

Senator Sessions, did you have one other question before I turn to Senator Kennedy?

Senator SESSIONS. Well, just briefly, I know on the gun question it is something I asked you about at confirmation. I was with one of your United States Attorneys and they told me their gun prosecutions have gone up 50 percent.

I think you are having something close to that nationally. I believe this Department of Justice, under Attorney General Ashcroft—and I asked him about that when he was confirmed—has, in fact, really set a high standard for aggressive prosecution of gun laws, have they not?

Mr. CHERTOFF. That is correct, Senator.

Senator SESSIONS. I just think that is important. Ultimately, you are focusing on criminals who are out threatening people and killing people.

You know, Senator Durbin, on Frank Johnson, he was indeed a great judge. He was a prosecutor in his early life and he had a fierce hostility to wrong. He did not like to see wrong, and people who dealt with him knew that. It wasn't anger so much as just a deep conviction that wrongdoing shouldn't be accepted.

You could say those were activist opinions, but really I think the better judgment may be—and you and I can talk about this some as we go along, but I think the better judgment of that ought to be that the Constitution and the laws were not being followed correctly.

We had allowed social and political pressures to justify interpreting the constitutional protections of equality and due process—to be interpreted in a way that did not allow that and it was not occurring in reality, and he did, in fact, step up courageously. I think he would say that he merely affirmed the great principles contained in the Constitution.

“Strict construction” is a phrase the President has used. I am not sure that is the best phrase. Miguel Estrada in his hearing was asked about it and he said, well, he thought maybe “fair construction” would be the right phrase. Maybe that is a better phrase. What is strict construction or fair construction? I don't know, but you raised some good points and I just wanted to make those comments.

I think these people have demonstrated a high degree of fidelity to the highest ideals of our Constitution and liberties.

Senator KYL. Senator Kennedy.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you very much, Mr. Chairman, and I welcome our nominees. I apologize. I was necessarily absent earlier, but I appreciate the chance now to ask Mr. Chertoff some questions dealing with the Criminal Division. I am grateful for your presence here.

In late March, as the House of Representatives was about to vote on important child abduction legislation, a controversial amendment on sentencing was added to the bill. This amendment, called the Feeney amendment, had nothing to do with the protection of

children and everything to do with handcuffing judges and eliminating fairness in our Federal sentencing system.

The reaction to the Feeney amendment was immediate and very critical. Chief Justice Rehnquist, not known as a coddler of criminals, said that the Feeney amendment would do serious harm to the basic structure of the Sentencing Guidelines system and seriously impair the ability of the courts to impose just and responsible sentences.

The Judicial Conference of the United States, the American Bar Association, the Sentencing Commission, and many prosecutors and defense attorneys, law professors, civil rights organizations and business groups vigorously opposed it. Then, on April 4, the Justice Department sent a five-page letter to Senator Hatch expressing its strong support for Congressman Feeney's amendment to the House version of S. 151.

Mr. Chertoff, as Assistant Attorney General in charge of the Criminal Division, you are chiefly responsible for formulating criminal enforcement policy and advising the Attorney General and the White House on matters of criminal law.

Your letter of April 4, issued a few days before the House-Senate conference on the child abduction legislation, was very influential in getting the provision enacted. So I would like to ask you a few questions about your support for that particular provision.

One of the provisions in the Feeney amendment overturned a unanimous Supreme Court decision, *Koon v. United States*, which established a deferential standard of review for departures from the Guidelines based on the facts of the case.

In *Koon*, the Court ruled that the text of the Sentencing Reform Act reflected an intent that the district courts retain much of their traditional sentencing discretion. While the courts of appeals certainly have the authority to correct mathematical and legal errors made below, the Supreme Court ruled that it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.

The *Koon* decision has been praised by judges, prosecutors and scholars on both the left and the right. The Justice Department, on the other hand, argued that *Koon* should be overturned by the Feeney amendment because doing so would make it easier for the Government to appeal illegal downward departures.

Now, if you are confirmed as a judge to the circuit court, you and your fellow judges will have to review de novo every instance in which a district court decides that a departure from the Guidelines was justified.

Why do you believe that all nine Justices of the Supreme Court got this issue wrong in *Koon*?

Mr. CHERTOFF. Well, first, let me say, Senator, I think an important point as I sit here in a confirmation hearing is to make it clear that positions I have taken on behalf of the administration should not necessarily be taken as a predictor of how I would rule on a case, were I to be confirmed as a judge.

I have had the opportunity to be both a prosecutor and work for the Department, and frankly to be a defense attorney. I remember times as a defense attorney that I argued very vigorously against

what I considered to be an unfair application of the Guidelines, and I remember times as a prosecutor I argued very vigorously for—

Senator KENNEDY. Well, didn't you support this? You can tell us whether you supported it or differed. "Senator, I differed with this, but this was the administration's position and so I signed off or I supported it."

Mr. CHERTOFF. What I think would be inappropriate for me to do is to relate internal discussions about positions within the Department, or even to talk about how I might approach something in the role of a prosecutor which, of course, would be different in the way that I would approach something in the role as a defense attorney. And that, in turn, would be different from how I would approach something as a judge.

That being said, I think this is a very complicated area. I know, Senator, you were involved in the original Sentencing Reform Act.

Senator KENNEDY. Very much so.

Mr. CHERTOFF. I was a prosecutor actually for a time before the Act came into effect, so I lived under the old system and under the new system and they are both systems which have pluses and minuses.

Under the old system, there was a tremendous amount of discretion in the judges. Sometimes, that was good in terms of achieving justice. Sometimes, that led to unfairness. Some judges, for example, particularly in the area of white-collar crime, philosophically believed white-collar criminals shouldn't go to jail, and I think that was one of the impetuses for having the Guidelines to try to equalize that out.

Guidelines create different kinds of unfairness. Sometimes, there are circumstances in which the Guidelines appear to apply a cookie-cutter to very different individual circumstances.

I think that the process of going back and forth with Congress and the Commission in tuning the Guidelines is a process of trying to strike the right balance between a system that will give a certain amount of determinacy and equality, and also one that will allow a certain amount of flexibility in cases where fairness requires it.

Senator KENNEDY. Well, why wouldn't it have made sense, then, to say that we ought to have some hearings? I mean, why didn't you write to the Chairman of the Judiciary Committee, if you are so concerned about this in the Criminal Division, and say we ought to take another look at this?

This was passed and there was seven minutes of debate in the House of Representatives. It basically virtually undermined the sentencing provisions, all of which were legislated. We had the hearings on it, we made the judgments on it, we made the decisions on it.

The reference that you made about white-collar crime—as you may remember, my former Governor, Bill Weld, and Wayne Budd quit the Justice Department because Ed Meese was reluctant to apply it to white-collar crimes. I have followed this. I understand. I know what is going on there.

Where the Congress has taken a great deal of time to consider this whole issue in terms of fairness in sentencing—we might not have it right; we may have to strengthen and improve it. But basi-

cally to undermine this and to support undermining it without a single day of hearings about this as the head of the Criminal Division in the Department of Justice just puzzles me.

And to have an answer of, well, I can't really say I was for it or against it and I might rule differently if I am a judge—

Mr. CHERTOFF. Well, I think, Senator, what I can say is this.

Senator KENNEDY. Not to be more forthcoming than that is, quite frankly, troublesome.

Mr. CHERTOFF. I think what I can say is this. The issue of how one manages legislation through the legislative process and whether there should be hearings or not is not a matter that I was involved in or was consulted about. That is not my area. I only get involved in taking positions as to substantive issues.

So I can't speak to the question of whether the Department's position in terms of how things move through Congress should be different because that frankly is not in the area that I deal with. I can only say that, as a judge, I will have to—and I will be ready to apply the law as it is enacted by Congress.

I do recognize these are matters as to which reasonable people can disagree. It is a complicated area. I understand the Chairman indicated at some point there probably would be some kind of hearings, and I imagine these issues will continue to be addressed in the future.

Senator KENNEDY. Well, here we had a unanimous vote by the Supreme Court, on a divided Court. Most decisions that are hotly contested these days are 5-4. This was a unanimous vote on this.

This decision by the Justice Department and your division basically overrode that decision without any other kind of follow-up. This was in your department. You are the head of the Criminal Division. This is sentencing for criminal activities. Not to be able to have some kind of view by you whether you agree or differ with the *Koon* case—what is your position on the *Koon* case?

Mr. CHERTOFF. Senator, the issue with *Koon*—*Koon* interpreted the Sentencing Guidelines under the legislative provision as it then existed. The issue, I think, was not whether *Koon* was rightly or wrongly decided as interpreting the statute.

I think the Department and everybody else understood that the Court had definitely ruled on it. I think the question was whether the legislation ought to be changed. And, of course, that is not so much a question of saying that *Koon* was correct or incorrect as it was saying that, given the way the statute has been interpreted, should the statute be changed.

I think the concern underlying the Department's position was this, that the legitimate desire to allow judges to depart downward in extraordinary circumstances not become a vehicle for basically making a major overhaul in the Sentencing Guidelines themselves, so that in some districts there might be situations where, in effect, departures were being granted at such a high rate for extraordinary reasons that it effectively transformed the Guidelines into a system that was more haphazard than I think originally intended.

I understand that there are different positions. I have to say, as a defense attorney, sometimes I argued very vigorously for departures and felt hamstrung because there were none available. So I

think it was a decision on the part of the Department as a whole that some kind of adjustment was necessary in terms of the availability of downward departures.

Senator KENNEDY. Well, of course, the existing judges all comment on Feeney. You have the Chief Justice talking about Feeney, you have other judges talking about Feeney, but you feel that you can't talk about it.

On this issue of departures, there is good evidence that about 80 percent of the departures are at the request of the Government itself. I never really understood, when we were in that conference and trying to make some sense out of it on an issue of the complexity that this had, the arguments.

Because the Feeney amendment was presented without discussion or debate at the last minute, Congress was deprived of full and balanced information concerning the issue of whether departures are made in appropriate instances.

The Justice Department compounded the problem by submitting a highly misleading letter on April 4. For example, the Justice Department argued that the Feeney amendment was justified because an epidemic of lenient sentences was undermining the Sentencing Reform Act.

It failed, however, to note that the Committee report accompanying the 1984 Act anticipated a departure rate of about 20 percent. Today, the rate at which judges depart over the objection of the Government is slightly more than 10 percent, well within the acceptable rate.

While the Department claimed that there are too many downward departures, it failed to note that according to the American Bar Association, almost 80 percent of downward departures are requested by the Justice Department.

In arguing for the abrogation of the Supreme Court's ruling in *Koon*, the Department failed to mention that it wins 78 percent of all sentencing appeals, and it has never acknowledged that 85 percent of all defendants who receive non-cooperation downward departures are nevertheless sentenced to prison.

To quote a letter from eight highly respected former U.S. Attorneys from the Eastern and Southern Districts of New York, "What these statistics reveal is a relatively limited exercise of sentencing discretion of the sort contemplated by Congress when it authorized the promulgation of the guidelines."

It is important to understand your views on the issue. There are over 2 million Americans in prison or jail, including 12 percent of all African-American men between the ages of 20 and 34. One out of three young African-American men born in the United States will spend time behind bars in their lifetime. The Federal prison population has quadrupled in the last 20 years and it is now larger than any State system. Dozens of new Federal prisons are under construction.

Do you really think that there is a problem with excessive leniency in the Federal criminal justice system?

Mr. CHERTOFF. I don't know that I think there is a problem with excessive leniency, and again I want to be careful to distinguish, because I think it is important, between my views as an advocate or a policymaker within the executive branch, which is, of course,

focused on these matters from a prosecutorial standpoint, as distinguished from views I advocated as a defense attorney, and which are distinguished yet again from the perspective of a judge, which is different from the prior two.

Again, I don't know that the issue is leniency. I know that there are debates about the issue of extraordinary departures. I am not talking about cooperation departures, which are a different issue. I also know that there are tremendous regional variations. In some districts, they are quite infrequent. In some districts, they are, in fact, much more regular.

I understand these are matters as to which reasonable people can disagree. Within the Department, the policymaking process involves getting input from a wide variety of people—line prosecutors, United States Attorneys, people from the Criminal Division, people from the appellate sections, all of whom weigh in. And ultimately the Department formulates a position, which it did in this case.

As I say, I mean I think leniency is not so much the issue as it is the extent to which one wants to allow departures for extraordinary reasons and whether that at some level can become inconsistent with the overall thrust of the Guidelines.

Senator KENNEDY. Well, all the other attorneys in the Justice Department are not up for a judgeship here. Other judges are commenting on these; they don't feel restricted in commenting. The Justice Department's April 4 letter stated, "Too many judges ignore the Guidelines in favor of ad hoc leniency." That is what the Department said on this.

Another provision in the Feeney amendment requires the Attorney General to effectively establish a judicial black list by informing Congress whenever a district judge departs downward from the Guidelines, imposes new burdensome recordkeeping and reporting requirements on Federal judges, and requires the Sentencing Commission to disclose confidential court records to the House and Senate Judiciary Committees upon request.

Just this Monday, Chief Justice Rehnquist criticized these provisions as potentially amounting to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.

We are talking about a matter of enormous importance and consequence. To get that kind of involvement of the Chief Justice of the Supreme Court who has been as involved and concerned about this and its impact in terms of justice in this country is extraordinary.

And to have the Department just dismiss all of these activities and to support an effective dismissal—no hearings in terms of the United States Senate on this, no hearings in the House of Representatives, a seven-minute discussion on the floor of the House of Representatives—and then to embrace this completely in terms of the conference on this, in the department that you were the head of—

Mr. CHERTOFF. Well, Senator, the issue of whether there should be hearings or how legislation is managed is a matter I have really not only nothing to do with, but frankly no knowledge about.

Senator KENNEDY. Well, it seems to me that you could have said we ought to have hearings on this. We are talking about sentencing. You are the head of the Criminal Division and you are bothered by this. It would seem to me that we could have expected you to write to the Chairman of the Committee and say the Justice Department is bothered by this, we hope you will have hearings about it, and ask that we go ahead and have them in the House and the Senate and appear up here and make the case for it.

But we have gotten now into a situation where, as a result of the actions on sentencing, which is effectively out of your Department, we have the Chief Justice criticizing these. He is not known as a criminal coddler, certainly. Rehnquist criticized it as "amounting to an unwarranted, ill-considered effort to intimidate individual judges in the performance of their judicial duties."

It is a fair question for any of us to ask where were you during this time, when you have the Chief Justice mentioning this. Where were you during this time?

Mr. CHERTOFF. Well, I am not aware that the Chief Justice's remarks—I don't think they preceded the legislation. Again, Senator—

Senator KENNEDY. No, no. This is with regard to the Feeney amendment. This is with regard to the Feeney amendment and the provisions in the Feeney amendment that require that the judges are going to have to list and they will have their names sent to the Justice Department and effectively you will have a judicial black list. Those are my words, "judicial black list," about judges that are going to stray from this.

I used the words "judicial black list," but this is what Rehnquist said just this past Monday: "an unwarranted, ill-considered effort to intimidate"—this is the Chief Justice saying that the effect of this, he believes, is it will intimidate individual judges in the performance of their judicial duties. He said the provisions could be used to undertake a witch hunt against judges who appear soft on crime, and cautioned that they should not be used to trench up judicial independence.

In its letter dated April 4, the Justice Department didn't object to these new recordkeeping and reporting burdens on the Federal judiciary. To the contrary, it argued that the Feeney amendment was a necessary response to what it described as the well-known problem of judges ignoring the Guidelines in favor of ad hoc leniency.

Is Chief Justice Rehnquist wrong to be concerned about the threat of the Feeney amendment?

Mr. CHERTOFF. Well, I will say this, Senator. I think the Chief Justice is completely correct, and I completely agree that no tool ought to be used in an effort to try to intimidate judges or pressure judges to rule in individual cases.

Judges are obliged to follow the law, and they are obliged to do it to the best of their ability. But I certainly don't endorse the idea of hauling judges up and questioning them about decisions that they have made because I think that can be problematic.

I think the reason judges, though, are given life tenure is precisely to give them the ability to withstand the kind of pressure that sometimes is brought to bear. Sometimes, being a judge re-

quires making unpopular decisions and a judge has to have the ability to withstand that. Part of that comes from the life tenure and part of that comes from the judge's own internal character.

So I do agree that the executive process is not a place where judges ought to be called to answer or explain what they have done, outside, of course, what they explain in the course of their opinions, which is the way in which judges express themselves.

Senator KENNEDY. Well, I think you have answered this question, which is do you believe it is appropriate for the Justice Department and Members of Congress to single out Federal judges who they believe are soft on crime or engage in ad hoc leniency? I think you have answered that.

I will ask that the full letter be put in the record. I won't take much more time.

In the letter, in the last paragraph, it says, "As stated in the April 3 letter, the Judicial Conference believes that this legislation, if enacted"—this is Justice Rehnquist's letter—"would do serious harm to the basic structure of the Sentencing Guidelines system and seriously impair the ability of the courts to impose just and responsible sentences. Before such legislation is enacted, there should at least be a thorough, dispassionate inquiry on the consequences of such action."

I don't expect you to turn on the Department, but I certainly would have thought that, given certainly your own review of this situation and the actions and statements, you would have expressed some greater kind of concern on this issue and proposal, Mr. Chertoff, than you have.

Let me move just quickly to this on the death penalty. In January 2003, Attorney General Ashcroft ordered Federal prosecutors in New York to seek the death penalty for defendant Zario Zapata, even though the prosecutors had negotiated a deal in which Zapata had agreed to testify against others in a Colombian drug ring in exchange for a sentence of life imprisonment.

One former prosecutor, Jim Walden, said it was a remarkably bad decision that will likely result in fewer murders being solved because fewer defendants will choose to cooperate.

Did you advise the Attorney General to make this decision?

Mr. CHERTOFF. No. The way the process works with the Department, I was not personally involved in that decision. But I do think that news accounts—without getting into matters which I think are non-public, I think news accounts are sometimes misleading.

And I should clarify two general issues about plea negotiations. One is—and this was certainly the rule when I was a line prosecutor—even when an Assistant U.S. Attorney negotiates a tentative agreement with a defense attorney, it is always subject to approval by more senior people in the Department. That is always understood.

So there really should never arise a situation, frankly, in which a deal is actually agreed upon and then it gets reversed. And if that ever does happen, that is because the assistant perhaps didn't make it clear that whatever they were able to offer was subject to some further approval.

Second, we completely agree cooperation is important in any plea negotiation. You always, of course, have to weigh the value of the

cooperation and the credibility of the person who wants to cooperate, whether, in fact, they have any information of value to give. So those are general considerations. As to this particular decision, I am not generally in the process of—and I don't believe I was in the process of that particular decision.

Senator KENNEDY. If you would talk for a minute about how you view the balance in terms of in this case having the Federal prosecutors going for the death penalty, what does that do in terms of the possibility of defendants being willing to talk, maybe, with the idea that they get life imprisonment, the area of cooperation?

This former prosecutor was indicating that at least it was his judgment that you could get a lot more by going for life imprisonment rather than if you go for the death penalty. The message it was sending to others is that it will be harder to get the kind of information that might be useful and helpful in terms of undermining these drug rings.

Senator KYL. Excuse me just a second, Mr. Chertoff.

Senator Kennedy, you are welcome to take all the time. I am going to have to recess the hearing in a couple of minutes just so we can get somebody else to replace me here, but you are welcome to take more time. I just wanted you to be aware of that, but go ahead and proceed with your question right now.

Mr. CHERTOFF. I can be very quick in answering by saying that I think cooperation, including negotiating something less than the maximum penalty, is often helpful, but it is not always helpful. It depends on the quality and nature of the cooperation. It also depends, frankly, on the nature of the crime. Sometimes, people commit crimes that are so heinous that one would not want to give them an accommodation even with some cooperation.

Senator KENNEDY. I have about five more minutes of questions, so I will do whatever—I do want to ask about crack and powder and racial disparities.

Senator KYL. Thank you. Then, Senator Kennedy, what I would like to do is to recess the hearing. I think that Senator Hatch or someone else can be here in about 5 minutes or maybe a little bit longer, perhaps not until 11:30. That would give everybody an opportunity to take a quick break and then come back.

So, therefore, this hearing will be recessed until the call of the Chair.

[The Committee stood in recess from 11:20 a.m. to 11:27 a.m.]

Senator KENNEDY. [Presiding.] We will come back to order.

Mr. Chertoff, for years the civil rights groups and sentencing experts have been concerned about the substantial sentencing disparities that result from the different Federal mandatory minimums for crack cocaine and powder cocaine trafficking offenses. For example, 5 years' imprisonment is mandated for 500 grams of powder cocaine worth \$40,000 on the street, and 5 grams of crack, worth about \$500.

Because African-Americans comprise 84 percent of those convicted on crack cocaine charges, only 31 percent of those convicted of powder cocaine charges, the lower standard for crack cocaine has the effect of disproportionately punishing the African-American defendants.

In December 2000, Senator Sessions and Senator Hatch introduced a bill to reduce the disparity for 5-year mandatory by increasing the crack threshold substantially and lowering the powder threshold by a small amount. Most authorities view the Sessions–Hatch proposal as a positive first step, though perhaps one that doesn’t go far enough.

In March 2001, the administration announced it will oppose any reduction in drug sentences, including those in the Sessions–Hatch bill. While acknowledging that the actual sentences for crack are more than 5 times longer than sentences for the equivalent amounts of powder cocaine, the administration argued that any reduction in penalties would send the wrong message on drugs.

Mr. Chertoff, as Assistant Attorney General in charge of the Criminal Division, you had an important role in developing the administration’s position on the case, and I am very concerned about the administration’s dismissive view of this serious, longstanding problem. Do you deny that there is any racial injustice in the 100-to-1 crack/powder disparity?

Mr. CHERTOFF. Well, Senator, first of all, I don’t think the Department’s view is dismissive. In fact, I know this matter has been discussed and studied, was debated at very senior levels. There’s been a lot of analytical work done, and it continues to be discussed. And I think the Department’s position was not opposed to reducing the disparity, but was opposed to reducing the disparity by lowering penalties at one end. In other words, I think the Department’s position was consistent with the idea of reducing the disparity by raising the powder—or adjusting the powder numbers to bring them closer.

I do recognize that there is a serious issue—

Senator KENNEDY. Do I understand you, you want then the powder to go up where it is to crack and—

Mr. CHERTOFF. I don’t mean to suggest a specific proposal. What I mean to say is I don’t think the Department opposed any closure of the disparity. I think what the Department opposed was a closure that was achieved by lowering the penalties for crack.

This was a subject, I think, the U.S. Attorney in D.C. testified about before the Sentencing Commission, and his testimony, as I understand it, basically reminded the Commission of how serious a problem crack is in poor neighborhoods. I remember when crack first came on the scene back when I was a young prosecutor, and it clearly led to a more violent type of behavior in terms of crack dealers and people who were using crack than had been the case with powder alone.

I have seen many studies, many arguments and analyses about how to reduce this disparity. I know there is a serious and legitimate concern about the appearance of injustice when it seems that people in certain communities wind up disproportionately feeling the sting of a certain type of punishment. I think we have to keep working on a way to reduce that appearance of unfairness without diminishing the serious punishment for a type of criminal conduct that can be very, very damaging to our poor communities.

Senator KENNEDY. Well, I think there is—no one is suggesting that it isn’t a serious crime and that there shouldn’t be serious punishment. What we are focusing on is this area of disparity, and

if we are saying that we are not going down in terms of the crack, that means you have to go up in terms of the powder, with all of its implications in terms of room and the various prisons of this country. I don't know what that would do, but it would certainly appear to be a very substantial expansion.

I don't think it is just the appearance of equal justice for all Americans. I think it really comes down to the—not just the appearance but in terms of the reality of this. And just to have the—as you well know, the Sentencing Commission has tried over very considerable time. Another time we had a very prominent former Deputy Attorney General, Wayne Budd, from my own State of Massachusetts, a Republican, worked with the Sentencing Commission, tried to work out a series of recommendations with that because of its importance. Serious people have really attempted to try and find some way to deal—make sure that we are going to have the tough penalties, but also deal with the real disparity in terms of the justice on this question.

I am just troubled that it is the position of the Criminal Division effectively to stonewall, to maintain the existing current situation, and without really attempting to work through. No one assumed that it was going to be easy, but I must say I want to give credit to Senator Sessions as well as Senator Hatch for at least trying to think of ways of addressing this. These are serious Senators who are attempting to try and deal with this. I am not sure I agree with all the things they are going about, but they are attempting to come up with—recognizing this extraordinary disparity and the real injustice that it provides. So it is troublesome.

Let me go to a—in a book review published by the Michigan Law Review in 1995 titled “Chopping *Miranda* Down to Size,” you criticized the Supreme Court's decision on *Miranda v. Arizona* as a rule too far and described the right to have counsel present at police interrogation as insupportable. You argued that it was improper for the Supreme Court to import adversarial constitutional protections into the non-adversarial pre-indictment police investigation process. And since then, of course, the Supreme Court reaffirmed the *Miranda* decision, holding in *U.S. v. Dickinson* that a Federal statute that purported to undo *Miranda* was unconstitutional.

Do you acknowledge that *Miranda* remains the law of the land and must be enforced?

Mr. CHERTOFF. Absolutely.

Senator KENNEDY. In March, New Yorker magazine reported that in December 2001, officials from the Criminal Division solicited, then disregarded advice from the Professional Responsibility Advisory Office regarding the legality of interrogating John Walker Lindh outside the presence of counsel. Specifically, an attorney from that office advised prosecutors that Attorney James Brosnahan, who had been retained by Lindh's father, had sent the Attorney General a letter stating that he represented Mr. Lindh and wanted to meet with him, and that a pre-indictment custodial interview was not lawful under the circumstances. Nevertheless, the FBI proceeded with its interrogation of Lindh.

On January 15, 2002, the Attorney General stated that the Lindh interrogation was proper because the subject here is entitled

to choose his own lawyer, and to our knowledge, has not chosen a lawyer at this time.

Under this reasoning, Brosnahan was not Lindh's attorney at the time of the interrogation because Lindh had not personally retained him, even though Government officials had blocked Brosnahan's effort to speak with Lindh.

Were you involved in the decision to proceed with Lindh's interrogation over the advice of the Professional Responsibility Office?

Mr. CHERTOFF. I have to say, Senator, I think that the Professional Responsibility Office was not asked for advice in this matter. I'm familiar with the matter. I was involved in it. I can say that there was advice about the law that was solicited from parts of the Department that are expert in it. There is a Supreme Court decision—it may be *Moran v. Irvine*, but I may have the case wrong—which actually addresses the issue of whether someone is held to be under the right to counsel where they have not asked for counsel but where someone else has hired counsel for them, and the Court there held that, in fact, the person does not—is not treated as if they're covered by counsel in that circumstance.

Senator KENNEDY. Well, this is a father. Was that case dealing with a father as a member of the family?

Mr. CHERTOFF. I believe it was a relative. Now, I should say, Senator, there's a different issue presented when you're dealing with minors. Lindh was not a minor, however. I understand minors, you get—there's a somewhat different rule, perhaps, about whether a parent seeking to invoke counsel has a role to play. But Lindh was not a minor.

One thing I should point out is that I believe in the motions that Mr. Brosnahan filed in the case, he did not challenge—

Senator KENNEDY. How was justice sort of served by not following the request of the father of Mr. Lindh in terms of—how was the justice served by going ahead and having the interview after the father had indicated that he wanted him to at least be able to talk to counsel?

Mr. CHERTOFF. I think as you'll recall, Senator, this, of course, occurred I think in December of 2001, literally in the battlefield in Afghanistan. And it would have been—had the Department not accepted the position of the Supreme Court and treated Mr. Brosnahan's request to meet with Lindh as invocation of right to counsel, in practical terms it would have meant there could have been no questioning of Lindh since it was quite obviously not the case that a lawyer was going to be flown into the battlefield in Afghanistan.

Senator KENNEDY. Well, you are not suggesting that he was being held in a battlefield? I mean, this was—that's not your testimony—I mean, it's not—they were outside of where Lindh was. I mean, it's my memory he was taken away from the conflict, and he was moved around in the different secure locations. You are not suggesting that the battlefield conditions were such that an attorney couldn't have had some access to him?

Mr. CHERTOFF. I think at some—

Senator KENNEDY. How long does it take to fly over there, 18, 19 hours, maybe, to go to Afghanistan?

Mr. CHERTOFF. I know he was held in various places in Afghanistan and then ultimately removed to a war ship. You know, I have never flown to Afghanistan, but I think it would have been impractical to imagine that an individual held under these conditions in the middle of a conflict would be meeting with an attorney. So I think the consequence of treating it as an invocation of the right to counsel would have been essentially to terminate any questioning.

I should say, though, that Mr. Lindh was Mirandized, and had he requested counsel or requested to invoke his right to silence at the point at which the FBI was involved, they would have honored that request. And this was a matter which was—certainly Mr. Brosnahan could have raised this issue before the district judge. I don't believe that he actually sought to suppress based on that ground.

Senator KENNEDY. Well, what was the—do you remember what the Professional Responsibility Advisory Office, what their position was on this?

Mr. CHERTOFF. I think I've been—I have to be careful to not get into matters that are not public. The Professional Responsibility Office normally is not—well, let me put it this way: I was not consulted with respect to this matter. There are other parts of the Department that generally render opinions in this area of the law and other expertise that was consulted.

Now, it may be that there are people who disagree with the legal analysis we undertook, and that's not infrequently the case.

Senator KENNEDY. Well, your statement that the Professional Responsibility Advisory Office did not have an official position on this—

Mr. CHERTOFF. I don't believe they had an official position on this.

Senator KENNEDY. Well, I want to thank you very much, Mr. Chertoff. Justice Callahan, Judge Coogler, I apologize I didn't have a chance to inquire. I know that others did, and we want to thank you for your patience here this morning. I commend you for your nominations, as well as Mr. Chertoff, and I am grateful for the chance to be able to ask these questions.

Since there is no other business before the Committee, it will stand in recess. Thank you very much.

[Whereupon, at 11:41 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]