

# **OBAMA HAD 60 VOTES FOR DAWN JOHNSEN'S CONFIRMATION LAST YEAR; JOHNSEN STALLED AGAIN THIS YEAR**

✘ The Obama Administration's confounding unwillingness and/or inability to move the nomination of Dawn Johnsen as head of OLC has manifested itself yet again. The renomination of Johnsen was set to be voted out of the Senate Judiciary Committee Thursday, but somehow they just "ran out of time" before they could get to it, even though they found time to muse about a couple of far less significant district court judges and other lesser nominees.\* It is a continuing and puzzling pattern of delay and diversion that has kept Dawn Johnsen's nomination in limbo for better than a year.

I previously wrote about the failure of the Obama Administration to support the Dawn Johnsen nomination, a far less than good faith effort that finally resulted in Johnsen's nomination being killed by operation of Senate Rule XXXI when they adjourned on Christmas Eve, December 24, 2009. It turns out what I wrote has been borne out and, as lawyers are wont to say, proved up pretty well.

As I will detail below, there is now crystal clear evidence that Barack Obama and Harry Reid had the sixty (60) votes for cloture on the confirmation of Dawn Johnsen all along last year, at least subsequent to July 7, the day Senator Al Franken was sworn in, and despite that fact refused to call a vote and get Johnsen installed in her critical post at OLC. Here is what I wrote immediately following the Christmas Eve death of her nomination:

Moreover, the bleating by Harry Reid and the Obama Administration that it is all the fault of mean old Republican obstructionism simply does not hold water. The Democrats hold a 60 seat caucus block, sufficient to overcome Republican obstruction. Of those, the Main Justice article is quite clear there were only two Democratic problem children, former Republican Arlen Specter and the ever whiny Ben Nelson, who never passes up an opportunity to betray his party. That means there were potentially only 58 Democratic votes for Johnsen's nomination. But Republican Richard Lugar firmly supported Dawn Johnsen, so that makes 59 votes, only one shy of confirmation.

In addition to Lugar, both Republican Senators from Maine, Susan Collins and Olympia Snowe, have refused to rule out voting for Johnsen and were being lobbied hard by extremely influential women's groups and liberal constituents. Both Collins and Snowe have a history of agreeing, when pressured, to allow up or down votes on Presidential nominees, even from Democrats.

Barack Obama and Rahm Emanuel had 59 votes in favor of Dawn Johnsen's nomination, a distinct possibility of picking up Collins, Snowe or both, and are more than aware Arlen Specter needs big help in his reelection campaign in Pennsylvania and that Ben Nelson can always be bought. And despite all of the above, the Obama White House did not ever request Harry Reid to call a vote. The only rational conclusion from this is the Obama White House did not want Dawn Johnsen, their own nominee, to be confirmed.

My calculations on the 60 votes being available were confirmed upon Obama re-nominating Johnsen

when it was immediately announced to much ballyhoo that Arlen Specter would be the 60th vote for cloture on the re-nomination; albeit apparently only after Johnsen has been again dragged through the committee process and other vagaries of prolonged confirmation procedure. The TPM report of Specter's intention to support Johnsen's confirmation confirms exactly what I stated, Specter was the 60th vote (there were always 58 Dems plus Richard Lugar) and was there all along; all Obama and Harry Reid had to do was call the vote. From TPM's Brian Beutler:

Sen. Arlen Specter (D-PA) says he's revisited his initial concerns over Obama Justice Department nominee Dawn Johnsen, and has decided to support her confirmation.

**"After voting 'pass' (which means no position) in the Judiciary Committee, I had a second extensive meeting with Ms. Johnsen and have been prepared to support her nomination when it reaches the Senate floor,"** reads a statement Specter sent to TPMDC. .... With Specter now in the 'yes' column, there are no obvious impediments to her confirmation. (emphasis added)

If Arlen Specter's own statement is to be taken at face value, then he has been prepared to, at a minimum, support cloture on Dawn Johnsen since his second meeting with her. I have been personally informed by Senator Specter's office that Specter's second meeting with Dawn Johnsen took place on May 12, 2009; further, Specter's office reaffirmed the accuracy of his reported statement on having been prepared to support her.

Unless Arlen Specter is just being disingenuous to curry votes in his primary battle, and to his credit there is no evidence of that (I have specifically given Specter the opportunity to retract or hedge his statement; he has affirmatively not done so), it means that with

Specter's availability, there were the necessary 60 votes for cloture on Dawn Johnsen's confirmation as of July 7, 2009, the day Al Franken was sworn in as the junior Senator from Minnesota.

All President Obama had to do to get Dawn Johnsen confirmed was have Harry Reid call the vote. But the Obama White House obviously never requested a vote on their own nominee; if they had, Reid would have obliged, that is simply what Majority Leaders do for Presidents from their own party. By the same token, when such Presidents don't want such a vote called, it is not; and that refusal by the White House is almost certainly the reason Dawn Johnsen was not confirmed, and is not in office serving the OLC and country right now.

But wait, there is more evidence of the Obama Administration's disinterest in Johnsen's confirmation. It was not just Arlen Specter that was wrongly pegged with being the holdup on Dawn Johnsen, it appears the White House has falsely let Ben Nelson be pegged as a culprit, as well. Turns out that is not necessarily true, either, as Nelson has point blankly stated the White House never even asked him to support Johnsen. From The Indianapolis Star:

Nelson said Wednesday that he doubted Johnsen's nomination would be brought to a vote.

"We have to let the administration decide what they want to do," Nelson said. Asked if he has told the administration whether he'd vote for Johnsen, Nelson said he hasn't been asked.

And, of course, there is the fact that the Maine twin Senators, Collins and Snowe, have steadfastly refused to directly oppose cloture on Johnsen's confirmation. Despite history that suggests they very well might not deprive Johnsen of an up or down vote, they too have not

been put on the spot by the White House.

Which brings us back to why Obama never had Harry Reid call the vote last year. As I previously opined, there are hard policy grounds to explain the Administration's failure to push Dawn Johnsen's confirmation:

In the end, it is likely Barack Obama, Rahm Emanuel and the servants of the status quo simply did not really want a true advocate for governmental transparency, a critic who excoriated Bush/Cheney policies on warrantless wiretapping, torture, indefinite detention, ignoring international treaties and conventions, and concentration of power in a unitary executive; all policies the Obama Administration has substantially co-opted as its own.

If one needed any more confirmation of the stunts Obama and his Administration have been pulling without the strong and principled leadership at the OLC (and there really should be no question after the wholesale adoption of Bush policies on surveillance and torture that are at complete odds with Johnsen's long-stated beliefs), it came like a ton of bricks with the recent revelation that Obama brazenly used the OLC to retroactively immunize serial and repetitive illegal and unconstitutional violation of Federal wiretapping laws by the FBI and telecom companies.

As Marcy previously noted, the stunning report comes from Ryan Singel at Wired/Threat Level:

The FBI and telecom companies collaborated to routinely violate federal wiretapping laws for four years, as agents got access to reporters' and citizens' phone records using fake emergency declarations or simply asking for them.

....

The Obama administration retroactively legalized the entire fiasco through a secret ruling from the Office of Legal Counsel nearly two weeks ago.

That's the same office from which John Yoo blessed President George W. Bush's torture techniques and warrantless wiretapping of Americans' communications that crossed the border.

Yes, indeed, that is precisely the type of bastardization of the rule of law and accountability the Bush/Cheney administration would have cravenly used the Office of Legal Counsel for. Bush and Cheney used the OLC (also, notably, without a Senate confirmed leader at the time since Steve Bradbury served only in "acting" capacity) to shamelessly and retroactively give paper cover to illegal and immoral torture after the fact; I guess it is progress and "change" that Obama only does it to cover up illegal surveillance. But it is most certainly not consistent with the lifetime of work, opinions, statements and positions from Dawn Johnsen, who would be expected to have adhered to the law and OLC protocols.

The standard of conduct for OLC in this regard is specified by the OLC guidance for Best Practices for OLC Opinions (promulgated May 16, 2005):

OLC is authorized to provide legal advice only to the Executive Branch; we do not advise Congress, the Judiciary, foreign governments, private parties, or any other person or entity outside the Executive Branch.

....

As a prudential matter, OLC should avoid opining on questions likely to be at issue in pending or imminent litigation involving the United States as a party (except where there is a need to resolve a dispute within the Executive Branch

over a position to be taken in litigation). Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the legality of past conduct (though from time to time we may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct).

Pretty hard to figure exactly how retroactively giving paper cover to the FBI and telecom co-conspirators for patently illegal surveillance in violation of the Electronic Communications Protection Act and Fourth Amendment is a proper OLC function, especially when doing so is contra to their own stated protocols. It is hard to fathom Dawn Johnsen signing off on this legal perfidy by Obama; pixie dust does not seem her style.

The evidence is clear and convincing that it was not a lack of 60 votes behind Dawn Johnsen's nomination withering and dying on the vine last year, it was the desire by the Obama Administration to not have a strong confirmed leader like Johnsen guiding the OLC. President Obama owes Dawn Johnsen and the nation an explanation for his disingenuous handling of her nomination, failure to install strong leadership in a rudderless OLC and for continuing the Bush/Cheney-like abuses of the OLC to cover up illegal acts.

**Update:** \* I have been informed by Judiciary Committee staff that they truly did just run out of time today, that Chairman Leahy is committed to Johnsen's nomination, and immediately noticed another Committee business meeting for next Thursday, in which Dawn Johnsen is listed as the first order of business.