

Statement of Chairman Patrick Leahy
Senate Judiciary Committee
On Nomination Of Steven Agee To The Fourth Circuit
May 15, 2008

Today we have again on our agenda the nomination of Justice Steven Agee of Virginia to fill a vacancy listed as a judicial emergency on the United States Court of Appeals for the Fourth Circuit, a nomination that was held over at last week's meeting. I thank Senator Cardin for chairing the hearing on this nomination.

I have commended President Bush for his nomination of Justice Steven Agee of Virginia to the Fourth Circuit. Justice Agee's nomination to a long vacant Fourth Circuit seat from Virginia is the result of a breakthrough with the White House that affords us the opportunity to be productive, even in an election year, after years of contentiousness. This nomination is a result of the good work of Senators Warner and Webb.

In contrast to the Republican Senate majority that more than doubled circuit court vacancies under President Clinton, we have reduced circuit vacancies by almost two-thirds, reduced them in nearly every circuit, and five circuits are now without any vacancies. When Justice Agee is confirmed as a Federal circuit judge, the Fourth Circuit will have fewer vacancies than at the end of the Clinton administration.

By turning today to the Agee nomination, we make progress. The alternative approach being urged upon us by some would lead, instead, to more contentiousness. President Bush had until very recently insisted on confrontation by nominating Jim Haynes, Claude Allen and Duncan Getchell from Virginia. Each was controversial. The most recent nominee, Mr. Getchell, was nominated over the objections of both home state Senators, a Republican and a Democrat. Those Senators had sought to work with the White House and provided the

administration with a number of recommended candidates. When the President nonetheless insisted on nominating Mr. Getchell, that nomination did not have their support. It was ultimately withdrawn. That misadventure resulted in the vacancy continuing for many months, if not another year.

That delay came on top of the years we wasted on the highly controversial and failed nomination of William “Jim” Haynes II to the Fourth Circuit. As General Counsel at the Department of Defense, he was the architect of many discredited policies on detainee treatment, military tribunals, and torture. Mr. Haynes never fulfilled the pledge he made to me under oath at his hearing to supply the materials he discussed in an extended opening statement regarding his role in developing these policies and their legal justifications.

The Haynes nomination led the *Richmond Times-Dispatch* to write an editorial in late 2006 entitled, “No Vacancies,” about the President’s counterproductive approach to nominations in the Fourth Circuit. The editorial criticized the administration for pursuing political fights at the expense of filling vacancies. According to the *Times-Dispatch*, “The president erred by renominating . . . and may be squandering his opportunity to fill numerous other vacancies with judges of right reason.”

The *Times-Dispatch* editorial focused on the renomination of Mr. Haynes, but could just as easily have been written about other controversial Fourth Circuit nominees. The President insisted on nominating and renominating Terrence Boyle over the course of six years to a North Carolina vacancy on the Fourth Circuit. This despite the fact that as a sitting United States District Judge and while a circuit court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. The President should have heeded the call of North Carolina Police Benevolent Association, the North Carolina Troopers’ Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and

Paramedics of North Carolina, as well as the advice of Senator John Edwards. Law enforcement officers from North Carolina and across the country opposed the nomination. Civil rights groups opposed the nomination. Those knowledgeable and respectful of judicial ethics opposed the nomination. This President persisted for six years before withdrawing the Boyle nomination.

I mention these ill-advised nominations because so many Republican partisans seem to have forgotten this recent history and why there are continuing vacancies on the Fourth Circuit. The efforts and years wasted on President Bush's controversial nominations followed in the wake of the Republican Senate majority's refusal to consider any of President Clinton's Fourth Circuit nominees. All four nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. These outstanding nominees included United States District Court Judge James Beaty, Jr., United States Bankruptcy Judge J. Richard Leonard, North Carolina Court of Appeals Judge James Wynn and Professor Elizabeth Gibson. The failure to proceed on these nominations has yet to be explained. Had either Judge Beaty or Judge Wynn been considered and confirmed, he would have been the first African-American judge appointed to the Fourth Circuit.

In contrast, I worked with Senator Edwards to break through the impasse and to confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her. I worked to reduce Federal judicial vacancies in North Carolina by confirming three judges last year -- Judge Schroeder, Judge Reidinger and Judge Osteen. Previously during the Bush administration, I cooperated in the confirmation of Judge Whitney, Judge Conrad, Judge Dever, Judge McKnight and Judge Flanagan. That totals nine Federal judges in North Carolina including a Fourth Circuit judge during the Bush Presidency. By contrast, during the entire eight years of the Clinton administration, one district court judge was allowed to be confirmed in North Carolina.

We have also made progress in South Carolina. Senator Graham follows Senator Thurmond as South Carolina's representative on the Judiciary Committee. Despite the controversy that accompanied the nomination of Judge Dennis Shedd, and my own opposition to it, I presided as chairman when we considered that nomination and when the Senate granted its consent. I also presided over consideration of the nomination of Terry Wooten. More recently, we acted favorably on the nominations of Harvey Floyd and Robert Bryan Harwell.

While I chaired the Senate Judiciary Committee from the summer of 2001 to the end of 2002, I presided over the consideration and confirmation of three Fourth Circuit judges nominated by President Bush. All together, President Bush has already appointed five judges to the Fourth Circuit. By contrast, President Clinton was allowed by Senate Republicans to appoint three and left office with five vacancies existing on that court.

Of course, during the Clinton administration, Republican Senators argued that the Fourth Circuit vacancies did not need to be filled because the Fourth Circuit had the fastest docket time to disposition in the country. If the Agee nomination is confirmed, as I expect it will be, the Fourth Circuit will have fewer vacancies than it did when Republicans claimed no more judges were needed.

I am sure there are some who prefer partisan fights designed to energize a political base during an election year, but I do not. Under the Republican Senate majority during the Clinton administration, circuit court vacancies more than doubled, rising from 12 to 26 during the last five years of the Clinton administration. Those circuit vacancies grew to 32 during the transition to the Bush administration. We have been able to reverse that and reduce circuit vacancies by almost two-thirds. Today, there are just 12 circuit court vacancies across the nation, instead of 32, and there are fewer circuit court vacancies than at any time since the 1996 session.

We stand poised to reduce circuit court vacancies even lower and

possibly reducing it to single digits for the first time in decades. Last week, we held a hearing for two nominations to fill judicial emergency vacancies on the Sixth Circuit, Judge Helene White and Ray Kethledge. As with the Agee nomination, these nominations provide an opportunity not only to further reduce vacancies, but also to end a longstanding impasse.

I have urged the President to work with the Michigan Senators, and, after seven years, he finally has. Last month our extensive efforts culminated in a significant development that, unless partisanship interferes, can lead to filling the last two vacancies on the Sixth Circuit before this year ends. This accomplishment stands in sharp contrast to the actions of Senate Republicans who refused to consider any nomination to the Sixth Circuit Court of Appeals during the last three years of the Clinton administration. Ultimately, the Republican-led Senate left open four vacancies on that circuit.

In fact, our work has led to a reduction in vacancies in nearly every circuit. We have lowered vacancies in the Second Circuit, the Fifth Circuit, the Sixth Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, the D.C. Circuit and the Federal Circuit. Both the Second and Fifth Circuits had circuit-wide emergencies due to the multiple simultaneous vacancies during the Clinton years with Republicans in control of the Senate. Both the Second Circuit and the Fifth Circuit now are without a single vacancy. Circuits with no vacancies also include the Seventh Circuit, the Eighth Circuit, the Tenth Circuit, the Eleventh Circuit and the Federal Circuit. That is five circuits without a single vacancy due to our efforts. The Sixth Circuit is poised to join them after our recent breakthrough if we focus on finishing the job.

Indeed, only one circuit has more vacancies than it did at the end of the Clinton administration and that is a circuit that has but a single vacancy. The other three circuits, the Third, the Fourth and the Seventh have the same number of vacancies today as there were at the end of the Clinton administration. When we confirm the Agee

nomination, even the Fourth Circuit will be in an improved posture.

We have wasted too much valuable time that could be spent on the real priorities of ordinary Americans in disputes over a handful of controversial nominees. I am determined to prioritize progress and focus the Committee on those nominations on which we can make progress and, in particular, on those in which the White House has finally begun to work with the Senate.

The alternative is to risk becoming embroiled in contentious debates for months and thereby foreclose the opportunity to make progress where we can. The most recent controversial Bush judicial nomination took five and one-half months of debate after a hearing before Senate action was possible. We also saw what happened during the last several months of the last Congress, which was not even a presidential election year. There were many hearings on many controversial nominations. That resulted in a great deal of effort and conflict but not in as many confirmations as might have been achieved. I prefer to make progress where we can and to work together to do so.

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