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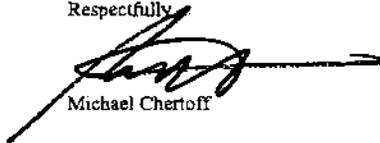
May 19, 2003

The Honorable Edward M. Kennedy
Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Kennedy:

I am pleased to enclose my answers to your supplemental questions dated May 16, 2003. Of course, if you need any additional information or clarification, I would be happy to meet with you at your convenience. Thank you for your consideration of my nomination.

Respectfully



Michael Chertoff

Enclosures

cc: The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary

The Honorable Russ Feingold
Member, Committee on the Judiciary

SUPPLEMENTAL QUESTIONS FOR MICHAEL CHERTOFF

I. Please review the questions previously submitted by Senator Kennedy on May 12th and Senator Feingold on May 13th and supplement your responses to provide fuller detail in both your official capacity and your personal capacity, separating the two to the extent not apparent from the context.

Response: I believe that the responses I provide below will supplement the responses to Senator Kennedy's questions submitted on May 12. Regarding Senator Feingold's questions submitted on May 13, I have one supplemental answer to question e. Since my response to that question was returned on May 14, there has been one additional guilty plea of the remaining member of the so-called "Buffalo Six" on May 19. That plea agreement, in the case of United States v. Al-Bakri, also contains provisions regarding the government's ability to declare the defendant an enemy combatant. The relevant documents are attached.

II. In particular, your supplementary submission should include, but not be limited to, the following matters and should amplify and explain any "yes" or "no" answers:

A. The Interrogation of John Walker Lindh

1. You state that "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." Isn't it true that John DePue, an attorney in the Terrorism and Violent Crime Section of the Criminal Division, which you head now and headed then, called the Professional Responsibility Advisory Office in December 2001 and requested its opinion on the propriety of having the F.B.I. interview Lindh, in light of the fact that Lindh's father had already retained counsel for him? And isn't it true that PRAO attorney Jesselyn Radack answered DePue's phone call in her capacity as the duty attorney that day? When and how did you become aware of this or any similar contacts between anyone in your Division and anyone in PRAO on this matter?

Response: The e-mails which are quoted in Newsweek and referred to in Senator Kennedy's questions of May 12 indicate that Mr. DePue initiated contact with PRAO about whether the FBI should question Walker Lindh and that Ms. Radack responded to that inquiry. I do not know how he came to do that and he did so without my knowledge at the time. Before and during the December 9 and 10, 2001 interviews of Walker Lindh I was unaware that anyone had contacted PRAO regarding the FBI's intent to interview. I first became aware of contacts on this issue between anyone in the Criminal Division and PRAO after Lindh had waived his Miranda rights (including his right to counsel) and consented to his December 9 and 10 interviews. I recall that in early 2002 the existence of e-mail traffic between Mr. DePue and Ms. Radack came to my attention as an outgrowth of the prosecutors' review of documents in connection with the Lindh case.

2. You state that “[b]efore and during the time of these interrogations, I was informed of no opinion expressed by any individual at PRAO about the Lindh interrogation.” When and how did you learn about the e-mail message sent by Ms. Radack to Mr. DePue on December 7, 2001, stating: “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.”? When and how did you become aware of any similar or related opinion or advice by any attorney in the Department?

Response: I learned about the e-mail communication between Ms. Radack and Mr. DePue in early 2002 when it came to my attention as an outgrowth of the prosecutors’ review of documents in connection with the Lindh case. Apart from the foregoing e-mails, I do not recall anyone expressing the opinion that the FBI should be stopped from interviewing John Walker Lindh because of professional ethics rules about contacts with represented persons. Independent of any communication between Mr. DePue and Ms. Radack, other attorneys and I were analyzing and discussing legal issues raised by FBI questioning of overseas combatants during the period before and after the Lindh interviews.

3. You state that the advice provided in Ms. Radack’s e-mail “would not constitute an official opinion” because it “appears to be the impressions of a single PRAO attorney, without factual analysis and case law discussion.”

a. Ms. Radack’s e-mail of December 7, 2001, states that she “consulted with a Senior Legal Advisor here at PRAO.” We understand that Ms. Radack in fact consulted with both Senior Legal Advisor Joan Goldfrank and PRAO Director Claudia J. Flynn. Do you have any reason to believe that Ms. Radack did not consult with these other attorneys at PRAO? When and how did you become aware that such consultations occurred? Isn’t it true that Ms. Radack’s e-mail of December 7th further states: “This opinion is based on the facts as presented and described above and in our telephone conversation. If the facts are different or changed, further analysis may be required.”?

Response: Apart from the text quoted in the question, I do not know with whom at PRAO Ms. Radack consulted. Apart from any facts set forth in the quoted e-mails, I do not know what other facts were discussed in any telephone conversation between Ms. Radack and Mr. DePue.

b. Isn’t it customary for PRAO attorneys to provide opinions on professional responsibility matters via e-mail; to base their opinions on the facts presented to them by other Justice Department employees; and not to cite case law unless specifically asked to, particularly when the applicable legal authority is already set forth in existing PRAO memoranda (such as the PRAO memorandum on “Communications Authorized by Law”) and when the inquiry is time-sensitive? Are there any Justice Department policies or regulations that distinguish between “unofficial” and “official” PRAO opinions, or are you applying your own subjective standard on this issue?

Response: I appreciate the opportunity to place this in context. PRAO is not part of the Criminal Division and does not report to me. My personal understanding is that PRAO's assignment is to give guidance to prosecuting attorneys regarding issues that may arise under the professional ethics rules in the states in which the prosecuting attorneys are admitted or practice. I also understand that among the rules on which PRAO advises are those canons of professional ethics that specifically address communication between Department attorneys and represented individuals. I do not know PRAO's customary practice in rendering guidance or advice on attorney ethics questions in routine settings or in various contexts.

In stating my personal belief that I would not regard the e-mail traffic as constituting an official opinion of the Professional Responsibility Advisory Office, I am expressing my subjective standard based on what I would expect in the circumstances. Indeed, I still do not know whether PRAO has taken an official position on whether the professional ethics rules governing attorneys should have barred FBI agents from questioning Walker Lindh while he was in military custody in Afghanistan.

In my personal opinion, the legal questions raised by the FBI's desire to interview Walker Lindh were and are far from routine or customary. They involve, among other things, the interplay between the Fifth and Sixth Amendments and intelligence gathering during military operations overseas. Further, the ethics rules by their terms apply only to attorneys. Accordingly, it is unclear how such ethics rules could be applicable to an FBI agent who wishes to question a combatant overseas. See 28 C.F.R. 77.2 (explicitly excluding from the definition of attorney for ethics purposes "investigators or other law enforcement agents"). Yet another consideration is that the Supreme Court has established that a family member's retention of counsel for a suspect does not create a legal bar to questioning where the suspect has waived his Miranda rights. In Moran v. Burbine, 475 U.S. 412 (1986), the Court held that although an adult defendant's sister had retained counsel without defendant's knowledge, it was not a constitutional violation for police to fail to inform the defendant of that fact when they obtained his Miranda waiver and questioned him. The Court also held that prior to the initiation of adversary judicial proceedings, no Sixth Amendment right would attach.

In expressing my personal belief that I would not regard the cited e-mail as PRAO's official position, I have in mind my expectation that an official opinion addressing the novel and complex issues involving questioning of an American captured with the enemy during operations overseas would include explicit analysis of the above factors (and others). Accordingly, in reading the quoted e-mail, I interpret it at most as an initial step toward an official position. In so stating, I do not mean to be critical of the attorneys for exchanging their views (of which I was unaware at the time).

B. The Feeney Amendment

1. You state that you had "no part in drafting" the Justice Department's letter of April 4, 2003, which expressed "strong support for Congressman Feeney's amendment to the House version of S.151." As Assistant Attorney General in charge of the Criminal Division, however, you surely had some involvement in gathering information, consulting with other practitioners and policymakers, and advising the Attorney General and other top officials on this important legislation. Please describe the full extent of your involvement in the development of the Justice Department's position on the Feeney Amendment.

Response: Generally, the Department has raised its concerns about the issue of downward departures before Congress on previous occasions. On July 10, 2002, for example, United States Attorney William Mercer and I testified before the Senate Subcommittee on Crime and Drugs on the issue of punishment of white collar crime. This testimony was part of the Congressional process leading to enactment of the Sarbanes-Oxley Act of 2002, in the wake of the events at Enron, Worldcom and other corporations. In that testimony both Mr. Mercer and I commented on the fact that some judges were overly willing to depart downward in the case of white collar offenders.

I understand that during the fall of 2002 and early 2003, other officials of the Department testified and wrote to Congress about the subject of downward departures in the context of child victim and sexual crimes. To my knowledge, these communications included a letter from Assistant Attorney General Daniel J. Bryant to the Speaker of the House dated October 4, 2002 and testimony by Associate Deputy Attorney General Daniel Collins before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on October 2, 2002 and March 11, 2003.

During this time, I did not personally gather information or consult to a significant degree with outside policymakers and practitioners on the issue of downward departures. Shortly before the Feeney Amendment was adopted I became aware that it was pending. Although others within the Department of Justice were primarily engaged in addressing the Amendment, I did have a few discussions about the Amendment generally with others at the Department. I personally had no part in drafting Acting Assistant Attorney General Brown's April 4 letter, nor did I review it before it was sent.

2. You state that you are unfamiliar with the record of Judge James Rosenbaum, a Reagan-appointed district judge whose sentencing record was subject to extensive investigation and attack in the House Judiciary Committee. You also stated that you took no part in drafting the Justice Department's letter of April 4, 2003, which described the Feeney Amendment as an appropriate response to the "well known" problem of judges "ignoring the Guidelines in favor of ad hoc leniency." At your hearing, however, you stated that you were aware of "tremendous regional disparities" in departure rates. You said, "In some districts, they are quite infrequent. In some districts, they are, in fact, much more regular." What disparities are you referring to?

Where are they documented? And did you mean to suggest that you were not previously aware of the Rosenbaum controversy? If not, based on what you do know from any source, please answer the questions posed in the last paragraph of Senator Kennedy's Question 4 of May 12th.

Response: In mentioning disparities at my hearing, I was referring to downward departures other than for "cooperation." These disparities are reflected, for example, in the United States Sentencing Commission's Sourcebooks of Sentencing Statistics. The 2000 and 2001 Sourcebooks note that rates of nonsubstantial assistance downward departures range from a low of approximately 2 to 3 percent in some districts to highs of 25 to 30 percent in others, such as the District of Connecticut, Eastern District of Washington, and Eastern District of Oklahoma (excluding southwest border districts which present separate issues). In referring to disparities in my testimony, of course, I only meant to illustrate that they have presented an issue that needs to be addressed, and I explicitly testified that these are matters about which "reasonable people can disagree."

So far as the matter of Judge Rosenbaum is concerned, my awareness of a controversy involving his testimony comes from a news article, the details of which I do not remember. I have not read Judge Rosenbaum's testimony nor have I read the Committee report. Under these circumstances, I have no basis to evaluate Judge Rosenbaum's record or to believe that he is anything other than a conscientious judge. Equally, I have no basis on which to offer an opinion about the positions taken by the House Judiciary Committee, or about what has transpired between the Committee and the judge.

I reaffirm that I do not endorse the idea that judges should be required to defend their individual decisions outside the framework of their judicial opinions and orders. At the same time, judges must be prepared to accept that they may be criticized for unpopular decisions.

3. You stated that even though you share Chief Justice Rehnquist's concern that judges should not be intimidated or pressured by Congress about sentencing decisions they have made, you cannot express an opinion whether Congress should repeal sections (h) and (l) of the Feeney Amendment, as enacted, because "[a]s a current Department of Justice official my professional obligations make it inappropriate" for you to answer. At the same time, you told Senator Feingold that you cannot say whether the Department has ever threatened or suggested that a defendant may be declared an enemy combatant if they did not plead guilty to criminal charges, because you are "answering questions in my personal capacity as the nominee for a federal judicial position, and not in my official capacity." Please answer the following questions in your personal capacity as the nominee for a federal judicial position, and not in your official capacity as a current Justice Department official:

a. Chief Justice Rehnquist wrote that the Feeney Amendment "would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences." The Judicial Conference of the United States vigorously opposed the Feeney Amendment. Given your extensive

background as a prosecutor and defense attorney, do you share any of the concerns that these judges have expressed about the Feeney Amendment?

Response: I understand that the Chief Justice's letter of April 7 and the Judicial Conference submission of April 3 address the Feeney Amendment as passed by the House. I also understand that the final bill which was enacted modified some elements of the Amendment which the Judicial Conference found objectionable. For example, the final bill eliminated non-enumerated downward departures only in the case of certain child victim and sexual crimes. These changes addressed some of the major concerns raised by the Judicial Conference.

That being said, I take seriously the judges' remaining concerns about the standard of appellate review and record keeping. How these changes will play out in practice will depend, among other things, on application of the new standard of review and upon implementation of the record keeping requirements. Therefore I cannot form a judgment at this point about whether the concerns expressed will be realized.

Finally, I should observe that while I have not seen the operation of departures as a judge, I have addressed the issue as both a prosecutor and as a defense attorney. There is validity to the argument that downward departures are a necessary escape valve for the truly atypical case, recognizing that no guideline structure can foresee all of the many variables arise in a case. There is also weight to the concern that an increase in extraordinary downward departures can generate disparities over time, and thus erode the principle of consistency embodied in the Guidelines.

b. At your hearing, you argued that even though the Justice Department sought the establishment of a *de novo* standard for appellate review of departures from the sentencing guidelines, it does not necessarily follow that the Supreme Court incorrectly interpreted the Sentencing Reform Act when it established a deferential standard of review in its 1996 decision *Koon v. United States*. In reaching its unanimous decision, however, the Court cited not only the text of the Sentencing Reform Act, but also the "traditional sentencing discretion" of trial courts and "institutional advantage" of federal district courts over appellate courts to make fact-based sentencing determinations. Please explain your view of the proper roles of trial judges and appellate judges in criminal sentencing matters. If you are confirmed as a judge on the Third Circuit, do you believe you will be able to show proper respect for the traditional sentencing discretion of district judges while applying the *de novo* standard established by this legislation? In what types of cases would it be appropriate not to respect that tradition sentencing discretion? How will you be able to do this?

Response: As a general matter, trial judges who have had the opportunity to become fully acquainted with the facts of the particular case, who have faced the defendant, and who may have sat through a full trial are, as the *Koon* Court said, best situated from an institutional standpoint to make fact specific determinations called for in

sentencing. At the same time, appellate courts are capable of deciding legal issues that affect sentencing. Thus, for example, Koon said that even under the traditional approach to sentencing a court of appeals “need not defer” to a trial court’s resolution of a question of law. 518 U.S. 81, 100 (1996).

The new statute applies the de novo review standard to certain aspects of the district court’s application of the guidelines to the facts, but does not repeal the preexisting standard of review for the trial court’s judgments about credibility and findings of fact. Thus, some of the fundamental elements of traditional deference remain unchanged, but review of the application of the guidelines to the facts is undertaken pursuant to the new standard. If confirmed, I believe that I will be able to respect the traditional sentencing discretion of the trial judges in those areas which the statute permits while applying a de novo review standard where the new law mandates. Of course, the application of standards of review in particular cases is often a problem of exquisite specificity, and it is impossible (and inadvisable) to generalize in advance. If confirmed, I will have the benefit of briefing, oral argument, consultation with judicial colleagues, and developing case law to aid in applying the new rule.

C. Firearm Purchases by Suspected Terrorists

1. You state that you were not involved in “the decision concerning what restrictions, if any, would apply to an FBI review of the audit log records.” As Assistant Attorney General in charge of the Criminal Division, however, you were surely aware that the F.B.I. wanted to investigate the recent gun purchases of suspected terrorists after September 11th. Were you or anyone else in your Division involved in any way in the discussions leading to the decision? If so, what was that involvement? If not, explain how and why a matter involving such an important criminal investigation could be decided without the involvement of the Criminal Division, and indicate what other officials and elements of the Department were involved.

Response: I was not involved in any discussions leading to the decision about what regulatory restrictions apply to the review of gun purchase records by the FBI. So far as I know, no one else in my Division was involved in this decision to any significant degree. Although I have no personal knowledge about the process, published reports indicate that the resolution of the issue of how to apply regulatory restrictions on gun purchase logs involved communication mainly among representatives of the FBI, Office of Legal Counsel and Office of Legal Policy. Although attorneys with criminal law expertise are often consulted about matters of policy, interpretation of Department regulations addressing investigative agencies does not always include Criminal Division attorneys. Among other repositories of relevant expertise are the United States Attorneys’ Offices and experienced prosecutors in various other components.