Written by **Jack Kenny** on June 1, 2011

Filibuster Kills Fed Judgeship Nomination of UC Law Prof. Liu

During the filibuster that effectively killed the controversial nomination of University of California law professor Goodwin Liu to a federal judgeship, U.S. Senator Richard Blumenthal (D-Conn.) called for his nomination on the grounds of his ethnicity: "There is no Asian-American member on the Ninth Circuit Court of Appeals," he noted. "There should be, and Professor Liu ought to be that judge."

Ah, so now we learn the reason for having courts. Some of us might have thought it was to support the rule of law and the administration of justice. But no, Sen. Blumenthal has an improved understanding. We have courts as an affirmative action vehicle to ensure all racial and ethnic groups are represented by men, women and, who knows, perhaps transgendered Americans in judicial robes. Justice is supposed to be blind with respect to persons, but Blumenthal and other loose-minded liberals who think as he does would undermine that principle by the very process whereby judges as chosen.

Professor Liu should be put on the court, said Blumenthal, because he is an Asian-American. That implies he will reach or contribute to better or more representative decisions than he would if he were, say, Irish-American or Italian-American. That is a variation on Justice Sonia Sotomayor's claim that a Latino woman will likely come to a wiser decision when judging a case than some old white men would. Similarly Pat Buchanan, usually a keen and eminently sensible political analyst, has lamented the fact that there are now no White Anglo-Saxon Protestants (WASPs) on the U.S. Supreme Court. For most of the nation's history, there were very few of anything else on the high court.

But Buchanan is a polemicist and a partisan Old Guard Republican. Blumenthal is a U.S. Senator, the successor to fellow Connecticut Democrat Christopher Dodd, which means he has not a very high bar to clear to surpass his predecessor as a rigorous thinker. But Blumenthal may be a better dancer than thinker. Unless he has two left feet, he would almost have to be. So instead of clearing that bar, he went under it, Limbo style. ("Don't move that Limbo bar! You'll be a Limbo star . ..How low can you go?") Before winning his Senate race last year, Blumenthal served for 22 years as Connecticut's Attorney General. Yet he appears clueless as to what courts are for.

Connecticut's other U.S. Senator is Joseph Lieberman. Both Lieberman and Blumenthal are Jewish. Can

you imagine the indignant outrage that might occur if one of Buchanan's poor, neglected, underrepresented WASPs ran for the Senate in Connecticut saying, "There is no Protestant member of the U.S. Senate from Connecticut. There should be and that Senator should be ___." The hoots of derision and gasps of horror would drown out the rest of the sentence.

Courts are not designed to be representative bodies. Years ago, conservatives could still argue against the notion that it was necessary to retain a black (now "African-American") seat on the Supreme Court to protect the rights of African-Americans, who, to be sure, were denied the equal protection of the law through much of this nation's history. Indeed, I recall one prominent Washington journalist embarrassing herself (whether she knew it or not) on one of those TV shows consisting of people sitting on a sofa and uttering (mostly) applause-generating nonsense (i.e. claptrap) by saying that the Supreme Court's school desegregation orders, *Brown v. Board of Education* and its progeny, never would have happened had Thurgood Marshall not been on the Court. Yet Marshall, the first African-American on the Court, joined the "Supremes" in 1967, 13 years after the court unanimously found in favor of the plaintiffs in *Brown v. Board of Education*. Lead attorney for said plaintiffs in that landmark case was none other than Thurgood Marshall, a young lawyer with the National Association for the Advancement of Colored People. Somehow, miraculously perhaps, he was able to convince nine white male judges of the rightness of his pleading.

No doubt some equally confused commentator will one day pontificate — perhaps already has — that the Supreme Court's ruling on abortion rights, claimed by many as the quintessential women's issue, would never have come about before we had women on the high court. There are two things wrong with that argument. One is that the demographic group most in favor of abortion "rights" is young men, followed perhaps by men who wish they were still young. The ranks of the anti-abortion demonstrators, on the other hand, are filled with young and middle-aged women. The other is that the mother of all abortion decisions was issued by a court of nine old men — seven in favor of finding abortion as a right guaranteed by the Constitution and two pointing stubbornly to the fact that the Constitution says no such thing — in the parallel cases of *Roe v. Wade* and *Doe v. Bolton*, which decisions were handed down on January 22, 1973, eight years and some months before Sandra Day O'Connor was confirmed as the first woman justice on the U.S. Supreme Court. But the historical revisionism, intentional or otherwise, is put forth regularly by people old enough to know better; people who cannot say, as they might about *Marbury v. Madison*, "It was before my time."

How do such people argue with a straight face that a) justice should be blind and no respecter of persons and that b) a judge should be appointed to represent the people of his or her own race, ethnic group, or perhaps religion? Six Catholics on the Supreme Court at the same time? How unfair! Catholics are overrepresented. Only one Jewish woman? And what about a Muslim seat on the Supreme Court or at least one of the other federal appeals courts? What about a Jehovah's Witness seat? When will a truly religiously diverse, multicultural court begin its deliberations with "Hare Krishna"?

I began with the foolishness of a single U.S. Senator and am tempted to end there. One could do worse than focus on any one of a number of such loose-minded lawmakers as the Alpha and Omega of inane politics. But let us not leave out journalists. They deserve, after all, some representation beyond that of the unnamed female commentator mentioned above. So let us also consider a comparable gem from Juan Williams on Fox News.

Mr. Williams, you may recall, is the man who survived his martyrdom on National Public Radio for admitting on air that he gets a little nervous when he sees someone in Muslim garb on the same

airplane he has boarded. (Really, are the terrorists so dumb that they would have someone on whom they have planted a bomb or engaged in a plot to blow up the plane dressed in "Muslim garb"? Wouldn't they rather use someone who looks like Shirley Temple?) As a dark-skinned American with a Hispanic name, Juan Williams should already be on the Supreme Court by Sen. Blumenthal's rule of non-thought. (There is no Hispanic male on the Supreme Court. There should be and Juan Williams should be that judge.)

In a Fox News discussion of the Liu nomination, a discussion that followed the Senate filibuster by roughly 24 hours, Mr. Williams mentioned that the American Bar Association found Professor Liu "highly qualified" for the post. Then he uttered the following semblance of a thought:

> The thing about it is, he is someone who sees rights in the Constitution in terms of things like gay marriage or healthcare for all, and Republicans didn't like it.

As Archie Bunker used to say during one of Edith's endless stories, "Help me, Lord!" Is the Constitution really that fluid? Is it a living, evolving document that enables one to see his or her policy preferences reflected therein, regardless of what the text does and does not say? Really, the essential "thing about it is" that, wholly apart from what Republicans or Democrats do or do not like, someone who sees rights for "gay marriage" or "healthcare for all" in the Constitution is seeing things that are not there. It calls to mind the crowd in the Hans Christian Andersen tale that had to *see* the emperor's new and remarkable suit of clothes when the great man marched down the street stark naked. An essential point in Chief Justice John Marshall's argument in *Marbury v. Madison* is that our Constitution *is written* in words on the page that do not appear or disappear depending on the policy preferences of the reader.

But that is talking plain common sense about the Constitution, and at various times on various issues Republicans and Democrats, as Mr. Williams observed, don't like it.