

Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
To the Reply Questions of Senator Cornyn

- 1. In question 4(a) of my previous questions, I asked whether you thought the arrest challenged in *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), violated the defendant’s constitutional rights. You did not answer this question. Please answer it now.**

Response: My concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification and thus might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation. My view on whether the arrest violated the defendant’s constitutional rights would depend on whether the arrest policy was based on “mere negative attitudes” or “vague, undifferentiated fears.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 449 (1985); *see id.* at 446-50 (applying rational basis review to invalidate the denial of a local use permit for operation of a group home for the mentally retarded). But that argument was not addressed in the court’s opinion.

- 2. In your answer to my previous question 4(a), you noted that your “concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification,” and you cited then-Judge Roberts’s statement that “it is far from clear that the gains in certainty of notification are worth the youthful trauma and tears,” *Hedgepeth*, 386 F.3d at 1157. But in your op-ed, *Roberts Would Swing the Supreme Court to the Right*, Bloomberg (July 22, 2005), you used the *Hedgepeth* case as the sole example of how then-Judge Roberts’s “legal career is studded with activities unfriendly to civil rights”**

- a. What part of then-Judge Roberts’s opinion in *Hedgepeth* proved that he was “unfriendly to civil rights”?**

Response: My concern was that the court’s opinion did not address the possibility that the mandatory arrest policy for juvenile offenders might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation.

- b. Do you agree with Judges Roberts, Henderson, Williams, and Sullivan that the arrest policy challenged in *Hedgepeth* was constitutional?**

- i. If not, on what basis do you think it was unconstitutional?**

- ii. If so, on what basis were you criticizing Judge Roberts’s *Hedgepeth* opinion?**

Response: Please see response to Question 1 above.

- c. **In retrospect, do you think that you fairly used Chief Justice Roberts’s opinion in *Hedgepeth* to label him as “unfriendly to civil rights”?**

Response: For the reason stated in my response to subpart (a) above, the *Hedgepeth* opinion gave me some concern with respect to civil rights. If I may clarify, I did not use the *Hedgepeth* case as the sole example of then-Judge Roberts’s record on civil rights. My op-ed also expressed concern about his contributions as a Justice Department lawyer to “efforts to oppose school desegregation, to prevent employers from using affirmative action to remedy past discrimination, and to defeat a bipartisan consensus to expand voting rights protections.”

3. **In answering my previous questions (5)(a)-(c), you stressed that a judge must have a “genuine understanding of how the law affects the parties to a given case or controversy.” Is this statement of yours consistent with President Obama’s statement that, in hard cases, the determinative factors for a judge are “the basis of [his or her] deepest values, [his or her] core concerns, [his or her] broader perspectives on how the world works, and the depth and breadth of [his or her] empathy”?**

Response: I do not know whether President Obama intended his statement to encompass the quality of judging identified in my statement above. However, I did not intend my statement to have anything to do with a judge’s “deepest values,” “core concerns,” “broader perspectives on how the world works,” or “depth and breadth of empathy.” My statement referred only to the notion that a judge must understand how the law affects the parties to a given case in order to apply the law objectively and impartially. One example I have used to illustrate the point is *Plessy v. Ferguson*, where the Supreme Court’s misapprehension of how segregation laws affected black Americans led to an erroneous reading of the Fourteenth Amendment. See 163 U.S. 537, 551 (1896) (dismissing the argument that “the enforced separation of the two races stamps the colored race with a badge of inferiority” on the ground that “[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it”); *History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision*, 2 Harv. L. & Pol’y Rev. 53, 60-61 (2008).

4. **In answering my previous question 7(a) you refused again to say whether you consider yourself a transnationalist or nationalist as described by Dean and State Department Advisor Harold H. Koh in *Why Transnational Law Matters*, 24 Penn. St. Int’l L. Rev. 745, 749-50 (2006). Likewise, in your answer to question 7(b), you declined to say whether you agree with Dean Koh that courts have “a critical role to play in domesticating international law into**

U.S. law” and “should use their interpretive powers to promote the development of a global legal system.” In both answers, you stated only: “This subject lies outside of my expertise, and I have not previously expressed a view on this question.”

- a. You have been nominated to a court with jurisdiction over many areas of law in which you are not an expert. Keeping this in mind, please now answer:**
 - i. Do you consider yourself a transnationalist or nationalist as described by Dean Koh in *Why Transnational Law Matters*, 24 Penn. St. Int’l L. Rev. 745, 749-50 (2006)?**
 - ii. Do you believe domestic courts have “a critical role to play in domesticating international law into U.S. law” and “should use their interpretive powers to promote the development of a global legal system”?**

Response: In stating that the subject of Question 7 “lies outside of my expertise,” I intended only to note that the contrast between “nationalists” and “transnationalists” is a complex area of academic debate, and not one where I have sufficient familiarity to categorically identify myself with one camp or the other, given the broad range of views subsumed under each label. If I may move past the labels, I would say that my scholarship has generally treated the American legal system as an autonomous system of law; it has focused on the development of U.S. law as a national system of law; it has not sought to blend international and domestic law; and it has not urged U.S. courts to domesticate international law into U.S. law or to use their interpretive powers to promote the development of a global legal system. In these respects, my record is aligned with the “nationalist” approach as defined by the excerpt from Dean Koh’s article.

- b. Would you, as a judge on the Ninth Circuit, refrain from deciding a case involving a subject outside your expertise?**

Response: If confirmed as a judge on the Ninth Circuit, I would faithfully discharge my duty to decide all cases that are properly within the court’s jurisdiction, including cases involving a subject outside of my scholarly expertise.

- 5. In question 9 of my previous questions, I asked: “Do you agree with Professor Cole that courts should ‘employ the rhetoric and tactics of the international human rights movement to help frame our constitutional**

vision’?” Your answer was nonresponsive. Please answer now whether you agree with Professor Cole’s quoted statement.

Response: To the extent that Professor Cole believes “the rhetoric and tactics of the international human rights movement” include “steer[ing] clear of appeals to citizenship,” my writings have rejected that view. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006). My writings have also rejected the view that our Constitution can be interpreted in accordance with theories of justice that aspire to universalism. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 218-27 (2008).

- 6. In answering my previous question 12(a), you cited *Roper v. Simmons*, 543 U.S. 551, 575-58 (2005), and *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003), as examples of cases in which Supreme Court Justices chose foreign law that was favorable to their argument.**

- a. Do you believe Justice Kennedy was wrong to reference selectively foreign law in his *Roper* and *Lawrence* opinions for the Court?**

Response: As a nominee to serve as an inferior court judge, I do not think it is appropriate for me now to critique a sitting Justice of the Supreme Court or precedents that I will be duty-bound to apply faithfully and impartially if I am confirmed. As I said at my confirmation hearing, “choos[ing] the law that is favorable to the argument” is one of “many hazards involved in looking at foreign law as guidance for how we interpret our own principles.”

- b. Do you think that the Supreme Court’s reasoning in *Roper* or *Lawrence* was flawed?**

Response: I have written with approval that *Lawrence*’s reasoning follows the Supreme Court’s precedents interpreting “liberty” under the Due Process Clause, *see Keeping Faith with the Constitution* 105-06 (2009), although my writings do not address *Lawrence*’s citations to foreign law. I have not expressed any view about *Roper*, and as a nominee to serve as an inferior court judge, I do not think it is appropriate for me now to critique precedents that I will be duty-bound to apply faithfully and impartially if I am confirmed.

- 7. If social norms changed so that handguns were not “the most popular weapon chosen by Americans for self-defense in the home,” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008), would you believe that the Second Amendment still protected the right of Americans to possess handguns?**

Response: The Supreme Court in *Heller* held that the sorts of weapons protected by the Second Amendment are those “in common use at the time.” 128 S. Ct. 2783, 2817 (2008). Whether or not handguns are “the most popular weapon chosen by Americans for self-defense in the home,” they will remain protected by the Second Amendment so long as they are “in common use at the time.”