

Testimony of

The Honorable Patrick Leahy

December 10, 2001

Today, the Judiciary Committee is holding its seventeenth nominations hearing and its eleventh judicial nominations hearing since the Senate reorganized in July. Since that time, when the Committee's membership was set, we have maintained a strong effort to consider judicial and executive nominees. We have confirmed 21 judicial nominees since July, including three just last week.

That will be more than the total number of judges that were confirmed in all of 1989, the first year of the first Bush Administration, and will include twice as many judges to the Courts of Appeals as were confirmed in the first year of the Clinton Administration. It is also more judges than were confirmed in all of the 1996 session.

Thus, despite all the obstacles, we matched and are exceeding the number of confirmations of judges during the first year of first Bush Administration by six, the last year of the first Clinton term by four, and we are on pace to confirm as many judges as were confirmed in the first year of the Clinton Administration.

Today we consider the nomination of David L. Bunning to be a United States District Court Judge for the Eastern District of Kentucky. The Eastern District of Kentucky is a district that has been fortunate to have the President send nominations for its vacancies. Since the elections in 2000, three vacancies have arisen on the Eastern District bench, and three nominees have been sent to the Senate. This is in contrast to the 69% of the current district court vacancies for which the President has still not sent a nominee.

I am pleased that I was able to move two of those three nominees through relatively quickly. I was able to schedule a hearing for Karen Caldwell just six days after her file was complete, and to get her reported out of the Committee only sixteen days later. Only 25 days after her file was complete, Karen Caldwell was confirmed by the Senate. Danny Reeves, another nominee for that same district, was able to have a hearing only 40 days after his file was complete, to be voted out of committee only a few weeks after that, and he was confirmed last Thursday, only 69 days from the time all his paperwork was complete. This abbreviated waiting time stands in sharp contrast to the length of time it took to get nominees hearings and confirmations in the recent past. During the last six years of the Clinton Administration, it took an average of about 150 days to move a district court nominee to confirmation. I am proud that we have been able to do better since July.

That leaves Mr. Bunning, who as we will hear today, comes highly recommended by his home-state Senators and by those with whom he has worked as an Assistant United States Attorney. However, the American Bar Association's Standing Committee on Federal Judiciary has informed us that a majority of their Committee finds Mr. Bunning not qualified for the federal

bench, and such an assessment has traditionally, and sensibly, meant that the nomination gets a somewhat closer look than those whom the ABA rates qualified or well-qualified.

I agree with my colleague across the aisle, Senator Sessions, who supported the thoroughness and accuracy of the ABA investigatory process in his remarks on the Senate floor on October 16, 2001. As Senator Sessions said, the ABA "talks to people who have litigated in intense situations with the nominee . . . then the ABA makes their recommendations as to whether or not this nominee is "qualified" or "exceptionally well-qualified." I think that is a pretty good process."

The ABA's Standing Committee does an excellent job of conducting its independent, professional, and confidential peer review of the qualifications of judicial nominees. We should give some deference to the results of this tried and tested method of investigation - both when the results are favorable for the nominee and when they are unfavorable.

For 50 years, beginning with the Eisenhower Administration and ending with the Clinton Administration, the ABA provided this invaluable public service on which Presidents and the Senate gratefully relied. Before nomination, during the time that the FBI and the Department of Justice were evaluating the candidates, the ABA would receive their names and return to the Administration a rating, reflecting their view of the potential nominee's qualification. This process worked smoothly and productively until the beginning of this year, when President Bush decided he would no longer provide the ABA with the candidates' names before nomination. Instead, the ABA must now wait until the nomination is already a fait accompli and the nominees' names were made public.

In addition to extending the time the nominee must wait before being eligible for a hearing by six or eight weeks, this decision by the White House eliminated a crucial early warning system for itself and for us in the Senate. The ABA peer review evaluations have helped the White House and the Senate keep cronyism, strident ideology and political payoff at a minimum in the process because the people nominated had to be qualified and pass through a confidential and candid peer review process.

It is unfortunate that the President decided to shift the ABA's role in the judicial nominations process, but I am grateful that they agreed to continue to provide their evaluations to the Senate Judiciary Committee. We have always valued their contribution to the process and the willingness of the members of the Standing Committee, both Republican and Democrat, to volunteer their time, efforts and judgment to this important task. For the 15 members of the ABA Standing Committee and the former members and others who are called upon to help evaluate nominations, they donate their valuable time to these efforts - hundreds if not thousands of hours every year. That is the equivalent of tens of thousands if not millions of dollars in time dedicated to this effort to serve the public and maintain the quality of our federal courts.

So, this morning, after we hear from Mr. Bunning's home-state Senators, and from the nominee himself, we will hear from a panel of witnesses from the ABA's Standing Committee. Roscoe Trimmier, a partner in the Boston law firm of Ropes and Gray, and the chair of the Committee, will testify about the Standing Committee's process. David Weiner, a partner in the Cleveland firm of Hahn Loeser and Parks, the Committee's Sixth Circuit Representative, will tell us in more detail about the peer review he conducted of Mr. Bunning. Also available to answer questions is

Judah Best, a partner in the Washington office of Debevoise and Plimpton, and former chair of the ABA Committee.

Our final panel will consist of four more witnesses - all requested by the minority - who will talk about their professional opinions of Mr. Bunning. We are honored to have on that panel this morning three United States District Court judges, and a former United States Attorney, all from the Eastern District of Kentucky. Judge Henry Wilhoit, now on senior status, has served on the federal bench since his appointment by President Reagan in 1981, Judge Karl Forester, the current chief judge of the district has been on the bench since his appointment by the first President Bush in 1988, and Judge Joseph Hood has served since his appointment by the first President Bush in 1990. We look forward to their testimony, and the testimony of all of our many witnesses this morning.