

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

JESSELYN A. RADACK,

Plaintiff,

v.

UNITED STATES  
DEPARTMENT OF JUSTICE,

Defendant.

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Civil Action No. 04-1881 (HHK)

**RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR,  
IN THE ALTERNATIVE, RESPONSE TO  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT 3**

J.F.C.

STATEMENT

My name is John F. De Pue. I have been employed by the Department of Justice for approximately the past 25 years, first as an attorney in the Criminal Division's Appellate Section and then as the Senior Legal Advisor for Antiterrorism Activity in the Division's General Litigation Section. At present, I am a member of the Criminal Division's Terrorism and Violent Crime Section (TVCS), where I perform the duties of "legal counsel," providing legal advice relating combating terrorism and litigating issues relating to terrorism in the federal courts.

In early December 2001, James S. Reynolds, Chief of TVCS, asked me to consider a number of related legal issues that could arise if John Walker Lindh, who was then a military detainee, were to be questioned by the FBI, particularly the possible consequences for such an interrogation if preceded by military or intelligence questioning. It was apparent from my tasking that no one in our office had any concrete knowledge when such questioning might occur or the circumstances of any preceding questioning and that the analysis was to be based upon hypothetical possibilities. The Chief of the Appellate Section had a similar assignment and we discussed the possible need for some modification of Miranda warnings to deal with a preceding unwarned "intelligence" debriefing. As some point during my consideration of these issues, I became aware that Linh's parents had retained James Brosnahan, a California criminal defense attorney, to represent him and that Mr. Brosnahan was seeking access to Lindh. I was quite certain that such retention did not, alone, have Fifth or Sixth Amendment implications but was uncertain whether, under state ethics rules as applied to the Department of Justice by the "McDade" law, such retention created an ethical issue for any Department attorney involved in such questioning.

I initially raised the issue with Karen Hoppman, the ethics advisor for the Appellate Section. She was uncertain of the answer and, in turn, referred me to Jesselyn Radack, an attorney with the Department's Professional Responsibility Advisory Office (PRAO). I then phoned Ms. Radack and outlined my concerns, and she stated that she would get back to me. On Friday December 7, 2001, Ms. Radack sent me an e-mail stating that, in her office's view, because Brosnahan had been retained, an FBI interview of Lindh could not occur. The e-mail also provided several possible options to what PRAO termed an "overt, custodial interview." I immediately informed Jim Reynolds of PRAO's assessment and advice and believe that I forwarded Ms. Radack's e-mail to him. I also phoned Spike Bowman, the Deputy General Counsel for Intelligence at the FBI, but was informed that he was out of town. Early the following Monday, I was able to contact Spike, and I apprised him of Ms. Radack's assessment. Several hours later – perhaps at 11:00 a.m. – Spike called me and stated that he learned that the FBI interrogation had already occurred. I then notified Ms. Radack of this and she responded, via e-mail, with the view that the interview report might have to be sealed due an ethics

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violation. She also asked that I "keep her in the loop." Upon reading this, I responded with an expression of dismay and stated that we did not have any details concerning the circumstances under which the interview was conducted. During a further exchange of e-mails that day, I expressed concern that the propriety of conducting such interviews needed to be resolved at once and the FBI given unequivocal guidance.

I transmitted Ms. Radack's assessment verbally to Spike Bowman who stated that he would have no precise information concerning the circumstances of the interview pending receipt of a written report from the agent who conducted it. Further, I forwarded Ms. Radack's e-mail to Jim Reynolds and to the Chief of the Appellate Section. In turn, the Chief of the Appellate Section e-mailed me expressing the view that any such interview would not be subject to suppression. She subsequently e-mailed me a memorandum prepared by J. Douglas Wilson, formerly of the Appellate Section and presently the Criminal Chief at the San Francisco U.S. Attorney's Office that addressed the issue. The memorandum concluded that the sole remedy for a "McDade" violation was to discipline the responsible attorney and that suppression of any resulting statement was unwarranted. I furnished a copy of the memo to Jim Reynolds.

The issue subsided until January 2002, when Jim Reynolds informed me that the Criminal Division's leadership was disturbed that I had sought PRAO's advice in this matter. I recall that he asked me to retrieve additional items from my e-mail exchange with PRAO from my "trash," apparently so that he could furnish them to the Division's leadership. When, subsequently, an inquiry was made of all TVCS attorneys whether they possessed any discovery materials relating to the Lindh case, I identified the e-mail exchanges as likely falling within the ambit of the requests.

In early March 2002, I was in New Jersey due to a death in the family and was contacted at my family home by prosecutors with inquiries concerning my colloquy with PRAO and the timing of my calls to the FBI in relation to such advice. Upon my return, I learned that the e-mail exchanges were, in the prosecutors' view, within the scope of a defense discovery demand. During my absence, to assure compliance with the demand, Jim Reynolds had my computer trash "frozen" to prevent the items from being automatically deleted upon the lapse of 90 days. After providing my secretary, Emily Sullivan, access to my computer, she copied the entirety of the e-mail exchanges (both items between myself and PRAO, and myself and Appellate) to a disk, and hard copies were furnished to the prosecutors for ex parte, in camera review by the trial judge in Lindh. I subsequently learned that, following review of the material, the trial judge ruled that the items were not discoverable and would remain placed under seal. This left the defense with only a chronological summary of the exchange and not the actual contents of the e-mails.

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On Friday, June 14, 2002, at approximately 11:00 a.m., I received a phone call from a person who identified himself as Michael Isakoff of Newsweek magazine. He informed me that he had in his possession my e-mail exchange with PRAO and stated that he intended to publish them, as well as my name, in the copy of Newsweek for the following week. In an intimidating

manner, he inquired what I had done upon receiving advice from PRAO that a potential contact with Lindh would raise ethical issues, i.e., precisely whom I contacted and when. I responded by stating that any such inquiry should be made to the Department's Office of Public Affairs. I contacted that office and recounted the conversation immediately after the call terminated.

During the period between December 7, 2001 and June 14, 2000, I provided only those persons identified above with copies of my e-mail exchanges with PRAO and Appellate. I did not download and retain a complete set for myself, and printed for personal retention only the December 7, 2001 advice from PRAO stating that an ethical problem could result from an FBI interview of Lindh, and the advice of December 10, 2001 that the ensuing interview might have to be sealed. To my knowledge, no one other than those identified previously, had access to my computer password or to my computer so as to place them in a position where, unbeknownst to me, they could access these e-mails. Although I discussed issues relating to the e-mail exchanges with colleagues in the Section, I never provided anyone in the office, other than the persons identified above, with copies of any of the e-mails. Finally, I state unequivocally that I never provided Michael Isakoff or anyone else affiliated with the press or the news media copies of these exchanges.

Dated: 26 June 2002

  
John F. DePue