QUESTIONS AND ANSWERS

SENATOR EDWARD M. KENNEDY'S WRITTEN QUESTIONS FOR MICHAEL CHERTOFF

1. At your hearing, I asked you about a report in the March 10, 2003 issue of *The New Yorker* on advice that the Professional Responsibility Advisory Office provided regarding the legality of interrogating John Walker Lindh outside the presence of counsel. You stated that the Office did not take an official position on this matter.

On June 15, 2002, *Newsweek* magazine published a series of e-mails between Jesselyn Radack, an attorney at PRAO, and John De Pue, a counterrorism prosecutor, on the Lindh case. The e-mails included the following message from Radack, sent on Friday, December 7, 2001, at 1:06 p.m.:

> John,
>
> The FBI wants to interview American Taliban member John Walker some time next week. The interview would occur in Afghanistan. Walker's father retained counsel for him. The FBI wants to question Walker about taking up arms against the U.S.
>
> I consulted with a Senior Legal Advisor here at PRAO and we don't think you can have the FBI agent question Walker. It would be a pre-indictment, custodial overt interview, which is not authorized by law. . . .

On Monday, December 10, 2001, at 11:29 a.m., Ms. Radack wrote Mr. De Pue:

> You just advised that the Deputy Legal Advisor of the FBI stated that an agent went and interviewed Walker over the weekend, not knowing that Walker was a represented person. Please keep me in the loop as you learn more details. . . .

Mr. De Pue responded at 1:54 p.m.:

> Ugh. We are trying to figure out what actually transpired and what, if anything, Walker said. It may well be that the questioning

> was for intelligence purposes and that he was questioned as any other prisoner of war would be.

Mr. De Pue then wrote at 2:11 p.m.:

> If what you are telling us is true – and I am sure that it is – the FBI needs to b [sic] alerted at once.

How are these e-mails consistent with your testimony that PRAO never took a position on the legality of Lindh's interrogation?

Response: As I indicated during my testimony, those at the Department responsible for the Lindh matter before and during the time of Lindh's interrogation did not to my knowledge seek PRAO's advice, because other experienced lawyers were considering the legal issues raised by overseas interrogation of combatants by the FBI. Before and during the time of these interrogations, I was informed of no opinion expressed by any individual at PRAO about the Lindh interrogation. Even now, I am not aware that PRAO ever took an official position about the Lindh interrogation or that any views expressed by an individual PRAO attorney were documented, factually and legally substantiated, reviewed and authorized, as I would expect before an official opinion was rendered. The e-mail traffic that you cite appears to be the impressions of a single PRAO attorney, without factual analysis and case law discussion, and therefore would not constitute an official opinion.

2. The *New Yorker* article also reported that two weeks after the Department filed charges against Lindh, Radack, a highly qualified employee who had received a merit bonus the previous year, received a "blistering" performance evaluation which severely questioned her legal judgment, and she was advised to get a new job. After Ms. Radack notified Justice Department officials that they had failed to turn over several e-mails requested by the federal court, Justice Department officials notified the managing partners at Ms. Radack's new law firm that she was the target of a criminal investigation.

a. Was Ms. Radack forced to leave her position at the Justice Department because of the advice she provided on the interrogation of Mr. Lindh?

Response: I have no knowledge of the facts surrounding Ms. Radack's employment, performance or departure. PRAO is not within my area of responsibility, and does not report to me.

b. Has any investigation been conducted into the alleged withholding of emails from the federal court in the Lindh case? Was Claudia I. Flynn, Director of PRAO, investigated in relation to these events? Have any Justice Department employees other than Ms. Radack been reprimanded or disciplined in any way?

Response: I am not involved in any investigation into the above allegations, and to my knowledge the court did not express any dissatisfaction with the way in which the prosecution in the case conducted discovery. It would be improper for me to comment on whether Ms. Flynn was investigated. See USAM § 1-7.530. I do not know whether employees were reprimanded or disciplined.

c. Is Ms. Radack the target of a criminal investigation by the U.S. Attorney's office? For what conduct is she being investigated?

Response: It would be improper for me to comment on whether Ms. Radack is under investigation and, if so, about what her status might be. See USAM § 1-7.530.

3. As we discussed at the hearing, the Justice Department sent a five-page letter to Senator Hatch on April 4th expressing its "strong support for Congressman Feeney's amendment to the House version of S.15 1." As Assistant Attorney General in charge of the Criminal Division, you are chiefly responsible for formulating criminal law enforcement policy and advising the Attorney General and the White House on criminal law. The Department's letter was sent only a few days before the House-Senate conference on the bill and was influential in persuading the conferees to accept the Feeney Amendment.

The Feeney Amendment imposes burdensome new record-keeping 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. It also requires the Attorney General to establish what some have called a "judicial blacklist," by informing Congress whenever a district judge departs downward from the guidelines.

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." He said that 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 upon judicial independence."

At your hearing, you stated, "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. . . . 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."

Given this view, and in light of the Chief Justice's continuing concern about these provisions, do you believe that Congress should repeal these sections of the Feeney Amendment: *i.e.*, sections (h) and (l)? If not, please explain why you believe these provisions should remain in effect.

Response: As a current Department of Justice official my professional obligations make it inappropriate for me to communicate a personal opinion to Congress on a specific legislative proposal as to which the Department takes an official position.

I know that Department of Justice officials have continued to discuss these provisions, and pay serious attention to concerns expressed by members of Congress, judges, and others. As with any legislation, should Congress determine that there are problems arising from the implementation of these provisions, they may be revisited in the future.

4. The Justice Department's letter of April 4th also cited with approval the hearings held in the House Judiciary Committee in response to the so-called "growing leniency problem." As you know, these hearings involved a bitter and unprecedented attack against a federal judge in Minnesota, James Rosenbaum. A former prosecutor and Reagan appointee, Judge Rosenbaum had testified against a bill that would have reinstated longer sentences against certain first-time drug offenders. Republicans on the House Judiciary Committee later published a committee report containing a 22-page diatribe against Judge Rosenbaum, accusing him of misleading Congress and threatening to subpoena his sentencing records.

Throughout this bizarre and unseemly incident, the Justice Department did not utter a single word in defense of Judge Rosenbaum. Instead, it worked closely with the House Committee to develop and pass the Feeney Amendment, which the Department described in its April 4th letter as an appropriate response to the "well known" problem of judges "ignoring the Guidelines in favor of ad hoc leniency."

What is your opinion of this matter? Is Judge Rosenbaum a judge you believe has engaged in "ad hoc leniency"? Do you believe that the House Judiciary Committee was justified in taking the steps it did in response to Judge Rosenbaum's testimony? If so, please explain how this position is consistent with your testimony that you "don't endorse the idea of hauling judges up and questioning them about [sentencing] decisions that they have made." And do you share Chief Justice Rehnquist's concern that the Feeney Amendment may lead to additional attacks against federal judges who appear "soft on crime" in the future?

Response: I have not read Judge Rosenbaum's testimony or any committee report on that testimony, and I am unfamiliar with Judge Rosenbaum's record. Accordingly, I have no basis to offer an opinion on Judge Rosenbaum's record or on what the House Judiciary Committee did.

Again, I do not endorse the idea of requiring judges to testify in order to justify their decisions; justification should be set forth in the reasoning of their opinions. At the same time, judges are not – and should not be – free from criticism, and must accept that some decisions they make will be unpopular.

5. At your hearing, you stated that before formulating a position on the Feeney Amendment, the Justice Department received input from a wide variety of people. You also referred to "tremendous regional variations" in how federal judges depart from the Sentencing Guidelines. You stated, "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 that I think originally intended."

I would like to know more about how thoroughly the Justice Department studied this problem before it decided to express its "strong support" for the Feeney Amendment. What kind of analysis did you or other Justice Department officials perform? Did you: (a) compare the exercise of prosecutorial discretion with the exercise of judicial discretion, determining what percentages of total

downward departures were requested by the government or made over the government's objection; (b) analyze how often downward departures occur in particular kinds of cases, such as white-collar cases or low-level drug cases; (c) gather reliable data, as opposed to anecdotal information or supposition, on departure rates in the 94 federal judicial districts, or by judicial circuit; (d) compare actual departure rates with those anticipated in the legislative history to the Sentencing Reform Act of 1984; (e) analyze the departure rates of judges according to the Presidents who appointed them, or the judges' prior experience as prosecutors or defense attorneys; (f) in analyzing differences in departure rates among particular judges, districts, or circuits, take into consideration the relative magnitude of downward departures; and (g) consider the actual prison time served by defendants who received downward departures? Please provide a copy of all studies, surveys, or analyses that the Department of Justice relied on in deciding to support the Feeney Amendment.

Response: The Department of Justice April 4 letter from Acting Assistant Attorney General Brown, to which your questions refer, sets forth statistics and cites cases, and refers as well to information presented during hearings held before the Senate Judiciary Committee in 2000, and before the House Judiciary Committee during the last year. These materials, which are part of the public record, provide the basis of the recommendation in the letter. I had no part in drafting the letter.

6. At your hearing, you stated in response to a question from Senator Durbin that the Justice Department has made the enforcement of existing gun laws "a very high priority." Many, however, have expressed concern that the Department has ignored the very real possibility that terrorists are exploiting these gun laws to obtain firearms and learn how to use them. For example, a terrorist training manual entitled "How Can I Train Myself for Jihad," found in Afghanistan in November 2001, advised potential terrorists in the United States to "obtain an assault rifle legally . . . learn how to use it properly and go and practice in the areas allowed for such training."

In the aftermath of September 11th, the Justice Department worked aggressively to learn about the activities of the hijackers and other terrorist suspects: what flight schools they attended, where they lived, whom they spent time with, their spending patterns, and other activities. Yet the Department rejected the request of the Federal Bureau of Investigation to investigate the gun

purchases of suspected terrorists – despite the legal opinion of the Office of Legal Counsel, dated October 1, 2001, stating that there is "nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records" – such as assisting in the investigation of the 9/11 attacks.

As a federal prosecutor who has worked on very significant criminal matters in recent years, you are certainly aware of the need for investigators to have all relevant information when conducting an investigation. Did you support the Department's decision to reject the F.B.I.'s request to investigate gun purchases by suspected terrorists after September 11th? Do you believe we know everything we could know about whether the 9/11 terrorists purchased firearms, received firearms training, or otherwise possessed or used firearms during their time in the United States? Are you concerned that the Department has unreasonably constrained the ability of the F.B.I. to investigate potential terrorists who use legal means, such as purchasing firearms, to obtain the necessary weapons to carry out terrorist attacks?

Response: I was not involved in the decision concerning what restrictions, if any, would apply to an FBI review of the audit log records. Law enforcement knows a great deal about the background and training of the 9/11 hijackers, although the fund of knowledge increases as additional al-Qaeda members are apprehended. The FBI continues to successfully investigate potential terrorists who purchase or use firearms. For example, indictments currently pending against certain individuals who are charged with material support to terrorist organizations include allegations of use of firearms in the course of the charged criminal conduct.