

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.

Then when the committee got together for markup, there were additional amendments—seven more approved, including three from Republicans.

This bill is thoroughly bipartisan. The committee held to the agreement Senator HATCH and I struck to keep the focus on tax extender policies, and I want to make one thing very clear. Those bipartisan amendments—the ones we have already included—have made the legislation better. If you want the best proof, look at the amendment offered by our colleagues Senator ROBERTS and Senator SCHUMER, a Democrat and a Republican. It did important work to strengthen the tax credit for research and development. By the way, this bipartisan amendment built on another bipartisan idea, a first-rate idea from Senator COONS and Senator ENZI to improve the credit; in particular, to make it more attractive for the small businesses, those businesses across the country starting in a garage. It would allow innovative startups to use the R&D credit to help pay their employees' wages.

This is smart policy—not Democratic policy or Republican policy—because it encourages American innovation, the engine of economic progress, and makes that engine stronger than it is today. It is going to make it easier for young companies to hire new workers, and it is exactly the kind of bipartisanship that the country is making it clear it is hungry for.

There are other bipartisan examples I could cite that all prove the same point, but I wish to wrap up by saying now the Senate has the chance, using exactly that procedure, to make the bill even stronger. It was made clear last week by the majority leader, by myself, and others that we are open to amendments that build on what went on in the committee. By the way, there are lots of them.

I was here on Friday until late week and through the weekend talking to colleagues, an equal number of Democrats and Republicans. It would be one thing if there weren't a lot of germane issues, relevant issues, to choose from. That is not the case. There are dozens of amendments from Senators on both sides of the aisle that directly relate to the topic in question—these stop-and-go provisions that have expired—and if we don't move to renew them, our economy is going to get hurt in ways I have described.

Our goal all along on the Senate floor has been to replicate exactly the kind of bipartisanship that went on in the Finance Committee. I absolutely believe that is still possible. That is why I described it.

As soon as the vote was cast last week, I spent the weekend looking for a bipartisan pathway. We had encouraging calls over the weekend indicating that both sides of the aisle wanted to work together to make progress. We had additional conversations about this through the week.

Some Senators were concerned they wouldn't have a chance to offer any amendments whether they focused on tax extenders or not. But as I said then, and I repeat now, I am open to hearing from colleagues on both sides of the aisle about their amendments. I can keep repeating it again and again, but I hope the point is getting through.

If I had brought a billboard to the floor, as sometimes people do, the billboard would say: "BRING ON THE AMENDMENTS" in big capital letters.

I will wrap up by saying I know the bill is not the legislation that every Senator wants, and—if I had my first choice—we would be working on comprehensive tax reform rather than the extenders, but it hasn't been possible to do that. Today the Senate needs to focus on the urgent business at hand; that is, making sure our people don't get punished.

If the Senate doesn't act on this bill, we would be punishing veterans coming home looking for jobs, we would punish innovators, we would be punishing small businesses, punishing those homeowners who are underwater on their mortgages, and punishing students with the mountains of debt.

I close by saying any colleague who is for that let me know because I don't know of a single Senator, not one, who thinks that is a good idea—when our economy is so fragile—to weigh it down with a tax hike. There aren't any Senators who are telling me they want to subject American families and business to yet more uncertainty about their tax bill.

So our legislation, our bipartisan legislation, would keep that from happening. It is absolutely essential that the Senate come together in a bipartisan way, build on exactly what we did in the Senate Finance Committee, and get this legislation across the goal line.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. First, let me compliment our new chairman of the Finance Committee. He is doing a great job on this bill. He is keeping the tenor bipartisan as he has done throughout his whole career. He has only been there a short while, but he is taking to the chairmanship like a fish to water.

I wish to follow up. There is so much that is bipartisan in this bill. It was a bipartisan bill that passed out of committee unanimously. I worked on an amendment with Senator ROBERTS that Senator COONS had originated for the R&D credit with Senators CARDIN, ISAKSON, and BLUNT to improve the section 181 live production incentive so we keep the film industry here, not London or Canada; Senators PORTMAN and CARDIN worked on energy efficiency; Senators BROWN and PORTMAN on disadvantaged workers; and CANTWELL and ROBERTS on low-income housing tax credit. The list goes on and on. As a result, this bill has broad support: the Business Roundtable, Grover Norquist, as well as the NEA and Feeding America.

So where are we. And I would like to further elaborate on what the chairman has said. We are willing to vote on amendments.

I always think of my dear friend from Tennessee, LAMAR ALEXANDER, who remembers how the place used to work and constantly reminds us—and that is a very good and salutary thing in this body. He would say on most bills there would be bipartisan support in the committee. The ranking member and the chair would get together with a list of amendments, each for his or her side, and they would come up with the list.

We are willing to do that. In fact, Leader REID has been extremely generous. He said we are not going to decide it should be this one and not that one, as long as the amendments are germane to this extenders bill. Of course we can't open the whole Tax Code for debate or debate the merits of the ACA on this bill. This is not the type of bill to do that.

It is a bipartisan bill, as Chairman WYDEN outlined, that is very necessary. So we would plead, almost, with our colleagues on the other side of the aisle, for the sake of the country, come up with some amendments, a list. If it is 100, obviously Senators WYDEN and HATCH will have to whittle it down. If it is five or six from your side and five or six from our side and they are germane to extenders, we will have to vote them up or down.

But the cry from the other side—which I have sympathy with, even though I don't agree that they tell the whole story—is let us do amendments. We are answering that plea. Leader REID has made it clear, Chairman WYDEN has made it clear we are not going to pick and say we will do this one and not that one.

The only two limits that I can tell are time—we can't do 100 or 200 of these, but as the Senator from Tennessee constantly reminds us, that is not going to happen—nor can we go far afield way beyond the bounds of this bill. Germaneness makes sense in such a bipartisan and important bill, but other than that, let's let it rip.

I know my colleagues on the other side of the aisle are discussing this. I know they are very serious about it. I have talked to colleagues on the floor, in the gym, and in the corridors of these bodies about getting this done.

It is so important for the country. Even beyond that, if we can't work in a bipartisan way on this bill, which was put together by Senators WYDEN and HATCH in such a bipartisan way, which has so much input from both sides of the aisle and where the offer is let's do amendments, not picking and choosing—we will pick this one, not that one—simply limited to what the bill is all about, germaneness, then we will not get anything done.

I want my colleagues on both sides of the aisle—on my side of the aisle, so many Members—and I sympathize with them—who desire to legislate and do

amendments, we have made that offer. HARRY, the leader, the chairman, and I am fully part of this, have made the offer to let's do amendments.

We hope the folks on the other side—it is sort of a little bit of a test. I am not throwing down any kind of gauntlet, but if we can't come up with a way to legislate on this bill, a bipartisan bill that has the support of the left, right, and center, that everyone agrees with, as Senator WYDEN outlined how much America needs them, what are we going to be able to be legislate?

We have a little time. We have 1 week where we can discuss this while we are in our districts working away. Let's get this done. I plead with my colleagues—"plead" is the right word, the right verb—come up with a list. We will come up with our list, and then let's roll up our sleeves, get to work on the floor, and pass this bill.

I believe if we do, the other body will. The other body—one other point—has different ideas. They want to make a few of these permanent. That is a legitimate amendment in the bounds that Leader REID has talked about. Let's vote on it. Let's debate it and vote on it. That is what we are supposed to do. If the other body's wisdom prevails, it will make it easier to pass the bill. Even if the other body's wisdom doesn't prevail, they will see that our body has a chance to debate it and decide on it.

Again, we are willing not to pick amendments—I know there is a complaint on the other side of the aisle that our leadership picks which amendments. We are not doing that. All we are saying is they ought to be germane to tax extenders, focused on the issue at hand, which is the extenders. This is not a bill that came out of a figment of the imagination of four Democratic Senators with no Republican input.

If we can't legislate on this bill, then what bill can we? I would ask my colleagues on the other side of the aisle, ask them to get us the list they come up with of amendments they wish to vote on.

I yield the floor, and 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. COBURN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

#### WRRDA CONFERENCE REPORT

Mr. COBURN. Mr. President, I wanted to spend a moment or two talking about the Water Resources Reform and Development Act conference report, and I want to say to my colleagues, both in this Chamber and in the House, some improvement in the WRRDA reauthorization has happened, but it is not nearly enough.

From 1986 to 2010, the average new authorizations were over \$3 billion a

year, and the average amount of money was \$1.8 billion a year. So we have been going backwards all that time. In this report, they did deauthorize less than 10 percent of the \$80 billion in backlogged projects. Their attempt to take some of the political nature out of it is a good attempt, but it is not nearly complete and will be gamed, just as we have seen in the past.

What really hasn't happened in the WRRDA bill, and partly because they do not have the authority to do it, is to change the Corps of Engineers. There has never been a project the Corps of Engineers doesn't want to build, and there has never been a study they do not want to do, because what that means is their budget continues and their jobs continue. So we do not have that distinct independent voice we can rely upon because bureaucratic malaise and self-interest trumps it every time.

There is another critical problem with this report. The inland waterways trust fund is out of money. We steal it every year. Like Social Security, the money has been stolen and spent. Yet they change the requirement for inland waterway repairs. It used to be if it was under \$8 million, we would pay for it out of the general fund—not the trust fund—but now they have moved that to \$20 million. In essence, what that says is we are going to do things that are the responsibility of the trust fund but we are going to charge the American taxpayer rather than the users of the inland waterway to do these repairs. We have a lot of those in need of repair on the McClellan-Kerr waterway in Oklahoma.

So there is a little sleight of hand, another smoke and mirrors set from the Congress of the United States to the American people about not being truthful about what they are doing. We need a priority of projects. We need discipline within the Corps of Engineers. There is none. There is no discipline. It is turf protection and bureaucratic excess continued as normal.

What we should have done is to deauthorize about \$40 billion worth of the projects that are presently in line and really put a priority on what is most important for the Nation, not what is most important for a certain Congressman or a certain Senator to look good at home. Unfortunately, we didn't have the courage to do that. We didn't have the strength of character to do that. We wouldn't stand and defend that. So what we did is make minimal progress—and there is some progress; I will admit it—but it is certainly not enough to get my vote. When we fix symptoms of disease rather than fixing the real disease, all we do is delay the onset of the cure, and that is exactly what we have done with the water resources conference report.

Mr. President, I yield the floor, and 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. ISAKSON. 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. ISAKSON. I ask unanimous consent to address the Senate for up to 5 minutes as if in morning business.

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

#### HONORING OUR VETERANS

Mr. ISAKSON. Mr. President, on the last Monday of every May our country pauses to commemorate Memorial Day and honor the men and women who died in wars around the world in defense of freedom, liberty, peace, and the United States of America.

This coming Monday is no exception. I urge my fellow Members of the Senate, all Georgians, and all Americans, to take a moment sometime over this weekend to pause and give thanks for the sacrifices made so we can do what we are doing here today, and so Georgians and Americans can do what they do on the lakes, beaches, and mountains of our country as they celebrate Memorial Day.

I was honored and pleased to travel to eight of the American cemeteries in Europe—in Italy, Luxembourg, Great Britain, and France, particularly Normandy, on the 70th anniversary of D-day, which is coming up—and pay tribute to the thousands of graves of Americans who went overseas in World War I or World War II and gave their life—sacrificed and died—so we can live in freedom and peace today.

Our Armed Forces are a great gift to us. They never ask for anything in return. They always give their service to our country. They swear their allegiance to protect and defend our domestic tranquility, and every single time they do the job.

Today we know they are deployed in Afghanistan, we know they are deployed in Africa, we know they are at sea—both on top of the sea and under the sea—and in the air, always looking to see that America is safe and free from harm.

I encourage all of my fellow citizens to say a special prayer of thanks this weekend for the men and women who sacrificed and died on behalf of our country, and on behalf of freedom, liberty, and peace for all mankind.

There is no secret that there is a scandal at the Veterans' Administration. We don't know how pervasive and we don't know how deep. But it surrounds the appointments and the cooking of the books in terms of appointments and services to our veterans and the VA health care system.

I know they have a hard job, but their first job and their main responsibility is to see to it our veterans get the health care they deserve, the health care we promised them, and the health care we are going to see to it they get.

I want the President to exhibit leadership and make sure we have a rudder