Testimony of

Mr. Robert B. McDuff

September 26, 2006

STATEMENT OF ROBERT B. MCDUFF
FOR THE SENATE JUDICIARY COMMITTEE
HEARING TO BE HELD SEPTEMBER 26, 2006

My name is Robert McDuff and I am a lawyer in Jackson, Mississippi. I am a native of Mississippi and I have practiced law for nearly 25 years, most of it in Mississippi. Much of my practice involved the representation of African-American voters in voting rights cases. I participated in at least three major cases in which Michael Wallace and I were on opposite sides. Two of these were voting rights cases -- the congressional redistricting case after the 1980 census and the congressional redistricting litigation twenty years later after the 2000 census.

I join the Magnolia Bar Assocation, the Mississippi NAACP, the NAACP Legal Defense Fund, Congressman Bennie Thompson, and others in opposing this particular nomination to the United States Court of Appeals for the Fifth Circuit. My primary concerns are two-fold: First, this nomination to this very important judgeship continues an unfortunate trend in recent years of almost totally excluding African-Americans from the federal judiciary in Mississippi and from the Fifth Circuit. Second, I believe Mr. Wallace has a very narrow view of the scope of the Voting Rights Act and of the power of Congress to enact broad remedial legislation like the Voting Rights Act to protect people against discrimination.

African-Americans are 36% of the population in Mississippi, higher than any of the 50 states. Louisiana, also in the Fifth Circuit, is the state with the second highest African-American population. But only one of the seventeen active seats for judges on the Fifth Circuit is filled by an African-American. That judge is from Louisiana and was appointed twelve years ago by President Clinton. President George W. Bush has made five nominations to the Fifth Circuit, none of them African-American. In Mississippi, the only African-American federal judge is a district judge appointed by President Reagan over twenty years ago. President Bush has made eight nominations to federal judgeships from Mississippi, none of them African-American.

The recommendations that apparently have been made by Senator Lott and Senator Cochran in recent years, and the nominations by President Bush, harken back to an unfortunate period in our past when African-Americans were not considered for the judiciary or other positions in government. We are now at a time in our history when it is vitally important to share power and responsibility and to overcome the legacy of racial discrimination. It is a scandal that these Senators and this President are making no effort to integrate the federal judiciary from Mississippi beyond the one African-American judge who was appointed to the district court bench twenty years ago, and no effort to integrate the Fifth Circuit beyond the one African-American judge appointed to that court twelve years ago.

It does not have to continue this way. Congressman Bennie Thompson, a Democrat, and Congressman Chip Pickering, a Republican, have both called for greater diversity in the federal judiciary from Mississippi. The existing vacancy on the Fifth Circuit is a good place to start. There are many qualified people, including African-American judges who should be politically acceptable to Republican senators and a Republican president. For example, Chief Judge Henry Wingate of the U.S. District Court, appointed to the trial bench by a Republican president over twenty years ago, would be an excellent appellate judge. So would Judge Dorothy Colom of Columbus, a distinguished state court judge who has served in the judiciary for many years. She is married to a longtime Republican lawyer who has served on the Mississippi Republican Executive Committee, Senator Cochran's first campaign committee, and President Reagan's transition team, and who was a delegate for President Bush at the most recent Republican convention. Both Judge Wingate and Judge Colom would be outstanding nominees for the Fifth Circuit. If Judge Wingate were nominated, there are other qualified African-American judges and lawyers who could be appointed to his district court seat. Now is the time to move forward and go beyond the one African-American judge among the seventeen active positions on the Fifth Circuit, and to break the unfortunate pattern of exclusion of African-Americans from recent appointments to Mississippi's federal judiciary.

Michael Wallace is a talented lawyer blessed with a keen intellect. He has always been very civil with me and straightforward in the cases where we have opposed each other. I see from the ABA report that others have had different experiences, and I cannot speak to those. My concern is with something more important, and that is the negative impact that I believe he will have as a judge because of his views on the law.

While appellate judges are bound by decisions of the Supreme Court, they nevertheless have a great deal of discretion in deciding individual cases and also power to move the law in particular directions. Theirs is not a ministerial job, automatically applying existing precedents to reach predictable outcomes. Inevitably, their views about the law come into play.

Mr. Wallace is, I believe, a person of strongly held views. My first involvement with him in a case was when I was the junior member of a three-lawyer team representing one of the groups of African-American plaintiffs in the Mississippi congressional redistricting litigation of the 1980s. He represented the Mississippi Republican Executive Committee and tried vigorously to prevent the drawing of Mississippi's first majority African-American voting age population (VAP) congressional district. Mississippi's congressional delegation had been all-white throughout the twentieth century, and with the advent of the civil rights movement, the Mississippi legislature had drawn the districts so that none had an African-American majority that would allow newly enfranchised black voters to elect a candidate of their choice. Those of us representing African-American voters in the post-1980 case argued that a plan where all five congressional districts were majority white VAP in a state that was 35% African-American led to a discriminatory result in violation of the bipartisan amendment to Section 2 of the Voting Rights Act passed two years earlier by Congress and signed by President Reagan. Mr. Wallace, on the other hand, contended in the face of totally contrary legislative history that Congress did not intend to outlaw districting plans simply on the basis of a discriminatory result. He also argued that if Congress had done so, it would have exceeded its power under the Constitution.

This was a startling claim under the law. Fortunately, it was rejected out of hand by the three-judge federal district court in Mississippi in 1984, which held that the results test of Section 2 required to an end to the all-white majority VAP districting plan. The Court ordered created a plan with one majority African-American district of the five. (The court also said that in pursuit of these arguments, Mr. Wallace "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."). Mr. Wallace's Section 2 appeal was summarily rejected later that year by the United States Supreme Court, thus affirming the results test of the 1982 amendment and affirming Congress's power to prohibit that sort of discrimination in voting. Two years later, the state's first black member of Congress in the twentieth century was elected from this district, and ever since that time, the Mississippi congressional delegation has been integrated.

But that would have changed in 2002 if Mr. Wallace's views in a more recent congressional redistricting case had prevailed. The Mississippi legislature failed to agree on a congressional redistricting plan after the 2000 census. In the ensuing litigation, Mr. Wallace represented the Mississippi Republican Executive Committee and argued that an obscure 1941 federal statute required that all of Mississippi's members of the U.S. House of Representatives should be elected at large as a remedy for the legislative default. This position was contradicted by the language of a later 1967 federal statute and by every court since then that had been required to adopt a congressional plan in the wake of a legislative default. Mr. Wallace's argument, if accepted, would have turned the clock in Mississippi back to the time when every one of its congressmen was elected by a white majority and, in the context of the racial bloc voting that still exists there, back to a segregated congressional delegation. Fortunately, this effort once again was rejected by a three-judge court in Mississippi and on appeal by the United States Supreme Court in an opinion by Justice Scalia.

If Mr. Wallace's position had prevailed in these cases, Mississippi would be a different place than it is. One of the awful legacies of the slavery and the vicious racial discrimination and separation that followed in its wake for over a hundred years is the presence of racial bloc voting, where whites rarely vote for blacks and blacks rarely vote for whites in black-white contests. This is a condition that exists in Mississippi and many other places. One way in which a disproportionate amount of political power remained in white hands after the Voting Rights Act was passed in 1965 was through the use of at-large elections, multi-member districts, and other districting plans where an unfairly high number of the elected officials were chosen by majority white electorates. The only way this could be broken down was through litigation. Congress concluded in 1982 that this remained a problem in Mississippi and other places in the country and amended Section 2 of the Act to clearly outlaw those systems that resulted in discrimination without placing on African-American voters to onerous burden of proving discriminatory intent.

If Mr. Wallace's contrary position had prevailed, Mississippi would not have made the progress it has made in dismantling unfair election systems for Congress, the state legislature, county boards of supervisors, city councils, and school boards. It is quite conceivable that we would still have an all-white congressional delegation as we did in 1984, a state senate that is only 4% African-American as we did in 1984, a state house of representatives that is only 13% African-American as we did in 1984, and vast under-representation of African-Americans in local governments as

we did in 1984, all in a state that is 36% African-American. Mississippi has the highest number of African-American elected officials in the country, but most of those were elected in majority African-American election districts created as the result of the Voting Rights Act. The number would be far smaller if Mr. Wallace's view had carried the day.

Of course, Mr. Wallace was representing a client in those cases. But this does not seem to be a situation where the lawyer argued something for a client that was contrary to the lawyer's own view. Nor does it appear that the client designed the strategy and the lawyer simply implemented it. When Mr. Wallace represented the Mississippi Republican Executive Committee in both 1984 and 2002, he knew more about the Voting Rights Act than anyone on that committee. In fact, in 1981-82, when working for then-Representative Lott, he had been one of the most active legislative staffers in the Congress on the 1982 renewal. He worked not only on the House side, but also worked in the Senate on loan as an adviser to Senator Hatch, then Chair of the Judiciary Committee, and sat through the lengthy hearings. In his role as a key staffer, he is reported to have worked strenuously against the effort to renew Section 5 and amend Section 2 of the Act. One year after the renewal, in 1983, during a hearing on his nomination to join the legal services board, Mr. Wallace testified that he believed the intent test was the proper test for Section 2. In light of all of this, it is pretty clear that these were Mr. Wallace's own views, and that he was the architect of the Mississippi Republican Committee's challenge to the results test of the amendment to Section 2 and to the power of Congress to adopt the results test in passing that legislation.

In 2001-2002, he was (if I remember correctly) not only the lawyer for the Mississippi Republican Executive Committee, but a member of it. Again, in light of his legal experience and knowledge, it is obvious that he was the author of the argument that Mississippi should elect all of its members of Congress at-large in the wake of the legislature's failure to adopt a plan.

These positions are consistent with what appears to be Mr. Wallace's hostility over the years to court-ordered redistrictings that increase the number of majority African-American districts. In a 1978 op-ed article, he stated that these court decisions resulted from "[t]he notion that citizens can only be properly represented by persons of their own race" and that this is "poor law and poorer philosophy." He also suggested that minorities were as well off politically being able to elect none of the members of a city's governing board as they would be if they could elect a third of them -- in other words, minorities achieved no political gain by integrating an elected body unless they could control a majority of the seats. This reflected a fundamental misunderstanding of the minority vote dilution argument, which is not that African-American citizens can only be represented by African-Americans. Instead, the point is that African-Americans have a right (assuming sufficient numbers in a sufficiently compact geographic area) to some districts where they constitute a majority and the right to elect African-American representatives from those districts if they so choose rather than living in an area where all of the elected officials are chosen by the white majority.

In an article published in 1996, Mr. Wallace stated that the "[t]he fundamental problem is the premise of dilution cases that elected officials have, and ought to be responsive to, racially defined constituencies." Again, this is a misunderstanding of the dilution cases, which focus on the right of minorities to be able to elect some candidates of choice, even in a place afflicted with

racially polarized, so that they can racially integrate public bodies if they so choose and be represented by who they choose.

Vote dilution cases are successful only where whites have disproportionate electoral power and are over-represented. Mr. Wallace's writings express no concern about that sort of over-representation in the number of majority white electoral constituencies, but instead challenge efforts at corrective action, saying these efforts necessarily lead to the "premise . . . that elected officials have, and ought to be responsive to, racially defined constituencies." And in none of his writings does he seem to acknowledge the importance of applying the Act as amended by Congress to integrate elected government in Mississippi and elsewhere and to break down the unfair racial barriers that gave whites far more power than their numbers and African-Americans far less.

I also share many of the concerns expressed by the NAACP Legal Defense Fund in its report, including those stemming from the letters he wrote for then-Representative Lott about the Bob Jones controversy and the Justice Department's monitoring of conditions in Mississippi jails, as well as his efforts to reduce the effectiveness of the Legal Services Corporation. These concerns, combined with Mr. Wallace's narrow view of the Voting Rights Act and the scope of congressional power, as well as the importance of further integrating the federal judiciary in Mississippi and in the Fifth Circuit, lead me to believe that someone else should be confirmed for this seat. If this nomination does not go forward, I hope that Senators Cochran and Lott will recommend, and President Bush will nominate, one of the many distinguished African-American lawyers or judges in Mississippi to fill the vacancy on the Fifth Circuit Court of Appeals.