



this issue:

Goodwin Liu, Nominee for Judge
on the U.S. Court of Appeals for
the 9th Circuit

Liu's Background

Associate Dean and Professor of
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Clerk, Justice Ruth Bader
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Senior Program Officer for Higher
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EDUCATION

B.S., Stanford University

M.A., Oxford University

J.D., Yale Law School

Who is Goodwin Liu?

On February 24, 2010 President Obama announced Goodwin Liu as a nominee for judge on the U.S. Court of Appeals for the 9th Circuit.

Liu's views on the role of judges and his past advocacy against President Bush's judicial nominees have guaranteed that he will face significant questions on whether he meets his own standards for being a judge.

Liu was a fierce opponent of confirming Judge Alito to a position on the U.S. Supreme Court. He testified before the U.S. Senate Committee on the Judiciary against the nomination.

In his testimony, Prof. Liu argued that Senators should consider a nominee's

Judge made law...

"judicial philosophy" and suggested that Judge Alito should fail such a test.

According to Prof. Liu, then-Judge Alito

was "at the margin, not the mainstream," and that the America envisioned by his record on the bench "is not the America we know. Nor is it the America we aspire to be." I suspect Senate Republicans will remember this testimony when considering Prof. Liu's nomination. Fn.1.

Liu's Views on Judicial Interpretation

Keeping faith with the Constitution means:

What we mean by fidelity is that the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every succeeding generation. Fn.2.

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"Liu's judicial philosophy that judges should render decisions based on societal consensus at a given moment rather than foundational principles is incredibly dangerous. He shouldn't be on any court, especially not a court of appeals."

-Bill Wilson, President, Americans for Limited Government

What you really need to know about Liu

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Essentially this means that the Constitution changes over time and means something different today than it did yesterday or will mean tomorrow.

Americans of all backgrounds can wholeheartedly take an oath to support and defend the Constitution when they are naturalized, join the armed forces, gain admission to the bar, or are sworn into elective office not because of how our founding text was understood in 1789, or even in 1870, but because of how we understand it today. Fn.3.

Liu on Constitutional Welfare Rights

Liu in a 2008 law review article discusses at length the concept of judicially imposed welfare rights. In this context welfare rights mean a societal consensus that persons possess a right to certain goods and services, a consensus of "how a society understands its obligations of mutual provision." Here is how his analysis works:

My thesis is that the legitimacy of judicial recognition of welfare rights depends on socially situated modes of reasoning that appeal not to transcendent moral principles for an ideal society, but to the culturally and historically contingent meanings of particular social goods in our own society. Informed by the central themes of Michael Walzer's Spheres of Justice, I argue that judicial recognition of welfare rights is best conceived as an act of interpreting the shared understandings of particular welfare goods as they are manifested in our institutions, laws, and evolving social practices.

On this account, the existence of a welfare right depends on democratic instantiation in the first instance, typically in the form of a legislated program, with the judiciary generally limited to an interstitial role. Further, because the shared understandings of a given society are ultimately subject to democratic revision, courts cannot fix the existence or contours of a welfare right for all time. So conceived, justiciable welfare rights reflect the contingent character of our society's collective judgments rather than the tidy logic of a comprehensive moral theory. Fn.4.

What does this type of judicial interpretation mean in the long run?

Some day yet, the Court may be presented with an opportunity to recognize a fundamental right to education or housing or medical care. But the recognition, if it comes, will not come as a moral or philosophical epiphany but as an interpretation and consolidation of the values we have gradually internalized as a society. Fn.5.

Sources for further reading:

Fn.1. Jonathan H. Adler, *Judge Goodwin Liu, The Volokh Conspiracy*, January 21, 2010. Available online at: <http://volokh.com/2010/01/21/judge-goodwin-liu/>. (Accessed March 10, 2010.)

Fn.2. Ed Whelan, *Ninth Circuit Nominee Goodwin Liu*, Bench Memos, NATIONAL REVIEW ONLINE, February 24, 2010. Available online at: <http://bench.nationalreview.com/post/?q=ZjBjM2VmMmYwM2Y4Y2E3Njc3ZDBhNzNhZWZlZmVjN2U>. (Accessed March 10, 2010.)

Fn.3. Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, *Keeping Faith with the Constitution*, American Constitution Society for Law and Policy, 2009, at p. 1. Available online at: http://www.acslaw.org/pdf/ACS_KeepFaith_FNL.pdf. (Accessed March 10, 2010.)

Fn.4. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008).

Fn.5. *Id.* at 269.

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