

Testimony of

# The Honorable Orrin Hatch

December 10, 2001

I am very pleased that you have convened this hearing to consider the nomination of David Bunning to be a United States District Judge in the Eastern District of Kentucky. My examination of Mr. Bunning's qualifications has convinced me that, during the course of his career, he has demonstrated abundant capacity, integrity, and temperament to serve as a federal district judge.

Although I am very pleased that we are having this hearing, I must say that I am unconvinced it is really necessary. The committee has reviewed a great deal of information about Mr. Bunning, from FBI files to his writings to letters from interested parties. We know his employment history, his work ethic, and even what lawyers who have opposed him in court think about him. Indeed, the Committee has as much information about Mr. Bunning as we ever have about any judicial nominee. So the purpose of this hearing is not to find out more about Mr. Bunning, but rather to find out why, in its single-sentence conclusion, the ABA, which is only one of the outside groups who have weighed in on his nomination, said he is not qualified.

Members of this committee do not know why the ABA chooses to label judicial nominees as qualified or not. The ABA does not share any information with the Committee other than its one-sentence conclusion. Even in cases where the decision is controversial, the ABA will not disclose its reasons or rationale. I have to be frank here and say that this is one of the main reasons that I find the ABA's reviews less and less essential to the Committee's confirmation process than some of my colleagues. I simply find it less than persuasive when I read - as in Mr. Bunning's case - a bare conclusion with no facts or analysis or anything to back it up.

Now I appreciate completely the ABA's explanation of the need to foster a full deliberation among its reviewers, as I also understand the need to keep confidential the FBI files that the Committee is provided for each nominee. If the Committee has asked the Executive Branch for FBI files, which we receive, and if the FBI can trust us here with the most sensitive information, then why can't the ABA? Is the ABA information more sensitive than the critically sensitive FBI files? If the ABA evaluations are to be most helpful to the Committee, then I believe that the Committee can and should receive the benefit of the ABA files, including the interviews, discussions, and reasoning, instead of a one-line, cursory conclusion that, in many cases, feeds the growing public perception that the ABA's evaluations are arbitrary and capricious or tainted by politics.

These questions, of course, have nothing to do with Mr. Bunning or his qualifications to serve as a federal district judge. As I said, I have learned a great deal about Mr. Bunning from the information provided by him and other sources to the Committee. Mr. Bunning is a Kentucky native. He attended college at the University of Kentucky, graduating with a Bachelor of

Business Administration degree with departmental honors. He then went on to graduate from the University of Kentucky College of Law.

During law school, Mr. Bunning worked as a law clerk at the United States Attorney's Office for the Eastern District of Kentucky. He must have done a good job, because the office invited him to join as an Assistant U.S. Attorney, one of the most honorable and important jobs in the federal law enforcement community, upon his graduation.

Mr. Bunning has enjoyed a well-balanced career in which he has gained valuable substantive experience in both civil and criminal federal practice. He began his tenure at the U.S. Attorney's Office as an AUSA in the Civil Division. During this time, he worked out of the main office in Lexington. For the first four years of his career, between 80 and 90% of his caseload consisted of a civil docket. One benefit of working in a smaller U.S. Attorney's Office is that a lawyer must become skillful in handling a wide variety of cases, a sort of jack of all trades. As a result, Mr. Bunning's civil experience has consisted of a broad range of cases, including prisoner litigation, medical malpractice cases, Federal Tort Claims Act cases, Bivens actions, affirmative civil enforcement cases, and DEA drug diversion cases.

Often, the goal in civil litigation is to avoid the time, cost, and uncertainty of a trial. Mr. Bunning repeatedly achieved this goal on behalf of his civil clients. In one prison litigation case, Mr. Bunning represented 22 prison officials in a Bivens action alleging that they had violated the plaintiff's constitutional rights. He successfully obtained summary judgment for all but one of these defendants. In another case, the district court granted Mr. Bunning's motion to dismiss - which he drafted while he was still in law school - in a Federal Tort Claims Act case brought against the United States.

In 1995, having established his reputation as a skillful lawyer in the Lexington office, Mr. Bunning was transferred to the Covington satellite office, where he handled his own caseload with minimal need for supervision. The nature of his practice changed from primarily civil to largely criminal, and since 1998 his case load has consisted exclusively of criminal cases. He has developed expertise in handling a wide variety of prosecutions, including narcotics cases, health care, Internet, and other white-collar fraud cases, violent crime, and forfeiture cases. In one case, Mr. Bunning successfully prosecuted a defendant for Internet fraud and harassment. Before the defendant was sentenced, he and his brother embarked on a murder for hire scheme targeting not only the victim of the fraud and harassment, but Mr. Bunning as well. Luckily, their scheme was thwarted, and they were duly convicted and sentenced. As a result of his work in this case, Mr. Bunning was awarded the Department of Justice Annual Victim's Rights Recognition Award, as well as a commendation by the United States Secret Service. Mr. Bunning was also awarded a commendation in a separate case by the United States Customs Service for his prosecution of the illegal importation of the party drug Ecstasy.

Mr. Bunning has accumulated a wealth of trial experience: Since joining the U.S. Attorney's Office, he has handled 20 civil and criminal trials as sole or lead counsel. He has also amassed significant appellate experience, having authored more than 50 appellate briefs, and argued between 10 and 15 cases before the Sixth Circuit Court of Appeals.

The high esteem in which the Kentucky legal community holds David Bunning is reflected in the numerous letters in support of his nomination that we have received. We have received letters from co-workers, from opposing counsel, and even a letter from a victim in a case he prosecuted. Although I regret that time limitations preclude me from reading excerpts from each letter, I would like to mention just briefly one of these letters. It is from Paul Vesper, an attorney in Covington, Kentucky. He writes,

"As a self-described 'liberal Democrat' I knew I would have to man the parapets to oppose any nomination by the recently inaugurated Republican occupant of the White House. And then to my delight, my colleague, David L. Bunning, was chosen to fill this post. I have known David in excess of 12 years, both as a competent practicing attorney, advocate for his clients, and lecturer on federal issues and practices. You will certainly receive many comments attesting to his intellect, skills and effectiveness which are now his resume. But to me, for a federal judge, the most important qualities are his integrity, genuine fairness - and no hint of aloofness. The litigants and lawyers before a Judge Bunning will be treated respectfully and receive prompt attention to their pleas. . . . It is always hard for me to find nice things to say about Republicans, but I hereby volunteer for the task to praise David L. Bunning. I commend the President for his choice and I wish David long tenure as a confirmed appointee to the bench."

Mr. Chairman, I ask permission to enter into the record the full letter from Mr. Vesper, as well as the other letters we have received in support of Mr. Bunning's nomination.

I understand that in addition to the ABA witnesses, we will hear from four witnesses who, like Mr. Vesper, have first-hand familiarity with Mr. Bunning's litigation experience, his courtroom demeanor, and his legal judgment. These witnesses include the former U.S. Attorney during the Clinton Administration, who was Mr. Bunning's supervisor for eight of his ten years as a federal prosecutor, and three federal district court judges before whom Mr. Bunning has practiced. Not surprisingly, the judges are particularly interested in filling the vacancies in the Eastern District of Kentucky with solid, qualified persons. I believe that David Bunning fits this description, which is why I proudly joined my colleague Senator McConnell in recommending to the President his nomination to the federal bench in Kentucky.

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