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April 9, 2010

Senator Patrick Leahy, Chair  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Senator Jeff Sessions, Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

## **RE: Nomination of Goodwin Liu for the U.S. Court of Appeals for the Ninth Circuit**

Dear Chairman Leahy and Senator Sessions:

We are Co-Chairs of the Constitution Project's Death Penalty Committee. While we take no position on whether the Senate should confirm Professor Liu, we take issue with those who have distorted Professor Liu's work on the death penalty, claiming that he is an anti-death penalty, would-be judicial activist. In fact, we applaud his admirable commitment to ensuring the constitutional rights of those facing the death penalty or sentenced to death.

As a former governor of Texas who oversaw the executions of 19 condemned criminals, and a former Florida Supreme Court justice who upheld numerous death sentences and, before that, headed the Dade County capital crimes prosecution unit, we are well-acquainted with the death penalty and its application. We decry the baseless claim that Professor Liu's commitment to upholding constitutional safeguards, such as competent counsel, a fair trial, and full judicial review, is anything other than appropriate -- indeed vital -- for any judge, particularly in capital cases where a person's life hangs in the balance.

Professor Liu's critics from the Criminal Justice Legal Foundation claim in a March 23, 2010, letter that he opposes the death penalty and would use his position as a judge to subvert state and federal law to achieve this hidden agenda. They base this accusation on a single paper that Professor Liu co-authored in 2005, examining Supreme Court Justice Samuel Alito's opinion in five capital cases he considered during his tenure on the Third Circuit Court of Appeals.

Contrary to the critics' claim, Professor Liu's analysis is not based on anti-death penalty fervor, nor does it question the propriety or constitutionality of the death penalty. Rather, it reflects his belief that appellate judges in capital cases must carefully examine the record for serious error and overturn convictions that are obtained in violation of the defendant's due process rights. In fact, explaining why he did not examine

one of Judge Alito's decisions, Professor Liu observes that sometimes an opinion upholding a death sentence may "involve[] fairly straightforward issues," where no constitutional violations occur.

Professor Liu's evaluation is rooted in an appropriate dedication to ensuring that every person is afforded the fundamental rights that give legitimacy to our criminal justice system. Despite what his critics might have us believe, the only conclusion a reader can fairly reach about Professor Liu and his views on the death penalty is that, as Liu says himself, "capital cases require judges to exercise utmost care in ensuring due process of law."

Professor Liu's views on this issue are well within the mainstream. Of the five cases Professor Liu examined, Judge Alito was the lone dissenter or in the minority in two cases and had his opinion overturned by the United States Supreme Court in a third case. In the two cases in which Judge Alito's opinion prevailed, there was legitimate disagreement, prompting four of his colleagues to dissent. Whether one agrees or disagrees with his conclusions in a particular case, far from being radical, Professor Liu finds himself in the company of a number of well-respected Supreme Court justices and Third Circuit judges.

The Constitution Project and its Death Penalty Committee are in full agreement with Professor Liu when it comes to vigorously protecting due process rights. As our report *Mandatory Justice: The Death Penalty Revisited* explains, we believe this nation can move beyond the political and philosophical divisions that currently consume the death penalty debate. This belief is borne out in the fact that our committee comprises former judges, prosecutors, victims' advocates, and defense lawyers who have diverse views on the death penalty. Regardless of each committee member's views on capital punishment, we all have profound concerns that the administration of capital punishment is deeply flawed and believe that all persons facing the death penalty are entitled to the fundamental rights guaranteed by the Constitution. Like our committee, this country can come together through the shared belief that our criminal justice system will only work if the procedural safeguards and fundamental fairness enshrined in our Constitution are vigilantly upheld in the administration of the death penalty.

The attacks on Professor Liu's fidelity to the Constitution and its protections of liberty as somehow anti-death penalty surely do not qualify as reasons for any Senator to oppose his confirmation.

Sincerely,

**Gerald Kogan**

*Former Chief Justice, Supreme Court of the State of Florida; Former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida*

**Mark White**

*Former Governor of Texas; Former Attorney General of Texas; Former Secretary of State of Texas; Former Assistant Attorney General of Texas*

cc: Senate Judiciary Committee