

# OBAMA KILLED THE JOHNSEN NOMINATION, NOT BEN NELSON NOR THE GOP

It strikes me as necessary to follow up a bit on the death of the Dawn Johnsen nomination to lead the Office of Legal Counsel at the Department of Justice. Specifically, it needs to be clear the conventional wisdom of the main media, and even a surprising number of normally more clear headed progressive bloggers, that the nomination failed because of opposition from Republican obstruction coupled with opposition by Ben Nelson, is completely and patently false.

The false meme was already in play with the first substantive reporting by Sam Stein at Huffington Post as I noted yesterday. It is being propagated by the Washington Post (Republicans and “moderate lawmakers”), the New York Times (conservatives and two Democrats), even progressive stalwarts like Glenn Greenwald and McJoan at DKos have discussed the effects of the Republicans and Ben Nelson on the torpedoed nomination (although, to be fair, neither ascribes full blame on the GOP and Nelson).

Perhaps the best example of purveying the false wisdom comes from Jake Tapper at ABC. Tapper, in an article supposedly about the Obama White House not having the stomach for a fight on Johnsen, nevertheless proceeds to regurgitate the usual suspects:

Senate Republicans opposed her nomination overwhelmingly, meaning Senate Majority Leader Harry Reid, D-Nev., needed 60 votes to bring her nomination to the floor of the Senate for a vote.

The White House put all the blame on the Republican minority – White House spokesman Ben LaBolt said, “Senate

Republicans will not allow her to be confirmed” – but it was a bit more complicated than that.

A Senate Democratic leadership source said that throughout 2009 two Democrats said they would vote against her – Sen. Ben Nelson, D-Neb., and Sen. Arlen Specter, D-Pa. The only Republican of the 40-member GOP caucus who said he would vote for her was her fellow Hoosier, Sen. Dick Lugar, R-Ind.

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Specter remained opposed to Johnsen’s nomination even after he switched parties in April 2009, but his primary opponent Rep. Joe Sestak, D-Pa., began to attack Specter for his opposition to her nomination.

Johnsen’s nomination expired at the end of 2009, but in January 2010 Specter said he’d vote for her.

This is a bunch of bunk. I have previously written extensively on why there were at least 60 votes for Johnson’s confirmation for the entire second half of last year after Al Franken was sworn in, and why there still were 60 votes for her confirmation this year upon Obama’s renomination, even after the Scott Brown victory in Massachusetts. If you have any question, please click through and refer to those articles; for now though, I want to revisit the false light being painted on Ben Nelson and Arlen Specter on the nomination’s failure.

To date, the only journalist I have seen to even come close to being accurate about Ben Nelson’s status on Johnsen’s nomination is Charlie Savage at the New York Times, who yesterday briefly noted:

And it was not clear whether Mr. Nelson would join Republicans in trying to block a vote on Ms. Johnsen with a filibuster.

And that is the only germane question. It matters not whether Ben Nelson likes Johnsen, nor even if he would vote for her on the floor; the only salient issue is whether Nelson would vote for cloture and permit a floor vote. Ben Nelson never said he would block cloture. Never. And when questioned by the Indianapolis Star, he said the WH had never even discussed the subject with him.

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.

There is no evidence whatsoever Nelson would have voted against allowing the nominee of Barack Obama, the sitting President of his own party, to have an up or down vote. None. How Nelson would have voted on the up or down floor vote is irrelevant as there were far more than the 51 votes for confirmation in an up or down vote. Ben Nelson was not the problem.

Arlen Specter was not the problem either. Specter's office directly confirmed to me that he was, and has been, willing to allow cloture on the up or down floor vote for Johnsen, and likely willing to support her in said up or down vote, ever since his second face to face meeting with Johnsen on May 12, 2009 and Specter confirmed the same to Marcy Wheeler in late February. The failure of the Johnsen nomination cannot be laid at the feet of Arlen Specter.

Oh, and one other thing should also be kept in mind, there is a very good chance that, if it ever came down to them, either or both of the Maine twins, Olympia Snowe and Susan Collins, would have permitted cloture on a floor vote too. They have a record of not blocking votes on

Democratic Presidential nominees going back to the Clinton era and leading Maine women's groups were very optimistic they would allow it on Johnsen if it came down to them (which I also separately confirmed with the groups).

So, it was not Ben Nelson who killed the nomination of Dawn Johnsen, nor was it Arlen Specter or Senate Republicans. No, the sole reason Dawn Johnsen is not leading the OLC is that Barack Obama and his coterie of advisors did not want Dawn Johnsen leading the OLC. The Obama Administration cravenly hung their own nominee out to dry, and the reason is almost certainly that she was not compatible with the Administration's determination to maintain, if not expand, the Bush/Cheney positions on unbridled executive power, indefinite detention without due process as well as warrantless wiretapping and other Fourth Amendment invasions.

You want to know why the Obama White House killed their own nomination of Dawn Johnsen? Glenn Greenwald put it so well that I cannot improve on it and will just adopt and incorporate his spot on words:

virtually everything that Dawn Johnsen said about executive power, secrecy, the rule of law and accountability for past crimes made her an excellent fit for what Candidate Obama said he would do, but an awful fit for what President Obama has done. To see how true that is, one can see the post I wrote last January detailing and praising her past writings, but all one really has to do is to read the last paragraph of her March, 2008 Slate article – entitled “Restoring Our Nation’s Honor” – in which she outlines what the next President must do in the wake of Bush lawlessness:

The question how we restore our nation’s honor takes on new urgency and promise as we

approach the end of this administration. We must resist Bush administration efforts to hide evidence of its wrongdoing through demands for retroactive immunity, assertions of state privilege, and implausible claims that openness will empower terrorists. . . .

Here is a partial answer to my own question of how should we behave, directed especially to the next president and members of his or her administration but also to all of use who will be relieved by the change: We must avoid any temptation simply to move on. We must instead be honest with ourselves and the world as we condemn our nation's past transgressions and reject Bush's corruption of our American ideals. Our constitutional democracy cannot survive with a government shrouded in secrecy, nor can our nation's honor be restored without full disclosure.

What Johnsen insists must not be done reads like a manual of what Barack Obama ended up doing and continues to do – from supporting retroactive immunity to terminate FISA litigations to endless assertions of “state secrecy” in order to block courts from adjudicating Bush crimes to suppressing torture photos on the ground that “openness will empower terrorists” to the overarching Obama dictate that we “simply move on.” Could she have described any more perfectly what Obama would end up doing when she wrote, in March, 2008, what the next President “must not do”?

I find it virtually impossible to

imagine Dawn Johnsen opining that the President has the legal authority to order American citizens assassinated with no due process or to detain people indefinitely with no charges. I find it hard to believe that the Dawn Johnsen who wrote in 2008 that “we must regain our ability to feel outrage whenever our government acts lawlessly and devises bogus constitutional arguments for outlandishly expansive presidential power” would stand by quietly and watch the Obama administration adopt the core Bush/Cheney approach to civil liberties and Terrorism. I find it impossible to envision her sanctioning the ongoing refusal of the DOJ to withdraw the January, 2006 Bush/Cheney White Paper that justified illegal surveillance with obscenely broad theories of executive power. I don’t know why her nomination was left to die, but I do know that her beliefs are quite antithetical to what this administration is doing.

There is your answer. In brutal black and white. And progressives better wake up and start paying attention, because what you see here is extremely telling about the mindset and backbone, or severe lack thereof, the Obama White House has for the coming nomination and confirmation battle to replace Justice Stevens. If past is prologue, we are on the cusp of shifting the ideological balance of the Supreme Court severely to the right – under a Democratic “liberal” President.