

Testimony of

The Honorable Henry Wilhoit

December 10, 2001

Mr. Chairman, Senator Hatch, and distinguished Members of the Committee, I want to thank you for this opportunity to appear before you. Today, December 10, 2001, marks the one hundred eighty-fifth anniversary of the date the Judiciary Committee was established as a standing committee of the United States Senate. The second chairman of this committee was Senator John J. Crittenden, a Kentuckian who served as a Senator on no less than six occasions. Among other tasks, it fell to Senator Crittenden to fill the shoes of another great Kentuckian, Senator Henry Clay, upon the "Great Compromiser's" resignation in 1842. I am also reminded of Senator John Rowan who served as chairman of this committee from 1829 to 1831. Senator Rowan, incidentally, is buried near Bardstown, Kentucky - the site of inspiration for Stephen Foster's "My Old Kentucky Home." Of course the Commonwealth is currently represented on this committee by my good friend Senator Mitch McConnell.

From my personal experience, I can say that the nomination and confirmation process is not an easy one. Despite the rigors and challenges of the confirmation process, those who have been through it recognize that it is vital in ensuring that the federal judiciary remains an independent and equal branch of government, as intended by our founding fathers. As you deliberate upon the nomination of David L. Bunning, please consider some personal observations of Mr. Bunning that I have had as I have observed him from the bench.

Let me begin by speaking about the manner in which I believe Mr. Bunning will conduct himself as a federal judge. The adversarial nature of our judicial process requires that we have men and women sitting in the federal bench who possess certain qualities that are otherwise rare in the legal community. The possessor of the ideal judicial temperament is an individual who thinks strategically, listens patiently and acts not out of passion or prejudice but instead as a result of reasoned logic. It is a person who can ask insightful questions without allowing himself to be drawn into the conflict. Most importantly, the ideal judge is an individual who respects the law as it is recorded and who's character and honesty are beyond reproach.

These are the characteristics which I have observed in David Bunning throughout his regular appearances before me. There have been many instances when he could have embarrassed an opposing party who's claims were un-meritorious or who's briefs were substandard. While a lesser man may yield to the temptations of victory, he has always respected the dignity of the opposing party and, thereby, the dignity of the Court. Regrettably, it is the practice of some attorneys in the federal bar to misconstrue the holdings of some cases or to fail to mention authority which contradicts their position. In the eighty civil and criminal cases which he has practiced before me, I have always found his oral arguments and briefs to be candid, forthcoming and credible. In short, David Bunning has always shown himself to be an advocate who, while arguing aggressively and persuasively for his client, has never strayed beyond the bounds of ethical practice.

He has also proven to be an effective manager of his time and has been a very able case manager. During his four years in the Civil Division of the U. S. Attorney's Office, Mr. Bunning handled approximately sixty-five cases that came before me. His transfer to the Criminal Division greatly limited the number of his cases which were assigned to me. The criminal cases which he did prosecute before me, however, were each handled in a timely and efficient manner. The case management skills he has learned through his decade of experience in the U. S. Attorney's Office will serve him well as a federal judge.

In preparation for appearing before you today, I wanted to review some of the cases in which he had participated. What struck me most is that his experience as an Assistant United States Attorney has been so broad. As I mentioned earlier, he has worked in both the civil and criminal divisions of the U.S. Attorney's Office. During his tenure in the civil division, he actively defended various officers and agencies of the government in numerous contexts. Since the United States Supreme Court handed down its landmark decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, that area of law has been continuously evolving. He has successfully defended several *Bivens* actions and has demonstrated a superior understanding of this confusing body of law. His command of this area of law is so significant that the Department of Justice invited him to be a guest lecturer on this topic in 1995. David Bunning has also been called upon to represent the government in several civil rights actions involving the federal government. He played a large role in the government's defense in *Washington v. Reno*. That case involved a claim by federal inmates that the Bureau of Prisons was acting in violation of their civil rights by restricting their access to telephones. Most recently, he has been involved in cases involving the United States Supreme Court's decision in *Apprendi v. New Jersey*. As I'm sure you know, the *Apprendi* decision has required the courts to reopen many, many criminal cases and to re-examine the sentences imposed on thousands of prisoners nationwide. In his briefs and oral arguments recently made before me, David Bunning has demonstrated an exceptional insight and command of the complex issues raised by *Apprendi* and their interaction with the federal sentencing guidelines. He is recognized by many as an expert on the federal sentencing guidelines and has been called upon by the Kentucky Bar Association to instruct attorneys on the most recent changes to the guidelines.

Temperament and experience make good judges. I believe David Bunning to be honorable, patient and a strategic-thinker. He knows and respects the law. He also has the experience necessary to take on this important task. I can say this with great confidence, for I have seen him in the courtroom. I have witnessed his command of the rules of procedure and evidence. I know that he is more than capable of dispensing justice. He comes before you as a servant of the people. He comes before you with a wonderful mother. His father might well pass muster with you, as well. We look forward to having David Bunning as our colleague. Thank you very much for your interest in him.