

**Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Grassley**

1. How do you define “judicial activism”?

Response: “Judicial activism” is a term often used to criticize a judicial decision for usurping the prerogatives of democratic decision-making, for failing to follow text or precedent faithfully, for going beyond the facts on record or the arguments made by the parties, for imposing the judge’s own values or beliefs, or for committing other legal errors in order to achieve a desired result. In general, I have not used the term “judicial activism” very often because it has no settled meaning and “often conveys little of substance beyond the fact that the decision has produced a result with which the critic disagrees.” *Keeping Faith with the Constitution* 41 (2009). In general, unelected judges must be very cautious in exercising power that displaces judgments made through the democratic process. At the same time, one of the crucial functions of an independent judiciary is to protect constitutional rights and liberties against encroachment by the political branches. See 1 *Annals of Cong.* 457 (1789) (statement of Rep. Madison); *The Federalist* No. 78 (Hamilton). I believe that labeling a judicial decision “activist” is less illuminating than identifying the specific legal errors that the decision committed.

2. Could you identify three recent Supreme Court cases that you believe are examples of “judicial activism”? Please explain why you believe these cases are examples of “judicial activism”.

Response: My writings have identified some Supreme Court cases as “activist” based on a failure to adhere to constitutional text (*Alden v. Maine*, 527 U.S. 706 (1999)) and lack of deference to precedent (*FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Bowles v. Russell*, 551 U.S. 205 (2007)).

3. How do you define “judicial restraint”?

Response: I have written that judicial restraint “is an important value” and “requires judges to refrain from enacting their own policy preferences into law.” *Keeping Faith with the Constitution* 41 (2009). At the same time, “while the notion of judicial restraint instructs judges to be vigilant against abuses of their own power, it does not provide much guidance as to what interpretive methods or substantive judgments properly fall within the scope of judicial power.” *Id.* For this reason, I believe the term “judicial restraint,” like “judicial activism,” is of limited utility in describing the virtues or vices of a particular judicial decision.

4. Could you identify three recent Supreme Court cases that you believe are examples of “judicial restraint”? Please explain why you believe these cases are examples of “judicial restraint”.

Response: My writings have identified *Gonzales v. Raich*, 545 U.S. 1 (2005), *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), as examples of cases where the Court deferred to the institutional competence or prerogatives of the political branches, a feature commonly associated with judicial restraint.

- 5. Do you believe that it is ever appropriate for judges to indulge their own values and/or policy preferences in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: I do not believe it is ever appropriate for judges to indulge their own values or policy preferences in determining what the Constitution and the laws mean.

- 6. Do you believe that it is ever appropriate for judges to indulge their own subjective sense of empathy in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: To the extent that empathy means an ability to understand a claim from another person's point of view, I think it can help a judge to appreciate the arguments on all sides of a case and to ensure that the litigants' claims have been fully heard. However, to the extent that empathy causes a judge to be biased or prejudiced or to identify with a particular litigant or outcome, it is inappropriate and must have no role in judicial determinations of what the Constitution and the laws mean.

- 7. Do you believe that it is ever appropriate for judges to indulge their empathy for particular groups of persons? For example, do you believe that it's appropriate for judges to favor those who are poor? Do you believe that it's appropriate for judges to disfavor corporations?**

Response: I do not believe it is ever appropriate for judges to indulge their empathy for particular groups of persons. A judge must approach every case objectively and impartially.

- 8. Should the courts, rather than the elected branches, ever take the lead in creating a more just society?**

Response: If "creating a more just society" means addressing issues of distributive justice, I have written that it is solely the prerogative of the elected branches, not the courts, to take the lead. See *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008). If "creating a more just society" means protecting the rights and liberties specified in the Constitution against encroachment by the political branches, I have written that this is a task appropriate for the courts because of their "independence from the political branches and public passions of the moment." *Keeping Faith with the Constitution* 24 (2009).

9. In your hearing testimony, you spoke about the role of a judge by paraphrasing now Chief Justice Roberts's umpire analogy: "I think the role of the judge is to be an impartial, objective and neutral arbiter of specific cases and controversies that come before him or her, and the way that that process works is through absolute fidelity to the applicable precedents and the language of the laws, statutes, regulations that are at issue in the case." However, in your book *Keeping Faith with the Constitution*, you expressed a very different view. There, quoting Chief Justice Roberts's umpire analogy, you argued that it did "not withstand scrutiny." Specifically, you stated "Ironically, the significance of Chief Justice Roberts's baseball analogy is exactly the opposite of what he intended. Just as baseball players and many fans know that umpires over time have interpreted the strike zone differently in response to changing aspects and contemporary understandings of the game, so too do lawyers, judges, and ordinary citizens know that the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context." Do you stand by your position that "the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context"? How do you reconcile your statements in your book and your statements before the Judiciary Committee?

Response: Chief Justice Roberts's umpire analogy makes the point that judges must be impartial and objective arbiters of the specific cases and controversies that come before them. I fully agree with that important point. At the same time, my book explains that the umpire analogy, to the extent it compares constitutional adjudication to calling balls and strikes, does not provide a complete account of how judges interpret the Constitution and tends to oversimplify the process. See *Keeping Faith with the Constitution* 28 (2009).

My hearing testimony urged "fidelity" to applicable precedents and the language of laws, statutes, and regulations at issue in a given case. My book does not address interpretation of statutes or regulations. The book defines "fidelity" to the Constitution to require that judges "interpret its words and ... apply its principles in ways that sustain their vitality over time." *Keeping Faith with the Constitution* 25 (2009). Using various Supreme Court cases as examples, including *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954), the book shows that "the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context." *Keeping Faith* 28.

Consideration of social context is not at odds with the duty of a judge to be impartial and objective. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Bond v. United States*, 529 U.S. 334,

338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment “from the perspective of the average person, applying contemporary community standards.” *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices requires the judge to be objective and impartial.

If confirmed, I would faithfully follow Supreme Court and circuit precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions.

- 10. In your hearing testimony, you stated that academics, when they write, are not bound in the same way judges are when they judge. You said: “The job of law scholars, when they write, largely, I think, is to probe, criticize, invent, be creative” You have certainly been creative and inventive during your academic career and have written in/spoken with “unnecessarily flowery language.” Doesn’t your written and spoken academic record shed light on what your judicial philosophy is and what your judicial method would be if you were confirmed to be a judge? How can you assure us that your academic creativity and inventiveness would be in check if you were confirmed to be a judge?**

Response: If confirmed as a circuit judge, I would set aside my own views and fully commit myself to the obligation of deciding cases impartially and objectively, with faithful adherence to the applicable law, including Supreme Court and circuit precedent. I recognize that the role of a judge is not to bend the law in service of any academic theory or to pontificate on what the law should be. The role of a judge is to apply the law *as it is* to the facts and arguments raised in specific cases or controversies.

I believe my academic record sheds light on my qualifications to serve as a judge in at least three respects. First, it shows that I would bring to the bench a broad knowledge of the law. Second, my academic writings clearly distinguish between what the law is and what I might wish it to be. I know the difference, and my obligation as a judge would be to follow what the law is, not what I might wish it to be. Third, my record shows that I possess the temperament and habits of mind necessary to be a judge. Throughout my academic work, I have approached legal questions with care and discipline; I have described and analyzed cases and statutes fairly and accurately; I have acknowledged weaknesses in my own arguments; I have given fair consideration to counterarguments; and I have followed logic and evidence to the most defensible conclusion whatever its political valence may be. It is this set of qualities, and not my views on particular legal issues, that would inform my approach as a judge if I were confirmed.

- 11. In your hearing testimony, you said that statements you made in writings¹ were not an “agenda” but rather “my endorsement of precedents of the court that have done**

¹ “Once a legislative body creates a welfare program it’s the proper role of the courts to grasp the community meaning and purpose for that welfare benefit. When necessary, courts should expand the wealth redistributing effects of the program to satisfy needs of equality and national citizenship.”

precisely those things.” Are you saying that you endorse judges and courts that expand rights that have been legislatively created?

Response: My testimony was a reference to published work in which I have endorsed the reasoning of Supreme Court precedents that have applied the Constitution in cases involving social welfare benefits and programs. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 255-66 (2008).

12. You also indicated in your testimony that you believe your writings demonstrate “a perspective of judicial restraint”. I’m not so sure they do. Could you please explain in detail how your writings demonstrate “a perspective of judicial restraint”?

Response: The comment in my testimony was made in reference to my academic writings on education and welfare rights. Most of my writings on these subjects have been directed at legislators and policymakers, not judges, reflecting my belief in the limited role of courts. For example, my article, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006), was “chiefly directed at Congress” and urged Congress to adopt educational policies that enable all children to become full and equal citizens. *Id.* at 339. In that article, I sought to avoid “the language of *rights*” because of “its deep undertone of judicial enforceability,” *id.*, and I have not urged any court to hold that a right to education exists under the Constitution.

Similarly, my article, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008), agrees with Supreme Court precedent that courts have no role in creating social or economic entitlements. *See id.* at 247 (social or economic “rights cannot be reasoned into existence by courts on their own”); *id.* at 252 (the judicial role “does not license courts to declare rights to entirely new benefits or programs not yet in existence”); *id.* at 264 n.324 (there is “no role for courts” to question Congress’s decision in the 1996 welfare overhaul to end the entitlement of poor families to cash assistance). My writings further agree with Supreme Court precedent that the necessity of social or economic entitlements is a judgment for legislatures, not courts, to make. *See id.* at 210 (“the existence of any welfare right depends on democratic instantiation”); *id.* at 265 (courts must defer to “legislative supremacy” in this area).

13. In your hearing testimony, you stated: “If originalism is taken to mean instead that the original meaning, and of course the text of the Constitution, are very important considerations that any judge, in interpreting a provision of the Constitution, must look to, absolutely. I believe that it is absolutely true. In many cases, that could be determinative. But it is not, in some sense, the sole or ultimate touchstone against which all other considerations must yield.” What other “touchstones” are there? What “other considerations” are you talking about? What do you consider to be the “ultimate touchstone against which all other considerations must yield”?

Response: I have written that “judges generally look to a variety of sources to elucidate the meaning of the Constitution. These sources include the document’s text, history,

structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation. The latter sources of meaning, no less than the former, are legitimate components of the methodology that courts use when applying the Constitution's general principles to present-day problems." Keeping Faith with the Constitution 33-34 (2009). The Supreme Court has evaluated the text and original meaning of the Constitution in the context of other considerations in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See Keeping Faith 26-28, 47-51 (discussing those cases). If confirmed, I would faithfully follow the Court's precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions.

- 14. One reason you thought it was necessary to oppose Chief Justice Roberts was because of his association with the National Legal Center for the Public Interest, and specifically "its mission to promote, among other things, free enterprise, private ownership of property, and limited government." Please explain your fundamental concerns with free enterprise, private ownership of property, and limited government, addressing each issue separately.**

Response: I do not have any concerns with free enterprise, private ownership of property, or limited government. From the time of America's founding, our nation and our Constitution have reflected an unwavering commitment to those values, and I am personally committed to and strongly believe in those values. The quotation above was from an op-ed in which I was objecting to one organization's use of those values in opposition to government efforts to ensure that our free market system is a fair, sustainable, and level playing field. In retrospect, I can see how the language I used may be read to suggest disparagement of the values of free enterprise, private property, and limited government, even though that was not my intention. For that reason, it was a poor choice of words. Free enterprise, private property, and limited government are cornerstones of America's prosperity and success as a free society, and I regret that the language I used may have suggested otherwise.

- 15. In your hearing testimony, you stated: "whatever I have written in the books and in the articles would have no bearing on my role as a judge." A number of those books and writings specifically discuss the role of a judge and how judges should perform their constitutional duties. Why should the Committee disregard those writings and which one of your writings should the Committee look to in order to grasp an understanding of your judicial philosophy? In responding to the question, please explain whether the writings you no longer embrace should be referred to by others as supporting the proper role of a judge.**

Response: That statement in my hearing testimony was intended to mean that, if confirmed as a judge, my duty would be to follow the law and not my personal views on legal issues. It was not intended to suggest that the Committee should disregard my writings in evaluating my qualifications to be a judge. I believe my writings shed light on my qualifications in at least three respects. First, they show that I would bring to the

bench a broad knowledge of the law. Second, my academic writings clearly distinguish between what the law is and what I might wish it to be. I know the difference, and my obligation as a judge would be to follow what the law is, not what I might wish it to be. Third, my record shows that I possess the temperament and habits of mind necessary to be a judge. Throughout my academic work, I have approached legal questions with care and discipline; I have described and analyzed cases and statutes fairly and accurately; I have acknowledged weaknesses in my own arguments; I have given fair consideration to counterarguments; and I have followed logic and evidence to the most defensible conclusion whatever its political valence may be. It is this set of qualities, and not my views on particular legal issues, that would inform my approach as a judge if I were confirmed.

- 16. At the hearing, Senator Sessions asked you about the Second Amendment in regard to your theory of constitutional fidelity that "[it] may be valid when the object of interpretation is one of the Constitution's concrete and precise commands. For example, all bills for raising revenue must originate in the House of Representatives" Senator Sessions' specific question was whether the Second Amendment, which states the right to bear arms shall not be infringed, provides such a concise command? I don't believe that you actually answered the Senator's question. Please explain if the Second Amendment is one of the precise commands in the Constitution or whether evolving norms might be used to modify its clear meaning.**

Response: In *District of Columbia v. Heller*, the Supreme Court engaged in a lengthy discussion of historical and contextual sources in interpreting the text of the Second Amendment, see 128 S. Ct. 2783, 2788-2804 (2008), which suggests that the amendment does not have the same precision that Article I, Section 7 has when it says "[a]ll bills for raising Revenue shall originate in the House of Representatives." Based on its extensive historical inquiry, the Court in *Heller* rested its holding that the Second Amendment protects an individual right to bear arms on "the original understanding of the Second Amendment." *Id.* at 2816. The Court further held that the Second Amendment covers only those arms "in common use at the time," *id.* at 2817 (internal quotation marks and citation omitted), and it considered contemporary societal norms in applying this limitation to the case at bar, see *id.* at 2818 ("handguns are the most popular weapon chosen by Americans for self-defense in the home"). If confirmed, I would faithfully follow the Court's precedent, including any instructions in the precedent on the proper way to apply the Second Amendment to a specific case or controversy.

- 17. The First Amendment contains the phrase "Congress shall make no law." Yet, in *Keeping Faith with the Constitution*, you wrote that the word "no" in this phrase does not mean no. You also wrote, in *Keeping Faith with the Constitution*, that the word "necessary" in the "necessary and proper" clause does not mean necessary. I am concerned about common words having different or changing meanings. For example, in response to a question from Senator Coburn, you stated that your testimony about Proposition 8 was that it "should" be upheld. Senator Coburn noted that your testimony was that it "would" be upheld, not "should" be upheld. If "no" does not mean no and "necessary" does not mean necessary, how can legal**

rulings be consistent and predictable as intended when the Constitution was drafted?

Response: Those examples are from a discussion in the book about strict construction that sought to illustrate that “the Constitution contains phrases that do not bear a literal reading.” Keeping Faith with the Constitution 42 (2009). For example, in reading the Necessary and Proper Clause, the Supreme Court in *McCulloch v. Maryland* rejected the ordinary meaning of the term “necessary” and held that “necessary” means “convenient,” “useful,” “plainly adapted,” or “conducive to the end.” 17 U.S. 316, 413-15, 421 (1819). This holding does not appear to have produced inconsistency or unpredictability; *McCulloch*’s reading of the Necessary and Proper Clause remains a stable and authoritative precedent on the scope of Congress’s power.

18. You’ve written that “[t]he enduring task of the judiciary . . . is to ‘find a way to articulate constitutional law that the nation can accept as its own.’”

a. Is it your position, then, that Constitutional law is whatever the nation is willing to “accept as its own,” rather than what the text of the Constitution provides?

Response: No. The above quotation is simply meant to indicate that it is important for courts to give reasons for their constitutional decisions that are persuasive not only to lawyers, judges, and others who are trained in the law, but also to the citizenry.

b. How, exactly, is a judge supposed to decipher what the “nation can accept as its own”?

Response: Judges may not decide cases on the basis of public opinion polls, majority sentiments, or the likely approval or disapproval of political leaders. Judges must decide cases on the basis of legal principles. The above quotation is simply meant to indicate that it is important for courts to give reasons for their constitutional decisions that are persuasive not only to lawyers, judges, and others who are trained in the law, but also to the citizenry.

19. I would like to get a better understanding of how you would interpret statutes and what your judicial method would be if you were confirmed to be a judge.

a. In cases involving a close question of law, what would you look to when determining which way to rule?

Response: The intent of the legislature is the ultimate touchstone of statutory interpretation. The best evidence of legislative intent is the text of the relevant statute, and the Supreme Court has said that a judge must “identify and give effect to the best reading of the words in the provision at issue” regardless of the policy

wisdom of the resulting interpretation. *Harbison v. Bell*, 129 S. Ct. 1481, 1493 (2009). Further, “[i]n reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute.” *Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008) (internal quotation marks and citation omitted).

Where the statutory text is ambiguous, the Supreme Court has applied various rules of construction where appropriate, such as the rule of constitutional avoidance, the rule of lenity, or the rule against absurdity. Statutory purpose and legislative history also may provide evidence of legislative intent. *See, e.g., Zedner v. United States*, 547 U.S. 489, 500-02 (2006). However, where the statutory text is clear, neither legislative history nor any other extrinsic source may be used to create ambiguity or an alternative meaning. *See Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“the authoritative statement is the statutory text, not the legislative history or any other extrinsic material”). If confirmed, I would faithfully follow the Court’s precedents on statutory interpretation.

b. Would you agree that the meaning of a statute is to be ascertained according to the understanding of the law when it was enacted?

Response: The Supreme Court has held that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009). These cases hold that, where the text is clear, the text is decisive as to the meaning of the statute notwithstanding any other evidence of how the law was understood when it was enacted. If confirmed, I would faithfully follow the Court’s precedents on statutory interpretation.

c. How would you use legislative history when interpreting a statute? What kind of weight would you give legislative history, if any, when interpreting a statute?

Response: The Supreme Court has looked to legislative history for evidence of legislative intent. *See, e.g., Zedner v. United States*, 547 U.S. 489, 500-02 (2006). However, where the statutory text is clear, legislative history may not be used to create ambiguity or an alternative meaning. *See Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“the authoritative statement is the statutory text, not the legislative history or any other extrinsic material”). If confirmed, I would faithfully follow the Court’s precedents on the use of legislative history.