

# WebMemo



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## Deputy Attorney General Nominee David Ogden: Questions on Interpretation of the U.S. Constitution

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On January 6, Barack Obama nominated David Ogden to be the next deputy attorney general of the United States, the second highest position in the U.S. Department of Justice. Reportedly hanging in Ogden's office at the time of the nomination was a plaque commemorating his victory in a controversial 2005 death penalty case before the U.S. Supreme Court.<sup>1</sup>

That case, *Roper v. Simmons*, was controversial not only because it determined the constitutionality of the juvenile death penalty but also because, in deciding the case, a narrowly divided Supreme Court relied in part upon the laws and practices of foreign nations as well as other sources of foreign law and "the opinion of the world community."

Although Ogden is certainly qualified for the position of deputy attorney general,<sup>2</sup> the views expressed in the brief he co-authored on behalf of the defendant in the *Roper* case are troublesome and should be explored during his Senate confirmation hearing before the Committee on the Judiciary, currently scheduled for February 5.

**Relying on Foreign Sources of Law to Interpret the U.S. Constitution.** The Supreme Court's citation to foreign law in cases interpreting the United States Constitution is controversial and has sparked an ongoing debate within the U.S. legal community.<sup>3</sup> The Court's decision to rely in part on foreign jurisprudence in reaching its decision in the *Roper* case is part of that debate.

*The Roper v. Simmons Case.* In 1993 in St. Louis, Missouri, Christopher Simmons, nine

months before his 18th birthday, planned and carried out the cold-blooded murder of 46-year-old Shirley Crook. Following a plan that he had discussed in great detail with his friends, Simmons and an accomplice broke into Crook's home, hogtied her with electrical wire, wrapped her head in duct tape, drove her to a bridge, and threw her into the Meramec River, where she drowned. Simmons subsequently bragged about the murder, explaining to friends that he killed Crook "because the bitch seen my face." Simmons was subsequently arrested, tried, convicted, and sentenced to death.<sup>4</sup>

Simmons' case was appealed through the Missouri legal system and ultimately argued before the U.S. Supreme Court, where Simmons was represented by a team of attorneys which included Ogden. Among the arguments made in the brief co-authored by Ogden and submitted to the Supreme Court was that, in making its decision, the Court should look to the laws, legal opinions, and decisions of foreign nations and international organizations regarding the death penalty.<sup>5</sup>

Ogden argued that the laws of foreign nations enjoy a direct cause-and-effect relationship with the interpretation of the U.S. Constitution: "Almost

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without exception, the other nations of the world have rejected capital punishment of those under 18, confirming that the juvenile death penalty is contrary to Eighth Amendment standards of decency.”<sup>6</sup> In other words, since the “other nations of the world” disfavor capital punishment for juvenile killers, it necessarily follows that the death penalty for juvenile killers in the United States is contrary to the Eighth Amendment to the Constitution.

*United Nations Treaties and International Organizations.* In support of this position, Ogden’s brief in *Roper* cites to the United Nations General Assembly’s adoption of the Convention on the Rights of the Child (CRC) in 1989, the terms of which bar the execution of persons who commit crimes while under the age of 18.<sup>7</sup> However, the United States did not vote in favor of the CRC in the General Assembly and has thus far—under both the Clinton and Bush Administrations—chosen not to become a party to the CRC.<sup>8</sup> The United States has excellent reasons not to ratify the CRC.<sup>9</sup> And yet

Ogden’s brief maintains that since “every [other] country in the world” is a party to the CRC, the United States (including the Supreme Court) should follow its terms and outlaw the juvenile death penalty.

Ogden’s argument turns logic on its head. In effect, the *Roper* brief maintains that even though the United States has specifically chosen *not* to join the CRC, it should still be bound by its terms. Moreover, it necessarily follows that the Supreme Court should ignore the U.S. government’s decision *not* to ratify the CRC and impose upon the nation the CRC’s death penalty prohibition.

Citing to a 2002 report of the Inter-American Commission on Human Rights, Ogden’s brief in *Roper* also argues for the proposition that there is a new “international customary norm” barring the juvenile death penalty—a norm to which the United States is now bound.<sup>10</sup> The U.S., however, has never consented to be bound by the recommendation of the Inter-American Commission, which

1. Joe Palazzolo, “Wilmer Cutler Partner Tops the List for No. 2 Slot at DOJ,” *Legal Times*, December 22, 2008, at <http://www.law.com/jsp/article.jsp?id=1202426934090> (January 30, 2009).
2. Ogden is currently a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr in Washington, D.C. He graduated *summa cum laude* and Phi Beta Kappa from the University of Pennsylvania and *magna cum laude* from Harvard Law School, where he was the editor of the *Harvard Law Review*. After graduation he clerked for U.S. Supreme Court Justice Harry Blackmun as well as Judge Abraham Sofaer in the U.S. District Court for the Southern District of New York. He has served in senior positions in both the Department of Justice and the Department of Defense.
3. Justices Antonin Scalia and Stephen Breyer famously debated the issue at American University’s Washington College of Law in January 2005. See U.S. Association of Constitutional Law Discussion: Scalia-Breyer debate on foreign law, American University, February 27, 2005, at <http://www.freerepublic.com/focus/f-news/1352357/posts> (January 30, 2009); see also Kenneth Anderson, “Foreign Law and the U.S. Constitution,” *Policy Review*, June & July 2005; Ruth Bader Ginsburg, “Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication,” Sherman J. Bellwood Lecture delivered at the University of Idaho, September 18, 2003.
4. *Roper v. Simmons*, 543 U.S. 551 (2005).
5. Seth P. Waxman, David W. Ogden, and Danielle Spinelli, Brief for Respondent Christopher Simmons on Writ of Certiorari to the United States Supreme Court, Case No. 03–633, July 2004, at [http://www.oyez.org/cases/2000-2009/2004/2004\\_03\\_633/briefs/Respondent's%20brief.pdf](http://www.oyez.org/cases/2000-2009/2004/2004_03_633/briefs/Respondent's%20brief.pdf) (January 31, 2009) (*Roper* brief).
6. *Roper* brief, pp. 47–48 (citations omitted).
7. *Roper* brief, pp. 48–49. Article 37(a) of the CRC states *inter alia* that “[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”
8. Madeline Albright signed the CRC in February 1995 on behalf of the United States, but President Clinton never submitted it to the Senate for advice and consent. The Bush Administration also did not submit the CRC to the Senate.
9. Patrick F. Fagan, “How U.N. Conventions On Women’s and Children’s Rights Undermine Family, Religion, and Sovereignty,” Heritage Foundation *Background* No. 1407, February 5, 2001, at <http://www.heritage.org/Research/InternationalOrganizations/BG1407.cfm>; Michael P. Farris, “Nannies in Blue Berets: Understanding the U.N. Convention on the Rights of the Child,” Home School Legal Defense Association, January 2009, at [http://www.hsllda.org/docs/news/HSLDA\\_Understanding\\_UNCRC\\_Issue\\_Paper.pdf](http://www.hsllda.org/docs/news/HSLDA_Understanding_UNCRC_Issue_Paper.pdf) (January 31, 2009).

has no jurisdiction over U.S. persons and cannot compel the U.S. government. Moreover, neither that commission nor any other international organization has the authority to declare anything to be a binding, international norm.

In sum, then, Ogden's brief maintains that the Supreme Court should interpret the U.S. Constitution with deference to (1) a global legal "consensus" allegedly reached by other nations of the world regarding the juvenile death penalty, (2) the provisions of a U.N. human rights treaty that the United States has never ratified and is not party to, and (3) a declaration by an international commission that has no authority over the United States. These three arguments have in common the desire to achieve by judicial proclamation that which could not be attained through the democratic process—either through Senate ratification of the CRC or through the amendment or repeal of the death penalty law in Missouri.

The death penalty is a serious issue for U.S. constitutional law that has been hotly debated in legal, social, cultural, and religious circles throughout America's history and across the globe. The circumstances under which it should be imposed continue to present vexing moral questions, especially since 1958, when the Supreme Court under Chief Justice Earl Warren declared that the Constitution's Eighth Amendment should be interpreted according to "evolving standards of decency."<sup>11</sup> Regardless of whether one believes that imposing the death penalty on persons who committed heinous crimes while under the age of 18 is cruel and unusual, it is improper for the Supreme Court to rely on arguments foreign to U.S. law such as those made in Ogden's brief in the *Roper* case.<sup>12</sup>

**Questions for Ogden.** If confirmed by the Senate as deputy attorney general, Ogden would be placed in a position of great influence over the policy of the Department of Justice, second only to the attorney general, whom he would "advise and assist...in formulating and implementing Department policies and programs."<sup>13</sup> Accordingly, Ogden will have a major hand in counterterrorism policy, enforcement priorities, sentencing, and the decision whether to authorize federal prosecutors to seek the death penalty in appropriate cases. What role will the decisions of foreign courts and the "opinions of mankind" have on Ogden's policy recommendations?

Ogden's co-authorship of the *Roper* brief does not definitively establish that the arguments in the brief reflect his personal opinion, nor does it dictate how he will advise the attorney general on matters of legal policy. It is right and proper, however, to inquire of Ogden during his Senate confirmation hearing concerning his views on international sources of law and give him an opportunity to explain his beliefs regarding the interpretation of the U.S. Constitution. Such inquiries could include:

- Reliance on foreign legal norms appears to have led to an incremental erosion of the number of crimes for which the death penalty is warranted. For instance, the death penalty is no longer available in cases where the defendant was a juvenile or mentally retarded at the time of the offense<sup>14</sup> or in cases of rape.<sup>15</sup> *What is next? If the "world community" reaches a consensus that the death penalty should not be applied for the crimes of terrorism, treason, or other federal capital offenses, what will you recommend to the attorney general in such cases?*
- If confirmed you will be involved in deciding which federal cases are appropriate candidates

10. *Roper* brief, pp. 49-50, citing *Domingues v. United States*, Case No. 12.285, Inter-Am. C.H.R. Rep. No. 62/02 (2002).

11. *Trop v. Dulles*, 356 U.S. 86 (1958).

12. Regrettably, the Supreme Court agreed with the assertions in Ogden's brief regarding the persuasive authority of foreign law in interpreting the United States Constitution. Justice Kennedy, writing for the 5-4 majority, cited to the CRC (despite the fact that it is not ratified by the U.S.) and to the laws and practices of foreign countries in coming to the conclusion that the juvenile death penalty is unconstitutional.

13. 28 C.F.R. § 0.15 (2008) (setting forth the responsibilities of the Office of the Deputy Attorney General).

14. *Roper*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

15. *Coker v. Georgia*, 433 U.S. 584 (1977) (where the Court noted that only 3 out of 60 "major nations" in the world surveyed in 1965 retained the death penalty for rape).

for the death penalty.<sup>16</sup> *What weight will you give to the decisions of foreign courts and other “international norms” in your death penalty recommendations to the attorney general?*

- International criminal legal norms are not limited to death penalty issues. For example, 135 nations apparently more “civilized” than the United States currently prohibit the imposition of the sentence of life without the possibility of parole (LWOP) for juvenile killers, while 44 U.S. states and the federal government currently permit such sentences.<sup>17</sup> *Do you respect the sovereignty of each state in the Union to decide appropriate punishments for juvenile killers, including LWOP sentences? In your opinion, does foreign law trump the laws of 44 U.S. states as well as the laws of the very government for which you are seeking to serve as deputy attorney general?*
- The legal systems of the world greatly vary from one another and from the U.S. criminal justice system. The criminal laws, social mores, and cul-

tural traditions of other nations are also considerably divergent. *Under what circumstances should the United States adopt the normative values and laws of other nations?*

**A Crucial Issue of Constitutional Interpretation.** Given the major role that the deputy attorney general will have in determining the criminal legal policy of the United States over the next four years, the arguments advanced by Ogden in the *Roper v. Simmons* case deserve close scrutiny.

Although the Senate confirmation hearing of Ogden will certainly not determine the propriety of relying on foreign sources of law to interpret the Constitution, the Committee on the Judiciary should not ignore his opinions on such a crucial issue of constitutional interpretation.

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16. Statement of deputy assistant attorney general Barry Sabin before the Subcommittee on the Constitution, Senate Committee on the Judiciary, “Oversight of the Federal Death Penalty,” June 27, 2007, at <http://www.usdoj.gov/criminal/pr/testimony/2007/06/06-27-07sabin-deathpenalty.pdf> (January 31, 2009).
17. Michelle Leighton *et al.*, “Sentencing Our Children to Die in Prison: Global Law and Practice,” Center for Law and Global Justice, University of San Francisco School of Law, November 2007.