



DAWN E. JOHNSEN:
Obama Nominee for Assistant Attorney General, Office of Legal Counsel

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Educational and Professional Background

Dawn E. Johnsen, a Long Island native¹, graduated *summa cum laude* with a B.A. in Economics and Political Science from Yale College in 1983.² She earned her J.D. from Yale Law School in 1986. During law school, Johnsen served as the Article and Book Review Editor for the *Yale Law Journal*. Upon receiving her law degree, Johnsen clerked for Judge Richard D. Cudahy of the United States Court of Appeals for the Seventh Circuit.³ Cudahy, a Yale Law School grad himself, was appointed to the federal bench by President Jimmy Carter in 1979.⁴ During her clerkship, Johnsen wrote an article for the Hastings Center Report in which she asserted that the concept of “fetal rights” threatened the autonomy of pregnant women.⁵

ACLU and NARAL (1987 to 1993)

In 1987, Johnsen joined the ACLU’s Reproductive Freedom Project in New York as a staff attorney.⁶ While serving in that capacity, Johnsen co-authored an article entitled, “Boyfriends and Husbands Use Courts to Block Women’s Abortions,” which appeared in the ACLU’s news publication, *Civil Liberties*.⁷ The article, published in 1988, condemns the then-current waive of pro-life attempts to prevent abortions through father’s rights litigation as “harassment” and an effort to “deprive women of their reproductive freedom.”⁸ In addition to the classic pro-abortion rhetoric put forth in the article, Johnsen and Paltrow state that “[t]he so-called right-to-lifers’ attempts to justify their harassment of these women as a desire to simply balance legitimate rights of the men involved is unconvincing. There is not [sic] way to balance the burden of pregnancy; it is not possible for the woman to carry the fetus for four-and-a-half months and then give it to the man to

¹ Cary Solida, *Attorney leaves Reno’s cabinet for Bloomington campus*, Sept. 16, 1998, THE INDIANA LAWYER, at 22.

² Dawn Johnsen, Curriculum Vitae, http://info.law.indiana.edu/pub/libs/images/pdf/cv_johnsen.pdf (last visited Jan. 15, 2009).

³ *Id.*

⁴ Federal Judicial Center, Judges of the United States (Cudahy, Richard Dickson), <http://www.fjc.gov/servlet/tGetInfo?jid=540> (last visited Jan. 15, 2009).

⁵ Dawn E. Johnsen, *A New Threat to Pregnant Women’s Autonomy*, THE HASTINGS CTR. REP. 33 (Aug. 1987).

⁶ Johnsen, *supra* note 2.

⁷ Dawn Johnsen and Lynn Paltrow, *Boyfriends and Husbands Use Courts to Block Women’s Abortions*, available at http://www.totse.com/en/law/high_profile_legal_cases/abt_blck.html (last visited Jan. 15, 2009).

⁸ *Id.*

carry for four-and-a-half months.”⁹ Johnsen and Paltrow then go on to analogize a father’s right to see his unborn child carried to full term to a woman’s right to force a man to undergo a vasectomy or produce sperm. The article states:

Certainly every individual has the constitutional right to decide, free from government interference, whether or not to have a child. This right, however, clearly does not give a man a right to force a particular woman to have his child. To the contrary, the Constitution guarantees that the power of the government will not be used to compel anyone, male or female, to be an unwilling participant in procreation.¹⁰

Johnsen and Paltrow’s reasoning follows that of their pro-abortion cohorts in basing their arguments on the incorrect assumption that a woman (unless she is a victim of rape) carrying a fetus *in utero* has not already been a willing participant in procreation.

After one year with the ACLU’s Reproductive Freedom Project, Johnsen became the legal director for NARAL, or the National Abortion and Reproductive Rights Action League (now NARAL Pro-Choice America).¹¹ As legal director, Johnsen “directed all legal and policy work of NARAL, NARAL-PAC, NARAL Foundation and 40 state affiliates.” She also served as the organization’s public spokesperson.¹² As NARAL’s legal director, Johnsen frequently weighed in on a variety of abortion-related issues ranging from legislation affecting a woman’s “right to choose” to Supreme Court nominees. For instance, in 1991, under Johnsen’s direction, NARAL produced a report which declared that, if confirmed, then-Supreme Court nominee Clarence Thomas would become “the most extreme anti-privacy, anti-choice vote on the (United States Supreme) [C]ourt.”¹³ After Thomas was confirmed and sworn in, Johnsen, who had vehemently opposed his confirmation, stated that “[i]n any abortion or sexual harassment case, Judge Thomas’s ability to be unbiased or neutral is highly suspect.”¹⁴

In response to the Supreme Court’s decision to hear what would become another landmark abortion case, *Planned Parenthood v. Casey*,¹⁵ Johnsen spoke at a news conference where she entertained a question concerning why reasonable restrictions such as informed consent laws were inherently inconsistent with the concept of fundamental rights since “there are many constitutional rights that are subject to some restrictions.”¹⁶ Johnsen replied:

That’s just not true. . . . [C]ertain regulations that are necessary to protect the woman’s health, for example, would be permissible, but not governmental interference with the right [to an abortion]. With the First Amendment, it would be as

⁹ *Id.*

¹⁰ *Id.*

¹¹ Johnsen, *supra* note 2.

¹² *Id.*

¹³ *Judge Thomas Anti-Privacy Views Are More Extreme Than Those of Any Sitting Supreme Court Justice*, New Report Says, U.S. NEWSWIRE, Sept. 4, 1991.

¹⁴ Neil A. Lewis, *The Thomas Swearing-In; After Ordeal of Senate Confirmation, Views on Thomas’s Court Opinions*, N.Y. TIMES, Oct. 19, 1991, at 8.

¹⁵ 503 U.S. 833 (1992).

¹⁶ *News Conference with National Abortion Rights Action League (NARAL) Re: Supreme Court Decision to Hear Pennsylvania Case*, FEDERAL NEWS SERVICE, Jan. 21, 1992 (alterations added).

if the State of Pennsylvania passed a law saying newspapers must wait 24 hours before publishing a specific story, or must sit down with state officials and read [] a list of reasons why they shouldn't publish a certain article. . . . [T]hat's the kind of restrictions we're talking about here.¹⁷

Johnsen later declared that, while parental involvement is ideal, parental consent or notification laws for minors seeking abortions serve as nothing more than a “smokescreen to stop young women from obtaining abortions.”¹⁸ In Johnsen's estimation, “passing legislation is not an effective way of promoting healthy communication” between parents and children.¹⁹ Of course, *preventing* such legislation would be an effective way for abortion proponents such as NARAL, the ACLU and Planned Parenthood to increase the frequency of abortions among minor girls.

In June of 1992, after the *Casey* Court ultimately upheld Pennsylvania's parental consent, informed consent and 24-hour waiting period laws, Johnsen stated that

The Bush court has now upheld restrictions today that are far more onerous than any the Court has previously upheld. The plurality, written by Justice O'Connor, says that the state can promote fetal life from the very beginning of the pregnancy, the very first stages of pregnancy, which is a dramatic departure from the holding in *Roe v. Wade*. Applying that analysis, the Court today upheld a restriction that allows the state to side against the woman, and argue against abortion through her doctor. . . . The Court is treating the right to choose as a second-class right. It's no longer being protected as a fundamental right. The restrictions that were upheld today will prove insurmountable for some women, and act as an absolute barrier to many women.²⁰

In October of that same year, the Supreme Court heard oral arguments in *Bray v. Alexandria Women's Health Clinic*,²¹ concerning whether “opposition to abortion [by pro-life groups such as Petitioners-Operation Rescue] constituted discrimination against women.”²² According to ACLJ Chief Counsel, Jay Sekulow, who argued the case before the Court, “the answer has to be no.”²³ Then-deputy solicitor general John Roberts, arguing on behalf of the Bush Administration, similarly asserted that abortion protesters' efforts did not target women “because of who they are, but because of what they are doing, getting abortions.”²⁴ Johnsen, however, strongly disagreed with both Sekulow and Roberts, declaring that the case was “yet another example of just how far President Bush [was] willing to go to take away a woman's right to make her own personal decisions about whether or not to have an abortion.”²⁵

¹⁷ *Id.*

¹⁸ Cristine Russell, *Between Parent and Child: When a Teenager Seeks an Abortion, Should Parent Be Told*, THE WASHINGTON POST, Apr. 7, 1992, at Z10.

¹⁹ *Id.*

²⁰ *News Conference with National Abortion Rights Action League Re: Supreme Court Decision in Pennsylvania Case*, FEDERAL NEWS SERVICE, June 29, 1992.

²¹ 506 U.S. 263 (1993).

²² Anthony Collings, *Supreme Court Stages Oral Arguments on Abortion*, CNN, Oct. 6, 1992.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

While continuing to serve as NARAL's legal director, Johnsen played an advisory role to President Clinton on reproductive rights-related issues during his 1992 bid for the presidency. She subsequently served as a member of the Clinton transition team. When Clinton took office in January of 1993, Johnsen viewed the new administration as a boon to the abortion rights agenda, particularly in light of her advisory role to the president on such issues prior to the election.²⁶ When Justice Byron White announced his retirement from the bench in 1993, Johnsen dubbed it as "a very important opportunity to begin restoring balance on the court."²⁷ She continued, however, by warning the pro-choice community that "it is going to take a number of years before we can remedy the harm of 12 years of ideologically driven Supreme Court appointments."²⁸

Believing the fate of the abortion right to be, in many cases, at the mercy of state courts in the absence of federal legislation otherwise protecting it, Johnsen has been a staunch supporter of the Freedom of Choice Act (FOCA). According to NARAL Pro-Choice America, FOCA is a federal measure that would essentially "codify *Roe v. Wade*."²⁹ Johnsen explained that, in light of the 1992 state elections, "[t]here's still a very great threat in many states to the right to choose. . . . We're going to see more obstacles imposed beginning in January. Which is why we need the Freedom of Choice Act."³⁰ Johnsen has also strongly advocated for the repeal of federal legislation that she perceives as a direct attack on a woman's right to choose. For instance, in response to Clinton's promises to repeal the Hyde Amendment, which prohibits federal funding for abortions, Johnsen said "[t]his marks an important beginning to an end of years of discriminatory policies, callous policies that denied the most vulnerable women the right to exercise their right to choose abortion."³¹ Finally, prior to leaving her post at NARAL to join the Clinton Administration in an official capacity, Johnsen "helped draft Clinton's series of executive orders on abortion-related issues – such as fetal tissue research and the 'gag rule' on abortion counseling."³²

***Clinton Administration* (1993 to 1998)**

Johnsen joined the Clinton Administration as Deputy Assistant Attorney General in 1993.³³ She served in that capacity until 1997 when she became Acting Assistant Attorney General in the Office of Legal Counsel (OLC).³⁴ Describing the role of the office that "provides authoritative legal advice to the President and all the Executive Branch agencies,"³⁵ Johnsen has explained that "[t]he goal of the [OLC] is to give the right answer to tough legal questions. . . . Our job is to say what the right thing is."³⁶

²⁶ See Solida, *supra* note 1.

²⁷ Jill Lawrence, *At Long Last, Maybe a Liberal*, ASSOCIATED PRESS, Mar. 21, 1993.

²⁸ *Id.*

²⁹ NARAL Pro-Choice America, Freedom of Choice Act (FOCA), <http://www.prochoiceamerica.org/issues/abortion/access-to-abortion/freedom-of-choice-act.html> (last visited Jan. 14, 2009).

³⁰ Arlene Levinson, *Abortion Fights Loom in Nine States While Focus Shifts to Congress*, ASSOCIATED PRESS, Nov. 30, 1992.

³¹ *President's Proposals to End Abortions Restrictions Controversial*, CBS NEWS TRANSCRIPTS, Mar. 31, 1993.

³² Al Kamen, *Heavy Lobbying for AID Administrator*, THE WASHINGTON POST, Feb. 3, 1993, at A15.

³³ Johnsen, *supra* note 2.

³⁴ *Id.*

³⁵ U.S. Department of Justice, Office of Legal Counsel Homepage, <http://www.usdoj.gov/olc/> (last visited Jan. 15, 2009).

³⁶ Solida, *supra* note 1.

During her brief tenure as Acting Assistant Attorney General, Johnsen had the role of providing legal advice to former Attorney General Janet Reno.³⁷ She also provided congressional testimony on a number of issues, including the Citizenship Reform Act (1997) and the Balanced Budget Amendment (1997), both of which contained controversial immigration components.³⁸ When she appeared before the House Subcommittee on Immigration and Claims in June of 1997, Johnsen fiercely criticized the Citizenship Reform Act, which was intended to curb illegal immigration by granting so-called birthright citizenship only to “children whose parents are citizens, legal aliens, or permanent residents.”³⁹ Invoking the Fourteenth Amendment’s citizenship clause, Johnsen asserted that the “proposed legislation is unquestionably unconstitutional. We cannot and should not try to solve the difficult problems illegal immigration poses by denying citizenship to persons whose claim to be recognized as Americans rests on the Constitution and over 200 years of history.”⁴⁰ California Congressman Brian Bilbray, the bill’s sponsor, however, countered Johnsen’s argument that the legislation violated the Fourteenth Amendment’s citizenship clause. Bilbray explained that Sen. Jacob Howard, the author of the citizenship clause, stated that the citizenship clause was not intended to “‘include persons born in the United States who are foreigners, aliens,’ or children of diplomats.”⁴¹

Indiana School of Law Faculty Member (1998 to present)

In 1998, Johnsen left the Clinton Administration and joined the faculty at Indiana University’s Maurer School of Law, where she has, since then, served as a law professor and Ira C. Batman Faculty Fellow.⁴² Her areas of focus are Constitutional law, First Amendment law, separation of powers, and reproductive rights under the Constitution.⁴³ Shortly after leaving Washington to enter academia, Johnsen participated in a panel with then-Independent Counsel Ken Starr to engage in a debate on the doctrine of executive privilege. Balking at “Starr’s assertion that Clinton’s claims of executive privilege were so bogus as to constitute an impeachable offense,” she used the panel discussion as an opportunity to defend Clinton’s recent invocation of the doctrine during the Monica Lewinsky scandal.⁴⁴ She defended the doctrine as a legitimate executive privilege and one that deserves the public’s respect. According to Associated Press journalist Gregg Aamot, Johnsen also “argued that Clinton [was] not acting improperly in trying to prevent his confidants from answering some questions.”⁴⁵

Over the past eight years, Johnsen has been an outspoken critic of the Bush Administration.⁴⁶ She has criticized Bush’s judicial nominees, claiming that since “Bush picks judges based on ideology,” there is no legitimate reason why senators should be prohibited from rejecting them for

³⁷ *Id.*

³⁸ Johnsen, *supra* note 2.

³⁹ Aziz Haniffa, *Noncitizen legal immigrants retain aid in budget bills*, ETHNICNEWSWATCH, July 11, 1997, at 44.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Johnsen, *supra* note 2.

⁴³ Indiana University School of Law, Dawn Johnsen: Faculty Profile, <http://info.law.indiana.edu/sb/page/normal/1419.html> (last visited Jan. 15, 2009).

⁴⁴ Eric Black, *At ‘U,’ Starr says privilege has limits; The independent counsel implied that the president has abused the doctrine*, STAR TRIBUNE, Oct. 25, 1998, at 8A.

⁴⁵ Gregg Aamot, *Starr joins panel to discuss landmark executive privilege ruling*, ASSOCIATED PRESS, Oct. 26, 1998.

⁴⁶ Eric Lichtblau, *Obama Pick to Analyze Broad Power of President*, NYTIMES.COM, Jan. 7, 2009, <http://www.nytimes.com/2009/01/08/us/politics/08johnsen.html>.

it.⁴⁷ The most common object of her political ire, however, has been the administration's policies concerning terrorism and the interrogation of enemy combatants. Johnsen is particularly known for hailing the administration's allegedly broad reading of executive authority in the war on terror as "outlandish."⁴⁸ Her criticism of the administration's war on terror policies was heightened after the release of the controversial 2002 Bybee Torture Opinion and 2003 Yoo Torture Memo. In response to the 2002 Torture Opinion, Johnsen, along with eighteen former OLC attorneys, drafted a list of ten guidelines for the president's legal advisors.⁴⁹ In her introduction, Johnsen essentially condemns the 2002 legal opinion, but states that the guidelines, though a "product of concerns initially raised by the OLC Torture Opinion," do not contain any legal analysis or "criticism specific to it."⁵⁰ One guideline states that "OLC should publicly disclose its written opinions in a timely manner, absent strong reasons for delay or nondisclosure."⁵¹ In the section expounding upon this particular guideline, Johnsen and her colleagues assert that

[m]aking executive branch law available to the public also adds an important voice to the development of constitutional meaning – in the courts as well as among academics, other commentators, and the public more generally – and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise.⁵²

In 2007, Johnsen stated that in order "[t]o justify policies that would otherwise violate applicable legal constraints, President Bush and his lawyers have espoused an extreme view of expansive presidential power during times of war and national emergency."⁵³ When the 2003 Torture Memo was released in April 2008, Johnsen renewed her criticism of the administration's policies on the war on terror, questioning "Where is the public outcry?! The shockingly flawed content of this memo, the deficient processes that led to its issuance, the horrific acts it encouraged, the fact that it was kept secret for years and that the Bush administration continues to withhold other memos like it—all demand our outrage."⁵⁴ Finally, in May 2008, Johnsen testified before a Senate subcommittee that the "Bush Administration's excessive reliance on 'secret law' threatens the effective functioning of American democracy."⁵⁵

Various Affiliations and Publications

Johnsen is currently a National Board Member of the American Constitution Society for Law and Policy. She also serves as the National Co-Chair of *Project on The Constitution in the 21st*

⁴⁷ Dawn Johnsen, *Tipping the Scale*, WASHINGTON MONTHLY, July/Aug. 2002, <http://www.washingtonmonthly.com/features/2001/0207.johnsen.html>.

⁴⁸ *Id.*

⁴⁹ Former OLC Attorneys (Foreword by Dawn E. Johnson), *Guidelines for the President's Legal Advisors*, Indiana L.J., May 22, 2006, available at <http://www.acslaw.org/node/2896>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Dawn Johnsen, *All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle*, July 2007, available at <http://www.acslaw.org/files/Dawn%20Johnsen%20July%202007.pdf>.

⁵⁴ Dawn Johnsen, *Outrage at the Latest OLC Torture Memo*, SLATE.COM, Apr. 3, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/03/outrage-at-the-latest-olc-torture-memo.aspx>

⁵⁵ Press Release, Indiana University, IU Professor Dawn Johnsen testifies at 'secret law' hearing (May 1, 2008) (on file with author).

Century, and the Co-Chair of Separation of Powers/Federalism Issue Group. Johnsen has published numerous articles and is a frequent contributor to Slate.com's legal blog, *Convictions*.⁵⁶

Johnsen's publications include the following: *What's a President to Do? Interpreting the Constitution in the Wake of the Bush Administration's Abuses* (2008)⁵⁷; *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power* (2007)⁵⁸; *The Progressive Political Power of Balkin's "Original Meaning,"* (2007)⁵⁹; *Foreword: War, Terrorism, and Torture: Limits on Presidential Power for the 21st Century* (2006)⁶⁰; *Guidelines for the President's Legal Advisors* (2006)⁶¹; *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate* (2005)⁶²; *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?* (2004)⁶³; *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change* (2003)⁶⁴; *Tipping the Scale* (2002)⁶⁵; *Presidential Non-Enforcement of Constitutionally Objectionable Statutes* (2000)⁶⁶; *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation* (1999)⁶⁷; *Maternal-Fetal Relationship: Legal and Regulatory Issues* (1995)⁶⁸; *Shared Interests: Promoting Healthy Births without Sacrificing Women's Liberty* (1992)⁶⁹; *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster* (1989)⁷⁰; *A New Threat to Pregnant Women's Autonomy* (1987)⁷¹; and Note. *The Creation of Fetal Rights: Conflicts with Women's constitutional Rights to Liberty, Privacy, and Equal Protection* (1986)⁷².

⁵⁶ Johnsen, *supra* note 2.

⁵⁷ 88 B.U. L. REV. 395 (2008).

⁵⁸ 54 UCLA L. REV. 1559 (2007).

⁵⁹ 24 CONST. COMMENT. 417 (2007).

⁶⁰ 81 IND. L.J. 1139 (2006).

⁶¹ 81 IND. L.J. 1345 (2006).

⁶² 26 CARDOZO L. REV. 463 (2005).

⁶³ 67 LAW & CONTEMP. PROBS. 105 (2004).

⁶⁴ 78 IND. L.J. 363 (2003).

⁶⁵ 34 WASH. MONTHLY 1519 (July 2002).

⁶⁶ 63 LAW & CONTEMP. PROBS. 7 (2002).

⁶⁷ 83 MINN. L. REV. 1127 (1999).

⁶⁸ 3 ENCYCLOPEDIA OF BIOETHICS, 2nd ed. 1413 (Warren T. Reich, Ed.). New York: Macmillan, 1995.

⁶⁹ 43 HASTINGS L.J. 569 (1992).

⁷⁰ 138 U. PA. L. REV. 179 (1989).

⁷¹ 17 HASTINGS CTR. REP. 33 (Aug. 1987).

⁷² 95 YALE L.J. 599 (1986).