

Responses to Questions of Senator Tom Coburn, M.D.
Nomination of Ron Weich to be Assistant Attorney General, Office of Legislative Affairs
United States Senate Committee on the Judiciary
April 8, 2009

- 1) As Assistant Attorney General in the Office of Legislative Affairs, will you commit to responding in a timely fashion to inquiries from minority members and staff?

Yes. I intend to respond in a timely and respectful manner to all congressional inquiries, including those from minority members and staff.

- 2) As Assistant Attorney General in the Office of Legislative Affairs, will you help facilitate a more timely delivery of DOJ Views Letters, in advance of Senate consideration of a measure?

Yes. I intend to facilitate the timely delivery of DOJ Views Letters and other materials that aid Congress in carrying out its duties.

- 3) As Assistant Attorney General in the Office of Legislative Affairs, will you commit to continuing with all minority staff the same courteous, candid interactions you have always conducted with my staff in the Senate?

Yes. I very much appreciate the cordial professional relationship I have developed with your staff in the years I have worked for Senator Reid. I will certainly work to continue that relationship and will seek to replicate it with other members of the minority staff.

It has been reported that you served as a member of President Obama's "transition team" and that you ushered Eric Holder through his nomination process. Please clarify the following related items:

- 4) Did you serve as a member of President Obama's "transition team"? If so, what did your duties entail? Were you compensated for your service? If so, by whom?

Yes, I served as a member of the congressional affairs staff of the Presidential Transition. In this role I facilitated communication between Congress and several policy and agency review teams within the Transition. In addition, I assisted several nominees including, Attorney General nominee Eric Holder, during the Senate confirmation process. I was not compensated for this work separately from my regular compensation as a member of Senator Reid's staff.

My role with the Transition was approved first orally and then in writing by the Senate Ethics Committee. I attach a letter dated January 16, 2009 from Ethics Committee Chief Counsel John Sassaman describing and approving of the role that I played, which Mr. Sassaman describes as consistent with prior practice.

- 5) In what capacity did you usher Eric Holder through his nomination process? (i.e., transition team, Senate staff, private lawyer, etc.) What did your duties entail? Were you compensated for your service? If so, by whom?

With the approval of the Senate Ethics Committee, I assisted Mr. Holder as a member of the congressional affairs staff of the Presidential Transition. I accompanied him to meetings with Senators, developed materials in support of his confirmation and helped Mr. Holder prepare for his confirmation hearing. I was not compensated for this work separately from my regular compensation as a member of Senator Reid's staff.

- 6) During your service as a member of the transition team (if you served in such a role), were you also serving as Senate staff?

Yes, with the approval of the Senate Ethics Committee I continued to serve as a member of Senator Reid's staff during my service as a member of the Transition staff.

- 7) During the time that you escorted Eric Holder through his nomination process, were you also serving as Senate staff?

Yes, with the approval of the Senate Ethics Committee I continued to serve as a member of Senator Reid's staff during the time I assisted Mr. Holder.

- 8) At any point, have you done work on behalf of the executive branch, the transition team, or a nominee during regular Senate office hours? If so, how much time do you estimate was spent working on these matters?

Yes, with the approval of the Senate Ethics Committee I divided my time between my Senate office and the Office of the President-Elect. I estimate that, in the aggregate, I spent approximately 50% of regular Senate office hours on transition-related activities.

- 9) Did you use any Senate resources (i.e., phones, computers, email, etc) while working on behalf of either the transition team or executive branch nominees, such as Eric Holder?

Yes, with the approval of the Senate Ethics Committee I utilized Senate resources on behalf of the Transition Office and also utilized Transition Office resources on behalf of the Senate. Mr. Sassaman's letter contemplates that I "would engage in these activities from both offices."

- 10) Due to your activities on behalf of either the transition team or then-nominee Eric Holder, has your Senate salary been reduced, or have you been removed from the Senate payroll for any period of time?

No.

- 11) During the time that you escorted Eric Holder through his nomination process, did you advise any member of the Senate on Mr. Holder's nomination? If so, do you feel that you were able to give objective advice, given your work on behalf of the nominee?

No. I explicitly recused myself from staffing Senator Reid on the Holder nomination. Other members of Senator Reid's staff advised him with respect to this nomination. Nor did I advise other members of the Senate about the Holder nomination. When I spoke to other members of the Senate or their staff about the nomination, I made a point of explaining that I was representing the Presidential Transition and not Senator Reid.

12) As Senate staff, is providing objective evaluations and advice about nominees part of your official duties?

Yes, although as noted above I recused myself from advising Senator Reid or any other Senator with respect to the Holder nomination.

13) At any point during your service on behalf of the transition team and/or Eric Holder, was the possibility of your nomination to serve at the Department of Justice ever discussed with any member of the executive branch, including Mr. Holder? If so, with whom? If so, did those discussions influence any advice you may have given on the Senate's consideration of the nomination?

Yes, I discussed the possibility of serving at the Department of Justice with Mr. Holder and with Transition officials during the period of time I served in the Transition Office. As noted above, I recused myself from advising Senator Reid or any other Senator with respect to the Holder nomination.

14) On February 23, 2000, you testified before this Committee, and on July 21, 1999, before the Subcommittee on the Constitution of the House Committee on the Judiciary, regarding the "Unborn Victims of Violence Act." You stated that the purpose of that bill was "to score rhetorical points in the never-ending struggle over abortion rights." You also described the bill as "purely symbolic: to bestow statutory personhood on fetuses, even those that are not viable." You further testified that the bill itself "is just one more step in the anti-abortion movement's methodical strategy to humanize fetuses, marginalize women, demonize abortion providers, and make the image of abortion less palatable to the American people." At the beginning of your testimony, you stated that the views you expressed were "strictly [your] own."

a. Are the views you represented at the above-referenced hearings still your personal views?

I was invited by members of the House and Senate Judiciary Committees to testify about this legislation as an expert on criminal law and federal sentencing law, having earlier served as a state prosecutor and as Special Counsel to the U.S. Sentencing Commission. The essence of my testimony was that the legislation was unnecessary because then-current federal law and sentencing guidelines provided ample authority to prosecute and punish those who assault pregnant women and hurt fetuses. This testimony does represent my personal views. However Congress eventually passed the bill and if confirmed I will support enforcement of the statute.

- b. In your opinion, if a woman is injured and a miscarriage results, is there a separate victim?

Yes, I believe a fetus can be a victim and my testimony did not argue otherwise. In fact, I referenced the well established common law doctrine that “fetal death subsequent to birth due to fetal injuries may be prosecuted as homicide,” and I cited favorably a case (U.S. v. Spencer, 839 F.2d 1341 (9th Cir. 1988)) in which such a homicide prosecution was upheld. I also stated in my testimony: “There is no dispute that causing harm to a fetus during commission of a federal felony should generally result in enhanced punishment, and courts have uniformly held that such enhancements are available under the current sentencing guidelines.” My testimony simply contended that a new federal criminal law was not necessary to prosecute or punish those who harm fetuses.

- c. In your opinion, at what stage of pregnancy, if any, should a fetus be considered a separate victim?

There is no doubt that an injury to the fetus is a separate and additional harm when a pregnant woman is assaulted. Under common law, an assault on a pregnant woman that results in the death of a viable fetus constitutes homicide. See, Annotation, Homicide Based on Killing of Unborn Child, 64 A.L.R. 5th 671 (1998). And, as expressed in my testimony, I believe that an assault resulting in injury to a pre-viable fetus also warrants additional punishment.

- d. When do you believe a fetus becomes a “person,” for purposes of federal law? More specifically, when do you believe a fetus becomes a “person” for purposes of being recognized as a victim of a federal crime?

In enacting the Unborn Victims of Violence Act, Congress recognized that fetuses at any stage of development may be victims of a crime. I did not dispute this proposition in my testimony. I merely contended that a new federal criminal law was not necessary to prosecute or punish those who harm fetuses. Congress concluded otherwise. If confirmed I will support enforcement of the statute.

- e. In your opinion, is there a separate victim where there is intent to cause a miscarriage?

I believe a fetus can be a victim whether or not the defendant intends to cause a miscarriage.

- f. Please explain what you mean by “humanize fetuses.”

The essence of my testimony was that the legislation was unnecessary because then-current federal law and sentencing guidelines provided ample authority to prosecute and punish those who assault pregnant women and hurt fetuses. I therefore concluded in my testimony that the purpose of the bill was “symbolic: to bestow statutory personhood on fetuses, even those that are not viable.”

That said, the phrase strikes me now, ten years later, as unnecessarily provocative. I regret my use of that phrase.

- g. National polls have shown strong support for recognizing two victims when there is a criminal assault on a pregnant woman, even among those who identify themselves as pro-choice, and especially among women. How, then, does the Unborn Victims of Violence Act “marginalize women”?

The essence of my testimony was that the legislation was unnecessary because then-current federal law and sentencing guidelines provided ample authority to prosecute and punish those who assault pregnant women and hurt fetuses. I expressed concern that the bill’s focus on the fetus had the effect of marginalizing the pregnant woman who was assaulted.

Again, I regret my use of unnecessarily provocative language in the course of presenting my views on criminal law aspects of the bill.

- g. Consider the recent case of Lisa Montgomery, who brutally murdered a pregnant woman, then delivered her unborn child with a kitchen knife and took the kidnapped baby across state lines. A federal grand jury indicted Montgomery under S.C. Section 1201, the federal kidnapping law. The defense argued that the law did not apply because the baby, Victoria Jo Stinnett, was not a "person" until birth, and therefore not a "person" at the time that Montgomery murdered her mother. The Justice Department argued, and the district court ruled, that Victoria Jo Stinnett enjoyed “person” status prior to birth for federal criminal law purposes, based in part on enactment of the Unborn Victims of Violence Act of 2004, a law that you strongly opposed in your 1999 and 2000 testimony. Montgomery was convicted. She is now appealing to the Eighth Circuit, arguing that 18 U.S.C. Section 1201 cannot be applied because Victoria Jo Stinnett was not a "person" at the time that her mother was murdered. Do you believe that the Justice Department should continue to argue the position that it took in the district court, that Victoria Joe Stinnett was indeed a person for purposes of the statute, as illuminated by enactment of the UVVA?

I am not familiar with the facts or legal arguments involved in the Montgomery case beyond what I have heard and read in press reports. I certainly agree that a defendant convicted of brutally murdering a pregnant woman deserves substantial punishment. I expect that such punishment would be imposed with or without the Unborn Victim of Violence Act. I have

no cause to question the Justice Department's arguments in the course of this prosecution.

- i. As you know, the Department of Justice is charged with enforcing the Unborn Victims of Violence Act (UVVA). I understand that the first UVVA prosecution is under way in New Mexico. The defendant in that case is Frederick Beach, who is accused of beating a 29-year-old to death with a baseball bat, resulting in the death of her unborn child. Given your past opposition, do you nevertheless believe the Department should vigorously defend the statute in this case? In general, do you commit to support the legislative integrity of the statute and its vigorous enforcement by the Department?

Yes, I believe the Justice Department should vigorously defend laws enacted by Congress unless there is no reasonable argument to be made in support of its constitutionality. I am personally unaware of any argument that this law is unconstitutional. If confirmed as the Assistant Attorney General for Legislative Affairs, I will support enforcement of the statute.

- j. In your 1999 and 2000, you attacked the proposed Unborn Victims of Violence Act on both policy grounds, and as in tension with Supreme Court cases such as *Roe v. Wade*. Nevertheless, the law was enacted in 2004, with strong bipartisan support. Moreover, a total of 35 states now have laws that recognize unborn children as homicide victims in at least some circumstances. The supreme courts of multiple states (including California, Minnesota, Pennsylvania, Texas, and Wisconsin) have rejected arguments that these laws conflict with *Roe v. Wade* or its progeny; no state supreme court has held otherwise. The constitutionality of fetal homicide laws has also been defended by many prominent defenders of *Roe v. Wade*, including Walter Dellinger and Richard Parker. Do you believe that the Justice Department should vigorously defend the constitutionality of the UVVA in any case in which the issue may arise?

My testimony did not argue that the bill in question was unconstitutional under Roe v. Wade. Rather, I argued that the purpose of the bill was to undermine public support for Roe v. Wade by treating an assault on a fetus as separate from an assault on the pregnant woman carrying the fetus. I agree that the Justice Department should defend the constitutionality of this statute, just as it defends the constitutionality of any statute enacted by Congress unless there is no reasonable argument to be made in support of its constitutionality. As noted above, I am unaware of any argument that this law is unconstitutional.

- 15) I am concerned about the over-federalization of criminal law. Although it may sometimes require unpopular decisions, I believe both the executive and legislative branches should avoid contributing to this problem. Under what circumstances do you

believe it is appropriate to add offenses to the federal criminal code? What criteria do you use to determine whether proposed new crimes are appropriate?

I personally share your concern. In my personal view, Congress should enact new federal criminal laws only when there is a demonstrated need and constitutional basis for federal involvement.

United States Senate

SELECT COMMITTEE ON ETHICS
HART SENATE OFFICE BUILDING, ROOM 220
SECOND AND CONSTITUTION AVENUE, NE
WASHINGTON, DC 20510-6425

January 14, 2009

Mr. Ronald Weich
Office of the Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Weich:

This responds to your recent letter seeking Committee approval for you to work with the Transition Team of President-Elect Obama. You currently serve as Chief Counsel to Senator Harry Reid. You have been asked to work with the Transition team on legal and legislative issues facing the Department of Justice.

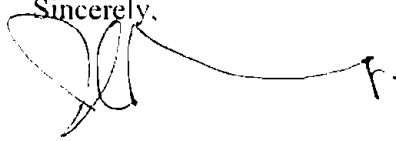
The Committee understands that you would serve in essence as a legislative coordinator and would work with the transition team to guide Presidential appointees to the Department of Justice through the Senate confirmation process. You would not receive compensation from the Office of the President-Elect and would divide your time between your Senate office and the Office of the President-Elect, and would engage in these activities from both offices. The Committee understands that Senator Reid has approved your proposed work with the Transition Team.

The Committee has previously approved Senate employees, from both Senators' personal staff and the staff of committees, serving as "legislative coordinators" to work with the Transition Team of a President-Elect. The Senate employees performed the same functions as Senate staff ordinarily performs when they work with an administration's officials in developing bills and legislation. This included the assessment of existing government programs, analysis of alternative programs and policies, and the development of recommendations for new or amended statutory provisions. Preparation of legislative authorization and appropriations bills, and the underlying studies, were also included. All of those functions were related to the legislative ramifications of the transition team's work. Additionally, the Senate employees worked under the direction and authority of their Senators, did not receive compensation from the Office of the President-Elect, and engaged in those activities, both from their offices in the Senate and at the facilities of the Office of the President-Elect.

The Committee noted that since the function the Senate employee was to perform for the transition team was an integral part of their Senate duties, no rule of the Senate precluded Senate staff participation with the consent of their supervisor.

It appears that prior rulings of the Committee provide sufficient precedent for you to work with the Transition Team of President-Elect Obama as a "legislative coordinator" under the conditions set forth above.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Sassaman", with a long horizontal flourish extending to the right.

John C. Sassaman
Chief Counsel and Staff Director