April 13, 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 U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Leahy and Senator Sessions:

We are former judges and prosecutors -- including former judges for the United States Courts of Appeal, former United States Attorneys, and former state judges and prosecutors -- who have had significant experience in the criminal justice system, including with capital punishment. Some of us support the death penalty; others of us oppose it. However, all of us are alarmed by certain recent, baseless attacks against Professor Goodwin Liu, President Obama's nominee to the United States Court of Appeals for the Ninth Circuit. These attacks, related to statements by Professor Liu regarding the death penalty, have been so erroneous and improper that we felt compelled to correct the record prior to the Committee's April 16th hearing to consider Professor Liu's nomination.

In its March 23, 2010, letter to the Committee, the Criminal Justice Legal Foundation ("CJLF") concluded that if confirmed, Professor Liu would advance his "anti-death penalty agenda" by ruling against prosecutors in every capital case brought before him. CJLF bases this conclusion on a six-year old memorandum Professor Liu co-authored in response to Justice Alito's nomination to the Supreme Court (the "Alito Memorandum"). Citing CJLF's analysis, which we regard as erroneous in many significant aspects, a group of California district attorneys has urged the Committee to reject Professor Liu's nomination. In our view, these conclusions are absolutely incorrect and unsupported by Professor Liu's record. Moreover, we believe, the rhetoric surrounding the criticism of his nomination has reached an unacceptable level, beyond what is appropriate in a civil, spirited debate.

Nowhere in the Alito Memorandum does Professor Liu state that he is opposed to the use of capital punishment or that he would not uphold death sentences as required by law. Nor are we aware of any of his other writings or public statements that reflect such a position. In fact, explaining why he did not examine one of Judge Alito's decisions, Professor Liu observed that sometimes an opinion upholding a death sentence may "involve[] fairly straightforward issues," where no constitutional violations occurred.

An examination of Professor Liu's record by attorney John A. Freedman at the law firm Arnold & Porter LLP confirms our conclusions. Mr. Freedman analyzed both the Alito Memorandum and the CJLF's letter discussing the memorandum. In stark contrast to CJLF's conclusions, he found that "Professor Liu takes no position on the death penalty… other than to state that he believes 'the Supreme Court has the ultimate responsibility for ensuring fairness in the administration of the death penalty.' This is an unremarkable position." We have provided a copy of his full analysis for the Committee's review following this letter.

Professor Liu has expressed a belief that every United States judge must exercise the utmost care to ensure that the fundamental due process rights of persons accused of crimes are protected. While our individual views about the propriety of the death penalty may vary, we all believe that it is the appropriate role of an appellate judge to ensure that these due process rights have not been violated and that every defendant is afforded a fair trial. This is especially true in death penalty cases, where the nature of the punishment is uniquely irreversible.

We applaud Professor Liu's commitment to ensuring the constitutional rights of defendants facing the death penalty. Contrary to his critics' claims, his commitment to the Constitution is commendable and vital for anyone seeking a position in what is often the court of last resort for individuals seeking to protect their constitutional rights.

Sincerely,

Rebecca A. Betts
United States Attorney, Southern District of West Virginia (1994-2001)

Robert C. Bundy
United States Attorney, District of Alaska (1994-2001)

J. Joseph Curran
Attorney General, State of Maryland (1987-2007)

Michael H. Dettmer
United States Attorney, Western District of Michigan (1994-2001)

Robert DelTufo
Attorney General, State of New Jersey (1990-1993)
United States Attorney for the District of New Jersey (1977-1980)

W. Thomas Dillard
United States Attorney, Northern District of Florida (1983-1986)
United States Attorney, Eastern District of Tennessee (1981)

Hon. Bruce J. Einhorn
United States Immigration Judge (Ret.) (1990-2007)
Special Prosecutor and Chief of Litigation, United States Department of Justice Office of Special Investigations (1979-1990)

Prof. Bennett L. Gershman
Prosecutor, Manhattan District Attorney's Office (1967-1972)

Hon. John J. Gibbons
United States Circuit Judge (Ret.), United States Court of Appeals for the Third Circuit (1970-1990); Chief Judge (1987-1990)

Daniel F. Goldstein
Assistant United States Attorney, District of Maryland (1976-1982)

Hon. Isabel Gomez
Judge (Ret.), Fourth Judicial District of Minnesota (1984-2006)

Hon. Joseph Grodin
Associate Justice (Ret.), California Supreme Court (1982-1987)
Chief Justice (Ret.), California Court of Appeals (1981-1982)
Associate Justice (Ret.), California Court of Appeals (1979-1981)

Hon. Shirley M. Hufstedler
United States Circuit Judge (Ret.), United States Court of Appeals for the Ninth Circuit (1968-1979)
United States Secretary of Education (1979-1981)
Associate Justice (Ret.), California Court of Appeal (1966-1968)
Judge (Ret.), Los Angeles County Superior Court (1961-1966)

Prof. Bruce R. Jacob
Former Assistant Attorney General, State of Florida

Hon. Nathaniel R. Jones
United States Circuit Judge (Ret.), United States Court of Appeals for the Sixth Circuit (1979-2002)
Assistant United States Attorney, Northern District of Ohio (1962-1967)

Miriam Krinsky
Assistant United States Attorney, Central District of California (1987-2002); Chief, Criminal Appellate Section (1992-2002); Chief, General Crimes Section (1991-1992)
Chair, Solicitor General's Appellate Working Group (2000-2002)

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Assistant State's Attorney, Dade County, Florida (1979-1980)
Assistant Attorney General, Maryland Criminal Investigations Division (1978-1979)
Assistant State's Attorney, Baltimore County (1975-1978)

Hon. William A. Norris
United States Circuit Judge (Ret.), Ninth Circuit Court of Appeals (1980-1997)

Hon. Stephen M. Orlofsky
United States District Judge (Ret.), District of New Jersey (1996-2003)
United States Magistrate Judge (Ret.), District of New Jersey (1976-1980)

A. John Pappalardo
United States Attorney, District of Massachusetts (1992-1993)

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United States Attorney, Northern District of Iowa (1976-1982)
United States Attorney, District of South Dakota by Special Appointment of Attorney General (1978-1979)

James K. Robinson
United States Attorney, Eastern District of Michigan (1977-80)
Assistant Attorney General, Criminal Division, United States Department of Justice (1998-2001)

Thomas P. Sullivan
United States Attorney, Northern District of Illinois (1977-81)
Co-Chair, Illinois Governor's Commission on Capital Punishment

Hon. Joseph D. Tydings
United States Senator, (D-MD) (1965-1971)
United States Attorney, District of Maryland (1961-1963)

James J. West
United States Attorney, Middle District of Pennsylvania (1985-1993)
First Assistant United States Attorney, Middle District of Pennsylvania (1983-1985)
Assistant United States Attorney, Western District of Pennsylvania (1974-1979)

cc: Senate Judiciary Committee

Response to Criminal Justice Legal Foundation March 23, 2010 Analysis

John A. Freedman, Arnold & Porter LLP

On March 23, 2010, the Criminal Justice Legal Foundation submitted a letter to the Senate Judiciary Committee purporting to analyze the death penalty "record" of Professor Goodwin Liu. This analysis is based entirely on a paper Professor Liu co-authored in December 2005 entitled "Judge Alito and the Death Penalty." That analysis noted that then-Judge Alito had participated in ten capital cases during his time on the Third Circuit Court of Appeals, and analyzed the five cases where there was "strong disagreement between Judge Alito and his colleagues."

Of the five decisions analyzed in Professor Liu's paper, then-Judge Alito wrote dissenting minority opinions in two (*Riley v. Taylor*, 277 F.3d 2001 (3d Cir. 2001) (en banc) and *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997)), and was reversed by the Supreme Court in a third (*Rompilla v. Beard*, 125 S. Ct. 2456 (2005)). Accordingly, CLJF's declaration that Professor Liu "would have voted to reverse" the capital sentences in these decisions actually indicates that Liu's views on the constitutional errors found to exist in these cases were consistent with a majority of judges on the Third Circuit or the Supreme Court at the time these cases were considered.

Moreover, the primary conclusions drawn by the CJLF from this paper – that Professor Liu is "intensely hostile to capital punishment," that he will look "for any excuse to overturn a [capital] sentence," and "will vote for the murderer on every remotely debatable point" – are entirely unsupported by the analysis. Rather, Professor Liu takes no position on the death penalty in this paper, or in his other writings, other than to state that he believes "the Supreme Court has the ultimate responsibility for ensuring fairness in the administration of the death penalty." This is an unremarkable position.

The following is a summary of the five cases discussed in Professor Liu's paper, as well as CJLF's commentary on Professor Liu's analysis.

1. *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997).

The majority decision in *Smith* was written by Judge Cowen (a former state prosecutor appointed to the Third Circuit by President Reagan) and joined by Judge Mansmann (another former state prosecutor appointed to the Third Circuit by President Reagan). The decision affirmed the findings of a federal district judge (Judge Harvey Bartle, a former Pennsylvania state Attorney General appointed by President George H.W. Bush) that the state trial judge improperly instructed the jury that the defendant could be convicted for first degree murder as an accomplice without specifically finding beyond a reasonable doubt that he intended to commit a murder. This error was compounded by repeated statements of the prosecutor during closing argument that the jury need not consider whether the defendant actually killed the decedent in order to convict. The majority found that the error in instructions, combined with the

prosecutors' comments, violated the defendant's due process rights, and remanded with directions that the defendant be released "unless the Commonwealth retries him."

CJLF's analysis of this case is limited to the point that the defendant's lawyers failed to object at the time to the jury instruction or on direct appeal to the state court. CJLF's assertion that "Professor Liu did not mention these facts" is incorrect – Professor Liu discussed these issues at pages 5 and 6 of his paper, noting that the majority decision rejected Judge Alito's argument on this point, because the government had failed to argue that the defendant did not preserve his objection.

2. *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (*en banc*).

Riley was an *en banc* decision written by Judge Sloviter. The majority of active Third Circuit judges found that a grant of *habeas corpus* was appropriate both because (a) there had been a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), because the prosecutor struck all of the prospective African-American jurors from the jury; and (b) the prosecutor made inappropriate remarks during the sentencing phase to the effect that the jury was not making a final decision because the verdict would be "automatically reviewed by the Supreme Court."

CJLF describes this case as one where "false allegations" of racism were made, and criticizes Professor Liu for "a propensity to indict and convict prosecutors of racism on flimsy evidence and to disregard the evidence to the contrary." These claims are without merit. Professor Liu never accused the prosecutors of racism. With regard to the *Batson* claim, the Third Circuit concluded that: (a) the prosecutor stuck every prospective African-American juror from the *Riley* jury; (b) the prosecutor's office in question had struck every other prospective African-American juror in the three other first degree murder trials that occurred within a year of the *Riley* trial; and (c) two of the three *Riley* prospective jurors who were struck gave virtually identical responses to white jurors who were allowed to sit. In light of this record, the Third Circuit noted it was not "necessary to have a sophisticated analysis by a statistician to conclude there is little chance of randomly selecting four consecutive all white juries." Professor Liu's analysis of this case in the article is consistent with these conclusions and CJLF does not address any of these facts.

With regard to the prosecutor's remark, the Third Circuit found it was "misleading as to the scope of appellate review" and "misled the jury to minimize its role in the sentencing process," in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This aspect of the Professor Liu's analysis is not discussed in CJLF's letter.

3. *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004) *reversed sub nom. Rompilla v. Beard*, 125 S.Ct. 2455 (2005).

Rompilla was a 2-1 panel decision written by then-Judge Alito rejecting a claim that the defendant had failed to receive effective assistance of counsel in conjunction with the sentencing phase of his trial where defense counsel failed to develop or present evidence (i) that the defendant was subject to severe child abuse including being locked by his father in "a small wire

mesh dog pen that was filthy and excrement filled" and being beaten with "fists, leather straps, belts, and sticks," and (ii) that the defendant suffered from "organic brain damage, an extreme mental disturbance impairing several of his cognitive functions" and that these issues may have been caused by fetal alcohol syndrome.

The Supreme Court reversed then-Judge Alito's opinion in 2005, with Justice O'Connor calling the Third Circuit opinion "objectively unreasonable" under "clearly established" law. Professor Liu cited this language in his article. CJLF does not mention this case in its March 23, 2010 letter.

4-5. *Flamer v. Delaware* and *Bailey v. Snyder*, 68 F.3d 736 (3d Cir. 1995) (*en banc*) (consolidated for appeal).

This was an *en banc* decision concerning two consolidated cases written by Judge Alito, which rejected an argument that two capital sentences should be vacated where the Delaware Supreme Court had subsequently found that one of the "aggravating" factors relied upon by the jury in sentencing these defendants to death was unconstitutionally vague. Judge Alito concluded that the juries had found sufficient other "aggravating" factors to support the sentences.

CJLF's analysis criticizes Professor Liu for failing to discuss the facts of the underlying crime, and states that his analysis of *Flamer* "demonstrates a propensity to overturn capital sentences on grounds that have little or nothing to do with the reliability of the verdict and that depend on changes in the rules made long after trial." Neither of these conclusions is supported by Professor Liu's analysis. Judge Alito's decision barely discusses the underlying facts concerning the defendants' crime, and accordingly, it is gratuitous to criticize Professor Liu on this basis. (CJLF does not discuss the facts particular to *Bailey* in its March 23, 2010 letter, and focused on the *Flamer* facts instead.)

Professor Liu's analysis summarizes the two competing lines of Supreme Court cases that the Third Circuit considered. Professor Liu also notes that the trial judge in the case had given the jury interrogatories which included the unconstitutionally vague language and accordingly could have potentially "focus[ed] the jury's attention on the statutory aggravating factor." Professor Liu also notes both that the dissent had made this point and that Judge Alito stated that the majority "strongly disapproved of the practice" of using an interrogatory in these circumstances because it is "potentially misleading and injects unnecessary confusion into the jury's deliberation." There is nothing in this analysis that suggests a "propensity to overturn capital sentences."