Statement of

The Honorable Chuck Grassley

United States Senator
Iowa
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Prepared Statement of Ranking Member Chuck Grassley
Senate Committee on the Judiciary
Executive Business Meeting
Goodwin Liu, Nominee to be United States Circuit Judge for the Ninth Circuit
Sunshine in the Courtroom Act
Faster FOIA
No Oil Producing and Exporting Cartels (NOPEC)
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Goodwin Liu

Mr. Chairman, Once again we are debating the nomination of Goodwin Liu, to be United States Circuit Judge for the Ninth Circuit. While I have pledged - and indeed demonstrated - cooperation in moving forward on consensus nominations, there is no doubt that Mr. Liu does not fall into that category. My objections to this nominee can be summarized with four areas of concern: his controversial writings and speeches; an activist judicial philosophy; his lack of judicial temperament; and limited experience.

Mr. Liu describes his writings as critical, inventive, and provocative. He states that he is simply a commentator, as it were to poke, prod and critique. The difficulty I have with this is that Mr. Liu's legal scholarship is beyond simple commentary. In fact, it is a prescription for a very activist agenda. Professor Liu argues that the Fourteenth Amendment creates a constitutional right to some minimum level of public welfare benefits. He has said that "the duty of government cannot be reduced to simply providing the basic necessities of life . . . the main pillars of the agenda would include . . . expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit."

Professor Liu is a strong proponent of affirmative action and its constitutionality. Celebrating the Supreme Court's decision in Grutter v. Bollinger, he said "[a]chieving racial diversity throughout our leading [educational] institutions is not merely constitutionally permissible, but morally required."

Professor Liu believes bans on gay marriage are unconstitutional. He was one of several law professors who filed an amicus brief with the California Supreme Court in a suit seeking to have California's same-sex marriage prohibition declared unconstitutional.

These statements, just a sample of his works, are not merely a scholarly reflection on the state of the law but a prescription for change. As he stated following President Obama's election in an

interview with NPR's Weekend Edition: "Whereas I think in the last seven or eight years we had mostly been playing defense in the sense of trying to prevent as many - in our view - bad things from happening. Now we have the opportunity to actually get our ideas and the progressive vision of the Constitution and of law and policy into practice."

Mr. Liu holds a view of the Constitution that can only be described as an activist judicial philosophy. The centerpiece of his judicial philosophy - a theory he describes as constitutional fidelity - sounds nice until you learn what he means by it. What he means by fidelity is "the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every single generation." Continuing, he states, "On this approach, the Constitution is understood to grow and evolve over time as the conditions, needs, and values of our society change."

When I questioned Mr. Liu on this he stated that his book respects the notion that the text of the Constitution and the principles that it expresses are totally fixed and enduring. I must admit some confusion with this contradiction. Either the text and principles are fixed and enduring, or they are adaptable - something that grows and evolves. Mr. Liu is apparently comfortable with this contradiction. It is a pattern I find throughout his testimony.

I am concerned about his appreciation of the proper role of a judge in our system of checks and balances. His philosophy leads to an inevitable expansion of the power of the judiciary. For example, according to Professor Liu, courts should play a role in creating and expanding constitutional welfare rights. He argues that, once a legislative body creates a welfare program, it is the proper role of the courts to grasp the meaning and purpose for that welfare benefit. He states that courts can recognize welfare rights by "invalidat[ing] statutory eligibility requirements or strengthen[ing] procedural protections against withdrawal of benefits.

Professor Liu also seems to favor a social needs-based view of living constitutionalism. His scholarly work argues that judicial decision making should be shaped by contemporary social needs and norms. Notably, he has said that "the problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine." This is troublesome. Our constitutional framework puts the legislative function in the Congress, not in the courts. It is the legislative function, through the political process, that determines when a particular value is to become part of our law. This is not a judicial duty. The judiciary is limited to deciding cases and controversies, not establishing public policy.

I would note further that this view of constitutional interpretation does not rely on the acts of the legislature or on the precedents established by higher courts. Rather, it is based on a concept of what he refers to as "evolving norms." Furthermore, as he testified before the committee, it is these "evolving norms" which inform the Supreme Court's elaboration of constitutional doctrine.

Mr. Liu tried to sound like a mainstream jurist when he stated the duty of a Circuit Judge was to faithfully follow the Supreme Court's instructions on matters of constitutional interpretation. Again, this sounds nice, but what does it mean? If we accept his premise that the Supreme Court's instructions are based on evolving norms, it follows that such "evolving norms" will shape the Circuit Courts decisions as well. This activist theory leads to a judicial system

substituting the whims of individual judges over the text and original meaning of the U.S. Constitution.

This is not the duty of a Circuit Judge.

Mr. Liu's legal views and judicial philosophy are clearly out of the mainstream. Just a small example illustrates this point. I questioned four of President Obama's District Judge nominees who followed Mr. Liu on the day of his hearing. I asked each of them concerning a specific point about Mr. Liu's judicial philosophy. Each one of them each one of them flatly rejected Mr. Liu's position. This included his view on judges considering "collective values" when interpreting the Constitution; on using foreign law; on interpreting the Constitution in ways that adapt its principles and its text; and on considering "public values and social understandings" when interpreting the Constitution.

Based on his out-of-the-mainstream views, it is no surprise that his nomination is opposed by so many. Included in that opposition are 42 district attorneys serving in the state of California. They are concerned, among other things, about his views on criminal law, capital punishment, and the role of the federal courts in second-guessing state decisions.

My third area of concern is that Mr. Liu has made a number of critical statements which indicate a lack of judicial temperament. He has been very openly critical of the current Supreme Court. In one article, he said that the holding in Bush v. Gore was "utterly lacking in any legal principle." He has claimed that the current court as a whole is unprincipled, saying that "if you look across the entire run of cases, you see a fairly consistent pattern where respect for precedent goes by the wayside when it gets in the way of result."

Professor Liu was highly critical of the nomination of Justice Roberts. He published an article on Bloomberg.com entitled "Roberts Would Swing the Supreme Court to the Right." In that article, he acknowledged that Roberts was qualified, saying "[t]here's no doubt Roberts has a brilliant legal mind. . . . But a Supreme Court nominee must be evaluated on more than legal intellect." He then voiced concerns that "with remarkable consistency throughout his career, Roberts ha[d] applied his legal talent to further the cause of the far right." He also spoke very disparagingly of Justice Roberts' conservative beliefs:

"[b]efore becoming a judge, he belonged to the Republican National Lawyers Association and the National Legal Center for the Public Interest, whose mission is to promote (among other things) "free enterprise," "private ownership of property," and "limited government." These are code words for an ideological agenda hostile to environmental, workplace, and consumer protections."

Professor Liu has been very publicly critical of Justice Alito in particular. He believes it a valid criticism of Justice Alito to say that "[h]e approaches law in a formalistic, mechanical way abstracted from human experience." And we are all familiar with Mr. Liu's scathing attack at Justice Alito's confirmation hearing. When asked about his testimony, Mr. Liu admitted the language was unduly harsh, provocative, unnecessary, and was a case of poor judgment. I can agree with Mr. Liu on this statement.

I can appreciate that Mr. Liu now understands the unfortunate language he used. The trouble I have with this, however, is that it shows that even when stepping out of the academic world, Mr. Liu promotes extreme views and intemperate language. Even if I accept his rationale for the tone of his work in the academic world, that does not explain his congressional testimony. That was one opportunity where he could demonstrate a reasoned, temperate approach. Yet he failed that test. I think it may also indicate what we might expect from a Judge Liu. To me, that is an unacceptable outcome.

My fourth major concern is his lack of experience. After graduating from law school in 1998, he clerked for Judge David S. Tatel on the U.S. Court of Appeals for the District of Columbia. When his clerkship ended, Professor Liu became Special Assistant to the Deputy Secretary of Education for one year. In 2000, he worked as a contract attorney for the law firm of Nixon Peabody, LLP, where he "assisted with legal research and writing." From 2000 to 2001, Professor Liu clerked for Justice Ruth Bader Ginsburg on the Supreme Court. After his Supreme Court clerkship, Professor Liu became an associate at O'Melveny & Myers, where he remained for less than two years. According to his questionnaire, he appeared in court only "occasionally." He also reported that his other work as an attorney has not involved court appearances. He has not tried any cases in courts of record to verdict, judgment, or final decision. Since 2003, Professor Liu has been a full-time law professor at UC Berkeley School of Law, and in 2008 he became Associate Dean.

After his nomination last year, the ABA Standing Committee on the Federal Judiciary gave Professor Liu the rating "Unanimous Well-Qualified." I am somewhat perplexed by this rating. According to the Standing Committee's explanation of its standards for rating judicial nominees, "a prospective nominee to the federal bench ordinarily should have at least twelve years' experience in the practice of law." Further, "the Committee recognizes that substantial courtroom and trial experience as a lawyer or trial judge is important." At the time of his nomination and rating, Professor Liu graduated from law school less than 12 years prior and has been a member of a state bar only since May 1999. As noted above, he has no trial experience and has never been a judge.

Mr. Chairman, we have often heard the term "confirmation conversion" applied to nominees who appear to have a change of legal philosophy when they are nominated to a federal judgeship. As I review the record, I think Mr. Liu has taken that concept a step further - I would use the phrase confirmation chameleon. It seems to me that Mr. Liu is willing to adapt his testimony to what he thinks is most appropriate at the time. I have discussed other contradictions already, but let me give you a clear example. Senator Cornyn asked him about his troubling record contained in his work product expressing opinions on death penalty to same-sex marriage to welfare rights. Senator Cornyn then stated "You are now saying, 'Wipe the slate clean because none of that has any relevance whatsoever to how I would conduct myself as a judge in confirmed by the Senate. Is that correct?" Mr. Liu responded, "That is correct, Senator." A few minutes later I asked him "If we were to, let us just say, wipe the slate clean as to your academic writings and career, what is left to justify your confirmation?" Mr. Liu responded "I would hope that you would not wipe my slate clean, as it were. You know, I am what I am."

Mr. Liu cannot have it both ways. Either his record stays with him or we wipe the slate clean. Perhaps in the long run it doesn't matter, because either way it leaves us with an individual who should not be given a lifetime appointment. With his record as a law professor we are left with the evidence of a left-leaning, judicial activist. Without it we are left with a two-year associate with law clerk experience and little else.

Lastly, Mr. Chairman, I will conclude with this thought. I do not believe Mr. Liu has an understanding and appreciation of the proper role of a judge. I believe, if confirmed, he will bring a personal agenda and political ideology into the courtroom.

It is ironic that in commenting on the Roberts nomination, Mr. Liu said "the nomination is a seismic event that threatens to deepen the Nation's red-blue divide. Instead of choosing a consensus candidate [the President] has opted for a conservative thoroughbred who, if confirmed, will likely swing the court sharply to the right on many critical issues."

If confirmed, I am concerned that Mr. Liu will deeply divide the Ninth Circuit and move that court even further to the left. Opinions he could offer would mean his activist ideology and judicial philosophy would seep well beyond the Berkeley campus. Sitting on the Ninth Circuit, his opinions and rulings would have far reaching effect on individuals and businesses throughout the nine-state Circuit, including places like Bozeman, Montana; Boise, Idaho, and Anchorage, Alaska.

For the reasons I have articulated - (1)his controversial writings and speeches; (2)an activist judicial philosophy; (3) his lack of judicial temperament; and (4) his limited experience - as well as many other concerns which I have not expressed today, I shall oppose this nomination.

Sunshine in the Courtroom

Mr. Chairman, I'm pleased to be here today to mark-up the Sunshine in the Courtroom Act. I'd like to take a moment to thank the Chairman and the other co-sponsors of this bill who have helped build such a strong bipartisan effort in support of this important legislation. Senator Schumer, who is the lead cosponsor of this bill, and Senators Graham, Cornyn, Durbin, Klobuchar and Blumenthal.

For the new members, let me first begin with a brief explanation of this bill's history in our committee. Then I'll explain the necessity of this bill and why it's so vital that we pass it.

Since 2001, the committee has marked-up this legislation five times and has reported it out of Committee each time with bipartisan support. In 2001, the Committee approved the legislation by a 12 to 7 vote. In 2003, it was approved by a vote of 14 to 4. It passed by a vote of 11 to 6 in 2006, by a vote of 10 to 8 in 2008 and by a vote of 13 to 6 in 2010. Each and every time the bill had coordinated efforts from both sides of the aisle to support its progress, just as it does today.

Cameras in federal courtrooms are at the very heart of an open and transparent government. In 1947, the Supreme Court stated, "what transpires in the courtroom is public property," and I believe this is true. The Founders intended for trials to be held in front of all people who wished to attend. The First Amendment supports the notion that court proceedings be open to the public

and by, extension, the news media and broadcast coverage, the same way C-SPAN opened Congress to the public.

Nothing could be more fundamental than the public's knowledge of their Constitution. To see it, not as some dusty old document they read about in their history books, but to see it upheld daily by the actions of their federal judiciary. To that end, the public will become better informed about the federal judiciary and the judicial process. Further, this bill will bring greater accountability and public scrutiny to the federal judiciary, a system that includes judges with lifetime tenure.

There are many benefits and few detriments to allowing greater public access to the judiciary. At least fifteen states have conducted studies which determined that camera coverage contributed to a greater understanding of the court system. Presently, all 50 states allow some form of modern audio visual coverage of court proceedings, within reasonable limits. Two Federal Circuit Courts of Appeal, the Second and the Ninth, currently allow selective coverage of appellate arguments.

The widespread use of electronic media coverage in state courts is evidence that cameras can be used without damaging the integrity of the trial process. Further, at the federal level, a 1994 Federal Judicial Center pilot program found no effects of camera presence on participants in the proceedings. Sixteen years later, the Judicial Conference launched another pilot program in September 2010, allowing cameras in federal district courts.

The courts have also recognized that there is a need to broadcast important cases. For instance, Chief Justice Rehnquist allowed the delayed audio broadcasting of the oral arguments in the 2000 presidential election dispute, in response to urging from Senator Schumer and myself to reconsider the decision to ban television coverage of the matter. This marked a historical step in the right direction for judicial branch transparency.

Chief Justice Roberts continued this precedent by releasing audio recordings of the oral arguments in the combined Guantanamo Detainee cases. This was another historic step forward.

Despite these instances, there is still a need for Congress to step in and legislate. For example, in January 2010, the Supreme Court issued a stay of an order by the Ninth Circuit allowing the real-time audiovisual streaming of the non-jury trial in Hollingsworth v. Perry. In issuing the stay, the court effectively halted the media coverage of the trial, but it was not on substantive grounds. Instead, the opinion expressly stated, "[w]e do not express here any views on the propriety of broadcasting court proceedings generally." The court went on further to find that the Ninth Circuit's decision to amend the court rules violated federal law because they did not follow the proper notice and comment procedures.

Our legislation will help settle this question about media access to federal courts. To those here who oppose the bill, let me be clear, it does not mandate camera coverage. Instead, it simply gives judges the discretion to allow media coverage in federal courtrooms.

It also prohibits the presiding judge from permitting the photographing, recording, broadcasting or televising of the proceedings if it would violate the rights of the individuals involved in the trial.

In addition, the bill provides a number of procedural safeguards. It protects the anonymity of non-party witnesses by giving them the right to have their voices and images obscured during testimony. The bill also provides a 3-year sunset provision allowing a reasonable amount of time to determine how the process is working before making the legislation permanent. Finally, the bill gives the Judicial Conference the authority to issue guidelines on administration of media coverage to ensure uniformity across the federal judiciary

This bill strikes the right balance between protecting individual rights and ensuring open access to the judiciary. It allows judges the discretion to allow cameras in the federal courtroom should they so choose. It protects witnesses and doesn't compromise the integrity of trials.

As it has proven in many different states, allowing media coverage of federal courtrooms will provide much needed sunshine in the least understood of the branches of the federal government. If federal judges are allowed to make life or death decisions for the individuals they try, we should respect their ability to make a decision to securely allow public access to their proceedings.

I urge my colleagues to support this bi-partisan legislation.

Faster FOIA

Mr. Chairman, I'd like to say a few words about the Faster FOIA bill.

I know that Senator Cornyn and you have put a lot of work into this bill and we appreciate it. The bill creates a commission to study the delays in the processing of information requests under the Freedom of Information Act.

I want to thank you and Senator Cornyn for agreeing to the changes that we requested. I believe that they significantly improve the bill.

As a result of those changes, the issues that the commission will study and report on now include --- whether any disparities in processing information requests have occurred because of political vetting; --- and the extent to which political appointees have been involved in the processing of requests under the Freedom of Information Act.

There's a real need to investigate these issues.

Given my experience in trying to pry information out of the Executive Branch and based on investigations by the media, I'm disappointed to report that President Obama's statements about transparency are not being put into practice. Federal agencies under the control of the Obama administration's political appointees have been more aggressive than ever in withholding information.

Perhaps the most dramatic and troubling departure from President Obama's vow to usher in a new era of open government was revealed in e-mails from the Department of Homeland Security obtained by the Associated Press in July of 2010.

The Associated Press uncovered that for nearly a year President Obama's political appointees at Homeland Security screened Freedom of Information Act requests and delayed responses.

Specifically, career employees were ordered to provide Secretary Napolitano's political staff with information about the people who asked for records -- such as where they lived, whether they were private citizens or reporters -- and about the organizations where they worked. If a member of Congress sought requested documents, employees were told to specify Democrat or Republican. The political vetting often delayed the release of information for weeks beyond the usual wait.

There are also news reports of employment retaliation arising out of the uncovering of the political vetting policy at Homeland Security.

In particular, there are reports that the career employee who complained about the political vetting policy to the inspector general was demoted by the Obama administration.

This career employee was the deputy chief in charge of the Freedom of Information Act. She was the most senior career employee in this area at Homeland Security.

She was denied a promotion and the day after she met with congressional investigators, --- her job responsibilities were reduced and she was told that she had a week to move out of her current office and into a smaller one.

We cannot ignore or minimize this type of conduct.

The situation at Homeland Security is not an isolated incident and the Faster FOIA bill could not have come sooner.

An article in the Washington Post last week by the president of the Association of Health Care Journalists and the president of the Society of Professional Journalists --- confirms that at least some in the media are concerned about the Obama administration's poor performance in the area of transparency.

According to the Washington Post article, the Obama administration has imposed restrictions on reporters' newsgathering that exceed any constraints put in place by the Bush administration.

For example, the piece in the Washington Post reports that the Obama administration muzzles scientists and experts within federal agencies. When they are allowed to talk about important public health issues, a chaperone often supervises every word.

The Obama administration has talked a great deal about the reams of data it has put online. However, as the Washington Post article explains, -- although this information is useful, --- it's merely a matter of the government posting what it wants when it wants, on sites most citizens would never think to visit.

Meanwhile, as the Washington Post reported, --- in more than a third of requests made for public records last year, the Obama administration failed to provide any information at all. The Obama

administration is releasing fewer records under the Freedom of Information Act than the Bush administration did. And when a response is provided, it often is incomplete or comes years later.

Ironically, the Obama administration even censored 194 pages of internal e-mails about its Open Government Directive.
So there's a real disconnect between the President's words about transparency and the actions of his political appointees.

Open government and transparency are more than just pleasant sounding words. They are essential to maintaining our democratic form of government.

Throughout my career I have actively conducted oversight of the executive branch regardless of who controls the Congress or the White House.

Open government is not a Republican or a Democrat issue. It has to be a bipartisan issue. Our differences on policy issues and the workings of the government must be debated before our citizens in the open.

It's our job in Congress to help ensure that agencies are more transparent and responsive to the people we represent.

I believe that investigating the political vetting of information requests under the Freedom of Information Act is part of our responsibilities to our fellow citizens.

So I believe that the changes to the Faster FOIA bill help to fulfill our constitutional duties as legislators.

No Oil Producing and Exporting Cartels (NOPEC)

Mr. Chairman, I am pleased once again to be an original co-sponsor of Senator Kohl's "No Oil Producing and Exporting Cartels" bill. This bill would allow the U.S. government to bring lawsuits against oil cartel members for antitrust violations. I have supported this legislation since 2000. High energy prices are a drag on our economy. With the price of oil pushing $110 a barrel, it's time to put an end to illegal price fixing. OPEC needs to know that we are committed to stopping their anti-competitive behavior. I am committed to pursuing this initiative, along with my efforts to develop renewable energy and increase America's energy independence.