REPORT ON THE NOMINATION OF MICHAEL B. WALLACE TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. INTRODUCTION

President George W. Bush has nominated Michael Wallace to the U.S. Court of Appeals for the Fifth Circuit. Mr. Wallace's nomination has earned an extremely dubious distinction: he is the first federal court of appeals nominee in almost twenty-five years to be rated unanimously "not qualified" by the American Bar Association. The ABA reached its conclusions based on its evaluation of Mr. Wallace's competence, integrity and judicial temperament.[1] It did not, as it explained, consider Mr. Wallace's views on the law. In fulfilling its constitutional obligation, the Senate properly considers both of these independent criteria.

Mr. Wallace has never been a judge and has spent much of his career as an aggressive advocate for partisan political causes. This alone is not necessarily disqualifying. What has set Mr. Wallace apart, however, are his strong personal beliefs in far-right legal positions and his inability or unwillingness to prevent those beliefs from interfering with his professional obligations as a lawyer and public official. Indeed, the ABA's "not qualified" finding was based in large part on the conclusion of many lawyers and judges that Mr. Wallace would be unable to put aside his own "entrenched" personal beliefs and fairly follow the law.[2] These individuals, all of whom have interacted with Mr. Wallace, worried that, if confirmed, he would "get the results he want[ed] in a case regardless of law or facts"[3] and "ignore the law if he disagreed with it" or if doing so suited his "personal agenda."[4]

The following provides a window into Mr. Wallace's strident – and troubling – views and legal philosophy:

- Mr. Wallace has testified that he "personally" believed that the Reagan Justice Department "was correct" in arguing that Bob Jones University should receive tax-

[1] In particular, the ABA found Mr. Wallace not qualified because he "lack[ed] the temperament required for service on a federal court." The ABA explained that in evaluating Mr. Wallace's judicial temperament, it considered, among other critera, his open-mindedness, freedom from bias, and commitment to equal justice under the law. American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 10-12.
[2] *Id.* at 17.
[3] *Id.* at 18.
[4] *Id.* at 19.

exempt status despite its racially discriminatory policies, an argument that had been rejected by an 8-1 vote of the Supreme Court.[5]

- Mr. Wallace vigorously opposed bipartisan legislation that restored the effectiveness of the Voting Rights Act in 1982 by re-instituting the "effects test," and then, despite clear Congressional language to the contrary, expressed his personal belief and argued on behalf of the Republican Party that the law did not have that result. In one voting rights case where he made such claims, a federal court criticized him for "crossing 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."[6]

- As chair of the Legal Services Corporation, Mr. Wallace received significant criticism from Republicans and Democrats alike for seeking to undermine the agency. Among other things, he cut programming, precluded legal aid lawyers from bringing certain types of lawsuits and – stunningly – authorized expending LSC funds both to lobby Congress for cuts in LSC's own budget and to have other conservative lawyers prepare a memo arguing for the LSC Board's abolition. Republican Senator Warren Rudman characterized Mr. Wallace's repeated disobedience to Congress as "absolutely bad faith."[7]

- Mr. Wallace has argued that LSC violates the constitutional separation of powers doctrine because its board members cannot be removed by the president. This rather radical view, reflecting what is called the "unitary executive theory," would spell the end of a number of vital independent regulatory agencies, including the National Labor Relations Board, the Securities and Exchange Commission, the Federal Communications Commission and many more.

- Mr. Wallace would also hobble the work of regulatory agencies by reviving the defunct "non-delegation" doctrine. That doctrine forbids Congress's long-standing practice of delegating rule-making authority to regulatory agencies that, unlike Congress, have expertise best-suited to address complicated issues ranging from environmental, telecommunications, securities and enery regulation to workplace, food and drug safety.

- Like others on the hard right, Mr. Wallace often rails against "judicial supremacy," and he has advocated severely curtailing the role of the courts. In one article, he chastised the Supreme Court for "overreaching" simply by agreeing to hear the landmark case of *INS v. Chadha*, which involved the validity of the legislative veto. Not a single member of the Court agreed with his view.[8]

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[5] *See Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 98th Cong. 169 (1983).
[6] *See Jordan v. Allain*, 619 F. Supp. 98, 111 (N.D. Miss. 1985).
[7] Paul Barrett, *Under Bush, a Band of Reaganites Continues Fight to Slash Funds for Legal Aid to the Poor*, WALL ST. J., Aug. 29, 1989.
[8] Michael Wallace, *Ad Astra Sine Aspera: Chadha Transcends Adversity*, BENCHMARK 13 (Fall 1983) (on file with author).

- In 1998, Senate Democrats reportedly objected to the appointment of Mr. Wallace to the U.S. Sentencing Commission because of his "activist conservative views."[9]

Together with his ABA rating, these and other aspects of Mr. Wallace's record make it clear that he should not be confirmed for a lifetime seat on the Fifth Circuit.

II. BRIEF BIOGRAPHY

Michael Brunson Wallace was born on January 1, 1951, in Biloxi, Mississippi. He received his bachelor's degree (*cum laude*) from Harvard University in 1973. Mr. Wallace received his JD from the University of Virginia in 1976. In law school, he served on Law Review and was a member of the Order of the Coif.

After law school, Mr. Wallace worked as a law clerk for Mississippi Supreme Court Justice Harry Walker (1976-1977) and then-Associate U.S. Supreme Court Justice William Rehnquist (1977-1978). He worked for the U.S. House Republican Research Committee from 1980 to 1981, and then from 1980 to 1983 served as counsel to then-Congressman and Republican Whip Trent Lott. For the remainder of his legal career, Mr. Wallace has worked for Mississippi law firms. He is currently a partner at the law firm of Phelps Dunbar LLP in Jackson, where he concentrates on constitutional and commercial litigation at both the trial and appellate levels. Mr. Wallace describes his current client base as including major national businesses such as Philip Morris and Ford Motor Company, as well as Mississippi businesses like Mississippi Baptist Health Systems and Wayne Farms, a major poultry producer.[10]

Mr. Wallace is no stranger to political controversy. In 1983, President Reagan nominated him to serve on the Board of Directors of the Legal Services Corporation (LSC) shortly after failing to persuade Congress to eliminate LSC's funding altogether. Mr. Wallace's nomination proved contentious because of his record as Congressman Lott's aide, which is discussed below. After the full Senate refused to act on his nomination, as well as other controversial LSC nominations, President Reagan installed Mr. Wallace and the other nominees as recess appointees. Approximately six months later, and after a second confirmation hearing, the full Senate approved Mr. Wallace's nomination by a 62-34 vote – quite a narrow margin for a low-profile executive branch appointment. Mr. Wallace served on the Board until 1990, becoming Director in 1989. The highly polarizing institutional changes he favored and helped push through are described in detail in Section IV.A. At one point, *The Nation* declared him "the most unsavory of [Reagan's] appointees."[11]

In 1992, President George H.W. Bush considered Mr. Wallace for a nomination to the Fifth Circuit. After his name was submitted to the ABA for review, civil rights organizations contacted the ABA to oppose the nomination.[12] The nomination never came before Congress.

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[9] Daniel Wise, *U.S. Panel Left Memberless by Senate Feud*, NEW YORK LAW JOURNAL., Nov. 9, 1998.
[10] Michael Brunson Wallace, Responses to Senate Judiciary Committee Questionnaire, at 8 (Feb. 26, 2006) (on file with author).
[11] Jonathan Gill, Editorial, *Fox in the Coop; Michael Wallace of the Legal Services Corporation*, THE NATION, Jan. 9, 1989.
[12] Cragg Hines, *W. Taps Another Throwback for Important Appeals Seat*, HOUSTON CHRON., Feb. 15, 2006. *See also* Letter from Frank R. Parker, Dir., Voting Rights Project, Lawyers' Comm. For Civil Rights Under Law, to

Mr. Wallace became involved in another political tug-of-war surrounding President Clinton's nominations to the Sentencing Commission in 1998. The stalemate started as a turf battle between Senators Lott and Hatch, both of whom claimed the prerogative to recommend nominations to the Commission. After the two Republican leaders agreed on a compromise slate that included Mr. Wallace, however, the Democrats rejected it.[13] Reportedly, Democrats found Mr. Wallace "objectionable … because of his 'activist' conservative views."[14] As a result of the divisive search for acceptable nominees, the Sentencing Commission went without commissioners for approximately one year, from November 1, 1998, until November 10, 1999.[15]

Not long after Mr. Wallace was rejected for a nomination to the Sentencing Commission, Senator Lott hired him to serve as counsel during the impeachment trial of President Clinton.[16] When Mr. Wallace took the position, one longtime GOP staffer remarked, "Whenever there's a spot open for a conservative lawyer from the outside, Mike's name is often on it."[17]

Mr. Wallace's law practice underscores his close ties to the Republican party and his devotion to conservative causes. As detailed in Section III.A.4, he has often represented the Mississippi Republican Party in voting rights disputes, arguing against changes designed to correct voting schemes that have historically diluted the votes of racial minorities. Mr. Wallace has also represented the state of Mississippi under Republican administrations, including former Republican Governor Kirk Fordice. For instance, when abortion providers challenged certain state abortion laws as unconstitutional, Fordice retained Mr. Wallace to defend them. In another suit, Mr. Wallace represented Fordice before the Supreme Court of Mississippi, arguing that the Governor should not be required to hold public hearings regarding a plan for hazardous waste disposal in Mississippi. In 2000, Mr. Wallace also represented the United States Chamber of Commerce in a suit involving Chamber-funded political ads that endorsed certain conservative state Supreme Court candidates. Mr. Wallace defended the Chamber's decision not to disclose the amount that it spent on the advertisements, despite laws requiring disclosure of political funding efforts.

Like many of President Bush's judicial nominees, Mr. Wallace is a member of the Federalist Society. He has served on the National Practitioners Advisory Council for approximately 10 years and has made contributions to Federalist Society publications and panel discussions. Mr. Wallace also has been a member of the steering committee for the Defense Research Institute (DRI), an organization dedicated to protecting corporate interests, and has served on its Appellate Advocacy Committee.

III. RECORD ON CIVIL AND CONSTITUTIONAL RIGHTS

Jorge C. Rangel, Re: Michael B. Wallace (Mar. 5, 1992) (on file with author) and Letter from Elliot M. Mincberg, Legal Dir., People for the American Way to Jorge C. Rangel (Feb. 28, 1992).

[13] Michael Grunwald, *Political Squabbles Leave Sentencing Panel Vacant*, WASH. POST, Oct. 29, 1998.

[14] Daniel Wise, *U.S. Panel Left Memberless by Senate Feud*, NEW YORK LAW JOURNAL, Nov. 9, 1998.

[15] *Id.*; *see also* News Release, Michael Courlander, Pub. Affairs Officer, Judge Murphy Named to Chair United States Sentencing Commission (Nov. 12, 1999).

[16] Amy Keller and John Bresnahan, *Impeachment Watch*, ROLL CALL, Jan. 7, 1999.

[17] T.R. Goldman, *Getting Ready to Rumble: Right Man, Right Place, Right Time*, LEGAL TIMES, Jan. 11, 1999.

Throughout his legal career, Mr. Wallace has consistently tried to undermine meaningful enforcement of the nation's civil rights laws. He fought unsuccessfully against restoring important, widely-supported voting rights protections, continued to maintain that such protections did not exist long after they were enacted, stopped legal services providers from bringing cases under the Voting Rights Act, and opposes current efforts to enforce the Voting Rights Act. Mr. Wallace also supported protecting the tax-exempt status of schools that discriminated on the basis of race and personally believes that the Supreme Court was wrong to conclude that the IRS properly revoked the tax-exempt status of such schools. He has opposed affirmative action as a matter of policy and, significantly, believes it is unlawful, despite countervailing Supreme Court precedent. In addition, Mr. Wallace tried to keep the Justice Department from investigating unconstitutional jail conditions in Mississippi.

Given his long record of strident, activist opposition to civil and constitutional rights protections, Mr. Wallace cannot be counted on to preserve and enforce well-established law. Indeed, that is the conclusion reached by a significant number of lawyers and judges interviewed by the American Bar Association's Standing Committee on the Judiciary. They expressed serious concern not only that Mr. Wallace is not committed to equal justice, but that he is so wedded to his own agenda that he cannot put aside his personal views and follow the law.[18] (These were among the primary reasons why the Committee unanimously agreed that Mr. Wallace was "not qualified" to become a court of appeals judge.) These lawyers and judges – including non-minority lawyers, lawyers not involved in civil rights enforcement, and lawyers who admitted sharing Mr. Wallace's political views – told the Committee that they were worried about Mr. Wallace's ability to serve as a fair and effective judge in cases involving poor, marginalized, and minority litigants that might come before him. Many of them who had been involved in civil rights cases with Mr. Wallace noted that he went beyond "zealous and forceful advocacy," instead pursuing his own personal or "partisan" agenda without regard for existing law.[19] Some also said that, even apart from vigorously advancing positions at odds with civil rights laws, Mr. Wallace does not always respect minority lawyers as peers, acting with an air of "superiority" and in a "demeaning" and "condescending" manner toward them and treating their arguments as "not as worthy of being in court" and not "carry[ing] the same weight" as those of non-minority lawyers.[20]

Concerns about Mr. Wallace's views were echoed by the Magnolia Bar Association, which represents the interests of the state of Mississippi's African-American lawyers. During the 24th Annual Mississippi Black Professional Association's membership meeting on May 6, 2006, the Association came out in opposition to Mr. Wallace's nomination. They said his record on civil and constitutional rights and his efforts to undermine the Legal Services Corporation showed that he was the "wrong person" to sit on the Fifth Circuit.[21]

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[18] American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 18-19.
[19] *See, e.g., id.* at 13-15.
[20] *Id.* at 21-22.
[21] Jaribu Hill, *Magnolia Bar Opposes Wallace 5th Circuit Nomination*, THE CLARION-LEDGER, May 22, 2006.

Statements made by a cross-section of lawyers and judges from Mr. Wallace's legal community include the following:

- He has "an instinctive contempt for the socially weak," including "the poor and minorities."
- He has a "blindspot" concerning issues affecting minorities.
- 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 would turn "back the clock in Mississippi on issues related to race relations."
- "The civil rights laws might be trumped." [22]

A. Redistricting and the Voting Rights Act of 1965

At every step of his legal career, Mr. Wallace has sought to weaken enforcement of the Voting Rights Act of 1965 ("VRA"), hailed as "the most successful civil rights law ever enacted."[23] Even Senator Orrin Hatch, a conservative Republican, has called the VRA "the most important civil rights act in the history of this country."[24] In 1982, Mr. Wallace fought against a measure to restore an important method of proving voting rights violations. Thereafter, despite the fact that a broad bipartisan majority rejected his view, he maintained – both personally and on behalf of clients – that that method was not in fact restored. In one case where he pressed his view, the district court flatly held that the argument had "no basis in fact or in law"[25] and sharply criticized him for "cross[ing] 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."[26] As a board member of the Legal Services Corporation, Mr. Wallace also prohibited legal services providers from continuing their long-standing efforts to enforce the VRA and, as a private citizen, he has voiced his personal opposition to vigorous VRA enforcement.

In reaching its conclusion that Mr. Wallace lacks judicial temperament, the ABA explained that "many lawyers" said that the positions he has taken on the VRA demonstrate his lack of commitment to equal justice.[27] One attorney even described Mr. Wallace as a lawyer "on a mission to destroy the Voting Rights Act [and] other civil rights laws."[28]

1. Opposed Efforts to Restore VRA Protections in 1982

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[22] American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 13-15.
[23] Leadership Conference on Civil Rights, *Without Justice* (Feb. 1982), at 56.
[24] *Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 98th Cong. 110 (1983).
[25] *Id*. at 106.
[26] *Id*. at 111.
[27] American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 12-13.
[28] *Id.* at 19.

Section 2 of the VRA combats discrimination against racial minorities by prohibiting election practices that deny citizens the right to vote on account of race or color. In 1980, a divided Supreme Court ruling in *City of Mobile v. Bolden*[29] significantly weakened Section 2, holding that individuals making claims under it had to prove not just that a defendant's actions had a discriminatory effect, but also that the defendant *intended* to discriminate against minority voters. Together with civil rights advocates, Republican and Democratic legislators, alike, agreed that the *Bolden* decision contravened both Congress's intent and lower court precedents by making it exceedingly difficult to prove voting rights violations. Consequently, in October 1981, by an overwhelming margin of 389 to 24, the House of Representatives renewed the VRA and restored Section 2's "effects test" in the process.[30] After Senate-House negotiations, an amended version of the House bill containing an effects test passed the Senate 85-8; the same amended version passed the House unanimously.[31] A *Christian Science Monitor* article observed:

> At final passage, the only surprise was the size of the majority. Even Sen. Strom Thurmond (R) of South Carolina, once the Senate's most vocal foe of civil-rights legislation, voted yes. So did fellow Republican Orrin G. Hatch, a conservative who had voiced grave concerns about the bill.[32]

Despite early opposition, the Reagan administration also ultimately accepted the amended bill with the effects test.[33]

Although an overwhelming bi-partisan majority of legislators supported restoring the full protections of the VRA, Mr. Wallace did not. In 1982, before Congress adopted the amended bill, while serving as top aide to then-House Minority Whip Representative Trent Lott, Mr. Wallace worked closely with both House and Senate opponents, taking a "leadership role in the House," to prevent the passage of any version of the House bill.[34] As the *Washington News* reported, he "bitterly opposed a congressional extension of the Voting Rights Act and was instrumental in the House battle against it."[35] Indeed, as explained in more detail below, Mr. Wallace's "instrumental" role in the failed opposition effort was one of the things that made his subsequent appointment to the Board of the Legal Services Corporation so controversial.

Significantly, it was during the hearings regarding his nomination to the LSC Board that Mr. Wallace offered his personal view that the VRA amendments had *not* restored the effects test – despite the fact that they undoubtedly had. Mr. Wallace testified:

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[29] 446 U.S. 55 (1980)
[30] *See* Robin Toner and Jonathan D. Glater, *Roberts Helped to Shape 80's Civil Rights Debate*, N.Y. TIMES, Aug. 4, 2005.
[31] Editorial, *Voting Rights: Be Strong*, WASH. POST, Jan. 26, 1982, at B8; Julia Malone, *Voting Rights Act; Even Conservative Senate Heeds Civil-Rights Groups*, CHRISTIAN SCIENCE MONITOR, June 21, 1982, at 15; Caroline Rand Herron, *Senate Uncorks Voting Rights*, N.Y. TIMES, June 20, 1982, Section 4 at 5.
[32] Julia Malone, *Voting Rights Act; Even Conservative Senate Heeds Civil-Rights Groups*, CHRISTIAN SCIENCE MONITOR, Jun. 21, 1982, at 15.
[33] *Id*.
[34] *See* Letter from (Democratic) Majority Senators of the Senate Comm. on Labor and Human Res. to Minority Staff (Jun. 20, 1984) (on file with author).
[35] *Washington News*, UNITED PRESS INT'L, Oct. 13, 1983.

> When the act left the House, it . . . provided an amendment . . . that was intended to broaden in an unspecified way the sort of challenges that could be raised to a whole range of election systems.
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> When the act emerged from the Senate, I believe it had been substantially improved . . . [S]ection 2 was given some specificity in the statute. The meaning of the language used now incorporates the Supreme Court's language in *White v. Regester* which . . . is in fact an intent test, as the Supreme Court later ruled in the case of *Rogers v. Lodge*.
>
> I am very satisfied with the language as it now stands, and I am very satisfied that the Supreme Court will so hold when the time comes.[36]

Mr. Wallace was wrong. As discussed below, the courts – including the Supreme Court – have uniformly found that the amended Section 2 contains an effects test.

2. Blocked Legal Services Providers' VRA Enforcement Efforts

During Mr. Wallace's LSC Board confirmation hearings, Senator John Kerry asked him whether he believed that LSC should continue to represent clients in a variety of "controversial issues," including voting redistricting cases. Mr. Wallace responded, "I have litigated against [legal services] in redistricting cases, and they did a good job. I have no problem with that."[37] Senator Kerry continued, "[s]o you would not seek curtailment or restriction with respect to any of those categories?"[38] Wallace responded, "I have no intention to seek curtailment ... I do not believe that those were the primary types of cases that Congress thought it was funding when it set up this program . . . [b]ut as a matter of principle, Senator, I have no reason to say that those things ought to be off-limits."[39] When Senator Kerry asked whether he would fight to keep redistricting and other issues within the realm of issues addressed by LSC, Mr. Wallace added:

> The main thing . . . it seems to me, is priorities. What is going to change my mind is that this is not an entitlement program, Congress does not provide an unlimited blank check for all the suits that lawyers can think of . . . . My priority is child support, wife-beating, consumer fraud – the kinds of problems that ordinary Americans face and that ordinary Americans pay lawyers to resolve . . . . [T]here are other avenues to deal with reapportionment . . . . They are called elections. . . . I am not going out of my way to cut [reapportionment litigation] off. I am telling you [reapportionment litigation and other issues] are not my chief priorities.[40]

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[36] *Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 109 (1983).
[37] *Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 99th Congress 32 (Apr. 24, 1985).
[38] *Id*. at 33.
[39] *Id*. at 33.
[40] *Id*. at 34. Another "controversial issue" about which Senator Kerry questioned Wallace involved conditions of jails, which will be discussed in further detail.

(Mr. Wallace's logic, of course, was deeply flawed: how can elections resolve problems of voting disenfranchisement if such problems, which corrupt the democratic process, are not fixed in the first place?)

Despite his testimony, Mr. Wallace in fact went "out of [his] way" to cut off VRA enforcement litigation by LSC's local legal services providers. Once Mr. Wallace was elected Chair of the Board, LSC began to prohibit its programs from handling redistricting actions, which had accounted for approximately 95% of the suits filed under the VRA nationwide.[41] Mr. Wallace declared that providing legal assistance in redistricting cases was "not an efficient use of corporation funds."[42] He "d[id] not believe that the corporation's dollars should be diverted . . . in the mere hope that someday some newly elected official may change the world for the benefit of the poor."[43] He felt, instead, that legal aid programs should concentrate on what he characterized as "day-to-day legal needs."[44] According to an article in the *Christian Science Monitor*, Mr. Wallace "forcefully" advocated prohibiting LSC grantees from handling voting rights cases and "made clear his distaste for use of the law to challenge at-large electoral systems or municipal annexation plans that operate to limit the election of black officeholders."[45]

This was the first time that LSC declared unilaterally that an entire area of civil litigation was completely off-limits to federally-funded legal aid lawyers.[46] Until then, it had been up to local legal aid boards to determine their own priorities.[47] Republican Thomas Smegal, Jr. – then a member of the LSC Board's moderate minority – believed that LSC's nationwide prohibition on providing legal assistance in redistricting cases was "a Wallace political judgment."[48] Stan Foster, then-executive director of Legal Aid of Western Oklahoma, agreed that LSC was taking a "highly political" position and making political decisions on what were appropriate cases.[49] According to an article in the *Legal Times*, Mr. Wallace denied these charges, claiming that his push for the restriction on redistricting cases "merely reflect[ed] his concerns about LSC's budget."[50]

The conclusion that Mr. Wallace's position was a political one is reinforced by the fact that Mr. Wallace, representing the Republican Party (a regular client), had lost a redistricting case in which some of the plaintiffs were represented by legal services lawyers. The case, *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *aff'd by*, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), is discussed in more detail below.

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[41] *See* Transcript of Legal Services Corporation Meeting of the Operations and Regulations Committee, Apr. 13-14, 1989; *see also* Anne Kornhauser, *Voting-Rights Cases Declared Off-Limits by LSC; Civil-rights Activists say the Regulation will be Disastrous for Voting-Rights Enforcement in the South and Southwest, where LSC Lawyers have Handled Many of These Cases*, LEGAL TIMES, Apr. 24, 1989, at 9.
[42] Anne Kornhauser, *Voting-Rights Cases Declared Off-Limits by LSC*, LEGAL TIMES, Apr. 24, 1989, at 9.
[43] Joan Biskupic, *Congress Again Scrutinizes Legal-Services Program*, CONG. Q. WKLY. REP., Vol. 47, No. 19, May 13, 1989, at 1120.
[44] Johanna Knapschaefer, *Foster: New Rules Threaten System of Justice to Poor*, JOURNAL REC., May 13, 1989.
[45] Kenneth Jost, *Sabotaging Legal Aid*, CHRISTIAN SCIENCE MONITOR, June 2, 1989, at 19.
[46] Anne Kornhauser, *Voting-Rights Cases Declared Off-Limits by LSC*, LEGAL TIMES, Apr. 24, 1989, at 9.
[47] Johanna Knapschaefer, *Foster: New Rules Threaten System of Justice to Poor*, JOURNAL REC., May 13, 1989 (quoting Stan Foster, then-executive director of Legal Aid of Western Oklahoma).
[48] Anne Kornhauser, *Voting-Rights Cases Declared Off-Limits by LSC*, LEGAL TIMES, Apr. 24, 1989, at 9.
[49] Johanna Knapschaefer, *Foster: New Rules Threaten System of Justice to Poor*, JOURNAL REC. (May 13, 1989).
[50] Anne Kornhauser, *Voting-Rights Cases Declared Off-Limits by LSC*, LEGAL TIMES, Apr. 24, 1989, at 9.

3. Continuing Criticism of the VRA

Mr. Wallace has criticized the enforcement of the VRA in personal statements and legal publications. For instance, as reported in a *Legal Times* article about LSC's prohibition on voting rights suits, Mr. Wallace admitted resenting the fact that under Section 5 of the VRA, Mississippi and other states with histories of discrimination had to submit redistricting plans to the Department of Justice for prior approval.[51]

In a 1996 article, edited by Roger Clegg and James D. Miller, Mr. Wallace also criticized the VRA for encouraging redistricting in Mississippi that led to the election of what he said were less-qualified African-American judges ill-disposed toward both out-of-state and local business interests.[52] Mr. Wallace contended that although Mississippi had a history of local hostility toward out-of-state interests, the VRA created "mechanics by which that hostility now manifests itself."[53] Rather stunningly, he wrote that before Mississippi created VRA-inspired voting subdistricts, "business interests worked . . . to ensure the election of *good black judges*;" however, "[t]he elimination of white voters from new subdistricts may have made their task somewhat harder."[54] "Compared to white members of the judiciary, both past and present," Mr. Wallace complained, "the new black judges have much less legal experience" and "the character of [their] experience hardly seems likely to render them sympathetic to business interests."[55]

In the same article, Mr. Wallace expressed his continued opposition to the VRA's effects test, persisting in the battle he had already lost more than a decade earlier while working in Congress:

> [Vote] [d]ilution claims bear little resemblance to the allegations most people would assume underlie voting rights cases. It is not asserted that blacks are kept from voting . . . [r]ather, dilution cases boil down to a claim that the likely *effect* – whether intended or not – of the incumbent system is fewer black officials than some alternative system. Thus racial gerrymandering is no longer seen as the problem, but as the solution.[56]

Mr. Wallace further complained that "racially gerrymandered districts, once thought to be unconstitutional, more recently have been the primary objective of those charged with enforcing the Voting Rights Act of 1965."[57]

4. Advancing His Personal Views in Private Practice

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[51] *Id*.
[52] *See* Michael B. Wallace, *The Voting Rights Act and Judicial Election, in the State Judiciaries and Impartiality: Judging the Judges* 93 (Roger Clegg & James D. Miller eds., 1996).
[53] *Id*. at 94.
[54] *Id*. at 117-18 (emphasis added).
[55] *See id*. at 112.
[56] *Id*. at 94 (emphasis in original).
[57] *Id*. at 94 (footnote omitted).

Mr. Wallace has often represented clients who have sought either to limit the scope of the VRA or to implement redistricting plans that threaten African-Americans' equal voting rights. The positions that he has advocated in these cases generally correspond to his own views, including his own legal views, concerning redistricting. Indeed, many lawyers and judges who know Mr. Wallace told the ABA Standing Committee that, in litigating VRA cases, he has gone beyond mere advocacy and has sought to advance his own personal agenda – an agenda that is both adverse to minorities' interests and contrary to existing law. The concern is that, if confirmed, he would bring that same agenda with him to the bench, disregarding both the facts and existing law to reach the results he favors.[58]

Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss. 1984), *aff'd by*, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984). A group of African-American plaintiffs claimed that Mississippi's post-1980 census congressional redistricting plan unlawfully diluted their voting strength in violation of Section 2 of the VRA. In 1982, the district court agreed, but refused to promulgate the plan that the plaintiffs favored, instead ordering another plan that was less favorable to the voting rights of African-Americans. In the meantime, as noted above, Congress amended Section 2 to restore the "effects test," making it illegal to dilute the votes of minority groups regardless of whether such dilution was intentional. As a result, the Supreme Court summarily vacated the district court's original plan and remanded the case for reconsideration in light of the amended Section 2.[59] On remand, consistent with the personal beliefs that he had expressed during his LSC confirmation hearings, Mr. Wallace argued on behalf of the Mississippi Republican Party that Section 2 did not restore the effects test and still required proof of discriminatory intent.[60]

The district court flatly rejected his argument: "The Republican Defendants have argued that amended Section 2 preserves the requirement of proving discriminatory intent. We find this

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[58] American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 12-15.

[59] *See Brooks v. Winter*, 461 U.S. 921 (1983).

[60] Serving as lead counsel in *Brooks v. Winter*, which was consolidated with *Jordan v. Winter*, Frank R. Parker, then-Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law ("LCCRUL"), named the Republican and Democratic party committees as defendants but asserted that, in reality, they were "merely stakeholders of the primary elections and not real parties in interest." *See* Letter from Frank R. Parker, Dir., Voting Rights Project, Lawyers' Comm. For Civil Rights Under Law, to Jorge C. Rangel, Mar. 5, 1992, at 2 ("LCCRUL Letter") (on file with author). Then-counsel for the Republican Party, Michael S. Allfred effectively agreed. He filed an answer alleging in the Sixth Defense that the Republican Party had no interest in the outcome of the litigation and agreed to abide by any orders of the court: "Defendant offers its consent to the entry of any decree whatsoever which this court may adopt with respect to the matter of congressional redistricting . . . and prays its dismissal from this suit to await the day when such decree may be entered, with notice to this defendant, so that it may conform to the mandate thereof." *See* LCCRUL Letter, at 3 (citing Separate Answer and Defenses of Defendant, Mississippi Republican Party Executive Committee Brief). "Subsequently, both the state Democratic and Republican Parties agreed to a consent order, entered April 29, 1982, in which they were relieved of any further active participation in the litigation, consented to entry of judgment against them, and agreed to be bound by any decree of the court regarding redistricting." *See* LCCRUL Letter, at 3; *see also Jordan v. Allain*, 619 F. Supp. at 103 n.12. The Mississippi Republican Party abided by this agreement until Mr. Wallace entered an appearance as its lead counsel in approximately December 1983. At that point, Mr. Wallace became involved in "extensive briefing and a secondary evidentiary hearing" aimed at preventing the adoption of the redistricting plan favored by the African American plaintiffs. *See Jordan v. Allain*, 619 F. Supp. at 104 ; *see also* LCCRUL Letter, at 3.

argument to be *meritless* as it runs counter to the plain language of amended § 2, its legislative history, and judicial and scholarly interpretation."[61] Mr. Wallace also claimed that if Section 2 were construed as reaching discriminatory effects, it would unconstitutionally exceed Congress's enforcement power under the Fifteenth Amendment.[62] The court similarly rejected that argument.

Mr. Wallace appealed to the United States Supreme Court.[63] In his jurisdictional statement, he contended that Section 2 did not apply to redistricting, prohibited only electoral schemes adopted with a discriminatory intent, and exceeded Congress's authority under the Fifteenth Amendment.[64] Rejecting these arguments, the Court summarily affirmed the district court's decision.[65] The Court, however, also rejected plaintiffs' proposed alternative redistricting plan.

After the Supreme Court's decision, Mr. Wallace sought attorneys' fees, asserting that his client had prevailed because the plaintiffs' proposed alternative redistricting plan was not adopted.[66] The district court found his argument had "no basis in fact or in law."[67] Moreover, the Court harshly criticized Mr. Wallace's behavior throughout the course of the litigation: "[T]hese defendants, and particularly the Republican Party, crossed the line separating hard-fought litigation from needless multiplication of proceedings, at great waste of both the court's and the parties' time and resources."[68]

Lawyers who have expressed serious concern about Mr. Wallace's commitment to equal justice echoed what the district court found. They expressed two primary concerns: (1) that Mr. Wallace's "position was not well-founded and was contrary . . . 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.;" and (2) 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

[61] *Jordan v. Winter*, 604 F. Supp. at 810 n. 5 (emphasis added).
[62] *Id*. at 811.
[63] *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984); *see also Jordan v. Allain*, 619 F. Supp. at 104.
[64] LCCRUL Letter, *supra* note 49, at 4 (citing Jurisdictional Statement, *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) at 6-9, 12-21, and 22-27).
[65] *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984). Justice Stevens concurred in the summary affirmance, stating "I find no merit in any of the specific challenges presented in the parties' jurisdictional statements…." *Id.* at 1005. Justice Rehnquist, joined by Chief Justice Burger, dissented and strongly suggested that they believed the district court's reading of amended Section 2 was incorrect.
[66] *See Jordan v. Allain*, 619 F. Supp. at 98.
[67] *Id*. at 106.
[68] *Id*. at 111.

of Mississippi."[69] The lawyers concluded that, in this case, Mr. Wallace's "positions went beyond mere 'zealous and forceful advocacy' and into the realm of personal belief."[70]

Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), *rev'd sub nom Chisolm v. Roemer*, 501 U.S. 380 (1991). Registered African-American voters alleged that Louisiana's at-large system for electing state Supreme Court justices diluted the voting strength of African-American voters in Orleans Parish, in violation of Section 2 of the VRA. Mr. Wallace represented the state of Mississippi, which was not a party to the case but filed a friend-of-the-court brief. This time, rather than arguing that Section 2 contained no effects test as he had in *Jordan*, Mr. Wallace asserted that Section 2 simply did not apply to judicial elections. But the result, he claimed, was the same – i.e., the plaintiffs could prevail only if they proved that Louisiana's judicial election scheme was motivated by discriminatory intent.[71] A three-judge panel of the Fifth Circuit disagreed, holding that excluding judicial elections would be "wholly inconsistent with the plain language of the Act and the express purpose which Congress sought to attain in amending section 2; that is, to expand the protection of the Act."[72] The full Fifth Circuit overruled the panel decision in *Chisom* by a narrow margin in a similar Texas case.[73] But when both cases were appealed, the Supreme Court firmly rejected Mr. Wallace's argument: "It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection. Today we reject such an anomalous view."[74]

Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss. 1991), *aff'd in part and vacated in part* 502 U.S 954 (1991). Mississippi voters challenged the state's reapportionment plan, which had been adopted following the 1990 census. The voters filed suit after the U.S. Attorney General officially determined that, under the new plan, "black citizens d[id] not have an equal opportunity to elect candidates of their choice to either the Mississippi House or Senate."[75] Again representing the Mississippi Republican Party, Mr. Wallace defended the plan. The district court found it unconstitutional, but ruled that the "priority of holding elections on a timely basis warrants a temporary departure from the one-person, one-vote principle, pending adoption of a permanent reapportionment plan by either the Legislature or the court."[76] In his Senate Judiciary Committee questionnaire responses, Mr. Wallace listed this case as one of his "most significant" litigated matters.[77]

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[69] American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 13-14.
[70] *Id.*
[71] *See Chisom v. Edwards*, 839 F.2d at 1060.
[72] *Id*. at 1061.
[73] *See League of United Latin American Citizens Council v. Clements*, 914 F.2d 620 (5th Cir. 1990), *rev'd sub nom Houston Lawyer's Association v. Attorney General of Texas*, 501 U.S. 419 (1991) (overruling *Chisom* and holding that Section 2 of the Voting Rights Act did not apply to judicial elections).
[74] *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *see also Houston Lawyer's Association v. Attorney General of Texas*, 501 U.S. 419 (1991) (reversing *League of United Latin American Citizens Council v. Clements*, 914 F.2d 620 (5th Cir. 1990)).
[75] *Watkins*, 771 F. Supp. at 792.
[76] *Id*. at 804.
[77] Michael Brunson Wallace, Responses to Senate Judiciary Committee Questionnaire, at 15 (Feb, 23, 2006) (on file with author).

Smith v. Clark, 189 F. Supp. 2d 548, 558 (S.D. Miss. Feb. 26, 2002), *aff'd by Branch v. Smith*, 538 U.S. 254 (2003). As a result of the 2000 census, Mississippi's congressional delegation was reduced from five representatives to four. When the state legislature subsequently failed to reapportion voting districts, the former president of the Mississippi NAACP and several Democratic activists filed a case in state court asking new congressional districts to be drawn in the event state legislators failed to do so in time for the March 2002 elections. When the legislature failed to act, the state court adopted the redistricting plan proposed by the Democratic activists. Representing the Republican Party, Mr. Wallace went to federal court to quash the plan and to have the elections proceed under the at-large scheme as required by an old Mississippi statute that the VRA had rendered largely invalid.[78] The district court agreed that the state court lacked authority to implement the new plan, since it had not been approved by the U.S. Attorney General, as required by Section 5 of the VRA. But the district court rejected the Republican Party's request for an at-large scheme and instead ruled that it would adopt its own plan, which it would enforce if the U.S. Attorney General did not approve the state court plan in time for the March election.[79] On appeal to the Supreme Court, where Mr. Wallace represented one of the individual Republican plaintiffs, the Court held that the district court properly enjoined implementation of the state court plan (since it lacked prior DOJ approval under Section 5); but, it rejected Mr. Wallace's claim that the district court instead had to adopt an at-large election scheme under Mississippi statute, holding that federal law prohibited federal courts from adopting at-large voting schemes for states entitled to multiple representatives in Congress.[80]

In his responses to the Senate Judiciary Committee questionnaire, Mr. Wallace described his involvement in this litigation – in both state and federal court – as among his "most significant" cases.[81] Lawyers interviewed by the ABA strongly suggested that that may be so because the positions he advanced – which would have eliminated the only majority African-American single-member district in Mississippi – mirrored his own personal opinions.[82] They reported that he went "far beyond" the role of an advocate in this line of cases, "[taking] 'partisan' positions that ignored existing precedent under the Voting Rights Act" in order to advance his own "personal position and 'agenda' without regard for the impact on African-American voters."[83]

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[78] *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. 2002).

[79] *See Smith v. Clark*, 189 F. Supp. 2d at 511 (S.D. Miss. Jan. 15, 2002); *see also Smith v. Clark*, 189 F. Supp. 2d 529 (S.D. Miss. Feb. 19, 2002). The district court released its redistricting plan in *Smith v. Clark*, 189 F. Supp. 2d 512 (S.D. Miss. Feb. 4, 2002). In *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. Feb. 26, 2002), the district court overruled the Democratic intervenors' objections to this plan and enjoined implementation of the state court plan altogether on the grounds that: (1) it was unlikely to be approved by the March elections; and more fundamentally (2) the state court did not have the authority to draw congressional voting districts. *Smith*, 189 F. Supp. 2d 548, 558 (S.D. Miss. Feb. 26, 2002).

[80] *See Branch*, 538 U.S. at 266.

[81] Michael Brunson Wallace, Responses to Senate Judiciary Committee Questionnaire at 23-24 (Feb. 23, 2006) (on file with author).

[82] American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 14.

[83] *Id.* at 15.

B. Supporting the Tax Exempt Status of Racially Discriminatory Schools

On behalf of then-Congressman Trent Lott, Mr. Wallace drafted a letter to President Reagan urging the administration, in the infamous *Bob Jones University v. United States*[84] case, to support the tax-exempt status of private schools that engaged in racial discrimination.[85] Ultimately, the administration reversed its prior position opposing the University's tax-exempt status, making it the first time since before the gains of the Civil Rights Movement took hold that a president favored the position of a racially discriminatory school.[86] Mr. Wallace later testified that he personally agreed with the administration's changed position. [87]

Bob Jones University is a nonprofit religious and educational institution that banned interracial dating and marriage until 2000, after which it permitted interracial dating only with written parental consent.[88] University sponsors claimed that the Bible forbade interracial dating and marriages and, therefore, completely excluded African-Americans from the institution until 1971.[89] From 1971 to 1975, the University began accepting applications from African-Americans, but only if they were married to other African-Americans; the University did not accept applications from unmarried African-Americans.[90] Although the University started permitting unmarried African-Americans to enroll in May 1975, it continued to prohibit interracial dating and marriage and had a disciplinary policy calling for the expulsion of any student who violated that rule.[91]

The *Bob Jones* case arose when the IRS decided that the University no longer qualified for tax-exempt status due to its racially discriminatory policies, which the IRS found to be contrary to public policy. The IRS determined that "a private school not having a racially nondiscriminatory policy as to students [was] not 'charitable' within the common law concepts" of the tax code.[92] The University challenged the IRS's revocation, arguing both that it contravened the plain language of the tax code and that it violated the First Amendment by penalizing the University for its religious tenets. The Justice Department initially backed the IRS's position, arguing that the revocation was proper. During President Reagan's first term, however, when the case was pending before the Supreme Court, the Justice Department switched sides.

With the Court's permission, then-Congressman Lott filed a friend-of-the-court brief supporting the University's position.[93] Congressman Lott, for whom Mr. Wallace then served as a top aide, argued that that the University's policies were not against public policy and, therefore,

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[84] 461 U.S. 574 (1983).
[85] Congressional Record – Senate, Jun. 12, 1985 at 15289; Nina Totenberg, *All Things Considered*, (NPR Broadcast Oct. 13, 1983); Mary Thornton, *Battle Seen on Legal Services Nominees*, WASH. POST, Oct. 17, 1983.
[86] Congressional Record – Senate, Jun. 12, 1985 at 15289. Senator Kennedy described Mr. Wallace's letter as "convinc[ing]" the Administration to change its position.
[87] *See Nominations: Hearing Before the S. Comm. on Labor and Human Res.,* 98th Congress 169 (1983).
[88] Cragg Hines, *W Taps Another Throwback for Important Appeals Seat*, HOUSTON CHRON., Feb. 14, 2006.
[89] *See Bob Jones Univ.*, 461 U.S. at 580.
[90] *Id.*
[91] Cragg Hines, *W Taps Another Throwback for Important Appeals Seat*, HOUSTON CHRON., Feb. 14, 2006; *see also Bob Jones Univ.*, 461 U.S. at 580-81.
[92] *Bob Jones Univ.*, 461 U.S. at 579.
[93] *Bob Jones Univ. v. United States*, 454 U.S. 1121 (1981).

that the IRS erred in denying tax-exempt status to it.[94] Moreover, he argued that "penalizing Bob Jones University for its uncontestedly genuine religious beliefs" "would clearly raise grave First Amendment questions."[95] Congressman Lott further attempted to justify the University's discriminatory practices by comparing them with diversity-driven affirmative action policies: "[R]acial discrimination does not always violate public policy. Schools are allowed to practice racial discrimination in admissions in the interest of diversity . . . . An institution's right to pursue diversity is not constitutionally protected, but its right to practice its religion is . . . . If racial discrimination in the interest of diversity does not violate public policy, then surely discrimination in the practice of religion is no violation."[96]

By an 8-1 vote, the Supreme Court rejected the contention that the University qualified as a tax-exempt organization under the tax code. The Court held that the IRS correctly interpreted the tax-exempt provision of the code as inapplicable to racially discriminatory private schools, explaining that it would be "wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities, which 'exert a pervasive influence on the entire educational process.'"[97] Moreover, the Court unanimously[98] rejected the University's and Congressman Lott's arguments that the IRS's denial of tax-exempt status violated the Establishment and Free Exercise Clauses of the First Amendment.[99] The Court held that the government had an overriding, compelling interest in "eradicating racial discrimination in education," which allowed for regulating the University's purportedly religiously-based policies.[100]

At his LSC Board confirmation hearings, Mr. Wallace was directly questioned about his position regarding tax exemptions for private religious schools with racially discriminatory policies. In response to Senator Eagleton's question about whether he personally believed that Bob Jones University should not have lost its tax-exempt status, Mr. Wallace testified, "I personally believe that the interpretation of the Internal Revenue Code advanced by the Department of Justice," which supported tax exempt status for the University, "was correct."[101] This was, of course, the same position that the Supreme Court overwhelmingly rejected.

C. Diversity and Affirmative Action

Following his 1985 hearing before the Senate Labor and Human Resources Committee, Senators Kennedy, Dodd and Kerry asked Mr. Wallace whether his earlier statement that he was "not interested in the minority recruiting goals of [the Legal Services Corporation]" meant he

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[94] *See* Brief of Congressman Trent Lott as *Amicus Curiae*, 1981 U.S. Briefs 3, *Bob Jones Univ. v. United States*, No. 81-3 (Nov. 27, 1981) (on file with author).
[95] *See id*. at 7.
[96] *Id*. at 8.
[97] *Bob Jones Univ.*, 461 U.S. at 595, 598 (internal citation omitted). Concurring in the judgment, Justice Powell found that even though the IRS had not necessarily properly interpreted the statute through its regulations, Congress nevertheless had acquiesced in the IRS's actions.
[98] Justice Rehnquist agreed that a policy denying tax-exempt status to racially discriminatory organizations did not infringe the organizations' First Amendment rights. *Bob Jones Univ.*, 461 U.S. at 622 n.3 (Rehnquist, J., dissenting).
[99] *Bob Jones Univ.*, 461 U.S. at 603-04, 604 n.30.
[100] *Id*. at 603-04.
[101] *See Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 98th Congress 169 (1983).

thought that "minority recruitment is not a legitimate goal." Mr. Wallace replied, "That is exactly what I mean. I am opposed to race-conscious government action, and I believe the law forbids it."[102] In other words, Mr. Wallace opposes affirmative action not only as a matter of policy, but also as a matter of law. Affirmative action, however, was not illegal at the time of his testimony,[103] nor is it illegal now.[104]

D. Prisoners' Rights

During his LSC Board confirmation hearings, Mr. Wallace was criticized for having authored a letter on behalf of then-Congressman Lott to Deputy Attorney General Edward C. Schmults. The letter challenged the actions of a Justice Department lawyer who had been investigating health and safety concerns in Mississippi jails. The Justice Department began investigating Mississippi's jails when, in response to a 1977 court order requiring the state to bring its overcrowded and inhumanely-operated prisons up to constitutional standards, Mississippi officials merely "shift[ed] hundreds of state prisoners into a network of equally crowded and ancient county jails."[105]

The letter Mr. Wallace wrote on Congressman Lott's behalf sought to prevent the Justice Department from sending additional federal inspectors into the jails. It also demanded that the Justice Department dismiss the attorney who had been working on the investigation, accusing her of pushing for jail conditions beyond the constitutional minima. The letter specifically asserted, "It will not be the policy of the Ronald Reagan Administration to force state penal authorities to conform to ideal standards. Rather, the Department [of Justice] will seek adherence to only the minimum standards compelled by the Constitution." [106] The letter proceeded to ask whether the Justice Department attorney's actions were consistent with Deputy Attorney General Schmults' "wishes"; if so "why the Administration policy has changed," and if not "why [the Department of Justice attorney assigned to the case] ha[d] not been fired."[107] The letter continued, "[t]here are too many lawyers ready and eager to carry out Ronald Reagan's policies to permit those policies to be subverted by mere civil servants."[108]

Mr. Wallace apparently succeeded in his effort to prevent the Justice Department from sending federal inspectors into Mississippi jails. In a letter to Congressman Lott, Deputy Attorney General Schmults indicated that he would no longer support opening county jails to inspections by FBI agents and other experts. [109] Schmults wrote that Justice Department lawyers would be required to approach county jails with "maximum possible deference to the right of

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[102] *See Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 99th Congress 32 (1985) at 124.
[103] *See, e.g.,United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).
[104] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[105] Michael Wines, *The Wheels of Justice – Choose Your Version*, NAT'L J., Nov. 20, 1982, copied in *Nominations: Hearing Before the S. Comm. on Labor and Human Resources*, 98th Congress 175 (1983).
[106] *Nominations: Hearing Before the S. Comm, on Labor and Human Res*., 98th Congress 170-71 (1983) ; *see also* Congressional Record – Senate, Jun. 12, 1985 at 15289.
[107] *Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 98th Congress 171-72 (1983).
[108] *Id*.
[109] Michael Wines, *The Wheels of Justice—Choose Your Version*, NAT'L J., Nov. 20, 1982, copied in *Nominations: Hearing Before the S. Comm. on Labor and Human Res.*, 98th Congress 175 (1983).

Mississippi to run its own affairs without federal interference and the need not to burden Mississippi with excessive compliance costs."[110] Unfortunately, less than one year after squelching the inspections of Mississippi jails, 29 inmates died in a fire in a jail in Biloxi, Mississippi, after flammable polyurethane padding spread toxic fumes throughout the facility.[111] The padding violated the standards set forth by the federal government, the American Public Health Association, and the American Correctional Association. These violations might have been detected through an inspection.[112]

Though widely regarded as having written the letter to Mr. Schmults – it contained his initials – Mr. Wallace has never owned up to it. When Senator Tom Eagleton asked him at his LSC Board confirmation hearings whether he had written the letter, Mr. Wallace refused to answer.[113] Instead, he criticized whoever had "leaked" the letter to the public. "It is a copy of a copy leaked from the Department of Justice, apparently by people who have less regard for their oaths than I do," Wallace testified.[114] When Senator Eagleton questioned Mr. Wallace about the sequence of events leading up to the 29 inmate deaths, again Mr. Wallace evaded the question: "My comments . . . will have to be confined to matters which appear on the public record . . . . Any lawyer who represents a client and any person who comes to work for a Member of Congress thereby undertakes a responsibility of confidentiality about the work he actually does."[115]

E. Immigration

Under Mr. Wallace's leadership, LSC adopted regulations that barred legal services lawyers from "aiding for a period of five years, aliens who receive permanent resident status under the general amnesty provisions of the 1986 immigration-reform act."[116] The regulation, in short, made legalized aliens ineligible for legal assistance.[117] The Washington Lawyers' Committee for Civil Rights had opposed the regulation, noting that various appropriation bills provided that "alien[s] lawfully admitted to permanent residence" were entitled to LSC services.[118]

During Congressional hearings concerning LSC funding, Congressman Barney Frank asked Mr. Wallace to explain his policy forbidding legal services providers from assisting individuals who were "eligible for legalization" – meaning those who "get legalization status"

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[110] *Id*.
[111] *Id*.; *compare* Congressional Record – Senate, Jun. 12, 1985 at 15288 (reporting the death of 29 inmates), *with* Congressional Record – Senate, Jun. 12, 1985 at 15289, 15291 (reporting that 27 inmates died).
[112] Nina Totenbert, *All Things Considered* (NPR Broadcast Oct. 13, 1983). An investigation of this jail and other Harrison County jails started approximately 2 to 3 months prior to the fire, after the Mississippi Prisoner Defense Fund—a civil rights law firm—alleged that the jails violated the 1980 Civil Rights of Institutionalized Persons Act. Michael Wines, *The Wheels of Justice*—Choose Your Version, NAT'L J. Nov. 20, 1982.
[113] *Nominations: Hearing Before the S. Committee on Labor and Human Res.*, 98th Congress 169, 176 (1983).
[114] *Id*. at 169.
[115] *Id*. at 176.
[116] Joan Biskupic, *Congress Again Scrutinizes Legal-Services Program*, CONG. Q. WKLY. REP., Vol. 47, No. 19 May 13, 1989, at 1120.
[117] Editorial, *Legal Help for Aliens: Vote Yes*, WASH. POST, Dec. 10, 1988, at A26.
[118] *Id*.

under the 1986 statute. Mr. Wallace testified that the decision to deny legal assistance was supported by his interpretation of the 1986 statute.[119]

In similar hearings before the Senate, Senator Dale Bumpers questioned Mr. Wallace about his later proposal to eliminate legal aid funds for the representation of all immigrants.[120] In response, Mr. Wallace stated that he was not proposing to eliminate all funds for immigrants: "The proposal is that the migrant funds be distributed to local programs rather than especially being earmarked for migrants."[121] When Senator Bumpers asked, "But then it is a catch-as-catch-can thing; the migrants may get it or they may not," Mr. Wallace simply stated, "They may not get it. That is what local control . . . is supposed to be all about."[122] As noted elsewhere, however, Mr. Wallace favored no such "local control" when it came to handling redistricting cases or expending other LSC resources.

F. Reproductive Freedom

Mr. Wallace's record on reproductive rights is rather sparse. On a couple of occasions, in both personal and representative capacities, he has defended restrictions on abortion. As a former member of the Board of the Legal Services Corporation, Mr. Wallace supported a federal ban on legal aid services to women seeking abortions for non-medical reasons.[123] In addition, he supported investigating legal aid lawyers suspected of assisting women in violation of the ban.[124] The executive director of California Rural Legal Assistance ("CRLA") called an LSC Board investigation "clearly political harassment" and accused LSC's anti-abortion forces of "look[ing] for abortion under every rock."[125] Mr. Wallace expressed his personal support of the LSC investigation, stating that "[t]he federal government puts lots of restrictions (on financing abortions) . . . . It doesn't sound unusual."[126]

In *Pro-Choice Mississippi v. Fordice*,[127] which is discussed in more detail below, Mr. Wallace, representing the state of Mississippi, argued forcefully that the state's abortion restrictions were lawful under the Mississippi Constitution of 1890. (Their lawfulness under the U.S. Constitution had been decided in separate proceedings.) The challenged restrictions included: (1) a provision requiring minors, with limited exceptions, to obtain the consent of both parents prior to obtaining an abortion; (2) a provision requiring women to wait 24 hours after receiving state-mandated information about the benefits of continuing a pregnancy before obtaining an abortion; and (3) a provision requiring a physician to have completed an American Medical Association-approved residency in obstetrics and gynecology before performing

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[119] *Oversight Hearing on Legal Services Corporation: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations*, 101st Cong. 126-27 (1989).
[120] *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for Fiscal Year 1990: Hearings Before a S. Subcomm. of the Comm. on Appropriations*, 101st Cong. 515 (1989).
[121] *Id*.
[122] *Id*.
[123] *See* Rick DelVecchio, *Nonprofit Lawyers, U.S. Tangle Over Abortion Counseling*, S.F. CHRON., Feb. 5, 1990, at A1.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] 716 So. 2d 645 (Miss. 1998).

abortions.[128] Mr. Wallace argued not only that these restrictions did not impose an undue burden on women, but that, unlike the U.S. Constitution, the Mississippi Constitution does not protect the right to abortion at all. [129] While agreeing that the restrictions were lawful, the Mississippi Supreme Court flatly rejected Mr. Wallace's more far-reaching argument: "Just as the United States Supreme Court has recognized that the federal constitutional right to privacy protects a woman's right to terminate her pregnancy, we find that the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion."[130]

In his Judiciary Committee questionnaire, Mr. Wallace referred to *Pro-Choice Mississippi* as one of his "most significant" litigated matters.[131] Interestingly, despite the Mississippi Supreme Court's unequivocal holding, quoted above, he characterized the decision as "establish[ing] the existence of a *very limited right to abortion* under the Mississippi Constitution."[132]

Given Mr. Wallace's repeated criticism of courts that, according to him, unjustifiably substitute their own wisdom for the legislature's (excluding courts that do so in furtherance of conservative causes, like abolishing affirmative action), it is likely that the arguments he advanced in *Pro-Choice Mississippi* reflect his own views. It would be unsurprising if Mr. Wallace believes not only that the Mississippi Constitution does not protect the right to abortion, but that the U.S. Constitution does not do so either.

IV. RECORD ON ACCESS TO COURTS

Mr. Wallace has consistently advocated limiting individuals' right to go to court to seek justice when they have been wronged. As a member of the Board of the Legal Services Corporation, he campaigned hard to restrict legal aid for indigents. In addition, as a contributor to various legal publications, Mr. Wallace has revealed a deep antipathy toward a robust civil justice system. Many lawyers who personally know Mr. Wallace told the ABA that, consistent with these actions and writings, Mr. Wallace does not understand or care about legal issues central to the lives of the poor, the marginalized, and the have-nots. They also suggested that he is more sympathetic to large businesses than individuals.[133] They have stated:

- He has "an instinctive contempt for the socially weak," including "the poor . . ."
- "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."
- I am not sure the "have nots" will always get justice; I am sure "the haves" always will.
- "If it is big business v. the little man, business usually wins.[134]

[128] *Id*. at 649.
[129] *Id*. at 650-53; *see also* Brief of Kirk Fordice, *et al*., Appellees, *Pro-Choice Mississippi v. Fordice*, No. 95-CA-0960, (Mar. 21, 1996) (on file with author).
[130] *Fordice*, 716 So. 2d at 654.
[131] Michael Brunson Wallace, Responses to Senate Judiciary Questionnaire, at 18 (Feb, 23, 2006).
[132] *Id*. (emphasis added).
[133] American Bar Association: Governmental Affairs Office, *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on behalf of the Standing Committee on Federal Judiciary of the American Bar Association concerning the Nomination of Michael Brunson Wallace*, Jul. 19, 2006, at 12.
[134] *Id.* at 15-16.

Mr. Wallace's views on equal access to justice raise special concerns in light of the fact that a cross-section of lawyers and judges interviewed by the ABA questioned Mr. Wallace's ability to put aside his own personal beliefs and fairly follow the law.[135] If, as these lawyers and judges fear, Mr. Wallace were to prejudge the outcomes of cases "based on personal beliefs and not the law, "[136] "poor people," the "have nots," and "the little man" would never get a fair hearing before him.

A. Undermining the Legal Services Corporation

As a member and director of the Legal Services Corporation, Mr. Wallace sought to cut funding, cut programming, preclude entire classes of lawsuits, erect burdensome rule changes and otherwise institutionalize his opposition to what he derisively called LSC's "law reform" programs. He even advocated eliminating the LSC Board and subjecting LSC to all of the political constraints of an executive branch agency.

Despite his assurances that "[w]e are not saboteurs…. [w]e are reformers,"[137] Mr. Wallace aroused considerable suspicion about his commitment to LSC's principles and his willingness to act in the best interests of legal services providers. Criticisms came from all sides: the American Bar Association, fellow Republican board members and members of Congress in both houses and on both sides of the aisle. Representatives from the ABA considered it "unbelievable that someone would accept an appointment to do something and then spend all [his] time in getting rid of what [he's] supposed to be managing,"[138] alleged that "[t]he majority of this board is out to destroy the Corporation"[139] and characterized the Board majority's tactics as "guerrilla warfare."[140] Fellow Republican Board Member Tom Smegal suggested that Mr. Wallace's six-person majority on the Board was out to "further reduce legal services to the poor."[141] Senator Bumpers (D-AR) asked Mr. Wallace whether "[i]n your heart of hearts you think the Government has any business providing legal services for poor people," whether in his view "all people ought to have access to justice," and whether he thought he "should stay on the Board in light of the fact that the Congress has indicated that it seriously and strongly disagrees with [him] on [his] approach to this whole thing?"[142] Republican Senator Rudman (R-NH) was similarly outspoken in questioning Mr. Wallace commitment to LSC's purpose, saying he trusted Mr. Wallace and the Board "about as far as I can throw the [Capitol] dome."[143] At another point,

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[135] *Id.* at 17.
[136] *Id.* at 18.
[137] *Oversight Hearing on Legal Services Corporation: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations,* 101st Cong. 39 (1989).
[138] Neil Lewis, *Legal Services: Political Test Looms for Bush,* N.Y. TIMES, Sept. 8, 1989 (quoting L. Stanley Chauvin, former ABA President).
[139] *Oversight Hearing on Legal Services Corporation: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations,* 101st Cong. 39 (1989).
[140] Ethan Bronner,, *After Surviving Reagan Ax, Legal Aid Awaits Bush's Move,* BOSTON GLOBE, Nov. 27, 1989 (quoting Robert Raven, then President of the ABA).
[141] *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before a H. Subcomm. of the Comm. on Appropriations,* 101st Cong. 1262 (1989).
[142] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the Committee on Appropriations,* 101st Cong. 514-15 (1989).
[143] Ethan Bronner, *After Surviving Reagan Ax, Legal Aid Awaits Bush's Move,* BOSTON GLOBE, Nov. 27, 1989.

Senator Rudman asserted that Mr. Wallace's repeatedly disobeying Congress was nothing less than "absolutely bad faith."[144]

LSC is "[t]he primary method for providing legal services to the poor" in the country.[145] It was established in 1974 to "provide equal access to the system of justice in our Nation for individuals who seek redress of grievances" and "to provide high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel."[146] Importantly, "Congress designed the program to be highly decentralized."[147] LSC and its local legal services grantees "were to operate free from the political pressure of local, state or national government."[148] LSC was thus established as a private, non-profit corporation under the laws of the District of Columbia to provide funding to local entities, which were in turn to be directed by "independent policy-making boards, comprised in part of community and indigent members."[149] There are two types of entities that receive LSC funding: local legal services organizations, which provide direct legal services to the poor, and "support centers" – LSC's think tanks – which approach poverty and attendant problems systemically, focusing on challenges and solutions specific to certain segments of the population.

Mr. Wallace's nomination to the LSC Board followed 32 months of well-publicized Reagan administration efforts to abolish LSC. The Reagan administration, which took issue generally with LSC's more law reform-oriented work, "complained that some Legal Services funds are used illegally for political purposes and that many of its lawyers are liberal activists who sue government agencies in an effort to change society and create new rights for the poor."[150] During his "running battle" with Congress over LSC, President Reagan "tried three times unsuccessfully to persuade Congress to eliminate funding for the corporation."[151] When his proposed funding cuts proved unsuccessful, he attempted to achieve his agenda by appointing like-minded individuals to the LSC Board.

After making "no appointments to the board for the first 11 months of his administration," President Reagan made seven heavily-criticized recess appointments, followed by the nomination (and withdrawal under criticism) of nine board members, at least two of whom "did not believe in the Legal Services program."[152] Mr. Wallace was one of several nominees that the White House subsequently submitted to Congress with promises that they were "in tune with Reagan's philosophical view of the Corporation and its mission."[153] Mr. Wallace was considered "[t]he most controversial" and was initially installed only through the

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[144] Paul Barrett, *Under Bush, a Band of Reaganites Continues Fight to Slash Funds for Legal Aid to the Poor*, WALL ST. J., Aug. 29, 1989.
[145] Larry Spain, *Public Interest Law: Improving Access to Justice: The Opportunities and Challenges of Providing equal Access to Justice in Rural Communities*, 28 WM. MITCHELL L. REV. 367, 370 (2001).
[146] 42 USC 2996(2) (2001).
[147] J. Dwight Yoder, *Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services*, 6 WM. & MARY BILL OF RTS. J. 827 (1998).
[148] Committees on Civil Rights and Professional Responsibility, *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 THE RECORD 13, 20 (1998).
[149] *Id*.
[150] Mary Thornton, *Reagan Names Full Board for Legal Services*, WASH. POST, Oct. 8, 1983.
[151] *Id*.
[152] *Id*.
[153] *Nomination: Hearing Before the S. Comm. on Labor and Human Res.*, 98th Cong. 93 (1983).

use of a recess appointment.[154] Ultimately, the Senate confirmed Mr. Wallace by a 62-34 vote. Some Senate Democrats called his confirmation "a mockery of the notion that members of the board of directors should be individuals who are committed to the [LSC] program and what it represents."[155]

During his confirmation hearing, Mr. Wallace cast himself as a proponent of legal services. He stated that he "fully endorse[d] [the] goal" of "provi[ding] high quality legal service for those who could not otherwise afford adequate legal counsel."[156] He also expressed a personal commitment to representing the poor, saying "[i]t is my duty as a lawyer to serve the just, regardless of their ability to pay."[157] In answers to written questions from Senator Kennedy, Mr. Wallace claimed to be ignorant of the Reagan Administration's "remarks about the similarity of our views" and assured the Senator that he had told the Administration that he "supported the Act." He claimed to "believe the corporation is a necessary tool" and pledged to "work to see that the Corporation properly administer[ed] the Act."[158] In an exchange with Senator Kerry at a later hearing, Mr. Wallace agreed with the statement that "Legal Services have been traditionally involved in what have been some controversial issues on behalf of poor people" but claimed to have "no problem" with Legal Services' representation of clients in "utility rate cases," "challenges to jail conditions," "[r]edistricting cases," or "[c]lass actions against the government."[159] Moreover, Mr. Wallace explained that he had "no intention to seek curtailment" of these categories of legal aid.[160]

However, some of Mr. Wallace's confirmation hearing testimony foreshadowed the changes he would later advocate. Mr. Wallace told Senator Kerry that he believed Congress wanted to give "poor people the kind of access that ordinary middle-class Americans have" but did not believe that "Congress or the American people want to give full and unlimited funding to the creativity of lawyers."[161] As noted above, he said he would prioritize "child support, wife-beating, consumer fraud – the kinds of problems that ordinary Americans face and that ordinary Americans pay lawyers to resolve."[162] But he suggested that other kinds of cases, like those involving jail conditions and voting rights, would not be a priority, asserting rather incredibly that those problems should be fixed through "elections. … Poor people vote."[163] (Putting aside the fact that the law, and particularly the Constitution, is *designed* to protect political minorities, felons in many states are disenfranchised and the victims of voting rights violations, by definition, do not have equal access to the democratic process.)

Once installed on the LSC Board, Mr. Wallace began to express overt disagreement with LSC's principles and practices. Criticizing the LSC support centers, he said, "Their history shows without doubt that they were originally established for the purpose of achieving 'law

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[154] *Washington News*, UNITED PRESS INT'L, Oct. 13, 1983.
[155] Steve Gerstel, *Washington News*, UNITED PRESS INT'L, June 12, 1985
[156] *Nomination: Hearing Before the S. Comm. on Labor and Human Res.*, 98th Cong. 87 (1983).
[157] *Id*.
[158] *Id*. at 93-94.
[159] *Nomination: Hearing Before the S. Comm. on Labor and Human Res.*, 99th Cong. 32 (1985).
[160] *Id.* at 33.
[161] *Id*. at 31.
[162] *Id*. at 34.
[163] *Id.*

reform' through lobbying and impact litigation."[164] Mr. Wallace also condemned the local and national administration of LSC, deriding both "501(c)(3) corporations selected back during the Carter-Mondale administration with boards nominated by local bar associations and picked from who knows where"[165] and "[national support] centers [which] were established for the primary purpose of advancing the law reform agenda of the 1960's through lobbying and so-called impact law suits."[166]

Mr. Wallace backed his criticisms with a series of specific "reforms." First, he and other board members regularly pushed to cut LSC's funding. In 1988, their budget request – which tracked President Reagan's – reflected an 18% or $55.5 million reduction from the previous year's budget.[167] The following year, roughly at the time that Mr. Wallace became chair of the Board, he proposed another $13.24 million cut.[168] At hearings before a Senate appropriations subcommittee, Mr. Wallace defended his request for a smaller budget and attempted to reassure the subcommittee that he and the other members of the Board were not "attempting to destroy the Federal system of providing legal services to the poor."[169] But another Republican Board member, Thomas Smegal, suggested that, to the contrary, the "entire thrust" of the Board's budget request was "to further reduce legal resources available to the poor."[170] Testifying before Congress, Mr. Smegal said:

> Mr. Wallace asserts that … every board member strongly supports the Federal provision of legal services for the poor. That's a quote. That's not been my experience with Mr. Wallace and other members of the Board. … [F]or the second year in a row now this six-person majority is here proposing a funding budget that's substantially reduced.[171]

Mr. Smegal then explained that the Board tried to accomplish its goals by "hir[ing] professionals to lobby your committee for an 18 percent reduction in legal service funding" and "urg[ing], through the conservative 700 Club, that the voters call President Reagan and ask that he veto the whole appropriations bill, your whole committee's appropriations bill, just to kill legal services."[172] And in fact, the LSC Board under Mr. Wallace's leadership did hire a lobbying

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[164] *Legal Services Corporation Reauthorization: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 101st Cong. 14 (1989).
[165] *Oversight Hearing on Legal Services Corporation: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations*, 101st Cong. 104 (1989).
[166] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the S. Comm, on Appropriations*, 101st Cong. 454 (1989).
[167] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for Fiscal Year 1989: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations*, 100th Cong. 257 (1988) .
[168] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations*, 101st Cong. 1129 (1989).
[169] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the S. Comm. on Appropriations*, 101st Cong. 426 (1989).
[170] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations*, 101st Cong. 1262 (1989).
[171] *Id*. at 1260.
[172] *Id*. at 1260-61.

firm to push for funding cuts – a practice that Congress discontinued.[173] "That doesn't sound like a board that supports the delivery of legal services to the poor," Mr. Smegal concluded.[174]

Mr. Wallace and his cohorts justified the proposed budget cuts by eliminating entire categories of legal services programs. As Senator Bumpers noted during Congressional hearings, the budget cuts were to "eliminate funding for the very programs Congress has gone on record as overwhelmingly supporting."[175] These programs, LSC Board member Smegal explained, were LSC "components" that had "demonstrated over more than a decade how essential and important [they were] to an effective national legal delivery system."[176] The programs included "State and national support centers, the National Clearinghouse for Legal Services, regional training centers and computer assisted legal research centers,"[177] as well as "staff field programs" upon which Mr. Wallace at one point attempted to impose a "$66 million reduction in funding."[178]

Mr. Wallace's attempts to eliminate LSC's national support centers – which focused on systemic problems affecting youth, migrants and Native Americans or involving employment, housing and health – proved particularly controversial. These support centers, as Senator Bumpers emphasized, enjoyed overwhelming support in Congress and served as what Mr. Smegal called "the senior partners in the Legal Services Corporation law firm."[179] Despite their central role in the LSC's mission, Mr. Wallace attempted to rationalize cutting them as "eliminating unnecessary or inefficient expenditures,"[180] which "provide little if any direct delivery of legal services to the poor,"[181] and result in little more than money "just going down the drain."[182] Laying bare his ideological differences with the original goals of the legislation creating LSC, Mr. Wallace said:

> According to early advocates of these support centers, they were funded solely for the purpose of bringing test cases and advocating legislative change. As experts in various types of welfare of poverty law, the National Support Centers were to set a national agenda of political and social reform. Such an agenda often ignores

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[173] *Legal Services Corporation Reauthorization: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations*, 101st Cong. 30 (1989).
[174] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations*, 101st Cong. 1260-61 (1989).
[175] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the S. Comm. on Appropriations*, 101st Cong. 425 (1989).
[176] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Committee on Appropriations*, 101st Cong. 1260-63 (1989).
[177] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the S. Comm. on Appropriations*, 101st Cong. 425 (1989).
[178] *Departments of Commerce, Justice, State, The Judiciary, And Related Agencies Appropriations for Fiscal Year 1988: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate*, 100th Cong. (May 12, 1987) at 641.
[179] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Sub. of the H. Comm. on Appropriations*, 101st Cong. 1261 (1989).
[180] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the S. Comm. on Appropriations*, 101st Cong. 529 (1989).
[181] *Id*. at 453-54 .
[182] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1989: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations*, 100th Cong. 846 (1988).

> the needs of the individual poor person, and in fact, in some instances is counterproductive.[183]

Under Mr. Wallace's leadership, LSC pursued another controversial cost-saving strategy: restricting the categories of cases that could be brought with LSC funding. As discussed in the Civil and Constitutional Rights Section, the Board prohibited LSC programs from handling voting-rights actions (which made up approximately 95% of all Voting Rights Act suits), actions on behalf of amnestied immigrants, and work on behalf of poor women seeking abortions for non-medical reasons.

Mr. Wallace also presided over several rule changes that placed additional administrative and financial burdens on LSC grantees. The changes included: issuing four-month rather than full-year grants; requiring programs to relinquish portions of their court-awarded attorneys' fees; and limiting how local programs could use privately-raised funds.[184] Additionally, Mr. Wallace unsuccessfully opposed an existing requirement that LSC grantees receive a full hearing in denial-of-refunding proceedings, calling the procedure a "tremendous drain" and lamenting that "the costs involved are so great that LSC has attempted to deny refunding fewer than ten times since 1977."[185]

Mr. Wallace also made several controversial proposals. For instance, he advocated doing away with free legal services altogether, suggesting a "sliding scale that would require eligible recipients to pay a portion of their legal bills."[186] Mr. Wallace claimed it would "recogniz[e] the client's own dignity" by allowing him to "contribute to his own welfare."[187] Mr. Wallace also wanted to eliminate "th[e] system of 'presumptive refunding'" and replace it with "competitive bidding for grants."[188] The *L.A. Times* reported that "Wallace and a majority of Legal Services' board endorse a plan that many legal services attorneys contend would eviscerate their program."[189] Researchers agreed, based on a $450,000 federal experiment released during Mr. Wallace's push for competitive bidding, that "the free-enterprise experiment [was] flawed and the results disturbing."[190] The researchers asserted that their findings suggested "that if such a program were implemented nationally, it ultimately could reduce the number of lawyers willing to donate, or provide pro bono, services to the poor. … Any policy-maker claiming this study as a justification for a major shift in national policy would be making a grave mistake."[191]

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[183] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the S. Comm. on Appropriations*, 101st Cong. 530 (1989).
[184] Kenneth Jost, *Sabotaging Legal Aid*, CHRISTIAN SCIENCE MONITOR, Jun. 2, 1989.
[185] *Departments of Commerce, Justice, State, The Judiciary, And Related Agencies Appropriations for Fiscal Year 1988: Hearing Before a S. Subcomm. of the S. Comm. on Appropriations*, 100th Cong. 639 (1987).
[186] *Legal Services Corporation Reauthorization: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations* 101st Cong. 29 (1989).
[187] *Id*. at 17.
[188] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the Comm. on Appropriations*, 101st Cong. 451 (1989).
[189] Ted Rohrlich, *Helping Needy or Social Engineering?; Key Turning Point Facing Legal Services for the Poor*, L.A. TIMES, Aug. 17, 1989.
[190] Gregg Zoroya, *Legal-aid Proposal for Poor is Faulted*, ORANGE COUNTY REG., Aug. 24 1989.
[191] *Id*.

Significantly, Mr. Wallace's efforts to undermine LSC goals and programs even included trying to abolish the corporation as an independent agency. As discussed in more detail in Section V below, Mr. Wallace thought that LSC's structure – particularly the fact that the President could not remove Board members – was unconstitutional in that it violated the separation of powers. He and others on the LSC Board commissioned a memo advancing this argument.[192] To have it drafted, they paid between $77,000 and $100,000 of legal aid funds to an outside attorney, Charles Cooper, a former high-ranking Reagan Administration Justice Department official who "shared President Reagan's hatred of the legal services program."[193] Cooper billed 68 hours for preparation of the memo; his associate, Michael Carvin, billed nearly 88 hours.[194] Mr. Wallace used the memo to push Congress to eliminate LSC as an independent agency and have it reauthorized as an executive branch agency answerable exclusively to the President.[195] Mr. Wallace's proposal, if adopted, would have subjected LSC to the political whims of whichever administration was in power – which, in the case of President Reagan, would have led to its demise.

Mr. Wallace said that bringing LSC under the exclusive control of the President would facilitate his goal of getting legal services providers to abide by the severe restrictions that he and his Board allies were imposing. He thought that the non-agency status of the LSC "pose[d] substantial impediments to holding [LSC attorneys] civilly or criminally liable for any fraud or abuse."[196] In a 1989 article, he charged that elements of LSC had been "proven guilty of waste, fraud, and abuse" and derisively observed that LSC's system "was designed to preclude effective control of the recipients of federal legal services funds, and it has worked brilliantly,"[197] But Thomas Smegal, another Reagan-nominated Republican on the LSC Board, indicated that the corporation had not found evidence of fraud or abuse by LSC programs.[198] Hewlett Askew, a staff lawyer with the National Legal Aid and Defender Association, also noted that the Board had been making allegations of abuse but had no proof: "They've been trying to prove this for five years and they can't do it. They sent a report to Congress, after five years of investigation, and it did not have a single piece of concrete evidence. It doesn't cite a single program by name. It just goes on and on with this tilting-at-windmills proposals."[199]

Members of Congress and the LSC Board criticized Mr. Wallace's reauthorization proposal as yet another effort to undermine the provision of legal services to the poor. Congressman Cardin observed:

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[192] *Legal Services Corporation Reauthorization: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations*, 101st Cong. 30 (1989); *see also* Editorial, *Stop Us Before We Sue Again*, WASH. POST, Aug. 8, 1989.
[193] *Lame Ducks and Legal Services*, N.Y. TIMES, Jul. 25, 1989.
[194] Letter from Charles J. Cooper to Terrance J. Wear (Jun. 26, 1989) (on file with author), *see also Legal Services Corporation Reauthorization: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations*, 101st Cong. 74 (1989).
[195] *See e.g.* Michael B. Wallace, "Out of Control: Congress and the Legal Services Corporation," in L. Crovitz & J. Rabkin, *The Fettered Presidency: Legal Constraints on the Executive Branch* (1989); *Legal Services Corporation Reauthorization: Hearing Before the H. Subcomm. on Admin. Law and Gov't Relations*, 101st Cong. 14 (1989).
[196] *Departments of Commerce, Justice, And State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1990: Hearing Before the S. Subcomm. of the S. Comm. on Appropriations*, 101st Cong. 456 (1989).
[197] Michael B. Wallace, "Out of Control: Congress and the Legal Services Corporation," in L. Crovitz & J. Rabkin, *The Fettered Presidency: Legal Constraints on the Executive Branch* (1989) at 174, 177.
[198] Dennis Bell-Newsday, *Advocates for Poor in Trouble-Again*, NEWSDAY, Aug. 16, 1987.
[199] *Id*.

> [I]t seems to me … that what you are suggesting is going to hurt [the grantees], make it more difficult for them to carry out their responsibility under very difficult circumstances through additional regulations, additional burdens that they have to go through. I am listening today to try to understand why you feel that we need additional Federal involvement as far as either criminal sanctions or regulations concerning fee-generating cases, or class action matters, or trying to target the money more into the individual client rather than the class action case.[200]

Board member Thomas Smegal also criticized the proposal, recalling, "at our January 27 meeting, [Mr. Wallace] described our function was not to improve the delivery of legal services to the poor, but our job was 'as a law enforcement agency with a primary objective of finding alleged criminals among legal service lawyers.'"[201]

When attempts to transform LSC into an executive agency answerable to the president failed, Mr. Wallace and other LSC board members sought to make their "reforms" permanent by lobbying to secure future appointments of like-minded Board members. Mr. Wallace and his cohorts backed a former aide to Senator Jesse Helms (R-NC), a former director of the American Conservative Union, and candidates with close ties to agricultural businesses (which were critical of LSC activities on behalf of migrant farm workers).[202] Senator Henry Bundman (R-NH) criticized these lobbying efforts, explaining "I don't think it's proper for people who are on board and who operate on government funds to lobby for their successors."[203] Mr. Wallace, however, defended his actions as an "absolutely proper" effort "to promote the continuation of the policies that we fought so hard to get for the last five years."[204]

B. Assailing the Civil Justice System

Mr. Wallace's antipathy toward legal services programs dovetails with his feelings toward the plaintiffs' bar and the civil justice system generally. He appears to view the system as categorically harmful to business rather than as protective of workers and consumers. For example, in a 1996 article described above, Mr. Wallace lamented the fact that, in his eyes, the Voting Rights Act produced African-American judges sympathetic to consumer interests.[205] In another article, entitled *The Case for Partisan Judicial Elections*, he and his co-authors concluded that they favor partisan judicial elections because they think that elections will produce more business-friendly, less consumer-friendly judges who will "be better able to rein in the judiciary and block the deterioration of the civil justice system." Mr. Wallace continued:

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[200] *Oversight Hearing on Legal Services Corporation: Hearing Before the H. Subcomm. on Admin. Law and Gov,t Relations*, 101st Cong. 115 (1989).
[201] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations*, 101st Cong. 1261 (1989).
[202] Ruth Marcus, *Future of Legal Services Corp. Will Hinge on Bush Nominees; Top Officials Lobby for Conservative Slate*, WASH. POST, Aug. 22, 1989.
[203] *Id*.
[204] *Id*.
[205] Michael B. Wallace, *The Voting Rights Act and Judicial Elections, in the State Judiciaries and Impartiality: Judging the Judges* 93 (Roger Clegg & James D. Miller eds., 1996).

> What can be said affirmatively about partisan judicial elections? Simply stated, two of the seven states that have a partisan judiciary election system – Alabama and Texas – have recently seen successful voter revolts against trial-lawyer inclined judiciaries… These states' judicial election campaigns provide the best possible battleground for business to articulate the ideals of stability and predictability in the legal system, in a way that voters finally can understand and choose over the trial bar's dark vision of American life and law. [206]

Mr. Wallace further contended that consumer protection lawsuits like the recent tobacco litigation reflect "the continued deterioration of the civil justice system," complained that litigation today improperly "expand[s] liability and increase[es] the amount of uncertainty" in the courts, and condemned judges who have struck down restrictive "tort reform initiatives" on state constitutional grounds.[207] For Mr. Wallace, to the extent the civil justice system provides a means for individuals to hold corporations accountable for wrongdoing, it is a nuisance that illegitimately "increase[s] the cost of doing business."[208] Given these strongly held beliefs, it is hard to see how Mr. Wallace will give plaintiffs a fair shake in his courtroom.

C. Advocating Defendants' "Access" to Courts

While Mr. Wallace's behavior on the LSC Board and some of his writings show a desire to curb access to the courts, Mr. Wallace has strongly promoted the "access" rights of tort defendants. In both his personal and representative capacities, Mr. Wallace has advocated for allowing tort lawsuit defendants greater access to the federal courts.

Conventional wisdom holds that in class action and other tort suits, federal courts offer defendants a more sympathetic forum than state courts, which are the traditional venue for tort actions. As JoEllen Lind, Professor at Valparaiso University School of Law, explained:

> Through recent legislation, amendments to the Federal Rules of Civil Procedure ("FRCP"), and judge-made procedural principles, the federal courts offer an ever-more-enticing package of rules that can conflict with state practice and produce profoundly different outcomes in cases. Were these results neutral, they would not be so troublesome; however, procedural differences in the federal courts typically disadvantage plaintiffs, not defendants, and so provide an increasing incentive for defendant forum shopping.[209]

In *A Modest Proposal for Tort Reform*,[210] Mr. Wallace suggested amending the federal removal statute to allow for federal jurisdiction *whenever* defendants can show diversity between any two opposing parties to the suit – rather than meeting the more demanding requirement of complete

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[206] Michael B. Wallace et. al, *The Case for Partisan Judicial Elections*, THE FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES (2003).
[207] *Id*.
[208] *Id*.
[209] JoEllen Lind, *Article: "Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (2004).
[210] Michael B. Wallace, *A Modest Proposal for Tort Reform*, THE FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES (1997).

diversity between plaintiffs and defendants. He posited that looser diversity requirements would prevent judge-shopping by "wily" plaintiffs, who he claimed were beneficiaries of "an unfair advantage" in "state courts. Mr. Wallace also expected greater defendant access to federal courts would prevent "egregious" judgments. Mr. Wallace's assertions beg the question whether he seeks an even playing field or jurisdictional rules that would give tort defendants the upper hand. As Professor Lind explained, "It is one thing to search for solutions to complex cases in a federal systems; it is another to use complex litigation to hide law reform that could not gain public approval if its consequences were better known."[211]

V. VIEWS ON SEPARATION OF POWERS

Consistent with the legal views of aggressively right-wing legal conservatives, Mr. Wallace adheres to a rigid – and long-rejected – view of the separation of powers. He would expand the power of the president and bring all regulatory agencies exclusively under the president's control. He would cripple meaningful enforcement of many of our country's most important statutes by eliminating Congress's authority to delegate rule-making power to regulatory agencies. And he would constrict the vital, historic duty of the courts to safeguard individual rights. If these views were ever to become law, the effect would be a radical restructuring of modern society, one that would threaten a century of legal and social progress.

A. Expanding Presidential Power

During his tenure on the LSC Board, Mr. Wallace articulated an expansive view of presidential power. As discussed in Section IV above, he argued that the LSC's structure impinges on the president's authority and violates constitutional separation of powers principles because its Board members perform discretionary executive branch functions but are not answerable to and cannot be removed by the president.[212] Mr. Wallace contended, "it has always been my conviction that [LSC] ought to be run by a president responsible to the President who can be fired by the President."[213] On another he said, "[W]e ought to abolish the Board [altogether] . . . for constitutional reasons…,"[214] and then repeated, "the Corporation should be converted to an ordinary Federal agency and our Board should be abolished."[215] On yet a third, he reiterated that LSC is "probably unconstitutional."[216] Mr. Wallace's argument regarding LSC's unconstitutionality was detailed in a memo he and his LSC Board allies paid well-known conservative lawyers Charles Cooper and Michael Carvin to prepare for Congress. Cooper's and

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[211] JoEllen Lind, *Article: "Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (2004).
[212] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations,* 101st Cong. 1228 (1989).
[213] *Departments of Commerce, Justice, State, The Judiciary, And Related Agencies Appropriations for Fiscal Year 1988: Hearing Before a S. Subcomm. of the S. Comm. on Appropriations*, 100th Cong. 660 (May 12, 1987).
[214] *Legal Services Corporation Reauthorization: Hearing Before the H. Subcomm. on Admin. Law and Gov,t Relations* 101st Cong. 14 (1989).
[215] *Id*. at 19.
[216] *Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations,* 101st Cong. 1217 (1989).

Carvin's memo is not publicly available, but the argument it advanced appears to be fully developed in an article they published in 1994.[217]

Mr. Wallace's argument regarding LSC's constitutionality appears to rely on the same, controversial theory of the "unitary executive" that Justice Antonin Scalia espoused in his lone dissent in *Morrison v. Olson*, where the Supreme Court upheld the now-lapsed independent counsel statute against the claim that it unlawfully enabled a judicially-appointed prosecutor, outside the control of the president, to bring charges against high-ranking government officials.[218] The "unitary executive" theory was also the subject of intense scrutiny – and criticism – during the confirmation proceedings for Justice Samuel Alito, who had embraced it in two different speeches, saying in one that it "best captures the meaning of the Constitution's text and structure."[219] Conservative legal scholar Steven Calabresi, one of the strongest academic proponents of a unitary executive, explained the theory as follows: "Unitary executive theorists read th[e Constitution] … as creating a hierarchical, unified executive department under the direct control of the President. … The practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power."[220]

The upshot of Mr. Wallace's views is that they would lead not only to the abolition of LSC,[221] but also to the abolition of myriad, vital independent enforcement agencies – the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, the Consumer Products Safety Commission, and many more. Mr. Wallace would bring all of these agencies squarely under the president's control. The effect, as Professor Calabresi concedes, would indeed be dramatic. It would directly subject the currently independent enforcement efforts of these agencies to the political agenda of the president in office. As University of Chicago Professor Cass Sunstein noted, the unitary executive theory reflects "a quite broad understanding of presidential power."[222]

The unitary executive theory also has been employed to justify the Bush administration's unprecedented arguments in support of aggrandizing the president's authority. The

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[217] Charles J. Cooper & Michael A. Carvin, *The Price of "Political Independence": The Unconstitutional Status of the Legal Services Corporation*, 4 B.U. PUB. INT. L. J. 13 (1994).

[218] Mr. Wallace claimed that *Morrison v. Olson*, 487 U.S. 654 (1988), and two other cases, *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Mistretta v. United States*, 488 U.S. 361 (1989), actually supported his arguments. *See Departments of Commerce, Justice, And State, The Judiciary, And Related Agencies Appropriations for 1990: Hearing Before a H. Subcomm. of the H. Comm. on Appropriations*, 101st Cong. 1227 (1989).. But each of those cases *upheld* appointment and removal arrangements falling short of perfect executive control. Rather than support Mr. Wallace's argument, they undermine it.

[219] Samuel Alito, et. al., *Administrative Law and Regulation: Presidential Oversight and the Administrative State*, ENGAGE, Nov. 2001.

[220] Steven A. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-66 (1992).

[221] Mr. Wallace's arguments notwithstanding, it is doubtful that even the unitary executive theory would outlaw the LSC: the theory holds that all executive authority must be exercised by the president, but the LSC does not meaningfully exercise executive authority.

[222] Jo Becker, *Alito Is Called 'Sensitive' to Executive Power*, WASH. POST, Nov. 5, 2005.

administration has claimed that the president has inherent power, as commander-in-chief, to authorize warrantless domestic spying in violation of the Foreign Intelligence Services Act. It previously claimed inherent authority to torture military detainees in violation of U.S. laws and treaties. President Bush also has invoked the unitary executive theory more than 100 times when signing bills into law, indicating that he would not be bound by those laws whenever he felt they interfered with his executive powers. It is unclear whether Mr. Wallace supports the administration's highly controversial reliance on the unitary executive theory, but his persistent arguments against the constitutionality of LSC raise concerns about his views on the subject.

B. Curbing Congress' Delegation Powers

While on the LSC Board, Mr. Wallace testified before Congress that "no regulations of any agency should take effect until enacted pursuant to Article I."[223] This statement indicates that, in Mr. Wallace's view, Congress may not delegate broad rule-making authority to regulatory agencies, as it currently does. Rather, according to him, whenever an agency promulgates a new regulation pursuant to rule-making authority Congress has given it, that regulation may not go into effect unless and until Congress enacts it and the president signs it into law. This view would revive, and in fact bolster, the long-defunct "non-delegation doctrine," which holds that Article I of the Constitution forbids Congress from delegating its legislative authority to anyone else. For the better part of the past century, the non-delegation doctrine has been limited so as to permit Congress to delegate significant rule-making authority to regulatory agencies, which, unlike Congress, have expertise best-suited to address complicated issues in areas ranging from environmental, telecommunications, securities, and energy regulation to workplace, food, and drug safety.

The effect of Mr. Wallace's position, which is shared by only a small number of fiercely anti-regulation ultra-conservatives, would be radical. It would hobble the work of every agency entrusted by Congress to implement the nation's most important laws. To cite just a few examples, it would make it exceedingly difficult for the Environmental Protection Agency to meaningfully enforce the Clean Air and Water Acts, for the National Labor Relations Board to meaningfully enforce the National Labor Relations Act, for the Consumer Products Safety Commission to meaningfully enforce the Consumer Product Safety Act, for the Federal Communications Commission to meaningfully enforce telecommunications legislation, and for the Securities and Exchange Commission to meaningfully enforce securities regulations. Mr. Wallace's position would, in short, undermine the near-consensus view of how the government may go about making society safer, cleaner and more fair.

C. Limiting the Vital, Historic Role of the Courts

The Constitution's framers established an independent judiciary to preserve checks and balances between the legislative and executive branches and to safeguard individual rights against overreaching by elected officials and their subordinates. The concept of judicial review, which authorizes courts to step in cautiously to invalidate or remediate the unlawful actions of the elected branches, protects this careful design. To Mr. Wallace, however, the exercise of the

[223] *Departments of Commerce, Justice and State: The Judiciary and Related Agencies Appropriations for 1989, Hearing Before the S. Subcomm. Of the S. Comm. On Appropriations,* 100th Cong. 638 (1989).

power of judicial review is ordinarily corrupt. For him, as for other conservatives who believe that the courts' contribution to social progress over the past half-century has been largely illegitimate, the judiciary should not be a genuinely co-equal branch of our government. Mr. Wallace and his ideological allies think that, except when needed to invalidate laws and policies that they do not like (e.g., land use restrictions, campaign finance reform, affirmative action and federal worker and consumer protections), courts are to be tolerated but heavily disfavored. They view the judiciary as more of an impediment than a bulwark in our constitutional scheme.

Consistent with this view, Mr. Wallace has long advocated diminishing judicial authority. He has repeatedly criticized court decisions that open the courthouse doors to enforce legal protections, and he advocates expanding the limits on the jurisdiction of the courts in order to close them off to what he derides as "impact litigation" pursued by "activists." Mr. Wallace also has chastised "activist" courts for invalidating state practices or imposing remedies where lawmakers have failed to do so, and he favors partisan judicial elections over appointments as a means of curbing such "usurpation" and "overreaching." Mr. Wallace's record strongly suggests that if confirmed to the Fifth Circuit, he will not meaningfully police violations of federal law by the other branches of government.

In the first place, Mr. Wallace believes in enforcing strict limitations on the authority of the courts to hear cases. In his Senate Judiciary Committee questionnaire, he begins his discussion of the judiciary's role by emphasizing, above all, how limited the jurisdiction of the federal courts is.[224] The response echoes a refrain from several of the articles he has written. In a 2004 piece that he co-authored for the Federalist Society, Mr. Wallace condemned the Mississippi Supreme Court for past rulings recognizing that the Mississippi Attorney General had standing to bring suit in the public interest, that other public officials had standing to bring suit to protect their own legislative prerogatives, and that private citizens had standing to bring suit to challenge the constitutionality of the board of trustees of Mississippi's Institutions of Higher Learning.[225] The thrust of his criticism was that by recognizing that the courts had jurisdiction to hear these cases, the court illegitimately gave "activists" a "procedural vehicle … to file lawsuits against government agencies to determine abstract principles of law," "justified a new procedural approach that encouraged such 'impact litigation,'" and permitted "'test cases' that … intru[ded] into the business of the other branches of government" and amounted to "legislating" from the bench.[226] (Mr. Wallace elided the fact that these decisions were largely compelled by precedent, including, in the board of trustees case, a precedent dating back to 1930.[227]) Mr. Wallace credited the Mississippi high court for more recent decisions that, in his

[224] Michael Brunson Wallace, Responses to Senate Judiciary Committee Questionnaire at 30-31 (Feb. 26, 2006) (on file with author).
[225] James W. Craig and Michael B. Wallace, *From the Crossing of the Rubicon to the Return of a Republic: The Mississippi Supreme Court's View of the Judicial Role, 1980-2004*, THE FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES (2004).
[226] *Id*. at 3-4, 6.
[227] *Miller v. Lamar Life Insurance Co.*, 158 Miss. 753 (1930) (holding that Constitutional litigation by private citizens may be maintained in cases where there is no probability of the statute being challenged by one of the class discriminated against; or, when a decision on validity would not be necessary, one not within the class may question the validity of the statute).

view, "pulled back on the issue of standing," including some that "might be characterized as an abuse of stare decisis."[228]

In another article, published in *Benchmark* in 1983,[229] Mr. Wallace criticized the Supreme Court for "overreaching" when it asserted its jurisdiction to hear *Immigration and Naturalization Service v. Chadha*.[230] *Chadha* decided the constitutionality of unicameral legislative vetoes, which Congress had authorized in a number of laws since the 1910s to give either or both houses of Congress the power to invalidate decisions made by executive branch agencies that enjoyed legislatively-delegated regulatory authority. The Supreme Court ultimately agreed by a 7-2 vote that the practice was unconstitutional, finding that Congress could act only pursuant to a law passed by both houses and presented to the president for signature. Mr. Wallace criticized the Court, not principally for its ultimate ruling, but rather for taking the case in the first place. He contended that the Court exceeded its constitutional authority to hear only "cases or controversies," claiming that because both the Attorney General and Chadha wanted to suspend Chadha's deportation, there was no dispute between Chadha and the Attorney General to adjudicate.[231] Mr. Wallace thus accused the Attorney General of seeking merely "an advisory opinion on the legislative veto,"[232] rather than the kind of relief that the Constitution authorizes courts to grant. Not one of the Supreme Court's nine justices expressed agreement with Mr. Wallace's restrictive view of the Court's adjudicative authority.

Like other hard right conservatives, Mr. Wallace also has repeatedly condemned courts for judicial activism, referring to the exercise of judicial review as the "usurpation" of the policy-making prerogatives of the elected branches of government. Indeed, "judicial overreaching" is a dominant theme in the articles he has published. In one piece written for the Federalist Society, entitled *The Case for Partisan Judicial Elections*, he and his co-authors strongly favor partisan elections over appointments as the means for choosing judges, not only because they think that elections produce more business-friendly courts (see Section IV.B. above), but also because they think that elections produce judges who are "better able to rein in the judiciary" and whose "opportunity for activism would be constrained."[233] The article sets up the choice between elections and appointment as a choice between judicial accountability on one hand and judicial independence on the other. By subjecting judges to political pressure and potentially to removal for unpopular decisions, accountability ensures that courts do not abuse their authority to review the lawfulness of the actions of elected officials. Judicial independence, by contrast, guarantees judicial insulation from political pressures and protects judges' ability to reach decisions that are potentially unpopular but nevertheless required by law. Concluding that accountability is more important than independence, or in other words that "govern[ing] consistently with the majority's policy prefences" is more important than protecting the rights of political minorities,

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[228] James W. Craig and Michael B. Wallace, *From the Crossing of the Rubicon to the Return of a Republic: The Mississippi Supreme Court's View of the Judicial Role, 1980-2004*, THE FEDERALIST SOCIETY (2004) at 6.
[229] Michael Wallace, *Ad Astra Sine Aspera*: *Chadha Transcends Adversity*, BENCHMARK 13 (Fall 1983) (on file with author).
[230] 462 U.S. 919 (1983).
[231] Michael Wallace, *Ad Astra Sine Aspera*: *Chadha Transcends Adversity*, BENCHMARK 13 (Fall 1983) at 14.
[232] *Id*.
[233] Michael B. Wallace et. al, *The Case for Partisan Judicial Elections*, THE FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES (2003).

Mr. Wallace and his co-authors advocate partisan elections.[234] They charge that an appointment system like the federal system "promote[s] a dangerously high level of judicial overreaching," "empower[s judges] to act in an inappropriately activist fashion," and "has brought us substantial amounts of judicial overreaching for a significant period of time."[235] They single out the Warren Court as being guilty of "usurpation" and "overreaching."[236] Long scorned by the right wing, the Warren Court is responsible for landmark achievements like abolishing segregated schooling, recognizing the one person-one vote principle, safeguarding freedom of speech and religion, and bringing a measure of fairness to the criminal justice system.

In *From the Crossing of the Rubicon to the Return of the Republic*, Mr. Wallace similarly chastised the Mississippi Supreme Court for a series of past decisions, including decisions promulgating procedural and evidentiary rules, enforcing the separation of powers, and recognizing a right to counsel in capital postconviction proceedings.[237] Using rhetoric often employed by right-wing critics of the judiciary, he variously accused the court of having ushered in an "era of judicial supremacy," "assert[ing] an activist role within the branches of state government" to correct "perceived legislative inertia," issuing a "unilateral declaration of judicial supremacy that was highly controversial," "abandon[ing] judicial restraint," and "us[ing] … judicial declarations to supplement perceived legislative inadequacies"[238] Mr. Wallace proceeded to laud more recent decisions, including cases where the Mississippi high court held that it could not draw congressional redistricting plans[239] (a case he worked on, *see* Section III.A.4. above), invalidate a law approving the calculation of sales tax repayments to municipalities,[240] or rely on the right to privacy to strike down a law prohibiting the sale of sexual devices.[241] He asserted that these decisions properly displayed "renewed respect" for the actions or inactions of the legislature.

VI. HINTS OF AN OVERARCHING JUDICIAL PHILOSOPHY

Because Mr. Wallace has been neither a judge nor a frequently-published scholar, there is insubstantial evidence of his general judicial philosophy. But what exists suggests that, like Justices Thomas and Scalia, Mr. Wallace is an "originalist" when it comes to interpreting the Constitution and a strict "textualist" when it comes to interpreting statutory provisions. Originalists/textualists believe that the Constitution's provisions ought to be interpreted exclusively according to the meaning they had ascribed to them at the time they were ratified, while a statute's provisions should be interpreted according to their plain language, without any reference at all to what their legislative drafters intended. The effect of originalist/textualist methodology is ordinarily to shrink the ambit of protections that the law provides.

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[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] James W. Craig and Michael B. Wallace, *From the Crossing of the Rubicon to the Return of a Republic: The Mississippi Supreme Court's View of the Judicial Role, 1980-2004*, THE FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES (2004).
[238] *Id.*
[239] *Mauldin v. Branch*, 866 So.2d 429 (Miss. 2003).
[240] *City of Belmont v. Mississippi State Tax Comm'n*, 860 So.2d 289 (Miss. 2003)
[241] *PHE, Inc. v. State*, 877 So.2d 1244 (Miss. 2004).

Mr. Wallace's apparent belief in constitutional originalism comes through in his Senate Judiciary Committee questionnaire. In response to a question on judicial activism, Mr. Wallace presumes that originalism is the proper way to interpret the Constitution without directly saying that it is. He asserts, for instance, that in reviewing a statute's constitutionality, "it is often difficult to determine how the framers of the Constitution would have intended their work to apply to the problems affecting later generations;" but he never suggests that there is any other way, apart from looking at the framers' intent, to apply the law.[242] The remainder of Mr. Wallace's response also focuses exclusively on what the framers thought. He says that "the fact that Congress or a plurality of state legislatures has adopted a position on a particular issue is by itself strong evidence that their ancestors in adopting the Constitution would not have intended a different position to prevail" – again assuming that the framers' intent is the lodestar of constitutional legitimacy.[243] He similarly concludes by claiming that courts are to enforce only those constitutional restrictions that the framers intended to impose on legislative and executive action.[244] Interestingly, Mr. Wallace emphasizes that although courts should rarely exercise the power of judicial review, they should be particularly concerned about actions "detrimental to religious or racial groups and those who had acquired property by honest toil."[245] The fact that Mr. Wallace specifically identifies the framers' intent to protect these interests perhaps implies that he believes the power of judicial review, while usually illegitimate in his eyes, should be exercised to strike down certain policies disfavored by political conservatives, such as affirmative action programs and land use regulations.

Mr. Wallace's brand of originalism is exemplified by the arguments he made in a representative capacity for the Republican Party in *Pro-Choice Mississippi v. Fordice*, which involved a challenge to Missisippi's abortion restrictions based on the Mississippi Constitution. *See* Section III.F. above. Mr. Wallace argued for a restrictive reading of the Constitution's provisions, claiming the court had to construe them exclusively "with reference to the subject matter reasonably appearing to the framers thereof at the time of adoption."[246] "Unless there is some 'plain provision' of the State Constitution which beyond reasonable doubt recognizes a right to abortion," he asserted, "a court is without authority to create any such right."[247] Based on these principles, Mr. Wallace contended that the state Constitution did not protect the right to abortion because it did not contain any specific reference to abortion and because, at the time of adoption, unborn children could inherit property and manslaughter liability attached to abortions performed after the first trimester. The Mississippi Supreme Court disagreed. It rejected Mr. Wallace's originalism argument: "We are not required to metaphysically enter the minds of the Constitution's framers in order to make an interpretation from their viewpoint. It is a mistake to suppose that a constitution is to be interpreted only in the light of things as they existed at the time of its adoption."[248] The court further criticized Mr. Wallace's claim that "reading rights into the Constitution that are not explicitly stated therein is equivalent to amending the

[242] Michael Brunson Wallace, Responses to Senate Judiciary Committee Questionnaire, at 31 (Feb. 26, 2006) (on file with author).
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] Brief of Kirk Fordice, *et al.*, Appellees, *Pro-Choice Mississippi v. Fordice*, No. 95-CA-0960 at 29-30 (Mar. 21, 1996) (on file with author).
[247] *Id*. at 28.
[248] *Pro-Choice Mississippi v. Fordice*, 716 So. 2d at 651 (citation omitted).

Constitution."[249] In finding that "the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion,"[250] the court relied on what Mr. Wallace's argument elided: state law precedent recognizing the right to bodily integrity and autonomy, the "reserved rights" provision in the state Constitution (which mirrors the Ninth Amendment of the U.S. Constitution), and the U.S. Supreme Court's parallel analysis in *Roe v. Wade*. The Mississippi high court further noted that Mr. Wallace's originalism arguments were undercut by the fact that at the time of the state Constitution's adoption, first trimester abortions – abortions performed prior to viability, or "quickening" – were legal.

Mr. Wallace's apparent embrace of statutory textualism comes through in his *From the Crossing the Rubicon* paper for the Federalist Society. Among the criticisms he levels at past Mississippi Supreme Court rulings is his criticism of what he considers to be the court's ill-conceived "quest for 'legislative intent'."[251] In his view, the court has been completely wrong, when interpreting a law, to examine what state legislators intended when they passed it. Like Justice Scalia and a relatively small number of other jurists, Mr. Wallace believes that rulings based on such an examination amount to illegitimate judicial legislation. According to Mr. Wallace, rather than trying to give a statute the most "coherent and principled" reading available, and rather than applying what have become accepted as the ordinary tools of statutory construction, courts should engage only in "literal" interpretation.[252] Like the Mississippi Supreme Court, the U.S. Supreme Court rejects Mr. Wallace's view, acknowledging that where statutory language is ambiguous, divining legislative intent is appropriate, even necessary, since "literal" interpretation would itself open the door to imposition of a court's subjective views.

As he explained in his Judiciary Committee questionnaire, Mr. Wallace's belief in literal statutory interpretation extends to his view of how to determine whether a federal statute confers jurisdiction on the federal courts. He stated, "If Congress has not affirmatively authorized its jurisdiction, a federal court can do nothing."[253] Though consistent with the views of Justices Scalia and Thomas, this view runs contrary to existing Supreme Court precedent, which allows at least some federal statutes not containing express grants of jurisdiction to be enforced against government officials through 42 U.S.C. §1983. Judicial enforcement of these laws is vital to the interests of those whom Congress intended to protect through various safety net statutes, including seniors, people with disabilities and the impoverished.

[249] *Id*. at 652.
[250] *Id*. at 654.
[251] James W. Craig and Michael B. Wallace, *From the Crossing of the Rubicon to the Return of a Republic: The Mississippi Supreme Court's View of the Judicial Role, 1980-2004*, THE FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES (2004) at 4.
[252] *Id.*
[253] Michael Brunson Wallace, Responses to Senate Judiciary Committee Questionnaire, at 31 (Feb. 26, 2006) (on file with author).