

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
April 16, 2010

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On Judicial Nominations
April 16, 2010

Today, the Committee finally welcomes two of President Obama's nominees to fill vacancies on the Federal bench in California, Professor Goodwin Liu, nominated to fill a vacancy on the Ninth Circuit, and Magistrate Judge Kimberly Mueller, nominated to a judgeship in the Eastern District of California. These nominees were prepared to appear before the Committee March 24, and I was disappointed that Republicans employed a seldom-used procedural rule at the last minute to prevent them from appearing. They and their families had traveled across the country, and have done so again to appear today. I welcome them at last to the Committee.

I also look forward to hearing from the other nominees before the Committee today: Catherine Caldwell Eagles, nominated to a seat on the Middle District of North Carolina, and who's nomination is supported by Senator Hagan and Senator Burr; and two nominees to seats in the District of South Carolina, Richard Mark Gergel and J. Michelle Childs, both of whom are supported by Senator Graham, a member of this Committee.

I thank Senator Feinstein for chairing this important hearing today. Committee Republicans have requested that we delay Professor Liu's hearing a third time. I first accommodated their request not to schedule it until the end of March; it was delayed a second time through the use of the two-hour rule. As was noted yesterday at our business meeting, delaying this hearing yet again would have permitted an extension of the weeks of unanswered attacks on Professor Liu and his record. Those attacks should not continue.

Professor Liu has not been a stealth candidate. He has produced voluminous materials. Committee members have had more than seven weeks to review this nominee's record. They have also had two weeks to review the small amount of new, supplemental materials provided by Professor Liu on April 5. Republican members seem to be applying a standard to President Obama's nominees that they did not demand of President Bush's, many of which provided far less detail about their records to the Committee than Professor Liu has provided. Contrary to suggestions that the April 5 supplement was extensive, that supplement contained less than two dozen unique items including comments in Professor Liu's own words. The remaining items were duplicates of already-submitted items, cursory updates, listings of events or news articles. Two weeks is more than sufficient time for a fair and thoughtful review of this small amount of information, especially as none of the new items presented new issues or unfamiliar topics from

those in the rest of Professor Liu's record, which he had previously provided to the Committee, and which could already serve as a basis for inquiry and questioning of the nominee.

This is especially true in light of Professor Liu's well-known record as a widely-respected constitutional law professor. As conceded by a Fox News commentator, Professor Liu's qualifications for the appellate bench are "unassailable." It has been apparent since he was nominated that Senate Republicans were familiar with his record, immediately declaring themselves "disappointed" by the President's nomination of Professor Liu and claiming that Professor Liu was "far outside the mainstream of American jurisprudence." This opposition was instantaneous and has continued. Republicans continue to try to prevent Professor Liu from appearing, from answering their questions, and from addressing their concerns. They are being unfair. Their obstruction has prevented him from addressing these questions, while the attacks continue. It is time to hear from Professor Liu.

The son of Taiwanese immigrants, Professor Liu would bring much-needed diversity to the Federal bench. There are currently no active Asian American Federal appeals court judges in the country. Judge Denny Chin of New York has been nominated to the Second Circuit, but Senate Republicans have stalled his nomination for over three months, despite his unanimous approval by the Senate Judiciary Committee. The Senate majority leader yesterday was forced to file cloture on his nomination.

Goodwin Liu is a widely-respected constitutional law professor with sterling credentials. He has a brilliant legal mind, and is admired by legal thinkers and academic scholars from across the political spectrum. Professor Liu 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 D.C. Circuit Judge David Tatel and Supreme Court Justice Ruth Bader Ginsburg.

I urge all Members of the Committee to treat Professor Liu fairly and to give serious and open-minded consideration to his nomination. This hearing is our opportunity to ask questions, and for Professor Liu to respond. Reflexive opposition risks rendering these hearings a meaningless roadblock and a source of delay, rather than an important component of the confirmation process. That would be an abuse of this process and wrong. I recall another widely-regarded law professor who appeared before our Committee as a nominee, University of Utah Professor Michael McConnell. Like Professor Liu, he was supported by a senior member of this Committee, Senator Hatch. Professor McConnell was nominated by President Bush to fill a seat on the Tenth Circuit. Professor McConnell's 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 extra-legal behavior of both the defendants and the judge.

Each of these issues was explored in connection with his hearing before this Committee. I had concerns that Professor McConnell would turn out to be a conservative activist 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.

I put faith in Professor McConnell's assurances that he understood the difference between his role as a teacher and 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 supported his nomination, as did other Democratic Senators. He was reported favorably by this Committee, and he was confirmed to the Tenth Circuit by voice vote in the Senate just one day after his nomination was reported.

I hope that Republican Senators serving on this Committee and in the Senate will apply these same standards to the nomination of Professor Liu, another brilliant law professor and advocate. I hope they will give the same credence to Professor Liu's assurances that he understands the proper role of a judge. I hope they will keep the same open mind kept by Democratic Senators in reviewing Professor McConnell's qualifications for the bench. I hope they will not apply a double standard to this extraordinary nominee.

Of course, Senate Republicans threatened to filibuster President Obama's judicial nominations before the President had made a single one. They insisted on filibustering the nomination of Judge David Hamilton of Indiana, a well-respected mainstream district court judge who had the support of Indiana Senator Dick Lugar, the senior Republican in the Senate. The same philosophy of delay forced the Senate to invoke cloture, a time consuming process, on the nomination of Justice Barbara Keenan of Virginia the Fourth Circuit. She was then confirmed by a vote of 99 to zero.

These filibusters and stalling tactics have been evident since President Obama took office. Indeed, 15 of the 18 Federal circuit and district court judges confirmed have been without opposition. Nonetheless, their confirmations have delayed and stalled. That lack of progress stands in stark contrast to this date in 2002, when a Democratic Senate majority had proceeded to confirm 43 of President Bush's judicial nominations. Another 25 nominations are being stalled on the Senate Executive Calendar. The vast majority of these 25 nominations were reported with no opposition in Committee. If the Senate confirmed those 25 nominees, we would achieve the same record of filling vacancies with President Obama's nominees as we did for President Bush's by this date in 2002. Yet, Republicans drag out the process and stall Senate consideration by withholding their consent. I am hopeful the logjam will break now that the majority leader has filed cloture on two long-pending circuit court nominees, Denny Chin and Thomas Vanaskie. Both nominations were reported by the Committee in December.

During President Bush's first two years the Senate confirmed 100 of his judicial nominees. Republican obstruction has us on pace to confirm fewer than 30 Federal circuit and district court nominees before this Congress adjourns. Their approach has led to skyrocketing judicial vacancies, again, like the pocket filibusters they employed during the Clinton presidency that led to a vacancy crisis in the 1990s. They do a disservice to the American people seeking justice in our overburdened Federal courts. We have to do far more to address the growing crisis of unfilled judicial vacancies, which now top 100 and judicial emergency vacancies, which now top 40. We owe it to the American people to do better.

I welcome the nominees and their families to the Committee today and I want to congratulate Professor Liu and his wife Ann O'Leary on the birth of their son the week before his originally scheduled hearing.

#####