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The Legislative Action Arm of FAMILY RESEARCH COUNCIL

DEPUTY ATTORNEY GENERAL

NOMINEE: David Ogden
Born: November 12, 1953
Family: Wife, Anne Harkavy, and three children.
Occupation: partner at the Washington, D.C. firm Wilmer Cutler Pickering Hale and Dorr, co-running the firm's Government and Regulatory Litigation Practice Group.
Education: B.A. *summa cum laude* from the University of Pennsylvania, 1976; J.D. *magna cum laude* in 1981 from Harvard Law School
Clinton White House: 1994-1995, Deputy General Counsel and the Legal Counsel for the United States Department of Defense; 1995 - 1997, Associate Deputy Attorney General in the United States Department of Justice; 1997 - 1998, Counselor to the United States Attorney General; 1998 - 1999, chief of staff to the United States Attorney General; 1999 - 2000, Acting Assistant Attorney General; 2000 - 2001, Assistant Attorney General in charge of the Civil Division in the United States Department of Justice.

On Abortion
In a brief for the American Psychological Association in *Planned Parenthood* v. *Casey*, he wrote: "Abortion rarely causes or exacerbates psychological or emotional problems. When women do experience regret, depression, or guilt, such feelings are mild and diminish rapidly without adversely affecting general functioning. The few women who do experience negative psychological responses after abortion appear to be those with preexisting emotional problems ...."
Ogden also wrote: **"**In sum, 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 or adverse psychological effects ...."
[Source]

Opposed Parental Notification by 14-year olds
In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), Ogden co-authored a brief for the American Psychological Association arguing that parental notification was an unconstitutional burden on 14-year old adolescent girls seeking an abortion. Excerpts:

> "There is no question that the right to secure an abortion is fundamental." (p. 10).
> "By any objective standard, therefore, the decision to abort is one that a reasonable person, including a reasonable adolescent, could make." (p. 11).
> "[E]mpirical 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. These unvarying and highly significant findings indicate that with respect to the capacity to understand and reason logically, there is no qualitative or quantitative difference between minors in mid-adolescence, i.e., about 14-15 years of age, and adults." (p. 18).
> [Source]

Miscellaneous Abortion filings
In *Rust v. Sullivan*, 500 U.S. 173 *(*1990), Ogden served as counsel to People for the American Way, the National Education Association, and others supporting petitioner's claim that abortion is a method of family planning that should be eligible for federal funding.

In *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003), Ogden co-authored the brief for the respondent NOW and several abortion clinics. They sought permanent injunctive relief under RICO, which was originally aimed at fighting organized mob crime, against pro-life protestors from Operation Rescue and the Pro-Life Action League. Available on WestLaw as 2002 WL 31154781.

See also *Gonzales v. Oregon*, 546 U.S. 243 (2006), where Ogden served as counsel of record on behalf of law professors filing an amicus brief supporting Oregon's Death with Dignity Act and opposing the Ashcroft Directive barring assisted suicide. Available on LexisNexis as 2004 U.S. Briefs 623.

On Homosexuality

In *Lawrence v. Texas*, 539 U.S. 558 (2003), Ogden served as counsel of record for the American Psychological Association, American Psychiatric Association, and the National Association of Social Workers filing an amicus brief in support of the defendants.

> "Of course, families headed by gay couples may encounter particular issues and challenges, much as families of racial and ethnic minority group members, low-income families, and single-parent families do." (p. 21).
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> "Although a shift in public opinion concerning homosexuality occurred in the 1990s, hostility towards gay men and lesbians remains common in contemporary American society. Prejudice against bisexuals appears to exist at comparable levels. Discrimination against gay people in employment and housing also appears to remain widespread. The severity of this anti-gay prejudice is reflected in the consistently high rate of anti-gay harassment and violence in American society." (p. 23-24). [Source]

On Gays in the Military

In *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989), Ogden filed an amicus brief on behalf of the American Psychological Association. In it, APA argued "(8) prejudice against lesbians and gay men in the Army is likely to be reduced by encouraging contact between homosexuals and heterosexuals; and (9) there was no rational basis for the Army's exclusion of gay people."
[Source]

On Strict Scrutiny for Gay Rights Claims

In an article for the APA, Ogden called for "strict scrutiny" of claims by homosexual persons. American Psychologist, Vol. 46, No. 9, p. 950-956 (September 1991).
[Source]

Pornography and Obscenity

Opposed the Children's Internet Protection Act of 2000

In *United States v. American Library Association*, Ogden served as counsel of record for an amicus brief filed on behalf of fifteen library directors in support of the Association.

> "As a condition of receiving federal funds, Congress has – with the Children's Internet Protection Act … - insisted that public libraries affirmatively censor constitutionally-protected material. By demanding that libraries be censors and devote resources - not to facilitating - but to interfering with patrons' pursuit of information and ideas, Congress has subverted the role of librarians and public libraries and violated the First Amendment rights of library patrons." (p. 3).
>
> CIPA "impairs the ability of librarians to aid patrons seeking information." (p. 11).
>
> [Source]

Challenged the Child Protection and Obscenity Enforcement Act

Ogden represented several communications trade associations challenging provisions of the Child Protection and Obscenity Enforcement Act of 1988. He convinced the court that requiring producers of pornographic materials to personally verify that models were over age 18 at the time the materials were made would "burden too heavily and infringe too deeply on the right to produce First Amendment protected material." *American Library Association v. Thornburgh*, 713 F.Supp. 469, 477 (D.D.C. 1989).

Representation of Pornographers

Ogden represented Playboy Enterprises, among others, seeking an order forcing the Library of Congress to use taxpayer funds to print Playboy Magazine's articles in Braille against the express wishes of Congress. *American Council for the Blind v. Boorstin*, 644 F.Supp. 811 (1986). Ogden represented Playboy Enterprises seeking an injunction against the inclusion of Playboy in a list of pornographic magazines that would potentially be included in the Meese Commission report. *Playboy Enterprises, Inc. v. Meese*, 746 F.Supp. 154 (D.D.C. 1990). Ogden represented a mail-order pornography distributor with a nation-wide business who complained of an allegedly unconstitutional multi-district prosecution strategy by the Department of Justice. *P.HE., Inc., v. United States*

Department of Justice, 743 F.Supp. 15 (D.D.C. 1990) and *United States v. P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992).

Ogden has filed numerous amicus briefs in pornography and obscenity cases before the Supreme Court of the United States, including *Knox v. United States, 510 U.S. 375* (1993) (on behalf of the ACLU and others); *Fort Wayne Books*, Inc. *v. Indiana*, 489 U.S. 46 (1989) (on behalf of mail-order pornography distributor P.H.E., Inc.); *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988) (on behalf of the Freedom to Read Foundation); *Pope v. Illinois*, 481 U.S. 497 (1987) (on behalf of the ACLU and P.H.E., Inc.). See also *Meese v. Keene*, 481 U.S. 465 (1987) (on behalf of Playboy Enterprises, Inc., and the American Booksellers Association).

On Judicial Activism

"Sen. Sessions: I was concerned about your comments on judicial activism or the meaning of our Constitution and how it ought to be interpreted in an article you wrote back in July 1986 concerning the *Bowers* case in Georgia . . .

> 'Constitutional interpretation cannot be limited to ascertain the way a particular law would have been viewed by the Framers. While constitutional principles do not change, the society and individuals in whom they are applied do, and our knowledge about that society and those individuals improves with time.'

Then you noted the changing social context is as much a part of the constitutional issues to be decided as the statute itself because to ignore it is to fail in the court's basic task, adapting the great outlines of the Constitution to the particular problems of each generation, and then you went on to make some other comments." Hearing before the Committee on the Judiciary, 106th Congress August 4, 1999.
[Source]

Tobacco Litigation

Was a major player in the Clinton Administration's efforts to profit from the numerous court cases against tobacco companies and releasing a statement on the day the suit was announced [Source]. He also testified before Congress in 2001 stating he believed the government had a strong case because of the tobacco industry's "long-standing conspiracy to defraud the American public."
[Source]