

Senator Joseph R. Biden, Jr.
Questions for the Record for Karen Tandy

2. Ms. Tandy, there have been a number of press reports about a DEA Agent in Billings, Montana who misinterpreted the Illicit Drug Anti-Proliferation Act when he approached the manager of the local Eagles Lodge to warn her that she may be violating the new law if the Lodge allowed the National Organization to Reform Marijuana Laws (NORML) to have a fundraiser at their facility.

I was troubled to hear this because, according to press reports, the Eagles Lodge had no knowledge that there might be drug activity at their location before the DEA approached them. And following the DEA Agent's visit, the Lodge decided to cancel the NORML event, leading to an outcry from various groups that the new law has stifled free speech.

As I'm sure you know, the law only applies to those who have "knowingly and intentionally" held an event "for the purpose of" drug use. It does not seem that the Eagles Lodge actions came anywhere close to that high legal standard.

Representatives from the DEA's chief counsel's office assured my staff that they shared my understanding of the law and that this interpretation of the statute was conveyed to all DEA field offices shortly after the bill was signed into law. Supplemental guidance was issued last week in a memo to field agents making 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. Legitimate property owners and event promoters would not be violating the Act simply based upon or just because of illegal patron behavior.

As Administrator, will you continue to abide by this interpretation of the Illicit Drug Anti-Proliferation Act?

Yes. If confirmed as Administrator, I will honor all requirements of the statute, including specifically those elements addressing an owner or manager's state of mind. I appreciate that the Act's standards regarding "knowledge" and "intent" exist to protect those innocently involved, such as legitimate event promoters or sponsors, as well as managers and owners of locations where events may be held.

Was the DEA legal guidance provided just to certain Agency personnel (e.g., Special Agents in Charge, Offices of Legal Counsel), or to all Agency staff? If it has not been provided to all staff, do you believe that providing this broad circulation would help ensure accurate interpretation and application of the law going forward? If it has been provided to all staff, please explain process by which it was so provided.

I have been advised that DEA guidance has been made broadly available. To date, DEA has issued the following guidance on the 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), *McChure v. Ashcroft*, No. 02-30357, 2003 WL 21418097 (5th Cir. Jun. 20, 2003), on DEA's internal website. This is an illustration of the continuing efforts of DEA's Office of Chief Counsel to disseminate timely information on pertinent legal developments.

How can you reassure people who may be skeptical of my legislation that it will not be enforced in a manner that has a chilling effect on free speech?

I am mindful of the potential impact on First Amendment protections that may arise in the enforcement of this statute. I understand that DEA already has issued guidance to its personnel alerting them to the potential First Amendment implications of the statute, and directing close consultation with Headquarters senior management and agency legal counsel prior to any investigative or enforcement activity under the statute. DEA now 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 organization that the statute may apply to a specific event.

As Administrator, I would continue to emphasize and enforce internal procedural safeguards to ensure that our mission is conducted in a manner that fully complies with First Amendment and other constitutional protections.

Will Agents continue to have to contact DEA Headquarters before using the law in order to make sure that it is interpreted properly? Will this requirement to contact headquarters apply to informal situations such as the one in Billings, Montana or just to more formal matters such as initiating an investigation?

I have been advised that current DEA policy requires close consultation with Headquarters senior management and agency legal counsel prior to any investigative or enforcement activity under the statute as well as prior to advising any person or organization that the statute may apply to a specific event. If confirmed as Administrator, I would insure adherence to the current guidelines under all applicable scenarios.
