

vote when you are in the majority and suddenly say they do not deserve it now.

I hope we will see the 60 votes for cloture and then the 51 votes for confirmation. I am privileged to have had this opportunity to share the story of Professor Goodwin Liu with my colleagues.

I yield the floor.

The PRESIDING OFFICER. The Senator from Montana.

Mr. TESTER. Madam President, I think this is appropriate. I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

DEBIT INTERCHANGE FEES

Mr. TESTER. Madam President, I thank Senator BOXER and Senator GRASSLEY for their generosity. I am not here to talk about Goodwin Liu. I am going to talk about the debate over debit interchange.

In a matter of weeks, the government is planning to price-fix debit card swipe fees below—below—the cost of doing business. They are going to price-fix debit card swipe fees below the cost of doing business.

On the surface, the plan might make sense. But peel back the layers and we will see why a whole bunch of folks out there on both sides of the aisle are raising a flag.

I am not asking to repeal the rules or even change them. I am asking that we take a closer look so we can get the information to understand the impacts, both intended and unintended. I have listened to the feedback my colleagues have shared on this issue. I have heard their concerns.

While it is important to stop and examine the impact of limiting debit card swipe fees, some have said 2 years is simply too long. I am willing to adjust my legislation to address those concerns. Senator CORKER and I have decided to shorten the timeframe from 24 months to 15 months.

Here is how the 15 months is going to be used. Fifteen months will provide the agencies with 6 months for a study. It will provide the Federal Reserve 6 months to rewrite the rules using that study. It will allow 3 months to implement the final rules. Fifteen months is the bare minimum to get this study right, and we want to get it right.

For me, stopping and studying the unintended consequences of government price-fixing has everything to do with access to capital for small businesses and consumers in rural America. Make no mistake, the big banks are going to do fine no matter what. So I opposed bailing them out. All but two banks in my entire State are considered small community banks and will be affected by this debit interchange price-fixing rule.

All of Montana's credit unions will be affected as well. They will feel the pinch, and they will lose because the government is going to set a price for doing business that does not cover their costs.

Let me say it again. The Federal Government is going to tell these folks what price to set on interchange rates, and it will not be enough for the little guys to be able to compete in the marketplace.

Let me ask this: How would a big box retailer react if we set the price of T-shirts below what it cost to make, ship, and market them? You can bet the retailers would be up in arms—and rightfully so—about the government setting prices and telling them how to run their business.

Some have suggested that the only way to have a competitive marketplace is by capping rates. That kind of reasoning does not make sense to a farmer like me. When we slant the playing field against small banks, they cannot compete with the big guys. If they go under, the businesses and consumers who rely on them are left hanging. That is why a populist farmer from rural America is on the side of common sense in this debate, and I am on the side of Montana small businesses and consumers.

Last Thursday, I asked Fed Chairman Ben Bernanke about the impact of government price fixing as it applies to rural America. He is not the only major regulator who has raised serious questions about whether the supposed exemption for small banks will work. He is not the only one. Last week, Chairman Bernanke said "it could result in some smaller banks being less profitable and failing."

Let me repeat that, in the words of Chairman Bernanke, the small banks in Montana and across America could fail under this planned rule.

What does it mean if more banks fail? It means more consolidation in the banking industry. How in the world is that good for consumers? How is it better for a small business in Glendive, MT, to have to ask a bank headquartered on Wall Street for a loan instead of going to the bank on Main Street? Are big banks going to provide the same level of service as community banks? I think not. Will they be able to evaluate the prospects of a small business by only looking at data, without understanding the communities they serve? Will big banks create strong relationships with the people in rural America? Will they do that? How about those folks who are looking to start a small business?

We know credit unions are one of the few financial institutions to ever consider going into Indian Country to help bring investment to some of the most impoverished areas in this country. Do you think if these small folks go under, there will be anyone else willing to lend on reservations? No way. No way.

During last week's hearing, FDIC Chairwoman Sheila Bair said this new rule is "going to reduce revenues at a number of smaller banks, and they will have to pass that on to customers in terms of higher fees." Rural America—especially in this fragile economy—cannot afford that.

Today I want to share why a few businesses in Montana are opposed to government price fixing. Their stories are not uncommon. They are quite ordinary.

Doris Rocheleau runs Doris's Day Care in Great Falls, MT. She has been doing business for nearly 30 years with a community bank. She tells me she is struggling to make ends meet, as many small businesses are, and paying more in monthly checking would hurt her very much.

Also, in Great Falls there is a small business owner named Mark Voyles. Mark owns Y-Not Trucking. His reason for supporting my amendment to stop and study the government limit is because he "doesn't want to pay more fees on his money in his bank."

Cabela's is a large retailer, a popular sporting goods store in Billings, MT. They are wary of the Durbin amendment because they offer their customers a reward credit card. They have real concerns with government price controls and what they will mean for their ability to meet the needs of their customers.

The bottom line is this: Allowing the government to price-fix debit card swipe fees is a slippery slope. Maybe that is why my amendment is to stop and study the impact of this proposed rule. It has broad bipartisan support from folks such as the National Education Association and Americans for Tax Reform—different sides of the economic equation. Then there are non-profit organizations, such as Rural Dynamics in Montana. Rural Dynamics serves the entire State of Montana—thousands of folks every year. Their mission? To help individual people and families achieve economic independence, to make sure folks can earn, keep, and grow their assets to reach economic independence.

Rural Dynamics is a well-respected organization. Many of their strategies involve helping Montanans manage their assets and save for their future, enabling them access to banking services. Anything that would result in undue higher fees would take their mission backwards.

Rural Dynamics says simply: We want to understand the long-term risk associated with limiting debit card swipe fees, how it will impact rural America, how it will affect economic independence.

Just as convincing as the small businesses in my State are the administration experts who have been tasked with trying to make this rule on debit interchange work. Chairman Bernanke last week said he is still not sure whether the small issuer exemption would work, saying:

There are market forces that would work against the exemption.

Sheila Bair, Chairwoman of the FDIC, raised similar concerns about the workability of the small issuer exemption. So has Chairwoman Debbie Matz of the National Credit Union Administration. So has the Conference of

State Banking Supervisors. So has the National Association of State Credit Union Supervisors.

This represents all—all—of the regulators of the small financial institutions at the State and national level—every one of them. These are the folks who are tasked with keeping our community banks and credit unions vibrant and strong, ensuring these institutions are well capitalized and making sound loans. Let me say again, all of them—all of them—have raised concerns about the impact of this rule on the small financial institutions they supervise.

These regulators are not convinced these rules are going to be able to work in the way they were intended. My friends on the other side of this debate continue to attack these folks. They have said they are shills for the big banks; that they do not understand market forces; that they don't understand small institutions. This couldn't be further from the truth.

And no one—no one—has been able to explain to me why studying this issue to make sure these rules do what they say they are supposed to do is a bad idea. To stop and to study. That is what the bipartisan bill I am sponsoring does. To stop and to study the unintended consequences for rural America and this country as a whole. If this rule goes into effect, the consumers and businesses who rely on community banks and credit unions—oh, yeah—are going to pay the price. And we can bet many retailers won't be eager to pass the few pennies they save down to you. Yet Doris Rochileau's monthly banking fees will go up. Mark Voyles will have to pay more to keep his money in his bank. The folks at Cabela's will be asking: What is next? And will it hurt their loyal customers? Thousands of Montanans who rely on Rural Dynamics will have more hurdles to jump over to reach economic independence.

These stories hit home. They are the stories I tell when someone asks: Why would a populist farmer be against the government telling the small banks that drive our economy how to do business? I am not asking to repeal this provision; far from it. I am asking us to do our homework in this body, to make sure we understand exactly what it means for Montana and all of America.

With that, I want to express my thanks to the good Senator from Iowa one more time.

I yield the floor.

THE PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Madam President, I come to the floor to speak on the nomination of Goodwin Liu to be Circuit Judge of the Ninth Circuit.

I have said many times over the past 2 weeks—and perhaps for longer than the last 2 weeks—that by any fair measure we are moving judicial nominees at a very brisk pace. This month alone, we confirmed 7 judges in 10 days.

In the short time we have been in session this year, we have confirmed 24 judges. That is a rate, almost, of one judge every other day. This year, the committee has favorably reported 51 percent of President Obama's nominees, yet it seems the more we work with the majority on filling vacancies, the more complaints we hear.

Furthermore, as we work together to confirm consensus nominees, we are met with the majority's insistence that we turn to controversial nominees, such as the one before us today—Goodwin Liu—because this seems to be the most controversial of President Obama's nominees we have had to this point. I have pledged, and indeed I have demonstrated, cooperation in moving forward on consensus nominations. There is no doubt that Mr. Liu does not fall into the category of being a consensus nominee.

My objections to this nominee can be summarized in five areas of concern: his controversial writings and speeches, an activist judicial philosophy, his lack of judicial temperament, his troublesome testimony and lack of candor before the committee, and his limited experience.

Mr. Liu describes his writings as critical, inventive, and provocative, and that is what they are. He states he is simply a commentator and his role is merely to poke, prod, and critique. The problem I have with that is his legal scholarship goes well beyond simple commentary. The nominee argues the 14th amendment creates a constitutional right to some minimum level of public welfare benefits. That is a real reach. He has said:

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.

There is no doubt those may be policy issues Congress ought to deal with, but it is a real stretch to say that they are constitutionally protected rights.

Mr. Liu is a strong proponent of affirmative action and the constitutionality of affirmative action. 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.

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

These statements, just a sample of his works, are not merely a scholarly reflection on the state of law. Instead, they are a prescription for change—big change. 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 it actually means. Here is what he means by fidelity:

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 on, 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.

That is not a far cry from the unwritten constitution of Great Britain, where the Parliament is supreme and makes a determination from time to time on what the policies are, as opposed to in this country where the natural law—or the laws that are the rights we have given to us by our Creator, not by government—are the basis of our law.

When I questioned the nominee at his hearing regarding his position, he stated his book respects the notion that the text of the Constitution and the principles it expresses are totally fixed and enduring. I must admit some confusion with this contradiction. Either the text and the principles are fixed and enduring or they are adaptable—something that grows and evolves, as it happens with the Constitution of Great Britain. Mr. Liu is, apparently, comfortable with this contradiction. I am not. It is a pattern I find throughout his testimony.

I am concerned by his apparent lack of appreciation for 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 Mr. 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 the purpose for that welfare benefit. He states the courts can recognize welfare rights by "invalidat[ing] statutory eligibility requirements or strengthen[ing] procedural protections against the withdrawal of benefits." That is forthrightly an attack on the legislative branch of government, and on its power to make statute and law. The courts are supposed to be interpreting, not making law.

The nominee also seems to favor a social needs-based view of living constitutionalism. His scholarly work argues that judicial decisionmaking should be shaped by contemporary social needs and norms, rather than the certainty of the Constitution. Notably, he has said:

. . . 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.

It is just as if what the writers of the Constitution in 1787 thought ought to be the basic law of this land means nothing today. So as you know, I think this is very troublesome. Our constitutional framework puts the legislative function in the Congress, not the courts. It is the legislative function, through the political process, where the people rule, that determine when a particular value is to become part of our law. This is not the duty of judges. The judiciary is limited to deciding cases and controversy, 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 prefers to call "evolving norms." Furthermore, as he testified before the committee, it is those "evolving norms" that 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. Who is going to argue with that? Again, that sounds nice, doesn't it, but what does it mean? If we accept his premise that the Supreme Court's instructions are based upon 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 any circuit judge.

Mr. Liu's legal views and judicial philosophy are clearly out of the mainstream. 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 philosophy. Each and every 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 the nominee 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."

Mr. 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.

Let's think about what he just said there, about Judge Roberts, now Chief Justice Roberts. He said private ownership of property, limited government, and free enterprise are code words for an ideological agenda hostile to environment, workplace and consumer protections? Does he think we are Communist-run China, that the government runs everything, that their system of government is a better one? When they bring online a coal-fired plant every week? Plants that pollute the air and put more carbon dioxide into the air than we do in the United States? Where children are dying because the food is poisoned and consumers aren't protected? Where every miner is in jeopardy of losing their lives? That is how far off base this nominee is when he refers to free enterprise, private ownership of property, and limited government as being bad. But if you get government more involved, as they do in China, it is somehow a better place?

The nominee has been very publicly critical also of Justice Alito in particular. He believes it is 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. That is one statement of Mr. Liu with which I can I agree.

I can appreciate that Mr. Liu now understands the unfortunate language he uses. The trouble I have with this, however, is that it shows that even when stepping out of the academic world, the nominee 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, should he be confirmed—the same thing. To me, that is an unacceptable outcome.

The fourth major area of concern is Mr. Liu's testimony and candor before the committee, which was troubling at times and lacked credibility. Even before he appeared before the committee, the nominee had difficulty providing the committee, with materials required by his questionnaire. As Senator SESSIONS said at the time:

At best, this nominee's extraordinary disregard for the Committee's constitutional role demonstrates incompetence; at worst, it creates the impression that he knowingly attempted to hide his most controversial work from the Committee.

During his testimony, the nominee said, in reference to his past legal writings, "whatever I may have written in the books and the articles would have no bearing on my action as a judge." Oh? Trying to paint himself as a judicial conservative, the nominee attempted to walk away from his previous positions. He tried to distance himself on the proper role of a judge, on the use of foreign law, on the appropriateness of racial quotas and from his previous views on free enterprise and private ownership of property. Even the *Washington Post* found his testimony a bit hard to believe. The *Post's* editorial stated:

Mr. Liu is unlikely to shunt aside completely the ideas and approaches he has spent years developing. But the real problem, of course, is not that he adheres to a particular judicial philosophy, but that he—like so many others before him—feels the need to pretend not to have one.

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 this nominee 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 of Texas asked him about his troubling record contained in his work-product that expressed opinions on issues such as the

death penalty, same-sex marriage, and 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 if 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?” The nominee 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. If you include his record as a law professor, then we are left with the evidence of a left-leaning, judicial activist. If you do not include it, then we are left with a 2-year associate with law clerk experience and little else.

That leads me to my final point. I am concerned about the nominee’s 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, Mr. Liu became special assistant to the Deputy Secretary of Education for 1 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, the nominee clerked for Justice Ruth Bader Ginsburg on the Supreme Court. After his Supreme Court clerkship, he became an associate at O’Melveny & Myers, where he remained for less than 2 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 to verdict, judgment, or final decision. Since 2003, the nominee 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 Mr. 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, the nominee had graduated from law school less than 12 years prior. He 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.

I will conclude with this thought. Given his record and testimony, I do not believe the nominee 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—if that is possible. If confirmed, his activist ideology and judicial philosophy would seep well beyond the Berkeley campus—and it seems that is difficult. 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, MT; Boise, ID, and Anchorage, AK.

For the reasons I have articulated—No. 1, his controversial writings and speeches; No. 2, an activist judicial philosophy; No. 3, his lack of judicial temperament; No. 4, his lack of candor before the committee, and No. 5, his limited experience—as well as many other concerns which I have not expressed today, I shall oppose this nomination.

I yield the floor.

The PRESIDING OFFICER (Mr. PRYOR). The Senator from California.

Mrs. FEINSTEIN. I ask unanimous consent I might be given permission to speak for one-half hour.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. FEINSTEIN. Mr. President, I have been on the Judiciary Committee for 18 years. I have never heard a harsher statement about a brilliant young man than I have just heard. During those 18 years, I have seen the standards for appointment change rather dramatically. I have seen a search engine develop on the Republican side to go out and find anything and everything an individual may have written, and then compile a dossier, almost like one would of a criminal, and then characterize and depict the individual in the terms they wish to do.

I regret this, and I hope to lay out how the Democratic side, with a number of nominees, has not done the same thing. But to see a young man with the credentials Goodwin Liu carries belittled in the way he has been belittled in these hearings and also on this floor really upsets me.

This man is a professor of law and the former associate dean of one of the 10 best law schools in America. He is a nationally recognized constitutional scholar. He is a truly brilliant legal

mind. I have every confidence in his intellectual firepower, his integrity, and his even-keeled demeanor, and I believe it will make him a fine judge.

Let me tell my colleagues a little about his background. He was born in Augusta, GA. He is the son of Taiwanese immigrants who were recruited to America to provide medical services in rural areas.

He attended public schools in Clewiston, FL, and in Sacramento, CA. He first struggled to learn English and master vocabulary but, ultimately, he graduated co-valedictorian from Rio Americano High School in Sacramento.

He was admitted to Stanford University, my alma mater. He graduated Phi Beta Kappa. He received numerous awards for his contributions to the university, and he was elected co-president of the student body. Pretty good.

He received a Rhodes scholarship. He graduated with a master’s degree from Oxford University. He attended Yale Law School. Once again, he was at the top of his class. He was editor of the Yale Law Journal. He won the prize for the best team argument in the moot court competition and won awards for the best academic paper by a third-year law student and the best paper in the field of tax law.

He received prestigious judicial clerkships with Circuit Judge David Tatel on the U.S. Court of Appeals for the DC Circuit and then with Ruth Bader Ginsburg on the U.S. Supreme Court.

He worked in the Department of Education as a special assistant to the Deputy Secretary of the United States of the U.S. Department of Education.

He spent 2 years in private practice at O’Melveny & Myers, which is a prestigious law firm—not a minor firm, a major firm—where he handled commercial matters, including antitrust, insurance, and class action cases. Appellate law comprised roughly half his practice.

Finally, in 2003, he accepted a tenure-track position on the faculty of Boalt Hall School of Law. At Boalt, he quickly established himself as one of our most astute legal scholars, with specialties in constitutional law, the Supreme Court, education law, and education policy.

He published articles in the Yale Law Journal, the Stanford Law Review, the California Law Review, the Iowa Law Review, the Harvard Law and Policy Review, and many other academic journals.

He received the Education Law Association’s Steven S. Goldberg Award for Distinguished Scholarship in Education Law, and he was elected into membership of the American Law Institute.

In 2008, his colleagues on the faculty of Boalt selected him as their associate dean. In 2009, the University of California at Berkeley awarded him their Distinguished Teaching Award, the highest award for teaching across the entire university.

I believe he holds a deep appreciation for what opportunities our country affords. I believe his background and his legal prowess are fitting for him to become an appellate court judge. When one speaks with him about his family and upbringing, one gains a sense of him as someone who loves this country and bears an abiding belief that ours is a land of opportunity and a place where everyone has a chance to learn and grow and to thrive.

Some of my colleagues have questioned a number of his writings and his temperament, and what figures very formidably, as I have talked to the Republican side, is particularly testimony he gave on the confirmation of Justice Alito. What he did was provide a long analysis of Alito's opinions and then at the end he used a rhetorical flourish that was, quite frankly, misguided. He strung together a series of facts from cases Alito had decided and then made a statement that I believe he very much regrets. It was over the top. But he has acknowledged it, he has been forthright, and he has apologized.

Before the Senate Judiciary Committee he said:

What troubles me most is that the passage has an ad hominem quality that is unfair and hurtful. I regret having written this passage.

He said if he had to do it again: "I would have deleted it."

It was a mistake—no question about it—but a mistake should not color this man's entire record.

I wish to read from two letters we received in the Senate from people who knew and know Goodwin Liu well, not just for a moment but for years. The first was sent to us jointly by three successive presidents of Stanford University. I have never seen a letter on behalf of a nominee from three different presidents of a university of the quality of Stanford.

Donald Kennedy was president when Goodwin Liu was a student at Stanford. He worked with Liu at the Haas Center for Public Service and was present when Liu won not only the Dinkelspiel Award, which is the university's highest award for undergraduate service, but also the James W. Lyons Dean Award for Service and the President's Award for Academic Excellence.

Gerhard Casper is president emeritus of Stanford and currently provost at the University of Chicago. He knows Liu both as a Stanford alum as well as a colleague in the field of constitutional law. He is familiar with Liu, as, in his own words, "a measured interpreter of the Constitution."

Finally, John Hennessy is Stanford's current President. He describes Liu as insightful, hardworking, collegial, and of the highest ethical standards.

Together, these three presidents of the university wrote the following:

Goodwin Liu as a student, scholar and trustee, has epitomized the goal of Stanford's founders, which was to promote the public welfare by exercising an influence on behalf of humanity and civilization, teaching

the blessings of liberty, regulated by law, and inculcating love and reverence for the great principles of government as derived from the inalienable rights of man to life, liberty, and the pursuit of happiness.

It is a fitting and, I believe, an accurate tribute.

We have one of the most brilliant legal scholars of our time. There is a majority here to confirm him. We know that. But, unfortunately, the minority is trying to use cloture to prevent us from ever casting a vote to confirm him.

Let me turn to another letter. This one is from eight top executives of major American companies, including Yahoo, General Atlantic, Morgan Stanley, and Google. They have all worked closely with Liu on the Stanford board of trustees. They wrote to say the following:

Even in a room full of highly accomplished leaders, Goodwin is impressive. He is insightful, constructive, and a good listener. Moreover, he possesses a remarkably even temperament. His demeanor is unfailingly respectful and open-minded, never dogmatic or inflexible.

Goodwin's strengths, they said:

... are exactly what we expect in a judge: objectivity, independence, respect for differing views, sound judgment.

We know the American Bar Association has unanimously rated him "well qualified" for the U.S. court of appeals, and his background is similar to many who have been confirmed to the circuit court in the past. But some on the other side, nevertheless, say he is too young and he doesn't have judicial experience, or his credentials are not right.

For those who ask for a judicial record to review, I would ask, what about Edward Chen? We considered Judge Chen's nomination last week. He was a district court nominee with a 10-year judicial record. He had written more than 350 published opinions, and the minority didn't criticize one. But most in the minority voted against his nomination anyway. So a judicial record doesn't get it done.

Then there is the criticism based on age or other qualifications. But Liu's qualifications surpass those of many we have confirmed under Republican Presidents.

Since 1980, the Senate has confirmed 14 circuit court nominees who were under the age of 40. That means they were all younger than Liu is now. All 14 were nominated and confirmed during Republican administrations.

Let me give two examples. Judge Kimberly Moore sits on the U.S. Court of Appeals for the Federal Circuit. She was nominated by President Bush at the age of 38. She had 2 years of experience as a law clerk, less than 4 years in private practice, and 6 years as a professor at three different law schools. The Senate confirmed her unanimously.

Judge Harvey Wilkinson is a judge on the U.S. Court of Appeals for the Fourth Circuit. He was nominated by President Reagan at the age of 39. He

had 1 year experience as a law clerk, 3 years as a newspaper editor, 1 year of government practice, and 5 years as a professor. He was confirmed.

Judge Brett Kavanaugh, who now sits on the U.S. Court of Appeals for the DC Circuit, also comes to mind. He was 38 when he was nominated. Unlike Liu, he had little track record to review and much of the record that did exist was partisan. He had been a law clerk for 3 years, spent 3 years in private practice, and spent the remainder of his career in the Solicitor General's Office, Ken Starr's Office of Independent Counsel, and the Bush White House. When the ABA conducted its reviews, many troubling reports were received, but I voted for cloture, as did many of my colleagues on this side, and he was confirmed.

Professors are hardly a new game for us when it comes to judicial nominees.

John Rogers is a judge on the U.S. Court of Appeals for the Sixth Circuit. At the time President Bush nominated him, he had only 4 years of practice experience, no appellate clerkships, and had spent the remainder of his career as a professor. He was confirmed by the Senate by a voice vote.

Finally, there is Michael McConnell from the State of Utah. President Bush nominated Professor McConnell for the Tenth Circuit. At the time, he had been a constitutional law professor for 16 years and his writings contained scores of controversial thoughts, ideas, and provocations. In reviewing McConnell's record, many of us on the Democratic side found writing after writing that we strongly disagreed with. McConnell had repeatedly stated that *Roe v. Wade* was wrongly decided. He called the Supreme Court decision "a grave legal error" and "an embarrassment."

He wrote that the Freedom of Access to Clinic Entrances Act and the Violence Against Women Act were unconstitutional. He criticized a Supreme Court decision barring racial discrimination at tax-exempt schools and one prohibiting sex discrimination in civic associations. He called the fundamental guarantee of one person, one vote "wrong in principle."

But similar to Professor Liu, he made clear in the Senate confirmation process that he understood the difference between the role of a professor and the role of a judge. Here is what he said when asked about all of his writings:

I have a whole bunch of writings out there that were provocative, and innovative, and taking a different view. Well, within—my academic colleagues understand that that's what we do. If you try to make those look as though they are legal analysis, as if they were what a lawyer thinks the law is, of course they don't reflect the law. They're not meant to. They're not a description of the law.

Professor Michael McConnell, Senate Judiciary Committee, September 18, 2002.

He then assured us he would apply the law as written, not as put forward in academic theory. Guess what. He

was confirmed to the Tenth Circuit by voice vote. There was no cloture vote. He was confirmed by voice vote because the Democrats on this side of the aisle believed he would do just what he said. I don't understand why this same situation is not accorded to this brilliant young American.

Today, we have Professor Liu before us. He has also written article after article as a law professor and people have disagreed with some of what he has written.

Here is what he said:

I think that there's a clear difference between what things people write as scholars and how one would approach the role of a judge. And those two are very different things. As scholars, we are paid, in a sense, to question the boundaries of the law, to raise new theories, to be provocative in ways that it's simply not the role of a judge to be. The role of the judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. And there is no room for invention or creation of new theories. That's simply not the role of the judge.

A very similar statement. It was made by Goodwin Liu before the Senate Judiciary Committee, April 16, 2010.

Professor McConnell went through by voice vote. The same kind of situation—voice vote—yet we may be prevented from even taking a vote on Professor Liu's nomination because he may not get a supermajority for cloture. I must say, what is sauce for the goose is sauce for the gander.

Professor Liu, like Professor McConnell, is a brilliant legal mind. He has written extensively. He has been absolutely clear that if confirmed he would follow not any academic theory or writing, but the law as it is written and handed down by the U.S. Supreme Court. We took Professor McConnell at his word. Professor Liu deserves the same treatment.

(Mr. WHITEHOUSE assumed the chair.)

Mrs. FEINSTEIN. What is interesting to me is how much things have changed on this committee—and we have a new Presiding Officer who also is on the committee—since before the Presiding Officer came on, when we would look at a person's personal record, what they have said, what they think the kind of judge they will be, and make a decision.

So I do not understand, if we can confirm Professor McConnell by unanimous consent, why can't we grant cloture to a man who has distinguished himself as one of the great legal scholars of our country?

Let me address one particular criticism that has been made of Professor Liu's writings, and that is his writings on constitutional interpretation and fidelity to the Constitution.

Some in the Senate have harshly criticized his book "Keeping Faith with the Constitution" because he says at one point that the Supreme Court has taken "social practices, evolving norms, and practical consequences" into account when interpreting the

Constitution. This, some colleagues say, means he will be an activist.

First, Liu has said this book was written as a professor, as an academic, that it is in no way a roadmap for how he would decide cases as a judge. He said, in his own words:

The duty of a circuit judge is to faithfully follow the Supreme Court's instructions on matters of constitutional interpretation, not any particular theory. And so that is exactly what I would do, is I would apply the applicable precedents to the facts of each case.

But I think some are using this nomination to try to set a new standard, to say that the only valid theory of constitutional interpretation is originalism. So I want to point out that Liu's comments about constitutional interpretation are hardly exceptional.

In fact, they echo statements made by some of our very best jurists across the span of American history: Chief Justice John Marshall, Justice Oliver Wendell Holmes, and Justice Sandra Day O'Connor, to name a few.

The most famous example: Chief Justice John Marshall wrote, in 1819, in the case of *McCulloch v. Maryland*:

We must never forget that it is a constitution we are expounding.

... This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

Chief Justice John Marshall.

We are not all originalists here, and originalism does not define the legal mainstream. In an interview, published in the *California Lawyer* in January, Justice Scalia made the shocking statement that he does not believe the U.S. Constitution guarantees women equal protection of the law. This came out this January. This is a sitting Supreme Court Justice saying the Constitution does not guarantee women equal protection under the law.

The text of the 14th amendment says no "person" shall be denied equal protection of the law—and after decades of precedent, unanimous Supreme Court decisions agree that women are protected. But regardless of text and precedent, Justice Scalia says it cannot be so because that is not what the drafters of the 14th amendment intended.

This is not the American mainstream. Following this line of reasoning, the minimum wage would be unconstitutional, schools could still be legally segregated, States could prohibit married couples from using birth control, and I, as a woman, could be prohibited from standing here today as an elected Member of the Senate.

That kind of thinking cannot be a criterion for acceptance onto our Federal courts. So some may disagree with Liu's statement about constitutional interpretation, but it is hardly far afield of the legal mainstream today.

Let me tell you what others who are familiar with Liu's full record—full record—have said about his work.

Richard Painter, a chief ethics officer for President George W. Bush, re-

layed similar thoughts after reviewing Liu's record. Here is a quote: Liu's "views are part of the legal mainstream" and that the "independence, rigor, and fair-mindedness of his writings support a confident prediction that he will be a dutiful and impartial judge." "Liu respects the law, which is what we should expect of a judge."

Yet the Senate may well not give him cloture even to come to a vote on his confirmation. That is unfair.

Jesse Choper, who reviewed all of Liu's writings as the chair of his tenure committee, has similarly said, "in addressing a wide range of issues, Liu demonstrates rigor, independence, fair-mindedness, and—most importantly for present purposes—sincere respect for the proper role of courts in a constitutional democracy." "One thing is clear," he says, "Liu's interpretive approach is part of mainstream legal thought."

Finally, someone who has been quoted often here today, Kenneth Starr, a prominent conservative and former Reagan appointee to the DC Court of Appeals, has written to us together with Professor Akhil Amar to say, Goodwin Liu is "a person of great intellect, accomplishment, and integrity, and he is exceptionally well qualified to serve on the court of appeals."

Continuing to quote:

In our view, the traits that should weigh most heavily in the evaluation of an extraordinarily qualified nominee such as Goodwin are professional integrity and the ability to discharge faithfully an abiding duty to follow the law. Because Goodwin possesses those qualities to the highest degree, we are confident that he will serve on the court of appeals not only fairly and competently, but with great distinction.

I have a very hard time understanding why people would do this: we listened to and read Judge McConnell's views, which were antithetical to many of us on this side, but we believed he would be a fair and good judge, and he was confirmed by voice vote; but today someone who has the finest education America has to offer, who is supported by scholars on both sides of the political aisle, who is truly scholastically exceptional, who could quote case after case after case in his hearings, may be denied cloture.

If he is, this is not the Senate of the United States of which I am most proud. I hope I am wrong. I hope he will be granted cloture because he deserves a vote up or down. A majority vote—that is America—a majority vote on his confirmation. We will see what happens.

Mr. INOUE. Mr. President, I rise today in support of Goodwin Liu for confirmation to the U.S. Court of Appeals for the Ninth Circuit.

Goodwin Liu and I share the immigrant experience. He is the proud son of Chinese immigrants and my father came to this great Nation from Japan. He holds degrees from some of the top universities in the world. Before attending Yale Law School, he worked with the Corporation for National

Service in Washington, DC, where he helped launch the AmeriCorps program. In 2000, he served as a law clerk for U.S. Supreme Court Justice Ruth Bader Ginsburg. Since 2003, he has taught law at the University of California, Berkeley School of Law, Boalt Hall. He has also served as a special assistant to the Deputy Secretary at the U.S. Department of Education, advising the Department on a range of legal issues including the development of guidelines to help turn around low performing schools.

Goodwin also practiced as a litigant for the firm of O'Melveny & Myers in Washington, DC. There, appellate litigation comprised nearly half his practice.

Were these accolades not enough to demonstrate Goodwin's capacity to serve as a Federal appellate judge, I would also point to the "unanimously well qualified" rating he received from the American Bar Association, ABA, the ABA's highest rating for Federal judgeships. I believe Goodwin's extensive knowledge of the law, understanding of appellate procedure, and appellate litigation experience make him an outstanding candidate for confirmation.

I would like to remind my colleagues that there are still many judicial vacancies that need to be filled. The constitutional right to a speedy trial correlates to the number of judges able to hear cases. While it is important to ascertain the character and capacity of a nominee to such an important position, postponing Goodwin Liu's confirmation does a disservice to our Nation, and to this body's responsibility for confirming Presidential nominees. I believe Goodwin Liu will make a fine judge, and will serve with distinction in the Ninth Circuit Court of Appeals. I ask my colleagues to join me in confirming Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit.

I thank the Chair and yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BARRASSO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BARRASSO. Mr. President, I ask unanimous consent to speak for up to 15 minutes as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

HEALTH CARE

Mr. BARRASSO. Mr. President, I come to the floor, as I have week after week since we passed the health care law, giving a doctor's second opinion of the law. I come today because last month President Obama delivered a very big speech on spending. Unfortunately, it seemed to be more of a political attack than a substantive speech offering a detailed plan to attack the American debt crisis.

The President did, however, mention one bit of substance that really should raise a red flag to the American people. He said:

We will slow the growth of Medicare costs by strengthening an independent commission.

Well, the Washington commission he is referring to is called the Independent Payment Advisory Board. This board may sound harmless, but let me assure you that the American people deserve to know and have a right to know more detail about the board and its work.

Many Americans may not remember that the health care law created this unelected, unaccountable board of Washington full-time bureaucrats. The sole purpose of the board is to cut Medicare spending based on arbitrary budget targets—not based on the number of people on Medicare or the number of seniors but based on arbitrary budget targets. These are cuts above and beyond the \$500 billion already taken from a nearly bankrupt Medicare Program during the health care law—taken from our seniors—not to save Medicare but to start a whole new government program.

Now the President wants to slow the growth of Medicare costs by strengthening this independent commission. Well, this board empowers 15 unelected Washington bureaucrats to make these Medicare cuts, all without full transparency and accountability to the American seniors and also to elected officials.

Once again, this board proved that the President and the Democrats in Congress who voted for the health care law simply didn't have the political courage to make tough spending decisions. Instead, they took the easy road and pulled a classic Washington maneuver: they created a board and then punted the tough decisions to the board. Well, this forced Congress to abdicate two important congressional duties. First is the constitutional responsibility to manage Medicare spending. The second is the responsibility to explain to the American people why specific payment changes might be necessary to keep Medicare afloat—all because the President and Washington Democrats refused to lead. They simply threw up their hands and said: Let someone else deal with it.

If expanding this independent board is—they call it "independent," but I am not so convinced it is. It is called the Independent Payment Advisory Board. If expanding the board is the one and only concrete proposal the President has to reform Medicare and reduce the debt and most Americans have never even heard of it, then it is important that we take the time on the Senate floor today to discuss exactly how this board works and the impact it will have on medical care in America.

I call this the top 10 things you need to know about the Independent Payment Advisory Board. To me, this issue is so important that I plan to talk

about five of them today, and I will come back next week, as part of the doctor's second opinion on the health care law, and talk about the next five.

No. 1, this board is how Washington will limit patient care.

When Congressman PAUL RYAN offered his 2012 budget plan, the President and members of his party launched an all-out media assault on Medicare spending. The White House and Democrats used inflammatory and patently false statements to scare people about the Ryan plan. What they failed to mention, however, is that the President's own health care law actually has significant caps on Medicare spending. To enforce the caps, the President and Washington Democrats went with their tried-and-true solution: create another board.

What does this mean for people who are currently on Medicare and for future Medicare patients? A centralized Washington board will arbitrarily cut payments to Medicare providers—doctors, nurses, and other people taking care of patients. They are going to squeeze Medicare savings by cutting provider payments and treatment options, which will punish patients. Why? To start a whole new government program—not for the people who paid into Medicare but for a whole different group of people. Not only will medical professionals facing these cuts decide to simply stop seeing Medicare patients—and we see that now. Frankly, doctors are running away from Medicare, not wanting to see those patients. Individuals and families will watch helplessly as a Washington bureaucrat decides what kind of treatments that person can have.

No. 2, this board is going to make recommendations, and those recommendations will automatically become law.

How can it be that something the board does automatically becomes law? But their spending recommendations automatically become law—unless Congress acts to stop it. If Congress would actually want to stop the board's policies, there are very few options. The options are severely limited. Overriding the board's recommendations requires a three-fifths majority vote in the Senate, a high hurdle to jump, or Congress can pass a different Medicare spending plan. But there is a catch. It still has to meet the same arbitrary spending target. So if Congress does nothing, then Health and Human Services Secretary Kathleen Sebelius will implement the board's plan.

Medicare consumes about 13 percent of the Federal budget, and former Office of Management and Budget Director Peter Orzag called this board "the largest yielding of sovereignty from Congress since the creation of the Federal Reserve."

The bottom line is that this board isn't making recommendations to Congress; this board is passing law. Well, Congress doesn't have to approve these policies of the board, and the President