

Written Questions of Senator Chuck Grassley to David Ogden to be Deputy Attorney General, U.S. Department of Justice

OBSCENITY PROSECUTIONS

If you are confirmed, given your extensive private law experience litigating obscenity and First Amendment cases, your legal opinions will greatly influence the Attorney General and the Justice Department's policies regarding the investigation, enforcement and prosecution of obscenity laws.

1. I think everyone would agree that protecting children and families from obscenity is a worthwhile objective. Do you concur that the Justice Department must continue to aggressively pursue criminal and civil litigation against those who violate federal obscenity laws? Why or why not?

Answer: I entirely agree that protecting children and families from obscenity is a worthwhile objective. I concur that the Justice Department must continue to aggressively pursue criminal and civil litigation against those who violate federal laws, including obscenity laws.

During my prior government service, as Assistant Attorney General for the Civil Division, I vigorously defended laws that protect children and families from obscene material. I led the constitutional defense of the Child Pornography Prevention Act of 1996 (CPPA), which expanded the ban on child pornography to cover virtual child pornography—sexually explicit images that appear to depict minors but were produced without using any real children, often using computer-generated imagery. The government's petition for certiorari that I submitted argued that the act "constitutionally advance[s] the government's compelling interest in the 'prevention of sexual exploitation and abuse of children.'" *Reno v. Free Speech Coalition*, No. 00-795, Petition for a Writ of Certiorari (November 16, 2000), at 12 (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982)). I also defended the Child Online Protection Act of 1998 (COPA), which aimed to protect children from harmful material on the Internet by requiring purveyors of prurient materials on the Internet to restrict their sites from access by minors.

I respectfully note that the private law experience to which you refer in your initial comment largely preceded my period of government service, and thus dates from before 1994, or more than 15 years ago. As my career has developed, I have viewed myself as a generalist in the law, not as a specialist in any particular area. In the government from 1994-2001, I handled the full range of legal issues confronted by the United States. An important part of that work included the First Amendment litigation defending the federal anti-pornography statutes referenced above, but I also devoted my efforts to matters in a great many other fields, encompassing virtually the entire range of subject matter addressed in the government's civil and criminal litigation. At WilmerHale over the past eight

years (2001-2009), I have not specialized in First Amendment matters. I have represented clients in a range of industries, including transportation (*e.g.* Amtrak, Lufthansa); insurance and financial institutions (*e.g.* Citibank, Fireman's Fund); petrochemicals (*e.g.*, Shell and BP); and pharmaceuticals (*e.g.*, PhRMA and Merck), in a broad range of legal contexts including antitrust, enforcement of foreign judgments and other international litigation, international arbitration, preemption, Commerce Clause litigation, lending discrimination matters, commercial disputes, federal investigations, and the False Claims Act.

2. Will you commit to seeing that obscenity prosecutions remain a top priority at the Justice Department?

Answer: Yes. If I am confirmed, I will recommend that protecting children and families should be a top priority, including through the prosecution of those who violate federal obscenity laws, and expect that this will be the case.

3. Do you support the ongoing efforts of the Obscenity Prosecution Task Force? Why or why not? If confirmed, do you plan to recommend disbanding this task force?

Answer: I support making efficient and effective use of the Department's resources to prosecute the crimes that threaten children and families. I am not specifically familiar with the work of the Obscenity Prosecution Task Force. If I am confirmed, I will confer with career professionals in the Department's relevant components, including the Criminal Division and its Child Exploitation and Obscenity Section, with state and local law enforcement, and with child advocacy organizations such as the National Center for Missing and Exploited Children, to ensure that the Department takes appropriate steps to protect children and families.

4. Do you believe that the Justice Department has adequate tools to effectively combat obscenity and child exploitation? Do you believe that further legislation is necessary to protect our children?

Answer: I am not currently aware of shortcomings in the federal laws prohibiting obscenity, child pornography, and child exploitation. If I am confirmed, I will work closely with the career professionals in the Department, with state and local law enforcement, and with child advocacy organizations such as the National Center for Missing and Exploited Children and if shortcomings are identified, I will support efforts to address them.

You submitted an amicus brief in the 1993 case of *Knox v. United States*.

1. In your opinion, does the First Amendment permit prosecution for child pornography under the facts as presented in that case? Why or why not?

Answer: Yes, and following the Third Circuit's ruling in *Knox* I understand that to be the law of the land.

2. If you are confirmed, would you endorse a more expansive definition of child pornography than you did in the brief you authored in the *Knox* case?

Answer: Yes. I would support the definition adopted by the Third Circuit in *Knox*.

In which, if any, of the following cases did you serve as pro bono counsel?

Answer: I worked on many of the cases cited below when I was a younger attorney, and did not have primary responsibility for accepting the representation as an initial matter, or for the terms of the representation (i.e., whether paid or pro bono). A number of them were before 1994 when I entered government service, and at a different law firm. In some cases, I cannot be certain of the terms of the representation, but have made my best guess. To the best of my recollection and belief, only the three cases in bold and underlined below involved pro bono representation.

Hartigan v. Zbaraz, 484 U.S. 171 (1987)
Casey v. Planned Parenthood of S.E. Pennsylvania, 505 U.S. 833 (1992),
Rust v. Sullivan, 500 U.S. 173 (1990),
Scheidler v. National Organization for Women, 537 U.S. 393 (2003),
Gonzales v. Oregon, 546 U.S. 243 (2006),
Lawrence v. Texas, 539 U.S. 558 (2003),
Bowers v. Hardwick, 478 U.S. 186 (1986),
Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989),
Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992),
State v. Schochet, 580 A.2d 176 (1990)
Minnesota v. Gray, 413 N.W.2d 107 (Mn. 1987),
State v. Stover, 350 S.E.2d 577 (Ga. 1986),
United States v. American Library Association, 539 U.S. 194 (2003),
American Library Association v. Thornburgh, 713 F.Supp. 469, 477 (D.D.C. 1989),
American Library Association v. Barr, 794 F. Supp. 412 (D.D.C. 1992),
American Library Association v. Reno, 33 F.3d 78 (D.C. 1994) and 47 F.3d 1215 (D.C. 1995),
American Council for the Blind v. Boorstin, 644 F.Supp. 811 (1986),
Playboy Enterprises, Inc. v. Meese, 746 F.Supp. 154 (D.D.C. 1990).
P.H.E., Inc., v. United States Department of Justice, 743 F.Supp. 15 (D.D.C. 1990),
United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992),
Roe v. Meese, 689 F. Supp. 344 (1988),
Playboy v. Public Service Commission, 698 F. Supp. 401 (D.P.R. 1988) and 906 F.2d 25 (1st Cir. 1990).
Johnson v. County of Los Angeles, 865 F. Supp. 1430 (Cent.Ca. 1994),
Knox v. United States, 510 U.S. 375 (1993),

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989),
Virginia v. American Booksellers Association, 484 U.S. 383 (1988),
Pope v. Illinois, 481 U.S. 497 (1987),
Meese v. Keene, 481 U.S. 465 (1987),

SUPREME COURT DECISION IN *HELLER*

This past year, the U.S. Supreme Court held in the *Heller* case that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." President-elect Obama stated that he supported an individual's right to possess a firearm and signaled his support for the *Heller* decision.

1. What is your personal opinion of the rights afforded by the Second Amendment?

Answer: I have not had an occasion to litigate Second Amendment cases and I have not studied the matter. I understand *Heller* to recognize an individual right to bear arms. I view that as the law of the land and of course would uphold and enforce that right as articulated by the Supreme Court.

2. What is your personal opinion of the *Heller* case?

Answer: See my response to 1, above.

3. If you are confirmed, will you commit to protect an individual's right to possess a firearm? If so, how?

Answer: Yes. I will work to ensure that the requirements of the Second Amendment, as interpreted in *Heller* and succeeding decisions, are respected in the policy, litigation, and enforcement decisions of the Department of Justice.

CONGRESSIONAL OVERSIGHT

1. If confirmed, will you pledge to be responsive to all Congressional requests for information in a timely manner? Including requests for documents and witnesses for interviews?

Answer: Yes.

2. Will you work to ensure that responses are not held up due to lengthy "clearance" processes at subordinate agencies such as the FBI?

Answer: Yes.

OLC OPINION ON RANKING MEMBER ACCESS TO DOCUMENTS AND INFORMATION

On December 5, 2001, the Office of Legal Counsel (OLC) issued a Letter Opinion to the General Counsel at the Department of the Treasury. The Opinion titled “Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members,” concludes that the Privacy Act “prohibits the disclosure of Privacy Act-protected information to the ranking minority member” of a congressional committee of jurisdiction that requests information from a Federal agency. The Opinion reached this conclusion despite the fact that the Privacy Act allows disclosures, “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.” Nowhere in the statute does it define “committee” to mean only the Chairman and not the Ranking Member. Despite the plain language and the court interpretations to the contrary, this Opinion is used as a shield to prevent disclosure of information to Ranking Members.

1. Do you support the position taken by DOJ in this OLC Opinion?

Answer: I agree with the Attorney General’s view of this matter. Like him, I fully respect Congress’s important constitutional role, and if I am confirmed I will work to ensure that the Department operates in a manner consistent with Congress’s legitimate oversight authority.

2. Do you believe that, as a general matter, Ranking Minority members of a Committee should be prohibited from obtaining information from an agency absent the approval of the Chairman? If so, why?

Answer: I agree with the Attorney General’s view of this matter. Like him, I strongly believe in transparency and that the Department should, to the extent possible, cooperate with Congress and its members in the exercise of legislative oversight. As he also said, there may be occasions on which the executive branch must keep information confidential, as the courts have recognized.

3. In your opinion, couldn’t the wording of the Privacy Act that allows disclosure “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof” be construed to allow disclosure to Ranking Members if the Administration was willing to do so? Please explain why or why not.

Answer: I have not had the opportunity to study the Privacy Act precedents and form an opinion as to whether it allows disclosure to particular members of Congress. Like the Attorney General, I believe that it is important for the Department to work with members of Congress to ensure legitimate and effective legislative oversight.

4. Will you pledge to work with Ranking Minority Members of Committees on any oversight request, regardless of the OLC Letter Opinion?

Answer: Yes, I pledge to work with Ranking Minority Members of Committees on any oversight request.

FALSE CLAIMS ACT

1. If you are confirmed, will you vigorously enforce the False Claims Act?

Answer: Yes. I view the False Claims Act as a critically important tool for identifying fraud against the United States, recovering federal funds, and protecting the public fisc. I vigorously enforced the False Claims Act during my tenure as Assistant Attorney General of the Civil Division.

Given that commitment, I am gratified that in 2000, leading relators' counsel strongly supported my nomination to serve as Assistant Attorney General. In a letter to you, Senator Grassley, dated February 25, 2000, those ten counsel stated:

“It is our firm belief, without qualification, that David Ogden, while serving as Acting Assistant Attorney General for the Civil Division, has effectively and enthusiastically implemented your *qui tam* amendments. . . . Whatever the outcome of any particular matter may have been, we all agree that the consideration we receive from Mr. Ogden is fair and unbiased. . . . We firmly believe that under David Ogden’s leadership, the Department of Justice has now fully embraced the Congressional policy underlying the *qui tam* amendments.”

I am also proud today to have the support of John Phillips, senior partner in the leading firm Phillips & Cohen. In a letter to you dated February 2, 2009, and enclosing the earlier letter from relators' counsel, Mr. Phillips states

“I have had the opportunity to work with every Assistant Attorney General for the Civil Division dating back to 1986, the year the False Claims Act (Qui tam) amendment you sponsored was signed into law by President Reagan. I can report without qualification that David Ogden has more faithfully and effectively implemented your amendments than anyone else who has served in that position. He was always open and accessible to the whistleblower and their counsel when any problems arose. He made the bureaucracy work in ways I have rarely seen in my forty years of practicing law.”

For your convenience, I am attaching this correspondence.

2. Will you oppose efforts by industry groups, including the health care industry and the defense industry, to weaken the False Claims Act and the *qui tam* provisions

of the Act?

Answer: I will oppose efforts to weaken the False Claims Act and the *qui tam* provisions.

3. Do you have any question as to the constitutionality of the False Claims Act and its *qui tam* provisions?

Answer: No. I believe those provisions to be constitutional. While I served as Assistant Attorney General for the Civil Division, a three-judge panel of the Fifth Circuit struck down the *qui tam* provisions as violating the “Take Care” Clause and the separation of powers. *Riley v. St. Luke’s Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999). I believed that defense of the *qui tam* provisions was extremely important. Consequently, I decided personally to argue the case before the Fifth Circuit en banc, and won a reversal sustaining the law. *Riley v. St. Luke’s Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001). I have cited this case in my Committee questionnaire as one of the ten most significant cases I have litigated.

4. Do you anticipate any decrease in the budget for the Justice Department’s Commercial Litigation section which is responsible for false claims prosecutions? In previous years, the Justice Department has specifically requested litigation support funds, including funding for accounting experts, for pending false claims cases. Are you committed to securing the funding necessary to successfully litigate False Claims Act cases?

Answer: I am committed to working with Congress to ensure that the Commercial Litigation Section has the funding, including litigation support funds, sufficient to successfully litigate False Claims Act cases, protect the public fisc, and deter fraud.

5. Will you support efforts to utilize the False Claims Act to recover government money lost to fraud or abuse of government bailout funds, including but not limited to funds expended under the Troubled Asset Relief Program and other direct infusions of Government money used to prop up the balance sheets of various financial institutions across the country? Why or why not?

Answer: Yes. I will support efforts to enforce the False Claims Act, consistent with its terms, to recover government money lost to fraud or abuse during the implementation of any program. The TARP and other economic recovery efforts must be vigilantly protected from fraud in order to protect the public fisc and ensure the integrity of these vital programs.

6. Recently, a lawsuit was filed alleging that the seal provision of the False Claims Act, codified at 31 U.S.C § 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed in camera and

remain under seal for at least 60 days, and not be served upon the defendant until the court orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it allows frivolous complaints to remain under seal without causing harm to a defendant. In the past, I've been a critic of prolonged extensions of the seal. I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. That said, I think the seal does a lot of good, especially in protecting whistleblowers against retaliation. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?

Answer: I agree that the provision allowing False Claims Act cases brought by *qui tam* relators to remain under seal for 60 days is useful, particularly to protect whistleblowers. I also agree that extending the period during which a case remains under seal for a prolonged period of time is usually not constructive and should be avoided. I have not studied issues relating to the constitutionality of the seal provision. If I am confirmed, however, I would expect to support the presentation of any reasonable argument in its constitutional defense.

7. Will you work cooperatively with me—and other members of this Committee—to ensure that legislation I introduced restoring the original intent of the False Claims Act is reviewed by the Department in a timely manner with constructive input?

Answer: Yes.

WHISTLEBLOWERS

1. Will you provide Congress with accurate and timely information regarding any action taken, administrative or criminal, against individuals who retaliate against whistleblowers?

Answer: Like the Attorney General, if I am confirmed, I will work with the Judiciary Committee and the independent Office of Special Counsel, which investigates and prosecutes violations of law, including reprisals against whistleblowers, to provide timely and accurate information to the Congress.

2. I have closely monitored the treatment of whistleblowers by the FBI over the years. Could you please address what safeguards you will put in place to ensure that all FBI whistleblowers are not subject to retaliation, be it from the Office of Professional Responsibility or elsewhere within the FBI or DOJ?

Answer: I share the commitment of the Attorney General not to tolerate unlawful retaliation against any Department of Justice employee, including FBI employees.

If confirmed, I, too, will work with OPR and others in the Department to ensure that there are adequate safeguards and that whistleblowers receive all of the protections to which they are entitled by law.

3. What actions will you personally take to abate any fears of retaliation against individuals who are critical of procedures, practices or policies that do not guarantee or execute the primary mission and goals of both the FBI and DOJ?

Answer: I will join the Attorney General in sending a clear signal to senior officials and managers in the Department, including the FBI, that unlawful retaliation against whistleblowers will not be tolerated and will be cause for discipline.