy condemning racial discrimination in public and private education ....”<sup>161</sup> Mr. Coleman stated there was “no reasonable doubt that Congress has ratified and approved the IRS policy.”<sup>162</sup>

On May 24, 1983, the Supreme Court issued its decision. *Bob Jones University v. United States*.<sup>163</sup> In an opinion by Chief Justice Warren Burger, the Court ruled that the IRS was correct to prohibit tax-exempt status for private schools practicing race discrimination. “It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities ....”<sup>164</sup> The Court stated “[t]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice,”<sup>165</sup> and concluded that “racial discrimination in education is contrary to public policy.”<sup>166</sup>

Justice William Rehnquist wrote the only dissent. While he did not disagree with finding a strong national policy opposed to race discrimination, he believed Congress had not acted to deny tax-exempt status to private schools having a racially discriminatory policy.<sup>167</sup>

At his nominations hearing for the Legal Services Board months later, Michael Wallace told the Senate it was his own view was that Bob Jones University should have been permitted to maintain its tax-exempt status. Since this testimony, there is no evidence that Mr. Wallace has distanced himself from this public position siding with Bob Jones University:

Senator Eagleton: You can say, though, that you personally were in favor of the view that Bob Jones University should not lose its tax-exempt status.

Michael Wallace: I personally believe that the interpretation of the Internal Revenue Code advanced by the Department of Justice and the Treasury Department before the Supreme Court was correct.

Senator Eagleton: You disagreed with the position taken by the former Secretary of Transportation who was appointed by the Court to plead the case because the Justice Department had defaulted on its responsibility, Mr. William Coleman?

Michael Wallace: Two parts to that question: I disagree with Mr. Coleman’s view of the case. I also disagree that the Justice Department defaulted on its responsibility. If the Justice Department is of the opinion that it is taking an erroneous position with regard to the rights of the litigant, I believe it is the responsibility of the Justice Department to say so to the Court and to quit suing that litigant.<sup>168</sup>

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<sup>161</sup> Brief of Amicus Curiae In Support of the Judgments Below, *Bob Jones University v. United States* (No 81-3); *Goldsboro Christian Schools v. United States* (No 81-1) at 8.

<sup>162</sup> *Id.* at 9.

<sup>163</sup> 461 U.S. 574 (1983).

<sup>164</sup> *Id.* at 595.

<sup>165</sup> *Id.* at 592.

<sup>166</sup> *Id.* at 595.

<sup>167</sup> *Id.* at 622 (Rehnquist, J., dissenting).

<sup>168</sup> 1983 NOMINATIONS HEARING at 169.

## VII. AFFIRMATIVE ACTION

Wallace's position on affirmative action and other race-conscious measures upheld by courts needs to be fully explored by the Senate. As an appellate court judge in the circuit with the highest minority population in the country, he will likely be called upon to rule in affirmative action cases involving education, employment or contracting. During his nomination to Legal Services Board, he was asked about supporting the elimination of the Legal Services Corporation minority recruitment effort, the Reginald Heber Smith Fellowship Program. In the following responses to Senate questions, Mr. Wallace indicated he did not approve even of efforts to recruit minority lawyers. He clearly stated he was opposed to race-conscious government action. His blanket statement that such action violated the law was simply incorrect, even at that time. The ABA review raises the specific concern about whether Mr. Wallace can follow the law if he holds contrary personal views. These factors all cast doubt that Mr. Wallace can fairly apply laws that uphold race-conscious action under some circumstances.

Q. Recognizing that the number of minority lawyers is far below the proportionate representation of minorities in society in general, do you feel that situations may arise where in order to attract minority lawyers to a program they may have to be specifically recruited?

A. I do not believe that it is necessary to employ minority lawyers to serve minority clients. Not all lawyers can adequately represent all clients, but good ones can, just as good Senators can represent all types of citizens.

Q. Do you think a program that specifically seeks as part of its goal to recruit women and minorities may have legitimate value in a program of this kind?

A. No. The proper goal is to recruit lawyers, or whatever race or sex, who can properly represent minorities and women, as well as other clients.

Q. In the transcript of the Committee on Appropriations and Audit meeting of February 21st, you indicated that in making your decision regarding the future of that program that you were not interested in the minority recruiting goals of the program. Do you mean by that statement that minority recruitment is not a legitimate goal? If that is what you mean, can you tell us why?

A. That is exactly what I mean. I am opposed to race-conscious government action, and I believe the law forbids it. We probably will find it necessary to recruit lawyers who can respond to the special circumstances of minority clients, especially those who speak little English. Those lawyers need not necessarily themselves be minority citizens.<sup>169</sup>

## VIII. PRISON CONDITIONS IN MISSISSIPPI

Another issue warranting Senate review is the degree of Mr. Wallace's involvement, while counsel to Congressman Lott, in Justice Department litigation against the State of Mississippi over the conditions of its prisons. The issue arose during Wallace's nomination to the Legal Services Board; the

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<sup>169</sup> 1985 NOMINATIONS HEARING at 124 (Response to Questions from Senator Kennedy, Dodd and Kerry).

“sharpest exchanges” of Wallace’s hearing occurred when Wallace refused to answer questions about whether he drafted a letter from Lott pressing the Justice Department to drop plans to inspect the jail conditions.<sup>170</sup> The matter raises questions about whether Mr. Wallace subscribes to the strong views reflected in the correspondence and the nature of his own views on the proper role of the federal judiciary in enforcing constitutional guarantees.

Pursuant to a Justice Department lawsuit, Mississippi’s prison system was placed under federal court order in the 1970s to improve conditions of confinement; and officials began shifting state prisoners into county jails.<sup>171</sup> In April 1981, Justice Department lawyers asked U.S. District Judge William Keady to order a federal inspection of the county jails.<sup>172</sup> Congressman Lott reportedly asked the Justice Department for a three-week delay of the hearing, and wrote a letter to the Department asking for an explanation about why it wanted the information.<sup>173</sup>

Prior to the hearing, Deputy Attorney General Schmults wrote to Congressman Lott, stating that the Justice Department would allow the state to gather the information.<sup>174</sup> Schmults assured Lott that Department lawyers would be ordered to approach the county jails issue with “maximum possible deference to the right of Mississippi to run its own affairs without federal interference and the need not to burden Mississippi with excessive compliance costs.”<sup>175</sup> Mississippi officials relied on Schmults’ letter in court, and Judge Keady ruled that the Department could not use federal agents for the inspections.<sup>176</sup> Judge Keady also ruled that state inmates held in the county jails were entitled to the same conditions of confinement as those housed in state prisons.<sup>177</sup>

On October 21, 1981, Trent Lott reportedly sent a letter to Schmults. As with Congressman Lott’s letters regarding the voting rights lawsuit and Bob Jones University, the initials “mbw” appeared after “TL.”<sup>178</sup> At the time of Wallace’s Legal Services hearing, Trent Lott’s press secretary confirmed that Michael Wallace had written the letter, although Lott later disavowed this.<sup>179</sup>

The letter complained that the Justice Department lawyers, without seeking approval, sought to expand the state prison litigation to include state prisoners held in Mississippi’s 82 county jails.<sup>180</sup> The letter referenced an agreement to “moderate [the] Department’s demands,” and noted difficulty with lawyers in the field in honoring that agreement. The letter refers to the understanding that “it will not be the policy of Ronald Reagan’s Administration to force state penal authorities to conform to ideal standards. Rather, the Department will seek adherence to only the minimum standards compelled by the Constitution.” The letter demanded to know why a new lawyer was insisting that American Correctional Association standards be implemented in each county jail. The letter noted the standards were adopted by consent for application to penitentiaries and could not reasonably be applied to incomparably smaller institutions. “Nevertheless, your lawyers are apparently seeking perversely to compel even more

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<sup>170</sup> LSC Board Nominees in Limbo, NAT’L LAW J., Nov. 14, 1983.

<sup>171</sup> Lott, *Cochran Request Changes in Rights Cases*, CLARION-LEDGER, May 22, 1981.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> 1983 NOMINATIONS HEARING at 175 (enclosing *Wheels of Justice*, NAT. J., Nov. 20, 1982).

<sup>176</sup> Lott, *Cochran Request Changes in Rights Cases*, CLARION-LEDGER, May 22, 1981.

<sup>177</sup> *Judge Rules for Equal Treatment in Jails, Prison*, CLARION-LEDGER, May 24, 1981.

<sup>178</sup> 1983 NOMINATIONS HEARING at 171-72.

<sup>179</sup> Nina Totenberg, *All Things Considered*, NAT’L PUBLIC RADIO, Oct. 13 & 14, 1983.

<sup>180</sup> 1983 NOMINATIONS HEARING at 171-72 (Letter from Rep. Trent Lott to Deputy Attorney General Schmults, Oct. 21, 1983).

restrictive standards on the local facilities. ... This is contrary to common sense and to my understanding with you. I expect the situation to be corrected without delay.” The letter continued:

When Bradford Reynolds was nominated to take charge of the Civil Rights Division, several Members of Congress expressed the concern that the Division was uncontrollable and that lawyers hired by earlier Administrations would have to be replaced [sic] on a vast scale. We were assured by you and by the Attorney General that Mr. Reynolds with your help would be able to render the Division subservient to Departmental policy. Apparently you are satisfied that you have having no difficulty in honoring your commitment to us, as I understand that the Department’s first action on being able to hire new lawyers was to place onto the public payroll another hundred lawyers hired by the preceding Administration. I can only conclude that you have decided that you have all the personnel necessary to carry out your commitment to us and that henceforth all actions by Departmental lawyers may fairly be attributed by the President’s appointees.

With this in mind, I wish to know whether or not [the lawyer] is acting according to your wishes in the Mississippi prison case. If she is, I want to know why Administration policy has changed. If she is not, I want to know why she is being permitted to pursue her own policies at taxpayer expense. These are not rhetorical questions. I want to know, with reference to chapter and verse of the civil service statutes, why she has not been fired. There are too many lawyers ready and eager to carry out Ronald Reagan’s policies to permit those policies to be subverted by mere civil servants.<sup>181</sup>

National Public Radio reported that Congressman Lott’s letter outraged Justice Department officials and that Lott withdrew it, blamed it on an unnamed aide, and submitted a more moderate letter.<sup>182</sup>

Mr. Schmults responded to Congressman Lott, assuring him that “the Department has disavowed any claim that the constitutional standards applicable to state institutions are equally applicable to county jails.”<sup>183</sup> Schmults noted that the Department was unable to obtain information about conditions in the county jails and therefore could not take a position on whether they comply with constitutional norms, writing that “[i]t would measurably advance the resolution of this issue if the Department were provided information regarding county jail conditions without litigation or delay.”<sup>184</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> Nina Totenberg, *All Things Considered*, NAT’L PUBLIC RADIO, Oct. 13 & 14, 1983. Trent Lott sent a similar letter to Schmults two weeks later, reflecting the initials “si,” where “mbw” had been noted previously. Letter from Rep. Trent Lott to Deputy Attorney General Edward Schmults, Nov. 2, 1981. The letter had the same introduction: “I am deeply concerned about reports I have received from Mississippi concerning the federal government’s conduct of the continuing litigation over state prisoners.” *Id.* But it was considerably more moderate in tone. While noting that Department lawyers sought to expand the litigation, it omitted the reference that they did so “without seeking approval of higher authorities.” *Id.* The letter omitted reference to the understanding that the Department would seek adherence to only “minimum” standards compelled by the Constitution, referring instead to “standards compelled by the Constitution.” *Id.* It omitted many of the references to Justice Department lawyers.

<sup>183</sup> Letter from Deputy Attorney General Edwards Schmults to Rep. Trent Lott, Nov. 25, 1981.

<sup>184</sup> *Id.*

On December 15, Congressman Lott sent Schmults another letter, reflecting the initials “mbw”:

I certainly understand the difficulty which your lawyers face in obtaining good information about conditions in county jails. However, it appears to be that this difficulty arises, not from any cooperation on the part of the state, but from the terms of Judge Keady’s order of May 20, 1981, and the basic structure of local government in Mississippi. ... In fact, the state has done much better than that, sending inquiries to local authorities in an attempt to secure new information. To obtain more would require the court to assert jurisdiction over a whole new class of defendants, a step which I trust you would not permit without full consultation with appropriate officials.

I am delighted to learn that your own position remains that county jails are not necessarily subject to the same constitutional standards as are state institutions. However, one could be excused for concluding from [the Justice Department lawyer’s Response] that she is not in accord with this position. The Response repeatedly asserts that each county jail is required to comply with the prior orders in *Gates*, except where concerns of scale would require common-sense modification. I would appreciate your explanation of this apparent discrepancy.

You had assured me on May 19, 1981, that you were only interested in enforcing the minimum demands of the Constitution. It should be apparent to all concerned that the dictates of *Gates* are not synonymous in all respects with the dictates of the Constitution. Many aspects of *Gates* were decided by consent, based upon the estimates of its own capacities for compliance. Those estimates have no relevance at all to the minimum standards set by the Constitution regarding another jail. ....

Most disturbing is the Response’s suggestion that the *Gates* orders should take precedence over orders applicable to particular jails by judges more familiar with local conditions. It is absurd to suppose that the Constitution requires compliance with two court orders on the same subject. Such overregulation by federal authorities is exactly the sort of thing that President Reagan is pledged to bring to an end.

Fortunately, Judge Keady’s order of November 6, 1981, rejects for the most part the straight-jacket approach set out in the Department’s response. However, this happy result was reached only after protracted litigation and significant expense to the taxpayers of Mississippi and of the United States.

I am satisfied that you are doing what you can to avoid this kind of problem. I am not satisfied, however, that your policies are being adequately effectuated by the lawyers in the field. ... [The Justice Department lawyer’s] Response certainly gives no sign that she is interested in effectuating those assurances. You may have a different interpretation of the available evidence, but my interpretation is that a better system for delivering and enforcing orders is badly needed....<sup>185</sup>

Less than one year later, a fire occurred in a Harrison County jail located in Biloxi. Twenty-nine inmates died when flammable bedding spread fumes through the jail.<sup>186</sup> Twenty-one of the victims were

<sup>185</sup> Letter from Congressman Trent Lott to Deputy Attorney General Edward Schmults, Dec. 15, 1981.

<sup>186</sup> *Washington News*, UNITED PRESS INT’L, Oct. 13, 1983.

state prisoners.<sup>187</sup> The Justice Department issued a press release on the day of the fire, stating that its Civil Rights Division had been “actively investigating” conditions in the Biloxi jail. The National Journal later reported, “[w]hat the Justice press release did not say, however, was the Department blocked its own lawyers’ efforts to investigate the Biloxi jail and others in Mississippi 18 months ago.”<sup>188</sup>

## IX. CONCLUSION

President Bush has had eight opportunities to nominate Mississippians to the federal bench. He has not used one of those selections to ensure that *all* of Mississippi feels represented on its federal courts. The Wallace nomination goes well beyond the important issue of diversity on the bench. Like the ill-advised Pickering nomination, it represents a backward slide for a state whose only movement on civil rights should be forward. Voting rights are sacrosanct in Mississippi, which continues to struggle with ensuring full political participation for all of its citizens. Mr. Wallace has aggressively opposed measures that help to ensure representation for African Americans, and has taken other positions detrimental to their advancement in American society. When combined with the serious reports detailing the inflexibility of Mr. Wallace’s views in the face of competing laws, Mr. Wallace’s nomination poses a significant threat to the advancement of civil rights within the Fifth Circuit. Mr. Wallace should not be confirmed, especially to a court so recognized by history for its strong stand for justice.

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<sup>187</sup> 1983 NOMINATIONS HEARING at 175 (enclosing *Wheels of Justice*, NAT. J., Nov. 20, 1982).

<sup>188</sup> *Id.*