

Society of American Law Teachers—SALT-- Urges Confirmation of Professor Dawn Johnsen as Assistant Attorney General of the Department of Justice Office of Legal Counsel

April 16, 2009--The Society of American Law Teachers—SALT—supports the nomination and confirmation of Professor Dawn Johnsen as Assistant Attorney General to direct the Department of Justice, Office of Legal Counsel (OLC). Indeed, few, if any, past nominees are more qualified than Professor Johnsen to serve President Obama and the people of the United States as director of OLC.

First, Professor Johnsen is an expert on Constitutional Law with an impressive resume of scholarship that illustrates the depth of her understanding of American jurisprudence. Professor Johnsen has won a university teaching award as a Professor of Constitutional Law and holds a fellowship in recognition of her contributions to the field. Moreover, Professor Johnsen's scholarship includes a history of OLC and the role it has played in guiding presidents and the executive branch of government¹ as well as other contemporary constitutional issues.²

Second, Professor Johnsen has already served with distinction in OLC. Professor Johnsen was Deputy Assistant Attorney General in OLC from 1993-96 and Acting Assistant Attorney General, in charge of OLC, from 1997-98 during the Clinton Administration. At that time, she received high praise from agencies she advised, even when her opinions concluded that the Constitution and laws of the United States did not permit the agency's proposed action. She brings extensive knowledge of the issues OLC faces, together with managerial experience, to an office whose mission was severely diverted during the Bush administration.³

One of the strong virtues that Professor Johnsen will bring to OLC is her position on more limited Executive war powers. Her evaluation of the role of OLC, as demonstrated by her scholarly articles and her tenure at OLC, properly disavows the view that the Executive Branch may wield absolute power. Opposition to her nomination mischaracterizes her statements regarding Executive powers. Nowhere has she stated that OLC ought not to be mindful of protecting legitimate Presidential powers against unwarranted intrusions by other branches.

¹ *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1603 (2007), including App. 1 & 2.

² *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 239 (2007); *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS 105 (2004); *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003); *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS 7 (2000); *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992); *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599 (1986)

³ Some have objected to Professor Johnsen's candidacy because of her work as Legal Director at NARAL before she joined OLC. In particular, opponents point to a footnote in a brief in an abortion case citing the Thirteenth Amendment. As Professor Andrew Koppleman, author of an article making a Thirteenth Amendment argument about abortion rights, made clear in an April 1, 2009, letter to Senator Arlen Specter (R-Pennsylvania), the footnote was from an entirely different brief, not one authored by Professor Johnsen. In any event, Professor Johnsen's career has made it quite apparent she can distinguish advocacy from providing legal advice and analysis.

Upon learning of the Bush administration OLC's secret memos authorizing torture, Professor Johnsen initiated and led a distinguished group of former OLC attorneys, including former assistant attorneys general in charge of OLC, in writing a statement of ten "Principles to Guide the Office of Legal Counsel," based on best, non-partisan practices developed by the office over the years.⁴ That statement, signed by nineteen distinguished former lawyers for OLC, was based on the Constitution and legal role of OLC as attorney-advisors to the Attorney General and President, and articulates strong and workable principles to guide the office in considering separation-of-powers issues, protecting the presidency, and preventing secrecy in lawmaking, while eschewing partisan advocacy.

Although there are times when national security requires nondisclosure, secret laws are the very opposite of Rule of Law principles in a democracy. Professor Johnsen's work on the statement of principles, articles, and speeches recognizes and respects that balance.

SALT applauds President Obama's decision to nominate Professor Johnsen, especially in light of her outspoken criticism of the secret memos OLC staff in the Bush Administration wrote that purported to justify and permit the use of torture on detainees held by the United States as suspects in the "war on terror." Professor Johnsen has already exhibited the intellectual prowess and moral courage needed to mediate the difficult and important balance-of-power issues that will inevitably arise during any presidency. SALT urges confirmation of Professor Johnsen as Assistant Attorney General to head the Office of Legal Counsel.

Since 1972, the Society of American Law Teachers (SALT) has been an independent organization of law teachers, deans, law librarians, and legal education administrators working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-served individuals and communities. www.saltlaw.org

Margaret Martin Barry, Catholic University Columbus School of Law
Deborah Waire Post, Touro Law Center
Co-Presidents

Society of American Law Teachers
Public Advocacy Center, Touro Law Center
225 Eastview Drive
Central Islip, NY 11722
631 650 2310

⁴ Johnsen, *Internal Legal Constraints*, *supra*, at 1603; *Guidelines for the President's Legal Advisors, an introduction to Principles to Guide the Office of Legal Counsel*, 81 IND.L.J. 1345, 1348 (2006).