

**QUESTIONS FOR THE RECORD FOR DAVID W. OGDEN
SUBMITTED BY SENATOR JEFF SESSIONS**

Library Internet Restrictions

1. At your hearing we discussed your brief on behalf of various library directors in *United States v. American Library Association*. You stated that, if confirmed, you will follow the Supreme Court's decision in the case, which requires public libraries receiving public funds for Internet service to filter out pornographic materials.

Do you agree with the plurality's view that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right[?]" If not, will you commit to follow the law?

Answer: I agree with the plurality's view you identify and will commit in this matter as in all matters to follow, defend, and enforce the law.

Evolving Standards of Decency and International Law

1. To follow up on our discussion during your hearing, can you please clarify for me when you believe it is appropriate to use and/or look to international law when addressing constitutional issues? In which contexts within the Bill of Rights and/or the Fourteenth Amendment are international laws and norms relevant?

Answer: In general, I believe that foreign and international law typically has very little relevance in construing the Constitution (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 there 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). We had an obligation to advance all arguments in our client's behalf we believed might be persuasive to any Justice. I would note that the Court cited the laws and practices of foreign countries in ruling in favor of our client. See *Roper v. Simmons*, 543 U.S. 551, 575 (2005). 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").

2. In your personal view, are "evolving standards of decency" a one-way ratchet that can only limit – and not expand – the application of the death penalty?

Answer: No. I understand the “evolving standards of decency” test as leaving open the possibility that society will come to view the death penalty as appropriate for additional classes of crimes or additional classes of defendants.

3. In *Kennedy v. Louisiana*, the Supreme Court rejected the death penalty for child rapists under the Eighth Amendment. President Obama was very critical of this decision. He told reporters: "I disagree with the decision. I have said narrow circumstances for the most egregious of crimes. The rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances that the death penalty can be pursued, that that does not violate the Constitution."

Do you personally agree or disagree with the standard put forward by then-Senator Obama on the applicability of the death penalty to child rapists?

Answer: I agree that the rape of a child is a heinous crime. If I were confirmed and Congress passed a statute applying the death penalty to that crime, I would support advancing all reasonable arguments in defense of the constitutionality of such a law.

4. How much effect, if any, will the views of the various states and the “international community” have on your death penalty advice and decisions as Deputy Attorney General? For example, if a plurality of states or the “international community” reaches a consensus that the death penalty should not be applied for certain crimes, e.g., terrorism, how will this impact the advice you give to the Attorney General regarding the Department of Justice’s death penalty policy?

Answer: The views of the various states or the “international community” will not have an effect on my advice or decisions in this area. I believe the federal laws that authorize imposition of the death penalty for certain acts of terrorism are constitutional under controlling precedents and should be enforced. In formulating my recommendations to the Attorney General, I will apply the laws and Constitution of the United States to the facts of each case

Morality and the Law

1. In *Lawrence v. Texas*, Justice Kennedy, writing for the majority, dismissed legislation based on moral foundation and suggested that such legislation could not provide a rational basis to support the government’s action. He wrote: “For many persons these [moral beliefs] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole

society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’”¹

- a. Setting aside the specific issue in *Lawrence*, do you believe, like Justice Kennedy, that legislation based on moral foundation cannot provide a rational basis to support a law or government action?

Answer: No. I believe that legislation based on a moral foundation can, and typically does, have a rational basis that renders it constitutional.

- b. If confirmed, do you commit to enforce federal statutes – like Internet gambling and obscenity regulation – even though they are based, in whole or in part, on moral and ethical principles?

Answer: Yes. I will enforce any federal law, including the ones you reference, for which a reasonable argument can be made that it is constitutional.

Fairness Doctrine

1. When Attorney General Holder testified before this committee I questioned him about his thoughts on the so-called “Fairness Doctrine.” Specifically, I asked Mr. Holder whether he would support the “Fairness Doctrine” and if he thought it was constitutional.

You once wrote that “[I]t is often the very purpose of ‘compelled speech’ requirements to correct market flaws in the ‘marketplace of ideas’ and further the First Amendment’s goal of maximizing communication and discovery of truth.”²

Given your extensive practice experience in First Amendment speech issues and viewing your past statement in light of the “Fairness Doctrine,” I am interested to hear whether compelling broadcast stations to present viewpoints they would not otherwise air fits your description; and whether you regard the “Fairness Doctrine” as a restraint on, or protection for, free speech.

Do you believe the “Fairness Doctrine,” if revived, would pass constitutional muster under the First Amendment?

Answer: The decision about whether to revive the Fairness Doctrine would be one entrusted in the first instance to the Federal Communications Commission (FCC) or Congress, not the Department of Justice. I have not studied the policy ramifications of reviving the Fairness Doctrine and therefore do not have a personal view regarding whether it should be revived at this time.

¹ *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

² David W. Ogden, *Is There a First Amendment “Right to Remain Silent”?*, Fed. Bar News & J., Vol. 40, No. 6, at 368, 370 (July 1993).

For the same reason, and because I do not have specific statutory or regulatory language to which to refer, I am hesitant to express a view as to whether a new statute or regulation would survive First Amendment scrutiny. If confirmed as Deputy Attorney General, in this area as in others, I would support the Department's advancing any reasonable argument in defense of a statute's constitutionality.

In the article to which you refer about compelled speech, I identified viewpoint based mandates as a matter of particular constitutional concern. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court declared this sort of mandate unconstitutional. The courts have indicated, however, that broadcasting presents special considerations because of the limited broadcasting spectrum. The Supreme Court upheld the constitutionality of Fairness Doctrine in *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969), before the FCC repealed it. I have not studied whether advances in broadcasting technology render some of those special considerations moot.