

to get something done for business? Or do you want to impose more gridlock and obstruction and delay for the sake of delay?

We are here because we want to get something done for the middle class. That is how we feel on this side of the aisle. It is a shame my Republican colleagues cannot say the same.

#### RESERVATION OF LEADER TIME

The PRESIDING OFFICER (Mr. WALSH). Under the previous order, the leadership time is reserved.

#### MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, the Senate will be in a period of morning business until 1:45, with Senators permitted to speak therein for up to 10 minutes each, with the time equally divided between the two leaders or their designees, with the majority controlling the first 30 minutes and the Republicans controlling the second 30 minutes.

The PRESIDING OFFICER. The Senator from Vermont.

#### JUDICIAL NOMINATIONS

Mr. LEAHY. Mr. President, later today we are going to vote on the confirmation of David Barron, who has been nominated for a vacancy on the U.S. Court of Appeals for the First Circuit.

Yesterday, we were able to overcome the unjustified Republican filibuster of this extraordinary nominee. Now, I have had the privilege of serving longer in this body than any other Senator here. I have never seen so many filibusters of judicial nominees by any President, Republican or Democratic. In fact, Republicans filibustered the very first judge President Obama sent to this body, a judge who was strongly supported by the Senators from his State, one of whom was the most senior Republican in this body, the other a moderate Democrat. Fortunately, enough Senators joined together to overcome that filibuster.

David Barron is currently a professor at Harvard Law School. He is a nationally recognized expert in constitutional law and the separation of powers, administrative law, and federalism. He clerked on the U.S. Supreme Court for Justice John Paul Stevens. In fact, I recall that Justice Stevens had so much regard for him that he attended Mr. Barron's nomination hearing.

I am in full support of Mr. Barron's nomination. It is almost as if he was sent to central casting for who should be a court of appeals judge. I have not seen any judicial nominee with better qualifications by either a Republican or Democratic President.

Let me respond to some of the criticisms levied against him with respect to the so-called drone memos as well as allegations that he would not be an independent judge who adheres to the rule of law. I reject both of those criticisms.

Over the last few weeks, I have spoken extensively about the issue of the drone materials and would refer specifically to my statement of May 14 of this year. While Senators may disagree with the administration's policies regarding the use of drones for lethal counterterrorism operations—and I have raised concerns about some of those operations—it is important not to conflate the confirmation of David Barron with the disclosure of Justice Department memoranda over which he had no control. He wrote an analysis of the law. Others make the decision of what they will do.

Yesterday the Justice Department made the right decision by agreeing to publicly release the redacted version of the legal justification for the government's potential use of lethal force against U.S. citizens in counterterrorism operations. I welcome the administration's additional step toward greater transparency.

Incidentally, these materials have been available to all Senators in recent weeks. We have had them in the unredacted form in a secure room here in the Capitol. We did that so that nobody could claim: Well, if only I knew what was in those memos, I could make up my mind. Every single Senator has had an opportunity to read them before today's vote.

We have heard some Senators argue that the Justice Department legal analysis provides the government with a blank check to use lethal force against Americans in places such as Germany or Canada. Oh my God, talk about grasping at straws. We are dealing with reality here, not Alice in Wonderland. Such a claim is simply inaccurate, inconsistent with the understanding anybody would have reading these materials.

In any event, the Attorney General has confirmed that Anwar al-Awlaki is the only American who was specifically targeted and killed since 2009. Awlaki was a senior operational leader of all of Al Qaeda in the Arab Peninsula, located in Yemen. He directed the failed attempt to blow up an airliner over Detroit on Christmas Day 2009. He was continuing to plot attacks against the United States when he was killed, according to the Attorney General.

I am glad a number of Senators share my deep regard for the constitutional rights of Americans and have spoken about that on the floor. I hope that after Mr. Barron is confirmed, they will show they really believe what they have been saying by joining me and 21 other Senators in cosponsoring the USA FREEDOM Act to help restore America's constitutional and privacy rights.

Finally, both Mr. Barron and a long list of bipartisan supporters have forcefully refuted any indication that he views the role of a judge as that of a policymaker. In a response to a question from Senator GRASSLEY, Mr. Barron stated the following under oath:

The judicial obligation is to set aside whatever personal views one may have and

to decide the particular case at issue. A judge must base the decision in any case solely on the facts and the law, while respectfully considering the arguments of the litigants. I would take that obligation to be an inexorable one, just as I felt obliged to set aside any personal views I may have had in providing legal advice within the executive branch while serving as the Acting Assistant Attorney General for the Office of Legal Counsel and as a career lawyer in that Office. I believe the best way to ensure one honors that obligation is to immerse oneself fully in the particular facts of the case and the law relevant to it and then to apply the law faithfully to those facts.

Mr. Barron's respect for the rule of law was recently reaffirmed by Stanford Law Professor Michael McConnell, a well-respected conservative scholar and former George W. Bush appointee to the Tenth Circuit. In a letter dated May 7, 2014 in support of Mr. Barron's nomination, Professor McConnell stated:

I suspect that on particular controversial issues, Barron and I disagree more often than not. But I have read much of his academic work, and followed his performance as acting head of the Office of Legal Counsel. In my opinion, his writings and opinions have demonstrated not only intelligence (even where we disagree) but respect for the rule of law. In the Office of Legal Counsel, whose functions closely resemble those of a judge, Barron's publicly released opinions indicated that he was consistently a force for legal regularity and respect for the constitution and laws of the United States. That is an important and precious thing.

I ask unanimous consent that Professor McConnell's letter be printed in the RECORD at the conclusion of my remarks.

It should be clear from Mr. Barron's testimony and Professor McConnell's letter that David Barron would faithfully discharge his duty as a judge in a manner consistent with the Constitution. Senator GRASSLEY cited yesterday to some statements made by Mr. Barron in his academic writings, but as Professor McConnell noted in his letter:

It is important to bear in mind that academic legal writing in constitutional law is often exploratory and provocative. No one should assume that an academic would take the same approach toward deciding cases that he does in writing about cases.

Professor McConnell should know, as he is a prolific academic who was similarly able to discharge his duty as a judge faithfully and consistently with the Constitution when he served on the bench. As a reminder to Republicans who are currently opposing Mr. Barron's nomination on these grounds, I will note that the Senate unanimously confirmed Professor McConnell's nomination to the Tenth Circuit by voice vote in 2002 during the George W. Bush administration.

Mr. Barron is truly an outstanding nominee. So outstanding, in fact, that Professor McConnell called him "one of President Obama's two or three best nominations to the appellate courts." I would urge all Senators to vote to confirm Mr. Barron to the First Circuit.

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

STANFORD LAW SCHOOL,  
May 7, 2014.

Hon. Senator HARRY REID,  
Majority Leader, U.S. Senate,  
Washington, DC.

Hon. Senator MITCH MCCONNELL,  
Republican Leader, U.S. Senate, Washington,  
DC.

Hon. Senator PATRICK J. LEAHY,  
Chairman, Committee on the Judiciary, U.S.  
Senate, Washington, DC.

Hon. Senator CHARLES GRASSLEY,  
Ranking Member, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

Re Letter of support for David Barron.

DEAR SENATORS REID, MCCONNELL, LEAHY, AND GRASSLEY: I do not often interject myself into the politics of judicial confirmations, but in the case of David Barron I make an exception. In my opinion, David Barron is one of President Obama's two or three best nominations to the appellate courts. Based on his scholarship and record of public service, he has the potential to be one of this nation's outstanding jurists.

It should be obvious that my assessment does not stem from political agreement. Barron has described himself as an advocate of "progressive constitutionalism"; I believe the Constitution should be interpreted without a partisan lens, in terms of the principles reflected in its text and history. I suspect that on particular controversial issues, Barron and I disagree more often than not. But I have read much of his academic work, and followed his performance as acting head of the Office of Legal Counsel. In my opinion, his writings and opinions have demonstrated not only intelligence (even where we disagree) but respect for the rule of law. In the Office of Legal Counsel, whose functions closely resemble those of a judge, Barron's publicly released opinions indicated that he was consistently a force for legal regularity and respect for the constitution and laws of the United States. That is an important and precious thing.

Some groups have been described Barron as "an unabashed proponent of judicial activism." That characterization, frankly, demonstrates a lack of familiarity with the tone of much academic debate over constitutional issues. Within that framework, Barron stands out as an advocate of lawyerly restraint. It is important to bear in mind that academic legal writing in constitutional law is often exploratory and provocative. No one should assume that an academic would take the same approach toward deciding cases that he does in writing about cases.

In ordinary times, Barron's legal ability and professional integrity would suffice to ensure his confirmation. But unfortunately, in recent decades, and especially during President George W. Bush's presidency, the opposition party has taken a more ideological and adversarial posture toward judicial nominations than the framers of our Constitution intended. It is understandable that Republicans today would apply the same adversarial standards to President Obama's nominations as the Democrats applied to exemplary nominees of his predecessor. It is my hope that eventually, this process of mutually assured destruction will pass, for nominees of both parties. That cannot be expected to occur without mutual accommodation and confidence that the same standards apply to nominees from both sides.

Nonetheless, David Barron's nomination should be supported by Senators of both parties. Perhaps the most significant constitutional questions of our time arise from the unilateral use of executive power in both the

domestic and international arenas. David Barron has written powerfully on this subject, demonstrating a balance between the need for an energetic executive and the centrality of law and the legislative branch. He has supported efforts to adopt laws to enable judicial review of executive actions that might otherwise escape judicial review because of lack of standing, and has written powerfully about the need for constitutional limits on executive excesses.

Some may wonder whether Barron's defense of separation of powers against executive unilateralism, which he articulated in the context of the Bush presidency, will survive intact in a presidency he supports. That is a legitimate question. No one knows the answer. But speaking as a fellow legal academic and sometime nominee, I believe that David Barron is a straight shooter and will not trim the sails of his deep-felt constitutional convictions on account of the different direction of political winds. One of this nation's proudest claims is that the limitations of constitutionalism hold firm without regard to which party is in power. I believe David Barron will carry on that tradition.

Beyond generalizations about judicial philosophy, this nomination has encountered resistance because of Barron's authorship of opinions in the Office of Legal Counsel justifying drone attacks by American forces on specified individuals abroad. The Administration's public legal defense of these strikes, especially by Attorney General Eric Holder, have been less than convincing as a legal matter. It is important for Congress to consider the legality of these strikes, but I strongly urge that Barron's nomination to the First Circuit not be collateral damage to this debate.

The pertinent question for this nomination cannot be whether any Senator agrees or disagrees with the practice of drone strikes. Barron was not Commander in Chief and he did not order the strikes. He has not been nominated to a position with authority over drone strikes, so his view of those strikes is relevant only to the more general question of his suitability to be an appellate judge on a court of broad jurisdiction. His job as acting head of the Office of Legal Counsel was to advise the President based on the traditional legal authorities of text, history, and precedent. He must be evaluated in light of that role.

Of course, neither I nor anyone else can evaluate the legal arguments made in Barron's OLC opinions until they are released. But whatever their content, it is difficult to imagine that they would place Barron outside the mainstream of professional legal judgment. The question of drone strikes is novel and much debated, and the authoritative legal sources are scant. It is far from clear that the Due Process Clause even applies to military attacks on targets in places abroad where American law does not run. If it does, it is equally unclear what kind of process is required when split-second decisions are made that could save countless innocent lives. These are discussions that should occur in the proper place, but a judicial nomination is not the forum for their resolution.

Ultimately, this confirmation requires a judgment about judicial character. The most important characteristic of a great judge is not brainpower or empathy, but the willingness to apply rules of law dispassionately and unflinchingly to all cases, regardless of the political context. My sense from long conversations with David Barron, and review of his writings and legal opinions, is that he is such a person. I urge members of the Senate to give their advice and consent.

Best regards,

MICHAEL W. MCCONNELL.

Mr. LEAHY. I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon.

## EXPIRE ACT

Mr. WYDEN. I wish to speak for a few minutes about the urgency of passing the tax extender bill and describe to our colleagues all the bipartisanship that has gone into this important effort.

This bill is truly urgent because America's employers file their taxes quarterly, which means they are paying higher taxes today without this tax extender package, which means less money for hiring and training workers, less money for buying new equipment, and less money for investing in innovation and growing jobs at home.

For example, a restaurant owner who needs to replace a walk-in freezer to keep their business running is going to pay higher taxes because they can't, in effect, hold down the costs through the provision in the tax bill. That means they will be cutting shifts and cutting workers.

This bill is just as urgent for millions of other American families; for example, a family with a college student who is registering for summer school this week and is going to lose a tuition tax break and homeowners whose place is now worth less than they paid for it. They finally caught a break recently from their lender, and without this legislation they will now face a real tax increase on phantom income. So that is why this bill is so timely, so urgent.

I am going to spend a few minutes talking about the extraordinary bipartisan team effort that went into putting this legislation together, getting it through the Finance Committee, and sending it to the Senate floor. The process began almost immediately after Chairman Baucus went to China, when my staff and I began working with Senator HATCH and his staff, as well as other committee members on both sides of the aisle.

We recognized that this would not be an easy bill to write, so Senator HATCH and I agreed to limit the focus of the legislation to tax extenders, the stop-and-go tax policies that we both think should end with comprehensive tax reform. After a lot of sweat equity put in by Democrats and Republicans on the committee, I introduced the EXPIRE Act, and that was the beginning of the bipartisan odyssey to make sure this bill was passed—and passed quickly—so as to deal with those urgent needs I described.

Before the committee met for markup, Senators offered 93 amendments, including 36 from Republicans. My team and I worked with both sides of the committee to incorporate 13 amendments into a modified bill. Eleven of them had Republican sponsors or cosponsors.