Responses to Senator Specter's Written Questions for Ronald Weich, Nominee to be Assistant Attorney General, Office of Legislative Affairs

1. A 1995 Congressional Research Service report summarized the broad scope of Congressional authority to conduct oversight on the Department of Justice as follows:

   [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).

   a. Do you agree with the Congressional Research Service's analysis of the scope of Congressional authority to investigate the Department of Justice pursuant to its oversight function?

   I have read the 1995 Congressional Research Service report and agree with its general conclusion that Congress has broad authority to conduct oversight of Executive Branch agencies, including the Justice Department. Moreover, as a longtime Senate staff member, I personally appreciate Congress' interest in obtaining timely, accurate information from the Department in furtherance of such oversight.

   b. If not, with which part(s) do you disagree?

   It is my understanding that the Justice Department has historically declined to accept certain aspects of the CRS analysis related to the interaction of Congress'

oversight responsibilities and the Justice Department's law enforcement and litigation responsibilities in individual cases. Nonetheless, if confirmed I will work to accommodate the Judiciary Committee's need for information consistent with the Department's responsibilities, and will seek to resolve any disputes between the branches in an amicable and constructive fashion so that Congress can carry out its oversight responsibilities.

2. If confirmed as Assistant Attorney General for Legislative Affairs, one of your primary responsibilities will be to facilitate Congressional oversight of the Department of Justice. What specifically will you do to expedite the flow of information between the Department of Justice and Congress?

    a. Will you pledge to promptly respond to requests for information and documents from either the majority or the minority?

    If confirmed, I will work with others in the Department to respond promptly to all Congressional requests for information and documents.

    b. What specific steps will you take to ensure that this Committee and/or individual Members receive the information they need?

    I will familiarize myself with the systems currently in place to track requests and will explore adjustments to improve the timeliness of the Department's responses to Congressional requests.

    c. Will you commit to making line prosecutors and various agents available to answer questions from Committee Members?

    I am not in a position to make this commitment because I am not currently serving at the Department. It is my understanding that the Department has historically made available Senate-confirmed officials such as the Attorney General, the Deputy Attorney General, the Associate Attorney General and Assistant Attorneys General to answer questions from Members of Congress in order to shield line attorneys and agents from political influence. If confirmed, I will work to accommodate the Committee's oversight needs, consistent with the Department's responsibilities.

    d. What are some of the goals you would like to accomplish during your tenure in the Office of Legislative Affairs, if confirmed?

    If confirmed, I would seek to strengthen the relationship between Congress and the Justice Department so that they work in partnership for the benefit of the American people. I would work to ensure that the views and concerns of Members of Congress are made known to Department of Justice officials. Similarly, I would work to ensure that the views and policies of the Justice Department are communicated effectively to Members of Congress.

3. While serving as counsel for Senator Kennedy, you wrote an article entitled, "The Battle Against Mandatory Minimums: A Report from the Front Lines," 9 Federal Sentencing Reporter 94 (1996). A footnote states that the views expressed therein were your own. In that article, you opined that mandatory minimum sentences are bad public policy and that the Justice Department should instead "work to build congressional and judicial support for the sentencing guideline system." You also recount Senator Kennedy's opposition to mandatory minimums even for recidivist child abusers, child pornographers, and illegal alien smugglers. In many cases, you say, Senator Kennedy sought to replace mandatory minimums with enhanced guidelines over the opposition of other senators, including Senators Hatch and Feinstein, who argued that "judges don't always follow the guidelines." You also described efforts to modify or halt legislation containing mandatory minimums for certain drug dealers (including methamphetamine and Rohyphynol (the "date rape" drug)) and youth gang members.

   a. Since you published this article, the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004), rendered the sentencing guidelines advisory. How have your views changed, if at all, since the Supreme Court's decisions in these cases?

   At the outset, please note that if confirmed I intend to recuse myself from legislation concerning mandatory minimums because my wife – who I married three years after I wrote the article you have referenced – is president of an organization that advocates against mandatory sentencing. I have already consulted with Department of Justice ethics officials to establish a recusal protocol for such matters.

   Nonetheless it remains my personal view that mandatory sentencing laws are unnecessary and unwise. I came to this view during my service as Special Counsel to the U.S. Sentencing Commission from 1987 to 1989. The Commission itself has long adhered to this position, as have many leading criminal law scholars and federal judges. The late Chief Justice William Rehnquist, for example, was a critic of mandatory sentencing laws.

   The basis for my personal opposition to mandatory sentencing laws is stated in my 2004 testimony before this Committee in the aftermath of the Blakely decision:

   > **"Both mandatory minimums and sentencing guidelines limit judicial discretion, but guidelines do so in a more balanced and sophisticated fashion. Guidelines take account of far more sentencing factors than mandatory minimums, which are typically triggered by a single factor like the quantity of drugs sold or the use of a gun. Also the departure mechanism in a guidelines system preserves needed judicial discretion; mandatory minimums, in contrast, can only be avoided by the actions of the prosecutor through charging decisions, plea practices and cooperation agreements. For this reason mandatory sentencing laws, more so than sentencing guidelines, transfer sentencing power from the judge to the prosecutor."**

It is true, as you have suggested, that the Blakely and Booker decisions have changed the landscape of federal sentencing law. Yet Sentencing Commission statistics demonstrate that judges are largely complying with the now-advisory sentencing guidelines. Moreover, Congress can always consider proposals to make the guidelines enforceable again by simplifying them and putting key sentencing factors to the jury in order to comply with the Sixth Amendment principle articulated in Blakely and Booker. In my personal view, that would be preferable to a regime of mandatory sentencing.

b. One of the arguments in favor of mandatory minimums was that they sought to cure disparity between sentences for the same crime in different parts of the country. Do you have concerns about these disparities? If so, how would you address these concerns?

I am deeply concerned about unwarranted sentencing disparities. In my time at the Sentencing Commission I worked to strengthen the federal sentencing guidelines in order to limit such disparities, and in the numerous articles I have published in this field I have condemned sentencing disparities based on race or other factors. I personally believe, however, that mandatory minimums promote rather than cure such disparities. I associate myself with the views of Senator Kennedy, who was a leading proponent of mandatory sentencing laws in the 1970's because he believed they would reduce racial disparity, but who later came to oppose mandatory minimums because he concluded that sentencing guidelines, rather than mandatory minimums, are the right tool to address unwarranted disparities.

c. How would you address Senators Hatch and Feinstein's concerns that "judges don't always follow the guidelines"?

Under the Sentencing Reform Act of 1984, which was still in full force in 1996 when I wrote the article in question, judges were legally required to impose a sentence within the range established by the Sentencing Commission unless they identified a valid departure factor. Any departure from the guidelines was subject to appellate review. Even after Blakely and Booker, Sentencing Commission statistics demonstrate that judges are largely complying with the now-advisory sentencing guidelines.

d. In the same article, you state that the United States Sentencing Commission suffered a "grievous blow when it courageously but unsuccessfully took on the politically explosive issue of the disparity between crack cocaine sentences and powdered cocaine sentences." Please set forth your position on that issue.

If confirmed, I expect to recuse myself from working on crack-powder disparity legislation because my wife's organization advocates a position on that issue. My personal view, informed by detailed empirical analysis from the Sentencing Commission, is that the 100-to-1 ratio in current law is unjustified.

4. In The Bush Administration Takes Aim: Civil Rights Under Attack, a report prepared by you for the Leadership Conference on Civil Rights, you are harshly critical of proponents of states' rights in the area of civil rights legislation stating: "[t]here is indeed a legitimate role for states as sovereign bodies and policy laboratories in our system of federalism, but when it comes to discrimination there is no room for experimentation." However, in your testimony before this Committee in July 2004 regarding "*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines," you contend that the states are a "source of criminal justice expertise [that] deserve[] an amplified voice in the process of developing long-term post-*Blakely* reforms."

    a. Please explain why you believe states can be trusted to make determinations as to civil rights in one arena and not another.

    The report you reference was issued by the Leadership Conference on Civil Rights in its own name, not in my name. I was retained by that organization to draft the report based on positions advocated by the organization rather than my own personal views. That said, the sentence you have quoted seems to me accurate. It acknowledges the role of states as sovereign bodies and policy laboratories in our federal system, but suggests that such state-by-state experimentation is constrained by the Equal Protection Clause of the 14th Amendment.

    I also stand by my 2004 testimony (which does express my own personal views) promoting the role of states as a source of criminal justice expertise. I see nothing inconsistent between that proposition and the proposition that states may not violate the Equal Protection Clause.

5. In a report that you authored for the Leadership Conference on Civil Rights entitled "Justice on Trial: Racial Disparities in the American Criminal Justice System," you state:

    > many of the discriminatory practices that characterize the criminal justice system – from racial profiling to the crack/powder sentencing divide – may well constitute violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which condemns laws and practices that have invidious discriminatory impact, regardless of intent. The United States has declined to make the CERD self-executing, which means that in the absence of legislation granting the rights conferred by the Convention, CERD is without legal effect in the United States. The combination of the United States' reluctance to confer the rights guaranteed by CERD on its own citizens, combined with its failure to eradicate practices which violate the guarantees therein, surely damage our government's credibility when it seeks to lead the charge against racism and intolerance abroad.

    You also argue that felony disenfranchisement laws violate international law, specifically Article 25 of the International Covenant on Civil and Political Rights.

    a. Do you believe that United States criminal laws should be changed to conform to principles of international law?

This report, like the report referenced in the previous question, was issued by the Leadership Conference on Civil Rights in its own name, not in my name or my coauthor's name. Again, we were retained by that organization to draft the report based on positions advocated by the organization rather than our own personal views. My own view is that the United States is not obligated to change its criminal laws to conform to principles of international law.

6. According to your questionnaire, as a lobbyist you represented the National Pawnbrokers Association "on bankruptcy and firearms issues." Please describe the "bankruptcy and firearms issues" to which you refer in your questionnaire.

   I worked on two separate issues for the National Pawnbrokers Association. First, the Association sought an amendment to federal law to resolve conflicting case law concerning the status of pawned property in bankruptcy proceedings. On behalf of the Association, I argued that such property should be deemed to be the property of the pawnbroker rather than included in the estate of the bankrupt individual.

   Second, I assisted the Association in arguing that the retrieval of a pawned firearm from a pawn shop should not occasion a background check under federal law because the gun owner never abandoned legal ownership of the firearm. A contrary interpretation of law by the Bureau of Alcohol, Tobacco and Firearms had caused many gun owners to refrain from pawning their firearms between hunting seasons, a common practice in some parts of the country.

7. It is imperative that Justice Department officials, including Assistant Attorneys General, have the independence and integrity to stand up to the Attorney General and/or the President if they disagree with the Administration's position on a particular issue. You have spent a substantial portion of your career working for Democrats in the legislative branch and lobbying and/or advocating for certain politically-charged issues.

   a. Do you think that your prior work will have any influence on your ability to disagree with the Administration?

   I have always provided candid private advice to the Senators for whom I have worked and the clients who retained me in private practice. My prior work has given me a breadth of experience and perspective that will enable me to "stand up to" the Attorney General and other high ranking officials in private if I disagree with them.

   At the same time, I believe that after differing views are aired in private, a lawyer must be prepared to represent the position of his or her clients in any public setting. If confirmed as an Assistant Attorney General, my client would be the Department of Justice. Even if I personally disagree with a decision by the Attorney General, I am confident I can represent the Department's views effectively before Congress.

   b. Can you provide any examples from your previous work experience in which you disagreed with the position of your employer or a client?

I have occasionally disagreed with positions taken by Senators for whom I have worked and clients who retained me in private practice. For example, it is well-known that Senator Reid is "pro-life" whereas I am "pro-choice" on the issue of reproductive rights. I disagreed with some of the votes cast by him and other Senators for whom I have worked. Also, I did not personally agree with every position contained in the policy reports I drafted for clients in private practice.