

Questions of Senator Tom Coburn, M.D.
“Nomination of David Ogden to be Deputy Attorney General of the United States”
United States Senate Committee on the Judiciary
February 5, 2009

General

1. Your legal career has included in both public service and private law practice. While practicing law in the private sector, were you, at any time, required to represent any of your clients, whether as a party in a case or as *amici*? If, at any time, you were not required to represent a client, is it correct to conclude, in those situations, you had the freedom to accept or reject any client who sought your services?

Answer: Like any younger lawyer in private practice, earlier in my career I had relatively little choice regarding the clients I represented. It was my job to work for the clients my firm represented, generally the clients of more senior lawyers in my firm. In the past eight years, since my government service ended and while practicing at WilmerHale as a senior partner, potential clients more frequently have approached me directly about prospective representations, although in the nature of a partnership I have also continued to work on matters brought in by other partners. Of course, any lawyer, whether senior or junior, has the right within limits to refuse to accept certain assignments, or to quit his job and find another one. But like many lawyers in private practice, my approach generally has been to accept matters presented to me within my areas of competence and to do the best job for my clients that I can, consistent with the law and the ethical rules that govern attorney conduct. During his confirmation process, Chief Justice Roberts put this very well: “it was my view that lawyers don’t stand in the shoes of their clients, and that good lawyers can give advice and argue any side of a case. [I]t has not been my general view that I sit in judgment on clients when they come to me. I viewed that as the job of the Court when I was a lawyer. And just as someone once said, you know, it’s the guilty people who really need a good lawyer, I also view that I don’t evaluate whether I as a judge would agree with a particular position when somebody comes to me for what I did, which was provide legal advice and assistance”

2. In the hearing, you stated that you disagree with statements you have made in the past regarding several issues, including the tension between reliance on compassion versus the rule of law in judicial interpretation, as well as the role of morality as a foundation for federal laws and the Constitution. Do you now personally disagree with any other position you have taken in the past during representation of a client (whether as a party or as *amicus*), pro bono work, speeches or writings? Please explain in detail how and why you changed your position?

Answer: As Chief Justice Roberts observed during his confirmation hearing, “lawyers do not subscribe as a personal matter to the views they present on behalf of clients.” Rather, as he explained well, a lawyer’s job is to make reasonable arguments that advance the interests of his clients, whether or not he would agree with those arguments

if he were the judge. For that reason, like other lawyers, I have doubtless made on behalf of clients many statements that did not reflect my personal views, either because as a judge I ultimately would not have adopted that approach but felt the actual judge might do so, or because – not ever having had to decide how I actually would have ruled if I had been the judge – I never developed a personal view on the question. As Chief Justice Roberts explained, that is not a practicing lawyer’s role. In certain briefs, I have presented the views of a profession (such as psychology) or trade (such as the pharmaceutical industry or booksellers) or other experts on a question of science, law or policy. When I did so, I always attempted to make clear that these were the views of those professions, trades, or experts, and not personal views. Moreover, in light of developments in the law, there are doubtless arguments I have made on behalf of clients that I would not make today. Finally, over the course of a 30-year legal career, I am sure that there are things I have said in speeches or writings that, based on further experience and thought, I would clarify, modify or qualify today or with which I would now entirely disagree. I try to keep an open mind, listen to opposing viewpoints, take into account new developments, and be prepared to learn. I view that as a strength, and I am proud that many lawyers who have served both parties, including more than a dozen former senior officials in Republican administrations, support my nomination, and that many have specifically noted those characteristics in their submissions to this Committee on my behalf. It is not practicable to survey the entire volume of my work over the past 30 years to identify all such instances, but one example, identified in a question for the record propounded by Senator Specter, is found in a Case Comment relating to the Takings Clause that I wrote twenty-nine years ago as a twenty-six year old law student. In that case, with the benefit of greater life experience and a more fully developed understanding of the law, I simply disagree with my former analysis.

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Abortion

1. Mr. Ogden, in your brief for the American Psychological Association (APA) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, you make several points about the effect of abortion on women. As a physician, I take issue with most of the statements you have made on this topic. You wrote, “*empirical research does not support the contention that abortion is a significant risk factor for detrimental psychological effects.*”¹ In addition, you also stated that “research shows that substantial adverse emotional and psychological consequences to having an abortion are very rare.”²
 - a. In fact, there are studies from a variety of sources, including the American Journal of Psychiatry, the Canadian Psychiatric Association, Archives of General Psychiatry, Congressional testimony by experts, and a myriad of other sources that show (1) even if women may initially experience relief, those feelings are often followed by a period of emotional “paralysis;” (2) in the first few weeks after an abortion, between 40 and 60% of women report negative reactions; (3) half of teenage abortion patients suffer worsened psychosocial functioning within 7 months after an abortion; and (4) that there are from 5-10 years of denial when a woman will repress her feelings after the trauma of an abortion.
 - b. In addition, a very recent 2008 study published in the *Journal of Psychiatric Research* found that,

“women who have abortions are at higher risk for various mental health disorders. Overall, mental disorders among women who had abortions were 17 percent higher than among women who did not have abortions. When researchers looked at specific disorders, the increased rate among women who had abortions ranged from 44 percent higher for panic attacks and 167 percent higher for bipolar disorder.”³
 - c. In light of research available at the time you authored your brief, and what has developed in recent years, do you personally maintain the views you expressed in the brief that abortion does not cause substantial psychological consequences in women? If so, why?

Answer: The views expressed in briefs I filed on behalf of the American Psychological Association represented the views of my client, based upon its evaluation of the empirical evidence at that time, not my personal views. In connection with the *Casey* brief (filed

¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Nos. 91-744, 91-902, Brief for Amicus Curiae American Psychological Association in Support of Petitioners, at 4 (March 6, 1992) (1992 WL 12006399).

² *Id.* at 20.

³ The Elliot Institute, “New Study Links Abortion to Wide Range of Mental Health Disorders,” December 11, 2008.

almost 17 years ago) – as with the other briefs I worked on for APA – our client identified psychologists with expertise in the relevant scientific area, and asked us to rely on them to identify the empirical data and articulate the Association’s consensus view about its significance. Accordingly, our role as counsel was to set forth the views of APA on the questions addressed, with the assistance of the psychologists identified by name in that brief. The briefs presented the views as those of APA, not as the personal views of counsel. With respect to many of the positions in those briefs I did not then and do not now have a personal view. I did not then and do not today maintain as my own personal views the conclusions of APA set forth in the brief.

2. In your brief for the APA in *Casey*, you state that “it is grossly misleading to tell a woman that abortion imposes possible detrimental psychological effects when the risks are negligible in most cases, when the evidence shows that she is more likely to experience feelings of relief and happiness, and when child-birth and child-rearing or adoption may pose concomitant (if not greater) risks of adverse psychological effects for some women depending on their individual circumstances.”

- a. What are the medical bases for your conclusion?

Answer: The quotation you reference set forth the conclusion of the American Psychological Association. As explained above, it was not my personal conclusion. The scientific bases for the APA’s conclusion are cited in the brief.

- b. Please explain, specifically, your personal rationale on how ending the life of an unborn child might bring a mother feelings of “relief and happiness.”

Answer: The quotation you reference set forth the conclusion of the American Psychological Association, not my personal conclusion.

- c. You portray, through this statement and others, that a woman’s consideration and experience of an abortion rarely yield dire results. Yet, in 2007, “a California abortion clinic was closed down temporarily by the city due to the high death rate and health hazards. Approximately 40 to 50 women had died from abortions at the clinic.” Do you personally remain supportive of your statements in light of such occurrences? If so, why?

Answer: As noted above, the statements you reference reflected the conclusions of the American Psychological Association in 1992. It was not my personal conclusion at that time or today. I am not familiar with the 2007 events to which you refer.

3. Mr. Ogden, you stated in your brief for the APA in *Casey* that: “‘informed consent’ provisions are harmful because they require the physician...to recite and make available a specified list of information to every woman before obtaining her consent to an abortion.”⁴

⁴ *Casey*, Nos. 91-744, 91-902, Brief for Amicus Curiae American Psychological Association in Support of

- a. Do you personally maintain this position regarding informed consent laws?

Answer: No. The position you cite with respect to the informed consent provisions at issue in *Casey* was that of the American Psychological Association in 1992 and did not represent my personal view at that time or today. APA's *Casey* brief did not oppose the concept of informed consent. Rather, it maintained that the Pennsylvania statute at issue exceeded the traditional notion of informed consent by requiring the provision of non-medical information, and it expressed APA's view that some pregnant women "prefer to consider non-medical issues affecting this personal decision in private or with relatives or friends." Br. at 19. The brief also reflected APA's view that there is "no universal set of information that is appropriate for every patient" and that in each case information should be tailored by a health care professional to an individual patient's needs. Br. at 24.

- b. Could you please explain why you believe this type of information to be harmful to a woman?

Answer: As noted, the *Casey* brief presented the views of the American Psychological Association on this subject in 1992, and not my personal views then or now. It maintained that requiring a doctor to provide the specific information mandated by the Pennsylvania statute may in certain cases prove harmful. APA's reasoning for that view was set forth in the brief.

- c. Your statement appears to be a blanket opposition to any type of informed consent a doctor may give to a woman seeking an abortion. Do you personally believe that informed consent is inappropriate in every situation in which a woman may seek an abortion?

Answer: No. As noted above, the views in the *Casey* brief were those of the American Psychological Association in 1992, and do not represent my personal views. The APA's brief supported the provision of informed consent but took issue with how such consent was defined in the Pennsylvania statute. As a lawyer, I personally believe that informed consent should be obtained for all medical procedures. I am not a physician or other health care professional, and therefore do not have a view as to what specific information should be afforded in particular cases or in connection with particular procedures.

- d. Do you personally believe that patients should be informed about the risks associated with medical procedures such as knee replacement surgery, triple bypass surgery or other similar operations?

Answer: Yes.

- e. Do you personally believe patients should receive this information, even if risks such as death or paralysis may be present or the discussion of which would clearly be upsetting?

Answer: Yes.

- 4. In your brief for the APA in *Hartigan v. Zbaraz*, you argue that a parental notification law was an unconstitutional burden on 14-year old adolescent girls seeking an abortion. You state that “empirical studies have found few differences between minors aged 14-18 and adults in their understanding of information and their ability to think of options and consequences when asked to consider treatment-related decisions.” Yet, in *Roper v. Simmons*, you also argue for the APA that juveniles “lack the capacity for rational, mature judgment and for controlling their conduct that is a predicate to infliction of the death penalty.”⁵ You also note that “adolescents are reckless at least in part because they do not perceive and evaluate the costs and benefits of their actions in the same way that adults do.”⁶
 - a. How do you juxtapose these two viewpoints? Either minors have the capacity to evaluate the consequences of their actions and make rational, mature decisions or they do not.

Answer: In the two matters, I represented different clients in cases more than 17 years apart. In *Hartigan v Zbaraz*, the brief was filed in 1987, and our client was the American Psychological Association. As counsel, we presented the views of the national association of psychologists on empirical and scientific questions with the assistance of expert psychologists identified by the Association to work with us. In *Roper*, the brief was filed in 2004, and our client was Christopher Simmons, a death row inmate who had committed a terrible crime when he was 17 years old, and for which he had been sentenced to death. In representing Mr. Simmons, we were obligated to make all reasonable arguments in his favor.

Thus, the brief in *Roper* was based on the state of science and the law more than 17 years after we presented APA’s views in *Hartigan*. The *Roper* brief’s first argument made clear that “research in developmental psychology and neurology *over the last 15 years* has confirmed that 16- and 17-year olds differ from adults in ways that both diminish their culpability and impair the reliability of the sentencing process.” Brief at 11 (emphasis added). That new research had not existed 17 years earlier in 1987 when the APA’s *Hartigan* brief was prepared. In fact, as we explained in the *Roper* brief, the magnetic resonance imaging that formed the basis for the research discussed there “was not possible until the 1990s.” Br. at 16.

In addition to being based on scientific understanding a full generation apart, the legal and scientific issues addressed in the two briefs were also different in important ways.

⁵ *Roper*, No. 03-633, Brief for Respondent, at 15 (July 19, 2004) (2004 WL 1947812)

⁶ *Id.* at 17.

The *Roper* brief did not maintain that adolescents are incapable of knowing right from wrong or of making moral choices for which they should be held criminally responsible. The brief made clear that “juveniles’ immaturity does not excuse their crimes.” The brief thus agreed that minors may be held legally responsible for their decisions, just as in *Hartigan* APA had argued that adolescents can make legally binding choices. The *Roper* brief argued, however – based on recent neurological and behavioral studies, including the MRI research made possible only several years after we filed the *Hartigan* brief – that because adolescents are less able to control their impulses and cope with strong emotions, they are *less* culpable than adults and therefore should not be subjected to the ultimate penalty, which the Supreme Court has held (*Atkins v. Virginia*, 536 U.S. 304, 319 (2002)), is reserved by the law for “a narrow category” of the *most* culpable of offenders. Br. at 13, 15-24. The *Hartigan* brief seventeen years earlier had focused instead on adolescents’ cognitive capacity to make decisions related to medical and psychological treatment, and argued that they should be permitted to make legally binding decisions. It did not confront the question presented in *Roper* whether, though appropriately held responsible for their choices, adolescents have sufficient culpability to be subjected to the ultimate penalty when they commit a heinous crime. Br. at 15-18.

- b. In *Casey*, you argued that “early adolescence is marked by emergence of the adult’s capacity to form moral principles against which to judge one’s behavior and decisions, and this capacity is fully developed by ages 14-15,”⁷ such that a minor understands an abortion decision. Why wouldn’t this logic apply to minors charged with capital offenses?

Answer: The *Roper* brief discussed new studies based on magnetic resonance imaging – studies “not possible until the 1990s,” Br. at 16 – showing that full maturation of the portion of the brain associated with impulse and emotional control and moral decision making is typically not complete until age 18. Br. at 23. The specific scientific work in question was not published until 2001. The quotation in your question is from the APA’s brief in *Hartigan*, not *Casey*, and the *Hartigan* brief was presented in 1987, long before that study and before the relevant MRI technology was even available. As noted above, in our representation of Mr. Simmons, we were responsible for advancing all reasonable arguments that could be made on his behalf, based upon current case law and the current state of scientific evidence and understanding.

- c. If you believe that a minor aged 14-15 has the mental and moral capacity to end a life within herself—without consent or advice from her parents—why would that same minor not also be able to judge her behavior and decisions when it comes to taking the life of another?

Answer: As I have noted elsewhere, the views advanced on behalf of the American Psychological Association in the *Hartigan* brief represented APA’s views as of 1987, not my personal views. In the *Roper* brief, we tried to advance arguments that could reasonably be made on behalf of our client, Mr. Simmons, without regard to whether we personally agreed with them. I am not a psychologist or a neurologist.

⁷ *Casey*, *supra* note 1, at 15.

I would also note that the *Roper* brief did *not* argue that a minor is unable to judge his behavior or decisions, that minors should not be held criminally responsible for their criminal acts, or that severe punishment should not be imposed on minors who commit heinous crimes. On Mr. Simmons' behalf, the brief argued only that the imposition of the most severe punishment, the death penalty, would be unconstitutional as applied to juveniles because minors' impulse and emotional control is less developed than that of adults.

- d. In both of these briefs, you gave great consideration to social science in reaching your conclusion. Yet, in these two situations, social science seems to yield very different results.
 - i. Do you believe that social science is reliable?

Answer: The *Roper* and *Hartigan* briefs relied on both scientific and social science evidence, and the Supreme Court has, over the years, relied on such evidence when it considers it relevant to deciding the cases before it. The Supreme Court has relied on scientific and social science evidence in cases as diverse as *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (consulting sociological studies regarding the effect of segregation on educational opportunities), *Whitcomb v. Chavis*, 403 U.S. 124, 156-57 (1971) (consulting studies regarding the degree to which different districting and voting systems can achieve minority representation), *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (relying on social science studies regarding the degree to which religious doctrine is taught in parochial schools), and *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (relying on "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court"). As noted above, in the 17 years between the *Hartigan* and *Roper* briefs, new scientific research had been performed using new technologies. Although I am not a scientist or social scientist, I believe that scientific and social scientific research can be useful, particularly where a large body of work suggests consistent conclusions, and where those conclusions are made relevant by the established legal framework. But scientific and social scientific conclusions are always subject to modification with the passage of time and additional study.

- ii. As Deputy Attorney General, you will inevitably be called on to give your legal opinion and advice on a myriad of issues. Will you also look to social science as a basis for your conclusions? If so, how much weight will you give to it in your legal analysis?

Answer: The authority with respect to the resolution of legal matters is the law, not science or social science. Social scientific or scientific evidence may be relevant with regard to certain issues; how much weight it should be given depends on the issue and the reliability of the evidence.

- 5. Mr. Ogden, during the 109th Congress, both the House and Senate considered the Child Interstate Abortion Notification Act. The Senate version of this Act amends the federal

criminal code to prohibit transporting a minor child across a state line to obtain an abortion, and deems such transporting to be a de facto abridgment of the right of a parent under any law in the minor's state of residence that requires parental involvement in the minor's abortion decision. It makes an exception for an abortion necessary to save the life of the minor. I was a co-sponsor of this legislation.

- a. Although the Senate and the House passed versions of this legislation, a final bill was not agreed upon before the end of the 109th Congress. If similar legislation passed during your tenure as Deputy Attorney General and became law, would you have any problem enforcing such a law?

Answer: If I were confirmed, I would not have any problem enforcing any law as to which a reasonable argument could be made that it is constitutional, including laws similar to the legislation you describe. I cannot address the specific legislation without having the opportunity to review the text and to consult with experts in the Justice Department.

- b. If Congress scheduled hearings on proposed legislation on this topic, and you were required, as the Deputy Attorney General, to testify before Congress, how would you represent the Justice Department's position on this issue?

Answer: If I were confirmed, in such a situation I would consult with relevant Department of Justice experts in the Criminal Division, the Civil Division, and other relevant components, as well as the Attorney General, and I would represent the Department's position as developed through that process.

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Constitutional Interpretation and Federalism

1. Mr. Ogden, as Deputy Attorney General, you will have extensive power within the Department of Justice. As DAG, you will have “all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally.”⁸ You will also “assist the Attorney General in formulating and implementing Department policies and programs.”⁹

- a. What role will international law and the decisions of foreign courts have on your policy development at the Justice Department?

Answer: The best interests of the people of the United States, under the Constitution and laws of the United States, should be the exclusive determinant of policy development at the Department of Justice. If I am confirmed, I will do everything I can to ensure that that is the case. International law would play a role, for example, where the United States has elected to be bound by virtue of Senate ratification of a treaty or other international agreement; it thereby becomes a part of the laws of the United States. Circumstances in a foreign country, including its laws, may be relevant to decisions about extradition, repatriation, and the like. Foreign laws may be relevant to development of international crime-fighting policy – where the United States must work with its partners to combat international crime, including terrorism and narcotics – and other forms of international cooperation on economic regulation. Beyond such situations, the decisions of foreign courts applying foreign legal precepts will not guide the development of policy at the Department of Justice.

2. Given the divergent legal systems in countries around the world, as well as societal and cultural differences, in what situations (if any) do you believe the United States should adopt the laws and values of another country?

Answer: The United States should adopt only laws and values that are appropriate for this country. It should never adopt laws or values simply because they are those of another country.

3. Does social science play a role in the interpretation of the Constitution, or any other statute? If so, why? How significant is that role?

Answer: Social science should not play a role in the interpretation of the Constitution. The provisions of the Constitution should be interpreted according to their text, history,

⁸ Code of Federal Regulations, Title 28, Section 0.15 (2007).

⁹ *Id.*

and purpose, in light of precedent. In an appropriate case, social science may help a court apply constitutional principles in a concrete context. As I noted above, in *Maryland v. Craig*, 497 U.S. 836 (1990), for example, the Supreme Court held that a criminal defendant's Sixth Amendment right to confront witnesses was not violated by procedures that allowed for the testimony of young children to be given via remote closed circuit television rather than live in the courtroom before the jury. In reaching that conclusion, the Court considered social scientific evidence presented in a brief I submitted for the American Psychological Association documenting the potentially harmful effects on young children that could result from requiring them to appear in the courtroom where they would be confronted by their alleged abuser, particularly in situations in which they were victims of sexual abuse or had suffered other serious harms.

4. You stated in your brief for *Roper v. Simmons* that “in the 15 years since *Stanford v. Kentucky* [where the court upheld the death penalty for those under age 18], advances in the scientific understanding of adolescent development and the consistent movement by legislatures and juries away from imposition of death on juvenile offenders, have demonstrated that capital punishment of those under 18 is inconsistent with our society's evolving standards of decency. The execution of juvenile offenders...is both disproportionate to their personal moral culpability and contrary to national and worldwide consensus.”¹⁰

- a. Could you please explain why U.S. death penalty jurisprudence, or any other area of U.S. law, should reflect the values and decisions of other countries?

Answer: In *Roper*, we argued on behalf of our client that the death penalty should be deemed to be cruel and unusual punishment in violation of the Eighth Amendment when imposed on those under the age of 18 at the time they committed their crimes. Under the test long established in Supreme Court precedent, a punishment is considered “cruel and unusual,” and therefore unconstitutional, if it violates the “evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). In prior cases applying this “evolving standards of decency” test, the Supreme Court had considered the practices of other countries. See, e.g., *Atkins*, 536 U.S. at 316 n.21; *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982). In advocating on behalf of our client in *Roper*, we were obligated to make all reasonable arguments on his behalf that might be persuasive to any of the Justices. Drawing from Supreme Court precedent that the practices of other countries could be relevant to the “evolving standards of decency” analysis, as the final argument in a lengthy brief, we demonstrated that the juvenile death penalty was rare throughout the world, as we had previously shown it was rare within the United States. These arguments were not based on my personal views or those of my co-counsel, which were irrelevant to the Supreme Court. They were based on the Court's own precedent. And the Court cited the international evidence in ruling in favor of our client. See *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

¹⁰ *Roper v. Simmons*, Brief for Respondent, at 10 (July 10, 2004) (2004 WL 1947812).

- b. In your brief, you cite, as support, the Convention on the Rights of the Child (CRC), which bars capital punishment for those under age 18. Yet, the United States has not even ratified the CRC. So, how do the policies in the CRC support your argument for U.S. death penalty jurisprudence? Doesn't the decision of the Senate and the President not to ratify the CRC suggest that the U.S. either doesn't agree with the CRC or that we have not, in fact, established a national consensus on this issue?

Answer: The *Roper* brief cited the CRC as one piece of evidence relevant to applying the “evolving standards of decency” standard. In the brief, we specifically noted that the United States and Somalia were the only two countries in the world that had not ratified the CRC, so the Justices of the Court knew it had not been ratified by the Senate and could decide on the Convention’s relevance or lack thereof in light of that fact. I agree with you that the conclusions you suggest – that the U.S. either doesn’t agree with the CRC or has not established a national consensus – are possible ones the Court could have drawn. We cited it because we had a duty to our client to identify evidence that, consistent with the Court’s prior precedent, might persuade any Justice that the Court’s test for violations of the Eighth Amendment was met. I would note that the Court cited the CRC in its analysis when ruling in favor of our client. See *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

5. In Madison’s Federalist No. 45, he states that “the powers delegated...to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” You seemed to recognize this important concept in your brief in *Gonzales v. Oregon* when you stated “[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. *It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*”¹¹

Yet, in *Roper*, you argue in your brief that there is a “national consensus” regarding the death penalty, despite states having had different standards of application.

- a. Please give examples of other areas in which there has developed a “national consensus” that would lead you to believe that state prerogatives should be overridden.

Answer: The *Oregon v. Gonzalez* brief, like the others you have asked about, was submitted to present the views of my clients, and not my personal views. In that case, my clients were law professors with special expertise in matters of statutory interpretation. In my personal opinion, the principles of federalism are critical to preserving our system

¹¹ *Gonzales v. Oregon*, Brief for Professors of Law Richard Briffault, William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, Jerry L. Mashaw, Edward Rubin, David L. Shapiro, Peter L. Strauss, and Ernest A. Young as Amici Curiae Supporting Respondents, at 24 (July 18, 2005) (2005 WL 1707466).

of government and to the vitality of our country. As you note, the federal government and the Constitution establish certain national requirements, and beyond them the States are free to develop their own policies and rules. Situations in which the existence of a “national consensus” would restrict state prerogatives are a matter of constitutional law and I believe that they are rare, occurring only when that national consensus is reflected in an applicable constitutional norm or a federal statute, which as a constitutional matter is the supreme law of the land. The Supreme Court’s Eighth Amendment jurisprudence, which applies an “evolving standards of decency” test, is one of those rare examples. As noted above, the Supreme Court has examined the practices of the several states in applying this test.

6. What theory of Constitutional interpretation do you believe is appropriate? In your role as Deputy Attorney General, will you use that theory to evaluate cases and determine whether they are appropriate for prosecution?

Answer: I do not have a single overarching theory of constitutional interpretation. My approach to issues of constitutional law is similar to the one Chief Justice Roberts described in his confirmation hearing. I begin with the Constitution’s text and the precedent interpreting it, and in applying it take into account the particular factual and policy context. If confirmed I would of course consult as appropriate with those in the Department of Justice who have expertise regarding a particular constitutional issue.

7. At the hearing, you expressed that you no longer aligned yourself with statements you have made in the past about the role morality plays in our laws.
 - a. Do you now personally believe there is an intersection between morality and the law? In other words, does morality have a role in the interpretation of the Constitution, federal laws or statutes? Why or why not?

Answer: I believe that there is an intersection between morality and the law. Duly enacted laws typically prohibit conduct the majority believes to be wrong, and often the majority’s judgment will be based on considerations of morality. On the other hand, a judge’s or government official’s *personal* notions of morality should not play a role in his or her interpretation of the Constitution, federal laws or statutes. The Constitution and laws of the United States should be interpreted according to their text, history, and purpose, in light of precedent and other relevant considerations—which should not include the personal views of a judge or other government official.

8. The DAG also “coordinates[s] and control[s] the Department’s reaction to civil disturbances and terrorism.”

- a. Will international law and the decisions of foreign courts play a different or more authoritative role in your decisions affecting counterterrorism policy or sentencing of prisoners held at Guantanamo Bay? If so, how?

Answer: In my view, international law should play an authoritative role only to the extent it has become part of the domestic law of the United States by virtue of binding obligations reflected in treaties or other international agreements that the United States has duly ratified. Otherwise, international law and decisions of foreign courts will not play any authoritative role. As noted above, there may be situations in which foreign law or the decisions of foreign courts may affect our government's decision making. For example, if a foreign country's law or judicial decisions make clear that it will not detain a person the United States considers dangerous, that would likely affect the decision whether to repatriate that person to the country in question

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Death Penalty

1. Do you support the death penalty? If so, in what circumstances is it appropriate?

Answer: I support administration of the federal death penalty in a manner that is consistent with federal law. The death penalty is appropriate in situations in which the law authorizes its imposition and a jury or judge imposes it after a fair trial.

2. In your brief for *Roper*, you state that “individualized sentencing cannot be expected to sort mature from immature juvenile offenders, because the very qualities that make 16- and 17-year-olds, as a class, less culpable also make individualized sentencing of juvenile offenders inherently unreliable.”

- a. Do you believe that juries are not capable of weighing all the facts—including youth—in the evaluation of the death penalty as a punishment?

Answer: I believe that juries are generally capable of weighing all the facts when evaluating whether death is an appropriate punishment for murder. In the brief in *Roper*, we made a very narrow argument for our client with respect to the special circumstances of a youthful offender, specifically, that with any juvenile offender there is a significant likelihood that there will be physical and emotional maturation between the time of the offense and the time of trial, which can be as long as two years after commission of the crime. In attempting to determine the defendant’s maturity at the time of the *crime* – which would be the timeframe relevant to his culpability – we argued that the jury would be handicapped because the defendant in the courtroom would inevitably be more mature than he was at the time of the crime. This concern is not present in cases involving adults. As noted above, the brief contained arguments we thought might tend to persuade any Justice to support our client’s legal position, and did not necessarily reflect my personal views.

- b. Would not some minors actually show enough maturity to make a difficult moral decision, such as whether to commit a crime like murder?

Answer: Yes. Some minors certainly can show enough maturity to make difficult moral decisions, and the law appropriately holds those minors responsible for their actions. For a serious crime such as a pre-meditated murder, minors are subject to criminal punishment as severe as life imprisonment without the possibility of parole.

3. In your brief, you recount the facts of *Roper*. On several occasions, the minor, Simmons, as well as other witnesses testified that Simmons told them of his plans to burglarize the home or to murder the occupants or both. Even if an individualized sentencing structure was not appropriate for juvenile sentencing, shouldn't these types of facts be considered by a jury in determining whether the juvenile pre-meditated the crime?

Answer: Yes.

- c. Do you believe that pre-meditated murder warrants a death sentence?

Answer: Federal law recognizes that pre-meditated murder can warrant a death sentence.

- d. Isn't it true that, even if it is possible that juveniles, as a class, are less culpable than adults, they are still able to execute a pre-meditated crime such as murder?

Answer: Yes.

- e. If so, why wouldn't that crime deserve the punishment of death, as it would for an adult offender?

Answer: The Supreme Court concluded in *Roper* that although juveniles may have the ability to make reasoned moral choices and therefore may be subject to extremely serious penalties (including life imprisonment) when they commit serious crimes, they differ from adults in that they often lack full impulse control and emotional maturity, they are more susceptible to negative influences and outside pressures, and their character is "more transitory and less fixed." See *Roper v. Simmons*, 543 U.S. 551, 569 (2005). For these and other reasons, the Court held that juveniles should not be subjected to society's ultimate punishment.

Questions of Senator Tom Coburn, M.D.
“Nomination of David Ogden to be Deputy Attorney General of the United States”
United States Senate Committee on the Judiciary
February 5, 2009

Obscenity and the First Amendment

1. Mr. Ogden, the Department of Justice is responsible for enforcing our nation’s obscenity and child exploitation laws. Indeed, one of the things former Attorney General Alberto Gonzales undoubtedly got right was establishing the Department’s Project Safe Childhood (PSC) initiative to protect children from online exploitation and abuse. During your career in private practice, you have litigated to repeal many laws Project Safe Childhood enforces, such as the Children’s Internet Protection Act, the Child Protection and Obscenity Enforcement Act and the Child Protection Restoration and Penalties Enhancement Act.
 - a. Will you enforce the Children’s Internet Protection Act (CIPA)? Will you seek to make changes in the way CIPA is enforced? If so, how?
 - b. Will you enforce the Child Protection and Obscenity Enforcement Act of 1988? Will you seek to make changes in the way this Act is enforced? If so, how?
 - c. Will you enforce the Child Protection Restoration and Penalties Enhancement Act of 1990? Will you seek to make changes in the way this Act is enforced? If so, how?

Answer: If confirmed, I will support enforcement of these three statutes. I am not familiar with the way they are presently enforced, and have no plans to recommend changes in that regard. If confirmed, in this area I would expect to consult with the relevant components, here the Criminal Division and Child Exploitation and Obscenity Section; the FBI; and any other components with relevant expertise, before making recommendations, if any, with respect to changes.

2. In a press conference last May concerning Project Safe Childhood (PSC), Deputy Attorney General Mark Filip stated, “[a]s long as there are predators out there acting on their perverse fantasies, creating and trading in these videos and photos, we will not relent. These cases will continue to be a priority for the Department of Justice -- we want these people to know that we are going after them and that they will pay a high price for their crimes.”¹²
 - a. Given your history of involvement in promoting the interests of groups such as Playboy and Penthouse, will that affect the priority you assign to increasing DOJ’s efforts to fight issues such as on and offline child exploitation?

¹² Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at the Project Safe Childhood Press Conference in Lexington, Kentucky, Wednesday, May 7, 2008 available at www.usdoj.gov.

Answer: No. I have a record of representing and furthering the interests of the United States, as a public official, without regard to the interests or positions of entities that had been clients in private practice. The litigation I handled for the clients you specify preceded my government service. Subsequent to those representations I forcefully defended the laws against child pornography and child exploitation as Assistant Attorney General (my tenure was 1999-2001). Also subsequent to those representations, as set forth in the letter supporting my nomination from the National Center for Missing and Exploited Children (NCMEC), I worked constructively with NCMEC on these issues during my tenure as Chief of Staff and Counselor to Attorney General (1997-1999). I am proud to have NCMEC's support. Similarly, although I had filed briefs for the American Psychological Association opposing the Department of Defense's homosexual discharge policy in the 1980s, at DoD I worked closely with military attorneys to defend the Don't Ask Don't Tell policy enacted by Congress in 1993. I am proud that no fewer than 12 Generals and Admirals who ran the Judge Advocate General's Corps, based on that close collaboration, support me as "a person of wisdom, fairness and integrity, a public servant vigilant to protect the national security of the United States, and a civilian official who values the perspective of uniformed lawyers in matters within their particular expertise." Consistent with this strong and consistent record, if confirmed, I will vigorously represent the interests of the United States without regard to the interests of any of my past clients from private practice.

- b. If an actual conflict or an issue conflict arises with respect to your duties to enforce the laws and positions you have taken in prior litigation, do you pledge to recuse yourself and designate—where possible—an appropriate Criminal Division attorney in your stead?

Answer: If a conflict arises, I will consult with Department of Justice ethics officers to determine whether my recusal is required. In the unlikely event that my recusal is necessary, I will ensure that an appropriate Department official is assigned to oversee that particular matter so that the Department's efforts are not adversely affected.

- 3. Mr. Ogden, last year I participated in legislation targeted at combating child exploitation and enhancing enforcement of child exploitation laws. The SAFE Act "imposes enhanced criminal penalties for use of the Internet to violate child pornography or sexual exploitation laws." It also "expands the reporting requirements of electronic communication and remote computing service providers with respect to apparent violations of child sexual exploitation and pornography laws."

- a. If confirmed as DAG, will you have any problem vigorously enforcing laws such as the SAFE Act?

Answer: No.

- 4. Mr. Ogden, you have advocated that 14-year-old girls have the maturity and capability of adults, such that they are perfectly capable of making a decision regarding whether to

have an abortion. On the other hand, you have argued that 16- and 17-year-olds do not have the capacity for rational, mature judgment, nor the ability to control conduct that might lead to the death penalty.

- a. Which argument do you apply to juveniles that may be solicited by pornography producers to participate in their publications?

Answer: As noted above, my briefs in *Hartigan* and *Roper* were filed on behalf of different clients 17 years apart, and did not in any event represent my personal views. With regard to pornography producers who solicit juveniles to participate in their publications, the law is clear: such conduct is a serious federal crime, and rightly so. See 18 U.S.C. § 2251.

- b. Do you believe that pornography distributors should be required to verify that participants are over the age of 18?

Answer: Federal law requires that pornography producers must maintain records that include, *inter alia*, the date of birth of participants. See 18 U.S.C. § 2257. I believe that that is appropriate and am fully prepared to enforce that law. As I understand it, the law expressly does not include “activities that are limited to . . . distribution.” *Id.* § 2257(h)(2)(B). I look forward to consulting with experts in the Department of Justice with regard to the efficacy of this and other laws aimed at protecting children.

5. Mr. Ogden, during the Clinton Administration Attorney General Janet Reno overruled the decision of the Solicitor General not to prosecute a defendant in the 1993 case of *Knox v. United States*. The solicitor general decided that on appeal to the Supreme Court, he was not going to uphold the government’s successful prosecution of a man, Stephen Knox, who had purchased child pornography. Reno reversed this, stating that the Justice Department will seek to punish child pornographers “to the maximum extent possible.” She also personally signed a brief stating that the defendant was properly convicted. Further, in late 1993, President Clinton instructed the Justice Department to “aggressively attack the scourge of child pornography,” to seek new laws if necessary and to review the *Knox* case.

However, you filed a brief on behalf of several groups, including the ACLU, in support of *Knox*. In your brief, you stated that “permitting punishment for non-nude depictions of minors raises serious practical and constitutional concerns, and the risk of ruinous prosecutions, for the mainstream amici before this Court.”¹³ You also stated that “by not prohibiting simple nudity, the federal statute, like other state counterparts, would allow producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.”¹⁴

¹³ *Knox v. United States*, Brief for Amici Curiae in Support of Petitioner, No. 92-1183, at 8 (1993 U.S. Briefs 1183) (August 4, 1993).

¹⁴ *Id.* at 20-21.

Clearly, the Justice Department can make decisions affecting case law in the area of child pornography, request or decline to prosecute certain cases, as well as establish new laws and policies regarding prosecution of child pornographers.

- a. Do you agree with President Clinton and Attorney General Reno's decision to "aggressively attack the scourge of child pornography," and punish child pornographers "to the maximum extent possible?"

Answer: Yes.

- b. As the Number 2 official in the Justice Department, do you believe you could be called on to give advice in setting Justice Department policies regarding the official position of the Department on child pornography? If so, how will your position on *Knox*, the specific case that caused the Clinton Justice Department to step up its efforts against child pornography, affect your policy advice? If not, why not?

Answer: The amicus brief that we filed in *Knox* in 1993 would not in any way affect any policy advice I might give today as a government official. That brief reflected the views of my clients – including national associations of librarians, booksellers, artists, and periodical publishers – and not my personal views. I believe that child pornography is abhorrent and that its perpetrators can and should be prosecuted and incarcerated. Indeed, during my prior service in Department of Justice, as Assistant Attorney General for the Civil Division, I vigorously defended child pornography statutes – the Child Pornography Prevention Act of 1996 and Child Online Protection Act of 1998 – against challenges brought by some of the very clients on whose behalf I had earlier filed the *Knox* brief.

- c. Do you believe you could be called on to give advice on whether the Justice Department should prosecute certain cases? If so, how will you advise the Attorney General and/or Solicitor General on cases and policies affecting child pornography? How will your position on *Knox*, the specific case that caused the Clinton Justice Department to step up its efforts against child pornography, affect your advice? If not, why not?

Answer: For the reasons stated above, the amicus brief that I submitted for librarians, booksellers, artists and publishers associations in *Knox* in 1993 would not affect my advice today as a government official in any way. In this area, as in all others, if confirmed I would consult with the relevant personnel in the Department responsible for enforcement and related considerations before formulating any advice. I favor vigorous enforcement of the laws against child pornography and exploitation of children.

6. You stated in the hearing that child pornography laws are important, child exploitation is abhorrent and children deserve protection. You also drew a distinction between minors and adults, with respect to obscenity issues. Please further explain this distinction.

Answer: The Supreme Court has held that the government may prohibit the sale to minors of materials defined to be obscene for (or harmful to) minors, regardless of whether such material would be obscene for adults. *See Ginsburg v. New York*, 390 U.S. 629 (1968). Unless those materials are also obscene (or otherwise unlawful) as to adults, however, adults have a constitutional right to obtain them if they so choose. In addition, it is always unlawful under the child pornography laws to produce sexually explicit materials that involve minors, whereas the production of such materials involving only adults is unlawful, as a general matter, only if the material is obscene or otherwise contrary to law. *See New York v. Ferber*, 458 U.S. 747 (1982).

- a. Do you personally believe that adult obscenity contributes to the sexual exploitation of children in any way? Why or why not?

Answer: I have not studied this issue and therefore do not have a personal belief.

- b. Do you personally believe that adult obscenity contributes to the demand for prostitutes, and/or women and children who are trafficked into prostitution?

Answer: I have not studied this issue and therefore do not have a personal belief.

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Sexual Orientation

1. The Defense of Marriage Act (DOMA) amends the Federal judicial code to provide that no State, territory, or possession of the United States or Indian tribe shall be required to give effect to any marriage between persons of the same sex under the laws of any other such jurisdiction or to any right or claim arising from such relationship. It also establishes a Federal definition of: (1) "marriage" as only a legal union between one man and one woman as husband and wife; and (2) "spouse" as only a person of the opposite sex who is a husband or wife.

DOMA passed in 1996 with 342 votes in the House and 85 in the Senate. It was co-sponsored by at least 13 Democrats, and signed into law by President Clinton. It clearly had bi-partisan support

- a. You have defended homosexuality as a “normal form of human sexuality...[which] is simply one normal variant of sexual identity.”¹⁵ In light of this and other positions you have advocated, as Deputy Attorney General, will you be able to enforce DOMA effectively?

Answer: As a general matter, it is appropriate for the Department of Justice to enforce any law for which a reasonable argument can be made that it is constitutional. Under that standard, I would expect to be able to enforce DOMA.

2. Do you personally believe there is a federal Constitutional right to same-sex marriage? Why or why not?

Answer: I have not studied this issue and therefore have not developed a personal view as to whether there is a constitutional right to same-sex marriage.

¹⁵ *Lawrence v. Texas*, No. 02-102, Brief for Amici Curiae American Psychological Association, American Psychiatric Association, national Association of Social Workers and Texas chapter of the national Association of Social Workers in Support of Petitioners, at 1-2 (January 16, 2003) (2003 WL 152338).