

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

- 1. You co-authored a recent book published by the American Constitution Society entitled *Keeping Faith with the Constitution*. In that book, you claimed that constitutional interpretation**

“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 changing needs, conditions, and understandings of our society.”¹

You went on to argue that constitutional interpretation properly considers “the evolving understandings of the Constitution forged through social movements, legislation, and historical practice.”² It seems from these statements that you believe the meaning of the Constitution is not fixed at what the framers intended it to mean.

- a. If confirmed, what “changing needs, conditions, and understandings of our society” would you choose to consider as you interpret the Constitution?**

Response: If confirmed, I would faithfully follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy. In many areas of constitutional law, the Supreme Court has required judges to consider social understandings 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).

¹ GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 2 (2009).

² *Id.* at 3.

- b. **At your hearing, I read a shortened form of the quotation below that omitted the words “in order to sustain its vitality.” You testified that you believed that the missing words were: “to preserve the power and meaning of the text and the principles.” Obviously, your recollection of the missing words (versus the real text) changed the meaning. The full quotation is: “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 changing needs, conditions, and understandings of our society.” Looking at the full quotation, how would you decide how the Constitution “should” be applied today?**

Response: I apologize for misremembering the missing words of the quotation, and I stand corrected. I had in mind a similar quotation from the book: “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 meaning in light of the concerns, conditions, and evolving norms of our society.” *Keeping Faith with the Constitution* 25 (2009). I believe the two quotations express the same idea, *i.e.*, that the Constitution should be applied in a way that preserves the meaning or sustains the vitality of its text and principles. My writings do not claim that the Constitution should be applied to conform to the changing needs, norms, or understandings of society. Instead, my writings state that the application of the Constitution should always be faithful to its text and principles, and that such fidelity may require judges to consider the changing needs, norms, or understandings of society. *See id.* at 24-29.

- c. **What is legal test for how you decide how the Constitution “should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society”?**

Response: My book provides several examples of how Supreme Court implements this approach in its legal reasoning on a wide range of constitutional issues. The examples include *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). *See Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the Court’s precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy.

- d. **Do you stand by the quotation as written in the book (*i.e.*, “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 changing needs, conditions, and understandings of our society.”)?**

Response: I stand by the quotation as an expression of my scholarly views on constitutional interpretation. If confirmed, I would set aside my scholarly views and faithfully follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy.

2. At your confirmation hearing, you testified that you have “the highest regard for Justice Alito’s intellect and his career as a lawyer.”

a. Do you have high regard for Justice Alito himself?

Response: Yes. In addition to his intellect and professional accomplishments, I have particular respect and admiration for his personal background. Justice Alito grew up in an immigrant family, and he was raised by parents who worked very hard and made sacrifices for their children. He went to public schools, he studied hard, he was an active member of his community, and he went on to Princeton and Yale Law School. I believe he was the first person in his family to become a lawyer. He is an American success story, and he has served our country honorably as a prosecutor and as a judge.

3. At the confirmation hearing of Samuel Alito (January 12, 2006), you offered the following testimony:

Judge Alito’s record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won’t turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. Mr. Chairman, I humbly submit that this is not the America we know. Nor is it the America we aspire to be.

a. Do you really believe that that is his view of America?

Response: No. The passage above described a series of opinions that Justice Alito had written as a government lawyer and as a Third Circuit judge regarding what he believed to be permissible under the Constitution. Those writings were analyzed in my 2006 testimony, and the passage above was not intended to suggest that he supported, condoned, or endorsed those practices as a policy matter. However, upon rereading and reflecting on this passage in response to this question, I believe the passage is unduly harsh and provocative and does not add to the fifteen pages of legal analysis that preceded it. What troubles me most is that the passage has an *ad hominem* quality that is unfair and hurtful to the nominee—a reality that, in all

candor, I did not appreciate then nearly as much as I appreciate now. The passage does not reflect and indeed obscures the respect I have for Justice Alito as a person who rose from humble origins to serve our country honorably as a prosecutor, judge, and now Supreme Court Justice. For these reasons, I regret having written this passage, and I would omit it if I had the opportunity to rewrite my testimony.