Senator Richard J. Durbin
Questions for the Record for Karen Tandy

1. **In April, Congress enacted the Illicit Drug Anti-Proliferation Act (also known as the RAVE Act), which expands the federal "crack house statute" to more easily apply to outdoor and one-time events. On May 15, 2003, the DEA's Office of Chief Counsel issued guidance on how this law should be enforced. On May 30, 2003, this guidance was misinterpreted by a DEA Special Agent in Billings, Montana, which led to the cancellation of an event at the Eagles Lodge.**

I understand that in response to this incident, the DEA has issued supplemental guidance that "makes clear that property owners not personally involved in illicit drug activity would not be violating the Act unless they knowingly and intentionally permitted on their property an event primarily for the purpose of drug use." (Letter of June 19, 2003 from William B. Simpkins, DEA Acting Administrator, to Senator Joseph Biden.) I understand that the supplemental guidance also establishes procedures within the DEA to obtain Headquarters review of proposed enforcement activity under the Act.

A. I first would like to commend the DEA for its response to the incident in Billings, Montana. Will you provide Congress with the revised DEA guidance on the enforcement policies of the Illicit Drug Anti-Proliferation Act?

Please be assured that I share your appreciation for the importance of maintaining the public confidence with respect to the responsible implementation of this new law. I have been advised that, as a preliminary matter, on May 15, 2003, the DEA's Office of Chief Counsel issued guidance which was distributed to all DEA offices and posted on the agency's intranet. The guidance informed personnel that requirements of "knowledge" and "intent" were not changed by the Act. Accordingly, legitimate event promoters, such as bona fide managers of stadiums, arenas, performing arts centers, and licensed beverage facilities should therefore not be concerned that they will be prosecuted simply based upon or just because of illegal patron behavior.

I have been further advised that, on June 17, 2003, supplemental guidance which reiterated and expanded upon the initial guidance was distributed throughout the agency. The guidance made clear that property owners not personally involved in illicit drug activity would not be violating the Act unless they knowingly and intentionally permitted on their property an event primarily for the purpose of drug use. Consequently, legitimate property owners and event promoters would not be violating the Act simply based upon or just because of illegal patron behavior.

I understand that this guidance also establishes procedures within DEA to obtain Headquarters review of proposed enforcement activity under the Act, including approaching any private person or organization about possible application of the statute to a particular event or case. Should I be confirmed as Administrator, I would be steadfastly committed to insuring that all DEA activity under the Act complies with its terms and the First Amendment.

B. Does the DEA and/or Department of Justice intend to issue formal regulations regarding the enforcement of this Act? If so, when? If not, why not?

At this point, I am not aware of any plans by the Department of Justice to issue formal regulations regarding the enforcement of this Act. As for DEA, I have been advised that enforcement procedures are typically issued via internal policy statements, as has been done already in this case. To date, DEA has issued the following guidance on this amended statute: (1) On May 15, 2003 a memorandum from DEA's Chief Counsel, describing the IDAPA amendments to 21 U.S.C. § 856, was issued to all DEA divisions. This memorandum was also posted on DEA's internal website, making it readily available to all DEA personnel. (2) On June 17, 2003, the Acting Administrator issued a teletype to "DEA Worldwide," entitled "Specific Guidance for Utilization of the Illicit Drug Anti-Proliferation Act of 2003; Amendment to "Crackhouse" Statute, Title 21, U.S.C. 856." This teletype referenced the May 15, 2003 Chief Counsel memorandum noted above. It also provided DEA personnel additional legal and procedural guidance regarding use of this statute. (3) In an article dated June 20, 2003, DEA posted guidance on this statute on DEA's publicly available internet website, www.dea.gov. This guidance is also available to DEA personnel via the website. (4) On July 3, 2003, DEA posted a synopsis of a recent Federal appellate court decision involving 21 U.S.C. § 856(a)(2), *McClure v. Ashcroft*, No. 02-30357, 2003 WL 21418097 (5th Cir. Jun. 20, 2003), on DEA's internal website

C. Does the guidance ensure that property owners are allowed to engage in legal activities, including playing certain kinds of music and allowing people to dance with legal items, such as glow sticks?

The current guidance requires a thorough review of each situation on a case-by-case basis. As in other types of investigations, DEA recognizes that lawful activity, such as playing certain types of music, or using lawfully possessed items such as glow sticks, cannot by themselves give rise to prosecution under the Act. On the other hand, it has long been recognized that actions or circumstances that are lawful or consistent with innocence when viewed separately, may give rise to reasonable suspicion of unlawful activity when viewed together in the context of a specific situation. *See, e.g., United States v. Arvizu*, 534 U.S. 266 (2002). Accordingly, I believe that DEA must consider the totality of circumstances in each case and how these circumstances apply to the law in question.

D. Does the guidance contain any provisions regarding public safety measures, including the provision of bottled water, air-conditioned rooms, and paramedics on call? If so, what are those provisions? If not, would you be willing to supplement the guidance to clarify that such precautions are not evidence of "knowledge" or "intent" regarding drug use?

DEA must consider all facts and circumstances in assessing each case. DEA requires an individual management and legal review of any proposed investigative or enforcement activity under the statute. In addition, the guidance directs DEA personnel to undergo similar Headquarters review prior to contacting the public or advising any person or organizations that the statute may apply to a specific event. In conducting this assessment, DEA recognizes that the public safety precautions referenced in your question cannot, standing alone, give rise to prosecution under the statute. However, also as noted above, otherwise innocent or lawful actions may, when considered together in the context of a particular situation, legitimately contribute to suspicion of unlawful activity.

E. Would you be willing to develop guidance or regulations to create a legal "safe harbor" for property owners, under which owners could be guaranteed protection from prosecution if they undertook certain measures to deter drug use?

Given the wide variety of circumstances under which this statute could apply, it is not feasible to provide meaningful universal regulations. Any such regulations would necessarily be so generic as to provide little guidance, and may potentially serve as a blueprint for actual violators to evade prosecution. Under current policy, DEA personnel must consult with Headquarters management officials and agency counsel before taking any enforcement or investigative action under the statute; likewise they must do so before even approaching any private person or organization about possible application of the statute to a particular event or case.

I believe that this proactive, case-specific review provides far more effective protection than would the issuance of generic, non-specific guidance or regulations.

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2 **The California Compassionate Use Act (also known as Proposition 215) allows seriously ill people, who have a doctor's recommendation, to cultivate and use marijuana as a form of treatment. As permitted under this state proposition, the City of Oakland enacted a medicinal marijuana ordinance, and under the auspices of this ordinance, Ed Rosenthal grew marijuana to be sold for medicinal uses. In 2002, DEA agents raided Mr. Rosenthal's facility and arrested him for marijuana cultivation and conspiracy. Although Mr. Rosenthal was convicted of these charges, last month a federal judge sentenced him only to one day in prison and a fine of $1,000.**

I realize that marijuana is classified as a Schedule I drug and therefore the federal government does not recognize the medicinal benefits of marijuana. At the same time, according to California Attorney General Bill Lockyer, federal raids of medicinal marijuana providers such as Mr. Rosenthal began in 2001, despite the fact that the California state proposition passed in 1996.

A. In light of Mr. Rosenthal's sentence, do you believe the DEA's limited resources should be consumed on raids of medicinal marijuana providers? If so, what priority would you give such raids, in relation to other DEA enforcement activities?

I am advised that Mr. Rosenthal is appealing his conviction I therefore believe it would be inappropriate to comment on specifics relating to his case.

Regarding the larger question, in my view, DEA's priorities should reflect the need to encourage adherance to the law. As Justice Powell noted, writing for the Court in Wayte v United States, 470 U.S. 598 (1985), it is not improper for the government to prosecute individuals who make a point of disobeying the law, and encouraging others to disobey it, even if the disobedience is said to be for reasons of conscience.

B. Would you be willing to support a moratorium on such raids until Congress can hold hearings on this matter?

If I am confirmed as Administrator of the DEA, it will be my duty to see to the uniform enforcement of federal law. I do not believe it would be consistent with that duty for me to support a moratorium on enforcement of this law, or any law, in selected areas of the country.

C. Are you aware of information regarding the medicinal benefits of marijuana (for example: an editorial in the New England Journal of Medicine on July 30, 1997; the 1999 Institute of Medicine report "Marijuana and Medicine: Assessing the Science Base," authorized by the White House Office of National Drug Control Policy; and the 1988 ruling from the DEA's chief administrative law judge, Francis L. Young)? If not, would you be willing to review these publications?

I am not personally familiar with the sources you cite discussing the putative "medicinal benefits of marijuana." However, I am advised that to date, no clinical studies have been submitted to the FDA that have demonstrated that smoked marijuana can be used safely and effectively as a medicine. I am also advised that the DEA has registered eight researchers to further examine the possible medicinal benefits of smoking marijuana.

Moreover, in the 1980's the National Cancer Institute and a pharmaceutical company studied THC, the active constituent of marijuana, as a medicine for the relief of nausea and vomiting associated with cancer chemotherapy. The FDA subsequently approved a product containing THC (Marinol) as a medicine. As a result, the DEA moved Marinol into Schedule II and ultimately into Schedule III of the CSA.

I would be willing to review the materials you cite should I be confirmed as DEA Administrator.

D. Do you believe that marijuana has medicinal benefits? Upon what evidence do you base your opinion?

As I have noted, the active ingredient in marijuana, THC, has been accepted as having medicinal value when processed into Marinol. Marijuana itself, however, has not been shown to have medical benefits; accordingly, I have no basis for believing that marijuana, and specifically smoking marijuana, has any such benefits.

E. Would you support the creation of a special, well-balanced commission to evaluate the reclassification of marijuana from a Schedule I drug (considered to be potentially addictive and with no current medical use) to a Schedule II drug (potentially addictive but with some accepted medical use)?

I believe that current law and judicial review provide adequate mechanisms for the balanced review of the appropriate scheduling of marijuana. This system has been in place for over thirty years. If such a commission is established, I will, if confirmed as Administrator, offer my full cooperation. My own view is that the present mechanisms for examining classification issues are sufficient.