



AMERICAN BAR ASSOCIATION

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STATEMENTS

of

STEPHEN L. TOBER

and

E. OSBORNE AYSCUE, JR.

on behalf of the

STANDING COMMITTEE ON FEDERAL JUDICIARY

of the

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF GREGORY F. VAN TATENHOVE

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

before the

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

November 23, 2005

I. Statement of Stephen L. Tober

Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober. I am a practicing lawyer in Portsmouth, New Hampshire, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. I am submitting this written statement for the hearing record to present the Standing Committee's peer review evaluation of the nomination of Gregory F. Van Tatenhove to be a United States District Court Judge for the Eastern District of Kentucky. This statement is divided into two sections. In this first section, I am pleased to summarize the Standing Committee's investigative procedures and present an overview of the investigation of the nominee. In the second section, E. Osborne Ayscue, Jr., a former member of the Committee and the circuit member who conducted this investigation, explains the basis for our rating of Mr. Van Tatenhove.

After careful investigation and consideration of his professional qualifications, a majority of our Committee is of the opinion that the nominee is "Not Qualified" for the appointment. A minority found him to be "Qualified."

A. Procedures Followed By the Standing Committee

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures. A more detailed description of the Committee's procedures is contained in the Committee's booklet (commonly described as our *Backgrounder*),

Standing Committee on Federal Judiciary: What It Is and How It Works (2005).

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee -- his or her competence, integrity and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, knowledge of the law, breadth of professional experience, courtroom experience, character, integrity, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Mr. Ayscue, in his capacity as a former member, was kind enough to undertake this investigation because the current Committee member from the Sixth Circuit was already conducting another investigation.

The investigator starts his or her investigation by reviewing 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, including professional experience, significant cases handled and major writings. The investigator makes extensive use of the questionnaire during the course of the investigation. In addition, the investigator examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence and judicial temperament of

the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer-review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the investigator will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the Standing Committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the investigator takes whatever additional steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the investigator submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the investigator then prepares the formal investigative report, containing a description of the candidate's background, summaries

of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications. This formal report, together with the public portion of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire committee, composed of fourteen "circuit" members and the Chair. After carefully considering the formal report and its attachments, each member submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified" or "Not Qualified." An investigator who is not a current member of the Standing Committee would not vote.

I would like to re-emphasize that 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 or the information is so well known in the community that it has been repeated to the Committee members by multiple sources. 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 nominee, who is given a full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared with the nominee, it is not included in the formal report and is not considered by the Committee in reaching its evaluation.

B. The Investigation of the Nominee

Mr. Van Tatenhove was nominated on September 13, 2005. Mr. Ayscue, whom I

assigned to the investigation, began his effort on October 5, 2005, shortly after receiving the nominee's responses to the public portion of the Senate Judiciary Committee questionnaire and signed waiver forms.

On November 4, 2005, Mr. Ayscue submitted his informal report to me, reflecting the results of his investigation, including summaries of all of his confidential interviews and a description of his interview with the nominee. I carefully reviewed the report with Mr. Ayscue and was satisfied with the quality and thoroughness of the investigation and report. On November 5, 2005, Mr. Ayscue's formal report was transmitted to all of the members of the Committee. Those who had questions were encouraged to contact Mr. Ayscue directly.

After all of the Committee members had an opportunity to study the report and all the attachments, each member reported his/her vote regarding the rating of the nominee to the chair. A majority of the Committee found the nominee "Not Qualified" and a minority found him "Qualified." This vote was reported to you in a timely manner on November 10, 2005.

II. Statement of E. Osborne Ayscue, Jr.

Mr. Chairman and Members of the Committee:

My name is E. Osborne Ayscue, Jr.. I am a civil trial lawyer in Charlotte, North Carolina and, as Mr. Tober indicated, I served on the Committee for three years, from August 2001 to August 2004. During that time I participated in the evaluation of approximately 230 nominees to the U.S. Courts of Appeals and U.S. District Courts. I

was asked to undertake the investigation of the qualifications of Gregory F. Van Tatenhove to be a United States District Court Judge for the Eastern District of Kentucky. My investigation of the nominee was conducted in the same manner all investigations by the Standing Committee are conducted.

My investigation was conducted during October and early November. In addition to reviewing pertinent materials carefully, such as the nominee's responses to the questionnaire, his legal writings and other documents that he sent me to review, I solicited information from diverse members of the legal community who were likely to know him. As a result, my investigation of the professional qualifications of Mr. Van Tatenhove included confidential interviews with approximately 30 lawyers and judges who know and have worked with the nominee and who have direct knowledge of his professional qualifications. During each conversation I inquired how the person knew the nominee and what the person knew about the nominee's professional competence, judicial temperament and integrity that would bear on his qualifications to serve as a United States District Judge. I also inquired if they knew any reason why the nominee was not qualified to so serve. I also met privately with the nominee in his office. During the course of our meeting, concerns that had been identified during my investigation were discussed and the nominee was given an opportunity to rebut the adverse information and provide any other additional information.

As Mr. Tober explained, the Standing Committee assesses the professional qualifications of a nominee by evaluating his judicial temperament, integrity and professional competence. My investigation disclosed nothing that would impugn his integrity or judicial temperament. Indeed, everyone that I interviewed thought highly of

him, praising him for qualities such as his honesty, graciousness, collegiality, intellect, open-mindedness, industriousness and diligence. My sense, after my two-hour interview with him, was that he soundly deserved these accolades. Mr. Van Tatenhove is well-regarded by the legal community with which he works.

Those interviewed, however, expressed substantial concern over his competence to be a district court judge due to his lack of relevant professional experience, specifically, the absence of any significant trial or courtroom experience. Some of the comments made by those I interviewed were as follows: "(H)e hasn't tried very many cases"; "(H)e is not necessarily the most experienced"; "(H)is lack of trial experience concerns me"; and "(H)is lack of trial experience is troubling." Comments such as these were laced throughout the 30 interviews I conducted. Other individuals reaffirmed the infrequency with which he has appeared in court by making statements such as: "I have never seen him try a case"; "I do not get to see him in the trenches much"; "I do not remember him being in court on a case"; and "I do civil work and I have no contact with him or anyone in his office."

Our Committee members strongly agreed with these concerns, and our conclusion that the nominee is "Not Qualified" reflects our collective belief that the nominee does not have the breadth, depth and relevancy of experience to qualify him at this time for a lifetime appointment to a U.S. District Court.

Our *Backgrounder* explains that professional competency encompasses qualities of intellectual capacity, judgment, writing and analytical ability, and most particularly in this case, knowledge of the law and breadth of professional experience. There should be strong evidence that the nominee is professionally competent to manage and resolve the

hundreds of diverse matters a federal judge is likely to encounter. Some of those matters call upon a federal judge to resolve very complicated and challenging factual and legal issues. A district court judge must regularly make on-the-spot decisions in the courtroom that require a solid grounding in procedural and substantive law across a broad spectrum of fields. We therefore believe that a critical measure of professional competence in a nominee to a District Court is the breadth and depth of his or her courtroom and trial experience. A nominee should have substantial, relevant and recent courtroom and trial experience.

Trial experience brings with it not only what one learns from involvement in the litigation process as an advocate, but also what one learns from observing how the judges before whom one appears -- the good ones, the mediocre ones and the bad ones -- handle their job. The Standing Committee knows that much of this can be learned only from experience. Therefore, we believe that ordinarily a nominee to the federal bench should have been admitted to the bar and engaged in the practice of law for at least twelve years and have had substantial courtroom experience. A lawyer with that amount of experience is more likely to have been exposed to and have knowledge of a broader spectrum of legal issues; handled more complex and sophisticated legal matters; and developed more comprehensive and thoughtful perspectives than one lacking such experience.

This guideline is not an arbitrary standard. It is derived from over fifty years of experience in evaluating nominees and in absorbing the feedback that we get from interviewing trial lawyers and judges about what the job of a trial judge demands.

Nor is the guideline a hard-and-fast rule that is applied as an automatic disqualifier. It is, at best, a flexible guideline that provides one measure of professional

competence. A nominee may have practiced for less than 12 years but still have a broad exposure to many facets of the law and substantial trial experience, e.g., by being a lead attorney in a complex case that extends over a multi-year period. It is also possible that a nominee may lack substantial courtroom experience but still be professionally qualified for appointment to the bench because of the totality of his or her other legal experiences. Our *Backgrounder* specifically acknowledges this by stating: “Significant evidence of distinguished accomplishment in the field of law may compensate for a nominee’s lack of substantial courtroom experience.” There seems to be widespread, tacit agreement with this guideline, given that the vast majority of nominees that we have been asked to rate over the years have had more than 12 years of experience. Nonetheless, nominees with less than 12 years of experience on occasion have been found qualified by the Standing Committee. During my three-year tenure on the Standing Committee, I can specifically remember two nominees to District Court positions that had less than 12 years of experience who received favorable ratings from our Committee.¹

Mr. Van Tatenhove did not receive a favorable rating because he does not have substantial courtroom or trial experience, nor has he yet acquired the breadth and depth of other legal experiences, the totality of which might compensate for this deficiency. In his particular circumstance, that he has practiced law less than 12 years has provided him with less opportunity to acquire the requisite knowledge and experience than a nominee

¹ From the 103rd through the 108th Congress (1993-2004), the Standing Committee evaluated 753 nominees to the federal bench, eight of whom (all district court nominees) were rated "Not Qualified." We provided explanations for the "Not Qualified" ratings of six nominees (the other two withdrew prior to their hearing). Two "Not Qualified" ratings were based on issues involving judicial temperament; one "Not Qualified" rating was based on the nominee's lack of substantial trial experience, quality of his writing and lack of candor; and the other three "Not Qualified" ratings were based entirely on the nominees' lack of substantial courtroom and trial experience or other compensatory distinguished experience. Of these three nominees, two had practiced less than 12 years and one had practiced for over three decades.

to a district court should possess.

While I would like to emphasize that it is not the quantity but the quality of professional legal experience that qualifies a nominee, I am sure you would like an explanation of how the Committee quantifies his years of experience.

Mr. Van Tatenhove was licensed to practice law in 1990. During his first year of employment as an attorney, he clerked for a federal district judge. This particular judge acted as a mentor to his clerks and encouraged them to sit in on trials. After his judicial clerkship, he spent four years -- from 1990 to 1994 -- in the Department of Justice Honors Program, handling a variety of issues, many of which were unique to the federal government. After that, he was the Chief of Staff and Legal Counsel for a newly elected Congressional member, a post he held for seven years. In 2001, he returned to his native Kentucky as the United States Attorney. Because of the nature of his particular clerkship, that year can be described as a year engaged in the practice of law or as a year of surrogate practical experience. His years at the Department of Justice and his current employment as United States Attorney also factor in, giving him a total of eight or nine years of experience practicing law. My investigation convinced me that his responsibilities during his tenure as counsel to a Congressional member did not include activities that related to the civil or criminal litigation process and did not qualify as engaging in the practice of law.

I again want to emphasize that our substantial concerns over his competence are not because he has practiced law for less than 12 years, *per se*, but rather because he does not have a record of substantial, practical and varied legal experience. Let me elaborate.

His listing of the ten "most significant litigated matters" that he "personally

handled” consisted entirely of civil cases in which he was involved in the Department of Justice eleven to fifteen years ago. Five of those matters were still pending when he left the Department, two were dismissed on motion and two were settled before adjudication. The tenth, his only actual trial experience, consisted of a two-day evidentiary hearing twelve years ago before a Federal Magistrate Judge in Texas in an apparently routine employment discrimination case.

His experience in the Department of Justice eleven to fifteen years ago, his only civil litigation experience, appears to have been analogous to that of a mid- to upper-level associate in a large law firm, handling pretrial motion and discovery practice, but without substantive trial experience. Many of his assignments involved substantive issues that would rarely find their way onto a District Judge’s docket.

Those of us who are trial lawyers know that the civil litigation process as it has evolved over the years since the nominee was last involved in it, is in many ways light years beyond what he experienced. As just one example, Rules of Evidence, Rules of Civil Procedure, and Rules of Criminal Procedure -- over which he must have full command -- have continued to change and in many respects have moved on. Consequently, the fact that his limited trial experience was acquired many years ago also concerned the Standing Committee.

As United States Attorney during the last four years, he has been an administrator and spokesman for his office. He has never tried a criminal case in his career.

In summary, his record discloses that he has had limited and time-remote trial experience in relatively confined areas of the law. On the face of his own very candid account of his experience, he fell short of the published standard articulated by our

Committee's *Backgrounder* in both respects.

I called this shortcoming to his attention in our first introductory conversation and urged him to suggest avenues of inquiry that might help me to evaluate any experience he had had that might be considered a surrogate for actual trial experience. Following up on this inquiry, I looked at all his exposure outside the practice of law -- judicial clerkship, congressional staffer, member of the Attorney General's Advisory Committee -- that seemed to enhance the overall gravitas of his resume. None of these experiences, other than whatever he observed during his 1989-90 clerkship the year after he finished law school, involved anything that appeared to qualify as a surrogate for trial and courtroom experience.

I laid out in my report to the Standing Committee all the facts I had uncovered in my investigation. After careful review of the report, a majority of the members of the Standing Committee felt that, on the undisputed facts, the nominee has very limited trial or courtroom experience that was acquired over a decade ago, and that he lacks the depth and breadth of professional experience that would compensate for his insufficient courtroom experience. A majority of the Standing Committee, therefore, is of the opinion that the nominee is "Not Qualified" because he lacks the requisite professional qualifications to preside over the litigation process or over civil and criminal trials.

The Standing 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.

Thank you for this opportunity to share our views.