

I would like to close by mentioning two of my constituents in Illinois before I turn the floor over to the Senator from Kentucky.

Philosophy Walker is a 28-year-old graduate student in biblical studies at the University of Chicago. Her husband Adam is 31 years old and a part-time youth minister. Philosophy's school provides health insurance, but it is \$900 per month for her and her husband. That would require them to take out additional student loans to pay their health insurance while they are in school.

Before moving to Chicago, they were paying \$700 per month for health insurance through COBRA, which is an option for those who have lost health insurance—but an expensive one. The \$700 payment depleted their savings because her husband struggled to find a full-time job. Going without health insurance wasn't an option because Philosophy Walker has some severe allergy problems.

Last November they signed up through the Affordable Care Act exchange and purchased a plan comparable to the COBRA coverage that had cost them \$700 a month, but the plan also included dental insurance, which they never had before.

Philosophy and her husband Adam, under this Affordable Care Act plan, pay \$200 a month. It went from \$700 to \$200. Philosophy also receives her monthly allergy medication for free, rather than the previous \$10 monthly copay.

If we listen to some of the stories on the floor of the Senate, you would never believe this story, but it is true.

I wish also to talk about Laurel Tyler, who runs a small business with her husband in Illinois. Because they have two employees and one of the children of one of their employees has asthma, the policies they were sold in the past were extremely expensive.

Because of the Affordable Care Act and the Illinois marketplace, Laurel's business is going to save 20 percent on health care costs, and the 22-year-old son with asthma can stay on the employee's plan. That, to me, is a success story.

Let's build on that success. Let's work together to make this law even stronger.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Kentucky.

#### BARRON NOMINATION

Mr. PAUL. I rise today in opposition to the killing of American citizens without trials. I rise today to oppose the nomination of anyone who would argue that the President has the power to kill an American citizen not involved in combat and without a trial.

I rise today to say that there is no legal precedent for killing American citizens not involved in combat, and that any nominee who rubber stamps and grants such power to a President is

not worthy of being placed one step away from the Supreme Court.

It isn't about just seeing the Barron memos. Some seem to be placated by the fact that: Oh, they can read these memos.

I believe it is about what the memos themselves say. I believe the Barron memos, at their very core, disrespect the Bill of Rights.

The Bill of Rights isn't so much for the American Idol winner, the Bill of Rights isn't so much for the prom queen or the high school football quarterback. The Bill of Rights is especially for the least popular among us. The Bill of Rights is especially for minorities, whether you are a minority by virtue of the color of your skin or the shade of your ideology. The Bill of Rights is especially for unpopular people, unpopular ideas, and unpopular religions.

It is easy to argue for trials for prom queens. It is easy to argue for trials for the high school quarterback or the American Idol winner. It is hard to argue for trials for traitors and for people who would wish to harm our fellow Americans. But a mature freedom defends the defenseless, allows trials for the guilty, and protects even speech of the most despicable nature.

After 9/11, we all recoiled in horror at the massacre of thousands of innocent Americans. We fought a war to tell other countries we would not put up with this and we would not allow this to happen again.

As our soldiers began to return from Afghanistan, I asked them to explain in their own words what they had fought for. To a soldier, they would tell me they fought for the American way. They fought to defend the Constitution, and they fought for our Bill of Rights.

It is a disservice to their sacrifice not to have an open and full-throated public debate about whether an American citizen should get a trial before they are killed.

Let me be perfectly clear. I am not referring to anybody involved in a battlefield, anybody shooting against our soldiers. Anybody involved in combat gets no due process.

What we are talking about is the extraordinary concept of killing American citizens who are overseas but not involved in combat. It doesn't mean that they are not potentially—and probably are—bad people, but we are talking about doing it with no accusation, no trial, no charge, and no jury. The nomination before us is about killing Americans not involved in combat.

The nominee, David Barron, has written a defense of executions of American citizens not involved in combat. Make no mistake, these memos do not limit drone executions to one man. These memos become historic precedent for killing Americans abroad.

Some have argued that releasing these memos is sufficient for his nomination. This is not a debate about transparency. This is a debate about

whether or not American citizens not involved in combat are guaranteed due process.

Realize that during the Bush years, most of President Obama's party—including the President himself—argued against the detention—not the killing—of American citizens without a trial. Yet now the President and the vast majority of his party will vote for a nominee who advocates the killing of American citizens without trial. How far have we come? How far have we gone? We were once talking about detaining American citizens and objecting that they would get no accusation and no trial. Now we are condoning killing American citizens without a trial.

During President Obama's first election, he told the Boston Globe:

No. I reject the Bush administration's claim that the President has plenary authority under the Constitution to detain U.S. citizens without charges as unlawful combatants.

As President, not only has he signed legislation to detain American citizens without trial, but he has now approved of killing American citizens without a trial. Where has candidate Obama gone?

President Obama now puts forward David Barron, whose memos justify killing Americans without a trial. I can't tell you what he wrote in the memos; the President forbids it. I can tell you what Barron did not write. He did not write or cite any legal case to justify killing an American without a trial because no such legal precedent exists. It has never been adjudicated. No court has ever looked at this. There has been no public debate because it has been held secret from the American people.

Barron creates out of whole cloth a defense for executing American citizens without trial. The cases he cites—which I am forbidden from talking about, which I am forbidden from citing today—are unrelated to the issues of killing American citizens because no such cases have ever occurred. We have never debated this in public. We are going to allow this to be decided by one branch of government in secret.

Yet the argument against the Barron memo, the argument against what Barron proposes should be no secret and should be obvious to anyone who looks at this issue. No court has ever decided such a case. So Barron's secret defense of drone executions relies on cases which, upon critical analysis, have no pertinence to the case at hand.

Am I the only one who thinks that something so unprecedented as an assassination of an American citizen should not be discussed, that we should discuss this in the light of day. Am I the only one who thinks that a question of such magnitude should be decided in the open by the Supreme Court?

Barron's arguments for the extrajudicial killing of American citizens challenges over 1,000 years of jurisprudence. Trials based on the presumption of innocence are an ancient

rite. The Romans wrote that the burden of proof is on he who declares, he who asserts that you are guilty, not on he who denies. The burden is on the government.

We describe this principle as the principle of being considered innocent until guilty. This is a profound concept. This is not something we should quietly acquiesce to having it run roughshod on or diluted and eventually destroyed.

In many nations the presumption of innocence is a legal right to the accused, even in the trial. In America we go one step further to protect the accused. We place the burden of proof on the prosecution. We require the government to collect and present enough compelling evidence to a jury—not to one person who works for the President, not to a bunch of people in secret, but to a public jury. The evidence must be presented.

But then we go even further to protect the possibility of innocence. We require that the accused be guilty beyond reasonable doubt. If reasonable doubt remains, the accused is to be acquitted.

We set a very high bar for conviction and an extremely high bar for execution, and even doing all of the most appropriate things, we still sometimes have done it wrong and have executed people after jury trials mistakenly, erroneously. But now we are talking about not even having the protection of a trial. We are talking about only accusations.

Are we comfortable killing American citizens no matter how awful or heinous the crime they are accused of? Are we comfortable killing them based on accusations that no jury has reviewed?

Innocent until proven guilty—the concept—is tested. We are being tested. It is being tested when the consensus is that the accused is very likely guilty in this case. The traitor who was killed, in all likelihood, was guilty. The evidence appears to be overwhelming. Yet why can't we do the American thing—have a public trial, accuse them, and convict them in a court?

It is more difficult to believe in the concept of innocent until proven guilty when the accused is unpopular or hated. The principle of innocent until proven guilty is more difficult when the accused is charged with treason. The Bill of Rights is easy to defend when we like the speech or sympathize with the defendant. Defending the right of trial for people we fear or dislike is more difficult. It is extremely hard. But we have to defend the Bill of Rights or it will slip away from us.

It is easy to support a trial for someone who looks like you, for someone who has the same color skin, or for someone who has the same religion. It is easy. Presumption of innocence is, however, much harder when the citizen practices a minority religion, when the citizen resides in a foreign land or sym-

pathizes with the enemy. Yet our history is replete with examples of heroes who defended the defenseless, who defended the unpopular, who sometimes defended the guilty.

We remember John Adams, when he defended the British soldiers—the ones who were guilty of the Boston massacre. We remember fondly people who defend the unpopular, even when they end up being declared guilty, because that is something we take pride in—our system. We remember his son John Quincy Adams when he defended the slaves who took over the Amistad. We remember fondly Henry Selden who defended the unpopular when he represented Susan B. Anthony, who voted illegally as a woman. We remember fondly Eugene Debs who defended himself when he was accused of being against the draft and against World War I and was given 10 years in prison.

We defend the unpopular. That is what the Bill of Rights is especially important for. We remember fondly Clarence Darrow who defended the unpopular in the Scopes monkey trial. We remember fondly Thurgood Marshall who defended the unpopular when he convinced the Supreme Court to strike down segregation.

Where would we be without these champions? Where would we be without applying the Bill of Rights to those we don't like, to those we don't associate with, to those who we actually think are guilty?

Where would the unpopular be without the protection of the Bill of Rights?

One can almost argue that the right to trial is more precious the more unpopular the defendant. We cannot and we should not abandon this cherished principle.

Critics will argue these are evil people who plot to kill Americans. I don't dispute that. My first instinct is, like most Americans, to recoil in horror and want immediate punishment for traitors. I can't stand the thought of Americans who consort with and advocate violence against Americans. I want to punish those Americans who are traitors. But I am also conscious of what these traitors have betrayed. These traitors are betraying a country that holds dear the precept that we are innocent until proven guilty. Aren't we, in a way, betraying our country's principles when we relinquish this right to a trial by jury?

The maxim that we are innocent until proven guilty is in some ways like our First Amendment which presumes that speech is okay. It is easy to protect complimentary speech. It is easy to protect speech you agree with. It is harder to protect speech you abhor. The First Amendment is not so much about protecting speech that is easily agreed to; it is about tolerating speech that is an abomination. Likewise, the Fourth, the Fifth, and the Sixth Amendments are not so much about protecting majorities of thought, religion or ethnicity. Due process is

about protecting everyone, especially minorities.

Unpopular opinions change from generation to generation. While today it may be burqa-wearing Muslims, it has, at times, been yarmulke-wearing Jews. It has, at times, been African Americans. It has, at times, been Japanese Americans. It is not beyond belief that someday evangelical Christians could be a persecuted minority in our own country.

The process of determining guilt or innocence is an incredibly important one and a difficult one. Even with a jury, justice is not always easily discovered. One has only to watch the jurors deliberate in "Twelve Angry Men" to understand that finding justice, even with a jury, is not always straightforward. Today, virtually everyone sympathizes with Tom Robinson who was unfairly accused in "To Kill a Mockingbird" because the reader knows that Robinson is innocent, because the reader knows his accusation was based on race. It is a slam dunk. It is easy for all of us to believe that he should get a trial.

It is easy to object to vigilante justice when you know the accused is innocent. When the mob attempts an extrajudicial execution, we stand with Atticus Finch. We stand for the rule of law. But what of an American citizen who, by all appearances, is guilty; what of an American citizen who, by all appearances, is a traitor, who we all agree deserves punishment? Are we strong enough as a country to believe still that this person should get a trial?

Do we have the courage to denounce drone executions as nothing more than sophisticated vigilantism? How can it be anything but vigilantism? Due process can't exist in secret. Checks and balances can't exist in one branch of government. Whether it be upon advice of 1 lawyer or 10,000 lawyers, if they all work for one man—the President—how can it be anything but a verdict outside the law—a verdict that could conceivably be subject to the emotions of prejudice and fear; a verdict that could be wrong? This President, above all other Presidents, should fear allowing so much power to gravitate to one man.

It is admittedly hard to defend the right to a trial for an American citizen who becomes a traitor and appears to aid and abet the enemy, but we must. If we cannot defend the right to trial for the most heinous crimes, then where will the slippery slope lead us? The greatness of American jurisprudence is that everyone gets his or her day in court, no matter how despicable the crime they are accused of.

Critics say: How would we try these Americans? They are overseas. They won't come home. The Constitution holds the answer. They should be tried for treason. If they refuse to come home, they should be tried in absentia. They should be given the right to a legal defense. It should be provided. There should be an independent legal

defense that does not work for the government. If they are found guilty, the method of punishment is not the issue. The issue is, and always has been, the right to a trial, the presumption of innocence, and the guarantee of due process to everyone.

For these reasons I cannot support the nomination of David Barron. Even if the administration releases a dozen Barron memos, I cannot support Barron. The debate is not about partisan politics. I have supported many of the President's nominees. The debate is not about transparency. It is about the substance of the memos. I cannot and will not support the lifetime appointment of someone who believes it is OK to kill an American citizen not involved in combat without a trial.

Some will argue and say: The President, yesterday, has now changed his mind. He is going to release these memos to the public. Well, if that is true, why don't we wait on the vote and let the public read the memos? Why don't we have a full-throated debate over this? Why don't we actually see what the public thinks about the right to trial by jury? One would think that something we have had for over a thousand years deserves a bit of debate. Wouldn't you think we would at least take the time? Realize, this is not the position of the administration, this is the position of the administration now that it is relenting to the verdict of the Second Circuit Court. They are releasing this memo under duress. My guess is they are releasing this memo because they need a few more votes, and they will get a few more votes by releasing these memos to the public—or promising to release these memos. They will not be released—the memos justifying the killing of an American without a trial—will not be released before the vote takes place.

So the question is, Is this transparency good enough for you to cast aside the whole concept of presumption of innocence, the whole concept that an accusation is different than a conviction?

There has been much discussion of what due process is, and as we have looked at this debate there are some valid questions and some good writings on this. Conor Friedersdorf has written extensively on this, and he writes about the lawyer who enabled the extrajudicial killing of an American. He asks the question, Should the Constitution be entrusted to a man—and this is essentially what happens; the Constitution will be entrusted to an appellate court judge—should the Constitution be entrusted to a man who thinks Americans can be killed without due process?

The Fifth Amendment, Conor Friedersdorf says, is very clear. No person shall be held to answer for a capital or otherwise infamous crime unless upon the presentment or indictment of a grand jury. It doesn't say except or on presentment of an accusation by the executive branch without a trial. The

Fifth Amendment actually says, "Nor shall any person be deprived of life, liberty or property without due process."

The question is, What is due process? One would think this would be pretty clear and there wouldn't be much dispute over due process. But listen to some of these descriptions. This is the description Glenn Greenwald writes about in describing both the Bush and the Obama administrations. He says:

The core of the distortion on the war on terror under both Bush and Obama is the Orwellian practice of equating government accusation of terrorism with proof of guilt.

Realize what we are talking about. There is a big difference between an accusation and a conviction. If we want to realize how important this is, there are Senators on the other side of the aisle who have called Senators on this side of the aisle terrorists on multiple occasions. Who are we potentially going after with these directives toward killing? People who are either senior operatives of Al-Qaeda—of which there are no membership cards, so that is somewhat open to debate—but we are also going after people who are associated with terrorism.

The definition of terrorism—since on some occasions we have been accused of terrorism by the other side—can be somewhat loose. The Bureau of Justice put out a memo describing some of the characteristics of people who might be terrorists—which might alarm you, if you are traveling overseas: people who are missing fingers, people who have stains on their clothing, people who have changed the color of their hair, people who have multiple weapons in their house, people who have more than 7 days worth of food in their house.

These are people you should be suspicious of, according to the government; these are people who might be terrorists; and these are people you should talk to and inform the government about these people.

If these are the definitions of someone who might be a terrorist, wouldn't we kind of want to have a lawyer before the accusation becomes a conviction?

When we talk about conviction, we talk about the conviction or the bar for conviction being beyond a reasonable doubt. One can pretty much think—you can be in a jury pool and pretty much think someone killed someone—you have a suspicion, you have an inclination they are probably guilty, but you are supposed to be so convinced that it is beyond a reasonable doubt. In these memos there is a different standard.

Realize what the standard is of the person whom we will now be appointing to a lifetime appointment—one step away from the Supreme Court. That standard is an assassination is justified when an informed high-level official of the U.S. Government has determined that the targeted individual poses an imminent threat of violent attack against the United States.

We are not talking here about beyond a reasonable doubt anymore. That standard is gone. We are talking about an informed, unnamed high-level official in secret deciding an imminent attack is going to occur.

The interesting thing about an imminent attack is we don't go much by the plain wording of what one would think would be imminent anymore. The memo expressly states it is inventing—this is also from Glenn Greenwald—the memo expressly states it is inventing a broader concept of innocence that is typically not used.

Specifically, the President's assassination power does not require that the United States have clear evidence that a specific attack will take place in the immediate future. So you wonder about a definition of "imminence" that no longer includes the word "immediate."

The ACLU's Jameel Jaffer, as quoted by Glenn Greenwald, explains that the memo redefines the word "imminence" in a way that deprives the word of its ordinary meaning.

When we talk about due process, it is important to understand where due process can occur. Due process has to occur in the open. It has to occur in an adversarial process. If you don't have a lawyer on your side who is your advocate, you can't have due process. Due process cannot occur in secret, but it also can't occur in one branch of government. This is a fundamental misconception of the President.

The President, with regard to either privacy in the fourth amendment or killing American citizens with regard to the fifth amendment, believes that if he has some lawyers review this process, that is due process. This is appalling because this has nothing to do with due process and can in no way be seen as due process.

Some have said: Well, this is a judicial opinion. Barron has written an opinion; he has justified the President's actions. People have also said with regard to the NSA spying case that 15 judges have approved it. Well, the majority of the judges were in secret in the FISA Court, and that is not due process.

But the memo written by David Barron as recounted by Glenn Greenwald is not a judicial opinion. It was not written by anyone independent of the President. On multiple occasions they have justified and the memo argues that due process can be decided by internal deliberations of the executive branch.

The comedian Stephen Colbert mocked this and presented:

Trial by jury, trial by fire, rock, paper scissors, who cares? Due process just means that there is a process that you do.

The current process is apparently, first the president meets with his advisers and decides who he can kill. Then he kills them.

It is actually called "Terror Tuesday" with flashcards and powerpoint presentation.

Noah Feldman, a colleague of David Barron, writes:

... no precedent for the idea that due process could be satisfied by some secret, internal process within the executive branch.

So to those of my colleagues who will come on down here today and just stamp “approval” on someone who I believe disrespects the Bill of Rights, realize that other esteemed professors, other esteemed colleagues at Harvard disagree and that you cannot have due process by a secret internal process within the executive branch.

To those who say, oh, the memos are now not secret, are we going to be promised that from now on this is going to be a public debate and that there will be some form of due process? No. I suspect it will be done in secret by the executive branch because that is the new norm. You are voting for someone who has made this the historic precedent for how we will kill Americans overseas—in secret, by one branch of the administration, without representation based upon an accusation. We have gone from having to be proven guilty beyond a reasonable doubt to an accusation being enough for an execution. I am horrified that this is where we are.

To my colleagues, I would say that to make an honest judgment, you should look at this nomination as if it came from the opposite party. I can promise—and this would absolutely be my opinion, and this isn’t the most popular opinion to take in the country—that I would oppose this nomination were it coming from a Republican President.

But what I would ask of my Democratic colleagues is to look deeply within their soul, to look deeply within their psyche and say: How would I vote if this were a Bush nominee? If this were a Bush nominee who had written legal opinions justifying torture in 2007, 2006, 2005, how would I have voted?

I think 90 percent would have voted against and would now vote against a Bush nominee.

This has become partisan and this body has become too partisan. There was a time when there were great believers in the Constitution in this body, and we have degenerated into a body of partisanship. There was a time when the filibuster actually could have stopped this nomination. There was a time when there would have been compromise. There was a time in this body when we would get people more toward the mainstream of legal thought because those on each extreme would be excluded from holding office.

The people who have argued so forcefully for majority vote, for not having the filibuster, are the ones who are responsible now for allowing this nomination to go forward. This nomination would not go forward were it not for the elimination of the filibuster.

Some say about the filibuster: Oh, that was obstructionism.

The filibuster was also in many cases about trying to prevent extremists from getting on the bench. We will now allow someone who has an extreme

point of view, someone who has questioned whether guilt must be determined beyond a reasonable doubt, someone who now says that an accusation is enough for the death penalty. Now, that person may say: Only if you are overseas. Well, some consolation if you are a traveler.

What I would say is we need to think long and hard and examine this nomination objectively as if this were a nomination from a President of the opposite party. We need to ask ourselves: How precious is the concept of presumption of innocence? How precious are our Bill of Rights?

We need to examine—and it is hard when you know someone is guilty, when you have seen the evidence and you feel that this person deserves punishment. I sympathize with that and think that this person did deserve punishment. But I also sympathize so greatly with the concept of having a jury trial, so greatly that an accusation is different from a conviction, that I can’t allow this to go forward without some objection. I hope this body will consider this and will reconsider this nomination.

At the appropriate time I will offer a unanimous consent request to delay the David Barron nomination until the public has had a chance to read his memo. I will return at an appropriate time, and we will offer that as a unanimous consent.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from Kentucky.

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

The PRESIDING OFFICER (Ms. HEITKAMP). Without objection, it is so ordered.

#### UNANIMOUS CONSENT REQUEST— EXECUTIVE CALENDAR

Mr. PAUL. I ask unanimous consent that the cloture motion on the nomination of David Barron to be U.S. circuit judge be delayed until such time that the public can review documents that are now being promised to be revealed by the President, that have not yet been revealed. So I ask that we delay until such time that the public can review the text of his memos on the use of targeted force against Americans.

The PRESIDING OFFICER. Is there objection?

Mr. MARKEY. Objection.

The PRESIDING OFFICER. The objection is heard.

The PRESIDING OFFICER. The Senator from Oregon.

#### BARRON NOMINATION

Mr. WYDEN. Madam President, it wasn’t very long ago when the Senator

from Kentucky and I were on the floor talking about drones, and I want to make sure it is understood that Senator PAUL’s passion, intellectual rigor, and devotion to these issues of liberty and security—which he and I have worked on together now for a number of years—is much appreciated.

I come to the floor today to address the issue Senator PAUL and I have discussed in the past, and that is how vigorous oversight—and particularly vigorous oversight over the intelligence field—needs more attention. It is not something we can minimize. It goes right to the heart of the values the Senator from Kentucky and I and others have talked about, and that is liberty and security are not mutually exclusive. We can have both.

The Senator from Kentucky and I often joke about how the Senate would benefit from a Ben Franklin caucus. Ben Franklin famously said, in effect, that anybody who gives up their liberty for security doesn’t deserve either.

The Senator from Kentucky and I have certainly had some disagreements from time to time on a particular judicial nomination, but I thank him for his time this morning, and I thank him for the opportunity we have had over the years to make the case about how important these issues are. The American people ought to insist that their elected officials put in place policies which ensure we have both liberty and security. I thank the Senator from Kentucky for that, and I have some brief remarks this morning.

Of course, the Senate is going to vote on the nomination of David Barron to serve as a judge for the First Judicial Circuit. His nomination has been endorsed by a wide variety of Americans, including respected jurists from across the political spectrum.

Mr. Barron has received particularly vocal endorsements from some of our country’s most prominent civil rights groups. Of course, the aspect of his record that has perhaps received the closest scrutiny in recent weeks is his authorship of a legal opinion regarding the President’s authority to use military force against an individual who is both a U.S. citizen and senior leader of Al-Qaeda. I am quite familiar with this particular memo.

The executive branch first acknowledged its existence 3 years ago in response to a question I asked at an open hearing of the Senate Select Committee on Intelligence. I followed up by working with my colleagues and pressing the executive branch to provide this memo to the intelligence committee.

This month, of course, the administration made this memo available to all Members of the Senate. Executive branch officials have now said they will provide this memo to the American people as well. This is clearly, in my view, a very constructive step, and I am going to vote yes on Mr. Barron’s nomination.

I want to take a minute to outline that this whole matter is about much