



Written by [Warren Mass](#) on May 12, 2014

Rand Paul Wants Barron Memos on Extrajudicial Killings Made Public

U.S. Senator Rand Paul (R-Ky.) writing in an op-ed for Sunday's *New York Times*, questioned the Obama administration's actions of "appointing someone to the federal bench ... without fully understanding that person's views concerning the extrajudicial killing of American citizens."



Last September, President Obama nominated the candidate in question, Harvard Professor David J. Barron, for Circuit Judge for the U.S. Court of Appeals for the First Circuit. Barron previously served as the acting assistant attorney general of the Office of Legal Counsel (OLC) at the Department of Justice, and Paul has serious concerns that, while serving in that capacity, he wrote "at least two legal memos justifying the execution without a trial of an American citizen abroad."

In his editorial, Paul noted that on April 30, he wrote to Senate Majority Leader Harry Reid (D-Nev.), urging him to delay Barron's nomination, pending a court-ordered disclosure of the first of the nominee's memos that he knew about. Since writing that letter, said Paul, he has learned more.

Paul referred to a letter sent by the American Civil Liberties Union (ACLU) to every member of the Senate on May 6 citing the belief of Senate Intelligence Committee chairwoman, Dianne Feinstein, "There are *at least eleven* OLC opinions on the targeted killing or drone program." (Emphasis in original.)

While it has not been determined whether Barron wrote all those memos, noted Paul, "we do know that his controversial classified opinions provided the president with a legal argument and justification to target an American citizen for execution without a trial by jury or due process."

The senator stated his belief that all senators should have access to all these opinions so that they may fulfill their constitutional obligation to provide "advice and consent" to the president on this nomination.

Paul pointed directly to the Constitution as the basis of his argument, noting that the Bill of Rights is clear:

The Fifth Amendment provides that no one can be "deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury," as well as the right to be informed of all charges and have access to legal counsel. These are fundamental rights that cannot be waived with a presidential pen.



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The incident that lies at the root of Paul's — and many others' — vehement objection was the execution by drone strike in 2011 of Anwar al-Awlaki, an American citizen born in New Mexico to parents from Yemen.

Paul's objection to al-Awlaki's execution had nothing to do with the man's guilt or innocence, and he wrote: "I don't doubt that Mr. Awlaki committed treason and deserved the most severe punishment." Rather, the senator objected to the fact that the execution was carried out in complete disregard of the rights guaranteed to all Americans by our Bill of Rights. He wrote:

Under our Constitution, he should have been tried — in absentia, if necessary — and allowed a legal defense. If he had been convicted and sentenced to death, then the execution of that sentence, whether by drone or by injection, would not have been an issue.

Paul noted that violating the rights of even "a despicable human being" such as Awlaki is a threat to the rights of all American citizens, wherever they reside. He reminded the reader of instances in our history, such as the imprisonment of Americans who voiced opposition to World War I and the internment of Japanese Americans during World War II when prejudice or fear resulted in the rights of our citizens being suspended.

Paul is not the only senator who has expressed concern about the Barron nomination. Sen. Ted Cruz (R-Texas) issued a press release on May 8 that read:

David Barron's nomination underscores the danger of the so-called "nuclear option" Democrats are using to ram through controversial nominees on strict party-line votes. The Obama Administration has been extremely resistant in providing information about its drone program, which continues with its refusal to disclose the body of David Barron's government work.

The "nuclear option" is a parliamentary procedure that allows the Senate to override a rule or precedent by majority vote. The procedure thus allows the Senate to end a filibuster (such as one staged to delay voting on a nominee) by a simple majority (51 votes), even though the rules of the Senate specify that ending a filibuster requires the consent of 60 senators.

Cruz noted that back when Barron was a top official with the OLC, he had authored "consequential memos that justified the use of drones to kill U.S. citizens that the White House has not made public" and that "it would be a grave mistake to confirm Mr. Barron without meaningful access to the documents he authored."

Another concerned senator is Chuck Grassley (R-Neb.), who issued a press release on May 8 calling for transparency from the White House. Grassley noted that "Barron was instrumental in formulating the legal arguments that this administration used to justify the targeted killing of American citizens by drone strike. "

Grassley quoted from a May 2013 letter that Attorney General Eric Holder wrote to the chairman of the Judiciary Committee: "Since 2009, the United States, in the conduct of U.S. counterterrorism operations against Al-Qaeda and its associated forces outside of areas of active hostilities, has specifically targeted and killed one U.S. citizen."

Furthermore, noted Grassley, Holder conceded that three more Americans located outside the United States have been killed by drone strikes since 2011. And, according to the attorney general's letter, these Americans were killed even though they "were not specifically targeted by the United States" as part of a counterterrorism operation.



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Grassley complained that the Senate cannot, as things presently stand, discharge its constitutional duty to advise the president on the Barron nomination “without having a full picture of this nominee’s legal philosophy.”

The senator noted that on April 21 the Second Circuit issued an opinion in a Freedom of Information Act lawsuit brought by two *New York Times* reporters and the American Civil Liberties Union against the Department of Justice, the Department of Defense, and the CIA. Subsequently, the court ordered the administration to produce a redacted copy of a “Barron Drone Memo” to the *New York Times*.

In spite of this court action, the administration, said Grassley, has refused to provide anything in response to the *Times*’ request. Furthermore, noted Grassley, “Barron has written at least one other drone memo on the targeting killing of Americans while he was at the Office of Legal Counsel.”

Grassley said that since there are multiple memos written by Barron besides the one specifically mentioned in the court order — memos the administration has refused to hand over — he is starting to see a pattern, which defines what the administration means by the word “transparency.” It means “show me a court order first.”

In response to Grassley’s statement, Senate Judiciary Committee Patrick Leahy (D-Vt.) made the following statement on May 8:

Earlier today, the Ranking Member [Chuck Grassley] requested that the administration provide materials relating to Anwar Al-Awlaki so that all Senators would be able to properly evaluate Mr. Barron’s nomination. The administration has now made available unredacted copies of any memo issued by Mr. Barron regarding the potential use of lethal force against Anwar Al-Awlaki. I hope and expect that all Senators will review these materials today.”

Regardless of whether the administration turns over to the Senate all the Barron memos, or some of them, or just one memo — memos that Paul and even Colorado Democratic Senator Mark Udall believe should be made public — an even greater issue is at stake. That is: Is the administration’s use of drones to kill American citizens constitutional?

On April 4, a federal court dismissed a lawsuit filed by the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) on behalf of the families of Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki (Anwar al-Awlaki’s 16-year-old son) filed a complaint challenging the constitutionality of killing three U.S. citizens in two drone strikes in 2011.

Obama administration officials finally admitted that the three men were killed by the United States, but argued to the federal court that national security concerns should preclude the matter from being adjudicated.

In her ruling, Judge Rosemary M. Collyer refused to accept the concept of the executive branch judging the constitutionality of its own actions, but nevertheless dismissed the suit.

Since the U.S. PATRIOT Act was signed into law by President George W. Bush on October 26, 2001 in the aftermath of the 9/11 terrorist attacks, and the Sunsets Extension of the Act was signed into law by President Obama on May 26, 2011, constitutionally dangerous precedents have been set in which the executive branch has frequently ignored the Bill of Rights in the interest of “national security.” If this trend is not halted, the Bill of Rights will become nothing more than empty statements of principle.

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