

# WHY SHOULD SOMEONE WHO AUTHORIZED DUE PROCESS FREE EXECUTIONS BE A JUDGE ANYWAY?

Yesterday, Rand Paul announced he would filibuster the nomination of First Circuit nominee David Baron until the Administration released the OLC memo authorizing the killing of Anwar al-Awlaki, as ordered by the Second Circuit last month.

As I wrote in a piece at The Week, I think this move is far more serious a political move than Paul's earlier filibuster of John Brennan (and since you all know how I felt about Brennan, that's saying something).

Four years ago, David Barron opened a Pandora's box, giving presidents an inadequately limited authority to kill Americans outside all normal judicial process. As Paul notes in his letter, it would simply be "irresponsible" for the Senate to confirm his nomination without discovering what the memo could reveal about his views on due process, civil liberties, and international law. In a letter to all 100 senators, the ACLU [echoed this language](#), recalling the precedent of Jay Bybee. "No senator can meaningfully carry out his or her constitutional obligation to provide 'advice and consent' on this nomination to a lifetime position as a federal appellate judge without being able to read Mr. Barron's most important and consequential legal writing."

The Senate took such an irresponsible step in 2003 with Jay Bybee. It can avoid that mistake here.

Apparently, I'm not alone. Senators Udall and Wyden have both said they would not vote to advance Barron's nomination without more transparency on that memo (and remember – they've seen it).

Given that makes almost enough people (the GOP plus potentially 6 Democrats under the new filibuster rules) to hold up Barron's nomination, Obama is making yet another limited hangout, permitting Senators to go read the drone-killing memo in a SCIF.

On Tuesday, the White House offered the senators a concession. It offered all senators to a chance to look at the legal opinion. However, Obama has still not acceded to the Paul and Udall's call for public disclosure of the memo.

"I can confirm that the administration is working to ensure that any remaining questions member of the Senate have about Mr. Barron's legal work at the Department of Justice are addressed, including making available in a classified setting a copy of the Al-Awlaki opinion to any senator who wishes to review it, prior to Mr. Barron's confirmation," White House Press Secretary Jay Carney said at a daily briefing for reporters.

"It should be noted that last year members of the Senate Judiciary Committee had access to the memo and in his committee vote Mr. Barron received unanimous Democratic support," Carney said, referring to a January panel vote in which all Republicans opposed the nominee. "We are confident that David Barron will be confirmed to the 1st Circuit Court of Appeals and that he will serve with distinction."

So Senators will get to see it. But not the public (even though a court has ordered its

release!).

The President of the United States, of the purported most Transparent Administration Evah™, thinks it appropriate to have the Senate vote on a lifetime appointed Circuit Court judge without the public seeing one of that nominees' most momentous legal arguments ever.

The President thinks it appropriate to control access to information about a nominee who vastly expanded Executive Power.

And ultimately, it's time this discussion moved to whether the opinion is itself disqualifying.

In a comment to NYT, Wyden put it this way.

Mr. Wyden added that he was also not committed to voting yes.

"Certainly the opinion would not be something I would have written. The question is: Is it disqualifying," he said, adding that the administration should start the process of releasing the memos. "It needs to be addressed before a vote."

Frankly, I don't care how nice or how liberal Barron is. I feel about him like I feel about Jay Bybee. Someone who gets nominated after having rubber stamped such awful executive authorities should not be rewarded with a lifetime seat interpreting the law, because he has already been compromised.