



Written by [Jack Kenny](#) on May 26, 2011

## “Extraordinary” Liu Bows Out as Judicial Nominee

A highly partisan and ideologically charged Senate battle over the nomination of Goodwin Liu (left) to the Ninth Circuit Court of Appeals came to an end Wednesday when the University of California law professor sent a letter to President Obama asking that his name be withdrawn. A Republican filibuster on Thursday of last week blocked a vote on confirmation and Liu decided that a further delay in filling the vacancy would do neither him nor the court any good.



“With no possibility of an up or down vote on the horizon, my family and I have decided that it is time for us to regain the ability to make plans for the future,” Liu informed the President. “In addition, the Judicial Council of the 9th Circuit has noted the ‘desperate need for judges’ to fill vacancies and it is now clear that continuing my nomination will not address that need any time soon.”

The announcement was no surprise after Republicans prevailed in last Thursday’s filibuster. Jay Carney, the President’s press secretary, while pledging the administration would continue to press for confirmation, was speaking the next morning of Liu’s candidacy in the past tense. “We believe that Goodwin Liu was a highly qualified candidate, that he should have been confirmed,” Carney said at a White House press briefing.

Liu was first nominated by Obama last year, but the controversial choice never came to a vote. As the nomination moved toward confirmation this year, it became the center of a sharp ideological and political debate over the role of courts and the rule of judges. While some critics spoke of the 40-year-old professor’s lack of experience as either a trial lawyer or a judge, opposition was based mainly on the nominee’s academic writings and his strongly worded testimony before the Senate Judiciary Committee in 2006 against confirmation of Bush nominee Judge Samuel Alito to the Supreme Court. Alito won confirmation by a vote of 58-42, but Senate Republicans remember what they consider Liu’s unfairly harsh characterization of Alito’s opinions as a federal appeals court judge.

“Judge Alito’s record,” said Liu at the conclusion of his testimony, “envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance.” At his confirmation hearing in March of this year, Liu expressed regret over that statement, describing it as [“poor judgment.”](#)

Last week’s effort by Democrats to end debate and move to a final vote on confirmation was stymied in a 52-43 vote in favor. The Senate rule on cloture requires 60 votes, or three-fifths of the Senate, to cut off debate. One Democrat, Ben Nelson of Colorado, joined the Republicans in blocking a final vote,



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while Republican Lisa Murkowski of Alaska and independents Joseph Lieberman of Connecticut and Bernard Sanders of Vermont joined the Democrats in voting to end the debate.

Filibusters became the subject of intense debate in 2005 when Republicans, then in the majority, were frustrated by Democratic filibusters against judicial nominations by President George W. Bush. Talk of a “nuclear option” to alter or abolish the rule subsided when an informal “gang of 14,” composed of seven Senators from each party, produced an agreement that a filibuster would not be used against a judicial nominee except in “extraordinary circumstances.” Much of last week’s debate centered on whether the Liu nomination fit that description. South Carolina Republican Lindsey Graham, one of the architects of the 2005 compromise, contended that Liu’s testimony against Alito had placed the Berkeley professor at the other end of a “bridge too far.”

“These statements about Judge Alito and the decisions he’s rendered and his philosophy are designed to basically say that people who have the philosophy of Judge Alito are uncaring, hateful and really should be despised,” Graham said. “That is a bridge too far, because I share Judge Alito’s philosophy.” Alaska’s Murkowski, on the other hand, found the bridge worth crossing.

“I stated during the Bush administration,” she reminded her colleagues, “that judicial nominations deserved an up or down vote except in ‘extraordinary circumstances’ and my position has not changed simply because there is a different President making the nominations.”

“This nominee, I believe, represents an extraordinary circumstance,” said Republican Jeff Sessions, Republican of Alabama. “His record reveals that he believes the Constitution is a fluid, evolving document with no fixed meaning.” Senate Minority Leader Mitch McConnell pointed to Liu’s advocacy of a “progressive” understanding of the Constitution as a reason for blocking the nomination. “Mr. Liu said he believed that the last presidential election gave liberals, as he put it, quote, ‘a tremendous opportunity to actually get their ideas and the progressive vision of the Constitution and of law into practice.’ That is repugnant,” said the Kentucky Republican. Liu’s background as a former leader of the liberal American Constitution Society was also a red flag for judicial conservatives.

Both sides, in fact, argued that the nomination was “extraordinary,” though they differed on whether it represented an extraordinary good or an extraordinary danger to the rule of law. Speaking in support of the nomination, Richard Durbin, the No. 2 Democrat in the Senate, said federal appeals courts have become a political target “because of the tremendous responsibility and opportunity there is for important and historic decisions — and so Professor Liu has been caught in this maelstrom.”

The Ninth Circuit court, which covers much of the western United States, including Hawaii, is based in San Francisco, which has a large Asian-American population. Liu, an American-born son of Taiwanese parents, would bring a greater racial diversity to the court, argued Sen. Richer Blumenthal, a Connecticut Democrat. “There is no Asian-American member on the Ninth Circuit Court of Appeals,” Blumenthal said. “There should be, and Professor Liu ought to be that judge.”

The Republicans first successful filibuster of an Obama judicial nomination came “just weeks after Republicans tried but failed to thwart the confirmation of a district court judge,” the *New York Times* reported, while noting “a new Republican willingness to blockade judicial nominees. It also indicates that President Obama could face serious resistance as he tries to fill vacancies on the bench.”

But if Republicans are counting on a Republican President filling judicial vacancies starting in 2013, they had better hope at the same time for a filibuster-proof majority in the Senate, where they are now the minority party. Lauding Liu as an “extraordinary American,” Barbara Boxer not too subtly reminded



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her colleagues across the aisle that what goes around comes around again.

“This is not going to go down easily,” warned the California Democrat. “I think the ramifications of this filibuster are going to be long and difficult for those who caused this good man to be filibustered.”



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