Testimony of

Mr. W. Scott Welch

Shareholder
Baker, Donelson, Bearman, Caldwell &Berkowitz
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TESTIMONY
Of
W. SCOTT WELCH, III
Of
Jackson, Mississippi
On behalf of
THE NOMINATION OF MICHAEL B. WALLACE
TO BE A JUDGE OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Before the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
September 25, 2006
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Mr. Chairman and Members of the Committee:
My name is W. Scott Welch, III, though most call me "Scotty." I am a practicing lawyer engaged almost exclusively in civil litigation at the trial and appellate levels in state and federal courts throughout the State of Mississippi and, on occasion, in other states. I maintain my office in Jackson, Mississippi, and have since April 1, 1967. Prior to that I was an Assistant Staff Judge Advocate in the United States Air Force at Vandenberg AFB, California, prior to which I practiced briefly in Laurel, Mississippi, while awaiting orders to report to active duty in the Air Force.

I am honored to have been invited by the Chairman to testify on behalf of the nomination of Mr. Wallace, although I freely admit that others have known him longer and have had more cases with him than I. However, I have known Mr. Wallace since he came to Jackson to practice with the firm of Jones, Mockbee, Bass and Hodge in late 1983. Mr. Hodge is a former law partner of mine, and Mr. Jones is presently a partner of mine. Mr. Hodge and another of his present partners at Phelps Dunbar are former partners of mine in the practice of law. I have been actively engaged with Mr. Wallace, representing separate defendants in significant litigation arising out of Hurricane Katrina, since mid-September, 2005.

I am not a close personal friend of Mr. Wallace, but we have a long-time professional relationship. I see him socially only infrequently. I am more likely to see and be with him at meetings of The Mississippi Bar or some other professional organization. However, I have personally observed his legal ability, intellect, integrity, professionalism and demeanor on many occasions for almost twenty years. I offer this testimony, because I am convinced that the rating

of Mr. Wallace as "Not Qualified" for this appointment by the ABA Standing Committee on the Federal Judiciary, because about a third of the lawyers interviewed expressed "concerns" about his judicial temperament, is not justified. That, as this Committee is well aware, is the sole basis upon which the ABA Committee has found Mr. Wallace "Not Qualified." The ABA's Standing Committee, without exception, had the highest praise for his competence and integrity, so the only issue in dispute - at least from this individual's perspective - is whether the ABA's finding that Mr. Wallace lacks the appropriate judicial temperament is a sound basis for its finding of "Not Qualified." I respectfully submit that it is not.

While I have only known Mr. Wallace for just shy of twenty years, I knew and litigated against his first law firm in Biloxi, MS - Sekul, Hornsby, Wallace and Teel. Although his father was name partner in that firm, it is my opinion, based upon my practice against others in that firm, that those lawyers simply would not have tolerated a young lawyer with the sort of temperament and nature ascribed to Mr. Wallace by the anonymous reporters to the interviewers from the ABA Standing Committee. The same can be said for my present and former partners, who have practiced with Mr. Wallace.

Some comments are in order about my relationship with the ABA and with this Standing Committee, in particular. First, I do not offer this testimony from any official capacity whatever with the ABA, nor as an opponent of the ABA, the Standing Committee or any ABA policy. Second, I am an active member of the ABA, having served in the House of Delegates since about 1992. I am a current member of the ABA Board of Governors. Third, I have not served on the ABA Standing Committee on Federal Judiciary, and Mississippi has not had an individual to occupy the "5th Circuit" seat on that Committee since 1974, although former ABA President Michael Greco and his Committee Appointments Chair, Stephen Tober [Chair of the ABA Standing Committee which first reported that Mr. Wallace was "Not Qualified"] were implored by this witness and others in Mississippi to appoint me or another Mississippian to this seat. But, this testimony in support of Mr. Wallace is not about resentment about that failure to appoint, nor am I critical, in general, of the Association, its Standing Committee nor Committee members, though I seriously disagree with its conclusion. I believe that ordinarily the Committee serves an important role, and I have provided interviews about a number of Mississippi lawyers, who were candidates for judicial nominations. Finally, my comments about the testimony of the ABA Standing Committee are limited to the Statements previously provided to this Committee in July, 2006; because I am aware of recent interviews by other ABA Standing Committee members which I presume will yield additional ABA testimony. I have no knowledge what that testimony might be.

It is, however, my sincere belief - based on more than forty-two years of law practice, mostly in and throughout Mississippi, and numerous relationships with other lawyers throughout the United States - that the ABA Committee has simply not provided a sound basis for finding that Mr. Wallace is "Not Qualified," because he lacks appropriate judicial temperament.

Three things, in particular, concern me about the recommendation of the ABA standing Committee that Mr. Wallace is "Not Qualified" on the sole basis of his perceived lack of judicial temperament1.

First: The prior Statement of Mr. Tober to this Committee recited ABA policy from the "Backgrounder" [Tober Statement, July 19, 2006, p.4] with regard to the nominee's opportunity to rebut adverse information, stating that: "If the nominee does not have the opportunity to rebut

certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the standing committee, therefore, will not consider those facts in its evaluation." (Emphasis added.)

It is, I believe, impossible to read the prior testimony of the ABA Standing Committee as anything other than as being directly contrary to the stated policy of the ABA. There is no asterisk in the ABA policy as to the obviously subjective criterion of "judicial temperament," so the ABA Standing Committee is obliged to follow its policy directive in that area as well as others.

With the exception of citation to specific court opinions [Askew Statement pp. 12-15, July 19, 2006], it is clear that the prior ABA testimony to this Committee and consequently its recommendation are based on information that should not have been used by Ms. Askew in her report to the Standing Committee, nor by the Committee in reaching its conclusion; because not one person who was critical of the nominee - even to the extent of concern that his appointment would undo progress in the important area of civil rights [Askew, pp. 15-16] - would waive his or her right to anonymity. Curiously, the prior ABA testimony does not report any request to anyone to waive the right to remain anonymous. By its testimony, the ABA Standing Committee did not violate confidentiality of its sources, as was its obligation; however, it is beyond speculation that it relied upon those sources to reach and to attempt to justify its conclusions. It thereby failed to follow the ABA policy it detailed to this Committee.

Second: If the ABA Standing Committee gave credence -as it seems it clearly did - to those anonymous sources, it is unreasonable to expect that Mr. Wallace or any of us could realistically refute another's opinion or characterization of attitude, demeanor, manner, etc. Had he known the identity of ABA interviewees, Mr. Wallace might have been able to offer an explanation why those person held such an opinion; however, that would not change the person's opinion. By the prior testimony of the Standing Committee, he was denied the opportunity to do more than say, in essence, "I am not" in rebuttal of anonymous characterizations and opinions of him. Without knowledge of the ABA Committee's sources of which he was deprived - as was the right of the ABA - he faced, as any of us would, an impossible task of refuting the proverbial "they" who said things about him. Since that time a number of distinguished lawyers, judges and former judges have written contrary opinions in favor of Mr. Wallace, but it is not possible in this setting to do an opinion poll or survey and then count votes.

Moreover, if concern existed to the extent reported by Ms. Askew and Mr. Hayward, how I ask myself and this Committee may ask as well - could the ABA standing Committee possibly have found without dissent or apparent debate that Mr. Wallace is unquestionably qualified in the vital area of integrity? In this writer's humble opinion, it just does not follow that Mr. Wallace can be unanimously characterized as having the requisite integrity to be a judge on the important Court of Appeals and at the same time have the nature to ignore precedent, the rights of others and all of the other adverse comments with which the ABA testimony was laced. The strong finding of integrity seems to belie the finding upon which the recommendation is based.

Third: Even if the ABA were entitled to have relied upon the anonymous comments and even allowing that some interviewees held those opinions, they are opinions - even if opinions formed, as this witness's have been, after years of exposure to Mr. Wallace. So much of the prior Testimony by Members of the Standing Committee is devoted to a detailed discussion of what those with negative views had to say that it is easy to lose sight of the fact that ". . . over a third. . . " of the 69 lawyers and judges interviewed ". . . expressed grave concerns regarding Mr. Wallace's judicial temperament." [Askew p. 10].

While this is neither an election nor a popularity contest, the unavoidable corollary to the stated result is that almost two-thirds of those interviewed did not express any such concerns, and given the absolute anonymity, there is no reason to expect that they would have with refrained from expressing a "concern" if they held one. Ms. Askew and I are from different states, but expressing a "concern" is not the same as a steadfast conviction that another will or will not act in a particular manner in a given circumstance.

Therefore, we have a nominee, who is found without dissent - indeed beyond question - to possess the competence and integrity to be appointed to the position for which he has been nominated, faced with the recommendation that he be denied the appointment as "Not Qualified" based upon the stated concerns of 24 or so2 lawyers and judges out of 69 interviewed. Such a result simply cannot be justified, especially when it is remembered that Mr. Wallace is not being considered for a judicial position in which he alone will make final decisions that will not be reviewable by his own court and by the Supreme Court of the United States.

If the minority - but admittedly significant - number reported by Ms. Askew is proven to be correct (which I doubt), the nominee will not be setting things back, reversing existing law, nor taking us back to a former time. He will be writing lone dissents and, in all probability, will be shunned by colleagues and publicly criticized by legal scholars. It has been said that Mr. Wallace is proud. He is certainly too proud to want to endure that, although he has shown that he is not afraid to tackle unpopular or difficult representation - a trait we all admire in any attorney. This witness is convinced that if approved by this Committee
and by the Senate, Mr. Wallace's intellect, ability and integrity assure that he will follow established precedent and carry out his sworn duties in a manner of which we will be proud - whatever his personal views or preferences may be in a given instance. I urge the approval of his nomination. Thank you for permitting me this opportunity.

W. Scott Welch, III

1 I do not attempt to "drill down" into the details of Mr. Wallace's specific cases discussed in the ABA testimony or his service as a member of the Board of Legal Services Corporation. I have not attempted to go behind the work of Mr. Wallace and others as to what specific courts, papers or other public sources have said. Those sources are identified and are capable of more meaningful comment by Mr. Wallace and others who are willing to be identified.

2 Plus some proportion of those interviewed by Mr. Hayward and the unknown results of the more recent interviewers.