

. . . 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

more than a single memo. It drives home how incredibly important vigorous congressional oversight is, which is, of course, the mission of the intelligence committee, and it is the mission of all of us.

In his classic work on democratic government, Woodrow Wilson wrote that conducting oversight was one of the most important functions of Congress. He suggested it might be more important than passing legislation. Woodrow Wilson wrote:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees.

He added that Congress must examine “the acts and disposition” of the executive branch and “scrutinize and sift them by every form of discussion.” Woodrow Wilson said if the Congress failed in this duty, then the American people would remain ignorant “of the very affairs which it is most important that [they] understand and direct.”

Woodrow Wilson might not have been able to anticipate the size and scale of the modern national security apparatus, but I believe his words are as true today as they were a century ago.

As the elected representative of nearly 4 million Americans, I have spent years now working from the theory that all of us in the Senate have an obligation to understand how the executive branch is interpreting the President’s authority to use military force against Americans who have taken up arms against our Nation. I have long believed it is my obligation to make sure that those I am honored to represent in Redmond, Troutdale, and Dallas, and all across Oregon, understand that as well. I believe every American has the right to know when their government believes it is allowed to kill them.

In the case in question, as I have said before, I believe the President’s decision to authorize a military strike in those particular circumstances was legitimate and lawful. I have detailed my views on this case in a letter to the Attorney General that is posted on my Web site.

I agree with the conclusion Mr. Barron reached in what has now certainly become a famous memo. To be clear, while I agree with the conclusion, this is not a memo I would have written. It contains, in effect, some analytical leaps I would not endorse. It jumps to several conclusions, and it certainly leaves a number of important questions unanswered.

I am hopeful that making this memo public will help generate the public pressure that is needed to get those additional questions answered. I am talking here about fundamental questions, such as: How much evidence does the President need to determine that a particular American is a legitimate target for military action? Can the President strike an American anywhere in the world? What does it mean to say that capture must be “infeasible”? And ex-

actly what other limits and boundaries apply to this authority?

Mr. Barron was not asked to answer these questions, but it is my view it is vitally important that the American people get answers to those questions. In my view, those questions are essential to understanding how Americans’ constitutional rights will be protected in the age of 21st century warfare, and I am going to stay at it until the American people get answers to those questions.

In addition to getting detailed public answers to these matters, another important step will be for the Congress to review the other Justice Department memos regarding the President’s authority to use military force outside of an active war zone. Clearly, the most important memos on this topic are the ones the Congress has now seen regarding the use of lethal force against Americans, but it is also going to be important for the Senate to review the memos on other aspects of this authority as well.

The past few years have shown when the public is allowed to see and debate how our government interprets the law, it has led to meaningful changes in terms of ensuring that there are additional protections for privacy and civil liberties without sacrificing our country’s security at a dangerous time.

It is unfortunate that it took Mr. Barron’s nomination for the Justice Department to make these memos public. I will say it has been frustrating over the past few years to see the Justice Department’s resistance to providing Congress with memos that outline the executive branch’s official understanding of the law. When Mr. Barron was the head of the Justice Department’s Office of Legal Counsel, I believe congressional requests to see particular classified memos and legal opinions were appropriately granted. However, in the years since Mr. Barron moved on from that position, congressional requests to see memos and opinions have frequently been stonewalled—and I use those words specifically—frequently stonewalled.

The executive branch often makes the argument that these memos constitute confidential, predecisional legal advice to the President. Here is the problem with that argument: The President has to be able to get confidential legal advice before he makes a decision, but once a decision has been made and the legal memo from the Justice Department has been sent to the agencies that will carry out the President’s decision, that memo is no longer predecisional advice; it is the government’s official legal basis for actual acts of war, and as such, in my view, it is entirely unacceptable to withhold it from the Congress.

Congress has the power to declare war, and Congress votes on whether to continue funding wars, so it is vital for the Congress to understand what the executive branch believes the President’s war powers actually are. In that

classic work I have discussed from Woodrow Wilson, he said:

It is even more important to know how the house is being built than to know how the plans of the architect were conceived.

As a former basketball player, I often say that sections of the playbook for combating terrorism will often need to be secret, but the rule book the United States follows should always be available to the American people—all of the American people. Our military intelligence agencies often need to conduct secret operations, but they should never be placed in the position of relying on secret law.

I am very pleased this morning that we know the executive branch is going to provide this memo to the American people, and I believe this constructive step must lead to additional steps that are equally important. This episode is an object lesson in how the U.S. Congress can use the levers it has to fulfill one of the most important functions of government. As my colleagues and I engage in our personal discussions about how to make Congress more functional, I hope this is an experience we will remember.

I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

HEALTH CARE

Mr. BLUNT. Madam President, I want to talk a little bit about the continuing concerns we see in our office and hear from Missourians about what is happening with the implementation of the health care plan. The more people know about the path we are on with health care, the more concerned they appear to become.

I know the White House has suggested that somehow the numbers would reflect that people have responded to this program in a positive way. When you take away the health insurance people have and there is only one place they can go to get the insurance they think they need, obviously they are going to go there, but that doesn’t mean they like it.

In fact, there is a new political poll that suggests nearly half of the American voters say they are for outright repeal of this law, and nearly 90 percent say it will be important to them in determining how they will vote this year.

Another point in terms of why we want to start over again is everybody knows what the consequences are when you make a bad decision about people’s health care in a way that I think most Americans would not have anticipated in 2009 and 2010. When you fundamentally get involved in issues that impact people and their families, such as health care, and do things that fundamentally impact the way their money is going to be spent, and that decision is made by the Federal Government instead of by that family whose only decision might be to pay a penalty or not have insurance at all or