spending spree. Economically, the evidence shows cutting spending—not raising taxes—and we have done a number of studies on this—is the approach that consistently produces the best results time and time again.

We need a budget based on facts. We need a budget to grow the economy, not the government. We need a budget that imposes real spending discipline on Washington. We need a budget without gimmicks or empty promises. We need a budget that is produced publicly and openly, allowing the American people full opportunity to see what is in it and to consider it. We need a budget that the American people deserve, an honest budget that spares our children from both the growing burden of debt and the growing burden of big government. We need a budget that ensures America will compete, creating jobs, lead, and thrive in the 21st century.

Mr. HATCH. I thank my colleague. He sums it up pretty well, is all I can say. For our children, grandchildren, and great-grandchildren, we need to get this done. Frankly, it ought to be done in the Budget Committee and not by rule XIV on the floor. The reason it should be done in the Budget Committee is because I know the minority will weigh in and at least have their viewpoints expressed. There will be amendments, and people can vote up or down on whatever it is. Then they can bring it to the floor, and we should have a complete consideration of it here as well. That is the way it ought to be done.

As a former member of the Budget Committee, I have to admit it is a difficult process, but it is not difficult if we all work together to get spending under control and quit taxing the American people to death. We can do this if we work together.

I hate to say it, but I think our friends on the other side are not working together in their own caucus. The distinguished Senator from Alabama has pointed that out—I think courteously—today. I hope they will get together, even though I am pretty sure they are going to come up with a budget that continues to spend and tax such as we have had in the past. I hope they do not. If they do not, I think the American people will breathe a sigh of relief and say they did a good job. If they do, I think it will be more of the same.

Mr. SESSIONS. I thank Senator HATCH. I have enjoyed sharing these thoughts. I will note again that we are looking at a period in history in which our systemic debt problem is greater, I believe, than any time in our history. World War II was serious, but we could see our way out of it as soon as that war was over, and we bounced back rapidly.

Every expert tells us it is not going to be easy to bounce back out of the systemic problems we have. We need to have leadership. To have gone this long, 750 days without a budget in the Senate. Last year we did not pass a budget, and there were 59 Democrats in the Senate.

One may say: Don't be so partisan, Senator SESSIONS. We are calling their names this morning. We like our colleagues, but the truth is, when you have the majority, you have a responsibility. The responsibility at this point in history could not be greater than to produce a blueprint, a plan for the future, such as the House has done, that the American people can see: Does that solve our problems? Does it put us on the right path? I think the House bill does.

We have yet to see anything out of the Senate that does. It is our responsibility in this body to pass legislation, because if we do not, we cannot conference with the House, and we can never get a budget passed.

I thank Senator HATCH. I look forward to working with our colleagues. Maybe we can somehow break this logjam. The American people have a right to watch us and not be happy when we are not doing the kind of work necessary to put this country on a sound financial path.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Utah is recognized.

Mr. HATCH. Is it time to move to the Liu nomination?

The ACTING PRESIDENT pro tempore. Not until 11 o'clock. There are a few minutes remaining.

Mr. HATCH. Mr. President, I ask unanimous consent to move to the nomination, if the leader has no objection, so I may give my opening remarks.

I withdraw my unanimous consent request and suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. HATCH. Mr. President, I suggest the absence of a quorum, and I ask that the time be divided equally.

The PRESIDING OFFICER (Mr. BROWN of Ohio). Without objection, it is so ordered.

The clerk will call the roll.

The bill clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from California.

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

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

NOMINATION OF GOODWIN LIU TO BE A U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to resume the following nomination, which the clerk will report.

The bill clerk read the nomination of Goodwin Liu, of California, to be United States Circuit Judge for the Ninth Circuit.

The PRESIDING OFFICER. Under the previous order, the time until 2 p.m. will be equally divided and controlled between the two leaders or their designees.

The Senator from California.

Mrs. BOXER. Mr. President, I am very honored to speak in favor of the Goodwin Liu nomination and to urge my colleagues on both sides of the aisle to cast a proud vote for an extraordinary person, a remarkable young man who, for want of a better word, is just a star in everything he has ever done.

This is a picture of Goodwin. To say Goodwin personifies the dream of America is an understatement. To say this is a good nomination understates the way I feel about it. I thank the President for moving forward with Goodwin on two occasions, two nominations—or three times. I thank the Judiciary Committee for reporting him out on more than one occasion. Of course, I thank Senators LEAHY and REID and FEINSTEIN for their hard work in getting us to this point.

It is rather stunning for me to hear conservative Republicans come to the floor and blast this nominee because Goodwin Liu, Professor Liu has support from some of the most conservative legal minds in the country. Ken Starr, who, as we all know, was the special counsel on the White Water matter and who was considered at that time quite partisan and was one of the conservative, I think—I want to say stars of their thought, said:

In our view—

And he writes this with Professor Amar, and this was published.

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. We support and urge his speedy confirmation.

This is Kenneth Starr.

So I say to my Republican conservative friends, before you come here and start attacking Goodwin Liu for things he has never done, read what some of your conservative leaders in the legal profession are saying.

Just today in Politico there is yet another op-ed written by the chief

White House ethics lawyer under George W. Bush for 2½ years, Richard Painter, a Republican serving a Republican administration. This is what he said:

All that is required is for Senate Republicans to practice what they preached for so long under Bush. Give Liu an up-or-down vote rather than a filibuster.

Well, we are facing a filibuster. I want the American people to know—and everyone who is supporting Goodwin Liu and everyone who supports giving young, extremely talented people a chance to prove their mettle—that this is someone who has been a star his whole life, someone who caught the dream. Give this man a chance. Don't filibuster this. Let's have an up-or-down vote.

I think the ramifications—and I feel very strongly about this. I don't say this very often on the floor. I think the ramifications of this filibuster are going to be long and difficult for those who caused this good man to be filibustered, unless, of course, we get the 60 votes we need. Why do I think that? I am going to tell my colleagues why I think that. I am going to spend the next few minutes talking about Goodwin and telling my colleagues about his life and his achievements and his amazing recognition by so many in his short 40 years. Goodwin Liu has been extremely successful at each stage of his academic and professional career. He has reached for the stars, and he has grabbed them.

He was the covaledictorian and captain of his tennis team in high school. Let's start with Goodwin in high school. He was born to Taiwanese immigrants who are both physicians, they moved to Sacramento, and they were quite an influence on Goodwin. They used to leave out math problems for him to solve even after he finished his homework. They said to Goodwin: You work hard and you can get what you want. They forgot to mention there is a filibuster that could interfere, but let's not go there because we certainly hope we get the 60 votes.

So it starts in high school where we have a covaledictorian, a captain of the tennis team at Rio Americano High School in Sacramento. Then he goes to Stanford, where he graduates Phi Beta Kappa—a very big honor—from Stanford. While he is at Stanford, he is elected copresident of the student body. He receives an award called the Lloyd Dinkelspiel Award. It is the university's highest honor for outstanding service to undergraduate education.

So in high school, he is a star. He is a star at Stanford. Then he goes to Oxford University, where he was a Rhodes Scholar, which is considered one of the most prestigious academic accomplishments.

Following his time at Oxford, he decides to attend law school at Yale University. Once again, Goodwin goes to Yale and he is a star. He was an editor of the Law Journal. Along with a classmate, he won the law school's moot court competition. He wrote an article during his third year of law school that won two awards, one for best paper by a third-year law student and another for the best paper on taxation.

He had such a distinguished record in law school that it earned him a clerkship with Judge David Tatel of the U.S. Court of Appeals for the District of Columbia, and then he does so well there that he serves in one of the most prestigious clerkships in the country—a law clerk to Justice Ruth Bader Ginsburg on the U.S. Supreme Court.

I say to my Republican colleagues, what are you thinking? We should thank Goodwin for being willing to continue his life of public service. We should be praising his decision to put up with all of this confirmation process. Instead, they have given him a horrible time, an awful time, a miserable time. I said yesterday on the floor while addressing his wife and his kids: You be proud of your dad and you be proud of your husband, because I say this: If he doesn't get this, it is about politics. It says more about the people here in this place than it does about Goodwin. Throughout this period they have made all these attacks on him, all these ideological attacks, frankly, on someone they made him become.

This is a man with huge support from conservatives, moderates, and liberals. He brings people together because of his personality, his kindness, how intelligent he is, how he listens to people. That is what people tell us about him. Yet, still he has been viciously attacked, and we see politics being played.

This will not be lost on the American people, I will tell my colleagues that right now, because this isn't just some guy whom the President bumped into one day and said: I think you would be good on the court. This is an extraordinary American who has fought so hard in every job he ever had to be the best, to bring the best qualities to his work. That is why he has won the support of former Bush officials and Kenneth Starr, the conservatives I know support Goodwin. But it is not good enough for the politics that are being played around here, and this is not going to go down easy if he doesn't get his up-or-down vote. This is not going to go down easy. I have had experience in this political world for a long time. I won 11 straight elections. They have all been really—not all but most of them—very hard. I know when there is an issue that touches the heart, and I know when there is a person who comes along who deserves better than what Goodwin Liu is getting from the Republicans. I am speaking of the Republicans here in this Chamber, not the Republicans outside.

Let me read what Kenneth Starr said about this man. Let me read it again to my colleagues.

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. We support and urge his speedy confirmation.

That was Kenneth Starr. Well, Kenneth Starr's Republican friends are not listening. ''Speedy confirmation.'' This is an emergency vacancy. This is an emergency because they need to fill this position. What they are doing by playing politics with this is making sure the people of this country—because the Ninth Circuit is a very important circuit—will not get justice, unless they change their minds and come to their senses and do what they said they would do.

I won't quote who said these things, but I have heard many on the other side say: Oh, we don't want to filibuster judges. Let them get an up-or-down vote. Then we hear they are not going to vote to give Goodwin an up-or-down vote. What is the reason? There is no reason. Nobody can find a more qualified person. What is the message to the people in this country when we have someone who was a star in high school, a star in college, a star in law school, a star in everything he did, a law clerk?

Now, he gave a lot of his life to public service in the Corporation for National Service, where he helped launch the AmeriCorps public service program. As a senior adviser in the program, he led the agency's efforts to build the AmeriCorps program at colleges and universities across this country.

Between his clerkships, Goodwin returned to government service as a Special Assistant to the Deputy Secretary of Education.

He won praise from Republicans, from Democrats, from conservatives, from liberals, from moderates in every position he ever held until he got to this Senate floor, where the conservative Republicans turned their backs on Kenneth Starr, turned their backs on Bush administration lawyers, turned their backs on the facts of Goodwin Liu's life for some agenda. I am telling you, this will not go down easy for them. This will not go down easy.

Goodwin served in the private sector. He worked for a very well respected law firm, O'Melveny & Myers. He worked on a wide ring of matters from antitrust to white-collar crime. He also maintained an active pro bono practice—pro bono. He did things for free to help people who needed his help.

Walter Dellinger of O'Melveny said Goodwin was ''widely respected in law practice and for his superb legal ability, his sound judgment, and his warm collegiality.''

Well, let me tell you, the kind of treatment he is getting here is far from warm. It is cold. It is wrong. It is harsh.

I want to read again what Kenneth Starr said. This is the third time. Kenneth Starr—you cannot get more conservative.

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. We support and urge his speedy confirmation.

Kenneth Starr.

Again, today, in an op-ed piece in Politico, George W. Bush's White House ethics lawyer said:

All that is required is for Senate Republicans to practice what they preached . . . : Give Liu an up or down vote rather than a filibuster.

But, no, we are facing a filibuster against someone who is a star. So as we follow Goodwin's career—star in high school, star in college, star in law school—everywhere he goes he is recognized.

In 2003 he joined UC Berkeley's faculty as a law professor where he has excelled as a scholar and a teacher. He is considered in this Nation one of the leading constitutional law and education law experts—but not in this Chamber. What do they want from a nominee—backing from conservatives, backing from liberals, backing from the mainstream?

His article on education law issues won the Education Law Association's award for distinguished scholarship in 2006.

He received the Distinguished Teaching Award in 2009, the university's most prestigious award.

I have never—let me say this: I have seen some wonderful people come to this floor for confirmation, Democrats and Republicans. I have seen qualifications. I have voted for Republican judges, for Democratic judges. Honest to God, it is hard for me to recall someone who, at every stage of his life—and he is only 40 years old—has been able to achieve such excellence.

What is the message coming from this body if we do not give this man an up-or-down vote? I am telling you, it will go down hard.

The American Bar Association gave him the highest rating—the highest rating—and yet we are facing a filibuster.

The Goldwater Institute—everybody knows Barry Goldwater, idol of conservatives—the director of the conservative Goldwater Institute endorsed Goodwin Liu. But that is not good enough for my Republican friends. They said they are endorsing him because of his ''fresh, independent thinking and intellectual honesty.'' But that is not enough for my friends on the other side. They said they were endorsing him also because of his ''scholarly credentials and experience to serve with distinction on this important court.''

So we have heard from Kenneth Starr, a conservative icon. We have heard from George Bush's White House ethics lawyer for 2½ years, Richard Painter. He wrote today. Let's see what else Richard Painter wrote about Goodwin. These supporters of Goodwin's are passionate. That is why I say this is going to go down hard if we do not get this cloture vote. This is interesting. He writes:

I've done my share of vetting judicial candidates and fighting the confirmation wars. I didn't know much about Liu before his nomination to the Ninth Circuit. But I became intrigued by the attention the nomination generated, and I wondered if his Republican critics were deploying the same tactics the Democrats had used [against] Republican nominees. They were. If anything, the attacks on Liu have been even more unfair. . . .

More unfair.

Based on my own review of his record, I believe it's not a close question that Liu is an outstanding nominee whose views fall well within the legal mainstream. That conclusion is shared by leading conservatives who are familiar with Liu's record.

That is not good enough for my friends on the other side. Well, I will give them another quote.

Former Republican Congressman Bob Barr has also offered praise of Professor Liu's ''commitment to the Constitution and to a fair criminal justice system,'' as he puts it. He noted:

[Liu's] views are shared by many scholars, lawyers and public officials from across the ideological spectrum.

But Bob Barr's opinion is not good enough for my friends on the other side.

I am even going to read a quote from a former Congressman who tried to get the Republican nomination twice to run against me, Tom Campbell. He and I have had a couple of disagreements, but not on Goodwin. Tom Campbell, who served 9 years as a Republican Congressman from California, said:

Goodwin will bring scholarly distinction and a strong reputation for integrity, fairmindedness and collegiality to the Ninth Circuit.

Reflecting on Liu's many years of work in serving the public interest, Campbell also said:

I am not surprised that [Liu] has again been called to public service.

So it goes on and on. I will give you another Republican. Brian Jones, who served as the general counsel at the Department of Education from 2001 to 2005 under George W. Bush, after Liu's tenure there, this is what he said about Goodwin that speaks to the heart and soul of this good human being:

During [2001 and 2002], and even after he became a law professor in 2003, [Goodwin] volunteered his time and expertise on several occasions to help me and my staff sort through legal issues. . . . In those interactions, Goodwin's efforts were models of bipartisan cooperation.

Listen:

In those interactions, Goodwin's efforts were models of bipartisan cooperation.

He brought useful knowledge and careful lawyerly perspectives that helped our administration to achieve its goals.

And he says:

I am convinced, based on his record and my own experiences with him, that he is thoughtful, fair-minded and well-qualified to be an appellate judge.

Well, all those wonderful letters—and let me thank everyone who is engaged in this battle, from Kenneth Starr to the Goldwater Institute, and all the conservatives who have gotten involved in this campaign on Goodwin's side and all the liberals and all the moderates.

Here is a man whose family came from Taiwan. They taught him every value of family. Goodwin has a beautiful family. They taught him every value of hard work, every value of education, every value of fairness and justice. Why we would not give this man an up-or-down vote—that is all we are asking. No, they bring out the filibuster, and it is going to go down hard if this man does not get this opportunity.

So, Mr. President, this has been an honor for me to stand here for 2 days to lay out the strong support that Goodwin Liu has, not just from the two home State Senators—and let's keep that one in mind, Senators. When you and your colleague in your State are backing a nominee, just keep in mind, do not ever tell us, well, that does not matter because it should matter. He has strong support from the two home State Senators, strong support across the political spectrum, strong support by community organizations.

In closing, let me say this: Diversity is important on the bench. Why do I say that? I say that because America, we are a melting pot, and we are proud of this American dream. But if our court does not reflect this diversity, it could still be fair, it could still be just, but not as good as if we have a diversity of thought and ethnic diversity.

The Ninth Circuit—this is interesting. The Ninth Circuit covers an area where 40 percent of Asian Americans live. Forty percent of Asian Americans live within the Ninth Circuit boundaries, and we do not have an Asian American judge.

Is the Asian American community excited about this nomination? Absolutely. Whether they are Republicans—and many of them are—whether they are Democrats—and many of them are. I think it is almost like a 50–50 split in the Asian American community.

Well, pay attention to this. This is a moment. It should be a moment of great celebration. I am fearful—I am fearful—it might not be, but I am forever hopeful that it will be. If people listen, and they see the breadth of support for this man, and they take politics out of the equation and ideology out of the equation, they will vote for ending this filibuster, and they will vote for Goodwin.

I yield the floor.

Mr. HATCH. Mr. President, I rise in strong opposition to the nomination of Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit.

As he said at the first hearing before the Judiciary Committee, his record is public, and he has written what he has written; he has said what he has said.

That record is what we have to go on, the basis on which we have to make a decision about his nomination to the Federal bench or his confirmation by the Senate.

Professor Liu's record endorses a powerful judiciary that can take control of the law in general and of the Constitution in particular. His activist judicial philosophy is fundamentally at odds with the principles on which our system of government is based.

I examine a judicial nominee's entire record to determine if he is qualified by legal experience and, even more important, by judicial philosophy.

As to Professor Liu's legal experience, I know the ABA has rated him unanimously ''well qualified.'' That is more than a little baffling since the ABA's own criteria state the nominee should have at least 12 years of actual law and practice and substantial trial experience as a lawyer or trial judge. So it is a little bit more than baffling. Professor Liu has none of that. None of the actual law practice and substantial trial experience as a lawyer—none. Suffice it to say that understanding the mysteries of the ABA's judicial nominee ratings has eluded me for many years. Sometimes they do a great job. A lot of times they do not and politics enter in.

The more important qualification for judicial service is the nominee's judicial philosophy and his understanding of the power and the proper role of government in our system of government. Professor Liu has been unequivocal about his views on this issue, writing and speaking directly about how judges should go about judging. He has written and spoken extensively about how judges should interpret and apply the law, especially the Constitution, to decide cases.

The debate about judicial philosophy comes down to this. We can all read what the Constitution says. The real question is what the Constitution means, where the meaning of its words properly may be found. The debate is about who gets the final say on what the Constitution means, the people or the judges.

America's founders clearly took the people's side in this debate. In his farewell address in 1796, President George Washington said that the very basis of our political system is that the people control the Constitution. He said until the people change the Constitution, it is sacredly obligatory upon all. That certainly includes, in fact that primarily includes, government because that is what the Constitution exists to do, to both empower and to limit government.

The Constitution cannot limit government if it cannot limit judges and it cannot limit judges if they control what the Constitution means. The Constitution belongs to the people, not to judges.

President Obama takes the opposite view. When he was a Senator and opposed the nomination of Chief Justice John Roberts, one of the greatest appellate lawyers in the history of the country—he said that judges decide cases based on their deepest values and core concerns, their perspective on how the world works, their empathy, and what is in their heart. That is what then-Senator Obama said.

As a Presidential candidate he made the same case to the Planned Parenthood Action Fund and said these were the criteria by which he would pick judges.

President Obama certainly kept that campaign promise in the person of Professor Goodwin Liu. Professor Liu has written that judges are literally on a search for new constitutional meaning. In article after article, in speech after speech, he argues that judges on this quest for new constitutional meaning may find it in such things as the concerns, conditions, and evolving norms of society; social movements and practices; and shifting cultural understandings. No matter how you cut it, these are simply alternative ways of saying the Constitution means whatever judges say it means. This is a blueprint for a judiciary that controls the Constitution.

Professor Liu's approach treats the Constitution as if it were written in some kind of code or disappearing ink and treats judges as the only ones who have the key to figuring it out.

Professor Liu, of course, is hardly the only one to make this argument. It is pretty standard fare for those who want our Constitution to say and mean something other than what it does. When these folks want government to have power the real Constitution denies, they urge judges to change the Constitution's meaning to be what they want. When these folks do not want government to have power the real Constitution allows, they urge judges to make up so-called rights that are not there at all.

Whether seeking liberal or conservative political results, this is real judicial activism: judges taking control of our law by taking control of its meaning; judges remaking the Constitution in their own image. In my 35 years of actively participating in the judicial confirmation process, I don't recall someone who more forcefully and directly advocated such an activist judiciary.

In a 2008 article published in the Stanford Law Review, for example, Professor Liu argued that the judiciary is ''a culturally situated interpreter of social meaning.''

That would be a surprise to America's founders, who had a much more pedestrian view of the judiciary, which Alexander Hamilton described as the weakest and least dangerous branch.

Thomas Jefferson warned that if judges could control the Constitution's meaning it would be nothing but a lump of wax that judges could twist and shape into any form they please. There is no room in this modest judicial role for something as grand as interpreting social meaning.

I grant that there are individuals or institutions in our society that should play this role. I think elected representative bodies, such as the one in which I am proud to serve, should play this role. But the last body of people in our society who should play this role of culturally interpreting social meaning are judges in whose hands is placed the interpretation and application of the supreme law of the land.

I, for one, did not take an oath to support and defend a judge's empathy or perspective on how the world works, whether that judge is liberal or conservative. I did not take an oath to support and defend a judge's view of evolving social norms or shifting cultural understandings. I took an oath to support and defend the Constitution of the United States, a document that belongs, in its words and its meaning, to the people of the United States. The Constitution I have sworn to support and defend places limits on government, including limits on the judiciary and the people alone have authority to change those limits.

Professor Liu advocated an activist judiciary before he had been nominated to the judiciary, but when he came before the Judiciary Committee in each of two hearings he painted a very different picture. Before his nomination, for example, he wrote in the Stanford Law Review that judges must determine ''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.'' After his nomination he told the Judiciary Committee that there is no room for judges to invent or create new theories.

Now it is anybody's guess what all of that collective value convergence and credible crystallization means. But if that is not a new theory, I don't know what it is.

Before his nomination, Professor Liu wrote directly and forcefully about where judges should look for the meaning of the Constitution. He made a career of it, received awards for it, and became one of the stars of the leftwing legal universe. After his nomination when I raised some of his controversial writings at his first hearing, Professor Liu told me ''whatever I may have written in the books and articles would have no bearing on my role as a judge.''

At the end of that same hearing last year, Professor Liu told one of my committee colleagues that ''as you look across my entire record, there are many things I think relevant to the kind of judge I would be.''

Which is it? Before he wants to be a judge he argues that judges can find new meaning for the Constitution in changing cultural understanding and evolving social norms. After he wants to become a judge he tells critics to ignore that record but tells supporters to

consider that record. This has been about the most stunning confirmation conversion I have seen in all my time in the Senate.

In closing, the fight over judicial nominees is a fight over judicial power. Judges must either take the law as they find it, as the people and their elected representatives make it, or judges may make the law into whatever they want it to be. Those are the two choices. Our liberty requires that people to whom the Constitution belongs alone have the authority to change it. Our liberty requires judges who will be controlled by that Constitution.

President Obama and Professor Liu instead advocate a judiciary able to control the Constitution, to change the Constitution, to literally create from scratch a new Constitution. That will destroy our liberty.

When I look at Professor Liu's record I see he consistently and strongly advocates an approach that allows judges to find the meaning of the Constitution virtually anywhere they want to. That is the opposite of the defined, limited role judges properly have in our system of government. I cannot support someone for appointment to the Federal bench, especially to what is already the most activist circuit in the country, who believes judges should have that much power.

The Ninth Circuit Court of Appeals is indeed the most activist court in the country. It is a court that ignores the law consistently—or at least some of the judges on that court. Judge Reinhardt, who is a brilliant man by any measure, apparently doesn't even care what the words of the Constitution say. He is going to interpret things the way he wants. He is just one. There is a whole raft of them there. Judge Reinhardt gets reversed almost every time he writes an opinion—by the Supreme Court of the United States. The problem is that people can say: Isn't that taken care of by the Supreme Court? Yes, it is in those individual decisions. But in these circuit courts of appeals there are thousands of court cases and legal opinions written that will never be considered by the Supreme Court because the Supreme Court only considers between 80 and 100 cases a year. But thousands of cases are decided by these circuit courts of appeal, so they are important. Who we put on them is important, too. We don't need any more judicial activists, either from the right or left, interpreting the Constitution in accordance with their own predilections rather than what the Constitution actually says.

Goodwin Liu has a long history of positions that are outrageous to those of us who want the courts to be what they should be, interpreters of the laws, not makers of the law. They are not elected to anything and they are appointed for life on the basis that they will do what is right and that they will uphold the law regardless of whether they agree with it.

I have to say folks on our side who have listened to Goodwin Liu, we know what he stands for and what he has taught in schools. What he has written in books and law review articles is contrary to what judges should do. I don't care that the American Bar Association has given him such a sterling rating.

This is an important issue. I wish I didn't have to vote against Goodwin Liu because I like him personally. In fact, this is not about him as a person but whether he will be the right kind of judge. I am convinced that he will not and, therefore, I must strongly oppose his nomination.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I would like to speak on the Liu nomination. I appreciate the good advocacy of Senator BOXER. But I would remind her that she and her Democratic colleagues changed the ground rules of the Senate and created filibusters that had heretofore not been done in early 2001.

I opposed that, but after much debate, several years in which a half dozen fabulous nominees to the courts were being blocked by filibusters, the Gang of 14 decided that matter and said: Well, we all agree now. We will not filibuster except in extraordinary circumstances.

I think as a matter of law, not as a matter of character and personality but as a matter of approach to law, extraordinary circumstances exist in this case.

I have heard my colleague talk about Professor Liu's unusual intellectual abilities, his academic career, clerkship on the Supreme Court, and his prolific writings—and certainly I do not dispute he is a good man and involved in debate about law in America.

What they fail to mention, however, is his lack of any meaningful experience as a practicing attorney. He has never tried a case before a jury and has argued only once before a Federal court of appeals—only once. This is a very serious shortcoming for a number of reasons, the most important of which is the plain fact that significant legal experience litigating in court provides insight to someone who would be a judge and an understanding that words have meaning and consequences.

It is a real legal world testing ground in which persons can prove their judgment and their integrity and their skill. It also provides a maturing experience, where one learns that words have reality and that a single word in a deed, a contract, a letter or even an e-mail can determine which party receives millions of dollars in a lawsuit or even whether they go to jail.

Seasoned lawyers bring much to the bench, as do judges who have had previous experience when they go on to the courts of appeals. This lack of litigation experience leaves me with only two sources of how to evaluate how this nominee would behave on the bench: his writings, which are extensive, and his testimony before the committee, which frankly, I thought did not have much value.

From his writings, one cannot help but see that Mr. Liu has extraordinary beliefs about our laws and Constitution, beliefs that fall far outside the mainstream. They just do. Professor Liu does not believe judges are bound to apply the Constitution according to what it actually meant at its drafting or what it plainly says. But he believes judges are free to adapt the Constitution according to how they perceive the needs of modern society.

In fact, he has written this:

> Interpreting the Constitution requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question is not how the Constitution would have been applied at its founding, but rather how it should be applied today in light of changing needs, conditions, understandings of our society.

This is an untethering of a judge from law, in my opinion. He has also written that the Constitution has no fixed meaning. He has written that ''our Constitution has shown a remarkable capacity to absorb new meaning and new commitments forged from passionate dialogue and debate, vigorous dissent and sometimes disobedience.''

He goes on to say: ''Fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or in 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of concerns, conditions, and evolving norms of our society.''

To that, I would disagree and say: Words do have meaning. They mean something specific. When they are written down in a statute or a Constitution, that meaning does not change by the mere passage of time or the mere shifting of political winds or the judge's personal views about what may be the concerns, conditions, and evolving norms of our society.

Judges are not empowered to do that. They are not empowered to impose their views about the concerns, conditions, and evolving norms of our society. Judges are given the power to decide cases and to say what the plain meaning of the law is. For a judge to believe otherwise is a serious threat to the rule of law and to the principles that make this Nation great.

Professor Liu's writings express extreme views about more than Constitutional interpretation. His writings have often expressed an unorthodox view of the role of a judge. Alexander Hamilton famously wrote in the Federalist Paper 78 that:

> The judiciary . . . has no influence over either the sword, the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment.

Frankly, having read his writings and listened to his testimony, for all his great capabilities and fine character, I have concluded that he indeed

lacks the most essential quality of a judge; that is, good judgment, proven in the practice of law or as a previously appointed judge.

I agree with the role of a judge as envisioned by Chief Justice Marshall when he wrote: ''It is emphatically the province and duty of the Judicial Department to say what the law is.''

I think Chief Justice Roberts perfectly summed up the role of a judge as the Founders saw it, as we have been raised to understand it, when he said that a judge should be a neutral umpire who calls the balls and strikes without preference for either side.

But Professor Liu does not agree with that analogy. He attacked Chief Justice Roberts. He does not argue that the task of judges is to read the words of the Constitution according to their original meaning. Instead he has written that:

> The historical development and binding character of our constitutional understanding demand more complex explanations than a conventional account of the courts as independent, socially detached decision makers that say what the law is. The enduring task of the judiciary . . . is to find a way to articulate constitutional law that the nation can accept as its own.

This is utterly wrong. That view cannot be accepted because it calls for a judge to ponder, to seek, to render a decision that is popular or fits the judge's own values. Most certainly such a decisionmaking method is not law. It is not objective. It is subjective. It allows a judge to base rulings on factors that are incapable of being a standard. It introduces politics, ideology, religion, and whatever else may be in a judge's mind in a decisionmaking process. That is contrary to the entire history of the American rule of law that served us so well.

Mr. Liu has also written 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.'' These words describe a policymaker not a judge.

Professor Liu's writings also show he does not share our Founding Fathers' vision in many different areas. He does not see the Constitution as a charter of freedom from government interference. Instead, he argues that portions of the Constitution create positive rights to welfare benefits. He attempts to derive all these rights from the citizenship clause of the fourteenth amendment.

That clause reads simply this: ''All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.''

It may be difficult to determine exactly what some of the words mean in the Constitution. However, our language has not changed so much that these words could possibly be read to mean that all Americans have a right to various benefits, such as—this is what Mr. Liu has written:

> . . . expanded health insurance, child care, transportation subsidies—

I kid you not—

> job training and a robust earned income tax credit.

That is what he has written in several important law journals; not remarks in a casual conversation. He has written in law journals. He writes that word ''citizenship'' does not mean citizenship in that clause but rather ''the ability to be a fully able participating member of society.''

The Constitution did not say that. The citizenship clause simply made a person a citizen. His article asserts that education, health insurance, childcare, transportation subsidies, job training, and presumably other welfare benefits we might need are constitutional rights because the citizenship clause ultimately requires equality of results in those contexts.

He asserts that the judge's role is to ensure such a result is achieved, even if the legislature may not so find. That is like no definition of citizenship I have ever heard. Professor Liu's interpretation of the citizenship clause is so far disconnected from the actual text of the document and what the people meant when they ratified it that it would be unrecognizable to those who drafted it.

Some of Professor Liu's supporters have said—as he did before the committee—that his argument about the citizenship clause was directed only at Congress, the legislative branch, executive branch, and it was never meant for judges. That simply does not square with what he wrote, and we have researched this and tried to be fair to him.

In 2008, Professor Liu published an article entitled ''Rethinking Constitutional Welfare Rights.'' Constitutional welfare rights. In that article, he set out to make—as he said—''a small step toward reformation of thought on how welfare rights may be recognized through constitutional adjudication.''

That means by judges. Judges do adjudication. In that same article, Professor Liu argued that, once a legislative body creates a welfare program, it is the role of the courts—he said the courts—to determine the community meaning and purpose of that welfare benefit, in light of the needs of ''equality'' and ''national citizenship.''

Professor Liu explicitly stated that when necessary, courts should recognize or expand these welfare rights by ''invalidating statutory eligibility requirements''—this is his language he wrote—''by invalidating statutory eligibility requirements''—that means welfare eligibility requirements—''or strengthening procedural protections against the withdrawal of benefits.''

In other words, Professor Liu believes judges have the right and, indeed, the duty, to rewrite laws written by Congress when they think those laws are inadequate or when the judge, without the traditional limits of legal standards, decides the case on what the judge thinks is fair.

This truly is a dangerous, nonlegal philosophy. His writings also show he holds a number of views on some of the most controversial topics of our day that are extreme.

He believes the longstanding definition of marriage as between a man and a woman is unconstitutional. He filed a brief, with other law professors in the California case, on that subject. We asked him about that at the hearing. Frankly, his answer was not satisfactory, in the sense that he said he was only referring to California law, when, in fact, his brief cited the U.S. Constitution, which has similar language.

He also made statements that raise questions as to his temperament. He was very nice at our hearing. We have heard nice things said about him. I just ask if you consider these nice comments he made about Chief Justice Roberts, for example. He said that Chief Justice Roberts has ''a vision for American law—a right-wing vision antagonistic to important rights and protections we currently enjoy.'' He criticized him for being a member of 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 all Mr. Liu's words. He considers those improper goals and says, ''These are code words for an ideological agenda hostile to environmental, workplace, and consumer protections.''

Give me a break. With respect to Justice Alito—a fabulous member of the Supreme Court, who is so experienced, so much more seasoned as a nominee than this nominee comes close to being—he went even further, appearing in person before the Judiciary Committee to testify that Justice Alito ''envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where Federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where a black man may be sentenced to death by an all-white jury for killing a white man; and where police may search what a warrant permits, and then some.''

When asked about that in committee, he acknowledged that was unnecessarily colorful language. Nobody should say that kind of thing. It was an intemperate remark and was unfair to Justice Alito.

Thus, I have concluded that the nomination presents an extraordinary circumstance that requires me to oppose cloture on the nomination, which I am reluctant to do. I have voted against some nominees, but I have voted for probably 90 percent of President Obama's and President Clinton's nominees while I have been in the Senate. But this nominee, I believe, represents an extraordinary circumstance. His record reveals that he believes the Constitution is a fluid, evolving document,

with no fixed meaning; that he believes the role of a judge is to participate in a ''dialogue'' with the legislature about what welfare benefits are required by the Constitution, and that the traditional definition of marriage is unconstitutional. His record also reveals he is willing to use the courts in order to achieve what he thinks is the proper level of social welfare benefits, and that he is willing to attack the integrity and distort the records of honorable judges in order to promote his views of what he thinks the Constitution should require.

I do believe our Senate would have done better not to have had filibusters. That was my view. But we had a debate on that, and it changed. If Senator BOXER and other Democrats now have rethought that matter and wish to talk to me, I would certainly be willing to consider restoring the traditional view of the Senate regarding filibusters of judges. I don't think that is likely to happen, because it was done systematically and deliberately, with great deliberation and determination by the Democrats in 2001, I believe, and they imposed that change on the Senate. That is what we are operating under today.

Based on that, I do believe Professor Liu should not be confirmed.

I thank the Chair and yield the floor.

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Texas is recognized.

Mr. CORNYN. Madam President, I join my colleague from Alabama, who has served for a long time on the Senate Judiciary Committee, as have I, in voicing my strong opposition to this nominee.

It is odd, it seems to me, to have someone who has actually been nominated three separate times by this President, and I think it tells us something about the President's determination to nominate and see confirmed someone who is unsuited for service as a Federal judge.

In saying that, it doesn't mean they don't have rights to speak freely about their strongly held views. They do. That is what we do here in the legislative branch. That is not what we expect out of a life-tenured judge. We expect judges to be impartial, to render justice, and to decide cases, not to be roving policymakers making the country into their image of what it should be. We cannot vote for these judges. Judges are appointed and they serve for a lifetime. In return for that lifetime appointment and that protection from the sort of accountability that other elected officials are required to have, we understand and our Constitution provides, that they have a limited but important role, and that is to apply the law as written, apply the words of the Constitution as written, and not to sort of make it up as you go along or to dream up new rights along the way that are not subject to a vote of the American people, or subject to an election.

Based upon nearly everything that Mr. Liu, Professor Liu, has written or said, I have some very serious concerns about his impartiality and suitability to serve as a life-tenured judge. My concerns start with his lack of judicial temperament.

During the confirmation hearings of Justice Sam Alito, who is now on the U.S. Supreme Court, Mr. Liu went out of his way to testify under oath before the Senate Judiciary Committee in a way I can only describe as vicious and disgraceful. This is what he said:

> Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where Federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination; and where police may search where a warrant permits, and then some.

I humbly submit this is not the America we know, nor is it the America we aspire to be. These were the words of a person who President Obama has, three times, nominated to serve on the Ninth Circuit Court of Appeals, one of the highest courts in the land, which is expected to dispassionately decide cases without fear, favor, or any preconceived notion about the outcome. I think these words, perhaps more than anything else, demonstrate Professor Liu's nonsuitability to serve as a Federal judge. These were not an off-the-cuff set of remarks or a temporary lapse in judgment; they were a product of carefully scripted and prepared testimony provided to the Senate Judiciary Committee during the Alito hearings.

Despite Professor Liu's comments, Justice Alito was confirmed with bipartisan support. During his failed confirmation process last year, I asked Professor Liu that, if given the opportunity, would he change anything about his remarks about Justice Alito. In response, Mr. Liu claimed that he regrets having written that passage, calling it ''unduly harsh and provocative.''

Well, Professor Liu waited 4 years to provide that semi-apology to Justice Alito for these shameful remarks. Like so many nominees who come before the Senate Judiciary committee, they seem to undergo a nomination conversion that changes the tone and nature of their remarks and attitudes. Frankly, we cannot depend on this conversion sticking. We need greater assurance that the nominees who come before the Senate are going to exercise a sort of dispassionate judgment that we expect of judges.

Frankly, Professor Liu has shown himself capable of incredibly poor judgment—and not just one time. After Chief Justice Roberts was nominated to the Supreme Court, Mr. Liu again went out of his way to criticize then-Judge Roberts. He argued that Justice Roberts' record ''suggests that he has a vision for American law—a right-wing vision—antagonistic to important rights and protections that we currently enjoy, and that he is not afraid to flex judicial muscle to achieve it.''

In that same article, he attacked Justice Roberts' membership in the National Legal Center for Public Interest, calling its mission to promote free enterprise, private property, and limited government—he called those code words for an ideological agenda hostile to the environment, workplace, and consumer protections.

So Professor Liu considers free enterprise, private property, and limited government code words for an ideological agenda hostile to the environment, workplace, and consumer protections. That is what he said. Is that the kind of person we want, the Senate should want, or that America should want to sit in judgment, enforce our Constitution and laws passed by the Congress? Well, I think not.

Yet, in another dramatic nomination conversion during his failed nomination process last year, Professor Liu responded to my written questions by calling this statement a ''poor choice of words.''

There are several more examples of Professor Liu's lack of judicial temperament. His record is already crystal clear. It is one thing for Professor Liu to disagree with a person—we do that every day on the floor of the Senate, in committee, and around the country, across kitchen tables in our homes—but it is quite another to repeatedly engage in these types of inaccurate and, frankly, disgusting attacks against a public official trying to do their job the way they think it should be done. For Professor Liu to only reflect upon his statements once he is offered a life-tenured judgeship on the court of appeals is unacceptable.

Given his lack of experience as a practicing lawyer, obviously his lack of experience as a judge, never having served as a judge, it is impossible for me to trust his assurances that now all of a sudden he will calmly and impartially apply the law as written by Congress or as written in the Constitution of the United States.

I would cite just one other example of my experience on the Judiciary Committee, this one involving now Justice Sonia Sotomayor. Justice Sotomayor is a charming woman. She came into the Senate Judiciary Committee hearings and won over many people who were, frankly, a little skeptical of her nomination based on some of her previous writings and speeches. But I remember one particular question, she was asked whether she accepted as an individual right the guarantee in the second amendment of the Constitution the right to keep and bear arms, and she said she did. She accepted a decision in a case called the Heller case that said that was an individual right of a citizen.

A few months later, in a case called McDonald v. Chicago, she wrote a dissenting opinion from a Supreme Court decision where she said the right to keep and bear arms is not a fundamental right.

You can parse the words, ''an individual right,'' ''a fundamental right,'' but to me it is clear that Justice Sotomayor, during her confirmation hearings, tried to parse the words in a way so as not to raise alarms about her commitment to the Bill of Rights and the second amendment to the Constitution. But then once she was confirmed as a judge on the Highest Court in the land—of course, she serves for life with no accountability either to Congress or to the voters, and she, indeed, serves with impunity, even though her testimony before the committee and her decisions, once on the Court are inconsistent.

We just cannot take a chance that Professor Liu has somehow had a true conversion in his views and his attitudes during the nomination process.

Aside from his questionable temperament, Professor Liu's activist views of the law are equally troubling. In his book called ''Keeping Faith with the Constitution,'' Professor Liu summarizes activist philosophy in this way. He said:

> Fidelity to the Constitution requires judges to ask not how its general principles would have applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society.

What does that mean? Does that mean the words on the page do not necessarily mean what they say; that a judge is going to somehow subjectively read into those words what the evolving norms of our society are and to change an outcome to decide a case, to decide what our Constitution means based on their subjective impression of those words and what evolving norms in society means?

That is sometimes called a doctrine of believing in a living Constitution; that the words on the page are mutable or changeable and can morph over time and mean different things based on a judge's interpretation of what those evolving norms are. To me, that is a license to lawlessness. It is a license for a judge—an unelected, lifetime-tenured individual who takes an oath to uphold the Constitution and laws of the United States—that is untethered to any concept of what the law means, something that can be applied with equal application to every man, woman, and child in America and gives a judge a chance to impose their political or ideological views on what the Constitution means. That is dangerous, it is lawless, and it is not upholding the Constitution that we, even as Members, swear to uphold in our different jobs as policymakers.

Particularly troubling for Professor Liu is his controversial and, I would say, ridiculous view that our Constitution somehow guarantees a European-style welfare state. We are engaged in a very important debate on the floor of the Senate, and during the course of this vote on the debt ceiling—which I suppose we will have sometime in July, or not—with whether we are going to continue to be an opportunity society or whether we have become an entitlement society, a welfare state.

Professor Liu, in his article, ''Rethinking Constitutional Welfare Rights,'' has argued that the Constitution includes an ''affirmative right to health insurance, childcare, transportation subsidies, job training, and a robust earned-income tax credit.''

I must have missed that in my copy of the Constitution. I do not remember the Founding Fathers writing in the Constitution, nor the States ratifying language in the Constitution, that guarantees a right to a robust earned-income tax credit. When Senator SESSIONS gave Professor Liu the opportunity to clarify his views in April 2010, he replied:

> I do believe that, Senator. But those arguments are addressed to policymakers, not the courts.

I think Professor Liu is being disingenuous, and I am trying to be charitable. When he says the Constitution includes these rights but says those arguments are addressed to policymakers, not the courts, he is denying that a court that might agree with him might enforce those rights as a matter of constitutional law. This is not just addressed to policymakers. That is not being honest. I do not blame him if he has an honestly held view about these matters. I would welcome candor in expressing those strongly held views. But they are views more appropriately expressed in the court of public opinion where we debate the values and meaning of our laws and what kind of country we want this to be, not in people who want to be judges and impose those views as a matter of judgment in an individual case, transforming the written Constitution into something completely different than what each of us can read on a printed page or what we learned in school our Constitution actually means.

In other words, Professor Liu believes the Constitution contains an unenumerated list of goods and services, such as free health insurance, daycare, and bus passes that Federal legislators must provide to every citizen.

It is not difficult to see how an activist judge might one day use Professor Liu's theory to force Congress to provide for these lavish welfare benefits, even though our country faces a historic debt crisis, as we do now. What is more, Professor Liu has suggested that under his view of the Constitution, it may be unconstitutional to repeal certain welfare programs once they are enacted.

For example, in ''Rethinking Constitutional Welfare Rights,'' Professor Liu wrote that legislation may give rise to a cognizable constitutional welfare right if it has ''sufficient ambition and durability, reflecting the outcome of vigorous public contestation and the considered judgment of a highly engaged citizenry.''

That is a mouthful. What he is saying is, once the legislature passes a law, the legislature has no power to repeal that law because it somehow then is transformed into a constitutional right and beyond the power of Congress to change. That is radical.

Professor Liu's writings also have suggested his unconventional belief that the death penalty is unconstitutional, that same-sex marriage is a constitutional right, and that it is appropriate for judges to consider foreign law when reaching their legal conclusions about what American law means.

Taken as a whole, Professor Liu's record demonstrates that he would use his position as a Federal judge to advocate his ideological theories and undermine the well-settled principles of the U.S. Constitution. That is simply unacceptable to me. I think it should be unacceptable to the Senate.

Given his lack of temperament, his poor judgment, and his activist view of the role of judges and the law, I am left with no choice but to fight Professor Liu's confirmation with every tool at my disposal.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. COONS. Madam President, I rise today to continue to express my views in support of the nomination of Professor Goodwin Liu, a nominee, as you know, to the Ninth Circuit Court of Appeals. Much has been said on the Senate floor in recent hours, and I rise to offer my comments on some of the concerns that are being debated.

For once, it is great to actually hear debate on the floor of this Chamber. I have been here, as you know, Madam President, just 6 months. As someone who is new to the Judiciary Committee, new to the debates and dialog of this Chamber, I am struck at the things I am hearing about Professor Goodwin Liu and the significant divergence between what I have found in questioning him, looking at his record, and speaking with my colleagues and what I have heard on the floor just today.

I will do my best to try and lay out what I see as the real record of the real Professor Goodwin Liu, a nominee to the Ninth Circuit Court of Appeals.

Some have come to the floor today and argued that Professor Liu lacks the candor or the temperament to serve on a circuit court. As someone who clerked for the Third Circuit Court of Appeals for a distinguished judge, I will suggest something that I think is commonplace, which is that candor and an appropriate temperament are critical to service on a circuit court of appeals.

A lot of these charges raised against Professor Liu seem to center on a few

comments that Professor Liu made during the nomination hearing for now-Justice Alito or some purported deficiencies in his disclosures to the Judiciary Committee. Let me speak briefly to both of those, if I may.

Professor Liu has apologized at length and in detail for the intemperate tone of one brief passage that he wrote as part of his testimony before the Judiciary Committee during the Alito nomination hearings now some 6 years ago. I take this apology at face value. I take his expression of regret at the tone at face value. But anyone who has taken the time to meet him, to interview him, to question him, I think has to conclude that despite this one brief episode of the use of intemperate language, he is not an intemperate person.

In fact, the American Bar Association, as my colleague, Senator BOXER, pointed out previously today, specifically considered Professor Liu's temperament when it gave him its highest rating of ''unanimously well qualified'' in the recommendation for his consideration by this body.

Let me next turn briefly to claims about candor before the committee which I believe are equally unfounded. He has, in fact, testified before the Judiciary Committee for a total of 5 hours and answered hundreds of questions and requests for additional information. He has been sharply criticized for missing some documents from his initial response to what is a searching committee questionnaire.

I will comment for those following this debate that Professor Liu has been a prolific scholar and speaker. He is someone who has published extensively. He is someone who has spoken extensively. He is the first controversial circuit court nominee to have his nomination take place not just in the computer age but in the YouTube age when a combination of cell phones and video recorders have literally made a record of every bag lunch, every 5-minute speech, every off-the-cuff remark made by this nominee before us.

The argument that his need to supplement the record with some documents not initially produced and that somehow that reflects some lack of candor, and somehow that suggests a lack of truthfulness that should disqualify him not for a vote but not even for a consideration of a vote is wholly without merit.

As the White House Chief Ethics Counsel under President Bush, Richard Painter, has written: Professor Liu's ''original answers to the questions''—asked by the Judiciary Committee—''was a careful and good-faith effort to supply the Senate with the information it needed to assess his nomination.''

It means a great deal to me that someone such as Mr. Painter concluded that Professor Liu provided a lot more information than most nominees do in similar circumstances. Frankly, it seems to me overreaching to try to suggest that simply because in the YouTube age this professor, who provided us with hours of testimony, pages of responses, failed to notice the committee about some brown bag lunches and off-the-cuff comments rises to the standard of justifying a filibuster.

Let me next turn to the suggestion that he is insufficiently qualified to hold the position of circuit judge—an important concern, because we want judges of judicial temperament, of openness and candor and good character, and also those who are sufficiently experienced. As I said a moment ago, the American Bar Association, after conducting a confidential and comprehensive review of his qualifications, concluded he was ''unanimously well-qualified''—its highest possible rating.

In previous nomination debates, Senators of this body, Senators of the other party, have touted the ABA rating as a comprehensive and exhaustive evaluation that provides valuable insight that ought to be trusted. Several Members of this body—several Senators—including some who spoke immediately before me have made those exact references to the value of the ABA rating process. Reasonable minds may be able to differ on the margins, but it is not credible, in my view, to claim a candidate with Professor Liu's remarkable legal education, long record of public service and experience, and the ABA's highest rating is not qualified to serve on a circuit court.

The charges or suggestions that Professor Liu is unqualified because he is young or because he lacks significant courtroom experience are also hollow and one-sided when we look at the real record. Since 1980, 14 nominees younger than Professor Liu—advanced by Republican Presidents—have all been confirmed. For example, Judge Neil Gorsuch, on the Tenth Circuit, was 38 when nominated; Judge Brett Kavanaugh, an acquaintance and, I would say, friend of mine from law school—now on the DC Circuit—was 38 when nominated; and now-Justice Samuel Alito was 39 when nominated to the Third Circuit.

Republican nominees with similar or lesser practical courtroom experience than Professor Liu have also been nominated and confirmed. Circuit Court Judge Frank Easterbrook and J. Harvie Wilkinson were both under 40 when nominated without any practicing legal experience at all. Yet this lack of practical experience didn't prevent either of these judges from becoming the most well respected and widely regarded in their circuits.

I would ask my colleagues to seriously consider looking instead at the standard that was applied when a similarly controversial professor came before this body. I was not here at the time, but I understand from the record that Democratic Senators approached the nomination of Michael McConnell, President George W. Bush's nominee to the Tenth Circuit, in a way that was generous and that accepted at face value some of his assertions.

Like Professor Liu, Professor McConnell was a widely regarded law professor who was nominated to a Federal appeals court without having first served as a judge. Many Democratic Senators at the time had concerns about Professor McConnell's conservative writings, which included strong opposition to Roe v. Wade, congressional testimony that the Violence Against Women Act was unconstitutional, and harsh criticism of the Supreme Court's 8-to-1 decision in the Bob Jones case. Despite these positions—which one could argue are at the outer edge, even the extreme of the legal canon at the time—Professor McConnell was confirmed, not after a filibuster, not after a long series of grinding nomination hearings and public discourse, but Professor McConnell was confirmed by voice vote of this Chamber 1 day after his nomination was confirmed by the Judiciary Committee.

In supporting Professor McConnell's nomination, Democratic Senators at the time credited his assurances that he understood the difference between the role of law professor and judge and that he respected and would follow precedent. In my view, the Senators of this body should credit similar assurances that Professor Liu has provided during his confirmation hearings and that Professor Liu has provided to me in an individual interview in answer to hundreds of written questions from members of the committee as well as in answer to challenges presented here.

Let me next turn to some challenges or concerns that have been raised about Professor Liu's view on education. A bipartisan group of 22 leaders in education law, policy, and research have written to support Professor Liu's nomination and to highlight his scholarship and reputation in the field of education law and policy. They wrote:

> Based on his record, we believe Professor Liu is a careful, balanced, and intellectually honest scholar with outstanding academic qualifications and the proper temperament to be a fair and disciplined judge.

Later, they wrote in this letter:

> His work is nuanced and balanced, not dogmatic or ideological.

Madam President, I ask unanimous consent to have printed in the RECORD the letter to which I just referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MARCH 23, 2010.

Re Federal Judicial Nomination of Goodwin H. Liu, U.S. Court of Appeals for the Ninth Circuit.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. JEFF SESSIONS,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: We are a bipartisan group of 22 leaders in education law, policy, and research who support the nomination of Professor Goodwin Liu to be a judge on the U.S. Court of Appeals for the Ninth Circuit. Your

committee will undoubtedly receive much commentary about Professor Liu's scholarly work in constitutional law. We write to highlight his scholarship and reputation in the field of education law and policy. Collectively, we have read his work in this area; we have seen him speak at many panels and conferences; and some of us have worked closely with him on research projects or on policy issues when he served in the U.S. Department of Education. Based on his record, we believe Professor Liu is a careful, balanced, and intellectually honest scholar with outstanding academic qualifications and the proper temperament to be a fair and disciplined judge.

Professor Liu is one of the nation's leading experts on educational equity. His scholarly work on topics such as school choice, school finance, desegregation, and affirmative action is unified by a deep and abiding concern for the needs of America's most disadvantaged students. In analyzing problems and proposing solutions, Professor Liu's writings are thorough, pragmatic, and scrupulously attentive to facts and evidence. His work is nuanced and balanced, not dogmatic or ideological. For example:

He has argued for more resources for low-performing schools while also advocating greater opportunities, including school vouchers, to enable disadvantaged students to choose better schools.

He has argued for greater equity in school finance while also urging reforms that would loosen regulations and increase local control over spending decisions.

He has praised the No Child Left Behind Act for focusing education policy on achievement outcomes and inequities while also urging reforms to ameliorate the Act's unintended negative consequences.

He has argued that the Fourteenth Amendment guarantee of national citizenship encompasses a duty to provide adequate education while emphasizing that the responsibility for enforcement belongs to Congress, not the judiciary.

He has written in support of affirmative action while also emphasizing that affirmative action primarily benefits middle- and high-income minorities and does not do enough to promote socioeconomic diversity.

We do not necessarily agree with all of Professor Liu's views. But we do agree that his record demonstrates the habits of rigorous inquiry, open-mindedness, independence, and intellectual honesty that we want and expect our judges to have. His writings are meticulously researched and carefully argued, and they reflect a willingness to consider ideas on their substantive merits no matter where they lie on the political spectrum. Moreover, we are confident in Professor Liu's ability to decide cases based on the facts and the law, regardless of his policy views. His scholarship amply demonstrates that kind of intellectual discipline, and our high regard for his work is widely shared. Indeed, the Education Law Association selected Professor Liu in 2007 to be the first-ever recipient of the Steven S. Goldberg Award for Distinguished Scholarship in Education Law.

In short, Professor Liu is exceptionally qualified to serve on the federal bench. He would make an outstanding judge, and we urge his speedy confirmation.

Sincerely,

Cynthia G. Brown, Vice President for Education Policy, Center for American Progress Action Fund.

Michael Cohen, President, Achieve, Inc.; Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, 1999–2001.

Christopher T. Cross, Chairman, Cross & Joftus LLC; Assistant Secretary for Educational Research and Improvement, U.S. Department of Education, 1989–91.

Linda Darling-Hammond, Charles E. Ducommun Professor of Education, Stanford University.

James Forman Jr., Professor of Law, Georgetown University Law Center; Co-Founder and Board Chair, Maya Angelou Public Charter School.*

Patricia Gándara, Professor of Education and Co-Director of The Civil Rights Project/Proyecto Derechos Civiles, UCLA.

James W. Guthrie, Senior Fellow and Director of Education Policy Studies, George W. Bush Institute.

Eric A. Hanushek, Paul and Jean Hanna Senior Fellow, Hoover Institution, Stanford University.

Frederick M. Hess, Director of Education Policy Studies American Enterprise Institute.

Paul Hill, John and Marguerite Corbally Professor and Director of the Center on Reinventing Public Education, University of Washington.

Richard D. Kahlenberg, Senior Fellow, The Century Foundation.*

Joel I. Klein, Chancellor, New York City Department of Education; Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 1997–2001.

Ted Mitchell, President and Chief Executive Officer, NewSchools Venture Fund.

Gary Orfield, Professor of Education, Law, Political Science, and Urban Planning and Co-Director of The Civil Rights Project/Proyecto Derechos Civiles, UCLA.

Michael J. Petrilli, Vice President for National Programs and Policy, Thomas B. Fordham Institute; Research Fellow, Hoover Institution, Stanford University; Associate Assistant Deputy Secretary, Office of Innovation and Improvement, U.S. Department of Education, 2001–05.

Richard W. Riley, Partner, Nelson Mullins Riley & Scarborough LLP; U.S. Secretary of Education, 1993–2001; Governor of South Carolina, 1979–87.

Andrew J. Rotherham, Co-Founder and Publisher, Education Sector.

James E. Ryan, William L. Matheson & Robert M. Morgenthau Distinguished Professor of Law, University of Virginia School of Law.

William L. Taylor, Chairman, Citizens' Commission on Civil Rights.

Martin R. West, Assistant Professor of Education, Harvard University.

Judith A. Winston, Principal, Winston Withers & Associates, 2002–2009; General Counsel, U.S. Department of Education, 1999–2001, 1993–97.

Bob Wise, President, Alliance for Excellent Education; Governor of West Virginia, 2001–2005; Member, U.S. House of Representatives, 1983–2001.

(*affiliation listed for identification purposes only)

Mr. COONS. Madam President, during his confirmation hearings, Professor Liu said this, in testifying before the Judiciary Committee:

I absolutely do not support racial quotas, and my writings, I think, have made very clear that I believe they are unconstitutional.

Professor Liu also stated to the committee:

I think affirmative action, as it was originally conceived, was a time-limited remedy for past wrongs, and I think that is the appropriate way to understand what affirmative action is.

These two statements, which reflect Professor Liu's testimony to the committee, are well within the mainstream.

Professor Liu has written and spoken about his support for diversity in public schools and, in my view, there is nothing extreme in this view. Ever since Brown v. Board of Education was decided by a unanimous Supreme Court in 1954, the Supreme Court of the United States has recognized the legitimacy of State action to desegregate schools.

In fact, the Supreme Court upheld the use of race as one factor in admissions decisions in the 2003 case of Grutter v. Bollinger. Although some on the far right of the Supreme Court have argued that both Brown and Grutter should be disregarded to the extent they recognize the permissibility of efforts to achieve diversity in public institutions, it is, I would argue, those Justices who are out of step with the mainstream of Federal jurisprudence and of the constitutional tradition of this country.

Even in its most recent case on point, the 2007 decision in Parents Involved v. Seattle School District, which struck down a specific desegregation program, five of the nine Justices who made up the majority agreed with Liu that achieving diversity remains a compelling governmental interest.

The notion that somehow Professor Liu is an idealog on these issues is belied by his actual record. As a scholar, Professor Liu has supported market-based reforms to promote schoolhouse diversity—reforms that are often labeled conservative. Professor Liu believes, and has written in support of, school choice and school vouchers, stating they have a role to play in improving educational opportunities for disadvantaged children. He has publicly advocated for these programs on a nationwide scale, earning praise from conservatives in the process.

Clint Bolick, director of the conservative Goldwater Institute—referred to previously by my colleague, Senator BOXER—has written:

I have known Professor Liu . . . since reading an influential law review article he coauthored . . . supporting school choice as a solution to the crisis of inner-city public education. It took a great deal of courage for [him] to take such a strong public position . . . I find Professor Liu to exhibit fresh, independent thinking and intellectual honesty.

He closes his letter by saying:

He clearly possesses the scholarly credentials and experience to serve with distinction on this important court.

Professor Liu has, in my view, made very clear that he understands the difference between being a law professor, a scholar and advocate, and a judge. He has assured us during his nomination hearings before the committee and again in personal conversations with me he would follow the court's precedent if confirmed. During his confirmation hearings Professor Liu testified to our committee:

[I]f I were fortunate enough to be confirmed in this process, it would not be my role to bring any particular theory of constitutional interpretation to the job of an intermediate appellate judge. 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, I would apply the applicable precedents to the facts of each case.

As I said before, and I will say again, I believe this quote from Professor Liu deserves exactly the same weight and deference and confidence as similar assertions by then-Professor McConnell, now Circuit Court Judge McConnell, when he was confirmed by voice vote in this Chamber. To speak otherwise is to do violence to the tradition of deference to those who give sworn testimony, to hearings, and to the deliberations of this body.

Last, let me turn to some points that were raised recently about whether Professor Liu believes Americans have a constitutional right to welfare benefits, such as education, shelter, or health care; and, if confirmed, would somehow declare those constitutional rights from the bench.

Professor Liu has authored, as I have said, many different Law Review articles, and in one, the 2008 Stanford Review Article, entitled, ''Rethinking Constitutional Welfare Rights,'' he, in fact, criticized another scholar's assertion from a 1969 article that courts should recognize constitutional welfare rights on the basis of a so-called ''comprehensive moral theory.'' Professor Liu rejected that.

In 2006, he penned a Yale Law Review article that argued the 14th amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity.

His record is replete with sources that make it clear Professor Liu respects and recognizes the role of this body—of Congress—and the role of the Supreme Court in establishing, interpreting, and applying both precedent and constitutional theory, and that he accepts, acknowledges, and will respect the very real limits on a circuit court judge in innovating in any way.

Madam President, in closing, allow me to simply share with you and the Members of this body that—new to this body, new to the fights that have divided this Chamber and have deflected real deliberation on nominees to circuit courts and the Supreme Court—I have taken the time to review his writings, to interview him individually, to attend the nomination hearing, and have come to the conclusion that candidate, nominee Professor Goodwin Liu is a qualified, capable, competent, in fact, exceptional legal scholar, who understands and will respect the differences between advocacy and scholarship and serving as a member of the circuit court in the Judiciary of the United States.

I urge the Members of this body, I urge my colleagues to take a fresh look at the record and to allow this body to vote. Why on Earth this record of this exceptionally qualified man would justify a filibuster is utterly beyond me and suggests that, unfortunately, we have become mired in partisanship rather than allowing debate and votes on this floor, which, in my view, if we followed the best traditions of this body, would lead to the confirmation of Goodwin Liu to the Ninth Circuit.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Madam President, I would tell my colleague from Delaware that he makes some very excellent points and they were very well stated.

I have spent a number of years—now almost 7—on the Judiciary Committee, and my observations make me painfully aware of our process. Goodwin Liu is a stellar individual. There is no question about it. He is a stellar scholar. There is no question about it. But my observations have taught me, as we have voted and put judges on the appellate court and on the highest Court, that what is said in testimony before the committee doesn't bear out or have any impact on what happens once somebody becomes a judge. My observation is that people are who they are.

I actually spent a significant time with Goodwin Liu. I think he is a genuine great American. The question, however, is not whether he is a stellar scholar, of stellar intellect, or whether he is a great American. The question is: Do his beliefs match what the Constitution requires of appellate judges and higher judges. And I have come to the conclusion that being stellar and being a great teacher and professor, being a wonderful judge, is not enough. I take the words to heart, that my colleague said, because we all make mistakes. His comments on Judge Alito and Judge Roberts, he said, were poor judgment; he should not have done it. There is not anybody in this body who has not done the same thing, so we cannot hold that against him, and I do not.

But what I do think matters is whether the oath to the Constitution and our laws and our treaties and the foundational documents of our Constitution do matter. I believe that where we find ourselves today as a country—not having the debates on the Senate floor as we should be having the debates on the Senate floor—is partially to blame because of where the judges have put us. They have not been loyal to the document. They expanded the commerce clause well beyond its ever-anywhere-close intent. The general welfare clause, that now finds us at a time when we are nearing bankruptcy, and we cannot get out of our problems without retracting tremendously the size and scope of the Federal Government. We cannot grow our economy with the tax revenue increases that are going to be required to get out of this problem. It comes back down to what do they believe about the Constitution.

The best way to find that out is, before they ever thought about being nominated and before they are trying to be controversial in a teaching environment, what are their great thoughts and what are their beliefs. I do not believe professors write articles to be controversial. I believe they write articles based on what their learned research tells them. I just have a frank disagreement with Professor Liu on the role of a Federal judge.

I actually believe what the Constitution says. It says:

The judicial Power should extend to all Cases, in Law and Equity, arising under this—

And the word is ''this''—

Constitution, the Laws of the United States, and the Treaties made, or which shall be made. . . .

The problems I have with Professor Liu are that I believe he advocates for an unconstitutional role for judges. He believes the Constitution is a living document, that it is indeterminate.

I recognize I am just a doctor from Oklahoma and I don't have a law degree, but I can read these words as plain as anybody else. I don't think they are indeterminate. I think some of the things our Founders did were wrong, and we have corrected them through the years, through wise Supreme Court decisions, but also through amendments to the Constitution.

He also believes the Constitution should be subject to ''socially situated modes of reasoning that appeal culturally and historically to contingent meanings.'' What that says to me is what this says is wide open.

I really like the guy. I got along fabulously with him. He is a wonderful individual. But I don't think he is who we want on the appellate court. I think what potential judges say and write, when we take the totality of what they say and write—not what they say at a hearing because it all changes once they are nominated—what they say and write is very important about what kind of judge they are going to become.

You heard Senator CORNYN relate about Justice Sotomayor, based on ''here is her testimony,'' and in the first case what she does is exactly opposite of what her testimony does but is totally consistent with what her beliefs were and her writings in previous cases. It used to be the Judiciary Committee didn't bring the judges before them. We looked at the history.

Let me address something else. What the ABA says doesn't matter to me anymore because there was a controversial nominee from Oklahoma the ABA rated ''qualified,'' when four distinct people interviewed by the ABA said the individual wasn't qualified, and that was totally discounted by the ABA. The people who were actually interviewed said the person was not qualified. The ABA gave them a ''qualified'' rating anyway. These are their peers. That basis for saying we have qualifications is no longer trustworthy

in my mind and hasn't been for some time. I think the due diligence is lacking in the ABA and their method for scoring who is qualified or who is not.

The final point I would make is, although he has written a lot, and a lot of it has been controversial, one of the things that really bothers me is his profound belief that he has the right to use foreign law to interpret the U.S. Constitution. That is really code word for saying: If I do not like what is written in this document, I will go find some jurisprudence somewhere else and apply it to this document that gets me the result I want, rather than being truthfully and honestly obedient to what this document says.

I know that sounds overly simple, but it is not. The fact that we are not applying our Constitution and its meaning and what our Founders said about what it meant and we are ignoring it is one of the things that has put us in the perilous state we are in today.

We are going to have a great test sometime in the next year on the massive expansion of the commerce clause that was put in the law through the Affordable Care Act. I will predict in this body today, if that is upheld, there will be no need for State and local governments anymore because there will be no limitation on what we as a Federal Government can do to limit the freedom and free exercise of the tenth amendment to the States.

The idea that one can take what this Constitution very clearly says: ''all cases in law or equity arising under this Constitution''—not foreign law, not foreign constitution, not foreign thought, but our law—it does not mean we cannot learn from other things, but we cannot use foreign law to interpret our Constitution. It is a violation of a judicial oath every time one of our Supreme Court Justices references their opinion based on foreign law. It is a violation of their oath because their oath is to this Constitution, not some other constitution. So we see that occasionally, especially in minority opinions, and oftentimes in previous majority opinions, that have gotten our country into the problem we are in.

I believe Goodwin Liu a generally wonderful man. He is a stellar intellectual thinker. By reports he is an outstanding professor and is a great human being. That does not qualify him to be on the Ninth Circuit Court of Appeals. What will qualify him is absolute fidelity to our Constitution and our future and not the creative ways that we can change that through our own wills or whims of judges to get a result that is different than what our Constitution would say that we should have.

So I, regretfully—and it is truly with regret—will be voting against cloture for his nomination because I do not like this process. I think it hurts us. I think it divides our body. My hope is we can handle these in the future much better than we have handled them in the past.

I see the assistant majority leader on the Senate floor, and I will yield to him.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Madam President, at 2 o'clock we will have a vote on the Senate floor. A man is seeking a judgeship. There is no question in anybody's mind that this is a judgeship that should be filled. Professor Goodwin Liu wants to serve in the U.S. Circuit Court of Appeals for the Ninth Circuit. He was nominated in February of 2010. Here we are in May of 2011. The significance of that delay is the fact that this is a vacancy that causes a problem. The Administrative Office of the U.S. Courts—no political office but the court's office—declared a judicial emergency in this circuit and said they need this vacancy filled. So nobody questions that there is at least a sense of urgency in filling the seat.

So you ask yourself, if the President nominated someone back in February of 2010, why in May of 2011 are we just getting around to it? I think that question needs to be directed to the other side of the aisle. They have found reasons to delay this and to raise questions which have brought us to this moment.

So how about this professor? Is he qualified to serve at the second highest level of courts in America on the Ninth Circuit? The American Bar Association did not waste any time evaluating Professor Goodwin Liu. They awarded him their highest possible rating—''unanimously well-qualified.'' If we look at his background, it is no surprise.

The son of immigrants, he attended Stanford University, where he graduated Phi Beta Kappa. He won a Rhodes Scholarship, attended Yale Law School, where he was editor of the Yale Law Review. He served as a law clerk to Judge Tatel of the DC Circuit and to Supreme Court Justice Ruth Bader Ginsburg.

After finishing his second clerkship, the one at the Supreme Court, he worked for years at the law firm of O'Melveny & Myers in Washington. Then he joined the faculty at the University of California-Berkeley Law School. He has won numerous awards for his teaching and academic scholarship, including the highest teaching award given at the Cal-Berkeley Law School.

What is the point of this debate? We know he is well qualified. We know there is a judicial emergency that requires us to fill this seat—and we should have done it a long time ago. When we look at his resume, it would put every lawyer, including myself, to shame, when we consider all that he has done leading up to this moment in his career.

It turns out those who oppose him do not oppose his qualifications. They think he has the wrong philosophy, the wrong values. They criticize him for a handful of statements he made while he served as a professor. Isn't it interesting, the double standard that is being applied?

I was here in 2002 when a Tenth Circuit Court of Appeals nominee by the name of Michael McConnell was up to be considered. He had been a law professor at the University of Utah and the University of Chicago. At his nomination hearings, Senator ORRIN HATCH, who strongly supported his nomination, said:

> I think we should praise and encourage the prolific exchange of honest and principled scholarly writing, assuming such scholars know the proper role of a judge to interpret the law as written and to follow precedent.

What was Senator HATCH defending in Professor McConnell's background? It was the fact that he had called Roe v. Wade, a landmark Supreme Court decision, ''illegitimate.'' Professor McConnell had defended Bob Jones University's racist policies on the grounds that they were ''church teachings,'' even though the Supreme Court rejected his argument in an 8-to-1 decision, and he claimed the Violence Against Women Act was unconstitutional.

That was fodder for a lot of questions that should have been asked and were asked. He had made some very extreme statements as a professor. But Professor McConnell assured the Senate that when he left the classroom and entered the courtroom he would put his views aside and follow the law. The Senate did not stop him with a filibuster. The Senate took Professor McConnell at his word and gave him an up-or-down vote on the Senate floor, and he was confirmed. That is all we are asking for when it comes to Professor Liu. I point out that other well-respected Federal judges have also served in academic roles before coming to the bench.

Richard Posner of the Seventh Circuit in Chicago is a friend of mine. Every once in a while we get together for an amazing lunch. He is such a brilliant guy. We disagree on so many things, but I can't help but sit there in awe of this man's knowledge of the law and of the world and his prolific authorship of books on so many subjects.

I think most would agree he has taken some pretty controversial views himself. In a 2005 debate on civil liberties with Geoffrey Stone, Judge Posner said:

> Life without the self-incrimination clause, without the Miranda warnings, without the Fourth Amendment's exclusionary rule, with an unamended USA PATRIOT Act, with a depiction of the Ten Commandments on the ceiling of the Supreme Court, even life without Roe v. Wade would still, in my opinion anyway, be eminently worth living.

Is there any fodder there for political commentators? He was a sitting judge when he said that. Some of my friends on the left would have had a field day with that quote.

Some of my friends on the right might have disagreed strongly with Judge Posner when he wrote an article about the 2008 Supreme Court decision in DC v. Heller, a case where the court

stated the Second Amendment right to bear arms confers an individual right. Judge Posner wrote that the Court's decision in Heller ''is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.''

I suspect there are a lot of Senators on the other side of the aisle who disagree with that quote.

So let's get down to the bottom line. We recognize the value of academic freedom and discourse. We understand a professor has a different role in America than someone sitting on a bench judging a case. We trust them. We give them basic credit for integrity when they say they can separate the two lives. They understand the two responsibilities.

Professor Liu is a man widely recognized for his integrity and independence. That is why he has the support of prominent conservative lawyers. Kenneth Starr—no hero on the Democratic side of the aisle—has said he would be a great judge. Bob Barr, former Republican Congressman, and Goldwater Institute Director Clint Bolick express support for Liu's nomination. In fact, Ken Starr and Yale law Professor Akhil Amar wrote:

[I]n 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 these qualities to the highest degree, we are confident he will serve on the Court of Appeals not only fairly and competently, but with great distinction. We support and urge his speedy confirmation.

Well, we are not going to grant their wishes with a speedy confirmation; the question is whether 60 Senators will decide that Professor Goodwin Liu is entitled to a vote—a vote—an up-or-down vote—in the Senate.

Professor Liu said at his confirmation hearing:

[T]he role of a judge is to be an impartial, objective, and neutral arbiter of specific cases and controversies that come before him or her, and the way that process works is through absolute fidelity to the applicable precedents and the language of the laws, statutes, or regulations that are at issue in this case.

Professor Liu is committed to respect and follow the judicial role. I am confident he will fulfill that role with distinction.

This is a good man, a great lawyer, an extremely well-qualified nominee. His nomination has been languishing before this Senate since February of last year. He has had to put his life on hold in many respects waiting for the Senate to act.

We will have a cloture vote in about an hour. I think we know what is going on here. For many on the other side of the aisle, they are guided by advisers who tell them: Keep as many critical judicial posts open for as long as possible. Help is on the way in the next election. We don't want to allow this President to fill these vacancies, and particularly when it comes to the circuit courts because of the tremendous responsibility and opportunity there is for important and historic decisions.

So Professor Liu has been caught in this maelstrom. He is now going to be subjected to this filibuster vote. I sincerely hope my colleagues will be fair and honest in their vote. I hope they will look at the obvious record of this man to fill an important vacancy, a man found unanimously ''well qualified'' by the American Bar Association, a person with a legal resume that is peerless, someone who has stated purely and unequivocally that he will follow the law. To dwell on statements he has made as a professor is to do a great disservice to academic freedom and to ignore the obvious. When Republican nominees came before us, we have used our discretion to separate out their academic lives with their promise that as judges they will look at the world in a very sober, honest way.

I intend to vote in support of cloture and in support of this nomination. I urge my colleagues to do the same.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. LEE. Madam President, several of my colleagues have expressed concerns about the nomination of Goodwin Liu. I share many of those concerns and do not wish to belabor points they have already made. I will limit my comments today to two fundamental reasons why I find myself unable to support the nomination of Professor Liu to serve as a judge on the U.S. Court of Appeals for the Ninth Circuit.

First, I am truly dismayed by the lack of judgment displayed in Professor Liu's 2006 testimony regarding the confirmation of Samuel Alito as an Associate Justice for the U.S. Supreme Court. Throughout extensive written testimony and during an appearance before the Senate Judiciary Committee, Professor Liu unfairly criticized then-Judge Alito and his long judicial record as, among other things, having ''shown a uniform pattern of excusing errors and eroding norms of basic fairness.'' In particular, the final paragraph of Professor Liu's written testimony which served as a summary of his entire analysis of Judge Alito was nothing short of an inflammatory attack. He wrote:

Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man. . . .

Professor Liu's unseemly attack on Justice Alito generated considerable attention at the time, as well as understandable concern about Professor Liu's temperament, his judgment, and his basic ability to be fair.

So far as I know, it was only after he was nominated to be a judge on the U.S. Court of Appeals for the Ninth Circuit that Professor Liu offered any apology for his testimony about Justice Alito. A few weeks ago, Professor Liu told members of the Judiciary Committee that he had learned from the outrage his remarks caused ''that strong language like that is really not helpful in the process.'' Professor Liu's observation is certainly true, but it misses the central point. His comments about Justice Alito were offensive not simply because they were unhelpful in his confirmation process, but because they were misleading and they were an unwarranted personal attack on a dedicated judge and public servant.

Professor Liu's treatment of Justice Alito and his last-minute and incomplete handling of the concerns raised by his remarks lead me to believe that he lacks the basic judgment and discretion necessary to be confirmed to a life-tenured position in the judiciary.

The second reason I feel compelled to oppose this nomination has to do with the integrity of our Nation's system of constitutional government and the rule of law. In my careful and considered judgment, the judicial philosophy espoused by Professor Liu is fundamentally inconsistent with the judicial mandate to be a neutral arbiter of the Constitution and to uphold the rule of law.

I do not base this conclusion on the fact that his approach to the law is in many respects different from my own. That is not a prerequisite and that is not the basis of my opposition to this nominee. Most of the judges nominated by President Obama do not share my personal textualist and originalist commitments. Yet in my short time as a Member of the Senate, I have voted to confirm many nominees with whom I fundamentally disagree.

Professor Liu, by contrast, is not simply a progressive nominee with a somewhat more expansive view of constitutional interpretation than is common among many sitting judges, nor is he a nominee whose controversial remarks are few and can be overlooked given a long history of mainstream legal practice and observations.

Throughout the course of his numerous speeches, articles, and books, Professor Liu has championed a philosophy that in my judgment is incompatible with faithfully discharging the duties of a Federal appellate judge in our constitutional Republic. His approach advocates that judges go far beyond the written Constitution, statutes, and decisional law to ascertain and incorporate into constitutional law—in Professor Liu's own words—''shared understandings,'' ''evolving understandings,'' ''social movements,'' and ''collective values.''

In a 2008 Stanford Law Review article describing the judicial role, Professor Liu wrote:

[T]he problem for courts is to determine, at the moment of 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.

In so framing the process of judicial decisionmaking, he advocated a conception of a judiciary as a ''culturally situated interpreter of social meaning.''

In a 2009 book entitled ''Keeping Faith with the Constitution,'' he wrote that constitutional interpretation rightly ''incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice.''

In an interview later that year, Professor Liu suggested that the judicial role is an individual process that includes ''lessons learned from experience, and an awareness of the evolving norms and social understandings of our country.''

These are just a few examples of a clear, consistent, and extreme approach to judging that Professor Liu has championed in many settings over the course of many years. His approach necessarily requires a judge to violate separation of powers principles, making law based on the judge's subjective understanding of public opinion, communal values, historical trends, or personal preferences, rather than faithfully interpreting and applying the laws made by the legislative and executive branches.

A noted judge who has faithfully served in the role to which Professor Liu has been nominated, and who as a result was intimately familiar with the very real dangers of legislating from the bench, shared this vital insight:

It is absolutely important to freedom to confine the judiciary's power to its proper scope as it is to confine that of the President, Congress, or state and local governments. Indeed, it is probably more important, for only courts may not be called to account by the public.

I rise today in defense of our Nation's constitutional separation of powers and, ultimately, in defense of the essential liberty that it protects.

I also feel the need to respond to the point made by my distinguished colleague, the Senator from Illinois, moments ago. This is not an opposition that is based on a disagreement with a particular set of legal analyses. My colleague from Illinois noted there was some opposition to Judge McConnell who was confirmed by this body to serve on the U.S. Court of Appeals for the Tenth Circuit, notwithstanding the fact that many in this body disagreed with particular legal conclusions that had been reached by then-Professor McConnell. This is different than that. This is not about a disagreement with a particular legal conclusion. It is instead about a concern arising out of a systemic, broad-based interpretive approach, one I believe doesn't give due regard to the rule of law, to the notion that we are a nation that lives under the law, that our laws consist of words, that words have defined, finite meaning, and that in order for our laws to work properly, that meaning needs to be respected and it needs to be interpreted in and of itself and held as an independent good by the judiciary on a consistent basis.

Professor Liu's appalling treatment of Justice Alito leaves grave doubt in my mind as to whether he possesses the requisite judgment to serve as a life-tenured judge. I have come to the conclusion that Professor Liu's extreme judicial philosophy is simply incompatible with the proper role of a judge in our constitutional Republic.

For these reasons, as well as those articulated by many of my colleagues, I am compelled to oppose this nomination.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. LIEBERMAN. Madam President, I thank the Chair.

I rise to support the nomination of Goodwin Liu to be a member of the U.S. Court of Appeals for the Ninth Circuit. I believe Mr. Liu's academic qualifications, strong intellect, his character, and his temperament make him a person who would be a valuable addition to the Federal bench. Therefore, I urge my colleagues to vote for cloture and then in favor of his confirmation.

Mr. Liu brings an outstanding academic and professional background to this nomination and a personal life story that is quintessentially American. It is not a reason in itself, certainly, to vote to confirm him as a judge of this high court, but it speaks to the endless opportunities for upward mobility in this country for people who work hard. Where you end up is not determined by where you start out in this country.

Goodwin Liu is the second son of Taiwanese immigrants. As a young boy, his family settled in Sacramento. He began to work hard from the beginning, ultimately graduating from Stanford University. He received a Rhodes Scholarship to Oxford University and eventually graduated from Yale Law School.

Should he be confirmed to the Ninth Circuit, Professor Liu would become the second Asian American currently serving on a Federal appeals court. He is now an associate dean and professor of law at the University of California, Berkeley School of law. He is widely recognized and respected broadly throughout academic and legal communities in the United States.

I note that prior to entering academia, he was an appellate litigator with O'Melveny & Myers—a first-rate firm here in Washington—and clerked for both Circuit Court Judge David Tatel and Supreme Court Justice Ruth Bader Ginsburg, representing different points on the ideological legal spectrum, and served them both, I know, with great distinction.

Although I do not agree with everything Goodwin Liu has ever written or said, his views, it seems to me, have been well expressed and well reasoned and quite intelligent. I think he has a thoughtful approach to complex legal questions, and I am impressed he has earned the respect and support of thinkers and lawyers from all sides of the legal ideological spectrum, which I think speaks, ultimately, to his personal evenhandedness, to the power of his intellect, and what we can expect of him as a judge of the circuit court.

I was particularly impressed—and I know it has been quoted before, but it speaks volumes—by the comments of former Judge Ken Starr, a former dean also, who said Goodwin Liu is ''a person of great intellect, accomplishment, and integrity, and he is exceptionally well-qualified to serve on the court of appeals.''

I know many of my colleagues have concerns about this nomination, about things Professor Liu has either written or said, and I understand those. I have some of those concerns. I read the statement he made about Judge Alito. It has the ring of a passionate litigator making an argument with probably more zeal than he himself appreciates as he looked at it in the aftermath.

But for those who have concerns, I urge my colleagues to vote accordingly on an up-or-down vote, not to sustain this filibuster and, therefore, prevent an up-or-down vote on this nomination.

I have always felt that in our advice and consent role—this is my own personal reading of it—the President, by his election, earns the right to make these nominations. We do not have to decide, in confirming a nominee, that we would have made this nomination, only that the nominee is acceptable, is within the range of those acceptable and capable of doing the job for which he is nominated.

Not so long ago, in 2005, there was a move to reduce the right to filibuster and require 60 votes, particularly with regard to Supreme Court nominees but others as well. That led to the formation of the so-called Gang of 14. I was proud to be a member of that group, and we reached an agreement, one of whose I wish to read now on ''Future Nominations.'' This is one of them: Goodwin Liu.

Signatories will exercise their responsibilities under the Advice and Consent Clause of the United States Constitution in good faith. Nominees should only be filibustered under extraordinary circumstances, and each signatory must use his or her own discretion and judgment in determining whether such circumstances exist.

End of quote from the agreement of the Gang of 14.

I do not think these are extraordinary circumstances, when you consider Goodwin Liu's intellect, his varied background, the character he has, and this broad range of endorsements from people. To me, a disagreement about a statement made in the heat of an argument or even the substance of an article published is not strong enough to prevent this nominee from

having what I think is his right and the President's right to get a vote up or down—not to block him by requiring 60 votes.

So I urge my colleagues to vote for cloture. I am going to do so with a full measure of comfort and confidence about the kind of judge Goodwin Liu would be but with a full measure of comfort that I am exercising my responsibility under the advice and consent clause, as I have always seen it, including as it has been informed by my proud participation in the memorandum of understanding of the Gang of 14 in 2005.

I thank you very much and yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Madam President, I rise in regretful opposition, quite frankly, to having to vote to deny cloture for a judicial nominee. I also was in the Gang of 14, and the whole effort was to make sure the Senate follows constitutional and historical norms; that is, giving great deference to Presidential elections when it comes to the judiciary.

So to my conservative colleagues, the best way to make sure you have conservative judges is to win elections. Because if we start blocking all the judges whom we do not like, who have a different view of the law than we, our friends on the other side will return the favor and you wind up having a chaotic situation.

There is a reason Justice Ginsburg got 90-something votes and Justice Scalia got 90-something votes. It used to be the way you did business around here. When a President won an election, they were able to pick qualified nominees for the court. Unless you had a darn good reason, they went forward. I think that should be the standard.

To me, I do give a lot of deference. It is not one speech. It is not an article. Justice Sotomayor, whom I voted for, had made a famous speech that she thought the experiences of a Latino woman maybe were more valuable to the court than that of a White male, and people got up in arms about that. It bothered me. She explained herself. I look at the way she lived her life, and I understood, based on the way she lived her life, that she was a fair person who did not represent bigotry on her part toward White males.

We all make statements and write articles and get in debates and I am not going to use that as a reason to disqualify somebody from sitting on the judiciary. I would not want that done to our nominees, and I do not intend to do it to the other side.

But here is what Mr. Liu did that, to me, is a bridge too far. When a conservative wins the White House, you expect people such as Chief Justice Roberts and Justices Alito and Scalia. When a liberal wins, you expect people such as Justices Ginsburg and Elena Kagan and Sotomayor. That is the way it works. All of them are well qualified; they just have a different approach to the law. But there are a lot of 9-to-0 decisions.

The one thing that drives my thinking is, Mr. Liu chose—not in an article he wrote as a young man, not in some debate that got carried away but to appear before the Judiciary Committee and basically say Judge Alito's philosophy would create:

. . . an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse—

That line probably comes from some case Judge Alito was involved in—

where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination. . . .

These statements about Judge Alito and the decisions he has rendered and his philosophy are designed to basically say that people who have the philosophy of Judge Alito are uncaring, hateful, and should be despised. That is a bridge too far. Because I share Judge Alito's philosophy, we may come out at a different result on a particular case, but I do not think I fall in the category of being hateful, uncaring, and someone you should despise.

These statements given to the Judiciary Committee were designed to inflame passion against Judge Alito based on his analysis of cases before him during his judicial tenure.

If that is not enough, Chief Justice Roberts' record, according to Mr. Liu, suggests he has a vision for American law—a ''right-wing vision antagonistic to important rights and protections we currently enjoy.''

It is one thing to debate your opponent. It is another thing to have strong opinions. But this is not an accidental statement. This was calculated, delivered at a time where it would do maximum damage.

All I am saying to future nominees: I expect President Obama to nominate people of a liberal judicial philosophy. I do not deny you access to the court because you may have said something in an article I do not like, you may have represented a client with whom I disagree. But the one thing I will not tolerate is for a conservative or a liberal person seeking a judgeship to basically impugn the character of the other way of thinking.

These words are not that of a passionate advocate who may have went too far, according to Senator LIEBERMAN, in my view. These words were designed to destroy, and they ring of an ideologue. He should be running for office, not sitting on the court. There is a place for people who think this way about conservative judicial philosophy: Run for President. Run for the Senate. Do not sit on the court. Because the court has to be a place where you accept differences, you hash it out, you render verdicts. Based on the way he views Justice Alito and Chief Justice Roberts and his disdain for their philosophy, I do not believe he could give someone such as me a fair shake.

So at the end of the day, I ask one thing of my Democratic colleagues. I will try my best to make sure the Senate stays on track and that we do not get on the road of filibustering judges haphazardly based on the fact they are somebody we do not agree with. I have tried my best not to go down that road because I think it will destroy the judiciary and disrupt the Senate.

If you are a conservative in the future wanting to be a judge and you come before our committee, when a liberal nominee is before the committee, and you question their patriotism and you suggest they are hateful people who should be despised for their philosophy, then I will render the same verdict against you.

We want people on the court who are well rounded, who are qualified, who understand America is a big place, not a small place. In Mr. Liu's world I think he has a very small view of the law. Those on the other side who think differently should be engaged intellectually or challenged through academic debate. He has tried to basically rip their character apart, and he will not get my vote. A conservative who feels the same way about liberal philosophy would not get my vote either.

I am looking for the model of Miguel Estrada, who was poorly treated, who wrote a letter on behalf of Elena Kagan, saying: She was my law school classmate. We don't agree on much when it comes to the law, but she is a wonderful person, well qualified, and deserves to be on the bench.

That is the way conservatives and liberals should engage each other, in my view, when it comes to the judicial nomination process.

This was a bridge too far for LINDSEY GRAHAM.

I yield the floor.

Mr. MCCAIN. Madam President, as a member of the Gang of 14 in 2005, I agreed that ''Nominees should be filibustered only under extraordinary circumstances.'' The nomination of Mr. Liu rises to a level of ''extraordinary circumstances'' due to his clear belief that judges have vast powers to shape and even rewrite the law—a contention I deeply oppose as an elected representative of the people who believes it is the duty of the Congress to shape and write the laws and not that of the judiciary.

With no litigation or judicial experience to examine, the Senate can only consider Mr. Liu's academic writings and public comments. These writings and his testimony before the Senate Judiciary Committee show Mr. Liu believes that the Constitution is a living, breathing document that must change to accommodate new progressive ideas. Specifically, Mr. Liu has said, ''The Framers deliberately chose broad words so they would be adaptable over time.''

Additionally, in a November 2008 article published in the Stanford Law Review, Mr. Liu wrote,

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 difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.

Mr. Liu's remarks show that he does not subscribe to the philosophy that Federal judges should respect the limited nature of judicial power under our Constitution. Judges who stray beyond their constitutional role believe that judges somehow have a greater insight into the meaning of the broad principles of our Constitution than representatives who are elected by the people. These activist judges assume that the judiciary is a superlegislature of moral philosophers.

Despite this difference in judicial philosophy, I believe Mr. Liu has had a remarkable career in academics and has an inspiring life story as the child of immigrants from Taiwan. However, an excellent resume and an inspiring life story are not enough to qualify one for a lifetime of service on the Federal bench. Those who suggest otherwise need only to be reminded of Miguel Estrada who was filibustered by the Democrats seven times because many Democrats disagreed with Mr. Estrada's judicial philosophy. This was the first filibuster ever to be successfully used against a court of appeals nominee.

I supported Mr. Estrada's nomination to the DC Circuit Court of Appeals, not because of his inspiring life story or impeccable qualifications, but because his judicial philosophy was one of restraint. He was explicit in his writings and responses to the Senate Judiciary Committee that he would not seek to legislate from the bench.

Judicial activism demonstrates a lack of respect for the popular will that is at fundamental odds with our republican system of government. And, as I stated earlier, regardless of one's success in academics and in government service, an individual who does not appreciate the commonsense limitations on judicial power in our democratic system of government ultimately lacks a key qualification for a lifetime appointment to the Federal bench. For this reason, and no other, I am unable to support Mr. Liu's nomination.

Shaping the judiciary through the appointment power is one of the most important and solemn responsibilities a President has and certainly one that has a profound and lasting impact. The President is entitled to nominate those whom he sees fit to serve on the Federal bench, and unless the nominee rises to ''extraordinary circumstances,'' I have provided my constitutional duty of ''consent'' for most nominees.

I regret I am unable to do so for Mr. Liu, but I believe his inability to respect the limited nature of the judicial power under our Constitution should preclude him from a lifetime appointment to the Ninth Circuit Court of Appeals.

Mr. WHITEHOUSE. Madam President, I rise today to urge my colleagues to support Professor Goodwin Liu's nomination to the U.S. Court of Appeals for the Ninth Circuit.

Professor Liu is abundantly qualified to serve on the bench. He has a sharp legal mind, is a careful and rigorous thinker, and understands the proper limited role of a judge. He has shown a commitment to public service throughout his career and his remarkable success reflects well on the great opportunities our country offers and the qualities of Mr. Liu and his family. If confirmed, he would be a credit to the Ninth Circuit and to his home State of California.

People who know Professor Liu, Republican and Democrat alike, think very highly of him and have commended him for his intellect, integrity, and temperament.

Among many other Republicans and conservatives, Professor Liu can count as supporters former Whitewater prosecutor Ken Starr, former Republican Congressman Bob Barr, and Clint Bolick, the litigation director of the Goldwater Institute. Former Republican Congressman Tom Campbell has said that Liu ''will bring scholarly distinction and a strong reputation for integrity, fair-mindedness, and collegiality to the Ninth Circuit.'' Susan A. McCaw, who was an ambassador in George W. Bush's administration wrote that ''Goodwin's strengths are exactly what [she] expect[s] in a judge: objectivity, independence, collegiality, respect for differing views, [and] sound judgment,'' and noted that he ''possesses these qualities on top of the brilliant legal acumen that is well-established by his record and the judgment of those most familiar with his scholarly work.''

Furthermore, Professor Liu has the support of leading law enforcement groups and prosecutors, as well as business groups, and the endorsements of the New York Times, the Washington Post, the Los Angeles Times, the San Francisco Chronicle, and the Sacramento Bee. He has also been deemed unanimously well qualified by the American Bar Association.

These recommendations are part of an ample record on which the Senate can base its decision. Professor Liu's voluminous writings and unprecedented thoroughness in responding to questions from the Judiciary Committee give us great insight into his temperament and approach to the difficult questions of constitutional law.

This record reveals a genuine thoughtfulness and intellectual rigor. This has made Professor Liu one of the leading legal academics of his generation. As Professor Liu himself has said, the scholar's role is ''to question the boundaries of the law [and] to raise new theories.'' Professor Liu also clearly understands that the scholar's role is different from the role of a judge, explaining that it is the function of a scholar ''to be provocative in ways that it's simply not the role of a judge to be.'' He further elaborated that he would leave his personal views behind if taking the bench: ''What is not transferable [from the position of scholar to the position of judge] . . . are the substantive views that one might take as a matter of legal theory. Those are left at the door. When one becomes a judge, one applies the law as it is to the facts of every case.''

I would remind my Republican colleagues that they have been ready in the past to credit academics with the ability to put aside their scholarly views when they take the bench. True, this was for nominations made by a Republican President, but there is no reason why the rules should be different for President Obama. Consider the nomination of Judge Michael McConnell, for example. He was confirmed to the Tenth Circuit in 2002 by a unanimous vote on the Senate floor, despite having, as a scholar, vigorously criticized Roe v. Wade as ''illegitimate'' and wrongly decided, and having made sundry other criticisms of Supreme Court precedent. The Senate took him at his word that he would follow the law rather than his personal beliefs. A proper recognition of Professor Liu's strong character, integrity, and commitment to the rule of law should lead us to the same conclusion today.

In short, it is time to confirm this highly qualified nominee and I urge all my colleagues to support his nomination.

Mr. KYL. Madam President, it is with great reluctance that I vote against cloture on any nominee, including Professor Goodwin Liu. It is my general view that every nominee deserves an up or down vote.

Ever since the tradition was established that filibusters would be avoided, except in ''extraordinary'' circumstances, I have tried to apply that standard in an objective way.

This is one such occasion when I cannot vote for cloture on the nominee. I believe extraordinary circumstances exist. I have serious concerns as to whether Professor Liu could lay aside his ideas and ideologies and approach cases from a purely objective, unbiased point of view. It is very clear he would violate one of the first principles of judicial character, which is to approach each case without prejudice.

I will highlight some specific examples to illustrate my concerns.

First, is Professor's Liu's views on the use of foreign law in U.S. courts. He stated:

[T]he use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years. . . . The resistance to this practice is difficult for me to grasp, since the United

States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.

Of course, judges should never task themselves with finding ''wise solutions'' from ''foreign authorities,'' instead of interpreting U.S. law. And Americans shouldn't have to walk into a courtroom not knowing under which nation's law they will be judged!

Second, is Professor Liu's troubling view of constitutional ''welfare rights.'' Professor Liu wrote that courts should interpret ''welfare rights,'' such as education, shelter, subsistence, and health care (and the funding for each) as constitutional rights.

Of course, no such welfare rights exist in our Constitution, and it is inappropriate for the courts to attempt to invent new rights or revise the Constitution to advance an ideological or political position.

Third, Professor Liu wrote that he believes the Constitution is a ''living document,'' ''indeterminate,'' and subject to ''socially situated modes of reasoning.'' Moreover, Professor Liu believes that judges should look to ''our collective values,'' ''evolving norms,'' and ''social understandings'' in interpreting the Constitution.

Again, the Constitution is not subject to new definitions and interpretations. These views may be appropriate in the confines of liberal academia, but they have no place in a U.S. courtroom.

In addition to his controversial views on judging and the Constitution, I have an additional set of concerns, as well. Those concerns relate to Professor Liu's charges against Supreme Court Justices Roberts and Alito. Before his own nomination to the bench, Professor Liu led the opposition to their nominations to the High Court. His descriptions of their qualifications show very poor judgment.

For instance, Professor Liu spoke very disparagingly of Justice Roberts stating:

> [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 also wrote that regardless of Chief Justice Roberts's qualifications, ''a Supreme Court nominee must be evaluated on more than legal intellect.''

So, in other words, Professor Liu believes that a good judge must possess more than intellect and allegiance to the law.

Professor Liu also made some inappropriate comments when testifying against Justice Alito's nomination, stating:

> Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance . . . where a black man may be sentenced to death by an all-white jury for killing a white man . . . and where police may search what a warrant permits, and then some.

He also criticized Justice Alito because ''[h]e approaches law in a formalistic, mechanical way abstracted from human experience.''

Again, these comments are inappropriate and demonstrate that Professor Liu does not possess the requisite standards for impartial judging.

In conclusion, I do not vote against Professor Liu lightly. But the President has nominated someone who does not possess the requisite impartiality for judging. I am firmly convinced that, rather than apply the law, Professor Liu would apply his own preconceived notions and standards to advance his liberal views. Therefore I oppose his nomination.

Mr. AKAKA. Madam President, today I rise to speak in support of Goodwin Liu to be a Federal judge on the U.S. Court of Appeals for the Ninth Circuit.

I am confident that Professor Liu, as a nationally recognized expert on constitutional law, is highly qualified for this prestigious position. His understanding of the role of a circuit judge—to follow the instructions and precedents set by the Supreme Court—will allow him to remain a neutral mediator. This judicial philosophy will be the basis for his restrained actions, and will be balanced by his experiences as a professor and in the public and private sectors. Professor Liu's background speaks volumes about his qualifications and his strong work ethic.

Goodwin Liu, the son of immigrant parents from Taiwan, is a graduate of Stanford University. He was elected co-president of the student body and graduated Phi Beta Kappa. He was also awarded the Lloyd W. Dinkelspiel Award, the university's highest honor for outstanding service to undergraduate education.

After, Stanford, Goodwin Liu attended Oxford University on a Rhodes Scholarship and earned a master's degree in philosophy and physiology. He continued his education at Yale Law School, where he was an editor of the Yale Law Journal and won the prize for best team argument in the law school moot court competition. His academic accomplishments earned him clerkships with Judge David S. Tatel on the U.S. Court of Appeals for the DC Circuit and Justice Ruth Bader Ginsburg on the U.S. Supreme Court.

Between these prestigious clerkships, Goodwin Liu served as a special assistant to the Deputy Secretary at the U.S. Department of Education. In that capacity, he advised the Secretary and Deputy Secretary on a range of legal and policy issues, including the development of guidelines to help turn around low-performing schools. He also spent 2 years as a senior program officer for higher education at the Corporation for National Service, AmeriCorps, leading the agency's effort to build community service programs at colleges and universities nationwide.

Goodwin Liu also worked in the private sector for a prominent Washington law firm and maintained an active pro bono practice. In 2003, he returned to California to join the faculty of Boalt Hall, one of the Nation's top law schools, where he established himself as an outstanding scholar and teacher. A few years later, Goodwin's work on ''Education, Equality, and National Citizenship'' won him the Educational Law Association's Steven S. Goldberg Award for Distinguished Scholarship. He quickly earned tenure and was elected to the American Law Institute. In 2009, after being promoted to associate dean, he received Berkeley's most prestigious teaching award, the UC Berkeley Distinguished Teaching Award for excellence in teaching.

Goodwin Liu is an exceptionally qualified nominee and a shining example of the American dream. I have long been impressed by his academic and career achievements, and after meeting with him yesterday I am thoroughly convinced that he will be an outstanding judge for the Ninth Circuit, which encompasses Hawaii and includes over 40 percent of our Nation's Asian-American and Pacific Islander population. Goodwin Liu was given the American Bar Association's highest rating of ''Unanimously Well Qualified'' based on his integrity, professional competence, and judicial temperament. He is highly qualified, intelligent, and he will help the court better reflect the broad population it serves.

He has strong support in the Senate and he deserves an up-or-down vote.

The PRESIDING OFFICER (Mr. MANCHIN). The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I would like to inquire how much time we have on our side.

The PRESIDING OFFICER. Three minutes forty-five seconds.

Mr. GRASSLEY. Mr. President, I have a few closing remarks regarding the nomination of Goodwin Liu. Yesterday, I outlined my objections to this nominee in some detail. As I stated, my objections to this nominee can be summarized with 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.

I hope the President will withdraw this nomination and send to the Senate a consensus nominee to fill this vacancy. We have demonstrated over and over again our cooperation in moving forward on consensus nominations. The President needs to nominate mainstream individuals, who understand the proper role of a judge.

Nominees who would bring a personal agenda or political ideology to the courtroom will have great difficulty in being confirmed.

Yesterday, a few Senators met with Mr. Liu. After that meeting, one of my colleagues from the other side of the aisle made the following statement, ''The court of appeals is where law is made, and we need the finest minds in the world for that.'' I am troubled by that statement on more than one level.

First, intellect is an important element I consider in the confirmation process. Mr. Liu does have an outstanding academic record. His intellect is not the issue. The nominee himself noted there was more to being a judge than intellect. He stated, with regards to the nomination of Chief Justice Roberts, ''[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.'' Mr. Liu went on, demonstrating a lack of judicial temperament, to disparage Justice Robert's views on free enterprise, private property and limited government. In my statement yesterday I made my views very clear on how I feel about Mr. Liu's remarks, so there is no reason to repeat that.

The point is, intellect is only one component. Using Mr. Liu's standards, a nominee ''must be evaluated on more than legal intellect.'' Mr. Liu does have a fine intellect, but he has used his talent to consistently promote views that are far out of the mainstream. Shortly after President Obama was elected, he said, ''Now we have the opportunity to actually get our ideas and the progressive vision of the Constitution and of law and policy into practice.'' I do not intend to give Mr. Liu that opportunity.

The second problem I have with the statement is the assertion that ''The court of appeals is where law is made.'' We have heard this view before. While serving as a circuit judge, Sonia Sotomayor stated that the court of appeals ''is where policy is made.''

Now I understand there are elements of our society who wish this were the case. Those who can not get their policy views enacted through the legislative process, as our Constitution requires, often turn to the courts. But I flatly reject this notion.

The Constitution vests the legislative power in the Congress, not the courts. Judges are simply not policymakers. The court of appeals is not where law is made. The courts are vested with the judicial power. That means they are to decide cases and controversies. They are to apply the law, not make the law.

Unfortunately, this philosophical disagreement occasionally finds its way into the debates on nominations. But let me remind the Senate where this started. Going back to the nomination of William Rehnquist in 1971, Democrats have used or attempted to use the filibuster to delay or defeat judicial nominees. Fortunately, it is a rare occasion. There have been a total of 46 cloture votes, including this one, on 32 different judicial nominations in American history. Of the 32 judicial nominees subject to cloture votes, 22 were against Republican nominated judges. Between 1971 and 2000, there were 11 cloture votes on judicial nominees. Most of those filibusters, attempted by Democrats, were unsuccessful and cloture was invoked.

However, beginning in 2002, Senate Democrats changed the rules. There were 30 cloture votes on 17 of President Bush's judicial nominees. Eight of President Bush's nominees are not on the bench because of the filibuster or threatened filibuster by Senate Democrats.

This does not include a number of Bush's nominees that were subjected to the so-called ''pocket filibuster'' in Committee by the Democratic majority in the 110th Congress, including Peter Keisler to the DC Circuit and Robert Conrad to the 4th Circuit, among others.

We hear about the notion of ''extraordinary circumstances'' as a justification or requirement for extended debate. That was an outcome of an agreement in the 109th Congress. However, even after that time, Senate Democrats have used a broad and inconsistent application of that term. Even after that agreement, Senate Democrats attempted to filibuster judicial nominees. However, they do not seem to find it applicable to the nominee before us today. I disagree. The nomination of Goodwin Liu does raise extraordinary circumstances, as I outlined in depth yesterday.

I have no personal animosity towards Mr. Liu. I recognize he has a fascinating personal story and has accomplished much. This debate is not about his ethnic background or personal history.

I wish Mr. Liu well in his academic career. But a lifetime position on the Federal bench is not where he belongs. Therefore, I will vote no on the cloture motion and urge my colleagues to do the same.

I ask unanimous consent to have printed in the RECORD documents in opposition to the nomination.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From nationalreview.com, Mar. 3, 2011]

MIGUEL ESTRADA ON GOODWIN LIU'S CONTEMPTIBLE MUD-FLINGING

(By Ed Whelan)

More on Richard Painter's insipid argument (see point 2 here) that Goodwin Liu's attacks on the nominations of Chief Justice Roberts and Justice Alito shouldn't be held against him:

Former D.C. Circuit nominee Miguel Estrada, whose unsuccessful nomination Richard Painter despicably tried to invoke in support of his shoddy Huffington Post defense of Liu, strongly disagrees with Painter. In an e-mail to me, Estrada writes (emphasis added):

No one doubts that Senators from both parties have behaved shamefully toward nominees of the other party. The treatment of then-Judge Alito by Democratic members of the Judiciary Committee is not yet all that far in the rear-view mirror, and some of President Obama's nominees have waited far too long. There is much to be said, therefore, for the proposition that the degradation of the judicial confirmation process is a problem that cries out for a long-term solution. The one thing that ought to be reasonably clear, however, is that someone who personally contributed to the sorry state of the confirmation process, by jumping in the mud pit with both feet and flinging the mud with both hands, is not well positioned to demand that standards be elevated solely for his benefit. Surely Mr. Painter can find a better case than this to dramatize the need for reform.

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[From nationalreview.com, Mar. 2, 2011]

RICHARD PAINTER'S DECEPTIVE PORTRAYAL OF GOODWIN LIU—PART 1

(By Ed Whelan)

On Huffington Post, law professor (and former Bush White House ethics adviser) Richard Painter offers an extensive, but badly flawed, defense of Goodwin Liu that falsely accuses me of ''invent[ing] a series of myths about Liu with no basis in reality.'' The opening part of Painter's essay consists of regurgitating ill-informed or utterly conclusory endorsements of Liu from various folks, including some conservative who ought to know better. See, for example, my critique of the letter that Ken Starr submitted (jointly with Akhil Amar).

Given that Liu's hearing starts soon, I'm going to race through Painter's supposed myths in this post and the next (in the same order as he lists them):

1. According to Painter, I have propagated the ''myth'' that ''Liu believes judges 'may legitimately invent constitutional rights to a broad range of social ''welfare'' goods, including education, shelter, subsistence, and health care.'' My actual quote states that Liu argues in a law-review article that ''judges (usually in an 'interstitial' role) may legitimately invent constitutional rights to a broad range of social 'welfare' goods, including education, shelter, subsistence, and health care.'' It's telling that Painter has to excise the italicized parenthetical in order to falsely accuse me of misstating Liu's views. Nor does he address (much less take issue with) my detailed posts on the matter.

2. According to Painter, it is a ''myth'' that Liu ''believes in a 'freewheeling constitutional approach' that allows people 'to redefine the Constitution to mean whatever they want it to mean.'' Painter cherry-picks the most innocent-sounding of Liu's statements and ignores the controversial ones. (See, for example, the material in this post of mine.).

3. According to Painter, it is a ''myth'' that Liu ''is a supporter of racial quotas in the schools, and he supports school choice only insofar as it furthers that goal.'' That is no myth, as I have documented. Painter doesn't even address my arguments.

4. According to Painter, it is a myth that Liu ''supports racial quotas forever.'' Painter doesn't address my argument, and he hides behind a ridiculously narrow definition of quotas.

5. According to Painter, it is a ''myth'' that Liu supports ''reparations for slavery'' and a ''grandiose reparations project.'' Painter pretends to provide a full account of Liu's discussion of ''solutions for racial equality'' but somehow completely omits the remarks of Liu's that I've highlighted, including:

Then there's a further issue, which is that maybe there are white families who were not

involved as directly or even indirectly with the slave trade, but who still benefited from it. And then there is the whole question, which you put on the table, about people who came to America after, and, you know, like my family. And why is it that this movie speaks to me so deeply yet?

And so, what I would do, I think I would draw a distinction between a concept of guilt, which locates accountability in a sort of limited set of wrong-doers, and, on the other hand, a concept of responsibility, which is, I think, a more broad suggestion that all of us, whateverour lineage, whatever our ancestry, whatever our complicity, still have a moral duty to . . . make things right. And that's a moral duty that's incumbent upon everybody who inherits this nation, regardless of whatever the history is.

And I think, to add one more point on top of that, the exercise of that responsibility . . . necessarily requires the answer to the question, ''What are we willing to give up to make things right?'' Because it's gonna require us to give up something, whether it is the seat at Harvard, the seat at Princeton. Or is it gonna require us to give up our segregated neighborhoods, our segregated schools? is it gonna require us to give up our money?

Its gonna require giving up something, and so until we can have that further conversation of what it is we're willing to give up, I agree that the reconciliation can't fully occur.

[From nationalreview.com, Mar. 2, 2011]

RICHARD PAINTER'S DECEPTIVE PORTRAYAL OF GOODWIN LIU—PART 2

(By Ed Whelan)

I'll continue with Painter's last three supposed ''myths'' and then offer some broader comments on Painter's defense of Liu:

6. Painter says it's a ''myth'' that Liu supports ''direct judicial imposition of interdistrict racial-balancing orders'' in public schools. Painter tries to give his readers the impression that Liu accepts Milliken v. Bradley as settled law. But he somehow doesn't disclose that Liu (in remarks that he failed to disclose to the Senate Judiciary Committee) called for Milliken to ''be swept into the dustbin of history.''

7. Painter says it's a ''myth'' that Liu supports ''using foreign law to redefine the Constitution.'' Painter relies entirely on Liu's self-serving confirmation testimony and clips a passage to omit the fact that Liu wrote in 2006 that it ''is difficult for [him] to grasp'' how anyone could resist the ''use of foreign authority in American constitutional law.''

8. Painter says it's a ''myth'' that Liu supports ''the invention of a federal constitutional right to same-sex marriage.'' I addressed this matter in detail just yesterday and fully stand by my account. (Painter falsely attributes to me the claim that Liu's amicus brief in the California supreme court was ''truly an argument under the U.S. Constitution.'')

I'll briefly add some closing comments:

If Painter were really interested in a real debate on Liu, he wouldn't have waited until the day of the hearing to launch his shoddy attack on me. He could have done so at any time over the last eight months. Instead, he's tried to gain some tactical advantage by depriving me of a fair opportunity to respond. (I've had to write these responsive posts within the space of two hours or so of discovering Painter's essay, and I'm sure that there's much that I would say better, or more fully, if I had time.)

Painter claims to have ''reached the conclusion that Liu deserves an up-or-down vote in the Senate and ought to be confirmed'' only after ''reading Liu's writings [and] watching his testimony?'' But the fact of the matter is that Painter, evidently suffering a severe case of battered-conservative-academic syndrome, raced onto the Liu bandwagon without having any understanding of what was at issue, and (both now and in a previous op-ed) he has resolutely ignored or distorted the many highly problematic aspects of Liu's record.

[From nationalreview.com, Mar. 3, 2011]

RICHARD PAINTER'S DECEPTIVE PORTRAYAL OF GOODWIN LIU—PART 3

(By Ed Whelan)

I'll limit myself to a couple of additional observations (beyond my Part I and Part 2 posts) on Richard. Painter's deeply defective Huffington Post defense of Goodwin Liu:

1. In addition to failing to confront my actual arguments, Painter relies heavily on the argument-by-authority fallacy. As he puts it:

''Now, you can believe the top experts in the areas of Liu's scholarship and prominent conservatives such as Ken Starr and Clint Bolick—or you can believe National Review Online's Ed Whelan. I know where I would put my marbles.''

Set aside that Painter, having evidently lost his marbles, would have to find them first before he could put them anywhere. Painter leaves the false impression that folks like Starr and Bolick have actually responded to my critiques of Liu and of their misunderstandings of his record. So far as I'm aware, they haven't.

(It's also amusing that Painter can't even be evenhanded in his mistaken argument by authority. While he invokes various credentials of Liu supporters, he identifies me only as ''National Review Online's Ed Whelan.'')

2. Towards the end of his piece, Painter tries to dismiss the relevance of Liu's demagogic and irresponsible arguments against the confirmations of Chief Justice Roberts and Justice Alito. According to Painter, ''[i]t is critically important . . . that people feel free to speak their minds about Supreme Court and other judicial nominations without fear of retribution.'' But as I explained ten months ago when Painter made the same bad argument, Painter completely misses the point: The shoddy quality of Liu's opposition to Roberts and Alito reflects very poorly on him. There is no reason to encourage cheap attacks like Liu's by not holding him accountable.

[From nationalreview.com, Mar. 3, 2011]

PAINTER SHOULDN'T DISTORT WHELAN'S ARGUMENTS

(By John Yoo)

I've seen Richard Painter's post criticizing Ed Whelan for his posts on the nomination of Goodwin Liu. Painter accurately reports that I've said that Liu (a colleague of mine at Berkeley Law) is a good nominee to the Ninth Circuit for a Democratic president. However, I don't want that to be thought of as endorsing, in any way, what Painter says about Ed's writings on Liu.

What bothers me about Painter's post is that he accuses Ed of distorting Liu's record, but I believe that that's what he has done to Ed. He should provide in full or link to Ed's criticisms of Liu and let the reader decide, rather than describing (or misdescribing) and dismissing Ed's posts in a short sentence or two. I don't think the Painter post is fair on this point. To me, such posts actually may hurt Liu if it appears that his supporters are not fully engaging his critics and their best arguments.

[From nationalreview.com, Mar. 10, 2011]

CLINT BOLICK: RICHARD PAINTER IS ''OFF-BASE''

(By Ed Whelan)

A follow-up to my refutation (Part 1, Part 2, and Part 3) of Richard Painter's smears against me in his deeply defective Huffington Post defense of Ninth Circuit nominee Goodwin Liu:

Clint Bolick, whose support for Liu Painter cites repeatedly, has invited me to publish this statement of his:

Although Ed Whelan and I have taken different positions on the judicial nomination of Prof. Goodwin Liu, I believe that Richard Painter has mischaracterized a number of Ed Whelan's arguments as ''myths.'' In particular, Painter's assertions are off the mark regarding Whelan's criticisms of Liu on the creation of welfare rights, reparations, racial balancing, and the use of foreign law. Obviously, opinions vary regarding the merits of the nomination, but Painter is off-base on several crucial assertions.

Given our bottom-line differences on the Liu nomination, I am particularly grateful to Clint Bolick, as I also am to John Yoo, for standing up against Painter's smears. It's striking that two of the very small number of conservatives that Painter relies on for their support of Liu have repudiated Painter (versus zero, so far as I'm aware, who have endorsed his smears). Further, another conservative, Miguel Estrada, whose own nomination battle Painter tried to use in support of Liu, has emphatically condemned Liu's mudslinging against the Roberts and Alito nominations.

At this point, it should be clear that it would be reckless at best for anyone to accept Painter's propositions at face value. I am not arguing that the reader must accept my word on Painter (or Bolick's or Yoo's) or on Liu. Rather, the interested reader should carefully examine the competing accounts (both on the matters that Bolick identifies above and on those he doesn't address) and determine who has argued responsibly and effectively and who hasn't. I am confident of the judgment that the intelligent and fair-minded reader will reach.

CONFUSED AMAR/STARR LETTER IN SUPPORT OF GOODWIN LIU

(By Ed Whelan)

Law professors Akhil Reed Amar and Kenneth W. Starr have sent the Senate Judiciary Committee a badly confused letter in support of Goodwin Liu's nomination to the Ninth Circuit. The core of their letter is dedicated to the proposition that Liu has ''independence and openness to diverse viewpoints as well as [the] ability to follow the facts and the law to their logical conclusion, whatever its political valence may be'' (or, as they later put it, the ''ability to discharge faithfully an abiding duty to follow the law'').

Amar and Starr offer two examples in purported support of their proposition, but neither helps. First, they cite Liu's limited support of school-choice programs. As I've explained, Liu supports school-choice programs only insofar as they advance racial quotas. Once one understands that (and there's no indication that Amar and Starr do), it's difficult to see how Liu's position on school choice evidences his ''independence and openness to diverse viewpoints,'' and his position certainly has no relation to his supposed ''ability to follow the facts and the law to their logical conclusion.''

Second, Amar and Starr cite Liu's correct prediction that the California supreme court would uphold Proposition 8 ''under applicable precedents'' (their phrase). They assert

that his correct prediction shows that Liu ''knows the difference between what the law is and what he might wish it to be.'' But this is a glaring non sequitur. Liu wasn't stating how he would rule; he was predicting how the California supreme court would. Moreover, in an op-ed, Liu stated that the challenge to Proposition 8 was a ''good argument, but one that faces difficult precedents,'' and he argued that ''there are good reasons for the California Supreme Court to rethink its jurisprudence in this area.'' So much for his ''know[ing] the difference between what the law is and what he might wish it to be.''

Amar's and Starr's assertion of Liu's ''ability to follow the facts and the law to their logical conclusion'' is also curious, as it's not really his ''ability'' that anyone has questioned. It's his willingness and commitment. Further, anyone familiar with Liu's gauzy constitutional theorizing would recognize that the whole concept of following the law doesn't have much substance in his framework. Take, for example:

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 difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.

It is, of course, theoretically possible that someone who advocates a freewheeling judicial role could himself be quite scrupulous in following a whole body of precedent that he detests. But Amar and Starr provide zero reason for anyone to believe that Liu would carry out the judicial role in that manner, and there is nothing in his record to support speculation that he would.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I have listened to a lot of the debate about Professor Liu, and having sat in on the hearings with him, having met with him, having gone through the whole record, I sometimes wonder who this is everybody is talking about. It is not the man I heard from, the man who testified under oath and had to speak very candidly, very honestly about his positions. He is a man who is admired by legal thinkers and academic scholars from across the political spectrum.

He has spent his career in public service, private practice, and as a teacher since receiving degrees from Stanford University and Yale Law School. He is a Rhodes scholar. After law school, Professor Liu clerked for DC Circuit Judge David Tatel, and Supreme Court Justice Ruth Bader Ginsburg. No one can question his intellect or his qualifications. He should be treated with respect and admired, not maligned and caricatured. His honest testimony during two hearings before the Judiciary Committee should be credited, rather than ignored.

Professor Liu's parents, wife, children, friends and community are justifiably proud of him and have looked forward to his confirmation to the court of appeals since he was first nominated in February 2010. We saw his beautiful children at each of his two confirmation hearings—indeed, the first was born only weeks before his first hearing and was nearly a year old at his second. The son of Taiwanese immigrants, Professor Liu would bring much-needed diversity to the Federal Bench. There is no Asian Pacific American judge on the Ninth Circuit Court of Appeals, which, of course, includes California and Hawaii and a number of Western States.

If we look at the record, Professor Liu is a nominee with significant support from across the political and ideological spectrum. Among the letters I will have printed in the RECORD is one from Kenneth Starr, the former Solicitor General during President George H. W. Bush's administration. For those who have may have forgotten, he was the independent counsel who investigated President Clinton during the Clinton administration.

He and distinguished Professor Akhil Amar wrote:

[I]t is our privilege to speak to his qualifications and character, and to urge favorable action on his nomination in the discharge of your constitutional duties of advice and consent. In short, Goodwin is a person of great intellect, accomplishment, and integrity, and he is exceptionally well-qualified to serve on the court of appeals. The nation is fortunate that he is willing to leave academia to engage in this important form of public service.

We also heard from Clint Bolick, who is the director of the conservative Goldwater Institute, named after a former colleague of mine, Barry Goldwater. He said:

Having reviewed several of his academic writings, I find Professor Liu to exhibit fresh, independent thinking and intellectual honesty. He clearly possesses the scholarly credentials and experiences to serve with distinction on this important court.

A bipartisan group of eight chief corporate executives who know Professor Liu from his service on the Stanford University Board of Trustees recently wrote to the Senate in support of Professor Liu's nomination:

In short, Goodwin's strengths are exactly what we expect in a judge: objectivity, independence, collegiality, respect for differing views, sound judgment. Goodwin possesses these qualities on top of the brilliant legal acumen that is well-established by his professional record and the judgment of those most familiar with his scholarly work.

I ask unanimous consent that these letters be printed in the RECORD at the conclusion of my statement.

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

(See exhibit 1.)

Mr. LEAHY. I could put in the RECORD many more from the broad set of preeminent lawyers, organizations, and leaders in the academic world who support this nomination. Professor Liu's nomination merits our support, not this filibuster.

The Senate should vote on this nomination. In 2005, when the Republican majority threatened to blow up the Senate to ensure up-or-down votes for each of President Bush's judicial nominations, Senator MCCONNELL, then the Republican whip, said:

Any President's judicial nominees should receive careful consideration. But after that debate, they deserve a simple up-or-down vote. . . . It's time to move away from advise and obstruct and get back to advise and consent. The stakes are high . . . . The Constitution of the United States is at stake.

Other Republican Senators made similar statements back then. Many declared that they would never support the filibuster of a judicial nomination. Some have tried to stay true to that vision and principle. That is why the filibuster against Judge Hamilton failed and that against Judge McConnell was ended. This filibuster should also be ended.

Now the Senators, many of whom are still serving on the other side of the aisle, claim to subscribe to a standard that prohibits filibusters of judicial nominees, except in ''extraordinary circumstances.'' None of them have shown there are any extraordinary circumstances here. The President has nominated an outstanding lawyer, supported by his home State Senators and favorably reported by a majority of the Senate Judiciary Committee. This nomination is to fill a vacancy, a judicial emergency, on the Ninth Circuit.

The 14 Senators who signed the Memorandum of Understanding in 2005, the then-Gang of 14, wrote about their ''responsibilities under the Advice and Consent Clause of the United States Constitution'' and that fulfilling their constitutional responsibilities in good faith meant that ''[n]ominees should only be filibustered under extraordinary circumstance.'' Well, let's be responsible. Let's bring it to a vote.

I had hoped 2 weeks ago, when 11 Republican Senators joined in voting to end the filibuster against Judge Jack McConnell of Rhode Island that the Senate was moving away from the narrow partisan attacks of judicial nominations that have slowed us almost from the day President Obama took office. Instead, for the sixth time since President Obama took office just over a couple of years ago, we have had to seek cloture to overcome a Republican filibuster of one of President Obama's well-qualified judicial nominations.

The 14 Senators who signed the Memorandum of Understanding in 2005 wrote about the need for the President to consult with Senators. Well, this President, unlike his predecessor, has been a model in that regard. Unlike President Bush, President Obama actually has consulted with both Republican and Democratic Senators in the home States. And unlike my predecessor, the Republican Chairman of the Judiciary Committee, I have not proceeded with any nominee against the wishes of a home State Senator. So apparently we have one rule if it is a Republican President and a Republican chairman of the committee, but everything changes if we have the nominees of a Democratic President. I protected Republican home State Senators. In return, I would expect Republican Senators to respect the views of other Senators, and to work with the President.

In 2005 they called for a return to our earlier practices and the reduction of rancor in the confirmation process and a return to the traditions of the Senate. I have worked very hard to do just that. I think of the vote on Janice Rogers Brown to the DC Circuit. She was a nominee who had argued that Social Security was unconstitutional, saying that ''[t]oday's senior citizens blithely cannibalize their grandchildren.'' I think most of us disagreed with her on that, but she got an up-or-down vote. They agreed to invoke cloture on the nomination of Priscilla Owen to the DC Circuit. Owen, a nominee whose rulings on the Texas Supreme Court were so extreme, they drew a condemnation of other conservative judges on that court. In fact, President Bush's White House counsel and later Attorney General, called one of her opinions an unconscionable act of judicial activism. But she was a Republican and she got a vote.

By the standard utilized in 2005 to end filibusters and vote on President Bush's controversial nominees, this filibuster should be ended and the Senate should vote on the nomination.

There were no ''extraordinary circumstances'' to justify the Republican filibuster of Judge David Hamilton, President Obama's very first judicial nomination. David Hamilton of Indiana was a 15-year veteran of the Federal bench. President Obama nominated Judge Hamilton in March 2009, after consultation with the most senior and longest-serving Republican in the Senate, Senator DICK LUGAR of Indiana, who then strongly supported the nomination. Rather than welcome the nomination as an attempt by President Obama to step away from the ideological battles of the past, Senate Republicans ignored Senator LUGAR's support, caricatured Judge Hamilton's record and filibustered his nomination. After rejecting that filibuster, Judge Hamilton was confirmed. The majority leader has had to file cloture on four other highly qualified judicial nominations, and now Professor Liu's nomination is the sixth.

No Senator could claim the circumstances surrounding the filibusters of President Obama's other circuit court nominations to be extraordinary. Republicans filibustered the nomination of Judge Barbara Keenan, a nominee with nearly 30 years of judicial experience, and who had been the first woman to hold a number of important judicial roles in Virginia. Once the filibuster was ended, she was ultimately confirmed 99–0 as the first woman from Virginia to serve on the Fourth Circuit.

Senate Republicans filibustered the nomination of Judge Thomas Vanaskie, despite his 16 years of experience as a Federal district court judge in Pennsylvania. That filibuster ended when the Senate agreed to vitiate the cloture, end the filibuster, and proceed to a vote. There were no extraordinary circumstances.

Last year, Senate Republicans filibustered the nomination of Judge Denny Chin, an outstanding judge with 16 years experience. They delayed his Senate consideration for months. There was no reason to do it. Finally, when that filibuster ended, the Senate proceeded to vote and confirm the only active Asian Pacific American judge serving on the Federal appellate court. The only one in all of our courts. This nominee is likewise deserving of a vote and not a partisan filibuster.

Following the recent filibuster of the nomination of Judge Jack McConnell to the district court in Rhode Island, this filibuster is the sixth time the majority leader has had to seek cloture to bring a judicial nomination to a vote.

I will say how it is unusual to have a second hearing on a nomination, at the request of Republican members of the committee. I said at the time that I hoped they would evaluate him fairly with open minds. Any Senator who listened to Professor Liu's answers during hours of questions at two confirmation hearings and considered his responses to hundreds of written followup questions—hundreds—should come away understanding this is an exceptional lawyer and scholar who will make an outstanding judge, a judge who respects the rule of law and reveres the Constitution.

Professor Liu's answers under oath and his reputation as a well-respected constitutional law professor paint a very different picture than the caricature created by the attacks from the special interest groups. Republican Senators did not wait for his hearing before declaring their opposition.

Senator FEINSTEIN noted at Professor Liu's first hearing over a year ago that he has an extraordinary legal mind and is a person of integrity. I agree. No fairminded person can or should question his qualifications, talent, or character. Nobody can doubt his temperament. Through hours and hours and hours of questioning, we saw his judicial temperament. Unlike some of the nominees supported by the other side, he actually answered the questions. He assured the committee time and time again that he understands the role of a judge and the need for a judge to follow the law and adhere to the rule of law. He met every test presented to him by Senators on the Judiciary Committee from either side of the aisle. He exceeds every standard we have used to measure judicial nominees.

Yet in the course of the debate on this nomination we have heard troubling and baseless attacks on Professor Liu's character and integrity. Incredibly, despite this nominee's testimony at two confirmation hearings and his answers to hundreds of written questions, he has been accused of lack of candor. Professor Liu has not been a stealth nominee. In fact, his record as a professor, public servant and advocate has been a remarkably open and public one. Senators have been able to review an unprecedented volume of information provided by this nominee and ask him hundreds of questions about it. He has been available to meet with Senators and many have taken him up on the opportunity. So accusations that Professor Liu has been less than candid are misplaced, and a decision to simply ignore his record, his testimony before the committee, and his assurances under oath that he understands the role of a judge and would follow precedent if confirmed is misguided.

The many letters of strong support we have received from conservatives and Republicans who have reviewed Professor Liu's record and know the nominee show the hollowness of the partisan attacks on Professor Liu's character. In their letter, Ken Starr and Professor Amar describe Professor Liu as, ''a person of great intellect, accomplishment and integrity.'' A bipartisan group of eight CEO's based their support for Professor Liu's nomination on their observation of ''his character and intellect.'' A bipartisan group of 22 leaders in education law, policy and research cited Professor Liu's ''independence and intellectual honesty'' as among the many of his exemplary traits leading them to support his nomination. Senators can in good faith oppose this nomination, though I disagree with them, but the attacks on a fine man's character have no place in this debate.

Nonetheless, each time the Judiciary Committee considered Professor Liu's nomination a total of three times—Republican Senators voted against. When Senators are not willing to give serious and open-minded consideration to nominations it reduces the hearings and committee process to a game of delay and partisan points-scoring. That, too, is wrong.

I urge Senators to reject the special interest pressure groups and to approach this nomination the way I approached a similar nomination of a law professor by President Bush, the nomination of Professor Michael McConnell to the Tenth Circuit. He was a widely regarded law professor. Like Professor Liu, Professor McConnell was nominated to a Federal appeals court without having first served as a judge. He was one of two dozen such nominations confirmed after being nominated by President Bush.

Professor McConnell's own provocative writings included staunch advocacy for reexamining the first amendment free exercise clause and the establishment clause jurisprudence. He had expressed strong opposition to Roe v. Wade and to the clinic access law, and he had testified before Congress that he believed the Violence Against Women Act was unconstitutional. Professor McConnell's writings on the actions of Federal District Court Judge John Sprizzo in acquitting abortion protesters could not be read as anything other than praise for the extralegal behavior of both the defendants and the judge.

Some thought Professor McConnell would turn out to be a conservative activist judge on the Tenth Circuit. I was concerned about his refusal to take responsibility for his harsh criticism of the Supreme Court's decision in the Bob Jones case. But I put faith in Professor McConnell's assurance that he understood the difference between his role as a teacher and an advocate and his future role as a judge. He assured us that he respected the doctrine of stare decisis, and that as a Federal appeals court judge he would be bound to follow Supreme Court precedent. I valued the fact that his home State Senator, Senator HATCH, supported him. The similarity there—except for the philosophy—is exactly the same with McConnell and Liu. McConnell was reported favorably by the Judiciary Committee with my support, and he was confirmed to the Tenth Circuit by the Senate just one day after his nomination was reported. We voted for McConnell. They want to stop Liu.

Numerous conservative legal scholars have praised Professor Liu's understanding of constitutional law, stating that it falls well within the mainstream of American legal thought. Nothing I have read or heard from Professor Liu gives me any reason to doubt his conviction about the critical importance of the rule of law as the guiding principle of judicial decisionmaking. As a professor he has done what great professors do—challenge our view of the law. But he has left no doubt that as a judge he would do what great judges do in applying the law fairly to each case.

I thank Professor Liu's home State Senators, Senator FEINSTEIN and Senator BOXER, for their staunch advocacy for his nomination. I also thank the many Senators who have come to the floor to speak in support of Professor Liu's nomination, including the majority leader, Senator REID, the assistant majority leader, Senator DURBIN, and Senators BLUMENTHAL, COONS, CARDIN, FRANKEN, and LIEBERMAN.

I hope Senators from both sides of the aisle will join me in ending the filibuster of Professor Liu's nomination. He has demonstrated a command of the law and devotion to it. He has shown that he understands the role of the judge and how it differs from his career as an advocate and an academic.

I hope every Senator will treat Professor Liu with the same fairness that we gave Professor McConnell, and give the same weight to Professor Liu's assurances that we gave to McConnell's identical assurances. Then the Senate will finally be able to consider and confirm this extraordinary nominee.

How much time remains?

The PRESIDING OFFICER. There is 13 minutes 30 seconds remaining.

EXHIBIT 1

MARCH 19, 2010.

Senator PATRICK J. LEAHY,
Chairman,
Senator JEFF SESSIONS,
Ranking Member, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: As your Committee considers the nomination of Goodwin Liu to serve on the U.S. Court of Appeals for the Ninth Circuit, it is our privilege to speak to his qualifications and character, and to urge favorable action on his nomination in the discharge of your constitutional duties of advice and consent. In short, Goodwin is a person of great intellect, accomplishment, and integrity, and he is exceptionally well-qualified to serve on the court of appeals. The nation is fortunate that he is willing to leave academia to engage in this important form of public service.

The Committee is no doubt familiar with Goodwin's personal story as the son of immigrants from Taiwan and his sterling record of achievements and accolades. We know Goodwin as a fellow teacher and scholar of the law; we have read some of his writings, and we have seen him speak in academic and public settings. What we wish to highlight, beyond his obvious intellect and legal talents, is his independence and openness to diverse viewpoints as well as his ability to follow the facts and the law to their logical conclusion, whatever its political valence may be. These are the qualities we expect in a judge, and Goodwin clearly possesses them.

Two examples help make the point. First, Goodwin (and his co-author Bill Taylor) wrote an article in Fordham Law Review in 2005 defending the use of school vouchers to provide better educational opportunities for children trapped in failing schools. The article provides a careful and candid review of the evidence on how vouchers have worked in practice, and it responds to the critics of vouchers in a direct and forceful way. We are fairly sure that this piece did not win Goodwin any friends in the liberal establishment, but it reflected his sincerely reasoned view about one way to improve the life chances of some of our most disadvantaged children. Goodwin's commitment to this issue brought him to Pepperdine in 2006 for a meeting organized by Clint Bolick, then president of the Alliance for School Choice. Given how far apart he and Clint are on other issues, Goodwin's enthusiastic participation in that meeting demonstrates his willingness to find common ground even with people who have quite different beliefs from his own.

A second example hits closer to home for one of us. In 2008, Goodwin joined an amicus brief by constitutional law professors in support of the plaintiffs who challenged California's marriage laws in the state supreme court. The court ruled for the plaintiffs, but in November 2008 the voters of California effectively reversed that ruling by enacting Proposition 8, a state constitutional amendment that limits marriage to opposite-sex couples. In October 2008, before Proposition 8 passed, Goodwin was called to testify at a joint hearing of the California Assembly and Senate Judiciary Committees on the legal issues raised by Proposition 8. He was asked to testify as a neutral legal expert (indeed, he was the sole witness tapped for that role), and on the core issue that later became the subject of a state constitutional challenge, Goodwin correctly forecasted that Proposition 8 would be upheld by the California Supreme Court under applicable precedents. Again, Goodwin's position, which he also stated in a Los Angeles Times editorial, could not have pleased his friends who sought to invalidate Proposition 8. But, as the example shows, Goodwin knows the difference between what the law is and what he might wish it to be, and he is fully capable and unafraid of discharging the duty to say what the law is.

As his academic colleagues, we would add a further point. Given what we know of Goodwin, it seems no accident that he was asked by his dean (literally before the ink was dry on his tenure review) to assume the role of associate dean. If Berkeley is like other law schools, the duties of that position include planning the curriculum and, importantly, serving as something of a catch-all for faculty requests and complaints. His appointment to that role is additional evidence of his reputation for collegiality, fairness, and good judgment.

In sum, you have before you a judicial nominee with strong intellect, demonstrated independence, and outstanding character. We recognize that commentators on all sides will be drawn to debate the views Goodwin has expressed in his writings and speeches. In the end, however, a judge takes an oath to uphold and defend the Constitution, and in the case of a circuit judge, fidelity to the law entails adherence to Supreme Court precedent and (apart from the en banc process) adherence to circuit precedent as well. Thus, 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. We support and urge his speedy confirmation.

Respectfully submitted,

AKHIL REED AMAR,
Sterling Professor of Law and Political Science, Yale Law School.

KENNETH W. STARR,
Duane and Kelly Roberts Dean and Professor of Law, Pepperdine University School of Law.

GOLDWATER INSTITUTE,
Phoenix, AZ, January 20, 2010.

Re Nomination of Goodwin Liu to Ninth Circuit.

Hon. ORRIN HATCH,
U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SEN. HATCH: I hope the new year is off to a good start for you.

I understand that the President will send to the Senate the nomination of Goodwin Liu to serve on the U.S. Court of Appeals for the Ninth Circuit. He is associate dean and professor of law at Boalt Hall at the University of California, and a former Rhodes Scholar and clerk to Justice Ruth Bader Ginsburg. Although Prof. Liu and I differ on some issues, I strongly support his nomination.

I have known Prof. Liu for several years, since reading an influential law review article he co-authored with William Taylor of the Citizens' Commission on Civil Rights supporting school choice as a solution to the crisis of inner-city public education. It took a great deal of courage and integrity for Prof. Liu and Mr. Taylor to take such a strong and public position. Subsequently, Prof. Liu participated in a program hosted by the Alliance for School Choice bringing together diverse supporters of expanded educational opportunities.

Having reviewed several of his academic writings, I find Prof. Liu to exhibit fresh, independent thinking and intellectual honesty. He clearly possesses the scholarly credentials and experience to serve with distinction on this important court.

Thank you for considering my comments, and I hope our paths cross soon. With all best wishes.

Very sincerely,

CLINT BOLICK,
Director.

MAY 17, 2011.

Hon. HARRY REID,
U.S. Senator, Hart Senate Office Building, Washington, DC.
Hon. MITCH MCCONNELL,
U.S. Senator, Russell Senate Office Building, Washington, DC.

DEAR SENATOR REID AND SENATOR MCCONNELL: We are a bipartisan group of eight business leaders who write in our personal capacities in support of University of California law professor Goodwin Liu's nomination to the Ninth Circuit Court of Appeals. We know Goodwin from his service on the Stanford University Board of Trustees, and having observed his character and intellect in the intimate setting of a high-level fiduciary board, we have no doubt that he would make a superb federal judge.

The Stanford Board of Trustees is the university's governing body. It is the custodian of the university's endowment and properties, and it sets the annual budget, appoints the president, and determines policies for operation and control of the university. Election to the board involves a rigorous screening process that considers an individual's temperament, collegiality, professional accomplishments, leadership abilities, and judgment, among other qualities. The 32 current trustees include leading venture capitalists, foundation and university presidents, and more than a dozen chairmen or CEOs of major corporations and private equity firms. The board meets five times a year for two days at a time, so board members get to know each other quite well.

Goodwin's election as a trustee is indicative of his professional stature and integrity, as well as his record of public service. Through the careful and confidential scrutiny involved in the board's screening process, Goodwin emerged as a person widely admired for his intellect, fairness, and ability to work well with people of differing views.

On the board, Goodwin has lived up to his reputation. Across a wide range of complex issues, Goodwin routinely asks thoughtful and incisive questions. He is good at thinking independently and zeroing in on important issues that need attention. 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. Given these qualities, it was no surprise that he was asked to chair the board's Special Committee on Investment Responsibility after serving just one year of his five-year term.

In short, Goodwin's strengths are exactly what we expect in a judge: objectivity, independence, collegiality, respect for differing views, sound judgment. Goodwin possesses these qualities on top of the brilliant legal acumen that is well-established by his professional record and the judgment of those most familiar with his scholarly work.

The confirmation of exceptionally qualified nominees like Goodwin should not be a partisan issue. We believe Goodwin deserves the support of Senators from both parties; at the least, he deserves a timely up-or-down vote. We are pleased to join the diverse range of individuals who endorse Goodwin's nomination and urge his swift confirmation.

Sincerely,

MARIANN BYERWALTER,
Chairman, JDN Corporate Advisory LLC.
STEVEN A. DENNING,
Chairman, General Atlantic LLC.
JOHN A. GUNN,
Chairman, Dodge & Cox.
FRANK D. LEE,
CEO, Dragonfly Sciences, Inc.
HAMID R. MOGHADAM,
Chairman and CEO, AMB Property Corporation.
RUTH PORAT,
Executive Vice President and Chief Financial Officer, Morgan Stanley.
RAM SHRIRAM,
Founding Board Member, Google, Inc.
JERRY YANG,
Co-Founder and Chief Yahoo, Yahoo!, Inc.

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

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

The minority leader is recognized.

Mr. MCCONNELL. Mr. President, over the past two years, our Nation has been engaged in a great debate about the kind of country we want America to be—a place of maximum liberty and limited government, or a place where no problem is too big or too small for the government to get involved.

This debate arose because of a President who made no apologies about wanting to move America to the left, and it continues today, despite widespread opposition to the President's policies, because of the President's clear determination to forge ahead.

But just as Rome wasn't built in a day, neither is President Obama's vision assured. Rather, it is a work in progress.

A big part of the President's plan was to put government in charge of our Nation's health care system.

Another part was making sure government calls the shots over private industry and elections—so much so that we are actually having a debate right now about whether businesses need to ask the White House's permission to move to another State, and whether private businesses should be forced to disclose political contributions in order to get a Federal contract.

And still another part of the President's vision involves the people he wants to put on our Nation's courts.

Do we want people who have reverence for the U.S. Constitution and who believe it means what it says or do we want people on our courts who care more about advancing an ideology that is antithetical to the Constitution than they do about upholding it.

This is the question Presidents need to ask themselves when it comes to judicial nominees. And I think this President's preference in this area is clear.

Based on some of the nominations we have seen, President Obama wants men and women on the courts who will advance his vision, who would expand the scope of government beyond anything the founders could have ever imagined.

Yet not until now has the Senate been asked to confirm someone who has so openly and vigorously repudiated the widely accepted meaning and purpose of the Constitution. And here I am referring, of course, to the nomination of Goodwin Liu to the Ninth Circuit Court of Appeals.

So this afternoon I would like to take a moment to explain why I believe it is so critically important that the Senate reject this nomination now by opposing cloture on it.

The first thing I would say about Mr. Liu is that I have nothing against him personally. No one disputes that he has a compelling personal story or that he is possessed of a fine intellect. But earning a lifetime appointment isn't a right, nor is it a popularity contest.

Rather, it is incumbent upon those of us who are required to vote on judicial nominees like him to evaluate each one of them closely—to examine their judicial philosophies, to look at their records, and to consider their temperaments. And that's just what we have done here. What have we found?

When it comes to Mr. Liu's record as a practicing lawyer, the first thing to say is that it is almost nonexistent. He has no prior experience as a judge and minimal experience actually practicing the law.

This means that in evaluating what kind of judge Mr. Liu would be, and in trying to determine his judicial philosophy, we are necessarily limited to what he has written.

And what do Mr. Liu's writings reveal? Put simply, they reveal a left-wing ideologue who views the role of a judge not as that of an impartial arbiter but as someone who views the bench as a position of power.

As recently as 2 years ago, Mr. Liu said he believed that the last presidential election gave liberals, as he put it, ''a tremendous opportunity to actually get [their] ideas and the progressive vision of the Constitution and of law . . . into practice.''

Here is an open acknowledgement by Mr. Liu that a judge should use his position to advance his own views. This is repugnant. Anyone who holds such a view as a judge would undermine the integrity of the courts.

And what are Mr. Liu's views?

In an article he published 3 years ago, Mr. Liu wrote that courts should interpret the U.S. Constitution as containing a right to education, shelter,

subsistence, and health care—a constitutional right. By this he meant that the courts should determine how ''particular welfare goods'' should be distributed rather than the people themselves, through the democratic process.

The point is that Mr. Liu appears to view the judge not as someone whose primary job is to interpret the Constitution but as someone whose lifetime tenure liberates him to advance his views of what the Constitution means and empowers him to impose it on others. In his view, it is the job of a judge to create new rights, regardless of what the Constitution says or what the American people, acting through the democratic process, want.

And while this philosophy may be popular on left-wing college campuses, it has no place whatsoever in a U.S. courtroom. Everyone who enters our courtrooms should have the assurance that judges will uphold their rights equally and that they won't overstep their bounds. Mr. Liu's writings provide no such assurance. On the contrary, they suggest a deeply held commitment to the view that the Constitution can mean pretty much whatever a judge wants it to, that judges can just make it up as they go along.

In Mr. Liu's court, the defendant couldn't expect to be protected by the Constitution and the laws, because the law is subject to the whim of the judge. This is precisely the opposite of what Americans expect in a judge. It also happens to be the opposite of what the Founders envisioned for the courts. As it says in Federalist 78, the Judiciary ''has neither force nor will, but merely judgment.''

Compare this with Mr. Liu, whose writings suggest again and again that a judge shouldn't look so much at the words of the Constitution when setting out to interpret it, as they should ''our collective values'' or our ''evolving norms''.

Let's be clear. It is the judge, in Mr. Liu's view, who will determine what ''norms'' are ''evolving,'' not the American people.

Clearly, the Constitution itself would take a backseat in his court.

Indeed, even a brief review of his writings suggests that, as a judge, Mr. Liu might very well accord greater respect to foreign law than he would to our own Constitution.

As he once wrote:

> The U.S. can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.

Again, this might fly in a left-wing classroom—but it is cold comfort to those who look to the courts for equal justice under the law. Americans shouldn't have to wonder when they walk into an American courtroom which Nation's laws they will be judged under.

So, as I see it, there is no question, based on his writings, that Mr. Liu's judicial philosophy is completely antithetical to the judicial oath that he would be sworn to uphold.

Upon his own nomination to the bench, Professor Liu has sought to distance himself from his legal writings. He has also told the judiciary committee that he stands by them. Well, he can't have it both ways. And as others have pointed out, if we can't go by what Professor Liu has written, there is nothing left upon which to evaluate him.

On the question of qualifications, Mr. Liu just doesn't have much legal experience outside of the classroom. And while no one is saying teachers can't be good judges, this particular teacher's judicial philosophy, as evidenced by his writings, is so far outside the mainstream that anyone who believes in the primacy of the U.S. Constitution should be deeply troubled by the prospect of his appointment to the court.

I believe this nominee is precisely the kind of judge we want to prevent from getting on the bench. He should not be confirmed. I will vote against cloture. I urge my colleagues to do the same.

I yield the floor and 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. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SANDERS). Without objection, it is so ordered.

Mr. REID. Mr. President, I will use leader time to give my remarks. I ask unanimous consent that as soon as I have finished my remarks, the vote go forward.

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

Mr. REID. Mr. President, 2 days ago I came to the floor to talk about the nomination of Goodwin Liu, an extremely well-qualified, fairminded, and widely respected legal scholar. The President has nominated him to serve his country on the U.S. Court of Appeals for the Ninth Circuit.

All week, this body has heard speeches about Mr. Liu's merits, so I will repeat them only briefly. He was a Rhodes Scholar and clerked on the U.S. Supreme Court. He served as associate dean at the California Berkeley School of Law and is a professor there right now. He has done a lot of pro bono work and even helped launch AmeriCorps. On top of all that, he has lived the American dream. He is the highly successful son of immigrants.

His integrity has been praised by Democrats and Republicans, not just one or two but many. Former Republican Congressman—and a very conservative Congressman—Bob Barr commended Liu's commitment to the Constitution. One of President Bush's former lawyers said Liu falls within the mainstream. Even Ken Starr, the Whitewater special prosecutor, endorsed this man who served in the Clinton administration.

The record is clear. Any claims that Goodwin Liu is anything but deserving of our confirmation is simply inaccurate. But I recognize every Senator has the right to vote how he or she feels they should vote. It is worth noting, however, that the vote before us now is not a vote to confirm him; it is a vote on whether he deserves an up-or-down vote. There is no question he does deserve an up-or-down vote.

A simple up-or-down vote is hardly a controversial request. This is not only my view and the view of my fellow Democrats, it is a view of my Republican friends as well. In a 2004 Law Review article, one of our Republican colleagues, the junior Senator from Texas and longtime member of the Texas Supreme Court, wrote the following:

> Wasteful and unnecessary delay in the process of selecting judges hurts our justice system and harms all Americans. It is intolerable no matter who occupies the White House and no matter which party is in the majority party in the Senate . . . Filibusters are by far the most virulent form of delay imaginable.

The junior Senator from Texas is in the Chamber today. We will see if he still feels that way or if he will, in his own words, hurt our justice system and harm all Americans with intolerable virulent delays. We will carefully be watching how he votes.

We will also be carefully watching another Republican Senator, the senior Senator from Tennessee, who said this in 2005:

> I pledged, then and there, I would never filibuster any President's judicial nominee, period. I might vote against them, but I will always see them come to a vote.

The senior Senator from Tennessee is here today. ''Never'' is about as unambiguous as it gets. We will be watching to see if he upholds his public pledge.

A third Republican Senator, the junior Senator from Georgia, said this in 2005:

> I will vote to support a vote, up or down, on every nominee, understanding that, were I in the minority party or the issues reversed, I would take exactly the same position because this document, our Constitution, does not equivocate.

The junior Senator from Georgia will be voting this afternoon. Now, as he predicted, he is in the minority and the issue is reversed. We will see if, as he promised, he will take the same position or if he will equivocate.

Here is a fourth. Four years ago, another Republican Senator, the senior Senator from Utah, former chairman of the Judiciary Committee, said this on this floor:

> We may not use our role of advise and consent to undermine the President's authority to appoint judges . . . It is wrong to use the filibuster to defeat judicial nominees who have majority support, who would be confirmed if only we could vote up or down. That is why I have never voted against cloture on judicial nominations.

Yet another pledge never to vote against cloture on a judicial nomination. That is four. There are more.

That is precisely the vote before us now. We will be watching to see if the senior Senator from Utah follows his own counsel or if he, in his own judgment, undermines the authority of the President of the United States.

These pledges were made publicly and plainly. In a court of law, they would be considered pretty clear evidence. It does not take the great legal mind of a Goodwin Liu to recognize that simple principle.

We have heard the promises. Now we will hear the votes.

CLOTURE MOTION

The PRESIDING OFFICER. By unanimous consent, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of Goodwin Liu, of California, to be United States Circuit Judge for the Ninth Circuit.

Harry Reid, Patrick J. Leahy, Charles E. Schumer, Richard Blumenthal, Daniel K. Akaka, Al Franken, Richard J. Durbin, Sheldon Whitehouse, Dianne Feinstein, Jeff Merkley, Christopher A. Coons, Mark Begich, Amy Klobuchar, Barbara Boxer, Jack Reed, Debbie Stabenow, Sherrod Brown.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that the debate on the nomination of Goodwin Liu, of California, to be United States Circuit Judge for the Ninth Circuit shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Montana (Mr. BAUCUS) is necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from Texas (Mrs. HUTCHISON), the Senator from Kansas (Mr. MORAN), and the Senator from Louisiana (Mr. VITTER).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 52, nays 43, as follows:

[Rollcall Vote No. 74 Ex.]

YEAS—52

Akaka	Franken	McCaskill
Begich	Gillibrand	Menendez
Bennet	Hagan	Merkley
Bingaman	Harkin	Mikulski
Blumenthal	Inouye	Murkowski
Boxer	Johnson (SD)	Murray
Brown (OH)	Kerry	Nelson (FL)
Cantwell	Klobuchar	Pryor
Cardin	Kohl	Reed
Carper	Landrieu	Reid
Casey	Lautenberg	Rockefeller
Conrad	Leahy	Sanders
Coons	Levin	Schumer
Durbin	Lieberman	Shaheen
Feinstein	Manchin	Stabenow
Tester	Warner	Wyden
Udall (CO)	Webb	
Udall (NM)	Whitehouse	

NAYS—43

Alexander	DeMint	McConnell
Ayotte	Enzi	Nelson (NE)
Barrasso	Graham	Paul
Blunt	Grassley	Portman
Boozman	Heller	Risch
Brown (MA)	Hoeven	Roberts
Burr	Inhofe	Rubio
Chambliss	Isakson	Sessions
Coats	Johanns	Shelby
Coburn	Johnson (WI)	Snowe
Cochran	Kirk	Thune
Collins	Kyl	Toomey
Corker	Lee	Wicker
Cornyn	Lugar	
Crapo	McCain	

ANSWERED ''PRESENT''—1

Hatch

NOT VOTING—4

Baucus	Moran
Hutchison	Vitter

The PRESIDING OFFICER. On this vote, the yeas are 52, the nays are 43, and 1 Senator responded ''Present.'' Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

● Mr. MORAN. Mr. President, today, I was unavoidably absent for vote No. 74 on cloture for the nomination of Goodwin Liu, of California, to be a U.S. circuit judge for the Ninth Circuit. I was in my home State of Kansas at the time of the vote. Had I been present, I would have voted to oppose the invoking of cloture on the nomination.●

The PRESIDING OFFICER. The Senator from Illinois.

LEGISLATIVE SESSION

Mr. DURBIN. Mr. President, I ask unanimous consent the Senate resume legislative session.

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

MORNING BUSINESS

Mr. DURBIN. I ask unanimous consent the Senate proceed to a period of morning business until 6 p.m., with Senators permitted to speak for up to 10 minutes each.

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

The Senator from Nebraska.

PENDING TRADE AGREEMENTS

Mr. JOHANNS. Mr. President, I come to the floor this afternoon during World Trade Week to urge President Obama to submit pending free-trade agreements: Korea, Panama, and Colombia. I hope this is the last time I come to the floor on this issue until we are actually debating these job-creating agreements, but I must admit I feel as though I am holding my breath.

Mr. President, 1,420 days have passed since the U.S.-Korea Free Trade Agreement was signed; 1,422 days have passed since we signed an agreement with Panama, and it has been 1,640 days since we completed negotiations with our close ally, Colombia.

We have heard the administration tout the job-creating benefits of the agreements, so why more roadblocks? Our unemployment rate is nearly 10 percent. Our workers deserve a consistent message on job creation from this administration. It has been over a month since President Obama and the President of Colombia made an announcement. The announcement was that negotiations had been completed, I might add, yet again. I was relieved that President Obama finally announced there was an agreement and that there was a need to complete the long overdue agreement.

I am confident the agreement brought to the Senate and the House would finally win bipartisan support, and I still am today. In fact, over a month ago, in the Wall Street Journal, my colleagues, Senators BAUCUS and KERRY, called for Congress to ''restore a broadly-shared bipartisan consensus on trade.'' Now the administration seems to be moving the goalposts, suggesting continued delay. They are trying to hold up these agreements to force us to make spending increases that were contained in the ill-fated economic stimulus bill.

During the challenging economic times that our Nation has endured, we should all be doing all we can to exert every single ounce of energy to get our economy moving again and create jobs. This is not done by heavyhanded government, massive new spending, and new entitlements when our current programs are unsustainable. It is accomplished by lowering and removing barriers to our job creators so they can flourish. Korea, Panama, and Colombia all have much higher barriers to our exports than we have to their imports. These three bipartisan votes should have been near the top of the agenda 2 years ago. By now we should be voting on new agreements that this administration has negotiated, not the leftovers from the previous administration.

We will need an even greater focus on leveling the playing field through trade agreements if we are going to double our exports in the next 5 years, which is the goal the President has set. Yet the administration, claiming that reopening negotiations with Korea, Colombia, and Panama was necessary, continues to talk through these agreements. I am not saying every single agreement before us, or hopefully before us, is perfect. No agreement ever is. However, let's not forget that these agreements were originally negotiated in good faith between allies. What does this delay do to our reputation as a reliable negotiating partner?

Back where I come from in Nebraska, a lot of business is still done with a handshake. We trust our neighbors because they are good people with good values. But if one makes a deal with someone and shakes on the deal and they keep changing the terms or delaying the followthrough, one tends to stop dealing with those people. I sure hope that does not happen to us.

The fastest growing opportunities for American businesses, farms, and ranches are outside of our borders. Our greatest opportunities are overseas in rapidly developing countries. I fear that these long delays have hurt our ability, the ability of our government to negotiate high-quality trade agreements. But, most importantly, it has hurt the ability of Americans to compete in these growing marketplaces.

Let's not pretend this delay has not cost American workers. Since the Colombia agreement was initially signed all those days ago, our businesses and our agricultural producers have paid nearly $3.5 billion in tariffs for goods exported. That is enormous, especially when we consider that the U.S. International Trade Commission estimates that an American job is supported for every $166,000 in exports.

Instead of wasting money on tariff payments, the U.S. manufacturing and agricultural sectors could have spent billions of dollars creating jobs at home.

I hope we can soon get past the continued delays and the administration can signal to us that they are serious about doubling exports in 5 years.

On July 1, less than 2 months away from now, the trade agreement between the European Union and South Korea goes into effect. It is also the date that the FTA between Canada and Colombia goes into effect. The negotiators for other countries are watching the United States, and they have seen a lack of trade policy. They have seen a change here, and they are doing everything they can to fill that vacuum with negotiated and approved agreements. Now our exporters will face even greater competition when our trade agreements are approved, and hopefully they will be.

The President said it very well in his State of the Union Address:

> If America sits on the sidelines while other nations sign trade agreements, we will lose the chance to create jobs on our shores.

That is exactly what is happening. I will give one example. In 2007 American wheat farmers supplied Colombia with almost 70 percent of the wheat market, even though they faced tariffs of 10 to 35 percent. By 2010 our wheat farmers' share of the market had dropped to 46 percent. Where did that business go?

Meanwhile, Canada's share grew from 24 to 33 percent. That percentage will skyrocket when Canadian farmers can export their products duty free on July 1. Our wheat farmers may effectively be shut out of a market that they dominated at one point in time.

Americans who are out of work know firsthand that an opportunity is being missed. Nebraska farmers, businesses, workers, those across the country know we can compete with anyone given a level playing field. After the absence of leadership on trade in Washington during the last 2 years, though, the job of competing is harder and harder.

In proclaiming this week as World Trade Week, the President noted the connection between the global economy and prosperity in our own country. ''To ensure our success,'' he called for ''a robust, forward-looking trade agenda that emphasizes exports and domestic job growth.'' It is disappointing that the positive steps forward we have seen over the past few months have slowed in recent days, and we just cannot afford more setbacks.

I look forward to working with the administration over the next 2 years on forward-looking trade efforts. Real progress forward would produce great opportunity in our country, but we have to get this work done first. Therefore, it is my hope that the President will bring to us, without delay, the Korea, Panama, and Colombia Trade Agreements for us to vote yes.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BROWN of Ohio. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

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

FREE-TRADE AGREEMENTS

Mr. BROWN of Ohio. Mr. President, I appreciate the words of the Senator from Nebraska about these trade agreements. I take them at face value. I know he means well. I know he believes these trade agreements help the American people.

I also know every time there is a major trade agreement in front of this Congress—the Presiding Officer's first one, I believe, and mine, was something called the North American Free Trade Agreement. They promised and promised, saying there would be all kinds of jobs and our trade surplus would grow; that it would be not just more jobs but better paying jobs. It did not quite work out that way with NAFTA.

Then they did the same kind of promise and overpromise with PNTR, normal trade relations with China. In Mexico with NAFTA we had a trade surplus not too many years before NAFTA was signed, and it turned into a multibillion-dollar trade deficit.

With China we had a small trade deficit. A deficit in trade means we buy more from that country than we sell to that country. President Bush said a $1 billion trade surplus or deficit turns into—he had different estimates, but between 13,000 and 19,000 jobs is what he used to say. Whether or not that is precise is a bit beside the point. The point is, if we are selling a lot more than we are buying, it is going to create jobs in our country. If we are buying a lot more than we are selling, we are going to lose manufacturing jobs.

We went to literally hundreds of billions of dollars in trade deficit with China after PNTR. If we go into any store in the country we see the number of products made in China that used to be made in Vermont or Ohio or Michigan or Pennsylvania or Mississippi or wherever. So we know with these trade agreements, every time they come to the floor the promise is they are going to create jobs for Americans. They did it with NAFTA. They did it with PNTR with China. They did it with the Central American Free Trade Agreement. Now they are saying the same thing with South Korea, Panama, and Colombia, that it is going to create American jobs. Well, it doesn't ever. Maybe the theory is good. I don't think the theory is very good, but maybe it is, but it doesn't seem to work out that way.

I urge my colleagues to listen to what these supporters of trade agreements say, to be sure; trust but verify. Ask the tough questions: Why is this going to create more jobs? We know the cost of the South Korea trade agreement is literally $7 billion. It is going to cost us a lot of money. They are not paying for it. These fiscal conservatives here don't want to take away the subsidies from the oil industry. They also don't want to pay for the trade agreement that is going to cost us $7 billion, plus the lost jobs that come about as a result.

We know what these lost jobs mean to Mansfield, OH. We know what they mean to Sandusky and Chillicothe and Cleveland and Dayton, proud cities with a proud middle class that have seen these manufacturing jobs so often go straight to Mexico, go straight to China, go straight to countries all over the world after we sign these trade agreements or after we change these rules about trade.

At a minimum, I have asked the President of the United States by letter, with 35 or so Senators who also signed this letter—and we will release it and send it to the President tomorrow—underscoring the President's commitment and the commitment of the U.S. Trade Representative, Ambassador Kirk, and the President's economic adviser, Gene Sperling, who said they will not send these free trade agreements to the Congress until the President has had an opportunity to sign trade adjustment assistance.

Trade adjustment assistance simply says when you lose your job because of a trade agreement, you at least are eligible for assistance for job retraining. To me, the problem is the trade agreements and they are costing us jobs. But at a minimum, the great majority of Democratic Senators here understands, along with the President, that we don't pass these trade agreements without helping these workers who are going to lose their jobs.

To me, it is a little bit counterintuitive: Why pass these trade agreements at all if we expect job loss to come from them. But the other side of the argument is that jobs will increase overall, although it doesn't seem to work that way. But everybody knows some people are going to lose jobs as a