Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Ranking Member, Judiciary Committee

On the Nomination of Michael Wallace to the 5th Circuit

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The hearing today involves an important and controversial nomination. The Committee is attempting to hold this hearing during a very busy week. There is also a vast amount of unfinished business still before the Senate for action this week.

We have already held three other confirmation hearings this month, in which 12 nominees participated. This is a fourth hearing. This pace is one that I think is simply too fast for lifetime appointments. Nonetheless, Democratic staff and Senators have worked hard to clear a large number of nominations to go forward, leaving little time for a nominee as controversial as Michael Wallace.

With all of that going on, here we are very late in the day beginning a hearing with five panels that could go late into the evening. Either we will rush to get through this hearing too quickly, or we will lose to scheduling conflicts many of those Senators who have been able to make it here under these conditions. Either way, this is not an acceptable way to consider a nominee who presents as many serious problems as Mr. Wallace. If he is to be seriously considered at all, we will need to have another hearing for him at a later time when the Committee can focus on this nomination. Mr. Wallace received the first unanimous 'Not Qualified' rating from the American Bar Association for a circuit court nominee since at least the Reagan administration. In fact, this week, after a supplemental evaluation, the ABA again, with seven new members, found him to be unanimously "not qualified. Twenty one members of the ABA's standing committee on federal judiciary have now rated Mr. Wallace's qualifications. None have found him to be qualified. This is worth a careful look.

The Chairman has also taken the unprecedented step of holding a joint hearing on two nominees who received 'Not Qualified' ratings from the ABA. I cannot remember another time where more than one nominee rated 'Not Qualified' appeared at a single hearing. Mr. Wallace and Judge Bryant present very different issues, and it is not fair to either of them or to the Committee to throw them together in one hearing.

This year, the Senate has so far confirmed 31 judicial nominees. The Republican Senate confirmed only 17 of President Clinton's judicial nominees in the 1996 session. We have almost doubled that number. This is a far cry from the days when the Republican Congress pocket filibustered more than 60 of President Clinton's nominees, refusing even to bring them up for a vote in Committee.

Of course, we could have moved much faster this year if the White House had sent over consensus nominees early in the year. Regrettably, the Administration concentrated on a few highly controversial nominees.

Even in September, the White House has undermined this process. Instead of focusing on consensus nominees, the President sent back to us five highly controversial nominees, including Mr. Wallace, who had been returned to the White House in the hope that the President would take the opportunity to move on to consensus choices.

This Committee should not be a rubber stamp for the President's nominations. We should be taking our constitutional responsibility to advise and consent seriously. That means taking a long, hard look before giving a lifetime appointment to one of our nation's highest courts to someone who raises as many concerns as Michael Wallace.

One of this Committee's--and this Congress'-- principle accomplishments this year was the bipartisan reauthorization of the expiring provisions of the Voting Rights Act. As we heard in nine hearings in our Committee and in thousands of pages of testimony, statistics, and reports, the Voting Rights Act remains a cornerstone of our inclusive democracy, protecting the rights of all Americans to vote free from discrimination and to have their vote counted. The President acknowledged the continued importance of this landmark civil rights law when he signed the reauthorization into law. Almost 500 members of Congress who voted to reauthorize the VRA recognized it.

Yet, already there are those mounting challenges to the reauthorization and to the gains we have made. Some of the few Members of Congress who opposed the reauthorization are urging the filing of lawsuits seeking to undermine the reauthorization in the courts. And just last week the Republican leadership in the House retreated from its commitment to protect voting rights for all Americans by passing H.R. 4844, the so-called "Federal Election Integrity Act of 2006." This is a bill which would re-enact the worst of the Jim Crow era by enacting a modern-day poll tax--it would require photo identification that would be difficult and expensive to procure, especially for minorities, the poor, the elderly, and many of the most vulnerable groups in our society. We should reject similar efforts in the Senate.

I am concerned that Mr. Wallace would be among those rolling back the gains we have made in securing the guarantees of the 15th Amendment by applying an extremely narrow view of the Voting Rights Act and congressional authority to enact these vital remedies. There is much in Mr. Wallace's long history with the Voting Rights Act to suggest it. As a congressional counsel, Mr. Wallace helped lead the effort to defeat the 1982 reauthorization of the Act and severely limit its protections. Soon after he lost that political fight, he tried to win in court what he could not in Congress, and he twisted the words of Congress to do so. He argued in a voting rights case in federal court that Congress did not mean what it said when it clarified that Section 2 of the Act

requires only an "effects test" rather than the much more difficult to prove "intent to discriminate" test. One federal court described his argument that Section 2 required an "intent test" as a waste of court resources, holding: "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." The court also rejected Mr. Wallace's argument that the effects test required by Section 2 was beyond Congress' power to enforce the guarantees of the 15th Amendment. Mr. Wallace's inability to separate his policy preferences from the legal arguments he sought to advance raises serious concern that he would not fulfill the proper role of a judge-- to decide what the law is, rather than what he wishes it would be.

I am concerned that as a congressional counsel, Mr. Wallace apparently drafted letters urging the Regan Administration to allow Bob Jones University and other religious institutions with racially discriminatory policies to have tax exempt status. In his 1983 hearing for his nomination to the Legal Services Corporation, Mr. Wallace stated his own personal view that Bob Jones University should be tax exempt. The concerns about Mr. Wallace's civil rights record are considerable, and I hope to explore them today.

Mr. Wallace also served as a director and as chairman of the board of the Legal Services Corporation from 1984 to 1990. The Legal Services Corporation is a federal agency which coordinates provision of legal services to low-income people. Mr. Wallace, though, served on the LSC board as the point person in an effort to dismantle the Legal Services Corporation. His apparent hostility not only to a vital program that provides legal services to the poor, but also to the principle behind it, worries me deeply.

Those are just a few of the very significant concerns I have already identified with Mr. Wallace's nomination. His work as a litigator and throughout his career suggests a results-oriented and politically-motivated approach to the law, which gives me pause at the prospect of a lifetime appointment to an influential federal court. My concerns are echoed in the testimony of the American Bar Association, which gave Mr. Wallace a unanimous rating of 'Not Qualified.' The ABA did so after three reviews by a politically and ethnically diverse group of lawyers. They, too, expressed concern about Mr. Wallace's civil rights record and his attitude toward legal services for the poor. They also raised temperament concerns. I look forward to hearing more about those today.

I expect to hear a great deal of criticism of the ABA and its ratings from Republican Senators today. I recall, though, that the Republicans were recently touting the "well qualified" ratings of Justice Alito and Chief Justice Roberts during their confirmation process. A Republican Senator even touted the "well qualified" rating given to Peter Keisler at a recent hearing - after we had received the "Not Qualified" rating for Michael Wallace. I am surprised that Republican Senators are now attacking the same ABA ratings they have relied upon so heavily over the years when favorable. In my view, the ABA gave Judge Alito a pass on his ethics violations and has been exceedingly accommodating to this Administration as it has packed the courts. Its unanimous "Not Qualified" finding for Mr. Wallace should be taken seriously.

Republicans have done everything they could to tilt the rating, from intimidation to personal attacks to President Bush changing a process that had worked for more than 50 years in order to

try to suppress negative comment. We should hesitate before attacking the ABA's use of confidentiality and pushing changes that will further undermine their peer review process.

I was disappointed that the ABA's testimony, provided to the Committee in advance of a hearing that was then postponed, was leaked to right wing bloggers even though the Chairman had designated it Committee confidential. I can understand the ABA's unwillingness to violate the traditional assurances of confidentiality it gave to sources and its unwillingness to share confidential information when it is leaked to right wing bloggers for purposes of attacking the ABA.

I want to emphasize, though, that, while I respect the ABA's confidential process, I make my decisions independently based on my own review of a nominee's record. The ABA is a private voluntary association, and its ratings are advisory. Senators are free to rely or not rely on the ABA's rating. Sometimes I agree with them, sometimes I do not.

In Mr. Wallace's case, the ABA's exhaustive investigation led them to many of the same concerns my own review of his record has raised.

I want to thank the witnesses who have taken time out of their busy schedule to discuss this nomination with us today. Robert McDuff is a well respected civil rights, voting rights, and criminal defense attorney who has practiced law in Mississippi for nearly 25 years. He has argued four times before the Supreme Court, the most recent case involving a Mississippi redistricting plan in which Mr. Wallace was his opposing counsel. Carroll Rhodes, who testifies today on behalf of the Mississippi State Counsel of the NAACP, is a solo practitioner who has practiced law in Mississippi for 28 years and been instrumental in enforcing the Voting Rights Act. Mr. Rhodes has also served as a judge in the Municipal Court of Hazlehurst and worked as a Staff Attorney for the Central Mississippi Legal Services. Likewise, the Honorable Richard Blumenthal, who testifies today in support of Judge Bryant's nomination, is the Attorney General of the State of Connecticut and served as law clerk to U.S District Judge Jon O. Newman and U.S. Supreme Court Justice Harry Blackmun. I look forward to hearing from them and all the witnesses before us today.