

QUESTIONS FOR THE RECORD

DAVID OGDEN, NOMINEE TO BE DEPUTY ATTORNEY GENERAL SENATOR KYL

Mr. Ogden, although your credentials are certainly impressive, I am troubled by some of the litigation positions that you have taken over a course of years — particularly with regard to matters of obscenity and child pornography. On the one hand, one ought not judge a lawyer by the legal needs of his clients. On the other hand, lawyers do choose whom they will represent. More importantly, I am sure that you yourself have noticed that lawyers also have a tendency in many cases to identify and sympathize with the viewpoints of their clients. When a lawyer has litigated in favor of a particular viewpoint for many years, one may reasonably suppose that the lawyer is at least sympathetic to that point of view.

I and other members of this committee have devoted considerable energy over recent years to the enactment of legislation that seeks to suppress child pornography in particular and sexual-abuse crimes against children generally. For example, in 2006 Congress enacted the Adam Walsh Act, Public Law 109-248, which aimed to create a national sex-offender registry, which increased the penalties for a variety of crimes against children, and which created new record-keeping requirements with respect to the ages of actors appearing in pornography. And just last year, Congress enacted legislation that broadened the jurisdictional predicates and substantive proscriptions of the two main child pornography statutes. See Public 110-358.

Many issues remain to be resolved with regard to the implementation of the Adam Walsh sex-offender registry, and Congress is, of course, eager to see that new prosecutorial tools are put to their full use. As Deputy Attorney General, you would play an important role in such questions.

Is there anything that you can cite in your past — any litigation that you have undertaken, other work that you have been involved in, or a speech that you have given or an article that you have written — that demonstrates a commitment to fighting child pornography or otherwise protecting children from sexual abuse?

Answer: I am strongly committed to fighting child pornography and protecting children from abuse. There is much in my professional record that demonstrates my commitment. Before turning to specifics, however, I think it is important to consider the broader context of my career as a lawyer.

As my career has developed, I have viewed myself as a generalist in the law, not as a specialist in any particular area or advocate for any particular set of clients. My work at WilmerHale over the past eight years, for example, has not centered on First Amendment litigation. I have represented corporate 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 all of those areas, and with respect to the media organizations (including libraries, booksellers and publishers) I represented more than fifteen years ago (before my service at the Departments of Defense and Justice), if I am confirmed, I can and will view policy, enforcement and legal issues independently of any

prior work and exclusively from the perspective of the United States. That would be my solemn duty as a public servant and as an attorney.

My previous government service demonstrates that I will enforce and defend federal law vigorously, irrespective of positions I may have taken on behalf of clients in private practice. 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." I received the highest award the Department of Defense can bestow on a civilian -- the Department of Defense Medal for Distinguished Public Service -- which states that "[my] leadership, legal expertise, and masterful oversight of hundreds of actions proved indispensable in connection with a series of high-profile, contested cases arising from Department policy on homosexual conduct in the Armed Forces."

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."

In addition, I vigorously defended the constitutionality of child pornography statutes during my tenure as Assistant Attorney General for the Civil Division. 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 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)).

Finally, in private practice, I am particularly proud of the brief I submitted for the American Psychological Association in *Maryland v. Craig*, which I have cited as one of the ten most significant cases I have litigated. There, 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. Justice O'Connor relied expressly on the brief in holding that requiring a child to confront directly his or her abuser would further traumatize and harm the child. *See Maryland v. Craig*, 497 U.S. 836, 855 (1990). In the same period, prior to entering the government in 1994, on a reduced fee basis I represented the Chesapeake Institute, a clinic that provided therapy to child and adult victims of sexual abuse, and I volunteered my time to assist its "Sponsor a Child" program that sought to raise funds so that financially deprived victims could get needed treatment.