

May 7, 2014

The Honorable Senator Harry Reid
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Senator Mitch McConnell
Republican Leader
United States Senate
Washington, D.C. 20510

The Honorable Senator Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Senator Charles Grassley
Ranking Member, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

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.

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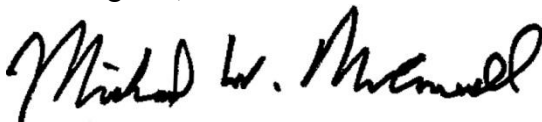
Beyond generalizations about judicial philosophy, this nomination has encountered resistance because of Barron's authorship of opinions in the Office of Legal Counsel justifying drone attacks by American forces on specified individuals abroad. The Administration's public legal defense of these strikes, 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,



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