

TF 39 The Federal Death Penalty - RUSH TRANSCRIPT

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Harry Litman [00:00:22] Welcome back to Talking Feds, the prosecutors roundtable that brings together prominent former federal officials for a dynamic discussion of the most important legal topics of the day. I'm Harry Litman. I'm a former United States attorney and deputy assistant attorney general and a current Washington Post columnist.

Harry Litman [00:00:44] Today, we're having a special podcast about the federal death penalty. And we've got three former feds, all former United States attorneys with extensive experience to cover the topic. First, we're joined by Carmen Ortiz, counsel at Andersen & Krieger. Carmen is the former United States attorney for the District of Massachusetts in Boston, where she served from 2009 to 2017. She was the first woman and the first Hispanic person to serve in that position. During her tenure, she oversaw the investigation and litigation of many significant and complex criminal and civil cases, including the prosecution of Whitey Bulger. And then one very noteworthy capital case. What was that, Carmen?

Carmen Ortiz [00:01:35] Well, the one that, you know, across America drew a lot of attention was the Boston Marathon bombings. One of the culprits, Dzhokhar Tsarnaev, lived to then be processed in court to be he was indicted and he was charged and convicted of the underlying offenses. He I think —

Harry Litman [00:01:53] The younger brother. Is that right?

Carmen Ortiz [00:01:55] He was the younger brother. He was 19 at the time of the commission of the offense. But I do want to just quickly say that very notable as well and unusual for from Massachusetts was the capital case of Gary Simpson, who was a serial killer and killed three people.

Harry Litman [00:02:11] And what happened there? Give us the quick skinny?

Carmen Ortiz [00:02:13] The quick skinny is that Gary Simpson actually pled to the underlying offenses and went to trial and the sentencing phase. The jury imposed the death penalty. And eleven years later, the trial judge granted a new trial, a new penalty phase, saying that a juror had not, had lied to the court. And so granted a new trial and we pushed it forward. And Mr. Simpson was again, the jury imposed the sentence of death.

Harry Litman [00:02:40] And we'll talk more about this. But that's really sort of a feature of the system. You know, eleven years and then it's overturned. That's not that unusual in this area is we're going to find. OK, second, Johnny Sutton, Johnny not John please. Johnny Sutton, who served as the US attorney for the Western District of Texas from 2001 to 2009, during which he chaired the Attorney General's advisory group of U.S. attorneys. And he is currently a partner with the Ashcroft Group, working with the former attorney general John Ashcroft as U.S. Attorney. He brought the Sherman Fields case in which a federal prisoner escaped from local detention, went killed his girlfriend, who was pregnant

with another man's child. That was a capital case. He also, as a state prosecutor, personally tried and put on death row. Three different defendants had the experience with some of them of many years later, the Supreme Court overturning the verdicts. But he also was involved, very notably here, with the first modern execution in the federal system. Johnny, can you tell us briefly about your work there?

Johnny Sutton [00:03:55] Sure. I was part of the Bush-Cheney transition team for the Department of Justice back in 2000 and 2001. And whenever there is, one government changes to another government, especially when the parties change, there's big changes inside the department of justice and the political side. So we came in to make those changes, of course, that election was contested. So it was about five weeks late getting everything done. Of course, when we got our memo turned in to show who our political appointees were going to be in different sections, we pulled President Clinton's memo to see when his was and he was a week later than us. You know we have no time. You get your homework done fast. But as a part of that, you have to deal with all the things coming up. Bob Mueller was the acting DAG at the time, so Ashcroft was not even confirmed yet. So one of the things that was coming up that we had to deal with was the execution of Timothy McVeigh. And the United States government had not executed anybody since 1963. We didn't even have a we didn't have a death chamber. We didn't. So there's a lot of work to be done. It was a lot of work and had to reform a lot of things.

Harry Litman [00:05:01] And we're going to talk about the kind of protocol. But I assume at that point you were just inventing the wheel. There wasn't really a protocol.

Johnny Sutton [00:05:08] We subsequently have a very routinized and detailed system.

Harry Litman [00:05:14] But at the time, you just had to figure out what was both fair and would stand a legal judgment down the line.

Johnny Sutton [00:05:20] Yes. There was always been a pretty solid protocol is probably more solid now. You know, Rod and Carmen can probably talk better to that. But since there hadn't been an execution in, you know, decades and decades, that was just something, you know, literally in Terre Haute, we had to build that situation, which is not something that's very typical. Of course, other states had you know, were routinely executing people, so they were places you could go to get assistance, but it was something that federal government hadn't done. So there was something that when we had a few months, because, as you remember, McVeigh had waived his appeals and was volunteering for the death penalty. So it was coming up fast and that date was set.

Harry Litman [00:06:01] And then third, we are very fortunate to welcome Rod Rosenstein to Talking Feds. Many of you, of course, know him already because of his recent tenure as deputy attorney general. But Rod came to that job after a long and extremely distinguished tenure in the department under both Republicans and Democrats as United States attorney. When he was confirmed for the deputy position, he'd been the longest serving U.S. attorney in the country I think, 12 years. He joined as a trial attorney. He and I were kind of young punks together in the department. I remember him and I hope he me. But he was then counsel to the deputy attorney general associate, an independent counsel to Ken Starr, and then appointed to the position of United States attorney for the District of Maryland by President George W. Bush. Where, as I say he served for 12 years. He was thereafter nominated and served as deputy U.S. attorney general, a tenure which has been well covered and we won't be delving into today. We want to focus on his experience

of actually bringing capital cases. Do you even have a sense in your in your 12 years? I have a sense you had many Rod. Do you know how many that office had while you were U.S. attorney?

Rod Rosenstein [00:07:20] Well, there were quite a few here. And I recall working with you in the Clinton administration in the mid 90s. I won't comment on whether either one of us qualified as a punk. We were certainly young, But, you know, we were in the department really at the dawn of the modern death penalty era.

Harry Litman [00:07:35] Right.

Rod Rosenstein [00:07:36] When the new statutes went into effect and the department started develop these protocols and Janet Reno, of course, put in place the protocol that still exists, that requires the attorney general personally to sign off not just on seeking, but even not seeking potentially death eligible cases. And I hope we can talk a bit about that procedure. So then as U.S. attorney, I overlap with both Johnny and Carmen. And we developed these procedures in the justice manual. They have evolved over time. And actually when I worked with Johnny on the Violent Crime Subcommittee, the AJAC, and also with Carm on the AJAC in the Obama administration, we've made modifications to it over time, as I think is appropriate, as we recognize that there were ways to improve the the way the department handles it as a procedural matter.

Rod Rosenstein [00:08:17] And also, as you know, there've been substantive changes because attorneys general have differed in their tendency or their inclination to be more or less aggressive in seeking the death penalty. In Maryland as U.S. attorney, we had a lot of death eligible cases, as you can imagine, Maryland, particularly, Baltimore city is very high, the violent crime rate. And many of our cases were death eligible because the defendants were involved in committing murders. But we sought death in only a fraction those cases. So there were many cases pending when I arrived as U.S. attorney in 2005. In modern times, the death penalty has been imposed twice in Maryland, once was a case that was the federal death penalty has been imposed twice, once in 2000 case indicted and prosecuted in the Clinton administration case is still pending. The defendant is on death row and continue to litigate as they do ceaselessly, but has not been reversed. The other one is a case that was pending when I arrived in 2005 and resulted in a death sentence a few months after I started. And that defendant also is still pending.

Harry Litman [00:09:20] Yeah, you know, I think the average tenure for people after trial to execution if they are executed, is something like ten years. And the just the practical complications for trying to let's say you've got a new trial and you have to go on earth, the old files, et cetera, can be daunting. All right. So, look, it's a it's obviously a contentious issue. The death penalty in general, perhaps more so than the federal death penalty in particular. But people have strong feelings. I should probably lay my cards on the table that as U.S. attorney, I sought the death penalty even though I'm personally opposed to it.

Harry Litman [00:09:56] But that's just I think goes with the territory for United States attorneys. I was just going to put out what Rod says puts in mind like a few nuts and bolts. I think people would be interested in. I was surprised to learn there hasn't been a federal execution. There have been three. But since 2003, the attorney general, Bill Barr, has now announced that they're going to try to resume. And there are five prisoners who are whose dates have been set, I believe, in December and January for execution. They're now, I think, a little over 60 people on death row. One woman, the other man, they were there

have been sixty eight or so who have been put on death row since about 2003 were executed. Clinton and Obama together took three off death row, and that leaves the sixty two that are pending there, all when they are executed, as happened when the case of McVeigh, the three that have been are all in Terre Haute under that protocol by lethal injection.

Harry Litman [00:10:58] And there's been quite an effort to make that as not both humane but and also impervious to challenge as possible. Okay. I mean, those are the basic nuts and bolts. Let's start with a sort of general philosophical or maybe you would say practical question. Why do we have a federal death penalty in the first place? We know there are certain crimes, but big ones, espionage, murder, treason if we have them, large scale drug trafficking. But for the most part, they would be death eligible in the state system. So what's the purpose that Congress has passed them, why we need them, in fact, do we need them is an important thing in the system to have a federal death penalty as supplementary to state death penalty.

Harry Litman [00:11:44] Well, let me start with you, Johnny, because in Texas, as you've mentioned, probably the most in the nation, if I'm not mistaken. Why do you also want a federal death penalty to be available?

Johnny Sutton [00:11:53] My opinion would be that I would normally defer to the states to carry out death penalty prosecutions. And I think that's normally what's done. Not always. Sometimes there's a real strong federal interest, for example, in examples of terrorism or international crime, international drug kingpins. What about McVeigh?

Harry Litman [00:12:12] Would you say that was a righteous federal? I think I'll tell you why.

Johnny Sutton [00:12:16] I think it certainly was. I mean, you know, he blew up a federal building. One hundred and sixty eight people died. It was a daycare. I mean, it was a horrible, horrible case. Just a unbelievable tragedy and grotesque murder. So there I think you clearly have a federal interest. I would usually argue that the feds are not going to be the first to seek the death penalty on these cases. Most of these are murders, plus something else. Kidnaping, robbery, you know, mass murder, those kind of things that normally the states can handle this. They try these quite often the feds don't try them as much. The federal government is usually better. Fellow prosecutors are usually better at doing more complicated cases. But there are times and another one is the Tanzanian and Kenyan embassy bombings, where it's an international matter. Thousands of foreigners died, thousands of Africans died. And many Americans..

Harry Litman [00:13:09] I mean, that seems like a perfect one to me, because what state is possibly going to handle that?

Johnny Sutton [00:13:13] Exactly. It would be very difficult. So it's a balance there. But I get my instinct is keep it close to the people and have it be just for those extra special, grotesque cases where the defendant is extreme terror, extremely dangerous and and needs that kind of retribution that the death penalty.

Harry Litman [00:13:33] Well, yes, although it can often be in the state system, though. But, Carmen, the marathon bombing, you know, Massachusetts doesn't have the death

penalty, but did you have a tussle with it was such a high profile crime, did the state prosecutors want to try to handle that or did they take a step back right away?

Carmen Ortiz [00:13:51] I had two separate experiences. There were the initial bombings occurred in Suffolk County and the Suffolk County district attorney from the moment that the explosions occurred. And we arrived with the FBI and is working closely with the Boston police commissioner. He was all hands off in this case. Is your case. This is a federal offense. This is terrorism. And once you you described it that way and timed it that way, there was no question that we were going, we weren't charging or taking over and we did. What happened was, if you remember shortly after the bombings, on that Monday, after the we identified the individuals, they look at their physical features, but still we're looking for them. They went on the run and they killed a young officer at M.I.T.. Now, that's in Middlesex County. And the Middlesex district attorney desperately wanted to try that case. And officer have been killed in her territory and she felt that they should go forward. And so they actually brought charges of first degree murder against show castle knife. But we took the lead and we took over the case and we tried and combined and handled all of the wrongful conduct in the case that we brought.

[00:14:57] Rod, your thoughts if we were writing on a blank slate and just deciding whether to have a federal death penalty or not or leave these these cases to state authorities, would you would you advocate for one and why when would you really want to have one for the system overall?

Rod Rosenstein [00:15:17] The death penalty, of course, is not a modern form of punishment section. Ancient penalty use much less frequently today than it would have been in ancient times and biblical times. But I think that if you look at the range of cases that would potentially be eligible for the death penalty, there are really three categories that stand out as cases that might merit at first or cases where there's such a large scale of violence in the McVeigh case. And Oklahoma City is a good example. That second is where the crime had a significant impact on the community. And I think Carmen's prosecution of Dzhokar Tsarnaev is a good illustration of that. The impact of that crime on the community and on the country was so dramatic. And in third cases such as Johnny identified that are so horrific in the nature of the crime. I think Johnny referred to it as extra special, grotesque. And, you know, that may apply to one of the cases we prosecuted in Maryland involving defendant by them. Kevin [unclear], who killed three young women for no particular reason, dumped their bodies on the Baltimore Washington Parkway and they were thereafter run over by vehicles.

Harry Litman [00:16:22] All right but like, effect on the community?Extra special, grotesque. Why doesn't that actually create an argument for state rather than federal prosecution, why do you want the feds in those categories?

Rod Rosenstein [00:16:34] Well, it may. But, you know, one of the challenges is Johnny is from Texas, where they have and use the death penalty frequently in state courts. Carmen and I in Massachusetts, Maryland, actually very different experiences, right. Maryland very rarely saw a historically and in recent years doesn't seek it at all. So if you want to have some degree of nationwide uniformity, then the proposal to defer to the states is not going to accomplish that. You're gonna have cases where defendants would face death in Texas, but would not face it in Maryland or Massachusetts. So I think if you're interested in uniformity, that would actually militate in favor of the federal government stepping in in appropriate cases. And so, as you're aware, one of the things

that we don't take into consideration in reviewing the cases federally is what the penalty might be in the state. We don't grant any deference to that. Now, it might become relevant in determining what the jury is likely to do with the case, but we don't consider state law in evaluating whether or not to pursue death in the federal case.

Harry Litman [00:17:29] Well, let's talk about then what we do consider so a little bit about this protocol. Rod made this important point that many people don't know, which is. It's the attorney general's determination, not simply whether a final determination whether to seek or not to seek. And that's really the Department Justice speaks with one voice when it's a matter of deciding who is going to be death eligible. So you don't consider the fact that in a given state the death penalty isn't available. What do you consider? I think everyone here has probably had the experience of going to Washington to main justice, to meet with the committee, explain the case, et cetera. John, let me go back to you. Give me your sense of what that was like, maybe in the Fields case and what they were interested in. Did you feel like you were sort of a partner or kind of the junior guy here since it was really going to be the AG deciding?

Harry Litman [00:18:25] Tell us about the process for seeking it.

Johnny Sutton [00:18:27] Well, these guys probably dealt with a lot more recently than I have. But yeah, the process is, you know, hand in glove process generally. I mean, you know,.

Harry Litman [00:18:35] What do you mean by that?

Johnny Sutton [00:18:36] I've always felt by that meaning that, you know, a memo is written up by the line prosecutors that are going to evaluate the facts. The number one fact is, can you prove it? I mean, you're you 100 percent sure this guy did it and I can prove it.

Harry Litman [00:18:49] And is it any different? The sort of burden of proof, even informally in a death penalty case from the normal. In my mind, it's a lot different.

Johnny Sutton [00:18:58] It's got to be much higher. I mean, it really, really got out is still the burden of proof. But in order to get, you know, 12 citizens to agree that this person needs to be convicted of a capital murder, and then that they need to be, you know, ultimately, you know, we're in turn a punishment that ultimately results in the government taking their life. That means you have to be absolutely sure you have the right person. So especially in the cities and the people that do a lot of murder cases, they're able to grade those up.

Johnny Sutton [00:19:28] You know, one of the worries sometimes is in the smaller communities that, you know, they never see a murder case and often they get a really bad one. You know, there's a push for the death penalty because it's so gruesome. When I was a district court chief in Houston in the state system, I'd see probably 10 to 12 capital murders a year just in my court. And there's 22 different courts. So you could pick very carefully. And you got to the point where you could evaluate what was actually a death penalty case and wasn't. And I'm sure that most people would look at those 10 or 12 death eligible cases that we saw say, oh, my gosh, every one of those deserves the death penalty. But we would say, no, actually, only this one deserves the death penalty because we're 100 percent sure they did it. They have a terrible criminal record that's going to be

easy to prove future danger. And there's really no mitigating circumstances. So that's kind of the big evaluation. Now, there more specifics that I think these guys are going to go into.

Harry Litman [00:20:20] I had a case like that where it seemed certainly to merit the death penalty based on the facts, but there was vestigial doubt, did we definitely, definitely, definitely have the right guy. And that was the decision I had to make. And it was after determining that I was sure we did that, we went forward to the department.

Harry Litman [00:20:38] You've done. And most recently, I guess, Carmen, tell us, you know, literally the kind of you and who else comes and whom do you meet with and are you given a protocol? And what are you trying to show other than the facts of the case? What's it like?

Carmen Ortiz [00:20:53] Well, it's a very thorough and thoughtful process. And I think, as Johnny indicated, you have to be beyond all doubt. Sure. That this is the individual in the Boston Marathon case. The evidence was overwhelming. We had video of him placing the bomb that killed two of the victims in the case. And so that was not an issue. I was very impressed with all the different tiers of review that existed initially.

Harry Litman [00:21:21] Give us the brief overview of what you had to do after.

Carmen Ortiz [00:21:23] Immediately?

Harry Litman [00:21:24] First it went to you and you made the decision that you were going to recommend it. Yes. We're actually we don't even.

Carmen Ortiz [00:21:29] Quite frankly, that's that's part of the protocol, as I have to call it, for the U.S. attorney, the U.S. attorney's recommendation is confidential. You cannot say whether you you know, you represent any nation or not. The time then for you to go to Washington. Well, before I made the recommendation, there were different levels of review within the office. And then Washington.

Carmen Ortiz [00:21:49] All right. So tell us about the Washington park, because there was a review within the office where your decision. Right. What about right? At the end of the day. That's right. So tell us the process in D.C. and that as far as you know, was exactly what happens in every capital case.

Harry Litman [00:22:02] Boston Marathon to whatever it 7-Eleven murder.

Carmen Ortiz [00:22:07] That's correct.

Harry Litman [00:22:07] OK. So tell us about it.

Carmen Ortiz [00:22:08] Well, what happened with the department is we have been working with them from just the initiation of the explosions, the capital crimes unit assigned. That attorney was working with us to talk all.

Harry Litman [00:22:20] what is the capital crimes unit?

Carmen Ortiz [00:22:21] It is a unit that all U.S. attorneys offices have to work with whenever there is a death eligible case to review the evidence be used. It's I mean, just who's on it? Do you know actually who's on the prosecutors from the criminal division?

Rod Rosenstein [00:22:34] Yeah, there's actually a section in the criminal division of capital prosecutors what Carmen's referring to. These are not necessarily the folks who review the cases. These folks actually assist in investigating and prosecuting death.

Harry Litman [00:22:44] Got it.

Rod Rosenstein [00:22:45] Then there's the Capital Case Review Committee, that does the reviews.

Harry Litman [00:22:49] OK. So tell us about that committee.

Carmen Ortiz [00:22:51] You work hand in glove with the Capital Crimes Unit and then it goes to the capital crimes section and then the Capital Crimes Review Committee. The review committee determines whether or not they're going to recommend they make a recommendation and they work closely with the chief, the head of the criminal division. And then they make a recommendation to the deputy attorney general. The deputy attorney general, I think, takes a close look at everything that's been done beforehand and makes a recommendation to the attorney general. And they come back with questions, concerns. But package that you deliver to the department is a very thorough package, outlining the evidence, outlining the aggravating factors. Obviously, you highlight any mitigating factors that may apply and then the recommendation.

Harry Litman [00:23:33] All right. Well, if you remember back when you were on the other side of that table, Rod, describe if we had a picture. You know, you're sitting on one side. How many people on the other, who's with you? How long does it take? Do you have the sense that it's conversation or you're almost talking to a court that's keeping, you know, its own counsel? What's it feel like when you're actually doing the process at main?

Rod Rosenstein [00:23:59] If I could take a step back, Carol, because the U.S. attorney gets involved before the case gets to that review process at main justice and the way the system is designed. The U.S. attorney's office has its own internal review process that often in cases in which there's a potential of seeking death, where there's a serious consideration of seeking death. We typically would hold a conference with defense counsel in the U.S. attorney's office before we even got what, defense counsel? And so we'd let them make their pitch. And then 90, 95 percent of the cases, maybe even more, that initial recommendation by the US attorney's office is the one that ultimately prevails with the attorney general.

Harry Litman [00:24:33] So, of course, although it's secret, the recommendation by the U.S. attorney prevails 95 percent of the time. And then, of course, those that 5 percent must be some pretty interesting case.

Rod Rosenstein [00:24:42] Well what you have to keep in mind is a lot of them are relatively routine in the sense that, you know, our federal prosecutors handling drug and violent crime cases are facing death eligible cases all the time. And most those cases, we do not seek death. So the majority of them are actually relatively straightforward. That decision is made in the U.S. Attorney's office. Sometimes we don't even meet with the

defense counsel and then the case makes its way through the process. This process was put in effect initially by Janet Reno, who was responding to criticism about inequitable imposition of the death penalty, wanted to make sure they're all centrally reviewed in Washington.

Rod Rosenstein [00:25:18] And what sort of inequities was she concerned about?

Rod Rosenstein [00:25:20] She was concerned about differences in standards applied in different U.S. attorneys offices throughout the country and consolidating the review process with her, as you may recall. Janet Reno was very hands on somewhat of a micromanager in the department, there have been several changes that I proposed in the past decade or so that have actually been enacted in existing in the DOJ rules, now, in the manual one that I proposed that was not adopted was that we really don't need the attorney general to review every one of these cases, because if you look at the no see cases, the cases where everybody consistently up the chain is determined that it's not appropriate to seek the death penalty, you're not going to find any cases where the attorney general personally overrules that. And my personal opinion, having been in and around the ages office, is they have a lot of other things to do rather than to rubber stamp routine cases. So in the majority of the cases that come through the system are no seek recommendations without objections and they go through fairly quickly.

Harry Litman [00:26:13] I guess I don't even know this is any is any so charged that that, you know, there are four or five death eligible charges, treason, which happens a lot more now. And they're like, OK, but is any any time there that charge is out there? Does that do you have to go through? The death penalty process, so it's based on charge.

Rod Rosenstein [00:26:32] Well it's actually even more than that. It's generally construed very liberally as potential charge. So if a defendant potentially eligible for death, but you're not even charging in death eligible count, we're still supposed to consult with Washington about those cases. And sometimes they do wind up getting written up and going through the process, even though nobody believes there's any realistic likelihood of seeing dath.

Harry Litman [00:26:52] Now, you said the majority. Is it known or is that confidential? Roughly speaking, the percentage of death eligible cases in which the department winds up going forward with seeking death?

Rod Rosenstein [00:27:05] I don't know the number. I'm not sure there's any reason why it would need to be confidential. But it's very small. Having been the deputy A.G. for two years, I saw them all coming up from throughout the country and there are very few recommendations in favor of seeking the death penalty by percentage.

Harry Litman [00:27:21] Okay. All right. And now I want to go back to Reno for a second, because I recall she was worried also about the potential disparities in race, which people often bring up the race of defendants. Is there any part of the process that is that tries to be sensitive to that, or is it just simply blind to demographic figures.

Rod Rosenstein [00:27:41] Well it's sensitive just in that respect of being completely blind in effect, the demographic considerations are sent to Washington in a separate, sealed envelope so that the folks who are making the decisions do not have access to that information. The idea is obviously, you know, if you're on the frontlines, you know, the personal circumstances of the defendant, but the goal is to make sure.

Harry Litman [00:28:00] The review committee doesn't know the race of the defendant.

Rod Rosenstein [00:28:02] That's correct. That data is.

Harry Litman [00:28:04] So what do you do if the name is likely identical? Do you actually take steps to know?

Rod Rosenstein [00:28:10] You might be able to guess based on name? You might be able to guess ethnicity. But the goal is to exclude it from the decision making process. And so it's not expressly included in any point in the process, as you can appreciate, in the Department of Justice. You know, this this is a very professional process. So it's really inconceivable to me that racial or any other inappropriate characteristics would be considered because their focus on such a narrow slice of cases to start with, where the facts are so egregious that there's a realistic probability of obtaining the death penalty.

Carmen Ortiz [00:28:39] You know, if I could just add to that, because I agree that you cannot give any due consideration, but I think given that there's a long list of different types of offenses that are death penalty eligible, but the feds really only seek it in a smaller number of cases. And a lot of those cases are very high profile, in which I think that the committee members would know who is the individual that they're considering as to whether or not that they're going to seek the death penalty, the department's going to seek the death penalty on.

Harry Litman [00:29:07] And by the way, I'll answer my own question a little. I only went through it one time, but we were in a room. There were three of us. There were five people on the other side. But it certainly felt it. I'm sure it's specific or particular based on who it is, but it felt much more like a conversation back and forth. Here's what the defendant will say. And by the way, they'll also hear potentially if the defendant wants, there'll be a way for them and main justice to to hear from them. So it felt to me like a very you know, it was quite clear who was going to make the final decision. But it was a very sort of collegial back and forth and very sort of pragmatic. How do you really purport to prove this? And what's your theory for this response to this possible objection? I guess that segue ways into the point that Rod was making that, you know, in addition to the approval process, the department has resources specifically to offer offices. You know, that there have not been that many prosecutions. So it's often pretty new to a federal office and there are specialists who help in the specific prosecution of the case. So let me ask about that a little. And, you know, so you've decided to bring to recommend or the attorney general has decided that it will be a death penalty case, then some people from Washington show up and we're here from Washington and here to help. How does that work? What's it like within the office? What's the process when it comes to trying cases? Rod, you just lean forward.

Rod Rosenstein [00:30:40] So you have right out there that help from Washington is welcome. These cases are very resource intensive. They tend to be very well defended in. Yeah.

Harry Litman [00:30:49] Tell us about that. How would it work? How would a typical case in a community you would really know about this as well Johnny, what kind of defense resources would be brought to bear, including by constitutional guarantee?

Rod Rosenstein [00:30:59] Right. Well, by customs guarantee and more importantly, by federal statute, defendants are entitled under federal law to two lawyers were in the typical case, they've been told only to one and one of them is required to be learned counsel, which is a statutory requirement that the attorney have death penalty experience. So these there are limited number of lawyers around the country who are death only certified in their early days. Early twenty first century, there would be not enough to go around. And so they tend to travel. But death is much more common now here than it was in your days as. Attorney And so all districts have experience, most districts have a lot of experience with these cases, but they still welcome those experts from Washington to help supplement our teams because the defense in addition, having two lawyers, they tend to be very well-funded with a variety of experts. It's very expensive.

Harry Litman [00:31:44] The expert battle and death penalty cases where the facts are normally laid down for the government can be huge. Right.

Rod Rosenstein [00:31:50] And there are often mental health issues that are raised, often pretrial litigation over those sorts of things. So we welcome support from Main Justice. They have lawyers who are experts in the type of issues that arise. And they will assist us typically with the briefing less frequently with trying the case more frequently with the research and brief writing, because they have access to those resources and experts in Washington.

Harry Litman [00:32:11] And what about so we talk about often the real focus is going to be on sentencing. I don't think we've mentioned so far that under federal law, you have to have a unanimous jury for sentencing as well. Sometimes there'll be I mean, there there are defendants who might plead guilty and move immediately to sentencing, but that becomes the main event. And that's got to be unanimous as well. Do the lawyers from Washington. You know, I assume they have they have experience there. Do they actually stand up and carry the water in the trial and in an individual office? Or do they are they simply advisors? How does it work? Carmen?

Carmen Ortiz [00:32:47] You know, I think it depends upon the office. And in our case, for example, during the marathon bombing trial, we had very active participation. One of the folks from Washington was actually one of the trial members of the team and had tried quite a number of death penalty cases, had experience, especially in framing the key arguments for openings and closings, and did a tremendous job assisting the team and in trial strategy, but also in presentation during the course of the the first trial and then the second trial, because defendants, you know, obviously you have to stand trial, by the way.

Harry Litman [00:33:23] So what about that? Everyone knows when they're trying a death penalty case that, you know, 10 years from now the Supreme Court might overturn it for a reason that you can't even anticipate. What, if anything, do you try to do at the actual on the ground stage in front of a jury? Or do the do the people from Washington counsel you to do to insulate the determination from appellate problems?

Rod Rosenstein [00:33:50] Death penalty cases really have at least four distinct stages in the sense the four different cases. First, if you file the death notice, there's pretrial litigation over the validity of a death notice. So you wind up with extensive litigation even before you get to trial.

Harry Litman [00:34:04] There's actually a right of review for that, for filing the death penalty.

[00:34:08] No it's not a right of review, but it's the litigation of whether the proper process was filed and over whether or not the defendant has mental health issues that make him statutorily ineligible for death. We've had cases that have involved extensive pretrial review. So there's an entire stage of the case unrelated to guilt or innocence that occurs even before you get to trial. And then, of course, there's the the guilt phase of the trial. But death cases really have two separate trials. Not only do we need to prove the defense guilt beyond a reasonable doubt, we also in death cases typically look to bring the death penalty only if there's no residual doubt. So these are cases where there's a very small probability of acquittal. So we're really preparing for a second trial. That's the death penalty stage. Whereas you point out we need the jury unanimously to vote in favor of death. And so as you're going through the first trial, you're thinking about not just what you need to convict a defendant, but what impression you're creating on the jury to prepare them for the second phase. That death phase, the trial. And then, of course, there's the post trial phase. All the litigation, as you point out, that follows the death sentence and continues unless and until the death penalty is ultimately imposed.

Harry Litman [00:35:16] Johnny, you've done this the most. You've been the actual state prosecutor boots on the ground asking for the death penalty at least three times. And you've gotten it. You've overseen it in the office. You've been in main justice looking at McVeigh, etc.. What's it like? You know, I assume it's very sobering. You have, you know, conflicted feelings of both. Well, I'll stop right there. You tell us that sort of you very highly of seeking the ultimate sanction.

Johnny Sutton [00:35:47] It's a very, very serious situation. It's probably the most serious thing that the government does in the whole country. I mean, even I guess going to war is worse. But I mean, you are making decisions about whether someone lives or dies. Ultimately, that may be decades down the road. So it's a very somber situation. People take it very seriously. I came out of Harris County D.A., his office in Houston back in the 80s and 90s. We were one of the murder capitals, United States. And, you know, there is a little bit of a gallows humor with the prosecutors that are down there, because you see so much death, so much, you know, trauma to victims. And you're dealing constantly with parents of murdered children. So it's it's very hard, but you've got to just make good decisions. No, the your paper is going to be graded for decades. You know that there's people on the other side that are true believers. I mean, that they really are going to fight hammer and tong to the very last second. And some of them are even to the point where they're willing to bend the rules and cheat because they think they're in order to save this person's life. I'm willing to go to greater cause. So you have to be really prepared to make sure that you've got all your ducks in a row. And it's what Ron is talking about. It's going to be hard litigation from the very start to literally the moment of execution. So it's serious. I'd say one thing, though. You know, people say all costs so much money and it's not worth it. I think there's a lot of misinformation there, especially in locations that do a lot of death penalty cases. You have judges that have tried a lot. You have defense attorneys that have tried them both many times as prosecutors and many times as defense attorneys. They're incredibly good lawyers that would in the free world would cost you hundreds of thousands of dollars to get that representation. And and oftentimes prosecutors that have tried this many times before. So I think the idea that it's just this haphazard thing that cost us millions of dollars and should go away is wrong. Now, one other thing we're seeing is the number of times that people are seeking death is way off, way down. I think the big

reason for that is the murder rate is way down. And I think that's kind of lost in the 24/7 media. Oh, we live in this incredibly dangerous society. You know, it's important. And I think it's something that everybody takes serious. I don't think any prosecutor at the end of a capital murder case, you know, celebrates and jumps up and down. And I'm so happy what they feel is relief that justice was served in their opinion. But, you know, it's just not not a happy day for anybody that we were there, a valued colleague to all of us.

Harry Litman [00:38:23] Chuck Rosenberg has a terrific podcast called The Oath. And he just recently had an episode on the Moussaoui trial that Rob Spencer, a great prosecutor that many people now had.

[00:38:35] And he talked about how, you know, this was a defendant reviled by everyone and the job that the defense attorneys did, who, of course, Moussaoui hated as much as all of American society. And at least the feeling at the end that the system had bent over backwards to make it the fairest possible trial.

Harry Litman [00:38:57] So, you know, that's one overlay to this whole cocktail of kind of emotions and somber ness that you note is the feeling that all in all, there's slight a lot of attention paid to making this ultimate act by the government be as full and fair as possible. Thank you very much, Carmen, Johnny and Rod, and thank you very much, listeners, for tuning in to Talking Feds. If you'd like what you've heard, please tell a friend to subscribe to us on Apple podcast or wherever they get their podcasts. And please take a moment to rate and review this podcast.

Harry Litman [00:39:38] You can follow us on Twitter at Talking Feds Pod to find out about future episodes and other fads related content. You can also check us out on the web at Talking Feds dot com where we have full episode transcripts.

Harry Litman [00:39:56] Submit your questions to questions at Talking Feds dot com, whether it's for five words or fewer or general questions about the inner workings of the legal system for our sidebar segment. Thanks for tuning in. And don't worry, so long as you need answers. The feds will keep talking. Talking Feds is produced by Jennie Josephson, Dave Moldovan. Anthony Lemos and Rebecca Lopatin. This episode was recorded by Natalie Jones.

Harry Litman [00:40:32] David Lieberman is our contributing writer. Sam Trachtenberg is our research assistant. Production Assistance by Sara Philipoom Transcripts by Matthew Flanagan, thanks as always to the incredible Philip Glass who graciously lets us use his music. Talking Feds is a production of Dalito LLC. I'm Harry Litman.

Harry Litman [00:41:01] See you next time.