

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 4, 2010

Statement Of Chairman Patrick Leahy (D-Vt.),
On The Nomination Of Dawn Johnsen to be Assistant Attorney General,
For the Office of Legal Counsel
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It has been more than a year since President Obama first nominated Dawn Johnsen to lead the Justice Department's Office of Legal Counsel (OLC). Yet, that critical office charged with providing independent legal advice to the President and the executive branch still remains without its Senate-confirmed leader.

We were reminded of the vital responsibilities of the Office of Legal Counsel at our hearing last week. The American people have seen the mounting evidence that OLC was converted during the Bush administration into apologists for their desired practices rather than the independent source of sound legal advice that it should have been. The so-called legal advice from OLC to the last administration was intended to provide a "golden shield" to commit torture and get away with it. It was shoddy work that could not stand in the light of day. On the eve of our confirmation hearing on the nomination of Alberto Gonzales to be Attorney General, the Bush administration famously withdrew the Bybee memo written by Mr. Yoo. The Dean of the Yale Law School testified before this Committee at that time that it was "perhaps the most clearly legally erroneous opinion I have ever read." Jack Goldsmith called the OLC memos "deeply flawed." The legal opinions of Yoo, Bybee and Bradbury, who reaffirmed the CIA interrogation program, failed to cite significant case law and twisted the plain meaning of statutes. These legal memoranda were designed to achieve an end. That is not what the Office of Legal Counsel should do, nor had done in other administrations.

The Bush administration lawyers lost their way. In my view, they disserved President Bush and his administration. The lawyers working at OLC were supposed to be giving independent advice regarding the rule of law and what it prohibits. Instead, they were focused on excusing what the Bush-Cheney administration wanted to do. These lawyers told the administration what Vice President Cheney wanted to hear. Without question, our Government institutions, the Justice Department and, in particular, the Office of Legal Counsel, were undermined. The rule of law was disrespected. Most importantly, the American people were harmed and put at greater security risk. The torture of individuals was not just a violation of our laws and treaties; it handed al Qaeda a propaganda tool to gain new recruits, and it made us less safe. General Petraeus recently said that when we have "taken expedient measures, they have turned around and bitten us in the backside." He is right. Colin Powell was right. Alberto Mora was right. The many JAG officers who fought these encroachments were right. The Bush lawyers abandoned their

independent responsibilities to become apologists.

Unfortunately, the Obama administration's attempts to repair this office and ensure that its lawyers are providing the Government with principled advice have been hamstrung by Senate Republicans who continue to delay appointment of the President's nominee to head the OLC. Even though this Committee favorably reported Professor Johnsen's nomination last March, it has been obstructed and delayed. In the more than nine months her nomination was pending on the Senate's Executive Calendar, Republican Senators refused to agree to debate and vote on the nomination. We do not know who played the role Senator Bunning recently did in blocking the extension of unemployment insurance and COBRA health coverage in blocking Senate debate and a vote on this nomination. It was another of their anonymous holds.

Republican Senators then insisted that the nomination be sent back to the White House at the end of the last year without final Senate action. President Obama renominated her and she has been on our agenda since January 28. I have accommodated repeated Republican requests for additional time. Today we should conclude our consideration and, again, send this nomination to the Senate for final consideration.

The President's renomination of Professor Johnsen in January indicates that he has confidence in her. As a veteran and former acting head of the office she has been nominated to run, Professor Johnsen is well qualified for the job. She understands the need to ensure a strong legal foundation for our national security and for advice to the Government. She previously served for five years in OLC and has a proven record of setting aside her personal views to render independent legal opinions rooted in the Constitution and the law. Professor Johnsen's former colleagues have called her the conscience of the office. Walter Dellinger, her former boss at OLC, has said that she "will be the best head of OLC in the history of the office."

When the excesses of the Bush administration's legal policies and its misuse of OLC were emerging in 2004, Professor Johnsen tried to protect its integrity and processes, bringing together 19 former OLC attorneys to formulate 10 "Principles to Guide the Office of Legal Counsel," based on longstanding practices of OLC under both Democratic and Republican administrations.

She has left no doubt that she will thoughtfully analyze - not simply rubber-stamp - the legality of administration policies. The ability of OLC to provide independent, apolitical, and expert legal counsel to the President and Attorney General is essential to the executive branch's ability to enforce the laws and adhere to the Constitution. There is a long tradition in both Democratic and Republican administrations of OLC doing just that.

Yet, rather than allow the Senate to consider this highly-qualified nominee who would restore the best principles and traditions of OLC, Senate Republicans have chosen to pursue a strategy of obstructing Professor Johnsen's nomination. Those who defend John Yoo and proclaim that the nation should be grateful to him for what he did, ought not to be questioning the seriousness and qualifications of this woman of principle. I believe that Professor Johnsen has demonstrated her resolve in national security matters, her "seriousness," and her commitment to the rule of law. She should be confirmed.

Members of the Committee had an ample opportunity to ask Professor Johnsen about matters related to her record in her open public hearing last February, in meetings and in the 165 written questions she has answered. Professor Johnsen has been open with the Committee about her record. I trust that Senators will not further delay action on this nomination. Senators who disagree can vote against her nomination. But it is time for us to vote.

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