Written Questions for David Ogden from Senator Specter

Attorney-Client Privilege

1. The Department of Justice's policy of seeking waiver of the attorney-client privilege from organizations under investigation originated under the memorandum that then-Deputy Attorney General Holder signed on June 16, 1999.

    a. Is there any real justification for having a waiver on anything other than a purely voluntary basis?

Answer: Any waiver of the attorney-client privilege should be voluntary.

    b. Doesn't it undermine the voluntariness of a waiver when a company's representatives have reason to believe the charges against it will be reduced in exchange for such a waiver?

Answer: Yes. It is for this reason that the United States Attorneys Manual states that "prosecutors should not ask for such waivers and are directed not to do so." U.S.A.M § 9-28.710. Prosecutors must make clear that a corporation will be viewed as cooperating with an investigation regardless of whether it waives attorney-client privilege so long as corporate representatives provide to the government "the facts known to the corporation about the putative criminal misconduct." *Id.*

    c. Should a refusal to waive the attorney-client or work product protections voluntarily ever be a factor prosecutors consider in deciding whether to indict a corporation?

Answer: No. As noted above, a corporation should be deemed to have cooperated with an investigation regardless of whether it waives attorney-client privilege so long as corporate representatives provide to the government "the facts known to the corporation about the putative criminal misconduct." *Id.*

    d. Attorney General Mukasey stated in his hearing during discussion of this question, "Absent privilege, the right to counsel is nearly meaningless. You can't get counsel – you can't be expected to disclose the facts to your lawyer so as to get good counsel if what you think you're doing is disclosing them, ultimately, to the prosecutor." Do you agree with that statement?

Answer: I believe the privilege is an essential aspect of the right to counsel because without it a client is less likely to be fully candid with his attorney, and such candor is the foundation of the attorney-client relationship.

2. The Filip Guidelines are a substantial improvement over the Holder, Thompson, and McNulty Memos. Nonetheless, they are subject to change through unilateral executive branch fiat. Additionally, since the Filip Guidelines are found in the U.S. Attorneys' Manual, they do not bind other independent federal law enforcement and investigatory agencies such as the Securities and Exchange Commission and the Internal Revenue Service. Rather than await yet another change—at least the fifth in a decade—that could prove as temporary as its predecessors, isn't it preferable to have a uniform federal policy precluding waiver requests except in limited circumstances (e.g., in cases where the defendant asserts an "advice of counsel" defense or the prosecution has credible evidence that the fraud or crime exceptions to the privilege pertain)?

   Answer: I agree that a uniform policy would have benefits, and I understand the benefits of making the policy more permanent through legislation. On the other hand, embodying the policy in a statute would reduce the government's ability swiftly to correct for unforeseen circumstances and unintended consequences.

   Toward the goal of greater uniformity, although other federal agencies are not bound by the Department of Justice's polices, I note that there is an indication others will adopt guidance similar to the Filip Guidelines. For instance, the Securities and Exchange Commission has issued a revised October 6, 2008 Enforcement Manual that states that attorney-client privilege waivers should not be requested from corporations and should be strictly voluntary.

3. Do you support the Attorney-Client Privilege Protection Act legislation I introduced to end waiver requests and consideration of waivers as part of a cooperation matrix?

   Answer: I agree that prosecutors should not extract a waiver of the attorney-client privilege from a corporate defendant with a promise to reduce the charges against that defendant. Corporations should be deemed to have cooperated with an investigation regardless of whether they waive the attorney-client privilege so long as corporate representatives provide to the government "the facts known to the corporation about the putative criminal misconduct." I believe the Department of Justice's current policies and practices address this concern and I favor considering how those policies and practices function in operation to be sure they work as intended before considering changes or legislation.

Executive Power

4. In November 1994, President Clinton's Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger, signed an opinion letter to the White House Counsel in which he said the following:

> The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment.[1]

   a. Do you agree with this statement?

Answer: I agree with the following comments of Attorney General Holder on this subject: "[T]he President's power is at its lowest ebb when he acts contrary to a statute duly enacted by Congress, but the Constitution is the supreme law of the land. There are circumstances where a President can refuse to comply with a statutory provision. These include a legislative veto, see INS v. Chadha, 462 U.S. 919 (1983), or a statute purporting to limit the President's removal power in certain circumstances, see Myers v. United States, 272 U.S. 52 (1926)."

5. A few months earlier, in July 1994, Deputy Attorney General Jamie Gorelick argued before the House Select Committee on Intelligence that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. The Committee at the time was considering legislation to subject such searches to approval from the FISA court. That issue arose when attention was drawn to the practice of intelligence agents conducting clandestine searches within the United States. Such searches extended not only to foreign embassies, but to U.S. citizens within our borders. The warrantless searches of the office and home of Aldrich Ames, a U.S. citizen, in June and October 1993 gave rise to concerns that courts might strike down this practice.[2] Deputy Attorney General Gorelick's testimony before the Senate Intelligence Committee maintained, "the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General." She stated further, "it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities." In the Department of Justice's view, she testified, it did not matter whether searches were "conducted for foreign intelligence purposes in the United

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[1] Memorandum for Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 U.S. Op. Off. Legal Counsel 199, 201, Nov. 2, 1994.
[2] Smith, *Administration Backing No-Warrant Spy Searches*, WASHINGTON POST, July 15, 1994.

States or against U.S. persons abroad. . . . [w]e believe that the warrant clause of the Fourth Amendment is inapplicable to such searches."[3]

a. Do you agree with this statement?

Answer: I agree with the following comments of Attorney General Holder on this subject: "Consistent with judicial precedents, I do believe the President has the authority, in the absence of a conflicting statute like FISA, to conduct warrantless foreign intelligence surveillance under certain conditions. As the Second Circuit explained in United States v. Duggan, 743 F.2d 59, 72 (2d Cir. 1984), 'virtually every court that had addressed the issue had concluded that the President had the inherent power to collect foreign intelligence information, and that such surveillances constituted an exception to the warrant requirement of the Fourth Amendment.'"

6. In 2000, Assistant Attorney General Randolph D. Moss issued an opinion letter to the Office of Intelligence Policy and Review entitled "Sharing Title III Electronic Surveillance Material with the Intelligence Community," which addressed the statutory provisions governing wiretaps in criminal investigations. That opinion included the following language:

> [I]n extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III. . . . Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "subject to an implied exception in deference to such presidential powers." *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.). We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances.[4]

a. Do you agree with this statement?

Answer: I agree with Attorney General Holder's comments on this subject: "[A] statute cannot impermissibly infringe the President's constitutional powers, including his authorities in the areas of national security and foreign relations. Statutes that attempt to

[3] Statement of Jamie S. Gorelick, Deputy Attorney General, Before the Permanent Select Committee on Intelligence, U.S. House of Representatives, Concerning Warrantless Physical Searches Conducted in the U.S. for Foreign Intelligence, July 14, 1994.

[4] Memorandum for the Counsel Office of Intelligence Policy and Review from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Sharing Title III Electronic Surveillance Material with the Intelligence Community, 2000 WL 33716983, *9, Oct. 17, 2000.

restrict the President's ability to share critical national security information with his own intelligence agencies in extraordinary circumstances pose special concerns. At the same time, the President's powers are, as Justice Jackson explained, at their lowest ebb when he acts in a manner that conflicts with a congressional enactment."

United States v. Morrison

7. As Acting Assistant Attorney General for the Civil Division, you signed the brief for the United States defending the provision of the Violence Against Women Act that creates a private right of action for victims of gender-motivated violence under both the Commerce Clause and Section Five of the Fourteenth Amendment. That brief stated: "[B]ased on the extensive factual record documenting the States' failure to respond effectively to violent crimes against women due to the 'archaic prejudices' of 'those within the justice system,' 1993 S. Rep. 38, Congress could properly have concluded that violations of equal protection, under the standard set forth by this Court, were occurring repeatedly in state justice systems across the country."[5] Many Members of Congress were disappointed with the Supreme Court's denigrating statements regarding congressional competence to enact legislation and the Court's rejection of congressional findings supporting the Violence Against Women Act due to our "method of reasoning."[6] As the dissent noted, the Court's judgment is "dependent upon a uniquely judicial competence,"[7] which implicitly criticizes a lesser quality of congressional competence.

    a. Is there any real justification for the Court to denigrate Congress' "method of reasoning" in our constitutional structure of separation of powers where Congress has the authority to decide public policy on issues such as gender-based violence affecting interstate commerce?

Answer: As the brief I submitted for the United States in *United States v. Morrison* stated, Congress has both the authority and the institutional competence to determine issues of public policy based on its investigation into, and understanding of, economic and social conditions in this country. To be sure, the Supreme Court has the last word on whether a congressional enactment is consistent with the Commerce Clause in particular or the Constitution generally, and the Court's ruling in *Morrison* is the law of the land. Nevertheless, the Supreme Court should (and typically does) afford great deference to Congress's superior institutional competence to assess economic and social conditions in formulating legislation. As I argued for my client, the National Association of Broadcasters, in a brief filed with the Court December 7, 1993: "When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference. That is because Congress is an institution better equipped to amass

[5] 1999 WL 1037259, **41-42.
[6] United States v. Morrison, 529 U.S. 598, 615 (2000).
[7] *Id.* at 638 (Souter, J., dissenting).

and evaluate the vast amounts of data bearing on the issues." Br. at 45 (internal citations and quotations omitted). I agree with those sentiments.

b. Is there any possible basis for the Court's suggestion of "uniquely judicial competence,"[8] implicitly criticizing a lesser quality of Congressional competence?

Answer: I do not hold the view that Congress is less competent than the courts to assess economic and social conditions.

8. What is your assessment of the jurisprudence of *United States v. Lopez* and *United States v. Morrison*, which overturned almost 60 years of Congress' power under the Commerce Clause?

Answer: *United States v. Morrison* and *United States v. Lopez* are the law of the land, and therefore they define the limits of Congress's power with respect to the laws at issue in those cases – which involved violence against women in *Morrison* and the possession of handguns on or near school grounds in *Lopez*. That said, it is my view (and it has generally been the view of the courts for more than 60 years) that Congress has expansive authority under the Commerce Clause to enact legislation it deems necessary to address problems that are national in scope, and that courts should afford great deference to Congress's judgments in this regard.

<u>Use of Foreign Law to Interpret the Constitution</u>

9. In the brief you submitted in *Roper v. Simmons*, you invoked foreign law in your argument in favor of barring the death penalty for those convicted under the age of 18: "Almost 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."[9] When asked during your hearing how much weight you give to foreign law, you replied, "typically very little weight … it depends somewhat on the context, which provision."

a. If confirmed as Deputy Attorney General, you will have great influence over the policies of DOJ. Accordingly, you 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. In what contexts would you give weight to foreign law in your new position?

Answer: Under the governing test in Supreme Court precedent, a punishment is cruel and unusual if it violates the "evolving standards of decency that mark the progress of a

[8] *Id.*
[9] 2004 WL 1947812, **47-48.

maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). In prior cases applying the "evolving standards of decency" test, the Supreme Court had considered the practices of other countries. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21; *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982). In advocating on behalf of our client in *Roper*, we were obligated to make all reasonable arguments on his behalf that might be persuasive to any Justice. We therefore discussed the fact that few countries in the world permit the execution of people who were minors at the time of their offense. The Court expressly relied on this factor in its decision. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005).

The best interests of the people of the United States, under the Constitution and the laws of the United States, should determine policy at the Department of Justice. International law would play a role where the United States has elected to be bound by virtue of Senate ratification of a treaty or other international agreement, thereby making it a part of the domestic laws of the United States. The laws or practices of foreign countries might also play a role, for instance, in the formulation of policies regarding when to transfer a detainee to a foreign country. In that circumstance, the laws of the country in question with regard to that government's ability to monitor, prosecute, incarcerate, and punish individuals accused of acts of terrorism might be relevant, as might be their laws and practices relating to the treatment of detainees.

b. If the "other nations of the world" believe 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?

Answer: In formulating my recommendations to the Attorney General in federal capital cases, I will apply the laws and Constitution of the United States to the facts of the particular case. The beliefs of other nations will not affect my recommendations.

i. Will you give any weight to the norms of the world community in your recommendation?

Answer: I will apply the laws and Constitution of the United States to the facts of the particular case. I will not give the norms of the world community weight in making such recommendations.

c. When you are interpreting the Constitution, for which provisions besides the Eighth Amendment might you consider foreign law to assist your effort?

Answer: In general, I believe that foreign and international law has very little relevance in construing the Constitution and the Bill of Rights (with the exception of English common law pre-dating American independence, which often provides insight into the Framers' understanding and intent). As I noted at the hearing, we argued on behalf of our client in *Roper v. Simmons* that the laws and practices of foreign countries were relevant because the Supreme Court had, in prior cases applying the "evolving standards of decency" test, considered the practices of other countries. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21; *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982). Although I have not made a study of the matter, I do not believe that outside that context the Court generally does – or should – take into account foreign or international law in interpreting the United States Constitution. *See*, *e.g. Boos v. Barry*, 485 U.S. 312, 324 (1988) (noting that "the fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis").

d. Would you ever give weight to other nations' restrictions on gun rights when interpreting the Second Amendment?

Answer: No.

<u>Child Pornography</u>

10. At your hearing, you concurred with Senator Cardin's statement that, with respect to child pornography, "you not only accept but support the court decisions and are prepared to enforce the law aggressively, as it's been interpreted by the courts." With respect to offering direction to U.S. Attorneys in the allocation of their resources, you endorsed the setting of "national priorities" and communicating them "very clearly." Will the enforcement of child pornography laws be among these priorities?

a. Where will it rank on your list of priorities?

Answer: Protecting children through aggressive enforcement of federal laws prohibiting the production, distribution, and possession of child pornography is among the Department's most important missions, and if I am confirmed it will rank very high on the list of priorities communicated to United States Attorneys' offices.

11. The amicus brief you filed in *Knox v. United States* on behalf of several organizations challenged federal child pornography statutes then in effect, as did the initial brief submitted in that case by the Solicitor General. As you know, both the Senate (by a vote of 100-0) and the House of Representatives (by a vote of 425-3) voted to reject the Justice Department's narrow interpretation of the child pornography statutes in that brief and implored it to protect our nation's children and enforce those laws. When this issue arose during your hearing, you put considerable distance between the position you took and the position of the Justice Department. You testified as follows in response to a question from Senator Hatch:

> I did not agree, even at the time it was filed, when I was not in the government, with the Justice Department's brief that you refer to. [The brief] took a very extreme view, I agree, of the law. I understand why the Senate and the House rejected it. The brief that I submitted on behalf of the ACLU, the American Library Association and the American Booksellers Association, on behalf of librarians and booksellers, made a different point. It made a point that I understand the Senate . . . disagrees with and one that the court disagreed with. But it was a point that was important to them. They wanted just to know, have

> a clear line as between what was illegal and what was legal. 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.

The Solicitor General's brief argued that the Third Circuit's decision below failed to consider the following two requirements of what it called the statute's "plain meaning:" "(a) the material must include a visible depiction of the genitals or pub[]ic area of the body (as distinguished from a depiction of the clothing covering those areas); and (b) the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)."[10] The government's argument, however, appears considerably less sweeping than that of your brief in at least two respects:

First, your brief construed the statute as "requir[ing] a nude depiction" and precluding "non-nude depictions."[11] The Solicitor General's standard of visibility was broader, stating: "some depictions make the genital or pubic area visible even though, as a technical matter, those body parts are not nude."[12] The government's brief further contended that a "lascivious exhibition of the genitals or pubic area" in the definition of child pornography only required "at least some substantial degree of genital or pubic visibility." That brief moreover conceded "that the materials in this case may in fact fall within the statute when judged according to the correct standard."[13]

Second, while both briefs ostensibly based their challenges primarily on grounds of statutory construction, your brief went further and asserted that the Third Circuit's construction created a "chilling effect on First Amendment rights" that was "obvious and vast."[14] The government's brief did not make that contention. Additionally, your brief went as far as to call for the Supreme Court to "affirm the longstanding requirement of 'nudity plus,' which alone is consistent with the statutory language, legislative history and the Court's precedents."[15] Your analysis of Supreme Court precedent noted that previously upheld restrictions included sexual conduct, not just nudity.[16]

a. Given the similarities and the contrasts between your brief and the government's brief, if the Solicitor General's brief took a "very extreme" legal position in that case, how would you characterize your brief?

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

[10] 1993 WL 723366, *8.
[11] *Id.* at **6-7, **17-18.
[12] 1993 WL 723366, *11.
[13] *Id.* at *13.
[14] 1993 U.S. S. Ct. Briefs LEXIS 719, *4.
[15] *Id.*
[16] *Id.* at **30-31.

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. In my view, this might have created a loophole that would have allowed pornographers to avoid enforcement simply by filming explicit footage of minors who did not have a lascivious intent. The Solicitor General’s view was properly rejected by the Third Circuit on remand. As I testified, the position of my clients, a coalition led by the American Booksellers, was 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.

b. Do you agree that your brief, which “requir[ed] a nude depiction,” advocated for a narrower definition of child pornography than the government’s brief, which merely required a “substantial degree of genital or pubic visibility?”

Answer: My clients’ brief advocated a bright line standard that would clearly have defined 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. The definition advocated by my clients was narrower than that advocated by the government in the sense that “nudity” may be somewhat narrower than “substantial visibility.” But the brief submitted by my clients advocated a broader definition of child pornography – one that would have included more images within the statute’s prohibition than the one advocated by the government – in the sense that it would not have required that lascivious intent on the part of the child be demonstrated. With respect to explicit images that involve nudity, the standard advocated in my clients’ brief would have been easier for the government to satisfy to obtain a conviction than the one advocated in the Solicitor General’s brief.

c. Do you agree that if the Court had adopted the standard for which you advocated in your brief that *fewer* videos and other materials would qualify as pornography under the federal child pornography laws?

Answer: 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. I also believe that the standard for which the government advocated could have created a serious loophole in the child pornography laws, and thus was narrower in an important respect than the one for which my clients advocated. This is because the government’s approach (but not my clients’ approach) would have required the government to prove lascivious intent on the part of the minor. I agree that the standard ultimately adopted by the court – which rejected both the government's position and my clients' position – renders unlawful more materials than the standards advocated by my clients or the government in the *Knox* case. As I have testified, I would be entirely prepared to enforce the standard adopted by the court.

d. What aspect of the government's brief was the "extreme view that [you] rejected" in your brief and is this the same part of the government's brief with which you did "not agree?"

Answer: As discussed more fully above in answer to 11.a., 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.

<u>First Amendment</u>

In an unattributed Case Comment you authored entitled "State-Guaranteed Right to Speak in Privately Owned Shopping Centers." 94 HARV. L. REV. 169 (1980), you stated: "Enhancing free speech advances the long-range goal of the takings clause: ensuring fair distribution of benefits and burdens over the long run. . . . Fairness is an elusive concept, but its most meaningful formulation looks to the long-range impact of a property deprivation to determine whether it tends to assure all citizens a fair allocation of benefits and burdens over time. If it does, a property owner cannot argue that requiring him to shoulder the burden is unfair because he, like the rest of society, benefits over the long run from the improvement in fairness the change brings about." Can you explain what a "fair distribution of benefits and burdens over the long run" entails?

Answer: Upon re-reading the case comment, which I wrote 29 years ago as a 26-year old law school student, I find I do not agree with my former analysis. Of course, Takings Clause jurisprudence has evolved considerably since the Court decided the case that I wrote about, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Upon re-reading the Case Comment, it appears that the point I was trying to make was that enhancing free speech expanded opportunities to participate in the political process and thus helped ensure that governmental decisions would fairly reflect the interests of the electorate. But in the passage you quote I failed as a law student to give appropriate weight to the question whether there is a permanent physical occupation, the investment-backed expectations of the property owner, and other Takings Clause considerations embodied in the Supreme Court's jurisprudence.

a. Do you agree with the Supreme Court's decision in *Kelo v. New London* holding that the Taking Clause poses no obstacle to the condemnation of private homes for transfer to private developers, solely in the name of economic development?

Answer: I have not studied the *Kelo* decision or considered how it conforms to the relevant precedent. While I understand it to be the law of the land, I do not have a view on whether it was correctly decided.

13. In the same case comment, you argued that "state expansion of speech rights at the expense of property rights does not constitute a taking."

a. Would you reach the same conclusion with respect to state protection of religious rituals conducted by third parties on private property against the intention of the owner?

b. Would you reach the same conclusion with respect to Second Amendment rights?

c. Why or why not?

Answer: I would first note that upon re-reading this categorical statement from my 29-year-old Case Comment, written as a law student, I find that I no longer agree with it. Indeed, I understand that the state of the law is otherwise. In *PruneYard*, the Court did not apply such a categorical rule; rather, the Court held that whether a state law or regulation infringes upon property rights so as to constitute a taking "entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." 447 U.S. at 83. The Court has later held that a permanent physical occupation, including the granting of a permanent easement, inherently constitutes a taking, without regard to the above-referenced factors. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). With regard to any state action that infringes upon property rights—whether designed to protect speech, religious exercise, gun rights, or any other activity—a court would first determine whether the state's action constitutes a permanent physical occupation. If so, a taking has occurred. If not, a court would then apply the above-referenced *PruneYard* factors.

14. Mr. Ogden, in one of your law review articles, you come out in favor of subjecting most forms of "compelled speech" to strict scrutiny under the First Amendment. However, among your exceptions, which would require only a lower standard of review, are the "imposition of common carrier obligations on telephone companies or 'must carry' obligations imposed on cable television [which] are intended to prevent private monopolists, in control of critical avenues of communication, from choking off speakers and messages dependent on those avenues for access to the public." What level of scrutiny would you favor for laws implementing the Fairness Doctrine?

Answer: The article you reference argued that the district court opinion under discussion took too broad a view of First Amendment protection because its rationale, if applied in other contexts, would inappropriately subject much "compelled speech" to strict scrutiny. I argued that strict scrutiny in compelled speech cases should be limited to specific circumstances, and that outside those circumstances a lower standard of review is appropriate. I noted that one circumstance where strict scrutiny is appropriate is in the case of viewpoint-based mandates. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court declared this sort of mandate unconstitutional and applied strict scrutiny. The courts have indicated, however, that broadcasting presents special considerations because of the limited broadcasting spectrum. The Supreme Court upheld the constitutionality of the Fairness Doctrine in *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969). The FCC then repealed the Fairness Doctrine. Because I do not have the specific statutory or regulatory language of a reenactment of the Fairness Doctrine, I am hesitant to express a view as to whether a new statute or regulation would survive First Amendment scrutiny forty years after *Red Lion*.