

Questions of Senator Tom Coburn, M.D.
*“Nomination of Dawn Johnsen to be Assistant Attorney General, Office of Legal
Counsel”*
United States Senate Committee on the Judiciary
February 25, 2009

Abortion

1. Please review and respond to the attached documents addressing abortion’s effects on women.

Answer: I am not a psychologist or social scientist, but appreciate that research is ongoing regarding the impact of pregnancy, childbirth and abortion, including as reviewed in a 2008 American Psychological Association report on all peer-reviewed studies in the past twenty years.

2. Ms. Johnsen, you have written numerous articles and Supreme Court briefs, and have given many advocating abortion rights and opposing virtually all government attempts to regulate abortion.

a. When do you believe life begins?

Answer: The question when a human life begins has religious, philosophical, and scientific dimensions. It also has legal dimensions, of course. In my view, the legal dimension, which is what I have addressed in my work, should continue to be governed by the Court’s decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*.

3. You have stated in several articles that “*the fetus is a physical part of a woman*” and that this is an “*essential fact*” for limiting the government’s actions with regard to promoting its interests. Please explain this view further.

a. To say a fetus is merely “part of a woman,” are you saying a growing child deserves no more recognition or respect from the state than a pancreas or gall bladder?

Answer: No.

b. Is there any circumstance in which you believe the law should recognize an unborn child as an individual, separate from the mother?

Answer: I have written a few pieces about how law and policy treat the fetus in cases where the woman has chosen to bear a child. In such cases I have encouraged approaches that do not create an adversarial relationship, but instead

(consistent with the positions of the major medical organizations to address these issues) seek to support women in acting responsibly and bearing healthy children. There are situations where the law could and should recognize the fetus, in ways that would not be create an adversarial relationship but actually support healthy childbearing.

c. Do you believe it appropriate for the State to recognize the fetus for the purposes of inheritance and probate law?

Answer: Yes.

4. In an article from last year, you called the term “*partial-birth abortion*” “*an invented and intentionally provocative political term previously unknown to the medical profession.*”

a. Whatever you call the procedure, you acknowledge that it occurs when an unborn child is partially out of the woman’s body?

Answer: Yes, I am aware that is how the laws typically are phrased.

b. In your view, at what point does that unborn child acquire a right to life? [Does it attach only when the child is completely out of the woman’s body? Or some time thereafter? When?]

Answer: If by right to life you mean an interest that would support an abortion ban, that point is fetal viability.

c. If you are confirmed, do you feel you would be able to defend a partial-birth abortion ban?

Answer: It would not be my role as the head of OLC to do so, because I would not litigate. But to the extent I might be consulted, I certainly would have no problem advising that a law like the one the Court upheld in *Gonzales v. Carhart* could be defended, because the Court held it was not facially unconstitutional.

5. In your writings, you have made several references to “*the progressive agenda*” and remarked in the area of abortion jurisprudence that “*the progressive agenda would focus on the courts as the vehicles for desired change.*”¹

a. On what basis do you believe that courts are an appropriate vehicle to enact a “progressive agenda?”

Answer: My statement reflects the fact that nearly everyone who studies public law believes that the Supreme Court sometimes gets decisions wrong (though they sometimes disagree about which decisions were in error). It is certainly

¹ *Id.* at *.

appropriate to attempt to persuade the courts to change their interpretations, based on a sincere belief that a court erred. But that advice applies to citizen advocates and legislators. The Office of Legal Counsel, in determining the law governing the executive branch, follows decisions of the Supreme Court, and that is what I will do if I am confirmed as head of OLC. My job if confirmed would be to apply the law according to decisions of the United States Supreme Court whenever the Court had spoken—regardless of how I personally thought the cases should have been decided.

b. How can we be sure you will not carry such an agenda into the Justice Department?

Answer: I deeply believe that the Office of Legal Counsel must be protected from harmful political or ideological agendas or influences. Maintaining the independence of the office—protecting its analysis and advice from corrupting influences—is the single most important responsibility of those who lead OLC. I believe that my five years of service in a leadership position at OLC—three and a half years as Deputy Assistant Attorney General and a year and a half as acting Assistant Attorney General—demonstrate my commitment to the independence and integrity of the office.

Since leaving OLC, much of my scholarship has examined the importance of keeping the office free from harmful political or ideological behavior, and has explored concrete ways of preventing such harm. I would cite in particular to my work developing and promoting the “Principles to Guide the Office of Legal Counsel,” the first principle of which essentially captures the spirit of your question: “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 . . . inadequately promotes the President’s constitutional obligation to ensure the legality of executive action.” Dawn Johnsen, 54 UCLA Law Review 1559, 1604 (2007) (quoting the Principles).

I believe all my work in the leadership of the Office of Legal Counsel from 1993 until 1998 demonstrate that I made decisions not according to any political or ideological preferences, but according to the law. Letters written on behalf of my nomination by the people with whom I worked closely during those years attest to my commitment to the rule of law. These letters come from officials throughout the Department of Justice, and also top lawyers and officials from the CIA, the National Security Council, the Secret Service, and the Departments of Defense, Education, and Health and Human Services. To cite just one specific example, I advised the Clinton Administration that, clearly counter to the policy preferences of all involved, it could not unilaterally waive a congressionally enacted statute of limitations in order to pay what it viewed as meritorious racial discrimination claims brought against the government by African-American farmers. My opinion also pointed out that new legislation would be required to authorize such

an expenditure, and Congress in response enacted such legislation. I pledge to this Committee that I will continue to honor the critical independence from policy preferences and party politics that is indispensable to the Office of Legal Counsel.

6. Do you believe that anyone in good faith and upon careful reflection can arrive at the conclusion that the Constitution does not include the right to abortion and that *Roe* should be overturned?

Answer: Yes, I absolutely believe and know that to be true. I know this is an issue that divides Americans, and even families. I have close friends, family, and members of my church who strongly differ on this issue, as is true I would expect of most of us. That is why I support so strongly the search for common-ground approaches that reduce abortions by reducing unintended pregnancies and provide support for healthy childbearing and healthy families.

7. In *Webster v. Reproductive Health Services*, your brief on behalf of 77 women's groups presented the argument that abortion restrictions constitute disparate treatment between men and women since men do not endure the burdens of pregnancy. Is that your own view of the issue?

a. Your brief maintained that "the non-fatal health risks associated with legal abortion are very limited and substantially lower than those risks . . . created by continued pregnancy and delivery."² Another brief you submitted in that case on behalf of women who had had abortions asserts, "The experience is no longer traumatic; the response of most women to the experience is relief."³ Now we know from multiple scientific studies to date that in fact abortion does cause significant psychological problems for many women. The Elliott Institute research survey alone references over two dozen studies on its website.⁴ Don't your statements understate abortion's harm to women?

Answer: To the best of my knowledge, the statements were accurate.

b. Your brief continued that a state's restriction of abortion "curtails women's ability to participate equally with men in the public world."⁵ Is it your view that pregnancy is a condition that renders women unequal to men? [How else do you explain the view that pregnancy must be able to be eliminated before running its natural course—otherwise women are not equal?]

Answer: The brief contended, and the Supreme Court observed in *Casey*, that government-compelled childbearing through abortion restrictions (*not* pregnancy) does curtail women's life options.

² 1989 WL 1127689, *9.

³ 1989 WL 1115239, **25-26.

⁴ See <http://www.afterabortion.org/reasmor.html>.

⁵ 1989 WL 1127689, *3.

c. Your brief attacked in strong language the solicitor general's argument in *Webster* that "such options as abstinence and contraception" offer women a "meaningful opportunity" to avoid an unwanted pregnancy. You argued that the solicitor general's "factual premise that women who become pregnant have in some sense consented to the pregnancy belies reality." "[U]nderlying the Solicitor General's position," you continued, "appears to be the outmoded view that women ought not engage in sexual intercourse for reasons other than procreation and that those who do—unlike their male partners—deserve to be punished with an unplanned pregnancy."⁶

A. Your brief also includes the following comment: "Abstinence during the forty years a woman is fertile is not a viable way of life for most women."⁷

(1) Is that your personal view?

Answer: Yes.

(2) Since much of that period occurs when a female is a minor, it must follow that abstinence is not a viable way of life for girls who are adolescents or teenagers, correct?

Answer: No, I do not believe that follows. I believe abstinence should be part of sexuality education, but not the whole of it.

(3) Doesn't that message undermine the values of most parents, as well as the premise of most states' statutory rape laws?

Answer: No, I do not see how it could.

B. Your brief also rebukes governments for the problem of unwanted pregnancy: "By requiring women to sacrifice their bodies and their liberty in ways that the state never demands of men, state laws manifest the stereotype that it is women's 'natural role' to bear children."⁸ The word "stereotype," of course, is a negative one; it suggests an attitude to be eradicated.

(1) But isn't it just a reality of nature that only one gender is capable of bearing children?

Answer. Yes, only women are capable of bearing children.

(2) Have I, by stating that fact, embraced a negative stereotype? [IF NOT] Aren't you saying that the practice of abortion is a necessary step to

⁶ *Id.* at *6 n.5.

⁷ *Id.*

⁸ *Id.* at *25.

remedying a defect of nature, and a state is only making matters worse by doing anything to restrict that practice?

Answer. No you have not thereby embraced a negative stereotype.

- C. Isn't it also true that your comments diminish the capacity of women to exercise personal responsibility? [If not, are you saying that women do or do not bear responsibility for consensual activity when that activity results in an unwanted pregnancy?]

Answer. No, I believe women and men should exercise personal responsibility and the government should support such efforts through programs aimed at reducing the incidence of unintended pregnancy, including by supporting the availability of contraception.

8. You have written extensively about how the recognition of fetal rights infringes upon woman's autonomy.⁹
- a. If you are correct that "women's autonomy" should trump the rights of the fetus in every instance, wouldn't it follow that the courts should permit abortion on demand up to the time of birth?

Answer: No, I have consistently and long supported the viability line drawn in *Roe* as the appropriate one.

- b. Why should a woman's autonomy differ at all after the point of viability?¹⁰

Answer: I believe that *Roe v. Wade* was correctly decided, including in its core holding that prior to the point of viability, the ultimate decision whether or not to continue a pregnancy is for the woman, in consultation with her family, her physician, and the religious advisors she chooses to consult. After the point of viability, the government may ban abortion as long as it includes an exception where the woman's health or life is at stake. I believe *Roe* struck the right balance and that after the point of viability the state can overcome the woman's interests and impose a criminal ban on abortion, with necessary exceptions for life and health.

9. In an article from last year, you called the term "partial-birth abortion" "an invented and intentionally provocative political term previously unknown to the medical profession." You also lumped into the category of "wrongly decided cases" "decisions that upheld the exclusion of abortion from health care the government provided the poor, the prohibition of abortion services at publicly

⁹ For example, see Johnsen, Dawn, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L. J. 599, 624 (1986).

¹⁰ She argued in response to the Missouri solicitor general's argument that the interest is not compelling enough to override the woman's right even after viability. "Webster and Women's Equality," Johnsen, Dawn, Wilder, Marcy J. *American Journal of Law and Medicine*. Boston: 1989. Vol. 15, Iss. 2-3, p. 178.

funded medical facilities (even when no public funds subsidized the services), parental notice and consent requirements, and most recently, *Gonzales v. Carhart*.”¹¹

a. Is it safe to say that you do not believe any regulation of abortion beyond requiring medical professionals to perform them would be constitutional?

Answer: The Supreme Court has upheld many restrictions on abortion as constitutional, including parental notice and consent laws, funding restrictions, a federal ban on partial birth abortions, and waiting periods. If confirmed as the head of OLC, if ever asked to provide legal advice about the constitutionality of abortion restrictions, my advice would of course be based upon those Supreme Court decisions. You seem also to be asking about my own views, so I will say that I personally do not oppose laws that regulate providers of abortion services just as the government does other providers of medical services, when the purpose and effect is truly to protect the health of patients and the safety of the procedure.

b. A majority of the Supreme Court has consistently held it permissible to deny the use of public funds or public facilities to perform abortions. Do you believe that the distinction between such a regulation and a law restricting what private parties can do with their own money is a constitutionally significant one?

Answer: I recognize the Court has so held and if confirmed would fully abide by those rulings.

c. If you are confirmed, do you feel you would be able to defend a partial-birth abortion ban that resembled the one the Supreme Court upheld in *Gonzales v. Carhart*?

Answer: As I stated above, it would not be my role as the head of OLC to do so, because I would not litigate. But to the extent I might be consulted, I certainly would have no problem advising that a law like the one the Court upheld in *Gonzales v. Carhart* could be defended, because the Court held it was not facially unconstitutional.

10. In your 2006 article entitled “How *Roe* will go,” you had sharp criticism for the notion that abortion should be “safe, legal, and rare.” You wrote, “The notion of legal restrictions as some kind of reasonable ‘compromise’—perhaps to help make abortion ‘safe, legal, and rare’—proves nonsensical.”¹² Yet it was the platform, or at least the rhetoric, of both of the last two pro-choice presidents, Clinton and Obama, to try to keep abortion rare.

¹¹ *A Progressive Agenda for Women's Reproductive Health and Liberty on Roe v. Wade's Thirty-Fifth Anniversary*, issue brief for American Constitution Society (2008) at 1, 5.

¹² How *Roe* will really go, Philadelphia Daily News (January 30, 2006).

a. Are you on board with President Obama's goal of reducing abortions – of keeping them rare?

b. [If she retreats from her rhetoric] So you concede the goal of reducing abortions is desirable? Why is this goal desirable? [if not because an innocent human life is at stake]

Answer: I would note first that this is an issue of policy, which will be no part of my work if I am confirmed to head OLC. While people of good will disagree on abortion, I believe we can all agree that it is desirable to reduce the number of abortions, and I believe that reducing the number of unintended pregnancies is an important way to achieve that goal. I have always strongly favored common-ground approaches that reduce the number of abortions by reducing the rate of unintended pregnancy and by supporting women who decide to bear children by giving them the resources necessary to bear healthy babies. In the quotation to which you refer, I was criticizing, not the phrase "safe, legal, and rare" but certain abortion restrictions. In particular, I have criticized abortion restrictions that are designed to look like reasonable compromises, but that have the effect of disproportionately harming the most vulnerable of women, in particular poor and low-income women who suffer most from the dramatically decreasing availability of abortion services.

c. According to William Saletan, your opposition to requiring parents' involvement in the abortion decisions of their teenage daughters was strong enough that you urged NARAL: "Do not, as part of an affirmative legislative strategy, introduce even a liberalized version of a parental consent or notification law."¹³ Do you remain opposed to such laws?

Answer: I was speaking there, in my position as an advocate, of what was best as a matter of legislative strategy: in particular the appropriate strategic response to the risk of bad amendments substantially changing a bill once a particular subject was raised. It has been a long time since I have been involved in such legislative work and I do not have a judgment about what should be done now with respect to the same issues of legislative strategy. I do remain opposed to laws that mandate parental consent or notice, though I believe minors generally should involve their parents. This is all, of course, a matter of policy, which would not be my role at OLC. If I were to be confirmed to head OLC, I would in giving legal advice adhere to all Supreme Court decisions, including those that upheld parental notice and consent requirements.

¹³ WILLIAM SALETAN, BEARING RIGHT 289 (University of California Press , August 20, 2003)