

April 12, 2010

The Honorable Patrick J. Leahy, Chairman
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United States Senate
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The Honorable Jeff Sessions, Ranking Member
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Re: Nomination of Goodwin Liu for the United States Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Senator Sessions:

We are former prosecutors who currently teach criminal law, criminal procedure and evidence. Because we care deeply about the fairness and effectiveness of criminal justice—because it is a lifelong professional commitment for each of us—we are particularly disturbed by the suggestion that Professor Goodwin Liu’s nomination to the United States Court of Appeals for the Ninth Circuit should be rejected because of his views on the death penalty.

Professor Liu has written very little about the death penalty. His academic specialties lie elsewhere. Five years ago, though, he co-authored a 14-page paper for the American Constitution Society on the death penalty opinions of then-Judge Samuel Alito. Professor Liu and his co-author concluded that those opinions raised “serious concerns” about Judge Alito’s nomination for the Supreme Court. It has now been suggested that this short paper casts doubt on Professor Liu’s fitness for the bench. A fair reading of the paper shows otherwise.

Professor Liu and his co-author read the ten capital cases in which then-Judge Alito had participated while on the United States Court of Appeals for the Third Circuit. Five of those cases were decided unanimously. Professor Liu and his co-author focused on the other five, because they involved “the kind of contested issues and judgment calls” commonly presented to

the Supreme Court. Judge Alito had voted to uphold the death sentence in each of the five contested cases, and Professor Liu and his co-author concluded that the cases, taken as a whole showed “a troubling tendency” by Judge Alito “to tolerate serious errors in capital proceedings.” Death penalty cases, they argued, “require judges to exercise utmost care and vigilance in ensuring due process of law.”

The first of the contested cases was *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997). The Third Circuit invalidated the death sentence because the jury instructions had not made clear, as everyone agreed they should have, that the jury needed to find that the defendant had intended to kill or to assist in a killing. Judge Alito dissented; he argued that the jury instructions were adequate, and that, in any event, the defendant may have waived the objection by not raising it earlier. Professor Liu and his co-author agreed with the majority that this view was too tolerant of loose and defective instructions, and that it was inappropriate to raise the issue of waiver, because the state itself had never raised that objection to the defendant’s argument.

It bears reiteration that Professor Liu’s position on *Smith v. Horn* was the *majority* position when the Third Circuit decided the case. The two judges constituting the majority, moreover, were Judge Mansmann and Judge Cowen, both former prosecutors appointed to the bench by President Ronald Reagan. Their view of the case—the one that Professor Liu and his co-author endorsed—carefully balanced the interests of finality, and respect for the state’s judicial processes, with a commitment to ensure that no one was wrongfully executed. It was a completely reasonable position, and one the court as a whole declined to reconsider *en banc*.

The second of the contested cases addressed by Professor Liu and his co-author was *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001). This is a case in which the Third Circuit, sitting *en banc*, invalidated a death sentence of a black defendant in part because of indications of racial bias in the selection of the all-white jury, and in part because of inappropriate and potentially misleading remarks by the prosecutor, suggesting to the jury that the final decision to impose the death penalty would be made by the state supreme court, not by the jury. Judge Alito took the position that the evidence of racial discrimination was too weak to warrant relief, and that the prosecutor’s remarks conveyed no improper suggestion. Judge Liu and his co-author agreed with the *en banc* majority that Judge Alito’s opinion “minimize[d] the history of discrimination against prospective black jurors and black defendants” and that the prosecutor’s remarks could well have misled the jury about the scope of appellate review of a death sentence.

Here, as well, Professor Liu’s position was the position of the Third Circuit *majority*. Among the judges who took that position were Judge Mansmann, Judge Nygaard (also appointed by President Reagan), Judge Roth (appointed to the federal bench by President Reagan and elevated to the Third Circuit by President George H.W. Bush), and Judge McKee (a former federal prosecutor). The opinion joined by these judges, and embraced by Professor Liu and his co-author, was anything but radical. It carefully applied Supreme Court precedents that require prosecutors to provide a convincing, race-neutral explanation for an apparent pattern of systematically excluding African-Americans in jury selection.

The third contested case addressed by Professor Liu and his co-author was *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004). In a 2-1 panel decision, with a majority opinion written by Judge Alito, the Third Circuit refused to set aside a death sentence, despite the failure by the defendant's lawyers to examine available records containing evidence of the defendant's troubled childhood and limited mental capacity. The Supreme Court reversed, reasoning that the defense attorneys provided constitutionally inadequate assistance when they failed to examine readily accessible court files on which they knew the prosecutors would rely. The majority opinion was written by Justice Souter, and joined by Justice Stevens, Justice O'Connor, Justice Ginsburg, and Justice Breyer. Professor Liu and his co-author faulted Judge Alito for failing to acknowledge, as the Supreme Court later did, that any minimally competent defense attorney would examine "a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking." *Rompilla v. Beard*, 545 U.S. 374, 388 (2005). Justice O'Connor, who provided the swing vote, joined the majority opinion and also wrote a separate concurrence, stressing the factors that collectively made the performance of defense counsel constitutionally deficient: they "knew that their client's prior conviction would be at the very heart of the *prosecution's* case," the prosecutor's use of the conviction "threatened to eviscerate" one of their primary arguments for mitigation, and the failure to obtain and examine the case file resulted from inattention, not from a strategic decision. Professor Liu's position on *Rompilla* was the position of a *majority* of the Supreme Court.

The fourth and fifth contested cases addressed by Professor Liu and his co-author were *Flamer v. Delaware*, 68 F.3d 736 (3d Cir. 1995), and another Delaware capital case with which it was consolidated for review, *Bailey v. Snyder*. In each of these cases, the jury had indicated that one of the statutory "aggravating factors" on which it relied in recommending the death penalty was the "outrageously or wantonly vile, horrible, or inhuman" nature of the murder. The Delaware Supreme Court later declared that factor unconstitutionally vague, and the central question on appeal in *Flamer* and *Bailey* was whether that development invalidated the death sentences.

Everyone agreed that it did so, under the Supreme Court's precedents, if the juries were limited to statutory factors in deciding whether to recommend death, but not if the juries were free to consider any factors in reaching their decision. Officially, Delaware juries were free to consider any factors in recommending a sentence of death (as long as the jury found at least one aggravating factor, making the defendant "eligible" for the death penalty). However, the juries in *Flamer* and *Bailey* had been instructed to indicate "which statutory aggravating circumstance or circumstances were relied upon." Judge Alito, writing the majority opinion for the Third Circuit sitting *en banc*, "strongly disapprove[d]" of this jury instruction, because it was "potentially misleading" and needlessly confusing. But he was unpersuaded that it would have led the juries to place inappropriate weight on the statutory list of aggravating factors. Four dissenting judges disagreed.

Professor Liu and his co-author agreed with the dissenters that the jury instructions in *Flamer* and *Bailey* created a serious risk of sentencing error. The point of procedure on which Professor Liu focused was not minor or unimportant; it was the center of the controversy when the Third

Circuit considered *Flamer* and *Bailey*. That was why the Third Circuit consolidated the cases. And the issue that troubled Professor Liu and his co-author was the same one that led four judges of the Third Circuit to dissent in *Flamer* and *Bailey*—including Judge Mansmann, Judge McKee, and Judge Lewis (a former federal prosecutor, appointed to the federal bench and later elevated to the Third Circuit by President George H.W. Bush).

Nothing, therefore, in Professor Liu’s short, co-authored paper on the death penalty opinions of then-Judge Alito suggests that Professor Liu is an extremist on capital punishment—unless Judge Cowen, Judge McKee, Judge Lewis, Judge Mansmann, Judge Nygaard, Judge Roth, and Justice O’Connor are all extremists as well. Nothing in this paper suggests that Professor Liu is out of the mainstream in his approach to the death penalty—unless the Supreme Court and the Third Circuit are also out of the mainstream. Nothing in the paper even comes close to indicating that Professor Liu would be unprincipled or result-oriented in capital cases—unless it is unprincipled and result-oriented to believe that these cases “require judges to exercise utmost care and vigilance in ensuring due process of law.”

Those of us who know Professor Liu professionally can say with confidence that he would be a truly exemplary judge. What *all* of us can say with confidence, even those who do not know Professor Liu, is that nothing in his co-authored paper on then-Judge Alito’s death penalty decisions provides any reason to doubt that he would be a superb addition to the Ninth Circuit.

Sincerely,

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