

Senator Russell D. Feingold  
Questions for Christopher Wray, Nominee to be Assistant Attorney General  
for the Criminal Division, U.S. Department of Justice

July 9, 2003

- (1) Please describe generally your role in the PENTTBOM investigation, including any involvement with the issue of detention and treatment of individuals held on immigration violations, their access to counsel and any other issue pertaining to the PENTTBOM investigation on which you were consulted or on which you worked.

As Principal Associate Deputy Attorney General, and thus a member of the senior management within the Justice Department, I have had substantial leadership and oversight responsibilities relating to all criminal investigations and prosecutions, including the PENTTBOM investigation. The PENTTBOM investigation into the attacks of September 11, 2001, and the preceding and ongoing activities of al-Qaeda, constitutes the largest and most broad-ranging criminal investigation in U.S. history, and has been our top priority. The planning and coordination of this massive undertaking have required a correspondingly massive dedication of leadership time and effort that defies summarization or quantification. Particularly in the immediate aftermath of the attacks, the senior Department management -- as well as the thousands of dedicated lawyers, agents, and support staff within the Department -- worked virtually around the clock under extreme pressure and in difficult conditions to organize and press forward with tracking down the perpetrators of these horrendous acts. While

07/14/03, MON 20:24 FAX

2/04

answers to these questions represent the best of my recollection, the intense context in which many of these events occurred necessarily prevented careful commemoration.

Generally, with respect to the PENTTBOM investigation, my primary role as Principal Associate Deputy Attorney General involved consultation with members of the FBI, Criminal Division, U.S. Attorney's Offices and other components regarding particular criminal investigations and prosecutions. I also attended and participated in frequent briefings by the CIA and FBI regarding specific threats. Immigration matters, including policy issues regarding the detention of illegal aliens for immigration violations, were not part of my portfolio. Nor did I work with INS officials on detention issues or serve as a part of the "SIOC Working Group" described in the Inspector General's report.

(2) The recent report by the Justice Department's Inspector General on the detention of immigrants during the investigation of 9/11 recounts several exchanges between you and Kathy Hawk Sawyer, then Director of the Bureau of Prisons:

Hawk Sawyer . . . told the OIG that she had conversations with David Laufman and Christopher Wray from the Office of the Deputy Attorney General, in which she was told to "not be in a hurry" to provide the September 11 detainees with access to communications - including legal and social calls or visits - as long as the BOP remained within the reasonable bounds of its lawful discretion. Hawk Sawyer emphasized that Department officials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to "do their job."

... Wray stated that when he contacted Hawk Sawyer about some specific criminal inmates connected to terrorism who were already in BOP custody at the time of the September 11 attacks, he discussed having these inmates placed under the most secure conditions possible. He stated that while he does not recall giving any specific instructions, he stated that the "spirit" of his comments was that the BOP should, within the bounds of the law, push as far toward security as they could. (Inspector General's report at 112-113.)

(a) In your July 7, 2003 response to questions from Senator Leahy, you state that "the only conversations I recall having with Ms. Hawk Sawyer concerned individuals already convicted of terrorist offenses." Please describe each conversation you had with Ms. Hawk Sawyer concerning convicted terrorists or individuals held on criminal or immigration charges in connection with the PENTTBOM investigation, including approximate dates on which the conversations took place and whether other individuals participated in those communications.

The only conversations I recall having with Ms. Hawk Sawyer concerned individuals who had already been convicted of terrorist offenses as of September 11, 2001. I do not recall having any conversations with her regarding individuals detained on immigration violations, or even regarding individuals detained (but not yet convicted) on criminal charges. As I recall, we discussed generally security concerns relating to convicted individuals already in BOP custody on September 11<sup>th</sup> and the importance of prioritizing security regarding those individuals, within the bounds of the law and BOP's own policies. Most of our discussions focused on specific inmates (already convicted; not detainees), although I believe we briefly discussed the convicted terrorists as a group as well. To the best of my

**recollection, our conversations occurred in the September 2001-December 2001 timeframe. I do not recall anyone else participating in the conversations I had with Ms. Hawk Sawyer.**

(b) In the course of those conversations with Ms. Hawk Sawyer, did you make any statements that would have clarified that your instructions pertained to convicted terrorists only, not to the individuals detained after September 11?

**I do not recall the precise words of the conversations I had with Ms. Hawk Sawyer, although I do believe it was clear from both the context and language of our conversations that we were discussing previously convicted terrorists only.**

(c) Approximately how many times did you provide instructions or advice, to Ms. Hawk Sawyer or other officials with the Bureau of Prisons, with respect to criminal defendants detained in the course of the PENTTBOM investigation?

**I do not recall providing any instructions or advice to Ms. Hawk Sawyer or other BOP officials regarding criminal defendants detained in the course of the PENTTBOM investigation. As I mentioned above, I only recall discussing previously convicted defendants who were already in BOP custody as of September 11, 2001.**

(c) Approximately how many times did you provide instructions or advice, to Ms. Hawk Sawyer or other officials within the Justice Department or its components, with respect to aliens detained on immigration charges in the course of the PENTTBOM investigation?

**I do not recall providing instructions or advice to Ms. Hawk Sawyer or other Justice Department officials regarding aliens detained on immigration violations in the course of the PENTTBOM investigation.**

(d) Please describe each conversation you had with any other Justice Department official concerning the detention of aliens on immigration violations in connection with the PENTTBOM investigation. Please specify when each conversation took place, what prompted it, and to whom you spoke.

**Over the roughly 22 months that have elapsed since September 11<sup>th</sup>, I have had countless conversations with officials in the FBI, Criminal Division, U.S. Attorney's Offices, and other components regarding specific, individual PENTTBOM-related criminal defendants, targets, subjects, and witnesses, many of whom were detained on immigration violations. Likewise, in the course of threat briefings from intelligence and law enforcement officials, I have discussed individual subjects of terrorism investigations, many of whom were detained on immigration violations.**

(e) Did you make any effort to distinguish among convicted terrorists, criminal defendants and immigration detainees in your instructions to other BOP officials?

**I do not recall the precise words of the conversations I had with BOP officials, although I do believe it was clear from both the context and language of our conversations that we were discussing convicted terrorists only.**

(f) Other than discussing your instructions to Ms. Hawk Sawyer with the Inspector General, did you inform or advise other Justice officials about your

conversations with Ms. Hawk Sawyer and your instructions to her? If yes, whom did you inform, when did you inform them and what did you say?

**I do not recall whom, if anyone, at the Department of Justice I informed about my conversations with Ms. Hawk Sawyer at the time of those conversations or in the approximately year-and-a-half between that time and my interview by the Office of Inspector General. Since the publication of the Inspector General's report, I have described what I recall about those conversations to a number of colleagues at the Department, particularly in preparation for my confirmation hearing.**

(g) Please describe any conversations you had with Assistant Attorney General Michael Chertoff or his staff regarding the detention of criminals or immigration violators in connection with the PENTTBOM investigation.

**Over the roughly 22 months since September 11<sup>th</sup>, I have had countless conversations with Assistant Attorney General Michael Chertoff and other Criminal Division personnel regarding specific, individual PENTTBOM-related criminal defendants, targets, subjects, and witnesses, many of whom were detained on criminal charges or immigration violations. As I mentioned at the outset, it would be impossible for me to describe specific conversations in any detail.**

(3) (a) As concerns about the conditions of detention of September 11 detainees were raised by various public interest groups, the news media, and public officials, including a letter on October 31, 2001 from myself and several other Members of Congress and during the course of Senate Judiciary Committee hearings on November 28, December 4, and December 6, 2001, what steps, if any, did you take to ensure that immigration detainees were not subject to unduly harsh conditions or deprived of access to counsel?

While fighting the threat of terrorism is a paramount concern for the Department of Justice, that battle must, of course, be waged within the letter and the spirit of both the Constitution and our federal laws. As a former defense attorney, I have listened seriously to concerns about the treatment of immigration detainees, and remained alert to any potential abridgement of the constitutional rights of those affected by our efforts. If confirmed as Assistant Attorney General for the Criminal Division, I will continue to take such concerns seriously, and remain vigilant for any constitutional issues raised by the vitally important role criminal law enforcement continues to play in the war on terrorism.

As explained above, I do not recall discussing immigration detainees, or their conditions of confinement or access to counsel with BOP officials. Numerous other officials throughout the Department focused on immigration issues. I note, however, that the Inspector General's report indicates that Director Sawyer "*emphasized that Department officials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to 'do their job.'*" [p.113 (emphases added)].

(b) Please explain what role, if any, you played in preparing Mr. Chertoff for his appearance before the Senate Judiciary Committee on November 28, 2001, or in helping Assistant Attorney General Viet Dinh prepare for his testimony before the Committee on December 4, 2001, or in helping the Attorney General prepare for his appearance before the Committee on December 6, 2001.

I do not recall participating in Assistant Attorney General Viet Dinh's preparation for his December 4, 2001 appearance before the Senate

**Judiciary Committee, nor in the Attorney General's preparation for his December 6, 2001 appearance. I recall being invited to participate in preparing Assistant Attorney General Michael Chertoff for his November 28, 2001 appearance, but I believe that time constraints ultimately interfered with my doing so.**

- (3) The Justice Department has said it will inform the Inspector General on July 11 which of the recommendations in the Inspector General's report it is adopting. If confirmed, what measures, other than those suggested by the Inspector General's report, would you support to ensure that future investigations are fair and effective?

**The Department generally, and I personally, learned a tremendous amount from the experience of responding to the horrific attacks on September 11, 2001, as well as from the critiques of that response by Members of Congress, the Inspector General, and others. If confirmed, I would apply that experience to our response to any future attacks -- attacks which we strive daily to prevent. We must plan for our general response while retaining the flexibility, within the bounds of the law, to craft our specific response based on the circumstances actually presented. In general, I believe we have learned three basic lessons in dealing with the issues presented in the Inspector General's report:**

- (1) **We need to devote more resources, if they are available, to completing the investigations on and "clearing" illegal aliens who are in custody based on their potential terrorism ties. Since 9/11, with the help of the Congress, the Federal Government -- and the Justice Department and FBI in particular -- have made great strides to expand available counterterrorism resources, particularly the number of specially trained agents, analysts, and attorneys.**

- (2) We need to improve coordination among law enforcement, intelligence, and immigration agencies to improve information-sharing and avoid delays due to administrative issues. The USA PATRIOT Act and other post-9/11 measures have greatly improved our abilities in this area, and if confirmed, I will continue to work with my colleagues in law enforcement, intelligence, and homeland security to improve our formal and informal means of coordination.
- (3) We need to ensure that detainees are treated fairly and appropriately. Abuse of detainees is unacceptable, and this fact should always be emphasized in responding to future events.

The Department is preparing a written response to the Inspector General's recommendations. If confirmed, I would study those recommendations further to address the extent to which they address the three basic areas outlined above and whether additional measures can and should be put in place, recognizing again that we do not want to implement policies that would prevent us from responding effectively and immediately to the varied nature of the threats we face.

- (4) What involvement, if any, did you have in the decision to seek denial of bond in all cases involving September 11 detainees? Were you consulted at any point about this decision? If so, what was your view? When did you first become aware of the "no bond" policy?

I do not recall participating in any policy decision to seek the detention of all illegal aliens apprehended during the PENTTBOM investigation. I was aware of numerous specific instances in which an illegal alien was detained in the course of that investigation, but I do not recall any such across-the-board policy apart from reading of it in the Inspector General's report.

07-14-04 MON 20:26 FAX

2013

(5) What involvement, if any, did you have in the decision to delay removal of detainees with final removal orders and voluntary departure agreements? Were you consulted at any point about this decision? If so, what was your view? When did you first become aware of this policy?

**I do not recall participating in any policy decision to delay the removal of illegal aliens detained subject to final removal orders and voluntary departure agreements. I was aware of specific instances in which an illegal alien's removal was delayed until appropriate law enforcement and intelligence investigation had been completed, but I do not recall any such across-the-board policy apart from reading of it in the Inspector General's report.**

(6) On June 23, 2003, Ali Saleh Kahlah al-Marri, a Qatari national indicted for credit card fraud and making false statements, was designated an enemy combatant and transferred to the control of the Department of Defense.

(a) What involvement, if any, did you have in the decision to classify al-Marri as an enemy combatant?

**The decision to designate someone as an enemy combatant is not a decision made by the Department of Justice. As a member of the Department of Justice's senior leadership, however, I was involved in reviewing the issues presented by the al-Marri matter and providing legal advice on those issues to the decisionmakers.**

(b) At any point, were you consulted by other Justice Department or Defense Department employees about the decision, or asked to provide them with information regarding al-Marri or the issue of enemy combatants generally?

07/14/03 MON 20:28 FAX

013

**As I mentioned above, I was involved in reviewing the issues presented by the al-Marri matter and providing my legal advice on those issues to the decisionmakers. Again, however, the decision to designate someone as an enemy combatant is not made by the Department of Justice.**

(c) When did you first become aware that there was a possibility that al-Marri might be classified as an enemy combatant, or that he had been so classified?

**As part of our information-sharing activities and as we continually evaluate how best to protect national security, Justice Department officials periodically discuss (both internally and with other agencies) persons who have terrorist connections. Some such person may qualify as enemy combatants. I am sometimes involved in those discussions. As information was developed over time regarding al-Marri's connections with terrorist activity and, in particular, with other al-Qaeda operatives, he became a subject of these discussions. I learned of the President's formal determination to transfer al-Marri to the control of the Defense Department as an enemy combatant just after that determination was made on June 23.**

(7) On June 25, 2003, the *New York Times* cited "administration officials" as saying that the decision to classify al-Marri as an enemy combatant "was intended in part to try to cull more information from him." The article continued, "By declaring Mr. al-Marri an enemy combatant, the administration also sends a message to other terrorist suspects now in the criminal system about what could happen if they do not cooperate with investigators, officials said." A senior F.B.I. official reportedly said of other terrorism suspects, "If I were in their shoes, I'd take a message from this."

(a) If these reports are accurate, a clear message is being sent to defendants in terrorism-related cases: unless the defendant fully cooperates with investigators, relinquishing his or her Fifth Amendment right not to disclose potentially

incriminating information, he or she may face imprisonment for life without trial, without access to an attorney, and without communication with the outside world. This seems to undermine fundamental constitutional rights, including the right to a jury trial. Even if the Justice Department does not explicitly use the threat of enemy combatant classification to coerce cooperation, the possibility of "switching tracks" will give all terrorism defendants, guilty or innocent, reason to believe that insisting on their right to a jury trial could lead to a loss of their constitutional rights as criminal defendants. Does this result concern you?

As the Attorney General has said, each case is reviewed on an ongoing basis to determine how best to protect the American people from additional terrorist attacks, which is our top priority. Prosecuting terrorists in the criminal system, and detaining them as enemy combatants, are different legal processes with different advantages and disadvantages, which may change in relation to a particular terrorist over time, particularly as new information is developed. Within the criminal justice system, some terrorists may not cooperate and may go to trial on criminal charges (e.g., the recent Detroit convictions); others may cooperate and plead guilty to criminal charges (e.g., Lyman Farris); the President may determine that others shall be held as enemy combatants without ever being charged criminally (e.g., Jose Padilla); and that others may be charged criminally and later transferred to be held as enemy combatants (e.g., al-Marri).

I am confident that we would have prevailed with our criminal charges against al-Marri and ultimately would have obtained a conviction and substantial sentence. However, based in part on recently obtained intelligence from other detained al-Qaeda operatives, on June 23, 2003, the President determined that al-Marri is an enemy combatant and should be transferred to the control of the Department of Defense. This action was determined to provide the best way to protect national security by taking an al-Qaeda

**operative out of action until the end of the war against al-Qaeda, and also to provide the best opportunity for gathering intelligence against the enemy. I fully support that result.**

(b) As a former prosecutor, you have seen that the plea bargaining process gives defendants an enormous incentive to cooperate with investigators, and can lead defendants to produce valuable information that might otherwise not have been obtained. Cooperation by terror suspects can be vital to the prevention of future terrorist attacks. Now that al-Marri has been classified as an enemy combatant, and faces indefinite detention without charge, however, what incentive exists for him to cooperate with investigators?

**Both as a former prosecutor and as a former defense attorney, I do indeed believe that the plea bargaining process in the criminal system provides powerful incentives to defendants to plead guilty and to provide valuable information, and we have seen that belief borne out in a number of terrorism cases both before and after 9/11. Plea bargaining is not, however, the only means by which we obtain valuable intelligence from terrorists. Just as skillful agents often obtain critical information through interrogation of criminal suspects even before arrest, questioning of enemy combatants can be very effective in obtaining intelligence to prevent future attacks. In addition, as a non-U.S. citizen, al-Marri is potentially eligible for trial by military commission under the President's November 2001 Military Order.**