

Service in Washington, DC, where he helped launch the AmeriCorps program. In 2000, he served as a law clerk for U.S. Supreme Court Justice Ruth Bader Ginsburg. Since 2003, he has taught law at the University of California, Berkeley School of Law, Boalt Hall. He has also served as a special assistant to the Deputy Secretary at the U.S. Department of Education, advising the Department on a range of legal issues including the development of guidelines to help turn around low performing schools.

Goodwin also practiced as a litigant for the firm of O'Melveny & Myers in Washington, DC. There, appellate litigation comprised nearly half his practice.

Were these accolades not enough to demonstrate Goodwin's capacity to serve as a Federal appellate judge, I would also point to the "unanimously well qualified" rating he received from the American Bar Association, ABA, the ABA's highest rating for Federal judgeships. I believe Goodwin's extensive knowledge of the law, understanding of appellate procedure, and appellant litigation experience make him an outstanding candidate for confirmation.

I would like to remind my colleagues that there are still many judicial vacancies that need to be filled. The constitutional right to a speedy trial correlates to the number of judges able to hear cases. While it is important to ascertain the character and capacity of a nominee to such an important position, postponing Goodwin Liu's confirmation does a disservice to our Nation, and to this body's responsibility for confirming Presidential nominees. I believe Goodwin Liu will make a fine judge, and will serve with distinction in the Ninth Circuit Court of Appeals. I ask my colleagues to join me in confirming Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit.

I thank the Chair and yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BARRASSO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BARRASSO. Mr. President, I ask unanimous consent to speak for up to 15 minutes as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### HEALTH CARE

Mr. BARRASSO. Mr. President, I come to the floor, as I have week after week since we passed the health care law, giving a doctor's second opinion of the law. I come today because last month President Obama delivered a very big speech on spending. Unfortunately, it seemed to be more of a political attack than a substantive speech offering a detailed plan to attack the American debt crisis.

The President did, however, mention one bit of substance that really should raise a red flag to the American people. He said:

We will slow the growth of Medicare costs by strengthening an independent commission.

Well, the Washington commission he is referring to is called the Independent Payment Advisory Board. This board may sound harmless, but let me assure you that the American people deserve to know and have a right to know more detail about the board and its work.

Many Americans may not remember that the health care law created this unelected, unaccountable board of Washington full-time bureaucrats. The sole purpose of the board is to cut Medicare spending based on arbitrary budget targets—not based on the number of people on Medicare or the number of seniors but based on arbitrary budget targets. These are cuts above and beyond the \$500 billion already taken from a nearly bankrupt Medicare Program during the health care law—taken from our seniors—not to save Medicare but to start a whole new government program.

Now the President wants to slow the growth of Medicare costs by strengthening this independent commission. Well, this board empowers 15 unelected Washington bureaucrats to make these Medicare cuts, all without full transparency and accountability to the American seniors and also to elected officials.

Once again, this board proved that the President and the Democrats in Congress who voted for the health care law simply didn't have the political courage to make tough spending decisions. Instead, they took the easy road and pulled a classic Washington maneuver: they created a board and then punted the tough decisions to the board. Well, this forced Congress to abdicate two important congressional duties. First is the constitutional responsibility to manage Medicare spending. The second is the responsibility to explain to the American people why specific payment changes might be necessary to keep Medicare afloat—all because the President and Washington Democrats refused to lead. They simply threw up their hands and said: Let someone else deal with it.

If expanding this independent board is—they call it "independent," but I am not so convinced it is. It is called the Independent Payment Advisory Board. If expanding the board is the one and only concrete proposal the President has to reform Medicare and reduce the debt and most Americans have never even heard of it, then it is important that we take the time on the Senate floor today to discuss exactly how this board works and the impact it will have on medical care in America.

I call this the top 10 things you need to know about the Independent Payment Advisory Board. To me, this issue is so important that I plan to talk

about five of them today, and I will come back next week, as part of the doctor's second opinion on the health care law, and talk about the next five.

No. 1, this board is how Washington will limit patient care.

When Congressman PAUL RYAN offered his 2012 budget plan, the President and members of his party launched an all-out media assault on Medicare spending. The White House and Democrats used inflammatory and patently false statements to scare people about the Ryan plan. What they failed to mention, however, is that the President's own health care law actually has significant caps on Medicare spending. To enforce the caps, the President and Washington Democrats went with their tried-and-true solution: create another board.

What does this mean for people who are currently on Medicare and for future Medicare patients? A centralized Washington board will arbitrarily cut payments to Medicare providers—doctors, nurses, and other people taking care of patients. They are going to squeeze Medicare savings by cutting provider payments and treatment options, which will punish patients. Why? To start a whole new government program—not for the people who paid into Medicare but for a whole different group of people. Not only will medical professionals facing these cuts decide to simply stop seeing Medicare patients—and we see that now. Frankly, doctors are running away from Medicare, not wanting to see those patients. Individuals and families will watch helplessly as a Washington bureaucrat decides what kind of treatments that person can have.

No. 2, this board is going to make recommendations, and those recommendations will automatically become law.

How can it be that something the board does automatically becomes law? But their spending recommendations automatically become law—unless Congress acts to stop it. If Congress would actually want to stop the board's policies, there are very few options. The options are severely limited. Overriding the board's recommendations requires a three-fifths majority vote in the Senate, a high hurdle to jump, or Congress can pass a different Medicare spending plan. But there is a catch. It still has to meet the same arbitrary spending target. So if Congress does nothing, then Health and Human Services Secretary Kathleen Sebelius will implement the board's plan.

Medicare consumes about 13 percent of the Federal budget, and former Office of Management and Budget Director Peter Orzag called this board "the largest yielding of sovereignty from Congress since the creation of the Federal Reserve."

The bottom line is that this board isn't making recommendations to Congress; this board is passing law. Well, Congress doesn't have to approve these policies of the board, and the President

doesn't have to sign them. They are law. This represents an unprecedented shift of power from the legislative branch of the Federal Government to an unelected board of 15 bureaucrats.

No. 3, the policies of this board cannot be challenged in court.

On April 19 of this year, the New York Times published an article entitled "Obama Panel to Curb Medicare Finds Foes in Both Parties."

This article explains that:

In general, federal courts could not review actions to carry out the board's recommendations.

Well, there is an institute called Arizona's Goldwater Institute. They filed a lawsuit based upon this payment advisory board. Part of the lawsuit says:

Congress has no constitutional power to delegate nearly unlimited legislative power to any federal executive branch agency, much less to entrench health care regulation against review, debate, revision, or repeal. . . . Such federal overreaching must be rejected if the principles of limited government and the separation of powers by the United States Constitution mean anything.

That is what the lawsuit says.

Let's go to No. 4. This board's mission is to cut provider payments. The board is strictly limited in what it can do to achieve Medicare spending reductions. By law, the board cannot raise revenue by increasing taxes. It cannot increase patient cost-sharing methods, such as premiums, copayments, and deductibles. It cannot alter Medicare eligibility or benefit package.

What can it do? One thing and one thing only: It will adjust provider reimbursement rates. We all know Medicare payment rates are already well below market rates. That is why so many doctors are limiting the number of Medicare patients they see and, in more severe cases, refusing to treat Medicare patients at all.

Additional subjective cuts to Medicare will not make the program more efficient or more available. These measures will simply reduce the supply of medical care to the Medicare patients of America.

The Medicare Chief Actuary, Richard Foster, warned us that the health care law's Medicare cuts would cause providers to leave the program, and we are seeing that today. It is not because they do not want to treat Medicare patients; it is because the doctors know the payments will be too low to even cover their costs. Mr. Foster, the Medicare Chief Actuary, has said approximately 15 percent of our Nation's hospitals would drop out of Medicare in 10 years.

Then No. 5: This board could eventually impact all patients, not just Medicare patients. Washington Democrats have long supported policies that give government more power to set health care prices, not just in public programs such as Medicare, but also in the private sector. President Bill Clinton asked for this authority in a 1994 debate on what at the time was called "Hillary care." It was one reason his

effort failed. President Obama learned from that failure. Make no mistake, he wants to achieve the same objective. This time he is using this board as a Trojan horse to sell it.

If President Obama's health care law remains the law of the land, millions of Americans will have government-subsidized health insurance. Paying for this new entitlement program will cost trillions. It will be no surprise when we inevitably hear cries for increased cost control. This is when the President will make his move—proposing to extend this board's reach beyond Medicare to the new health care law's subsidized insurance premiums. Last month, the President opened the door to this strategy when he proposed in his speech to expand this board's power and its control over Medicare.

That is why I come to the Senate floor each and every week to deliver a doctor's second opinion about the health care law—a law that I believe is bad for patients, bad for providers—the nurses and doctors who take care of those patients—and bad for our taxpayers. I believe the more the American people discover about this so-called independent payment advisory board, the more unpopular the President's health care law will become.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FRANKEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BENNET). Without objection, it is so ordered.

Mr. FRANKEN. Mr. President, I rise to speak in support of the confirmation of Professor Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit. As a member of the Judiciary Committee for the past 2 years, I have had the opportunity to meet with Professor Liu and vote on his nomination on several occasions. He is a singularly talented individual, and I wish to associate myself with the remarks all my colleagues have made in support of his confirmation.

But the strongest arguments I have heard in support of Professor Liu haven't come from my colleagues. In fact, they haven't even come from a Democrat. No, the most persuasive arguments I have heard for confirming Professor Liu come from the former chief ethics lawyer for the administration of President George W. Bush, a gentleman named Richard Painter. Professor Painter, a Republican, is now a prominent law professor at the University of Minnesota.

Earlier this year, Professor Painter wrote a lengthy article that systematically catalogued Professor Liu's strengths and systematically answered his critics. This is his conclusion:

In sum, Liu is eminently qualified. He has support from prominent conservatives. . . .

He is pragmatic and open-minded, not dogmatic or ideological. . . . Many, though by no means all, of his scholarly views do not align with conservative ideology or with the policy positions of many elected officials in the Republican Party. . . . Nevertheless, his views are part of the American legal mainstream. The independence, rigor, and fairness of his writings support a confident prediction that he will be a dutiful and impartial judge.

When I circulated Professor Painter's article to the members of the Judiciary Committee, my Republican colleagues sent me a series of articles critiquing Professor Liu. I would like to take a few moments to rebut the criticisms in these articles because they simply don't hold water.

The first and most common criticism of Goodwin Liu is that he somehow believes in a so-called living Constitution. His opponents are especially worried about his suggestion that in interpreting the Constitution, judges should consider the "evolving norms and traditions of our society."

Professor Liu has written an entire book about his theory of constitutional interpretation. On page 2 of that book, he writes that we need to consider a lot of different things when we interpret the Constitution. We need to consider the original understanding of the Framers. We need to consider the purpose and structure of the Constitution. We need to consider precedent. We need to consider the practical consequences of our laws. Lastly, we need to consider the evolving norms and traditions of our society. So this is just one thing—one thing—that we should take into account.

But even more important, this idea that we should merely consider the evolving standards of our society in interpreting the Constitution is not a radical idea. In fact, it isn't even a new idea. This issue frequently comes up in fourth amendment cases. Over 40 years ago, in a 1967 case called *U.S. v. Katz*, the Supreme Court was asked to determine whether a wiretap constituted a search under the fourth amendment. If it did, law enforcement would have to get a warrant to get a wiretap.

The problem, of course, was that the Founders never anticipated the telephone, let alone the wire to the telephone. So this was a new question for the Court. But the Court voted 7 to 1 to find that a wiretap was, in fact, a search under the fourth amendment, and one of the main reasons they cited was that people in modern society had come to expect and assume that their phone calls were private. Two years later, in a separate case called *Smith v. Maryland*, the Court formally adopted the rule that the fourth amendment will protect people where our society recognizes a reasonable expectation of privacy. So for 40 years, it has been the law of this land that you have to look at social norms when interpreting the fourth amendment.

Here is another example, one that Senator FEINSTEIN cited, but still, it bears repeating. This is what Chief Justice Marshall said about the Necessary

and Proper Clause in *McCulloch v. Maryland*.

... [t]his provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

*McCulloch v. Maryland* was decided in 1819. So the idea that we should merely consider the state of our society when we interpret the Constitution isn't new, it is old. It is very old. In fact, it is arguably older than the Senate Chamber we are standing in, which first opened in 1859.

Professor Liu's detractors have also accused him of believing that judges may "legitimately invent constitutional rights to a broad range of social 'welfare' goods, including education, shelter, subsistence, and health care." That is the accusation. This argument is based on an article Professor Liu wrote in 2008.

But if you actually read the article, you will find this statement right in the introduction. This is a quote from the article:

[B]ecause the existence of any welfare right depends on Democratic instantiation of our shared understandings, the Judiciary is generally limited to an interstitial role within the context of a legislative program. Courts do not act as 'first movers' in establishing welfare rights. . . .

In other words, Professor Liu is being accused of saying judges can invent welfare rights because of an article he wrote where he said judges cannot invent welfare rights.

The final point I wish to address is the idea that Professor Liu somehow supports "using foreign law to redefine the Constitution." Professor Liu's critics cite an obscure speech he gave at a Japanese law school 5 years ago. According to his critics, he said in this speech that it is "difficult for him to grasp how anyone could resist the use of foreign authority in American constitutional law."

I went and got a copy of the speech. If you read it, you will see that Professor Liu was referring to a series of Supreme Court decisions written by Justice Anthony Kennedy, where Justice Kennedy reviewed the laws of foreign countries on certain issues. Justice Kennedy didn't use the laws of foreign countries to decide the cases before him, he used them to get a sense of how other countries were resolving the legal issues before him.

Professor Liu was basically saying he found it difficult to grasp how people could disagree with Justice Kennedy. He has repeatedly said in his testimony, under oath, that he does not believe that foreign law should be binding in any way on Federal law.

There are other critiques against Professor Liu that I will not go into further, but I urge my colleagues to dig behind these blanket statements. To paraphrase Gertrude Stein, I think you will find there is no there there.

I think what my colleagues will find is an extraordinary intellect, a fundamentally decent man, and someone

who will be a strong and impartial jurist. I urge my colleagues to vote for cloture and to vote to support his nomination.

I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### MORNING BUSINESS

Mr. REID. Madam President, I ask unanimous consent we now proceed to a period for morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER (Mrs. HAGAN). Without objection, it is so ordered.

#### TRIBUTE TO BRIGADIER GENERAL STEPHEN R. HOGAN

Mr. MCCONNELL. Madam President, I rise today to congratulate a friend of mine who is a valued servant to the people of Kentucky, BG Stephen R. Hogan. On March 12 of this year, the former colonel had his promotion ceremony to the rank of brigadier general. This promotion to general is a very special accomplishment, as very few career officers in our Armed Forces ever reach the general rank.

This promotion is well deserved for all that Brigadier General Hogan has done for his country. Serving as the assistant adjutant general for the Kentucky Army National Guard, he is responsible to the adjutant general for balancing the requirements of readiness, modernization, force structure, and sustainment of the National Guard for mobilization and domestic missions.

Brigadier General Hogan's significant duty assignments include tours with the 101st Airborne Division (Air Assault), Fort Campbell, KY; the 6th Infantry Division Light, Fort Richardson, AK; the Army Operations Center, the Pentagon; and with the Multi-National Corps Iraq based in Baghdad, Iraq. When not serving on Federal active duty, he has served in the Kentucky Army National Guard as an active-duty guardsman with the State's Counter-Drug Unit, and \$11 billion worth of illegal marijuana has been eradicated during his service.

Brigadier General Hogan's awards, medals and decorations include the Meritorious Service Medal, with three Bronze Oak Leaf Clusters; the Army Commendation Medal, with one Bronze Oak Leaf Cluster; the Army Reserve Components Achievement Medal, with one Silver Oak Leaf Cluster; the National Defense Service Medal; with one Bronze Service Star; the Iraq Campaign Medal; the Global War on Ter-

rorism Service Medal; the Armed Forces Reserve Medal, with "M" Device and Silver Hourglass; the Army Service Ribbon, the Overseas Service Ribbon; the Master Parachutist Badge; the Pathfinder Badge; the Air Assault Badge; the Kentucky Merit Ribbon; the Kentucky Service Ribbon, with three Oak Leaf Clusters; and the Kentucky Counter Drug Ribbon.

Despite all this accomplishment, at his promotion ceremony, Brigadier General Hogan said, "All I ever wanted to do in life is be a professional soldier." Well, we in Kentucky are certainly glad he got his wish. I want to congratulate him on his promotion, and I know my colleagues in the U.S. Senate will join me in honoring his service and his sacrifice for our country.

An article extolling the virtues of Brigadier General Stephen R. Hogan appeared recently in the *Marion Star*. I ask unanimous consent that the article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the *Marion Star*, April 18, 2011]

CONNER HIGH GRAD NAMED BRIG. GENERAL—STEPHEN HOGAN SERVED AT PENTAGON, IN BAGHDAD

(By Stephanie Salmons)

FRANKFORT.—Conner High School graduate Stephen Hogan, of Frankfort, has been promoted to the rank of brigadier general.

A 1981 Conner graduate, Hogan is the son of Paul and Marilyn Hogan of Burlington. He is a 1985 graduate of Morehead State University and a 2008 graduate of the U.S. Army War College.

Hogan received his commission from the Morehead ROTC in 1985 and since 1993 has worked with the Kentucky Army National Guard as an active-duty Guardsman with the state's Counter-Drug Unit, where Paul Hogan says his son works for a marijuana eradication program.

His assignments have included tours with the 101st Airborne Division (Air Assault), Fort Campbell, KY.; 6th Infantry Division Light, Fort Richardson, Alaska; The Army Operations Center, Pentagon; and Multi-National Corps Iraq, Baghdad, Iraq.

Hogan has also received numerous awards during his time in the military.

The Hogans said they're proud of their son. "It's something you don't comprehend—when someone goes that far," Paul Hogan said.

Stephen Hogan has always had an interest in the military and has finally obtained his goal, Paul Hogan said.

"We're very pleased and proud of him. He's worked very hard," Marilyn Hogan said.

#### HONORING OUR ARMED FORCES

LANCE CORPORAL CHRISTOPHER S. MEIS

Mr. BENNET. Madam President, today I pay tribute to a young Coloradan, LCpl Christopher S. Meis, who died on March 17, 2011, from wounds he received while supporting combat operations in Helmand Province, Afghanistan. He was 20 years old. The loss of Lance Corporal Meis weighs heavily on his hometown of Bennett, CO, where he grew up dreaming of serving his country as a marine.