



# AMERICAN BAR ASSOCIATION

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**STATEMENT**

**of**

**ROBERTA D. LIEBENBERG, CHAIR**

**and**

**KIM J. ASKEW**

**THOMAS Z. HAYWARD, JR.**

**PAMELA A. BRESNAHAN**

**C. TIMOTHY HOPKINS**

**on the behalf of the**

**STANDING COMMITTEE ON FEDERAL JUDICIARY**

**of the**

**AMERICAN BAR ASSOCIATION**

**concerning the**

**NOMINATION OF MICHAEL BRUNSON WALLACE**

**TO BE JUDGE OF THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

**before the**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**September 26, 2006**

## **I. STATEMENT OF ROBERTA D. LIEBENBERG**

Mr. Chairman and Members of the Committee:

My name is Roberta D. Liebenberg. I am a practicing lawyer in Philadelphia, Pennsylvania and my practice is concentrated in the area of complex commercial litigation in federal courts around the country. I am a graduate of the Catholic University Columbus School of Law, and prior to entering private practice I clerked on the United States Court of Appeals for the Fourth Circuit. Since August, 2006, I have had the honor of chairing the American Bar Association's Standing Committee on Federal Judiciary ("Standing Committee").

I am submitting this written statement for the hearing record to present the Standing Committee's peer review evaluation of the nomination of Michael B. Wallace to serve on the United States Court of Appeals for the Fifth Circuit. This statement is divided into three sections. First, I will summarize the Standing Committee's general evaluation procedures. Second, Kim J. Askew, the Fifth Circuit representative on the Standing Committee and primary investigator for the evaluation rendered in May 2006, and Thomas Z. Hayward, Jr., a former Chair of the Committee, who was asked to be the second investigator for that evaluation, will explain the reasons for the Committee's unanimous rating of the nominee as "Not Qualified" in May 2006. Finally, Pamela A. Bresnahan and C. Timothy Hopkins, both distinguished former members of the Committee who recently conducted a supplemental evaluation of Mr. Wallace's professional qualifications after he was re-nominated by the President on September 5, 2006, will explain the reasons for the Committee's unanimous rating of the nominee as "Not Qualified" on September 25, 2006.

As a preliminary matter, I would like to review briefly the Standing Committee's procedures. A more detailed description of these procedures is contained in the Committee's booklet (commonly described as our "*Backgrounder*"), *Standing Committee on Federal Judiciary: What It Is and How It Works (2005)*, which may also be accessed online at: <http://www.abanet.org/scfedjud/>.

The Standing Committee considers and evaluates only the professional qualifications of a nominee -- his or her professional competence, integrity and judicial temperament. A nominee's philosophy or ideology is not taken into account. Our processes and procedures have been carefully structured and modified over the years to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are evaluated, including intellectual capacity, judgment, writing and analytical ability, knowledge of the law, breadth of professional experience, courtroom experience, character, integrity, industry, diligence, open-mindedness, compassion, decisiveness, courtesy, patience, freedom from bias, commitment to equal justice under the law and general reputation in the legal community.

After Mr. Wallace was nominated by President Bush in February, 2006, Ms. Askew was assigned to conduct the evaluation of his professional qualifications. Ms. Askew was the Fifth Circuit representative on the 2005-06 Standing Committee and remains in that position on the current 2006-07 Committee. The evaluation of Mr. Wallace was conducted in accordance with the normal practices and procedures of the Standing Committee. The investigator starts his or her evaluation by reviewing the nominee's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his

or her qualifications, including professional experience, important cases handled, significant legal writings and references. The investigator makes extensive use of the questionnaire responses during the course of the evaluation. In addition, the investigator conducts research about the nominee in both the print and electronic media, and identifies and examines the legal and non-legal publications, speeches and other writings by and about the nominee. The investigator also personally conducts extensive confidential interviews with individuals who have information regarding the integrity, professional competence and judicial temperament of the nominee, including federal and state judges, practicing lawyers in both private and government service, law school professors and deans, legal services and public interest lawyers, representatives of professional legal organizations, community leaders, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer review" aspect to our evaluation.

Interviews are conducted under an assurance of confidentiality. It bears emphasis that the Committee's ability to secure candid and complete assessments of a nominee's professional qualifications from the judges, lawyers, and others who are interviewed concerning the nominee is dependent upon the maintenance of strict confidentiality.

However, while confidentiality is the linchpin of our evaluation procedures, we are sensitive to the critical need to be fair to the nominee with respect to any adverse comments that are received during the course of the evaluation process. If adverse comments are made about the nominee, the investigator will disclose to the nominee during the personal interview as much of the underlying basis for the adverse comments as reasonably possible, consistent with the promise of confidentiality made to

interviewees. During the personal interview, the nominee is afforded a full opportunity to rebut the adverse comments and provide any additional information relevant to them. The investigator will then follow up on any such information provided by the nominee. If the nominee does not have the opportunity to rebut certain adverse comments because they cannot be disclosed without breaching confidentiality, the investigator will not use those comments in writing the formal Report and the Committee will not consider them in its evaluation.

Ms. Askew conducted a three-hour interview of Mr. Wallace on March 28, 2006. During that interview, she discussed with him the adverse comments that had been made during her prior interviews of judges, attorneys and other individuals with knowledge of his professional qualifications, and she gave him the opportunity to address and refute those comments.

Under Standing Committee procedures, a second investigator may be appointed when it appears at any time during the evaluation process that a nominee may receive a “Not Qualified” rating, and that is what occurred here. Upon the completion of her informal report, and before it was circulated to members of the Standing Committee, Ms. Askew advised the then-Chair of the Committee that she would be recommending a “Not Qualified” rating for this nominee. As a result, Thomas Z. Hayward, Jr., of Chicago, a former Chair of the Standing Committee, was asked to conduct a second evaluation. He interviewed additional third parties, and re-interviewed the nominee on May 2, 2006. Thereafter, based upon his own evaluation, Mr. Hayward also recommended a “Not Qualified” rating for this nominee.

Once the second evaluation concluded, both the formal report completed by

Ms. Askew and the second report completed by Mr. Hayward were forwarded simultaneously to all members of the Standing Committee. At the same time, members of the Standing Committee also received background materials relating to a 1992 pre-nomination evaluation by the Standing Committee of Mr. Wallace.

In May, 2006, after carefully considering the Reports prepared by Ms. Askew and Mr. Hayward, as well as the materials pertaining to the evaluation conducted in 1992, each of the fourteen voting members of the Standing Committee independently conveyed their votes to the then-Chair. Mr. Hayward, who was not a member of the Committee in May 2006, did not vote, nor did the then-Chair vote. The fourteen voting members of the Standing Committee voted unanimously that Mr. Wallace was "Not Qualified" for a position on the Fifth Circuit Court of Appeals.

The Standing Committee's normal practice is to conduct a supplemental evaluation of every nominee whose nomination has been withdrawn or returned and subsequently re-submitted by the President. Consistent with that standard procedure, the Committee has conducted a supplemental evaluation of Mr. Wallace, whose nomination was returned by the Senate on August 3, 2006, and re-submitted by the President on September 5, 2006. The supplemental evaluation was conducted by two highly experienced former Committee members, Pamela A. Bresnahan of Washington, D.C. and C. Timothy Hopkins of Idaho Falls, Idaho. Two investigators were appointed because of the need to conduct the supplemental evaluation on an expedited basis.

In general, a supplemental evaluation focuses on new information developed after a prior evaluation and rating. However, a supplemental evaluation may also entail further examination of any additional information that can be obtained regarding the nominee's

professional qualifications, even if it relates to the period prior to the most recent nomination, in order to ensure a thorough review of the nominee's professional qualifications.. And that was what was done here. Ms. Bresnahan and Mr. Hopkins performed their own evaluations, conducted a two-hour interview with the nominee, and took into consideration all of the materials relating to the prior evaluations of Mr. Wallace by the Standing Committee.

Present today are Ms. Askew and Ms. Bresnahan, who will testify regarding the evaluations and the reasons for the Standing Committee's rating of the nominee as "Not Qualified." Mr. Hayward and Mr. Hopkins are also present if the Committee has any questions regarding the evaluations.

After careful review of the supplemental evaluation by Ms. Bresnahan and Mr. Hopkins, and consideration of all materials concerning the prior Standing Committee evaluations of Mr. Wallace's professional qualifications, it is the unanimous opinion of the Standing Committee that he is "Not Qualified" for a position on the United States Court of Appeals for the Fifth Circuit.

## **II. MAY 2006 EVALUATION**

### **A. Statement of Kim J. Askew, Submitted on July 19, 2006**

My name is Kim J. Askew. I am a trial lawyer from the State of Texas. I serve as the Fifth Circuit Representative to the Standing Committee on Federal Judiciary. I have practiced for 22 years, primarily in the areas of complex commercial and employment

litigation. I am the Chair-Elect of the Section of Litigation of the American Bar Association, and formerly chaired the Board of Directors of the State Bar of Texas and its Section of Litigation. I am a graduate of Georgetown University Law Center and clerked for a federal district court judge before beginning my law practice.

1. The Investigation of Mr. Wallace

I conducted my investigation into the professional qualifications of Michael B. Wallace in March and early April of this year in the same manner all investigations of the Standing Committee are conducted. As outlined in the *Backgrounder*, the Standing Committee investigated only the professional competence, integrity, and judicial temperament of Mr. Wallace. Political considerations or personal ideology were not considered. My investigation began with a detailed analysis of Mr. Wallace's responses to the Personal Data Questionnaire in which he provided substantial information on his professional background and experience and writing samples. From this questionnaire, I identified attorneys and judges Mr. Wallace considered significant in his background.

In addition, I surveyed the docket sheets of state and federal courts in Mississippi, the state in which Mr. Wallace primarily practices, to identify other lawyers and judges with knowledge of Mr. Wallace's professional qualifications. I reviewed numerous published and unpublished opinions in which Mr. Wallace had appeared as counsel of record. I also asked Mr. Wallace to supplement his writing samples with any legal memoranda, briefs or writings that he considered significant and wished the Standing Committee to review. He did so and the Standing Committee reviewed these writings in reaching its recommendation.

As part of my preliminary investigation, I conducted confidential telephone



interviews with 69 lawyers, including 26 judges. These interviews covered the depth and breadth of the legal community. I interviewed law professors and deans, government officials, lawyers who practiced in large and small firms, solo practitioners, representatives of various bar organizations, and representatives of the legal services and public interest communities. I interviewed judges on the Fifth Circuit Court of Appeals, federal district courts, federal magistrate judges, and judges on every state court in Mississippi in which Mr. Wallace had practiced.

Of course, the interviews included lawyers and judges listed as having been involved in significant litigation matters in which Mr. Wallace had appeared, as well as lawyers and judges identified from public court docket sheets. Lawyers and judges often provided the names of other persons with knowledge of Mr. Wallace's professional qualifications. Interviews were balanced. Lawyers of color were interviewed. I spoke with lawyers on both the defense and plaintiff side of cases and those who represented public and private entities. In those instances in which Mr. Wallace listed significant cases involving political issues, such as cases arising under the Voting Rights Acts, I interviewed lawyers representing all parties. If I interviewed lawyers who represented the Republicans, I also interviewed the lawyers representing Democrats.

During each interview, I asked detailed questions regarding the person's knowledge of Mr. Wallace's professional competence, judicial temperament, and integrity. Often, I asked open-ended questions, seeking any information that might bear on the professional qualifications of Mr. Wallace to serve on the court. If an interviewee raised concerns or provided adverse information regarding any of the three criteria vetted by the Standing Committee, I asked follow-up questions designed to elicit facts

supporting the comments, including information on the names of cases, briefs or written materials, or the names of other persons who could corroborate any adverse concerns expressed.

Many of the interviews involving Mr. Wallace were quite lengthy; some lasting as long as 45 minutes. Some interviews were long because the *Backgrounder* requires that we fully explore any adverse comments so they can be discussed with the nominee. Interviews with persons who made favorable comments were sometimes lengthy because these individuals discussed unfavorable issues they had “read” or “heard” about regarding Mr. Wallace or they tried to anticipate issues they thought others might raise. If lawyers in a case gave conflicting views on Mr. Wallace’s temperament, I conducted additional interviews in an attempt to reconcile, if possible, the differing points of view. During these interviews, lawyers and judges frequently asked for assurances of confidentiality and repeatedly requested that the Standing Committee not make any public statements that would reveal their identity. Some lawyers and judges were so concerned about confidentiality that often they would not talk with me during my initial call and spoke to me only after verifying that I was a member of the Standing Committee.

On March 28, 2006, I conducted a confidential interview for about three hours with Mr. Wallace at his office in Jackson, Mississippi. During this interview, I discussed with Mr. Wallace the adverse concerns that had been raised during the course of my many interviews, and gave him the opportunity to rebut or discuss the adverse information in any manner he wished. Of course, I did not, and could not, reveal the identities of persons making particular comments or discuss particular cases if revealing those matters would have led to the identity of the person making the adverse comments.

All of these interviews were then compiled into an 83-page, single-spaced report, which included some 800 pages of background materials and writing samples.

The investigation revealed that Mr. Wallace has the highest professional competence. Mr. Wallace possesses outstanding academic credentials, having graduated from Harvard University in 1973 and the University of Virginia Law School in 1976. He was a law clerk to former Chief Justice William H. Rehnquist from 1977 to 1978. Mr. Wallace is often described as a “legal scholar” of “strong intellect;” a quality lawyer with a “quick legal mind.” He is a highly skilled and experienced trial and appellate lawyer who is considered a “go-to lawyer” on certain litigation matters in Mississippi. As discussed below, even those persons with serious concerns regarding Mr. Wallace’s judicial temperament describe him as a brilliant lawyer, one who would ably master legal issues before him as a judge.

The investigation also established that Mr. Wallace possesses the integrity to serve on the bench. His integrity was described by many as “impeccable,” “outstanding,” “the highest,” “absolute,” and “solid.” Persons throughout the legal community stated that Mr. Wallace is a fine family man, an excellent husband and father.

## 2. Adverse Comments on Judicial Temperament

As discussed below, Mr. Wallace received substantial adverse comments on the issue of judicial temperament. Of the 69 lawyers and judges interviewed, over a third of them expressed grave concerns regarding Mr. Wallace’s judicial temperament. People from a broad spectrum of the legal community expressed this concern, including judges who had presided over cases in which Mr. Wallace had appeared. While confidentiality prevents the Standing Committee from naming lawyers and judges who made negative

comments, and none of them waived confidentiality, the Committee was presented with the fact that many of the persons who expressed these concerns had worked with Mr. Wallace for a long period of time, some spanning over two decades. Others who questioned his temperament stated that they had known Mr. Wallace since his childhood or from the earliest days of his practice in the District of Columbia and Mississippi. Indeed, many lawyers who believed Mr. Wallace “Well Qualified” on the criteria of professional competence and integrity nonetheless stated that he lacked the necessary temperament for judicial service.

This was a difficult investigation because of the conflicting and strongly held views of lawyers and judges on one aspect of the qualifications we review - Mr. Wallace’s judicial temperament. On the one hand, many of those interviewed believe that Mr. Wallace possesses the professional competence and integrity that places him at the top of the profession. Many others, including some of those who believe him well qualified on the other criteria, are of the unwavering view that he lacks the temperament required for service on a federal court.

One of the unfortunate aspects of post-nomination review of the professional qualifications of judicial nominees by the Standing Committee is the need to report, in a public forum, adverse information that has been gathered in accordance with our long-established investigative practices. However, the interests of the American people can only be served by presenting our objective findings to the Senate Judiciary Committee. What is at stake is a lifetime appointment to the federal bench.

With this background, I independently reached the preliminary conclusion that Mr. Wallace should be rated “Not Qualified” and communicated this to the Committee

Chair who then appointed Thomas Z. Hayward, the immediate past chair of this Committee, to conduct a supplemental investigation and to re-interview Mr. Wallace. I provided Mr. Hayward a copy of my unreleased preliminary report containing all interviews. Also, I wanted Mr. Hayward to be fully aware of the adverse comments regarding Mr. Wallace's judicial temperament so that, in accordance with the *Backgrounder*, he could independently investigate those issues and discuss them with Mr. Wallace. I understand that Mr. Hayward independently interviewed additional persons and Mr. Wallace. I did not participate in the interviews. Mr. Hayward then prepared a supplemental report in which he too independently reached the same conclusion: Mr. Wallace is "Not Qualified" for service on the Fifth Circuit Court of Appeals because he lacks the required judicial temperament.

Judicial temperament captures the important elements set forth in our *Backgrounder*. "In investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law." Importantly, lawyers who raised temperament concerns expressed familiarity with the *Backgrounder* and, without my explanation of the Committee's criteria, raised the very elements set forth in our temperament definition. Many noted that temperament went to the very essence of being a judge because it dealt with the issue of whether a judge would be fair to all litigants and follow the law. Lawyers and judges raised issues with Mr. Wallace's judicial temperament in the following respects:

a. Commitment to Equal Justice

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. Lawyers and judges stated that Mr. Wallace did not understand or care about issues central to the lives of the poor, minorities, the marginalized, the have-nots, and those who do not share his view of the world. These concerns were most often discussed in the context of Voting Rights Act cases and other issues involving constitutional rights.

Many lawyers discussed the positions taken by Mr. Wallace related to the Voting Rights Act as evidence of his lack of commitment to equal justice. *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), was a Voting Rights Act case several lawyers felt comfortable discussing because of the specific public findings of the court that they believe demonstrated the manner in which Mr. Wallace litigated the case. In that case, Mr. Wallace, while representing the Mississippi Republican Party, defended a congressional redistricting plan challenged by African-American plaintiffs as diluting their voting strength. Lawyers questioning Mr. Wallace's temperament in that case raised two issues: (1) that his position was not well-founded and was contrary, they believed, to existing interpretations of the Voting Rights Act and cases which had expressly held that the African-American plaintiffs were not required to show discriminatory intent under Section 2 of the Voting Rights Act; (2) and, that while all lawyers advance positions as advocates for clients, the manner in which Mr. Wallace litigated this case made it most difficult to resolve the case. They felt that Mr. Wallace 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.

Various lawyers informed me that the court had rejected the position advanced by Mr. Wallace because his arguments were not in accordance with existing interpretations of the Voting Rights Act. I independently reviewed the language in the case to determine if the court had reached such a conclusion. There is language in the *Jordan* opinion in which the federal court stated that the position advanced by Mr. Wallace on the interpretation of the Voting Rights Act [Section 2] was “meritless.” *Id.* at 810, n. 5. The court rejected “the contention of the Republican defendants that Section 2, if construed to reach discriminatory results, exceeds Congress’ enforcement powers under the fifteenth amendment.” *Id.* at 810-11. Lawyers noted the particularly “ferocious” manner in which Mr. Wallace sought to prevent the formation of a majority African-American district under the redistricting plan. They opined that his positions went beyond mere “zealous and forceful advocacy” and into the realm of personal belief.

As further evidence of the manner in which Mr. Wallace litigated the case and as a basis for their assertions that he lacks temperament, several lawyers made me aware of some of the additional findings made by the court in the subsequent opinion on attorneys’ fees in *Jordan v. Allian*, 619 F. Supp. 98 (N.D. Miss 1985). There, the court expressly found that “these defendants, and particularly the Republican Party, [represented by Mr. Wallace] crossed the line separating hard fought litigation from needless multiplication of proceedings at great waste of both the courts and the parties’ time and resources.” *Id.* at 111.

Lawyers raised concerns regarding the positions advanced by Mr. Wallace in the redistricting area in the *Branch* cases, litigated in early 2000. Mr. Wallace argued for the creation of at-large districts for the election of Mississippi Congressional representatives,

a position that lawyers said would have eliminated the only majority African-American single-member district in Mississippi. These lawyers also pointed out that many other states had already implemented single-member districts. Lawyers stated that the United States Supreme Court rejected the position advanced by Mr. Wallace in *Branch v. Smith*, 538 U.S. 254 (2003) and allowed single-member districts in Mississippi.

Lawyers had concerns regarding the manner in which Mr. Wallace litigated the cases believing that he took “partisan” positions that ignored existing precedent under the Voting Rights Act. They also believed that he acted not merely as an advocate, but advanced his own personal position and “agenda” without regard for the impact on African- American voters. These lawyers stated that they understood the role of lawyers as advocate, but believed that Mr. Wallace’s positions went far beyond that of an advocate.

Lawyers other than those who were involved in the civil rights litigation mentioned above based their concerns regarding Mr. Wallace’s lack of commitment to equal justice on the overall dealings and interactions they have had with him over a period of years. Some had heard him give lectures on issues such as the Voting Rights Act and other constitutional issues and recounted follow-up personal conversations with him, which led them to question his commitment to equal justice. He is said to have a “blind-spot” with respect to certain issues as they relate to the certain issues affecting minorities. Several people commented that their concerns related to the “minority view” covered not just racial and ethnic minorities, but the manner in which Mr. Wallace reacted to any minority point of view.

The Standing Committee was concerned with the nature and number of



statements about Mr. Wallace's lack of commitment to equal justice made by people who know the nominee, a sampling of which includes the following:

- He has “an instinctive contempt for the socially weak,” including “the poor and minorities.”
- “The poor may be in trouble; he is just not open to those issues.”
- He does not “like poor people” or anyone “not just like him.”
- “He can't see the plight of those who are socially disadvantaged.”
- He would not only “not be open to issues involving minority rights,” he would be “hostile” to them.
- He is “out of step with the modern world - he thinks this is the Mississippi of the past.” He would turn “back the clock in Mississippi on issues related to race relations.”
- “It will be like 1965, not 2006.”
- “If it is big business v. the little man, business usually wins.”
- I am not sure the “have nots” will always get justice; I am sure “the haves” always will.
- “The civil rights laws might be trumped.”

These are the words used by lawyers and judges who know Mr. Wallace; they have been involved in cases with him, and are active in the bar and community in which Mr. Wallace lives and works. The statements came from a cross section of the legal community and not just minority lawyers or lawyers who had been involved in civil rights or other constitutional cases. As I noted earlier, judges raised some of these concerns. They repeatedly focused on the fact that the Fifth Circuit may have more poor, more marginalized, and more minority individuals than any other circuit in the country. They were convinced that Mr. Wallace did not understand the plight and issues of so many of the people he would have to serve as a judge.

In responding to these issues, Mr. Wallace noted that he was acting as an advocate when he took positions related to the Voting Rights Act, and that he had advanced positions within the bounds of advocacy. He denied not having a commitment to equal justice or to the poor and noted that he had represented many poor people during the early years of his practice. He spoke extensively about his community work, including building Habitat Homes and the work he and his family had done in Honduras. People in the community were aware of that service and uniformly praised it, but noted that Mr. Wallace supported those communities while not demonstrating a similar understanding of issues related to the poor in his own community in Mississippi.

b. Open-Mindedness

Lawyers raised concerns regarding Mr. Wallace's open-mindedness and questioned whether he would be a fair judge. They emphasized the importance of fairness in the courts and the critical role of judges in maintaining fairness. Some lawyers believed Mr. Wallace would be fair as a judge and would "call it as he sees it." Other persons interviewed described the nominee as "narrow-minded in his views," "lacking in tolerance," "entrenched in his views," "intolerant," "insensitive," "high-handed – not willing to yield to logic or the facts," "rigid," "inflexible," "overly-opinionated," "one-dimensional," "locked into a point of view – his," and not open to the positions of others.

Some lawyers stated that Mr. Wallace was so entrenched in his own personal views that they did not believe he could put them aside and fairly follow the law. There was said to be little "middle ground" with the nominee. He is said to be "argumentative" beyond the degree necessary for successful advocacy. An especially noted lawyer

commented that Mr. Wallace's own views are "so intense," "so personal," and "so blinding to himself" that he may not understand that he is not being open or is closed to the views of others. These lawyers noted that Mr. Wallace's lack of personal awareness of these issues is particularly troublesome in one who will serve in a lifetime appointment to the bench.

Some expressed concerns over whether Mr. Wallace would be able to transition from being an advocate to being a judge. They noted that Mr. Wallace only sees his point of view, and summarily rejects the views of others in a manner that suggests he has not fully listened to them. He is said to exhibit "hostility" to the views of others, especially if he disagrees with them. He has taken "harsh and unnecessary positions" in litigation that "may have resulted in undue burdens to the courts." While I cannot reveal the details of the cases, lawyers gave me specific examples of this in several recent high profile cases handled by Mr. Wallace.

Others stated a belief that Mr. Wallace would prejudge the outcome of cases "based on personal beliefs and not the law." He would "get the results he wants in a case regardless of law or facts." Another expressed the belief that Mr. Wallace would, based on his fast-held views, (1) make his mind up ahead of time or (2) be locked into a particular view and simply not hear the other side.

Other lawyers and judges that I interviewed did not share this view of Mr. Wallace and believed that he would be fair and open to all points of view. However, the number of persons who expressed concerns about his lack of open-mindedness and the nature of the concerns could not be ignored. These lawyers and judges who questioned this aspect of his temperament had been involved in many types of cases with Mr.

Wallace, and while strongly criticizing this aspect of temperament, admired his legal acumen.

Mr. Wallace rejected these assertions during our interview. He believes that he understands what it is to judge and to be fair in decision-making. He stated that litigants deserve certainty. The interview did not assuage the serious concerns that interviewees had raised.

c. Freedom from Bias

A substantial number of lawyers and judges stated that Mr. Wallace has taken positions that suggest he “may not follow the law.” They explicitly stated that he “simply” or “just won’t follow the law. Some judges even suggested that Mr. Wallace might not follow precedent or could “ignore the law if he disagreed with it” or if it suited his “personal agenda.” A long-time judge noted, “The law will not get in his way.” Many said his positions are sometimes “extreme.” “You either agree with him or capitulate.” “Mr. Wallace’s point of view prevails or else.” Some raised concerns that Mr. Wallace would follow his own interpretation of “what the law should be” rather than “what the law is.” Many were concerned that Mr. Wallace would use his considerable skills as a legal writer, thinker, researcher, and skillful advocate to change or modify the law to reflect his personal views rather than rely upon and apply existing precedent. Lawyers and judges noted cases in which Mr. Wallace had filed pleadings and taken positions that certainly did little or nothing to advance the merits of the case and suggested that he was deviating from existing precedent in some of his positions.

This latter point raises yet another significant concern: many lawyers expressed the view that Mr. Wallace had an “agenda” in seeking the bench. Statements were made,

such as: he will judge through “partisan eyes”; he is “undoubtedly a doctrinaire” who is on a “quest”; he is a lawyer “on a mission to destroy the Voting Rights Act, other civil rights laws”; and his “agenda” would “destroy the fabric of the bench.”

Lawyers assured me that their statements regarding an “agenda” or failure to follow precedent were not based on political considerations, rumor or hearsay. They made it clear that their statements were based on their direct, professional interactions with the nominee. In evaluating these statements, it is important to note that people who expressed these concerns were from divergent backgrounds, some of whom even volunteered that they were concerned even though they shared Mr. Wallace’s political views, because they foremost wanted a judge on the court who would follow the law. Many of the lawyers who made these comments said they had reached this conclusion after being in a variety of cases with Mr. Wallace -- civil rights, commercial, and products liability--a fact that I independently verified through my review of docket sheets and reported cases.

Mr. Wallace rejects the assertions of those who believe he is not free from bias and will not follow the law. He stated that he understands what it means to be an appellate judge. During the interview, he wanted detailed examples of the cases and types of statements made as well as the identity of persons making such statements. Beyond the statements that I have expressed here, I could not provide Mr. Wallace with any further details on the identities of lawyers or the names of cases without violating the confidentiality requirements upon which the interviewees relied.

d. Courtesy

Lawyers also criticized Mr. Wallace for failing to show common courtesy and

respect to other lawyers and litigants. Some of the comments arose in the context of his service on the national Legal Services Board in the late 1980s and early 1990s. Lawyers who had attended Board meetings and watched the interaction between Mr. Wallace and members of the public and the Legal Services staff described him as treating staff and lawyers “like they were dirt on the floor.” Many who had attended these meetings said he was “nasty,” “dismissive,” “abusive,” “mean,” “rude,” “extremely arrogant,” “egotistical,” “condescending” and “extraordinarily impolite” to those who appeared before the Legal Services Board.

Concerns regarding Mr. Wallace’s lack of common courtesy and respect continue to today. Persons who have worked with him well after he ended his service on the Legal Services Board raise similar issues. Lawyers and judges described him as “loud,” “aggressive,” “discourteous,” “abrasive,” “arrogant” and “condescending.” Some lawyers who have known him for a long period of time describe him presently as a man who has become “hardened in his convictions” rather than becoming “more open” to the issues of those around him. Lawyers stated that Mr. Wallace was not patient and often did not listen to the arguments of others, and that he could be “sarcastic” and “strident” in his approach to dealing with issues and in his conversations with fellow lawyers. They stated their belief that Mr. Wallace would engage in this same behavior as a judge. If he did so, they questioned whether litigants would obtain a fair hearing and resolution of their issues and whether the essential dignity of the court would be maintained.

A large number of minority lawyers stated that Mr. Wallace has on occasion been particularly disrespectful to them and often did not treat them as equals or peers in the profession. They stated that he acted with an air of “superiority” and in a manner that

was “demeaning” and “condescending” to them while he did not display this behavior to other lawyers in the cases on which they worked. Some non-minority lawyers who questioned Mr. Wallace’s temperament stated that he “seemed” to treat non-minority lawyers “as peers” while his “demeanor, reactions and interactions” with minority lawyers suggested he did not treat these lawyers as equals. And some minority lawyers, especially those who had been actively involved in litigating civil rights cases, stated that Mr. Wallace often did not respect their views, – it was as if the arguments of minority lawyers “were not as worthy of being in court” and did not “carry the same weight” as other lawyers. We are certainly aware of comments from other prominent minority attorneys who do not share this view, but on balance, the Committee could not discount the number of lawyers who raised this concern, the nature of their comments or the expressed intensity of beliefs of these lawyers concerning Mr. Wallace’s interactions with them.

In the interview, Mr. Wallace stated that he believes he maintains a professional demeanor with all lawyers and was not aware of concerns raised by minority lawyers or others who felt that he was not courteous to them. He stated that he helped to recruit and worked with minority lawyers in his own firm. With respect to his service on the Legal Services Board, Mr. Wallace attributes such comments to those who disagreed with his work and is proud of the work accomplished while he served on the Board.

Mr. Wallace asked for further details regarding all adverse comments, including the identity of those who made the comments and the “facts” or “proof” given by persons in support of their statements. I provided Mr. Wallace with as much information as I could without violating the confidential nature of this process that precluded me from

providing such information without the authorization of the lawyers.

**B. Statement of Thomas Z. Hayward, Jr., Submitted on July 19, 2006**

My name is Thomas Z. Hayward, Jr., and I am a lawyer from the State of Illinois. I served as the Seventh Circuit representative to the Standing Committee on Federal Judiciary from 1990 to 1994, and I served as Chair of the Committee from 2003 to 2005. I have practiced for 40 years, primarily in the areas of corporate and real estate law. I am a graduate of Northwestern University School of Law.

1. Investigation of Mr. Wallace

Because Kim Askew had reached the preliminary conclusion that Mr. Wallace should be rated “Not Qualified” by reason that he lacks the appropriate judicial temperament, the Chair appointed me to undertake a supplemental investigation. The purpose of the supplemental investigation was to assure fairness to Mr. Wallace in light of Ms. Askew’s negative assessment based on her extensive investigation. The *Backgrounder* provided that the second investigator may re-interview the nominee and conduct whatever supplemental inquiries he or she feels appropriate.

I carefully reviewed Mr. Wallace’s Personal Data Questionnaire and the preliminary and lengthy report prepared by Ms. Askew. Having read over 500 such reports during my tenure on the Committee, both as a member and as Chair, I was impressed by the number of interviews undertaken by Ms. Askew and the thoroughness and detail of the reported interviews which represented a cross section of federal and state judges, practicing lawyers, and law school professionals. I determined that I would not re-interview any of the individuals reported by Ms. Askew; her reports were detailed and



thorough summaries of what the individuals interviewed said regarding Mr. Wallace's professional competence, integrity and temperament. Instead, I opted to interview Mr. Wallace and verify comments, both pro and con, with a number of individuals not interviewed by Ms. Askew or listed by Mr. Wallace in his Personal Data Questionnaire. Indeed, I met with Mr. Wallace in his Jackson office on May 2, 2006 for an interview that lasted approximately one and one-half hours. During that interview I reviewed with him the adverse information I had obtained during the supplemental investigation, and gave him the opportunity to respond.

I agree with Ms. Askew that Mr. Wallace possesses the integrity to serve on the bench and that he has the highest professional competence as a highly skilled and experienced trial and appellate lawyer.

However, like Ms. Askew, after personally interviewing Mr. Wallace and others who know him professionally and personally, I came to the same conclusion that Mr. Wallace fails to meet the standards of judicial temperament as set forth in our *Backgrounder*. Temperament encompasses more than just being polite, maintaining one's temper, or showing proper decorum in a courtroom. Rather, as defined in our *Backgrounder*, it encompasses "the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law."

a. Open-Mindedness

One cannot overlook the many comments received by Ms. Askew and myself describing the nominee as narrow-minded in his views, rigid, hostile to, and not open to the position of others. One distinguished interviewee with whom I spoke commented that

with Mr. Wallace, it will be his “way or the highway.”

b. Freedom from Bias

After meeting with Mr. Wallace, I too share the concern that Mr. Wallace will interpret the law to meet his own interpretation rather than to follow precedent.

c. Courtesy

A broad cross section of the legal community interviewed by Ms. Askew and myself raised the concern that Mr. Wallace will not demonstrate the patience necessary to allow lawyers arguing cases before him to develop and set forth their argument. Many commented that Mr. Wallace would find it very difficult to make the transition from active trial and appellate lawyer to an appellate judge, to be a listener and not an advocate.

2. Conclusion

My supplemental investigation affirmed the findings reported by Ms. Askew. Her written statement accurately reflects the concerns of the legal community and the Committee and thoroughly explains the reasons that the Committee, after careful evaluation of the professional qualifications of Mr. Wallace, rated him “Not Qualified” for a lifetime appointment to the United States Court of Appeals for the Fifth Circuit.

**C. The Standing Committee's May 2006 Rating**

After considering the reports by Ms. Askew and Mr. Hayward, the 14 voting members of the Standing Committee unanimously rated Mr. Wallace “Not Qualified” for appointment to the United States Court of Appeals for the Fifth Circuit. The Standing Committee is comprised of highly accomplished attorneys of diverse backgrounds and

practices. Each member takes very seriously his or her responsibility to conduct an objective evaluation of the professional qualifications of each judicial nominee. Each of the members of the Committee applied his or her independent judgment in voting on the rating to be given to the nominee.

### **III. SEPTEMBER 2006 EVALUATION**

#### **A. Statement of Pamela A. Bresnahan and C. Timothy Hopkins**

In accordance with the Standing Committee's normal procedures, Mr. Hopkins and I conducted a supplemental evaluation of the nominee because this nomination was returned by the Senate on August 3, 2006, and was re-submitted by the President on September 5, 2006.

In conducting this supplemental evaluation, we reviewed the responses by Mr. Wallace to the public portions of the Senate Judiciary Committee Personal Data Questionnaire ("PDQ"). In addition, we reviewed the extensive materials pertaining to the prior evaluations of Mr. Wallace's professional qualifications by the Standing Committee in the Spring of 2006 and 1992. We also read several of the reported decisions cited by Mr. Wallace in his PDQ, and other decisions where he was listed as counsel.

Although the supplemental evaluation was conducted on an expedited basis, we sought to interview as many people as possible. We contacted judges and lawyers from a broad cross-section of the legal community. We re-interviewed 15 people who were

previously interviewed by Ms. Askew or Mr. Hayward in Spring 2006 and interviewed 11 additional people who had not been previously interviewed. Some of the people we interviewed had been mentioned to us during one or more of our interviews, (including our interview with the nominee), as possible sources of information regarding Mr. Wallace's professional qualifications. On September 18, 2006, we interviewed Mr. Wallace for two hours at his office in Jackson, Mississippi.

During our interview with Mr. Wallace, we presented him with an opportunity to rebut or discuss adverse comments we had received during the course of our interviews. We provided him with as much context and specificity as we could without breaching our promise of confidentiality to the interviewees. We told Mr. Wallace that, consistent with the process of obtaining information for a Report, we would not reveal the identities of the individuals who provided us with the adverse information if they wished for their remarks to remain confidential. In one instance, an individual who had made adverse comments regarding Mr. Wallace's potential for judicial temperament, consented to the disclosure of his identity and his comments to Mr. Wallace. These comments and the source of them were disclosed to Mr. Wallace so he could address them. These comments referred to a particular meeting he chaired. In response, Mr. Wallace stated there was a record of the meeting which he subsequently forwarded to us. We responded that, in many instances, a record does not disclose tone, demeanor or manner of speaking and not everything is always on the record. After some debate, the nominee, somewhat grudgingly acknowledged this was sometimes the case. Similar concerns with respect to the nominee's arrogance, rudeness and tone were raised by other individuals that we interviewed.

It should be noted that we refrained from including in our Report to the Standing Committee certain of the adverse comments we had received about Mr. Wallace, because disclosure of the underlying basis of these comments to Mr. Wallace would have necessarily compromised the confidentiality demanded by that interviewee. We did not rely on those comments in making our “Not Qualified” recommendation to the Standing Committee, nor were these comments referenced in our Report.

We found this evaluation to be a very difficult one. There were a number of very laudatory comments about Mr. Wallace’s integrity, legal ability and skill in representing his clients. However, consistent with the concerns and issues that were raised in the prior evaluations of Mr. Wallace, approximately 40 per cent of the interviewees raised issues involving Mr. Wallace’s temperament or suitability to sit on the bench.

The range of opinion was notable. At one end of the spectrum, several of our interviewees concluded that Mr. Wallace would be fair and open-minded and had the requisite judicial temperament for an appointment to the federal bench. In the middle, other interviewees were concerned whether he would be able to listen to both sides of a case and be open-minded, and those interviewees, from their observations of him as an advocate, were not sure if he had that ability, given his personality. At the other end of the spectrum – comprising approximately 40 per cent of those to whom we spoke—people had issues or concerns with some aspect of Mr. Wallace’s temperament. Individuals that were interviewed commented that his manner is often brusque and dismissive and expressed concerns that he would not be patient and courteous or respectful towards litigants, or that he would be open to the views of both sides of a case.

Several lawyers and judges observed to us that they believed that he would not put his advocacy role aside if he were a judge.

The Standing Committee has provided extremely thorough evaluations of Mr. Wallace over the years. In total, over 120 judges and lawyers have been interviewed. Judges and lawyers from widely-differing background and experiences who raised concerns and issues about Mr. Wallace's temperament could not be overlooked or discounted.

Notwithstanding Mr. Wallace's integrity and legal ability, the concerns about his temperament and suitability for the bench caused us to submit a recommendation of "Not Qualified" to the Standing Committee. The possession of judicial temperament is of critical importance to ensuring that litigants, their attorney's and the public have confidence in the fairness of the justice system.

**B. The Standing Committee's September 2006 Rating**

After careful consideration of the supplemental report of Pamela A. Bresnahan and C. Timothy Hopkins, as well as the materials pertaining to the previous evaluations of the nominee, the fourteen voting members of the Standing Committee unanimously rated Mr. Wallace "Not Qualified" for appointment to the United States Court of Appeals for the Fifth Circuit.

The Standing Committee greatly appreciates the Senate Judiciary Committee's consideration of this written statement.