

March 18, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Re: Nomination of Dawn E. Johnsen

Dear Chairman Leahy and Senator Specter:

The Senate's task in confirming nominees for senior Justice Department offices is always important and frequently difficult. Often, Senators can do no more than attempt to project from a nominee's past writings, speeches and positions some estimation of how that individual might perform in the position for which he or she has been nominated. In this instance, however, the guesswork has been eliminated: Dawn Johnsen spent nearly five years in major leadership roles in the Office of Legal Counsel, a year and a half of that time as its acting head. The views of those throughout the government with whom she worked, and the opinions published under her name, establish that she is an exceptional choice to head the office.

Sometime during the years that Dawn Johnsen served as Deputy Assistant Attorney General while I was head of the office, her colleagues in OLC's leadership and I adopted a simple motto to guide our deliberations: "*Dawn Johnsen Is Always Right.*" This was offered only partially in jest. The senior officials of the office would debate complex issues among ourselves for days and finally realize, time and again, that Dawn's first answer was the right one after all. Finally, after many recurrences, we memorialized this pattern into a testament of tribute to Dawn.

Dawn's capacity to come to the right answer -- the answer that after much analysis, lengthy discussion and sober analysis others came to agree was the best rendering of the law -- was not just a product of her keen intellect and extraordinarily good judgment. There was more. Dawn's deep dedication to the rule of law 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. Because she brought such intellectual honesty to her work, she was able to see through to the right answer with a clarity that made her universally admired by those with whom she worked in government.

Senior officials from the FBI, the CIA, the Department of Defense, the National Security Administration, the Secret Service -- the list goes on -- have filed with this Committee statements that attest to the fact that Dawn, in the office for which she has been nominated, carried out her duties in a responsible, even-handed way. Her skill and dedication in both serving the interests of effective government and adhering to legal principle is attested to by these important officials and others who sought and relied upon her legal advice during her tenure.

The opinions she signed stand on their own as testaments to Dawn's adherence to the rule of law. Her opinions on the question of whether compensation could be paid to African-American farmers who were victims of discrimination in farm benefits are an example. Many hoped that the Attorney General's settlement authority could be used to get around the fact that these claims were barred by the statute of limitations. Even though Dawn's sympathies were no doubt strongly with the farmer plaintiffs, her view of the law compelled her to reject "the novel conclusion that the executive branch has the discretion to dispense with a congressional mandated statute of limitations in litigation or the compromise of claims."

In these and other matters that came before the Office of Legal Counsel, Dawn demonstrated that respect for the legitimate role of Congress in enacting legislation was an essential part of the rule of law. Laws enacted by Congress are not, in her view, to be lightly disregarded. Her more recent criticism of some OLC opinions reflects this basic approach. Her principal critique has been that some opinions took positions that unduly denigrated the constitutional role of the Senate and House in enacting legislation under Article I to regulate torture and wiretapping. At the same time, she has cautioned critics of the early Bush OLC opinions to "be precise with their objections and recommendations in order to avoid undermining future Presidents' legitimate authorities or otherwise undermining the proper balance of governmental powers." The positions she took when the controversial OLC opinions were released are now the positions widely agreed upon by leaders of the bar, by members of this Committee from both parties and by subsequent officials in the administration of President Bush. As usual, Dawn got it right, and got it right from the beginning.

Critics of Dawn's nomination have scoured every footnote from every brief and article and every scrap of paper, including handwritten notes for speeches, from Dawn's entire professional life in an effort to glean bits suggesting that she would be an irresponsible or partisan head of OLC. Such "predictions" of course seem entirely beside the point for one who has actually held a leadership position in the office. But even on their own terms, these shards amount to nothing. The canard that this Sunday school teacher of three year olds at the United Methodist Church in Bloomington and loving mother of two wonderful boys believes that "pregnancy is slavery" is false, as is the suggestion that she urged the Supreme Court to strike down abortion restrictions on the basis of the Thirteenth Amendment. The truth is that Johnsen was the lead lawyer on a reproductive rights brief filed in 1989 on behalf of seventy-seven organizations represented by twelve independent attorneys that included a footnote that made a rough analogy between government-compelled childbirth (not "pregnancy") and involuntary servitude. The brief did not ask the Court to invalidate the restrictions on any basis but *Roe v. Wade* and the Fourteenth Amendment.

Dawn's legal work at an earlier point in her career for a pro-choice advocacy organization, and her more recent work for the American Constitution Society have been raised against her. But the relevant question is not what causes or parties an individual has worked for in the past, but whether this is a person who can put those prior public service efforts aside when entering into the United States Department of Justice. Officials of both parties have shown that men and women of character do just that. For example, one of our most admired former Justice officials, Theodore B. Olson, has shown how it is done right. Before becoming head of OLC, after serving in that office, before becoming Solicitor General, and again after his service as Solicitor General, Ted Olson has been an active, committed and effective advocate for his political party and for conservative causes. But everyone who follows the administration of justice knows that when he assumed duties at the Department, he left his party and his politics at the door and advanced no interest other than the interests of the United States. Dawn's work at OLC shows that she is cut from the same cloth.

Because of her exemplary resume, her extraordinary legal credentials, her extensive body of scholarship exploring issues of separation of powers, and her substantial prior experience in the Office of Legal Counsel, Dawn comes to the leadership of OLC as the most highly qualified nominee in memory. One of Dawn's faculty colleagues at Indiana has written, "Dawn is level-headed, deliberate and thoughtful. She is never afraid to speak her mind, but chooses her words with care. She listens to opposing viewpoints. Dawn radiates integrity." Exactly.

I believe that Dawn Johnsen will be the best head of OLC in the history of the office.

Respectfully,

A handwritten signature in black ink that reads "Walter Dellinger". The signature is written in a cursive, flowing style.

Walter Dellinger
Assistant Attorney General
Office of Legal Counsel
1993-1996