



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

June 6, 2013

VIA email: sharona@rhrealitycheck.org

Sharona Coutts, Director
Research and Investigations
RH Reality Check

Dear Director Coutts:

Attorney General Wasden asked me to respond to your public record request which we received on June 4, 2013. You requested copies of all "documents that you have provided, or will provide, in response to the letter, dated on or about May 7, 2013, from U.S. Representative Bob Goodlatte and Trent Franks, which requested a range of information related to abortion in your state."

I have enclosed Attorney General Wasden's letter of response dated May 28, 2013.

Sincerely,

A handwritten signature in blue ink that reads "Kriss Bivens Cloyd".

KRISS BIVENS CLOYD
Constituent Information Specialist

/KBC

Enclosure



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

May 28, 2013

VIA EMAIL: john.coleman@mail.house.gov
and VIA FACSIMILE: 202-225-4299

The Honorable Bob Goodlatte, Chairman
Committee on the Judiciary
The Honorable Trent Franks, Chairman
Subcommittee on the Constitution and Civil Justice
U S House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: May 7, 2013 Abortion-Related Criminal Enforcement Inquiry

Dear Representatives Goodlatte and Franks:

This letter responds to your request for information related to the criminal statutes and their enforcement in connection with newborn infants. We answer the questions in the order posed.

1. In 2002 Congress enacted the Born-Alive Infants Protection Act, which provides that all federal protections for persons apply to every infant born alive. Do prosecutors in your state treat the deliberate killing of newborns, including those newborns who were delivered alive in the process of abortions, as a criminal offense? If so, have there been any prosecutions in your state for this crime? If the answer to the previous question is yes, please provide a log of cases, excluding any personally identifying information.

The answer to the first question is yes. The answer to the second question is that, to our knowledge, no prosecution of the type described. By way of further response, homicides of the type referred to would be subject to the general definition of "murder" under Idaho Code § 18-4001 that, in part, provides that "[m]urder is the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being." The

terms "embryo" and "fetus" are defined more specifically in Idaho Code § 18-4016(1) to mean "any human in utero."

2. Has the legislature in your state enacted laws, in addition to general laws against homicide or requiring ordinary medical treatment, specifically to protect newborns delivered alive in the process of abortions? If so, how, if at all, have these laws changed prosecutorial practices?

The answer to the first question is no.

3. The grand jury expressed concern about Pennsylvania's law applying a statute of limitations to infanticide by neglect that it does not apply to murder. Does your state have different statutes of limitations for culpability in the death of an infant and culpability in the death of human beings in later stages of development? If so, what is the understood rationale for that difference?

The answer to the first question is no. No time limitation exists for the prosecution of murder in Idaho. Idaho Code § 19-401(1).

4. Have you or your predecessors prosecuted any criminal cases in which a woman has died or suffered serious complications as a result of an abortion? If so, please provide a log of such cases, excluding any personally identifying information.

The answer to the first question is no, insofar as this Office has knowledge. We note, however, that in Idaho the Attorney General does not have general prosecutorial authority. See *State v. Sumner*, 139 Idaho 219, 224, 76 P.3d 963, 968 (2003) (defect in Attorney General's obtaining an indictment without consent of county prosecutor cured by prosecutor's motion and subsequent district court order appointing deputy attorney general as special prosecutor). Although the Ninth Circuit Court of Appeals has disagreed (*Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004)), this Office has maintained this position consistently.

5. This Gosnell case has also raised concerns about the effectiveness of state laws that limit, or purport to limit, abortions late in pregnancy. If your state has such a limit, have abortions performed after the statutory limit been prosecuted in your state? If so, please provide a log of such cases, excluding any personally identifying information. If not, are there legal considerations that have prevented such prosecutions from proceeding?

The answer to the first question is no, insofar as this Office has knowledge. The answer to the second question is no. To our knowledge, the only criminal


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The Honorable Trent Franks
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prosecution for abortion since enactment of Title 18, Chapter 6 of the Idaho Code occurred in *State v. McCormack*, No. CR 2011-0008221-FE (4th Jud. Dist., Bannock County). That case was dismissed by state magistrate for lack of probable cause, but, nevertheless, became the focus of civil litigation in the United States District Court for Idaho and the Ninth Circuit. See *McCormack v. Hiedeman*, No. 4:11-cv-00397-BLW, 2011 WL 4436548 (D. Idaho Sept. 23, 2011); *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012); *McCormack v. Hiedeman*, 990 F. Supp. 2d 1128 (D. Idaho 2013). The aborted fetus in *McCormack* had not reached viability, and the prosecution itself was against the mother who allegedly ingested abortifacients acquired over the Internet.

Finally, to this Office's knowledge, no official written procedures or guidelines related to the gathering of information on, or the prosecution of, newborn homicides exist.

Please contact my Office with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lawrence G. Wasden', written in a cursive style.

LAWRENCE G. WASDEN
Idaho Attorney General

LGW/bk/jc