

Responses of Goodwin H. Liu
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Charles Grassley

1. **Senator Feinstein asked you to explain your judicial philosophy of constitutional fidelity, and its consideration of “evolving norms and social understandings along with the text, principle, and precedent in interpreting the Constitution.” Referring to *Katz*, you explained that “this was not just a matter of sort of recognizing new technology. It was a matter of recognizing the social norms that had grown up around using telephones.”**

- a. Did the Court consider “evolving norms and social understandings” when it decided *Roe*?**

Response: Yes. The Supreme Court undertook an historical inquiry into the evolution of English common law, English statutory law, state common law and statutes, and the positions of professional medical, public health, and legal associations, among other sources, in deciding whether the right asserted in *Roe* “can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’ ” *Roe v. Wade*, 410 U.S. 113, 129-47, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

- b. If so, was such consideration appropriate?**

Response: Yes. The historical inquiry in *Roe* is generally consistent with the Supreme Court’s approach in a wide range of substantive due process cases. The Court has said that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). In “examining our Nation’s history, legal traditions, and practices,” *id.* at 710, the Court has looked first and foremost to the practices of the states, both historical, *see id.* at 710-11, 715-16, and contemporary, *see id.* at 716-19. The Court has also looked to the English common law and to colonial practices. *Id.* at 711-14. If confirmed, I would faithfully follow the Court’s precedents. In describing the Court’s approach in this area, I have written that “[i]n order to keep faith with the text and principles of the Constitution, judicial decisions have interpreted its guarantee of liberty in light of our society’s evolving traditions and shared understandings of personal identity, privacy, and autonomy.” *Keeping Faith with the Constitution* 98 (2009).

- c. Please describe how the Court should endeavor to uncover and recognize social norms.**

Response: I believe judges may not rely on their personal or subjective beliefs in uncovering or recognizing social norms. In many areas of constitutional law, the

Supreme Court has set forth legal standards that require consideration of social norms, and the Court has appropriately made clear that such consideration is an objective, not subjective, inquiry. In some areas, the Court has instructed judges to consider societal norms by applying an objective standard of reasonableness. *See, e.g., Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009) (analyzing Sixth Amendment claims of ineffective assistance of counsel based on “an objective standard of reasonableness in light of prevailing professional norms”); *Bond v. United States*, 529 U.S. 334, 338 (2000) (analyzing 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”). In other areas, the Court has looked to state and federal legislation as objective indicators of societal norms, *see, e.g., Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002) (examining state and federal laws in deciding whether the Eighth Amendment prohibits execution of persons who are mentally retarded), or to well-established social facts, *see, e.g., District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (holding that the Second Amendment protects those weapons “in common use at the time” and that “handguns are the most popular weapon chosen by Americans for self-defense in the home”). In these and other areas, I would faithfully follow the applicable standards and instructions for objective inquiry set forth by the Supreme Court if I were confirmed.

2. **At your hearing, I asked about a chapter of your book in which you defended, in your words, a “constellation of cases extending constitutional protection to individual decision making on intimate questions of family life, sexuality, and reproduction.” Your book then argues that these cases, “from *Griswold* . . . to *Lawrence*” are “wholly consistent with an approach to constitutional interpretation that reads original commitments and contemporary social contexts together. The evolution of constitutional protection for individual autonomy in certain areas of intimate decision making reflects precisely the rich form of constitutional interpretation this book envisions.” I asked whether these cases, given that they “reflect precisely the rich form of constitutional interpretation this book envisions,” demonstrate fidelity to the Constitution. You did not answer. Rather, you said only that they are precedents of the Court that you would follow. I am not asking whether you would follow precedent. I am not asking whether you personally agree with those precedents. I am not asking whether you would employ, as a judge, the judicial philosophy you have advocated. I am asking only if you are willing to confirm what your book suggests. Do you believe *Roe* and its progeny demonstrate fidelity to the Constitution?**

Response: Yes. In describing *Roe*, its progeny, and its precursors, I have written that the methodology of those cases “keep[s] faith with the text and principles of the Constitution.” *Keeping Faith with the Constitution* 98 (2009).

3. **During your first hearing, you said, “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.” You went on to draw a**

distinction between citing foreign law for “authority,” as opposed to merely looking to foreign law for “ideas or guidance.”

- a. Please explain the rationale for the claim that “judges can collect ideas from any place that they find it persuasive.”**

Response: My statement was intended to mean that I believe there is nothing inappropriate about judges having a well-informed and broad-minded perspective on the legal issues that come before them. Indeed, the Supreme Court has regularly cited books and law review articles to support or illuminate aspects of its legal reasoning. *See, e.g.,* District of Columbia v. Heller, 554 U.S. 570 (2008) (citing a multitude of books and law review articles bearing on the text and history of the Second Amendment).

- b. Please explain how the distinction you draw is meaningful.**

Response: When the Court cites a law review article to support or illuminate an aspect of its legal reasoning, no one would say that the Court has treated the law review article as a binding legal authority in its decision. I believe foreign law should be treated the same way: just as law review articles have no legal authority in the process of adjudication, foreign law also has no legal authority in the process of adjudication.

- c. Even if the distinction you draw is meaningful, please explain why judges should look to foreign law for “ideas or guidance” at all. In what way is foreign law relevant?**

Response: 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.” *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.

- 4. Prior to your nomination, you made your views on same-sex marriage well known. You joined a brief in the California Supreme Court - a brief which relied primarily on federal law - challenging California's ban on same-sex marriage. You signed a letter concluding the legal arguments of those who supported Prop. 8 were false. You authored a letter in the *L.A. Times* arguing that permitting domestic partnerships, and not same-sex marriage, was an unacceptable “separate-but-equal regime.” Yet, in a written response to Senator Coburn, you would not state whether you believe the federal Constitution confers a right to same-sex marriage. In fact, you indicated you have never expressed a view on this issue.**

- a. Do you believe the federal Constitution confers a right to same-sex marriage?**

Response: I have not previously expressed any view on whether the federal Constitution confers a right to same-sex marriage, and because that issue may come before me as a judge if I am confirmed, I believe it is not appropriate for me to do so now.

- b. The first argument in your brief to the California Supreme Court was entitled “Constitutional Interpretation Appropriately Takes Into Account Changes in Social Circumstances and Cultural Understanding.” Do you stand by that argument?**

Response: Yes.

- c. In *Keeping Faith with the Constitution*, you wrote that “the history of litigation over the right to marry” is an example of how “changes in social understandings often, and rightly, change how constitutional principles are applied.” (emphasis added). Regardless of your view on whether the Constitution confers a right to same-sex marriage, what sources should a judge utilize to determine “social understandings” regarding same-sex marriage?**

Response: Because the question of how, if at all, courts should determine social understandings regarding same-sex marriage may come before me as a judge if I am confirmed, I believe it is not appropriate for me to answer this question.

- d. Assuming a judge is capable to accurately discerning “social understandings,” please explain how a judge should take them into account when considering the constitutionality of same-sex marriage?**

Response: Because the question of how, if at all, courts should take into account social understandings regarding same-sex marriage may come before me as a judge if I am confirmed, I believe it is not appropriate for me to answer this question.

- 5. At your first hearing, you argued that the job of a law scholar “is to probe, criticize, invent, and be creative,” but the role of a judge is different. Your sworn testimony before the Senate Judiciary Committee during consideration of now-Justice Alito’s nomination was one of the few opportunities you have had to set aside your role as a law professor and instead offer a neutral and objective assessment. You have characterized that testimony as “unduly harsh” and an exercise of “poor judgment.” Considering this, how can the Committee be assured that you will set aside your strongly held views, if confirmed?**

Response: I believe there are three reasons the Committee can be assured that, if confirmed, I will set aside my own views and render decisions impartially based on the

facts and applicable law in each case. First, I demonstrated this ability when a committee of the California Legislature asked me to testify on Proposition 8 as a neutral legal expert in October 2008. Although I personally opposed Proposition 8, I testified (correctly) that Proposition 8 could not be overturned by the California Supreme Court under applicable state constitutional law precedents. Second, my scholarly writings demonstrate my ability to objectively state and apply the law. Where my writings have criticized current law or proposed a different approach, I have been careful to state the law accurately and to distinguish clearly between what the law is and what I might want it to be. My writings recognize this crucial difference, and if confirmed, I would faithfully follow what the law is and not what I might want it to be. Third, I fully understand and respect the difference between the role of a scholar and the role of a judge. Although both roles require fairness, open-mindedness, and intellectual rigor, they are fundamentally different in that a judge, unlike a scholar, has an absolute duty to follow the law, even when it leads to an outcome with which he personally disagrees.

I wish to add one clarification on the question as stated above. My acknowledgment of “poor judgment” pertains to one paragraph of the seventeen pages of testimony I submitted and not to the testimony as a whole. Apart from that paragraph, the rest of my testimony involved careful and thorough analysis of legal opinions that Justice Alito had written before his confirmation to the Supreme Court.

6. **In response to a question from Senator Feinstein, you said that references in your book to “evolving norms” were merely descriptions of how evolving norms “inform the Supreme Court’s elaboration of constitutional doctrine.” Likewise, you said “the notion of evolving norms is simply a reference to – it is a way to describe how the Supreme Court has applied some of the text and principles of the Constitution to specific cases and controversies.” You have also argued repeatedly that the theory of constitutional interpretation you defend in your book will not influence your decisions as a judge. Instead, you will simply follow your understanding of Supreme Court precedent and instruction. If your book, and what you call “constitutional fidelity,” is merely an attempt to describe Supreme Court precedent, and if you would follow your best understanding of that precedent, why is it not fair to conclude that your decisions would reflect the judicial philosophy you propose and defend, “constitutional fidelity”?**

Response: If confirmed, I would not seek to apply my own theory of constitutional interpretation or any other because it is not the proper role of a circuit judge to decide specific cases or controversies on the basis of any general theory of constitutional interpretation. Instead, I would faithfully follow the precedents of the Supreme Court, including any instructions in such precedents on the proper way to interpret specific constitutional provisions in a particular case.

7. **Senator Franken quoted from a blog post that argued your “opponents have sought to demonize [you] as a radical, extremist, and worse.” Do you believe those who oppose your nomination have “sought to demonize [you] as a radical, extremist, and worse”?**

Response: Although I am aware that some opponents of my nomination have used various labels to characterize me or my scholarly views, I do not know whether they have “sought to demonize” me. In general, I believe the Advice and Consent requirement in Article II is an essential part of our Constitution’s checks and balances. Accordingly, I believe it is appropriate that there be full and fair debate on judicial nominees before they are voted on by the Senate.

8. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is the ability and unwavering commitment to apply the law impartially to the facts of each case. I believe I possess that attribute.

9. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I understand judicial temperament to encompass several qualities, most importantly impartiality, open-mindedness, collegiality, patience, fairness, and the treatment of all persons with dignity and respect. I believe I possess those qualities.

10. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

11. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: When an inferior court judge hears a case of first impression or otherwise confronts an issue on which there is no controlling precedent, Supreme Court precedent is still relevant and constrains the decision-making process. Thus, even in a novel case, a circuit judge must take his guidance from the Supreme Court and lacks authority to improvise his own approach to deciding legal issues. *See, e.g.,* United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010) (en banc) (applying *Jackson v. Virginia*, 443 U.S. 307 (1979), to sustain federal conviction for being a felon in possession of a firearm and ammunition); Bull v. City & County of San Francisco, 595 F.3d 964 (9th Cir. 2010) (en banc) (applying the Supreme Court’s Fourth Amendment precedents to uphold the strip search policy of the county jail system). In addition to Supreme Court precedent, I would consult relevant circuit precedent as well as any decisions by sister circuits on the issue.

In a statutory case, I would look first to the text and structure of the statute. If there is ambiguity in the statute, then I would faithfully follow the Supreme Court's approach to seeking other evidence of legislative purpose. I would also consult relevant circuit precedent as well as any decisions by sister circuits on the issue.

12. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?

Response: If confirmed, I would faithfully apply Supreme Court and circuit precedent even if I believed that the precedent was erroneous. A circuit judge may never deviate from Supreme Court precedent, and a circuit judge may not deviate from circuit precedent when serving on a three-judge panel unless doing so is required by an intervening Supreme Court precedent. Although circuit precedent may be reconsidered through the *en banc* process, the process should not be used frequently given the importance of maintaining stability in the law. See Fed. R. App. P. 35(a) ("An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.").

13. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: It is appropriate for a federal court to declare a statute enacted by Congress unconstitutional when the statute exceeds the limits of Congress's enumerated powers or when the statute otherwise violates a provision of the Constitution. The Supreme Court has said that acts of Congress carry a presumption of constitutionality, *see, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), and that courts should avoid deciding the constitutionality of an act of Congress when "a construction of the statute is fairly possible by which the question may be avoided," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks and citation omitted). If confirmed, I would faithfully follow the Supreme Court's precedents.

14. In response to a question regarding Prop. 8, you testified, "I did also write that the Supreme Court, California Supreme Court, might have some reasons for revisiting that precedent..." Under what circumstances, if any, do you believe an appellate court should overturn precedent within its circuit?

Response: A three-judge panel of a circuit court may not overturn circuit precedent. Circuit precedent may be overturned only through the *en banc* process. The *en banc* process should not be used frequently given the importance of maintaining stability in the law. See Fed. R. App. P. 35(a) ("An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."). In deciding whether to overturn circuit precedent, an *en banc*

court should consider the factors in the doctrine of *stare decisis*: whether the precedent is unworkable; whether the precedent has been relied upon such that overruling it would create special hardships or serious inequities; whether the precedent's reasoning has been eroded by intervening legal developments so that it is no longer persuasive; and whether facts have changed in a way that has eroded the precedent's applicability or justification. In addition, it is sometimes necessary for an *en banc* court to overturn precedent when the *en banc* court is deciding an issue on which circuit precedents are in conflict.

15. Please describe with particularity the process by which these questions were answered.

Response: I prepared a complete draft of my answers and then discussed the draft with a member of the U.S. Department of Justice. I prepared a final draft of my answers and sent them to the Justice Department for submission to the Committee.

16. Do these answers reflect your true and personal views?

Response: Yes.