



## Office of Legal Counsel Nominee Dawn Johnsen

On January 8, 2009 President Barack Obama announced his intention to nominate Dawn Johnsen to be the assistant attorney general for the Office of Legal Counsel. Her nomination was officially reported to the Senate on February 11. Senate Republicans are playing politics over this highly qualified nominee and some are threatening to filibuster because Ms. Johnsen does not conform to their political views.

### Importance of the Office of Legal Counsel

The Department of Justice's Office of Legal Counsel (OLC) is staffed by approximately two dozen career attorneys and helmed by several political appointees including the assistant attorney general. The office's major function is to provide advice on complex legal questions to the president and the rest of the executive branch so that the administration can fulfill its constitutional duty to "take Care that the Laws be faithfully executed."<sup>1</sup> Legal scholars, historians and Republican and Democrats alike criticized this office for putting politics ahead of law during the Bush administration.

### Restoring Respect for the Rule of Law

Restoring the Office's historical role of providing sound legal advice guided by respect for the laws and our Constitution is a major priority. Dawn Johnsen is superbly qualified to take on that task and has made clear her commitment to the rule of law, observing that for the OLC to "distort its legal analysis to support preferred policy outcomes would undermine the rule of law and our democratic system of government."<sup>2</sup> Further, she has co-authored a set of guidelines that make explicit her commitment to valuing the law over policy in doing the work of the Office:

OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the president's constitutional obligation to ensure the legality of executive action.<sup>3</sup>

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<sup>1</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>2</sup> Dawn E. Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559 (2007).

<sup>3</sup> WALTER E. DELLINGER, DAWN JOHNSEN ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), *reprinted in* 54 UCLA L. REV. 1559 app. 2.

## **Impeccable Credentials, Widespread Support**

Currently a professor of law at the University of Indiana School of Law-Bloomington, Dawn Johnsen graduated from Yale Law School before securing a highly competitive clerkship with Judge Richard Cudahy of the Court of Appeals for the Seventh Circuit. She also spent time working in public service for organizations like the ACLU and NARAL before entering government service.

Johnsen already has experience with the Office of Legal Counsel: she was deputy assistant attorney general for five years and acting assistant attorney general for a year and a half. Her supervisor in the OLC, former Solicitor General Walter Dellinger has said that Dawn Johnsen “will be the best head of OLC in the history of the office.” Dellinger also praised not only Johnsen’s “keen intellect and extraordinarily good judgment” but her “deep dedication to the rule of law” that “allowed her to put aside immediately and emphatically the confounding influences of policy preferences, political partiality and pressure from important governmental clients desirous of getting the answer they wanted to hear.”<sup>4</sup>

Ms. Johnsen has also received strong support from the national security community: officials from the FBI, Department of Defense, NSA and CIA issued statements to the Judiciary Committee stating their confidence in Johnsen’s ability to effectively carry out the duties of the head of the Office of Legal Counsel.

## **Partisan Games**

Dawn Johnsen was voted out of the Judiciary Committee strictly along party lines. Members of the Republican caucus have ignored both Dawn Johnsen’s impeccable record and strong support in favor of pillorying this exceptionally qualified woman.

Many Republicans claim to hinge their opposition not on Johnsen’s qualifications or legal acuity, but on a 20 year-old footnote in a legal brief discussing reproductive freedom. Many, however, seem most concerned about her repudiating the flawed policies pursued by the Bush administration. Vocal supporters of former Attorney General Alberto Gonzales like Senator John Cornyn (R-TX), have questioned Johnsen’s “seriousness” despite the impeccable qualifications of this noted legal and constitutional scholar. Unlike former Bush administration officials rubberstamped by Senate Republicans, Dawn Johnsen has made clear her commitment to checking executive power. “... OLC must be prepared to say no to the President.”<sup>5</sup>

Their opposition is not based on her ability or credentials, but on the fact that she does not adhere to their political views and aims. But, as Senator Cornyn himself observed, “Senate practice and even the Constitution contemplate deference to the president and a presumption in favor of confirmation”<sup>6</sup> and that “the American people want and expect is that we will get the business of the American people done in this body and that we will not degenerate into partisan fingerpointing or name-calling, nor obstruction.”<sup>7</sup>

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<sup>4</sup> Letter from Walter Dellinger, former solicitor general, to Senators Patrick Leahy and Arlen Specter, Senate Judiciary Committee (Mar. 18, 2009) (on file with the Senate Judiciary Committee).

<sup>5</sup> Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. 1559 (2007).

<sup>6</sup> John Cornyn, *Letter to the Editor*, N.Y. Times, June 14, 2005.

<sup>7</sup> 9 Cong. Rec. S109 (February 1, 2005) (statement of Sen. Cornyn).

## **Swift Confirmation**

The work of restoring the Office of Legal Counsel is too important to be delayed by partisan games. Dawn Johnsen possesses the single-most important qualification needed to head the Office of Legal Counsel: the willingness to put principle ahead of policy and ensure that the president obeys the law.