



GOODWIN H. LIU
Nominee for the U.S. Court of Appeals for the Ninth Circuit

May 18, 2011

Professor Goodwin H. Liu was first nominated by President Obama to the U.S. Court of Appeals for the Ninth Circuit in February 2010.¹ A *Politico* article has referred to Liu as “President Obama’s most controversial judicial nominee,” noting that Liu “has been waiting for more than a year for his nomination to be voted on by the Senate after Republicans deemed him to be too inexperienced and controversial to be a federal appeals court judge.”² Liu’s confirmation wait, however, may be nearing an end. As the Senate prepares to vote on cloture, it should carefully consider what type of judge Liu would be if confirmed. This is particularly important because, according to a *Washington Post* article, “Liu is seen in some quarters as a potential future candidate for the Supreme Court.”³

Since 2003, Liu has taught law at the University of California Berkeley School of Law.⁴ Because Liu, who graduated from Yale Law School in 1998,⁵ has spent a significant part of his career in academia, his scholarly writings provide key insight into his views on the law and constitutional interpretation. It is telling that an *Associated Press* article called Liu, “an unabashed liberal legal scholar who, if confirmed, could become a force on the federal appeals court for decades.”⁶ The same article noted that by

¹ Press Release, The White House, President Obama Nominates Goodwin Liu for the United States Court of Appeals for the Ninth Circuit, Judge Robert N. Chatigny for the United States Court of Appeals for the Second Circuit (Feb. 24, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-nominates-goodwin-liu-united-states-court-appeals-ninth-circuit-jud>.

² Abby Phillip, *Will Senate Ever Vote on Goodwin Liu*, POLITICO, Mar. 3, 2011, <http://www.politico.com/news/stories/0311/50567.html>.

³ Ben Pershing, *Senate Judiciary Republicans Ask Pointed Questions of Appeals Court Nominee Goodwin Liu*, WASH. POST, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041603269.html>.

⁴ *Nominations Hearing of U.S. Circuit and U.S. District Judges Before the S. Comm. on the Judiciary*, 111th Cong. 13 (2010) (Goodwin Liu’s Questionnaire) [hereinafter “111th Congress Hearing”].

⁵ *Id.*

⁶ Mark Sherman, *Obama Taps First Young Appeals Court Nominee*, ASSOCIATED PRESS, http://articles.boston.com/2010-03-14/news/29311201_1_goodwin-liu-obama-nominees-appeals-court.

nominating Liu, “President Obama finally gave liberal supporters the kind of judicial nominee they had sought and conservatives feared.”⁷

One of Liu’s written works that certainly gives conservatives pause is his co-authorship of a book by the American Constitution Society entitled *Keeping Faith With the Constitution*.⁸ In the book, Liu and his co-authors “describe and defend an approach to constitutional interpretation,” which they term “constitutional fidelity,” that they claim “is richer than originalism or strict construction, more consistent with the history of our constitutional practice, and more persuasive in explaining why the Constitution remains authoritative over two hundred years after the nation’s founding.”⁹ They argue that

[i]nterpreting the Constitution . . . requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question that properly guides interpretation is not how the Constitution would have been applied at the Founding, but rather how it should be applied today in order to sustain its vitality in light of the changing needs, conditions, and understandings of our society.¹⁰

According to the authors,

To be faithful to the Constitution is to interpret its words and to apply its principles in ways that preserve the Constitution’s meaning and democratic legitimacy over time. Original understandings are an important source of constitutional meaning, but so too are the other sources that judges, elected officials, and everyday citizens regularly invoke: the purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society. A dynamic process of interpretation informed by these considerations is what enables the American people to keep faith with the Constitution from one generation to the next.¹¹

Liu, however, when questioned by Senator Hatch about some of his writings, including the above-mentioned book, stated, “whatever I may have written in the books and in the articles would have no bearing on my role as a judge.”¹² However, as Liu and his co-authors wrote in *Keeping the Faith*,

Fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and

⁷ *Id.*

⁸ Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, *KEEPING FAITH WITH THE CONSTITUTION* (American Constitution Society 2009).

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² 111th Congress Hearing, *supra* note 4, at 65 (Professor Liu’s response to Sen. Hatch’s questions).

meaning in light of the concerns, conditions, and evolving norms of our society. As Jack Balkin has put it, “if each generation is to be faithful to the Constitution and adopt the Constitution’s text and principles as its own, it must take responsibility for interpreting and implementing the Constitution in its own era.”¹³

In response to a written question from Senator Sessions about the book and how he would “square” his testimony with his writings, Liu stated in part, “In deciding cases that come before me as a judge, I would set aside the views I have expressed as a scholar and follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in such precedents on how to interpret specific constitutional provisions.”¹⁴

As Ed Whelan questions in his review of Liu’s testimony, “how Liu can plausibly maintain that an interpretive approach that he believes is ‘require[d]’—which, indeed, he believes is essential to ‘enable[] the American people to keep faith with the Constitution from one generation to the next’—‘would have no bearing on [his] role as a judge.’ The contention is simply ludicrous.”¹⁵

Another example of Liu’s attempt to explain away controversial statements can be seen in the discussion about foreign law at his confirmation hearing. In a 2006 law review article Liu wrote,

“The use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years. The U.S. Supreme Court has cited foreign authority in cases limiting the death penalty and invalidating criminal laws against homosexual sodomy, among others. The resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.”¹⁶

When asked about this statement by Senator Coburn, Liu said that he did “not believe foreign law should control in any way the interpretation of United States law, whether it’s the U.S. Constitution or a statute,” noting some of the “many potential pitfalls” of using of foreign law.¹⁷ However, in clarifying the statement from the article, he said it “alludes

¹³ Liu, *supra* note 8, at 25 (endnote omitted).

¹⁴ *Responses of Goodwin H. Liu to Written Questions of Sen. Jeff Sessions* 6, <http://judiciary.senate.gov/nominations/112thCongressJudicialNominations/upload/GoodwinLiu-QFRs.pdf>.

¹⁵ Ed Whelan, *Simply Liu-dicrous Testimony—Part 1*, BENCH MEMOS (Apr. 19, 2010), http://www.eppc.org/publications/pubid.4342/pub_detail.asp#Testimony1. See also, Ed Whelan, *Liu-dicrous Responses to Written Questions—Part 3*, BENCH MEMOS (May 4, 2010), http://www.eppc.org/publications/pubid.4342/pub_detail.asp#WrittenQuestions3.

¹⁶ Ed Whelan, *Goodwin Liu on Using Foreign Law to Redefine the Constitution*, BENCH MEMOS (Apr. 16, 2010), http://www.eppc.org/publications/pubid.4342/pub_detail.asp#UsingForeignLaw (quoting Goodwin Liu, *Developments in U.S. Education Law and Policy*, 2 *Daito L. Rev.* 17, 27 (2006)).

¹⁷ 111th Congress Hearing, *supra* note 4, at 70 (Professor Liu’s response to Sen. Coburn’s questions).

only to the idea that I think foreign precedent can be cited in the same way that a Law Review article might be cited, which is simply to say, judges can collect ideas from anyplace that they find it persuasive.”¹⁸ Professor Liu drew a distinction in his testimony “between looking for guidance or ideas versus looking for authority,” noting that “[a]uthority is the basis on which cases are decided, not ideas or other forms of guidance.”¹⁹ As Whelan has pointed out, however, “The question whether foreign law should ‘control’ the interpretation of American law is a red herring What [Liu] was utterly blind to four years ago, and remains inattentive to, is the predicate question whether and how contemporary foreign and international legal materials have any genuine relevance to the issue of American law being decided.”²⁰

While Liu may attempt to sound like a conservative at his confirmation hearing and in his written questions²¹ by attempting to distance himself from his controversial writings, the fact of the matter is that, given his lack of judicial experience, Liu’s statements and writings provide the most insight into his view of the law. We urge the Senate to reject Liu’s nomination.

¹⁸ *Id.*

¹⁹ *Id.* In his answer to written questions for the record, Professor Liu explained more about the distinction between citing foreign law for ideas versus as authority and why foreign law might be relevant, writing, “In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas. I have written that foreign law may provide ideas on how to address ‘common legal problems faced by constitutional democracies around the world.’ Goodwin Liu, *Developments in U.S. Education Law and Policy*, 2 *Daito L. Rev.* 17, 27 (2006). The corollary is that any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own.” *Responses of Goodwin H. Liu to Written Questions of Sen. Charles Grassley 3*, <http://judiciary.senate.gov/nominations/112thCongressJudicialNominations/upload/GoodwinLiu-QFRs2.pdf>.

²⁰ Ed Whelan, *Simply Liu-dicrous Testimony—Part 3*, BENCH MEMOS (Apr. 19, 2010), http://www.eppc.org/publications/pubid.4342/pub_detail.asp#Testimony3.

²¹ Ed Whelan, *Liu-dicrous Responses to Written Questions—Part 3*, BENCH MEMOS (May 4, 2010), http://www.eppc.org/publications/pubid.4342/pub_detail.asp#WrittenQuestions3.