

Responses to Written Questions for Thomas Perrelli from Senator Specter

1. During our courtesy visit and at your confirmation hearing, I asked for your views on a Congressional Research Service (CRS) analysis regarding Congress' oversight authority with respect to the Department of Justice (DOJ). That statement is reproduced below:

[A] review of congressional investigations that have implicated DOJ or DOJ investigations over the past 70 years from the Palmer Raids and Teapot Dome to Watergate and through Iran-Contra and Rocky Flats, demonstrates that DOJ has been consistently obliged to submit to congressional oversight, regardless of whether litigation is pending, so that Congress is not delayed unduly in investigating misfeasance, malfeasance, or maladministration in DOJ or elsewhere. A number of these inquiries spawned seminal Supreme Court rulings that today provide the legal foundation for the broad congressional power of inquiry. All were contentious and involved Executive claims that committee demands for agency documents and testimony were precluded on the basis of constitutional or common law privilege or policy.

In the majority of instances reviewed, the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. In all instances, investigating committees were provided with documents respecting open or closed cases that included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrests of suspects, and documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, among other similar "sensitive" materials. Congressional Research Report, "Investigative Oversight: An Introduction to the Practice and Procedure of Congressional Inquiry", pp. 23-24 (April 7, 1995).

You testified that you agreed with the statement with regard to the scope of permissible oversight but that the statement did not discuss the "countervailing interests of the executive branch" that in certain circumstance require deviation from the foregoing standard.

- a. Please explain in detail what you meant by the "countervailing interests of the executive branch."

As I testified at my hearing, I agree with the statement's description of the scope of the permissible oversight by Congress that reaches all aspects on which it could legislate. I noted that the passage did not discuss the countervailing interests of the executive branch in certain circumstances. By that I meant the times when there is a tension between Congress's oversight interests and executive branch interests, such as where disclosure would impinge on the executive branch's ability to fulfill its responsibilities or would violate a federal statute. These circumstances include, for example, situations in which disclosure

would impair the executive branch's ability to carry out its national security, law enforcement, litigation, and other responsibilities.

- b. Please explain under what circumstances you think it is justified for the executive branch to deviate from the standard set forth in the CRS statement above.

I believe, for example, there can be instances where the Department of Justice is asked to discuss pending matters, Grand Jury testimony, or other information that could compromise an ongoing investigation or litigation. There could also be situations where Congress is asking for disclosure of advice given to the President or other senior officials, thus implicating significant confidentiality interests of the Executive Branch. I am, however, sensitive to the Committee's legitimate oversight interests, and I believe that in the ordinary course the Department and the Committee can reach an accommodation that will permit the Committee to conduct its necessary oversight, consistent with the Department's interests and responsibilities.

- 2. At your confirmation hearing, I asked you whether you thought the Obama Administration's invocation of the state secrets doctrine in *Mohamed et al. v Jeppesen Dataplan, Inc.*, currently before the U.S. Court of Appeals for the 9th Circuit, was an appropriate use of the doctrine. You responded that to answer the question you required more knowledge about the classified information at issue.

- a. Please explain your views on the current Administration's assertion of the state secrets doctrine in *Mohamed et al. v. Jeppesen Dataplan, Inc.*

Without having reviewed all of the relevant information in question, including the classified materials, I am unable to provide fully informed views on the invocation of the state secrets privilege in that case. I understand that the Attorney General has announced a review of assertions of the privilege and, if confirmed, I will participate in that review if directed by the Attorney General.

- b. In your view, what are the parameters of the state secrets doctrine?

Under *United States v. Reynolds*, 345 U.S. 1 (1953), the state secrets privilege can be invoked only following careful consideration by appropriate executive branch officials. Once the privilege is properly invoked, courts determining whether the privilege applies must then give deference to the Government's invocation of it; the privilege must be upheld if the Government demonstrates a "reasonable danger" that disclosure will harm the national security. *Reynolds*, 345 U.S. at 10. As courts have interpreted the doctrine, it covers information that, among other things, if disclosed, would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

- c. Please provide your opinion on S. 417, the “State Secrets Protection Act,” which was introduced on February 11, 2009.

I have not yet reviewed the State Secrets Protection Act, but I would be glad to do so if I am confirmed and to consult with career Department of Justice officials concerning the legislation. I believe it is extraordinarily important, both to individual litigants and to the national interest, that the state secrets privilege not be abused.

3. At your confirmation hearing, I asked for your views on whether criminal sanctions for corporate malfeasance are more appropriate than monetary fines.
 - a. Please explain your position and your reasoning

The appropriate sanction for corporate malfeasance will depend a great deal upon the particular facts of any given case. I do support, however, the availability of criminal sanctions and believe that, in appropriate cases, prosecutors must seek such sanctions and/or seek sufficient monetary fines to both punish the corporate offender and deter other corporate entities from violating the law.

4. In your Supreme Court brief in the Schiavo case (in opposition to Mrs. Schiavo’s parents’ application for an injunction), you argued that Congress exceeded its authority in enacting the federal statute that gave Mrs. Schiavo’s parents the opportunity to file suit in federal court. In my view, Congress has the authority to grant jurisdiction, which it did in the Schiavo matter. At your confirmation hearing, I asked you whether you stood by the assertions set forth in your brief. You answered that your argument before the Supreme Court was that “Congress cannot, through any vehicle, overturn a prior final court judgment.”
 - a. Please explain your views on when Congress has the authority to establish federal jurisdiction and why it did not in this case.

In the Schiavo litigation, I represented a client and sought to advance my client’s interests as effectively as I could. As was argued in briefs on behalf of Michael Schiavo in his role as guardian of Theresa Schiavo, at the time Congress enacted its law, the issues related to Ms. Schiavo’s medical condition, wishes, and her rights (under both state and federal law) had been fully litigated through the Florida state courts, including multiple appeals and petitions for certiorari to the U.S. Supreme Court. As was argued in those briefs, the Supreme Court has held that Congress may not enact legislation that has the effect of nullifying a decision in a particular case. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219, 225 (1995); see *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). As was argued in those briefs, if Congress would have been unable to enact such a law had the original litigation concerning Ms. Schiavo’s medical condition and wishes been litigated in federal court, Congress could not have enacted such legislation to overthrow the final decision of a state court, which had adjudicated state and federal rights, given

principles of federalism inherent in the Constitution. See *Alden v. Maine*, 527 U.S. 706, 752-53 (1999). One judge in the Eleventh Circuit did opine that the statute exceeded Congress' authority.

5. You have engaged in extensive redistricting litigation representing Democratic voters and legislators, including Democratic Speaker of the Oklahoma House of Representatives Larry E. Adair in *Alexander v. Taylor*, 51 P.3d 1204 (Sup. Ct. 2002) and Democratic voters in Pennsylvania in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Have you ever represented Republicans in a redistricting case? If confirmed, you will be at the Department of Justice after the 2010 Census when new redistricting plans will be submitted to the Department for approval under Section 5 of the Voting Rights Act. Do you believe that you should recuse yourself from consideration of any redistricting plans given your past representation of the Democratic Party in several redistricting cases? Why or why not?

I do not recall representing specific Republican voters or legislators in redistricting litigation. If I am confirmed as Associate Attorney General, I will consult with the Department's career ethics officials on any matter in which I believe there may be legitimate concern about my ability to fulfill my obligations to my client, the United States Government. I will not hesitate to recuse myself when ethical obligations require it.

- a. What steps will you take to ensure that your prior advocacy will not have any influence on decisions you make if confirmed as Associate Attorney General?

I will consult with the Department's career ethics officials on any matter in which I believe there may be legitimate concern about my ability to fulfill my obligations to my client, the United States Government. I will not hesitate to recuse myself when ethical obligations require it.

7. In *Vieth v. Jubelirer*, Democratic voters in Pennsylvania sued Republican state executive and legislative officers, alleging that the officers enacted legislation creating voting districts that favored Republicans in violation of the constitutional one-person, one-vote requirement. In a split decision with no majority opinion, the Court held that political gerrymandering claims were nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist. The Court stated that the appellants, whom you represented, took "a run at enunciating" a workable standard. According to the Court, the standard you enunciated "rests upon the principle that groups (or at least political-action groups) have a right to proportional representation," a principal not recognized by the Constitution. As you know, Section 2 of the Voting Rights Act, which prohibits abridgement of the right to vote on the basis of race or color, specifically states that Section 2 does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973.

- a. If confirmed, do you intend to use Section 2 to sue any states that do not have congressional representation in a ratio that is in strict accord with the racial and ethnic demographics of their state?

If confirmed as Associate Attorney General, I would seek to enforce the Voting Rights Act's Section 2 as the facts and law require. That law requires consideration of "the totality of the circumstances"; as the statute puts it, "nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

With respect, the briefs that I helped to prepare in *Vieth v. Jubelirer* expressly disclaimed the proposition that proportional representation is required. As those briefs stated, "Importantly, this test [i.e., the test that was proposed] does not compel proportional representation and is not satisfied by a mere demonstration that a political party has won fewer seats than its share of the electorate suggests." The briefs also stated that "[i]n America, no political, racial, or socioeconomic group has a constitutional right to proportional representation" (citations omitted).

- b. In *Vieth*, Justice Scalia, for a four-member plurality, wrote that the Court should declare all claims related to political (but not racial) gerrymandering nonjusticiable. He stated that, because no court had been able to find an appropriate remedy to political gerrymandering claims in the 18 years since the Court decided *Davis v. Bandemer*, 478 U.S. 109 (1986) (which held that such a remedy had not been found yet, but might exist), it was time to recognize that the solution simply did not exist. Do you agree with Justice Scalia's conclusion on behalf of the four-member plurality that all claims related to political gerrymandering are nonjusticiable?

The Supreme Court has twice struggled with the issue of partisan gerrymandering, and twice, five justices have concluded that political gerrymandering claims are justiciable. *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986). Justice Scalia's view in *Vieth* did not command a majority of the Court.

- c. Why or why not?

Five members of the Supreme Court in *Vieth* ruled that partisan gerrymandering claims are justiciable, but they did not agree on a precise standard for evaluating those claims.

- 8. Please explain your involvement, if any, in IMPAC 2000, the national organization responsible "for formulating, coordinating and implementing Democratic congressional redistricting efforts."

The law firm in which I am a partner, Jenner & Block LLP, was retained by IMPAC 2000 several years ago. I provided advice on one of IMPAC 2000's matters, but other lawyers at my law firm handled the bulk of the work.

9. In the recent case of *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), which upheld Indiana’s photo identification requirement, Justice Stevens stated “that flagrant examples of [in-person voter] fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana’s own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.” Despite such extensive evidence, however, there are those who continue to deny that voter fraud exists or that steps need to be taken to remedy the problem. The Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III profoundly disagreed, finding that our “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”

- a. Do you believe voter fraud, including votes cast by ineligible individuals, is a significant problem?

I believe that any unlawful activities relating to the conduct of an election are significant problems.

- b. Do you agree with Justice Stevens’ conclusion in the *Crawford* case that in-person voter fraud not only exists but “could affect the outcome of a close election”?

I agree that depending on the closeness of the election and the level of “in-person voter fraud,” such activity could affect the outcome of the election.

- c. Do you agree that the Justice Department should ensure that people who are ineligible to vote do not dilute the votes of eligible voters?

I agree that both civil and criminal laws governing the conduct of elections should be enforced. Both the Department of Justice and state governments play a role in this effort.

- d. If confirmed, would you commit to enforcing laws that ensure those who are ineligible to vote do not cast illegal votes?

If confirmed, I would certainly seek to enforce federal laws as the evidence and law warrant, to the extent such enforcement falls within the jurisdiction of the components that I would supervise.

10. For the first 10 years that the National Voter Registration Act of 1993 (NVRA) was in effect, the Justice Department never filed a single enforcement action against any state for failing to maintain its voter registration list and purge ineligible voters. In the previous administration, the Civil Rights Division of the Department of Justice, which you will oversee if confirmed, brought suit against jurisdictions that had failed to purge

ineligible voters as required by the NVRA. Those enforcement actions have been sharply criticized as attempts to “disenfranchise” voters.

- a. If confirmed, will you continue the practice of pursuing enforcement actions as required under the NVRA to ensure that states maintain accurate and up-to-date voter registration lists?

I agree that the maintenance of accurate and up-to-date voter registration lists is an important goal, and if confirmed, I would consult with the Department’s career professionals to determine the best tools for helping states reach that goal. I would seek to take appropriate action when warranted by the facts and the law.

- 11. Absentee ballots are particularly vulnerable to vote fraud, and “no-fault” absentee ballot laws that allow any registered voter to use an absentee ballot for any or no reason and the growing movement toward all-mail elections further weaken the safeguards enacted to prevent voter fraud.

- b. Do you agree that absentee ballots should be reserved for individuals who cannot vote in person at their assigned polling place on Election Day or at early voting sites prior to the election?

As a policy matter, issues regarding the availability of absentee ballots are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department officials if a particular state policy in this area is inconsistent with federal law.

- c. Do you agree that to increase the difficulty of fraudulent voting with absentee ballots, individuals submitting absentee ballots should be required to provide a copy of an identification document containing a photograph with their absentee ballots?

As a policy matter, issues regarding the manner in which voters are to identify themselves are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department officials if a particular state policy in this area is inconsistent with federal law.

- d. Do you agree that to deter the forgery of voter signatures, the signatures on absentee ballots should be either notarized or witnessed by at least two other individuals who provide their addresses and telephone numbers, and the number of voter signatures that any single individual is allowed to witness should be limited?

As a policy matter, issues regarding the signature requirements on absentee ballots are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department

officials if a particular state policy in this area is inconsistent with federal law.

- e. Do you agree that to prevent intimidation and fraud, unrelated third parties, including campaign workers and candidates, should be prohibited from delivering absentee ballots?

As a policy matter, issues regarding the handling of absentee ballots are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department officials if a particular state policy in this area is inconsistent with federal law.

- 12. In your brief before the Supreme Court in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, you argued, in the cable television context, that the federal government has an interest “of the highest order” in maintaining what you refer to as “broadcast diversity.” Your brief emphasizes “Congress’ interest in a multiplicity of diverse broadcast sources.”

- a. Do you believe that the federal government, rather than the free market, should determine the content of broadcasts, regardless of the medium?

As Associate Attorney General, my primary role in any such matters would be to enforce or defend the laws as Congress passes them and the regulations as agencies promulgate them. The must carry statute represented an effort by Congress to enact a narrowly tailored regulation to advance important state interests. That statute, which Congress itself intervened to defend at one point, was upheld by the U.S. Supreme Court as consistent with the First Amendment.

- b. Do you agree that government regulation could have the effect of eliminating certain programming that is demanded by audiences through the free market?

Depending on the regulation in question, I agree that regulation can affect the programming that would otherwise be offered through an unregulated market.

- c. Please set forth your position on so-called “Fairness Doctrine.”

Whether a regulation or statute implementing the so-called “Fairness Doctrine” is good policy generally does not fall within the jurisdiction of the Department of Justice. I would support the Department’s review of the constitutionality of any specific legislation or regulation under consideration.

- d. Do you agree that if the Fairness Doctrine is implemented, it could force the elimination of some programming (e.g., conservative talk radio programming might be cancelled to make way for less commercially viable programs with contrasting viewpoints)?

I have not studied the potential effects that the Fairness Doctrine, if implemented, would have on talk radio programming. A statute or regulation implementing the so-called Fairness Doctrine would have to be analyzed closely

under the First Amendment to determine if it could be justified under the relevant standards.

13. In your questionnaire, you state that as Counsel to the Attorney General and then as Deputy Assistant Attorney General in the Clinton Administration, you were “very involved in tobacco policy matters, including efforts to enact federal legislation concerning tobacco.” What were your policy recommendations in this regard?

a. Please explain what “efforts” you took to enact legislation concerning tobacco.

As Counsel to the Attorney General, I worked with the Senate Commerce Committee, then chaired by Senator McCain, and others in the executive branch to draft comprehensive tobacco legislation in the first half of 1998. That effort was unsuccessful.

b. Please explain your supervisory role over the Justice Department’s Tobacco Litigation Team in *United States v. Philip Morris*.

From 1999 to 2001, I was one of two Deputy Assistant Attorneys General who supervised the conduct of the Tobacco Litigation Team, which itself consisted entirely of career attorneys at the Department of Justice. In that context, I met with career attorneys to hear their recommendations on the Department’s litigation strategy and reviewed work product, such as specific pleadings and briefs.

16. According to FBI statistics, in the U.S., all traditionally defined property crimes accounted for \$16 billion in losses in 2005. The best estimates for losses from counterfeiting and piracy exceed that number by ten or fifteen times. Yet, the Justice Department spends a very small amount of resources combating intellectual property theft. In fact, in FY2007, the Department filed only 217 intellectual property cases, sentencing less than 300 defendants.

d. If confirmed, what will you do to ensure that resources and responses are commensurate with the scale of the threat and the gravity of the injury to the economy, public health and safety?

As I noted during my hearing, responsibility for the enforcement of the criminal copyright laws typically falls within the Criminal Division; accordingly, enforcement decisions and, in large part, budget decisions, related to those crimes would be outside of my purview if I am confirmed as Associate Attorney General. To the extent I am involved in the budget process or other matters related to enforcement of the laws governing intellectual property, I will work to ensure that resources are allocated properly.

17. In 2003, the Justice Department created an internal “IP Task Force” to raise the priority of intellectual property enforcement and to coordinate the efforts of the many components of the Department that play an important role in this area, including the Criminal Division, the U.S. Attorneys, the FBI, the Civil Division and the Antitrust

Division. That Task Force remained in place throughout the Bush Administration and Deputy Attorney General Mark Filip last served as its head.

- a. Do you intend to continue the IP Task Force as an integral part of the Department's strategy to protect intellectual property?

If confirmed as Associate Attorney General, I would seek the advice of the career professionals who work in the area, as well as participants on the IP Task Force, and work with others involved in the process to help determine the most effective approach to enforcing federal law in this area. Given the Task Force's structure, I do not anticipate that the Associate Attorney General would have the final decision on that issue.

- b. Given your background, do you expect to head this Task Force, rather than the Deputy Attorney General?

I have no current expectation to head the IP Task Force, assuming that it continues. If I am confirmed, I will work with the Attorney General and the Deputy Attorney General to ensure that the Task Force is appropriately staffed.

- 18. In 2007, the FBI and the People's Republic of China Ministry of Public Security conducted the largest ever joint counterfeiting and piracy investigation, "Operation Summer Solstice." Throughout the course of this investigation, agents arrested 25 individuals in China and seized more than a half billion dollars worth of counterfeit software (worth more than all the counterfeit and pirated goods seized by Customs and Boarder Protection in FY2007).

- a. If confirmed, what will you do to build on the success of operations like this that involve cooperation with foreign counterparts (especially China) and to address the problem of counterfeiting and piracy at its source?

If confirmed as Associate Attorney General, the work of the FBI would not be under my responsibility. That said, to the extent that issues related to foreign theft of intellectual property fall within the purview of the Associate Attorney General's responsibilities, I will work with other components of the Department as appropriate to find effective means to enforce U.S. law.