



PRELIMINARY REPORT ON THE NOMINATION OF G. STEVEN AGEE TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

On March 13, 2008, President Bush nominated Justice George Steven Agee to a seat on the United States Court of Appeals for the Fourth Circuit. Mr. Agee currently serves as a justice on the Supreme Court of Virginia, and was previously a judge on the Court of Appeals of Virginia. If confirmed, Justice Agee would fill a vacancy created in 2006 by the resignation of Judge J. Michael Luttig. The American Bar Association's Standing Committee on the Federal Judiciary has rated Justice Agee as well-qualified, with one abstention.

BRIEF BACKGROUND ON THE FOURTH CIRCUIT AND NOMINATION OF G. STEVEN AGEE

The Fourth Circuit is based in Richmond, Virginia, and hears appeals from federal district courts located in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. In recent years, the Fourth Circuit has been considered the most conservative circuit court in the country. Of the ten judges currently serving on the court, five were nominated by Republican Presidents, four were named by Democratic Presidents, and one, Judge Gregory, was nominated by President Clinton as a recess appointment and then re-nominated and confirmed by the Senate during President George W. Bush's first term. With one-third of its seats now vacant, the character of this court is poised to shift dramatically in the next few years. In addition to Justice Agee, President Bush has recently nominated Robert J. Conrad Jr. of North Carolina, Rod J. Rosenstein of Maryland, and Steve A. Matthews of South Carolina to seats on the Fourth Circuit.

The two open Virginia seats on the Fourth Circuit have recently been a source of much contention. After Judge Luttig's resignation in 2006, Virginia Senators Warner and Webb attempted to assist in filling the vacancies on the Fourth Circuit traditionally reserved for Virginians by conducting an extensive and highly lauded¹ bipartisan effort to identify qualified potential nominees. According to Senator Webb, the senators sought "an unprecedented level of involvement of professional legal organizations, as well as five Virginia Bar Associations."²

¹ Editorial, *Joint Effort: Sens. Webb, Warner Are Right to Work Together*, HARRISONBURG DAILY NEWS RECORD (May 29, 2007) (available at http://www.dnronline.com/opinion_details.php?AID=10493&sub=Editorial); Editorial, *Dividing, Not Uniting*, ROANOKE TIMES (Sept. 14, 2007) (available at <http://www.roanoke.com/editorials/wb/wb/xp-131927>); Carl Tobias, Op-Ed, *Senators' Suggestions are Ignored*, RICHMOND TIMES-DISPATCH (Sept. 13, 2007) (available at <http://www.inrich.com/cva/ric/opinion/oped.apx.-content-articles-RTD-2007-09-13-0053.html>); Press Release, Earthjustice, *Bush Rejects Bi-partisan Senate Effort in Order to Reignite Judicial Nomination Wars* (Sept. 7, 2007) (available at <http://www.earthjustice.org/news/press/007/bush-rejects-bi-partisan-senate-effort-in-order-to-reignite-judicial-nomination-wars.html>); David Kurtz, *Advice and Consent: The Bush Way*, Talking Points Memo (Sept. 7, 2007) (available at <http://www.talkingpointsmemo.com/archives/052546.php>).

² Press Release, Senator Jim Webb, *Webb Responds to White House's Nomination of Duncan Getchell* (Sept. 6, 2007) (available at <http://webb.senate.gov/newsroom/record.cfm?id=282009>).

After completing their research, the senators submitted a list of “five outstanding candidates” to President Bush. This list included Justice G. Steven Agee.

Despite the senators’ commendable efforts – and the fact that the individuals on their list possessed remarkably conservative credentials – President Bush ignored the senators’ recommendations and on September 6, 2007, tapped E. Duncan Getchell, whom the senators had considered for the list and rejected. Mr. Getchell’s nomination was met with vocal disapproval and disappointment from the senators, with Sen. Webb stating in a press release, “the White House talks about the spirit of bipartisanship, lamenting congressional obstructionism. The White House cannot expect to complain about the confirmation of federal judges when they proceed to act in this manner.”³

In addition to the senators’ refusal to support his nomination, Mr. Getchell was soon in the spotlight for being the lead attorney in a personal injury case where his firm’s failure to file a trial transcript caused the Virginia Supreme Court to throw out an appeal of an eight million dollar adverse damages award.⁴ Shortly thereafter, the lead trial attorney in the case filed a defamation suit against Mr. Getchell, alleging that Mr. Getchell conspired to place the blame for the mistake on the trial attorney in order to salvage Mr. Getchell’s judicial nomination.⁵ The combination of negative publicity and lack of support from Virginia’s senators led Mr. Getchell to request in January 2008 that his nomination be withdrawn. The White House officially withdrew his nomination on January 23, 2008.

The withdrawal of Mr. Getchell’s nomination provided the Bush administration with a second chance to respect the senators’ “advice and consent” role in the judicial selection process, and this time he responded by consulting the list previously put forth by Senators Warner and Webb. In a letter to President Bush on March 20, 2008, Senate Judiciary Committee Chair Patrick Leahy expressed his appreciation for President Bush’s long-overdue decision to cooperate with Virginia’s senators, saying, “Your previous nominations from Virginia, William Haynes, Claude Allen and Duncan Getchell, were controversial and did not proceed. Following your withdrawal of the Getchell nomination earlier this year, I urged you to work with the Virginia Senators. I now thank you for doing so.”⁶

Despite finally having home state senator support for his nomination, President Bush’s failure to respect the senators’ advice and consent role earlier in the process has put the Senate in a difficult position. In order to confirm a qualified nominee with bipartisan support, the Senate must rush through the confirmation process with little time for the in-depth consideration that is required. Further, it must do this during an election year, when the confirmation process typically slows due to the impending end of a presidency. Though the Senate may still confirm Justice Agee, it should not have had to do it this way. Rather, the process should not have been ignored earlier,

³ *Id.*

⁴ Marc Davis, *Error in Major Case Tied to Federal Judge Nominee*, THE VIRGINIAN-PILOT, Oct. 9, 2007, available at <http://content.hamptonroads.com/story.cfm?story=134267&ran=113533>.

⁵ Marc Davis, *Bush Judicial Nominee Sued, Accused of Defamation*, THE VIRGINIAN-PILOT, Nov. 16, 2007, available at <http://content.hamptonroads.com/story.cfm?story=137054&ran=127751>.

⁶ Press Release, Senator Patrick Leahy, *Leahy to Bush: Senate Republicans Stalling Executive Nominations* (Mar. 20, 2008) (available at <http://leahy.senate.gov/press/200803/032008c.html>).

when Senators Webb and Warner gave President Bush their list of carefully-chosen prospective nominees.

Indeed, given that the next judge confirmed to the Fourth Circuit will likely tip the balance on this court, the Senate should scrutinize Justice Agee especially closely. In particular, because the Fourth Circuit hears appeals in many cases involving issues of national security and military detention, the nominee's views on the scope of executive power should be closely examined. Although, as set forth below, Justice Agee has made public statements that are skeptical of broad assertions of executive power by state officials, the Committee should explore if this same skepticism extends, as it should, to exercise of sweeping presidential power.

BRIEF BIOGRAPHY OF G. STEVEN AGEE

1. Education and Career

Justice Agee was born in Roanoke, Virginia, in 1952. He graduated from Bridgewater College with a B.A. in 1974, where he majored in philosophy and religion. He attended the University of Virginia School of Law, where he earned his J.D. in 1977, and earned an L.L.M. in Taxation in 1978 from New York University School of Law.

After law school, Justice Agee worked in private practice, where he remained for over twenty years. He began as an associate at Martin, Hopkins & Lemon, P.C., and then spent a year as an associate at Rocovich & Dechow, P.C. Two years after graduating from law school, he became a named shareholder in the firm of Osterhoudt, Ferguson, Natt, Aheron and Agee, P.C., where he stayed until he was elected to the bench in 2000. His practice included general litigation and asset management, with a focus on bankruptcy, debt collection, trusts and estates, commercial transactions and criminal matters. During this time, he was counsel of record in eleven reported cases, including cases before the Supreme Court of Virginia, the U.S. Court of Appeals for the Fourth Circuit, and the United States Supreme Court. According to his questionnaire, Justice Agee tried approximately 75 cases to verdict or judgment.⁷

In addition to his private practice, Justice Agee also held public office before becoming a judge. In 1982, he was elected as a Delegate to the Virginia General Assembly, where he represented the City of Salem and parts of Roanoke and Montgomery Counties. In addition to serving in the General Assembly, Justice Agee served in the United States Army Judge Advocate General (JAG) Reserves from 1986-1997. In 1997, he was appointed by Governor George F. Allen to the Virginia Criminal Sentencing Commission, where he served until 2000. Finally, Justice Agee also held several volunteer positions, including serving on the federal court-appointed defense counsel list for the Western District of Virginia and volunteering for the Roanoke Bar Association's Legal Aid Assistance Program, which helps low-income individuals with their no-fault bankruptcies and divorces.

In 2000, the Virginia General Assembly elected Justice Agee to the Court of Appeals of Virginia, and in 2001 he left private practice to begin his first term as a judge. He remained on the Court of

⁷ G. Steven Agee, *United States Senate Judiciary Committee Questionnaire for Judicial Nominees*.

Appeals until 2003, when the Virginia General Assembly elected him to the Supreme Court of Virginia. His term on the Supreme Court of Virginia expires on March 1, 2015.

2. Political and Social Activities

During his time in the Virginia General Assembly, Justice Agee championed a variety of causes. In his speech at the 1993 Virginia Republican Convention – at which he was seeking the Republican nomination for Attorney General – he highlighted parts of his twelve-year legislative career:

We strengthened the death penalty; the General Assembly passed my legislation prohibiting parole for repeat drug pushers; we expanded the rights of home schoolers; we protected the First Amendment rights of abortion opponents.⁸

In addition to these issues, Justice Agee was particularly concerned with the politicized process by which Virginia’s state court judges were selected. In 1986 and 1987, Justice Agee introduced legislation that would have established an independent Judicial Nominations Commission comprised of lawyers and non-lawyers who would seek out and recommend qualified individuals for state judgeships on the basis of merit.⁹ As a Republican, however, Justice Agee saw his efforts to reform judicial selection “repeatedly dashed” by the Democratic-controlled legislature.¹⁰ In 2000, he became one of the first Virginia judges to be selected through the merit selection process he had promoted for so long.¹¹

Justice Agee also became involved in several other matters he viewed as rife with politicization and corruption. In 1990, he wrote the language amending the canons of judicial conduct in Virginia to prohibit judges from belonging to any organization that practices invidious discrimination. In 1991, asserting that “General Assembly incumbents shamelessly conspired to safeguard their own reelection prospects” through gerrymandering in recent elections, he wrote an Op-Ed for *The Washington Post* advocating the creation of a nonpartisan, independent redistricting commission to deal with the issue.¹² In 1992, after investigations revealed that Governor Doug Wilder had lied about authorizing a state police investigation of his main political rival, Senator Charles Robb, Justice Agee introduced legislation to repeal the Virginia statute that prohibited investigation of any elected official unless the governor, attorney general

⁸ G. Steven Agee, Candidate for Republican Nomination for Attorney General of Virginia, Address at the Virginia Republican Convention (June 5, 1993) (emphasis removed).

⁹ G. Steven Agee, Op-Ed, *Judges: Selection System Needs Reform*, THE DAILY PROGRESS (Charlottesville), May 17, 1987, at C1.

¹⁰ Laurence Hammack, *Lawyer Wins Judgeship on Merits of His Case*, ROANOKE TIMES, May 30, 2000 at B1.

¹¹ *Id.*

¹² G. Steven Agee, Op-Ed, *Rescue Redistricting From Party Politics*, WASH. POST, May 26, 1991, at D8 (Under Justice Agee’s proposed redistricting commission, “majority and minority leaders of the House and Senate would each submit three nominees to Virginia’s Chief Justice, who would select one individual from each list. These four members would select a fifth commission member to act as chairman.” Legislation proposing the creation of this commission continues to be introduced and most recently failed in committee on March 10, 2008, see Richmond Sunlight, SB38: Bipartisan Redistricting Commission, <http://www.richmondSunlight.com/bill/2008/sb38/> (last visited Apr. 2, 2008)).

or a grand jury authorized it. It was “troubling,” he wrote, that Virginia law “placed elected officials in a special protected class,” giving them “potential immunity from investigation.”¹³

3. Published Writings and Public Statements

Justice Agee’s editorial pieces have repeatedly called for government accountability, transparency, and separation of powers. He wrote editorials advocating the creation of a nonpartisan redistricting commission and the establishment of an independent judicial nominations commission.¹⁴ Justice Agee was also critical of perceived governmental abuses of power unrelated to pending legislation. In a 1986 Op-Ed piece, he denounced Virginia’s attorney general for refusing to answer a senator’s question about the state’s murky policy on death-row contact-visits, despite the existence of a statute requiring that “the attorney general *shall* give his advice and... opinion in writing when requested in writing to do so... by a member of the General Assembly.”¹⁵ Justice Agee especially took issue with the attorney general’s argument that discussing the visitation policy—which was quietly negotiated by Virginia’s previous governor—would violate the attorney-client privilege between the governor and attorney general.

In another editorial, Justice Agee criticized practices of the Virginia Employment Commission (VEC). Unknown to job applicants and employers, the VEC had been “adjusting” scores on the GATB—a supposedly race-neutral method of screening prospective employees—by boosting the “percentile rankings” of black or Latino test takers and depressing those of whites, Asians, and Middle Easterners. “Is this the harbinger,” he wrote, “of how the Bureaucratic Welfare State is strangling free and open government by making the citizens the servant of Government instead of government the servant of the Citizens?”¹⁶ He criticized the VEC for discontinuing the GATB instead of simply “dropping the conversion tables in the trash,” and lamented the damage the practice had done to the credibility of state government.¹⁷

Finally, in Justice Agee’s most partisan piece, *Reasserting Their Old Dominion: A Party Planning Guide for Va. Republicans*, he chronicled the Virginia Republican Party’s loss of power in the 1980’s and offered suggestions for its redemption in the 1990’s.¹⁸ Noting the Democrats’ success at shifting “to the mainstream of public perception” and usurping the language of “economic development, fiscal responsibility... and similar proverbs from the Republican bible of politics,” Justice Agee pointed to resistance to the moderate middle as the G.O.P.’s downfall. Too often, he wrote, the party “allowed conventions oriented to the church buses to shape the message, the candidates and the campaigns,” and chose nominees that “frightened many traditional Republican voters away” by making extreme statements about subjects such as teaching creationism in schools. Instead, he asserted, the party needed to return to time-honored Republican principles and “recognize that issues of strong ideological nature,

¹³ G. Steven Agee, Op-Ed, *It’s Time to Reform State-Probe Law*, ROANOKE TIMES, June 26, 1992.

¹⁴ *Rescue Redistricting*, *supra*, Note 12; *Judges*, *supra*, Note 9.

¹⁵ G. Steven Agee, *The Issue is Bigger Than Death-Row Contact Visits*, ROANOKE TIMES, Dec. 14, 1986, at F3 (emphasis original, internal citations omitted).

¹⁶ G. Steven Agee, *Employment Commission Deceived the Taxpayers*, ROANOKE TIMES, July 27, 1990.

¹⁷ *Id.*

¹⁸ G. Steven Agee, *Reasserting Their Old Dominion: A Party Planning Guide for Va. Republicans*, WASH. POST, Jan. 29, 1989, at C8.

such as abortion or family life education, cross party lines and should not be made dogma for either party.”¹⁹

Justice Agee was accused of distancing himself from these statements during his 1993 run for Attorney General when he “energetically [courted]” the same Christian conservatives his editorial had enraged, including Pat Robertson and the Christian Coalition.²⁰ Though Justice Agee maintained his longstanding position on abortion, for example—that the procedure should be available to women during the first trimester of pregnancy—on the campaign trail his rhetoric focused on “things antiabortion activists support: 24-hour waiting periods before abortions, parental notification and opposition to laws that would prohibit protesters from picketing abortion [clinics].”²¹ Ultimately, however, pundits opined that it was Justice Agee’s appeal to Republicans to reach out to moderate Democrats and independents that lost him the nomination, as his conservative Republican rival—who *was* successful in winning Pat Robertson’s support—“painted [him] as a liberal on abortion, gun control, and taxes.”²²

In addition to his written editorials, Justice Agee’s interviews prior to becoming a justice on the Virginia Supreme Court gave particular insight into his judicial philosophy. A strong theme throughout is the influence that his time as a legislator would have on his work as a judge. “I see the judiciary as fulfilling its role in interpreting the laws enacted by the legislative branch,” he said in one interview, “but interpreting is not the equivalent of making the law according to the justice’s personal views.”²³ Alluding to his legislative background, he stated, “There’s always a lot of discussion about judicial philosophy and a judge’s view of the separation of powers between the branches of government. It’s one thing to have a philosophical viewpoint of that, but it’s another thing to have both a philosophical viewpoint and an empirical background.”²⁴ Of that empirical background, he says, “You can get caught up in the court tower, so to speak, and lose touch with what goes on in the rest of the world and how what you do affects not just the bar but the people who have to live by the court’s rulings.”²⁵

¹⁹ *Id.*

²⁰ John F. Harris, *GOP Candidates in Virginia Lean Right, But Cling to Center*, WASH. POST, May 30, 1993, at B1.

²¹ *Id.*

²² Donald P. Baker & John F. Harris, *GOP Taps Allen for Va. Governor; Aggressive Pursuit of Conservative Vote Yields Nomination*, WASH. POST, June 6, 1993, at A1; Spencer S. Hsu & Doug Struck, *Gilmore’s Careful Climb to the Top*, WASH. POST, Oct. 15, 1997, at A01; Editorial, *For Governor, Don Beyer*, ROANOKE TIMES, Oct. 26, 1997, at 2.

²³ Laurence Hammack, *Agee Will Take Legislative View to Post on State Supreme Court*, ROANOKE TIMES, Jan. 27, 2003, at A4

²⁴ *Id.*

²⁵ *Id.*

SIGNIFICANT DECISIONS

1. Court of Appeals of Virginia

a. Key Decisions Reversed by the Supreme Court of Virginia

*Bower v. Commonwealth.*²⁶ The defendant was convicted of animate object sexual penetration and of taking indecent liberties with a child by a person in a custodial relationship for fondling his 13-year-old daughter and penetrating her with his finger while she pretended to be asleep. Justice Agee wrote the decision considering the defendant's appeal of the animate object sexual penetration conviction. According to the applicable Virginia statute, he wrote, such a conviction required the element of "force, threat, or intimidation." The Commonwealth conceded that it produced no evidence of force or threat by the defendant toward his daughter, and the court found that the evidence that the defendant was the victim's father and was physically larger than she was not sufficient to prove intimidation beyond a reasonable doubt. Accordingly, Judge Agee, writing for the court, reversed and dismissed the conviction. On appeal, the Virginia Supreme Court reversed the decision and reinstated the conviction, holding that intimidation could be caused by the imposition of psychological pressure on one who, under the circumstances, was vulnerable and susceptible to such pressure.²⁷

*Hudson v. Commonwealth.*²⁸ At trial, a jury convicted the defendant of the second-degree murder of his wife and of using a firearm in the commission of a murder. Justice Agee wrote an opinion reversing the trial court's judgment and dismissing the charges against the defendant. The opinion held that the Commonwealth's evidence failed to exclude all reasonable hypotheses of innocence; there was evidence to support the defendant's hypothesis of innocence: that his wife was shot by accident or by her own act. There was no evidence establishing that the defendant ever touched the weapon that fired the fatal bullet, but there was some evidence that his wife may have fatally fired the gun. Thus, Justice Agee's opinion found that there was insufficient evidence to prove defendant committed murder beyond a reasonable doubt.

The Virginia Supreme Court reversed Justice Agee's decision, finding that it had incorrectly viewed the evidence in the light most favorable to the defense, had emphasized that evidence rather than the totality of the circumstances, and had failed to give proper deference to the jury.²⁹ The court held that the jury could reasonably have found the defendant guilty based on circumstantial evidence of the absence of blood on the victim's hands after an apparent suicide by gunshot, inconsistencies between defendant's statements, and other circumstantial evidence.

b. Worker's Rights

*Maggard v. Westmoreland Coal Co.*³⁰ In this technical ruling that shut the courthouse doors to a worker, Justice Agee wrote the opinion affirming the Commission's decision that the claimant's

²⁶ *Bower v. Commonwealth*, 551 S.E.2d 1 (Va. App. 2001).

²⁷ *Commonwealth v. Bower*, 563 S.E.2d 736 (Va. 2002).

²⁸ *Hudson v. Commonwealth*, No. 0917-01-4, 2002 Va. App. LEXIS 389 (Va. App. July 16, 2002).

²⁹ *Commonwealth v. Hudson*, 578 S.E.2d 781 (Va. 2003).

³⁰ *Maggard v. Westmoreland Coal Co.*, No. 3001-00-3, 2001 Va. App. LEXIS 391 (Va. App. July 3, 2001).

claim for benefits, received on October 16, 1998, was barred by the statute of limitations because claimant was unable to prove that the claim was sent via certified mail on Oct. 13, 1998, the mailing deadline. Justice Agee's reasoning was that a private postmark bearing that date was not legitimate proof of the postmark date, nor was the certified mail sticker, because the envelope had not been re-postmarked by the post office.

c. Criminal Law/Due Process

*Davis v. Commonwealth.*³¹ Police pulled over the defendant, told her they had information that she was carrying narcotics, and requested to search her car. The defendant consented to the search and the police found narcotics, after which the defendant confessed her planned delivery of drugs to a third party. The police admitted later that they had had no reasonable suspicion or probable cause to stop her. Justice Agee wrote the opinion reversing the trial court's decision, finding that, under the totality of the circumstances, because the police accused the defendant of engaging in criminal behavior, the stop was nonconsensual. The defendant's consent to search her car was contemporaneous with her illegal detention, and was, therefore, not voluntary.

*Ramey v. Commonwealth.*³² An officer stopped and seized the defendant's vehicle based on a police dispatch's broadcast that the black male in the vehicle was somehow involved in the previous night's fatal shooting. The officer knew nothing more about the vehicle, its occupants or what "somehow involved" in the shooting meant. The Commonwealth presented no evidence concerning the source of the dispatch. Justice Agee wrote the opinion reversing the defendant's convictions for possession of cocaine with intent to distribute and possession of a firearm, finding that the officers lacked reasonable suspicion to make the initial investigatory stop because the language in the dispatch lacked sufficient indicia of reliability.

3. Supreme Court of Virginia

a. Discrimination/Equal Protection

*Davenport v. Little-Bowser.*³³ Each of the children involved in this case were born in Virginia but presently resided elsewhere, were adopted in other states, and had same-sex adoptive parents. The parents and children sought issuance of new birth certificates listing both of the same-sex adoptive parents, but the state Registrar refused. Judge Agee joined the majority opinion, which found that there was nothing in Virginia's statutory scheme that precluded recognition of same-sex couples as adoptive parents. The applicable laws referred to only "adoptive parents" and "intended parents," without designation of a mother and a father. The court held that the state Registrar was required to issue the requested new birth certificates in the name of both adoptive parents.

b. First Amendment

³¹ *Davis v. Commonwealth*, 559 S.E.2d 374 (Va. App. 2002).

³² *Ramey v. Commonwealth*, 547 S.E.2d 519 (Va. App. 2001).

³³ *Davenport v. Little-Bowser*, 611 S.E.2d 366 (Va. 2005).

Bowie v. Murphy.³⁴ At a vote to decide whether to remove a controversial church pastor, a church deacon benignly approached a church member who was visibly angry. She reacted by striking the deacon in the chest. When the police arrived, the woman told the police that the deacon had assaulted her, despite witnesses to the contrary. Based on this information, the pastor and members of the church voted to have the deacon dismissed and to have his church membership demoted. The pastor and other church members sent letters to the congregation accusing the deacon of assaulting the woman. The deacon sued for defamation, and a majority found that the court had jurisdiction to hear the defamation claim despite the religious background of the dispute. Justice Agee dissented, stating that the matter implicated “questions of religious governance or doctrine” in which the court should not become involved.

c. Medical Malpractice/Vicarious Liability/Worker’s Rights

*Ola v. YMCA of S. Hampton Roads, Inc.*³⁵ Plaintiff sued defendant association (YMCA), alleging that she was abducted and sexually assaulted in a bathroom on the association's premises. Justice Agee wrote the opinion upholding the appellate court’s ruling that the YMCA was charitably immune, because the plaintiff was participating in the association’s swim program at the time and therefore was a beneficiary of its charity.

Shutler v. Augusta Health Care for Women.³⁶ A patient sued her physician and doctor’s office when she allegedly suffered permanent injuries from the physician’s negligent treatment. Subsequently, however, the patient filed a motion to dismiss with prejudice the physician as a party defendant, which the court granted. The patient continued to pursue her claim against the doctor’s office. The office protested, and the trial court granted its motion for summary judgment. On appeal, the Virginia Supreme Court found that the dismissal of the physician “with prejudice” did not have any preclusive effect on the patient's ability to pursue her claims against the employer since it did not equate to an adjudication on the merits of the claim.

Justice Agee joined Justice Kinser’s dissent, which argues that “dismissal of a claim with prejudice constitutes an adjudication on the merits, and final disposition,” and, having dismissed the claims against the physician, the court should not allow a claim that relies on the culpability of the physician to proceed against the doctor’s office.

Oraee v. Breeding.³⁷ The doctor saw the decedent for complaints of facial drooping. The doctor requested a consultation by another physician, and that physician ordered testing for a clotting disorder. The doctor saw the decedent again nine days after she was discharged from the hospital, but he did not attempt to obtain the results of the tests, which were available. These tests confirmed that the decedent had antiphospholipid antibody syndrome. Twelve days later, the decedent was admitted to the hospital after suffering a stroke which led to her death. Experts at trial testified that the doctor's conduct fell below the standard of care because the doctor did not make himself aware of the test results; had he done so, he could have treated her

³⁴ *Bowie v. Murphy*, 624 S.E.2d 74, 81-82 (Va. 2006)

³⁵ *Ola v. YMCA of S. Hampton Roads, Inc.*, 621 S.E.2d 70 (Va. 2005).

³⁶ *Shutler v. Augusta Health Care for Women*, 630 S.E.2d 313 (Va. 2006) (internal citations omitted).

³⁷ *Oraee v. Breeding*, 621 S.E.2d 48 (Va. 2005) (emphasis original, internal citations omitted).

appropriately and saved her life. The court held that the doctor was not entitled to immunity even though he had not ordered the tests.

Justice Agee dissented, arguing that the doctor should have been entitled to immunity; the doctor was not responsible for knowing the results of the test because Virginia statute provided that “any physician shall be immune from civil liability for any failure to review... any report of the results of any laboratory test... which test... such physician neither requested nor authorized in writing.” By ruling otherwise, Justice Agee noted, the court also was overruling its own precedent interpreting that particular statute.

d. Criminal Law/Due Process

Muhammad v. Commonwealth.³⁸ Justice Agee wrote an opinion dissenting in part and concurring in part with the majority’s affirmance of the convictions and sentences of one of the perpetrators of the “Beltway Sniper” killings in 2002. The majority affirmed the two capital murder convictions and two death sentences of defendant Muhammad, who had been responsible for planning the murders, alerting the shooter as to when he had a clear shot and driving the getaway car. The majority held that Muhammad was an immediate perpetrator and, as such, was a principal in the first degree in the commission of capital murder during the commission of an act of terrorism. The majority found that even if Muhammad were a criminal actor ordinarily demonstrating culpability as a principal in the second degree, he was nonetheless guilty of capital murder because he had given directions or orders during the commission of an act of terrorism.

In his dissent, Justice Agee wrote that under Virginia law and precedent, Muhammad could only be convicted of capital murder if he were found to be a principal in the first degree. Virginia precedent showed that a person could only be a principal in the first degree if he had actually “[engaged] in criminal activity by his own hand—he [fired] the gun that [killed].”³⁹ Muhammad, Justice Agee argued, could not be a principal in the first degree because he had never actually pulled the trigger in the murders. Rather, his accomplice was the one who had made the final decision to pull the trigger, and thus, commit the crimes. As such, Justice Agee wrote, Muhammad could only be found to be a principal in the second degree and could only be convicted of murder in the first degree, not capital murder.

Commonwealth v. Cary.⁴⁰ Defendant alleged that a man who was killed had frequently abused her. She testified that he assaulted her, refused to leave her apartment, and, after going to the bathroom, threatened her and came towards her. She claimed she then shot him. The trial court, in denying her proffered self-defense instruction, ruled that the assault was not an overt act sufficient to support a claim of self-defense, because when the victim stopped the attack to go to the bathroom, defendant was no longer in imminent danger. The court of appeals held that the evidence established an overt act of sufficient imminence to entitle her to a self-defense and that the trial court had erred in excluding evidence of the victim's prior threats and acts of violence against her. The Virginia Supreme Court agreed.

³⁸ *Muhammad v. Commonwealth*, 611 S.E.2d 537 (Va. 2005).

³⁹ *Id.* (internal citations omitted).

⁴⁰ *Commonwealth v. Cary*, 623 S.E.2d 906 (Va. 2006).

Justice Agee authored the dissent, arguing that the defendant had not alleged at trial that the victim had threatened her and come towards her after using the restroom, causing her to fear imminent danger. Rather, the defendant had stated only that it was the victim's prior physical and verbal assaults that caused her to fear imminent danger. It was not until the case was on appeal that the defendant alleged the victim had moved towards her immediately prior to the shooting, establishing the existence of an "overt act" justifying self-defense. Since the defendant had argued at trial that the "overt act" of imminent danger to her was only the decedent's prior physical and verbal assaults, she could not now argue on appeal that the "overt act" had been the victim approaching her. Thus, she should have been barred from raising a claim of self-defense.

Jackson v. Washington.⁴¹ The sole issue on appeal was if the trial court erred in denying the defendant's claim that his trial counsel rendered ineffective assistance by failing to object to the defendant being tried before a jury while wearing a jail-issued jumpsuit. The Supreme Court found for the defendant, stating that the record established that jail personnel misplaced defendant's civilian clothes, failed to locate them, and failed to provide him with the means to obtain civilian clothes before trial. Those circumstances coupled with the nominal effort of his counsel to obtain civilian clothes for defendant mandated the conclusion that defendant was unlawfully compelled to stand trial before the jury in jail clothes and was prejudiced by this act.

The dissent, joined by Justice Agee, stated that the defendant could not meet the *Strickland* test for ineffective assistance of counsel because, given the defendant's confession, there was no "reasonable probability" that the jury's verdict would have been different had the defendant been wearing civilian clothes.

Commonwealth v. Hilliard.⁴² The majority held that a suspect's statement was a sufficient request for counsel under *Miranda*, and thus questioning of the suspect should have ceased and the incriminating statement should be suppressed. Justice Agee dissented from this holding, arguing that the suspect's statement of "Can I get a lawyer in here?" was not sufficiently unequivocal under Virginia precedent to invoke the right to counsel, nor was it sufficiently unambiguous under U.S. Supreme Court precedent. Rather, he wrote, "the majority's opinion will obscure a 'bright line' for future cases and foster the ambiguity [the U.S. Supreme Court] sought to constrain."

CONCLUSION

Despite President Bush's decision to finally work with the Senate to fill a seat on the Fourth Circuit, the Senate must take time to carefully and thoroughly review the record of this nominee before determining whether he is qualified to receive a lifetime appointment to the federal bench. A nominee must possess not only a superb legal mind and the highest professional integrity, but also a commitment to equal justice and a willingness to apply the law fairly to all Americans. The Senate should evaluate Judge Agee's nomination in light of these principles.

⁴¹ *Jackson v. Washington*, 619 S.E.2d 92 (Va. 2005).

⁴² *Commonwealth v. Hilliard*, 613 S.E.2d 579 (Va. 2005).