



AMERICAN BAR ASSOCIATION

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STATEMENT

of

ROSCOE TRIMMIER, JR.

and

DAVID C. WEINER

**STANDING COMMITTEE ON FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION**

concerning the

NOMINATION OF DAVID L. BUNNING

**TO BE JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY**

before the

**COMMITTEE OF THE JUDICIARY
UNITED STATES SENATE**

DECEMBER 10, 2001

STATEMENT OF ROSCOE TRIMMIER, JR.

Mr. Chairman and Members of the Committee:

My name is Roscoe Trimmier. I am a practicing lawyer in Boston, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. With me today is David C. Weiner, the Committee's Sixth Circuit representative and principal investigator for this investigation, and Judah Best, a former Committee member and Chair of the Committee who acted as the second investigator in this case. We appear here to present the views of the Association on the nomination of David L. Bunning to be a U.S. District Court judge for the Eastern District of Kentucky. After careful investigation and consideration, including an evaluation of his written submissions, a majority of our Committee is of the opinion that Mr. Bunning is "Not Qualified" for the appointment. A minority found him to be "Qualified."

I. PROCEDURES FOLLOWED BY THE STANDING COMMITTEE

Before the specifics of this case, I would like to review briefly the Committee's procedures so that you will have a clear understanding of the process the Committee followed in this investigation. A more detailed description of the Committee's procedures is contained in an ABA booklet entitled "Standing Committee on Federal Judiciary: What It Is and How It Works" (July 1999).

The ABA Committee investigates and considers only the professional competence, integrity and judicial temperament of the nominee. Ideological or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective evaluation of each nominee. A number of factors are investigated, including

intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law, professional experience, character, integrity and general reputation in the legal community.

The investigation is ordinarily assigned to the member of the Committee residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. The starting point of an investigation is the receipt of the candidate's responses to the public portion of the Senate Judiciary Committee Questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications -- professional experience, significant cases handled, major writings, and the like. The principal investigator personally conducts extensive confidential interviews with a broad spectrum of individuals who are in a position to evaluate the nominee's professional qualifications and also examines the legal writings of the candidate. The principal investigator interviews the candidate and discusses his or her qualifications for a judgeship, as well as the substance of adverse information raised during the investigation. The candidate is given a full opportunity to respond and to provide any additional information he or she may choose.

Sometimes a clear pattern emerges in the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations as to professional competence may be received, or questions may arise as to integrity or temperament. The principal investigator usually submits an informal report on the progress of the investigation to the Chair, providing a preliminary assessment of the nominee's qualifications. In those cases where it appears that the preliminary assessment may be "Not Qualified," as a matter of fairness, another investigator may be asked to come into the investigation and conduct the supplemental inquiries he or she feels appropriate and to make a recommendation.

At the conclusion of all inquiries, a formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview

with the prospective nominee), an evaluation of the candidate's qualifications and a recommended rating, is circulated to the entire 15-member Committee together with the complete Senate Judiciary Committee questionnaire and copies of any other relevant materials. Any supplemental report is also provided to each Committee member. After studying these materials, each member telephones a vote to the Chair, rating the nominee "Well Qualified," "Qualified," or "Not Qualified." The votes are later confirmed in writing.

An important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the candidate, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If that cannot be done, the information may not be relied upon by the Committee in reaching its evaluation.

II. THE INVESTIGATION OF MR. BUNNING

Mr. Bunning was nominated on August 2, 2001. Mr. Weiner began his investigation shortly after receiving Mr. Bunning's August 10, 2001 responses to the public portion of the Senate Judiciary Committee questionnaire.

On September 12, 2001, Mr. Weiner prepared and submitted to me, as Chair of the Committee, an informal report that thoroughly presented the results of his investigation, summaries of all of his confidential interviews, a summary of his interview with Mr. Bunning,

and a recommendation. Because the recommendation proposed was that Mr. Bunning be found "Not Qualified," consistent with the Committee's procedures, I appointed a second investigator, Mr. Judah Best, a former member and Chair of our Committee, to conduct a supplemental investigation. Mr. Best conducted confidential interviews with seventeen persons, some of whom Mr. Weiner had previously interviewed, and he, too, interviewed Mr. Bunning in his office on September 26, 2001. Mr. Best recommended that the Committee rate Mr. Bunning "Qualified."

On October 1, 2001, both Mr. Weiner's formal report and Mr. Best's supplemental report were transmitted to all of the members of the Committee. I encouraged Committee members who had questions for either investigator to contact them directly. After all of the Committee members had had an opportunity to study both reports, and all the attachments, they reported to me their votes on the qualifications of Mr. Bunning. A majority of the Committee voted to find Mr. Bunning "Not Qualified" and a minority voted to find him "Qualified." The vote was reported to you on October 11, 2001.

I will now ask Mr. Weiner to describe the conduct of his investigation and the basis of his recommendation, which the Committee adopted by majority vote. Mr. Best is also here to respond to any questions you may have regarding his supplemental investigation and his recommendation.

STATEMENT OF DAVID C. WEINER

Mr. Chairman and Members of the Committee:

My name is David C. Weiner. I am a trial lawyer from the State of Ohio, and have been practicing for 32 years. I am the Chairman of the Board of the 7th largest firm in Cleveland and a past Chair of the Litigation Section of the ABA. I earned my law degree here in D.C. at the

Georgetown University Law Center, and began my legal career down the street as a clerk for Senior Circuit Judge E. Barrett Prettyman of the U.S. Court of Appeals for the District of Columbia Circuit.

As the Sixth Circuit member of the ABA Standing Committee on the Federal Judiciary, I conducted the initial investigation of the qualifications of Mr. David L. Bunning. I have been a member of the Standing Committee since 1997. I have participated in numerous investigations of potential and actual nominees to the U.S. Court of Appeals and the U.S. District Courts. I have done so both as the Committee person responsible for the investigation, and as a reviewer of investigations conducted by fellow Committee members. My investigation of the nominee was conducted in the same manner all investigations by the Standing Committee are conducted, as Roscoe Trimmier just explained to you.

My investigation was conducted during August and September of this year. It included over fifty confidential interviews with trial and appellate federal judges in the Sixth Circuit and Kentucky lawyers who know and have worked with the candidate, and who have direct knowledge of his professional qualifications, including those Mr. Bunning listed as references. I included among my interviews prominent members of the Kentucky trial bar. During each conversation I inquired how the person knew, if at all, the nominee and what the person knew about the nominee's judicial temperament, integrity and professional competence relevant to his being qualified to serve as a United States District Judge. I also inquired if they knew any reason why the nominee should not be qualified to so serve.

In addition to these interviews, I reviewed other pertinent materials, including writing samples Mr. Bunning selected for me, such as legal briefs he had written. I also met privately with Mr. Bunning in his office in Covington, Kentucky, for nearly three hours. During the

course of our meeting, concerns that had been identified during my investigation were discussed and the candidate was given an opportunity to provide additional information and to respond.

Before reaching my recommendation, I reflected at some length upon our guidelines, which appear in a publication we refer to as the Backgrounder. In particular, I deliberated on the various duties and roles United States District Judges must perform on a regular basis, and the importance of that lifelong position. My recommendation was that the nominee be rated "Not Qualified." I will shortly set out the reasons for this recommendation, but stress that I did not reach this conclusion lightly.

Indeed, because my preliminary investigation resulted in a "Not Qualified" recommendation, our Committee Chair called for a second investigation, which was conducted by a very distinguished member of the D.C. bar, Judah Best. I have known Mr. Best for decades and I have the highest regard for him. I carefully reviewed Mr. Best's Supplemental Report, and Mr. Best and I discussed our respective views of the qualification of the nominee at length. We could not, however, reconcile our different views.

After careful consideration of both our reports, along with the nominee's Questionnaire, and the written submissions he had furnished, the majority of our Standing Committee was of the view that Mr. Bunning is "Not Qualified" for the position. A minority of the Committee found him to be "Qualified."

Our Committee takes most seriously its responsibility to conduct an independent examination of the professional qualifications of judicial nominees. There is no bright line litmus test as to whether a nominee is or is not qualified. Our recommendation is not the result of tallying the comments - pro and con - about a particular nominee. Rather, in making our evaluation, we draw upon our previous experience, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment. I must

stress that we apply the same standards and criteria impartially to all nominees. As you know, President Bush has submitted to the Senate the names of 64 nominees for judicial appointment, and our Committee has found only this one candidate to be "Not Qualified."

At the outset, let me state that as to two of our three criteria, little was brought out during the course of our investigation to question the nominee's integrity, and his judicial temperament was found likely to be satisfactory. There was no question that the nominee is a good person with strong family and religious ties, is a diligent worker (he told me that he regularly works from 8:00 a.m. to 5:00 or 6:00 p.m. daily), and is generally well-liked. I should also say that he has been cordial and respectful toward me throughout this process.

Rather, our conclusion that the nominee should be rated "Not Qualified" is based on several, serious concerns relating to his competence. Our Backgrounder states that "professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of professional experience." There should be, we believe, strong evidence that the nominee is professionally competent to manage and resolve the hundreds of diverse matters a federal judge is likely to face. Some of those matters call upon a federal judge to resolve very complicated and challenging factual and legal issues, which may well have far-reaching and lasting effects on numerous people. A judge regularly must make on-the-spot decisions in the courtroom that require a solid grounding in procedural and substantive law across a broad spectrum. Using that as a guide, we looked at the total experience of the nominee.

Evidence of competence is the strongest and easiest measure when the lawyer has practiced law for a number of years. Based on the Committee's long-time experience with investigating nominees, twelve years is what we think to be an appropriate minimum, absent extraordinary circumstances. A lawyer with this amount of experience is found more likely to

have been exposed to a broader spectrum of legal issues and acquired more sophisticated responsibilities and perspectives than one lacking such experience. We believe that the judicial system, the public, the trial bar and the nominees are not well served by placing on the Bench one with less than such minimum experience.

The 12-year experience guideline is not a hard-and-fast rule, and is not an automatic disqualifier. The Committee's criteria provide that limited experience may be offset by the extraordinary breadth and depth of a nominee's experience over the course of his or her career. Nominees with less than twelve years at the bar have been found qualified by our Committee, albeit rarely.

Mr. Bunning's civil case experience, however, is very limited and shallow. It includes no exposure to, let alone experience in, complex civil matters that regularly find their way to federal district courts. In response to the Senate Questionnaire's inquiry about the ten most significant litigated matters personally handled by the nominee, Mr. Bunning listed only three civil cases. One was a case dismissed on a motion written by the nominee while he was still a law clerk in the U.S. Attorneys Office. The other two civil cases, included a civil trial against a pro se prisoner and the trial defense of a so-called Bivens claim. I learned that approximately one-third of all the nominee's civil cases were Bivens cases, which typically call upon a defending AUSA like Mr. Bunning to routinely litigate similar defenses in each case. Additionally, I was told that many of the other civil cases involved federally detained mental patients who had guardians ad litem appointed when the patients refused prescribed drug treatments. These cases, while significant to the litigants involved, do not represent the type of cases which readily prepare one for a federal court docket.

While his criminal experience takes him to court regularly and he has concluded eighteen trials to verdict, the cases were not of the type that called for particularly challenging lawyering.

During the course of the investigation, it was pointed out by several interviewees that the Covington office of the United States Attorney's office is a satellite office and, therefore, does not get the more significant criminal cases. Further, there is no evidence that Mr. Bunning received direct supervision or constructive criticism on his work sufficient to contribute to his professional development as a lawyer. During my investigation, I determined that the nominee has learned and gained experience on his own. The nominee told me that "he is pretty much on his own," and he told me his boss believes in a hands-off approach to supervision.

A review of the legal writings he submitted found them to be sufficient from a legal standpoint. Yet, the issues addressed were routine and not complex, and the writing style was plain. They revealed little advocacy or elegance, and to me they read very much like the work of a young associate in our firm.

The nominee's lack of academic achievement was another limiting factor. The nominee attended the University of Kentucky for both his undergraduate and law school degrees. Although the University is a fine institution, its law school is not highly ranked. Thus, the nominee's middle-of-the-class law school record does not speak well for him. It is also not a plus that the nominee did not engage in any professionally oriented extra-curricular law school activities, such as Moot Court or Law Review.

The nominee's age is a concern only insofar as it reflects the quality and scope of his professional experience. One might fairly ask whether a 35-year old could be qualified to sit as a federal judge? I am not alone on the Committee in my belief that there are 35-year olds with ten years of experience who have the professional competence to so serve. Our Committee's belief, however, is that Mr. Bunning is not one of them. Yet, neither his age nor his lack of twelve years experience are the determining factors. Rather, it is a combination of average academics, limited civil experience, repetitious and routine criminal matters, writings which "just do the

job," serious doubts by respected members of the Bench and bar, and no intellectual spark or legal enthusiasm that carry the day for our Committee.

For our Committee to rate a nominee as "Qualified" for a lifetime appointment to the bench, a majority of us must find that the nominee meets "very high standards with respect to integrity, professional competence and judicial temperament," and we must find that the nominee "will be able to perform satisfactorily all of the responsibilities required by the high office of a federal judge." With respect to this nominee, we do not find that to be the case.