MEMORANDUM

TO: United States Senate Judiciary Committee

FROM: Alliance Defense Fund

RE: Opposition to Department of Justice Nominees David Ogden, Elena Kagan, Dawn Johnsen, and Thomas Perrelli

DATE: February 13, 2009

Introduction

The Alliance Defense Fund ("ADF") is a legal alliance, composed of more than 1,200 attorneys, that focuses its activities around three legal issues: (1) guarding the sanctity of life; (2) protecting marriage and the family; and (3) defending religious freedom. ADF regularly litigates difficult and contentious cases involving both novel and complex constitutional issues. In doing so, ADF consistently advocates for an originalist interpretation of the constitution, with the goal of fostering long-term legal stability and adherence to the "rule of law."

President Obama's most recent nominees for top-level positions in the Department of Justice ("DOJ")—David Ogden, Elena Kagan, Dawn Johnsen, and Thomas Perrelli—each subscribe to a results-oriented school of jurisprudence unmoored from a proper understanding of the constitution. Their legal philosophies depart from mainstream views, their professional careers reflect a far-left ideology, and their involvement in the DOJ will jeopardize the proper enforcement of federal law and development of constitutional doctrines. For the reasons expressed herein, ADF opposes each of their nominations and urges the Senate Judiciary Committee ("Committee") to do the same.

David Ogden

President Obama has nominated David Ogden to serve as Deputy Attorney General. Mr. Ogden's far-left jurisprudential background is truly astounding. He has repeatedly been an advocate of sexually oriented businesses, including distributors of hard-core pornography. He has represented a variety of clients

seeking to strike down even slight restrictions on abortion, such as parental-consent laws, spousal-consent laws, and 24-hour waiting periods. And he has been a consistent advocate for the homosexual agenda. Perhaps most troubling of all, it appears that Mr. Ogden has been somewhat misleading in his testimony before this Committee. For these reasons, which will be more fully discussed herein, ADF urges this Committee to reject Mr. Ogden's nomination.

Throughout his career, Mr. Ogden has been a major defender of sexually oriented businesses and organizations. He has repeatedly represented major organizations within the pornography industry—including Playboy Enterprises, Playboy Programming Distribution Corporation, the Consenting Adults Telephone Rights Association, and PHE, Inc., which is the nation's largest distributor of hard-core pornography and other sexually oriented products. This industry is unique in its extreme degradation of women and disregard for human relationships.

In *United States v. American Library Association*, 539 U.S. 194 (2003), Mr. Ogden submitted an amicus brief on behalf of fifteen library directors, arguing that the federal constitution requires public libraries to remove internet pornography filters. In that brief, Mr. Ogden treated pornography like informative data, writing that "[i]mposition of mandatory filtering on public libraries impairs the ability of librarians to fulfill the purpose of public libraries—namely, assisting library patrons in their quest for information . . . ." In several other cases, including *American Library Association v. Reno*, 33 F.3d 78 (D.C. Cir. 1994), Mr. Ogden represented sexually orientated businesses and organizations in their quest to avoid any measure—however slight—of government regulation. His advocacy of expansive First Amendment rights for sexually oriented businesses rests on a revisionist understanding of the constitution.

Mr. Ogden has also been a staunch supporter of abortion, seeking to eradicate any state or federal law protecting unborn children or educating women about the harms of abortion. In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), Mr. Ogden argued, in a brief for the American Psychological Association, that a parental-consent law violated the constitutional "right" of a 14-year-old girl to kill her unborn child. In that brief, Mr. Ogden argued that 14-year-old girls are mature enough to decide whether to abort their child, stating that "the decision to abort is one that . . . a reasonable adolescent[] could make." He also asserted that 14-year-old girls are just as capable of making abortion decisions as adults are:

> [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 decision. 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.

Mr. Ogden's efforts to invalidate parental-consent laws conflict with citizens' sentiment in this country; nearly 70% of Americans favor laws requiring women under 18 to get parental consent for any abortion. *See* Gallup's Pulse of Democracy: Abortion, *available at* http://www.gallup.com/poll/1576/Abortion.aspx.

In *Casey v. Planned Parenthood of S.E. Pennsylvania*, 505 U.S. 833 (1992), Mr. Ogden argued, in an *amicus* brief for Planned Parenthood and the American Psychological Association, that spousal notification and a mandatory 24-hour waiting period violate the federal constitution. He reasoned that "compelled spousal notification places a substantial burden on a married woman's right to terminate her pregnancy" and "cannot be justified [by] the [government's] interest in promoting the integrity of the marital relationship." By taking this position, Mr. Ogden's brief advocated the invalidation of a spousal-notification law supported by 64% of Americans. *See* Gallup's Pulse of Democracy: Abortion, *available at* http://www.gallup.com/poll/1576/Abortion.aspx. He also insisted that a minimal waiting period of 24 hours "severely burdens a woman's right to choose." These absolutist positions on abortion are based on a flawed understanding of the constitution, wholly disconnected from the federalist principles upon which our great nation was founded. Mr. Ogden's views leave no room whatsoever for the state to advance its compelling interest in its future citizens and taxpayers.

Mr. Ogden has also been an unwavering advocate for homosexual activists. In *Lawrence v. Texas*, 539 U.S. 558 (2003), he served as counsel for the American Psychological Association and argued that the criminalization of sodomy violates federal constitutional rights. In that brief, he asserted that "homosexuality is a normal form of human sexuality." He also argued, despite abundant evidence to the contrary, that "the children of [same-sex couples] . . . demonstrate no deficits in intellectual development, social adjustment, or psychological well-being as compared to children of [opposite-sex couples]." He submitted a brief advocating similar positions in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Mr. Ogden supports the use of "strict scrutiny" for equal-protection challenges brought by persons involved in same-sex relationships. He has asserted that "gay men and lesbians constitute a discrete and insular minority deserving strict equal protection scrutiny." Donald N. Bersoff and David W. Ogden, "APA Amicus Curiae Briefs: Furthering Lesbian and Gay Male Civil Rights," American Psychologist, Vol. 46, No. 9, p. 950-56 (Sept 1991). This radical legal theory has been rejected by nearly every court that has addressed the issue. *See, e.g.*, *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006); *Andersen v. King County*, 158 Wash.2d 1, 138 P.3d 963 (2006); *Conaway v. Deane*, 401 Md. 219, 932 A.3d 571 (2007). The only judicial opinion adopting that approach—the California Supreme

Court's decision in *In re Marriage Cases*, 43 Cal.4th 757, 183 P.3d 384 (2008)—has been resoundingly rejected by the people of California when they approved a constitutional amendment that effectively nullified the Court's decision. Mr. Ogden's advocacy of such radical constitutional jurisprudence lacks any basis in sound constitutional theory; instead, it is intended to further his favored political end, without regard for an originalist understanding of the document he purports to be interpreting.

And perhaps more troubling than Mr. Ogden's far-left jurisprudence is his lack of candor before this Committee. In a child pornography case, *United States v. Knox*, Mr. Ogden argued—on behalf of the ACLU, the American Library Association, and the American Booksellers Association—that the defendant had been improperly convicted under the federal child pornography statute. In that case, the Department of Justice adopted an "extreme" interpretation of the child pornography law, asserting that materials do not qualify as child pornography unless there is actual nudity, *i.e.*, the child's genitals or pubic area are fully or partially exposed. President Clinton publicly chastised the DOJ for its position, as did the Senate, by a vote of 100-0, and the House, by a vote of 425-3.

When questioned about this case during the Judiciary Committee's hearing, Mr. Ogden stated that he and his clients did not adopt what he characterized as the DOJ's "very extreme view . . . of the law." He stated: "The brief that I submitted . . . made a different point. . . . The court decided not to accept that view, but it wasn't the view—the extreme view that I myself rejected—that the Justice Department brief took." It appears, however, that Mr. Ogden's brief had in fact adopted the same "extreme" position put forth by the DOJ. The DOJ's brief asserted that "[d]epictions . . . come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their . . . genitals or pubic areas." Brief of Respondent United States at 13, *Knox v. United States*, No. 92-1183 (U.S.S.C. Sept 1993) (found at 1993 WL 723366). Similarly, Mr. Ogden's brief argued that "nudity was not only a requirement, but that nudity alone was insufficient. Something more, a 'lascivious exhibition of the genitals and public areas,' was required." Brief of *Amici* in support of Petitioner at 17, *Knox v. United States*, No. 92-1183 (U.S.S.C. Sept 1993) (found at 1992 U.S. Briefs 1183 (Lexis)). This lack of candor in Mr. Ogden's testimony further demonstrates that he is not fit to serve as a high-ranking DOJ official.

<u>Elena Kagan</u>

President Obama has nominated Elena Kagan to serve as Solicitor General. In her past, Ms. Kagan has shown open hostility towards the military's "Don't Ask, Don't Tell" policy, which is favored by a majority of Americans and, more importantly, by a majority of military servicemen and women. *See* Gallup's Pulse of Democracy: Homosexual Relations, *available at* http://www.gallup.com/poll/1651/

Homosexual-Relations.aspx; Military Times Poll, *available at* http://www.militarycity.com/polls/2007activepoll_politics.php.

While Dean of Harvard Law School, Ms. Kagan did not allow military recruiters on campus in protest to the military's "Don't Ask, Don't Tell" policy. In an email to the Harvard Law School community, she referred to this fifteen-year policy as "a profound wrong—a moral injustice of the first order." *See* Email from Elena Kagan, Dean Harvard Law School, to Harvard Law School Community (Oct 6, 2003, 9:04 EST), *available at* http://www.hlrecord.org/home/index.cfm?event=displayArticlePrinterFriendly&uStory_id=fb9b7e30-726c-45a1-ae9c-e74a7c5f655f.

Moreover, Ms. Kagan submitted an *amicus* brief challenging the Solomon Amendment, the federal law denying federal funding to an institution of higher education that has a policy or practice of prohibiting or preventing the military from gaining access to campuses for purposes of military recruiting. The *amicus* brief joined by Ms. Kagan and other law professors offered an implausible interpretation of the Solomon Amendment, which was rejected by a unanimous Supreme Court. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). In fact, the Court's opinion characterized Ms. Kagan's interpretation as one that would render the Solomon Amendment "largely meaningless." *Id.* at 57-58.

Ms. Kagan's proffering of an unsupportable interpretation of federal law to achieve her desired political result raises serious questions about her capacity to defend federal laws with which she personally disagrees. She appears driven by a results-oriented jurisprudence, unfitting for a high-ranking DOJ official who should not be tainted by an extremist ideology. Her outright hostility towards governing military policy and her inability to reconcile her personal views with her legal positions demonstrates that Ms. Kagan is ill qualified for the job of Solicitor General.

Dawn Johnsen

President Obama has nominated Dawn Johnsen to lead the Office of Legal Counsel within the DOJ. One need not explore far to see Ms. Johnsen's far-left legal background and jurisprudential theories. She was a staff counsel for the ACLU, and served as Legal Director for the National Abortion Rights Action League ("NARAL"). NARAL has adopted extreme, absolutist positions on abortion, opposing any attempt to restrict abortion on-demand. In line with its unwavering demands on abortion, NARAL has publicly condemned the federal law banning partial-birth abortions, *see* NARAL Pro-Choice American Press Release, "Senate Votes to Criminalize Safe, Legal Medical Procedures, Next Stop is President Bush" (Oct 21, 2003), *available at* http://www.commondreams.org/ news2003/1021-04.htm—a law supported by more than 72% of Americans. *See* Gallup's Pulse of Democracy: Abortion, *available at* http://www.gallup.com/poll/1576/Abortion.aspx.

As a legal scholar, Ms. Johnsen has promoted radical legal positions concerning abortion. She has sharply criticized the creation of any legal rights for unborn children, asserting that this might have a deleterious effect on her desired end—a woman's unfettered access to abortion. *See* Dawn E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," 95 Yale L.J. 599 (Jan 1986). In addition, she has adopted far-left feminist positions, arguing that "[f]etal rights laws would not only infringe on constitutionally protected liberty and privacy rights of individual women, they would also serve to disadvantage women as women by further stigmatizing and penalizing them on the basis of the very characteristic that historically has been used to perpetuate a system of sex inequality." *Id.* at 620. These radical legal theories are far outside mainstream legal thought; they are grounded in achieving her desired end—the widespread availability of abortion—and not in a proper understanding of constitutional doctrine. And again, they run contrary to the government's profound interest in promoting life.

Thomas Perrelli

President Obama has nominated Thomas Perrelli as Associate Attorney General. While in private practice, Mr. Perrelli represented Terri Schiavo's husband and worked closely with the ACLU to deprive Ms. Schiavo of food and water. His intimate involvement in that case and tireless efforts to ensure Ms. Schiavo's death show a calloused disregard for the sanctity of all life, including the lives of disabled individuals.

In fostering Ms. Schiavo's death, Mr. Perrelli advanced a legal position rejected by 80% of Americans. A poll completed after Ms. Schiavo's controversial death found that 80% of likely voters said that a disabled person who is not terminally ill or in a coma should not, in the absence of a written directive to the contrary, be denied food and water. *See* Zogby International Poll, *available at* http://www.zogby.com/search/ ReadNews.cfm?ID=982. Moreover, by a three-to-one margin, likely voters said that, when there is conflicting evidence on the wishes of a patient, elected officials should order that a feeding tube remain in place. *See* Zogby International Poll, *available at* http://www.zogby.com/search/ReadNews.cfm?ID=982. Mr. Perrelli's unwillingness to protect Ms. Schiavo's most important right—her inalienable right to life—raises serious questions about his ability to protect and defend the rights of other Americans.

Conclusion

ADF respectfully requests that the Committee reject the DOJ nominations of David Ogden, Elena Kagan, Dawn Johnsen, and Thomas Perrelli. Their far-left, results-oriented jurisprudence is wholly unmoored from the constitution as drafted

and understood by our Founders. Confirming them to high-level DOJ positions will wreak havoc on the “rule of law” in our country.