

Questions for David Ogden from Senator Orrin G. Hatch

1. At your hearing, you said: “I did not agree, even at the time it was filed...with the Justice Department’s brief [in *Knox*]....It took an extreme view...of the law....The brief I submitted on behalf of the ACLU...made a different point.” The Justice Department’s brief argued that a “lascivious exhibition of the genitals or pubic area” in the definition of child pornography required a “substantial degree of genital or pubic visibility.” Your brief argued that it was “Congress’ unequivocal intent...to prohibit only exhibitions that...depicted genital or pubic nudity.”

- What did you consider “very extreme” about requiring **substantial** nudity?
- If requiring substantial nudity was “very extreme”, how would you characterize the even more extreme position, which you advocated in your brief, requiring **complete** nudity?
- What was the “different point” you made in your brief to which you referred in your hearing testimony?

Answer: In describing the Solicitor General’s brief in *Knox* as taking a “very extreme view,” I was referring to the Solicitor General’s position that a conviction based upon material containing a “lascivious exhibition of the genitals or pubic area” of a child requires that “the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer).” Br. at 8. The Solicitor General’s contention that this statutory provision applied only where the *child* acted with lascivious intent reflected an extreme view, one not advanced by my clients. I was concerned that this view might create a loophole that would allow pornographers to avoid enforcement simply by filming explicit footage of minors who did not have a lascivious intent. This view was properly rejected by the Third Circuit on remand. The “different point” that I referred to during the hearing was the position of my clients that the courts should clearly define the depictions that could violate the statute so that distributors like public libraries and mainstream bookstores, which carry a great many books and other materials created by others, could be sure they avoided all illegal images and did not inadvertently violate the law. I believe that the standard for which my clients advocated would have made it easier for the government to obtain convictions in most cases than the standard for which the government advocated.

2. At your hearing, you discussed the brief you filed in *United States v. American Library Association* challenging the Children’s Internet Protection Act (CIPA). That statute required libraries receiving federal funds to block Internet access by everyone to obscenity and child pornography and access by minors to material that is “harmful to minors.” You stated that you “absolutely” accept the Supreme Court’s decision upholding CIPA. At the same time, however, you acknowledged only that children should be protected from exposure to what you called “material that’s obscene as to them.” You used that phrase several times. Do you understand these two categories – “harmful to minors” and “obscene as to minors” – to be identical? If not, explain your understanding of how they differ.

Answer: I understand these categories to be identical. In CIPA and in other statutes, Congress has defined “harmful to minors” in a manner that tracks the Supreme Court’s definition of obscenity for minors. That is a category appropriately more expansive than what is obscene as to adults.

3. At your hearing, you stated that “in the government, I worked...to defend child pornography and...obscene as to children legislation.” In the government, that was your job. As a private attorney, have

you ever filed a brief on behalf of or represented a party defending any restrictions on sexually explicit material?

Answer: As a private attorney, my clients in First Amendment cases were often libraries, booksellers, or publishers – or their national associations – and when those clients came to me they typically wished to challenge new governmental restrictions on their activities on the grounds that those restrictions improperly chilled or burdened protected speech. As a lawyer representing those clients, my job was to advance their arguments to the best of my ability. I cannot recall an occasion on which a potential client approached me as a lawyer in private practice wishing to advance arguments defending such restrictions. To the best of my recollection, I never declined to accept such a representation.

Of course, a very substantial client with an interest in defending such restrictions is the United States, which enforces and defends the restrictions imposed by the Congress or federal agencies. For more than six years I had the privilege of representing the United States as my client, and then as you say my job was to advance the arguments that defended such restrictions to the best of my ability, and I did so. 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. Our petition for certiorari 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)). Our petition further noted that this interest “extends to all children who may be abused as a result of the dissemination of visual depictions of child pornography, not just children who are actually involved in the production of such material.” *Id.* at 15. We argued that “[b]y prohibiting dissemination and possession of computer-generated images, the CPPA helps to stamp out the market for child pornography involving real children.” *Id.* at 17.

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. While I was at the Civil Division, we argued that “COPA advances the government’s compelling interest in protecting children from harmful to minors material on the World Wide Web and in aiding parents’ efforts in doing the same, and it does so by means that are narrowly tailored to advance those interests ‘without unnecessarily interfering with First Amendment freedoms.’” *ACLU v. Reno*, Third Circuit No. 99-1324, Brief for the Appellant (July 26, 1999) (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)).

With respect to protection of children specifically, I am proud to have the support of the National Center for Missing and Exploited Children. The Center’s letter of support notes that “[d]uring his tenure as Chief of Staff and Counsel to the Attorney General, we worked closely with the Attorney General . . . in attacking the growing phenomenon of child sexual exploitation and child pornography. . . . As counselor to the Attorney General, Mr. Ogden was intricately involved in helping to shape the way NCMEC responded to child victimization challenges and delivered its services.”

4. At your hearing, you discussed the case in which you persuaded the Supreme Court to strike down legislation establishing the requirement that producers of sexually explicit material keep records regarding the age and identity of performers. Congress recently, as part of the Adam Walsh Act, expanded the

recordkeeping and reporting requirement to depictions of simulated sexually explicit conduct. Do you believe that this extension of the reporting requirement is constitutional?

Answer: I would respectfully note that the case you cite was not before the Supreme Court but rather before the United States District Court for the District of Columbia. *See American Library Ass'n v. Thornburgh*, 713 F.Supp. 469 (D.D.C. 1989). Following that ruling, Congress amended the statute to remedy the court's constitutional concerns, and ultimately, as amended, that statute was largely upheld. I am comfortable with the rulings upholding the statutes and am fully prepared, if confirmed, to enforce them. Although I have not studied the Adam Walsh Act, I have no reason to believe that the expansion to depictions of simulated sexually explicit conduct is unconstitutional, and I would be prepared to advance all reasonable arguments in support of the constitutionality of the law.