

Senator Edward M. Kennedy

1. The Assistant Attorney General in charge of the Criminal Division is responsible for formulating criminal law enforcement policy and advising the Attorney General, Congress, and the White House on matters of criminal law. You have substantially less experience as a lawyer and a prosecutor than the ten most recent persons to hold this position. Why do you believe you are qualified to serve as Assistant Attorney General?

I welcome the opportunity to explain why, if confirmed, I would bring the right experience, integrity, judgment, temperament and perspective to lead the Criminal Division. I have had the fairly unique experiences of seeing — and understanding well — the Department’s criminal enforcement efforts from three important vantage points: as a defense lawyer, as a career prosecutor on the front lines in a U.S. Attorney’s Office, and as part of the Department’s senior leadership for the past two years, spanning the September 11th attacks and their aftermath.

During my years as an Assistant United States Attorney, I personally prosecuted a wide variety of federal criminal cases, including such offenses as securities fraud and public corruption, gun trafficking, murder-for-hire, racketeering and narcotics, kidnaping, immigration, counterfeiting, church arson, and many more. I have handled criminal cases through all stages of the process, from grand jury investigations, to jury and bench trials, sentencing, and appeals.

As Principal Associate Deputy Attorney General, I have had substantial leadership and oversight responsibilities relating to the Criminal Division and the U.S. Attorney’s Offices before, during, and after the September 11th terrorist attacks. From that position, I have seen closely nearly all of the major issues confronting the Criminal Division and the U.S. Attorney’s Offices during this particularly critical and unprecedented stage in their history. For well over a year, I have been attending and participating in daily threat briefings by the FBI and CIA with the Attorney General, Deputy Attorney General, and FBI Director. As Principal Associate Deputy Attorney General, I have had involvement in strategic and tactical decisions in nearly every significant terrorism case or investigation handled by the Department since September 11th, from the Eastern District of Virginia to the Southern District of New York, from Buffalo to Portland, Seattle, Chicago, Detroit, and others. I have had the privilege of developing excellent, personal working relationships with most of the current 93 U.S. Attorneys, the current leadership of the Criminal Division itself, the current heads of the other Main Justice components, the current leadership of the FBI, ATF, DEA, SEC and other key law enforcement agencies.

I have also held significant management responsibilities while Principal Associate Deputy Attorney General. I have served as the Department’s representative on the President’s Management Council, working with the Office of Management and Budget and chief operating officers from other Cabinet agencies in the implementation of the President’s management initiatives. I have also borne significant responsibility for the Department’s own Strategic Management Council, for the implementation of most cross-cutting management initiatives in the

Department, and for the Department's overall budget of approximately \$23 billion and more than 100,000 employees.

Finally, my experience as a defense attorney before joining the Department would provide me with another valuable perspective if confirmed as head of the Criminal Division. As a former defense attorney representing clients facing either Department investigation or prosecution, I understand well both the power entrusted to law enforcement and the importance of using it wisely and appropriately.

2. According to the recent report on the September 11 detainees by the Justice Department's Office of Inspector General, you called Bureau of Prisons Director Kathleen Hawk Sawyer soon after the attacks. As the report states:

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."

David Laufman confirmed the substance of Hawk Sawyer's account, but you told the OIG that you could not recall "giving any specific instructions" regarding the September 11 detainees, and that the "spirit" of your comments "was that the BOP should, within the bounds of the law, push as far toward security as they could."

- A Do you have any further recollection regarding your conversations with Hawk Sawyer? Please describe exactly what you remember about these conversations.

The relevant passage of the Inspector General's report is slightly ambiguous and would benefit from clarification in a number of respects. First, I do not recall having any three-way conversations with then-Director Hawk Sawyer and David Laufman, then the Deputy Attorney General's chief of staff. Rather, I had a handful of conversations with Ms. Hawk Sawyer myself, and I believe that Mr. Laufman separately did so as well. Second, and more importantly, the only conversations I recall having with Ms. Hawk Sawyer concerned individuals already convicted of terrorist offenses - "specific criminal inmates," to use the language of the Inspector General's report (p. 113) - *not* aliens being detained on administrative immigration charges in connection with the September 11 investigation, on whom the report is focused. Third, I do not recall ever using the phrase "not to be in a hurry" myself in speaking with Ms. Hawk Sawyer, nor do I ever recall her using that phrase with me even in the limited context of our conversations - again, convicted terrorists - much less in the context of immigration detainees. Moreover, as the Inspector General's report explains, "Hawk Sawyer emphasized that Department officials *never* instructed her to violate BOP

policies, but rather to take their policies to their *legal* limit in order to give officials investigating the detainees time to “do their job.” (Emphasis added.) The report is accurate to the extent that it was clearly understood that the BOP was to exercise discretion within the law and BOP policy.

- B. Do you agree or disagree with Hawk Sawyer’s characterization that you told her to “not be in a hurry” to provide the detainees with access to communications, including access to legal counsel?

As explained above, I do not recall ever using the phrase “not to be in a hurry” myself in speaking with Ms. Hawk Sawyer, nor do I ever recall her using that phrase with me even in the limited context of our conversations – again, convicted terrorists – much less in the context of immigration detainees. I do agree with the Inspector General’s report that it was clear that BOP was to emphasize security only in compliance with the law and its own policies.

- C. Who gave you the authority to direct Hawk Sawyer to “push as far toward security” as the Bureau of Prisons could? Please list the name of every official who was involved in making this policy decision or giving you the authority to so instruct Hawk Sawyer. Please describe to the fullest extent of your knowledge the chain of command that was involved in making this decision.

As explained above, the only conversations I recall having with Ms. Hawk Sawyer on this subject concerned convicted terrorists already in BOP custody on September 11th, not immigration detainees. Even in this limited context, as the Inspector General’s report explains, it was clear that BOP was to prioritize security “*within the bounds of the law*” and was “*never instructed* [] to violate BOP policies.” (Emphasis added.) At the time of the conversations, I was concerned about the risk that convicted terrorists posed to BOP personnel, to other inmates, and to the public generally, especially in the immediate aftermath of the September 11th attacks. At the time, I was aware of the ongoing investigation which has since resulted in the indictment of members of Sheikh Abdel-Rahman’s legal team, including his lawyer, Lynne Stewart, and interpreter, Mohammed Yousry, charging a conspiracy involving violations of the applicable BOP special administrative measures and material support to a terrorist organization. I was also aware of a then-recent incident in which two alleged al Qaeda operatives, Mamdouh Mahmud Salim and Khalfan Khamis Mohamed, had attacked Officer Louis Pepe in the high security unit of a New York-area BOP facility. Both individuals were at the time being held on pending charges in connection with their involvement in the al Qaeda terrorist network. During the course of the attack, hot sauce was sprayed into Officer Pepe’s face and a sharpened hair comb was stabbed into his left eye. The comb penetrated Officer Pepe’s brain, causing brain damage and the loss of his eye. Officer Pepe’s keys were taken from him and his radio was disabled. During a subsequent search, authorities found a note which indicated that the two were planning a hostage taking. Salim has since

pled guilty to conspiring to commit murder of a federal officer and attempted murder of a federal officer and faces a maximum sentence of life imprisonment. Mohamed was convicted for his role in the East Africa Embassy bombings and sentenced to life imprisonment. These concerns, and others, convinced me that BOP should prioritize security within its facilities – again, with respect to convicted terrorists already in BOP custody, and always within the bounds of the law and BOP’s own policies. I do not specifically recall seeking authorization or a decision from other Department officials regarding these communications to BOP.

- D. When and how did you first learn about the “communications blackout” that affected September 11 detainees in BOP facilities?

Again, the only conversations I recall having with Ms. Hawk Sawyer regarding such matters concerned criminally convicted terrorists already in custody on September 11th, not immigration detainees. To the best of my recollection, I did not learn of any BOP “communications blackout” affecting such detainees until reading of it in the OIG report itself.

- E. The OIG questioned “the justification for a total communications blackout on all these individuals, particularly for the length of time that it was imposed,” and stated that the telephone limitations imposed on the detainees “further hindered the detainees’ ability to obtain legal assistance, which posed a significant problem since the majority of the detainees entered the MDC without counsel.” What is your response to the OIG’s criticism?

It is my understanding that the BOP initially imposed certain limitations on communications based in part on security risks encountered in the immediate aftermath of the September 11 attacks. The difficulties encountered by aliens detained in the Metropolitan Detention Center in Brooklyn (MDC-Brooklyn) were a result of various factors, including: aliens in removal proceedings have the right to counsel but must obtain such counsel on their own (unlike criminal defendants, who have the right to appointed counsel at U.S. government expense); difficulty in obtaining an accurate list of free legal services; the initial use of a category generally used to protect witnesses, which made it difficult for their attorneys to locate them; and many attorneys were located near Ground Zero and were, therefore, unreachable due to disruptions in utilities. Having the benefit of the Inspector General’s report, I believe that there are steps that the BOP can take to improve the situation. In fact, the BOP first initiated those improvements following interim recommendations made by the Inspector General in July 2002.

3. The Inspector General found that officials at the Metropolitan Detention Center in Brooklyn did not follow the BOP's inmate security-risk assessment procedures for determining where to house the September 11 detainees. Instead, officials relied on the F.B.I.'s assessment that the detainees generally were "of high interest" to its ongoing investigation, and automatically placed them in the Detention Center's most restrictive housing unit, the Administrative Maximum Special Housing Unit. In this unit, the detainees were allowed to make only one "social" telephone call per month, and only one legal telephone call per week. At all times outside their cells, even during non-contact visits with attorneys or family members, the detainees were restrained in handcuffs and leg irons. No contact visitation was allowed. Lights were kept on in the inmates' cells 24 hours a day, causing the detainees to experience lack of sleep, exhaustion, depression, panic attacks, and reduced eyesight. The detainees remained in these harsh and restrictive housing conditions until the F.B.I. notified officials that they had been cleared. The monthly reassessment hearings required by the Bureau's own rules were not held, and the F.B.I. failed to give its clearance process sufficient priority. It took the F.B.I. an average of 107 days to clear detainees of any connection to terrorism.
- A. The OIG concluded that the detainees were exposed to unnecessarily severe conditions of confinement, and were improperly hindered from obtaining and consulting with legal counsel. Do you agree or disagree with these conclusions? Please explain.

I believe that improvements can be made with regard to both conditions of confinement and communications with counsel. I would note, however, that the BOP was facing very real security concerns at the time, and took certain measures to protect BOP personnel, the detainees, the public, and national security.

- B. Having directed the Bureau of Prisons to "push as far toward security as they could," what responsibility do you take for the unnecessarily severe conditions of confinement and lack of access to counsel that the detainees experienced?

As explained above, I do not recall any direct discussions with BOP related to the conditions of confinement of the aliens who were being detained on administrative immigration charges. The Inspector General's report does not address issues about which I was concerned at the time: individuals already convicted of terrorism-related crimes and the security concerns implicated by those particular inmates in the aftermath of the September 11th attacks. Even in that limited context, however, I believe it was clear that BOP should only prioritize security "within the bounds of the law" and was "never instructed [] to violate BOP policies." (OIG report, p.113) (emphasis added).

4. You served on the Attorney General's Review Committee on Capital Cases in 2001. As you know, Attorney General Ashcroft has repeatedly rejected the recommendations by U.S. Attorneys not to seek the death penalty. On several occasions, prosecutors have been forced to seek the death penalty against defendants who were willing to plead guilty in return for lengthy terms of imprisonment, including life sentences, in order to avoid the death penalty. Under what circumstances do you believe it is appropriate for the Attorney General to overrule local U.S. Attorneys and require them to seek the death penalty?

The Department is committed to the consistent, even-handed, and fair application of federal death penalty laws nationwide. To do this, the Department does not rely solely on the recommendations of local United States Attorneys. Instead, the Department has a longstanding internal protocol that is designed to ensure equal and fair treatment for all defendants. Under the protocol, each potential death penalty case is reviewed in the first instance by career prosecutors on the Attorney General's Review Committee on Capital Cases. The recommendation of the committee and the decision of the Attorney General are based on the facts of the offense, the strength of the admissible evidence, the background, including criminal record, of the offender, and the applicable aggravating and mitigating factors.

Although the United States Attorney's recommendation is afforded great weight, absent a compelling prosecutorial consideration, equally culpable defendants, who have similar backgrounds and criminal histories and who have committed comparable crimes, are likely to face the same potential sentence regardless of where the crime occurs. This protocol results in the most just treatment of defendants, and ensures that defendants from a particular jurisdiction are not treated unduly harshly or too lightly. The rationale for this uniform treatment, of course, is that the laws of the United States apply with equal force regardless of where the offense occurs and regardless of local sentiment or opinion.

5. In January 2003, Attorney General Ashcroft ordered federal prosecutors in New York to seek the death penalty for defendant Jairo Zapata – even though the prosecutors had negotiated an agreement in which Zapata would testify against others in a Colombian drug ring in exchange for a sentence of life imprisonment. One former prosecutor, Jim Walden, said it was “a remarkably bad decision” that will “likely result in fewer murders being solved because fewer defendants will choose to cooperate.” Do you have any concerns about the Attorney General ordering local federal prosecutors to seek the death penalty in cases when such a decision would clearly limit their ability to investigate and prosecute violent crimes?

While I cannot comment on the details of the Department's deliberations in a specific case, in my experience, we benefit greatly when criminal defendants accept responsibility and agree to provide substantial assistance to the government by helping the government charge more serious offenders. In fact, information provided by defendants has allowed us to go after some of the most serious criminals in the country, and has been critical, for example, in most of our prosecutions of the leadership of criminal organizations. I have used cooperating witnesses many times

throughout my career, and I would continue to support their appropriate use if confirmed as Assistant Attorney General.

That being said, the mere fact that a defendant wants to cooperate with the government does not automatically mean that the defendant deserves a lesser sentence. For example, it may be inappropriate to enter into a plea agreement with a principal actor in a murder when there is already more than sufficient independent evidence to obtain the necessary convictions. Similarly, although a defendant professes to "cooperate" with the government, it is soon evident that the defendant is not being fully truthful with the government, and that his or her cooperation is effectively useless.

6. It was recently reported that federal prosecutors have failed to persuade the jury to impose the death penalty in 15 of the last 16 trials in which they sought it. During this Administration, only five death sentences have been imposed in 34 federal capital trials. Why do you believe the Justice Department is losing so many death penalty cases?

As discussed in my previous answers, the Department is committed to the consistent and fair application of the federal death penalty statutes without regard to the location of the offense or the trial. The consistent and fair enforcement of federal death penalty law may result in capital trials in non-death penalty states before juries less receptive to capital punishment.

I have not observed any dramatic change in the rate at which death sentences are returned in authorized capital prosecutions. What has changed is the number of authorized capital prosecutions going to trial. In June 2001, the Department amended its internal protocol to require that the prosecuting district obtain the approval of the Attorney General before entering into a plea agreement eliminating a potential death sentence, just as the district is required to do to seek the death penalty in the first instance. A decision to seek the death penalty should represent an actual assessment that it is an appropriate sentence. Since the prospect of a capital prosecution should not be used to induce a plea, there is no general presumption that a life sentence will substitute for a death sentence. Accordingly, withdrawal of the notice of intent to seek the death penalty generally requires a change in the circumstances favoring capital prosecution. In contrast, under the previously applicable protocol, the prosecuting district retained the discretion to enter into a plea agreement even after a decision had been reached to proceed with a capital prosecution.

7. Please describe in full detail what role, if any, you had in developing or supporting the changes to federal sentencing law contained in the so-called "Feeney Amendment" to the AMBER Alert bill. Please state whether you were involved in drafting the letter sent by the Justice Department to Senator Hatch on April 4, 2003, expressing the Department's "strong support for Congressman Feeney's amendment to the House version of S.151."

Although I became generally aware that sentencing legislation of the sort reflected in the Feeney Amendment was under consideration shortly before its adoption, I did not personally participate in its development. Nor did I participate in drafting the Department's April 4, 2003 letter to Senator Hatch.

8. The Feeney Amendment imposes burdensome new record-keeping and reporting requirements on federal judges, and requires the Sentencing Commission to disclose confidential court records to the House and Senate Judiciary Committees upon request. It also requires the Attorney General to establish what some have called a "judicial blacklist," by informing Congress whenever a district judge departs downward from the guidelines. Chief Justice Rehnquist has criticized these provisions as potentially amounting "to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties," and cautioned that they should not be used to "trench upon judicial independence." Do you agree with the Chief Justice's concerns about these provisions? If you are confirmed as head of the Criminal Division, what steps will you take to protect the independence of federal judges?

I agree with the Chief Justice that any effort to use the PROTECT Act reporting provisions to "intimidate individual judges" or to "trench upon judicial independence" would be wrong. Although I am not intimately familiar with these provisions, I do not believe that they were intended to be used in that manner either by the Department or by the Congress, but were intended to reinforce the principle of the original Sentencing Reform Act of 1984 that decisions to depart from the Guidelines (either upward or downward) should be accompanied by a detailed explanation of the court's reasons. See S. Rep. 98-473 at 115 ("[T]he judge is required to state specific reasons for the sentence outside the guideline. Because sentencing judges retain the flexibility of sentencing outside the guideline, it is inevitable that some of the sentences . . . will appear to be too severe or too lenient.") As the Chief Justice stated in the speech that you quote, "[t]here can be no doubt that collecting information about how the sentencing guidelines, including downward departure, are applied in practice could aid Congress in making decisions about whether to legislate on these issues." (Remarks of the Chief Justice, Federal Judges Ass'n Board of Directors Meeting, May 5, 2003). If confirmed as Assistant Attorney General, I would strive to ensure that the information the Department obtains pursuant to the PROTECT Act is used to inform the Department's legitimate role in policy-making and recommending legislation to Congress, and not as a tool to police the decisions of individual judges.

9. On June 24, 2003, Judge John S. Martin Jr., a Bush I appointee with a conservative record on criminal issues, announced that he was retiring from the federal bench because he "no longer want[s] to be part of our unjust criminal justice system." He cited the Feeney Amendment as "Congress's most recent assault on judicial independence" and "an effort to intimidate judges." Judge Martin wrote, "Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant's incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice." Do you agree or disagree with Judge Martin's comments? Do you believe that the Feeney Amendment allows judges to consider all of the factors that go into formulating a just sentence?

I know that Judge Martin is a respected member of the federal bench in the Southern District of New York and I regret his evident belief that the criminal justice system is "unjust." I respectfully disagree with that aspect of his comments. I believe that the Feeney Amendment, along with the entire system of determinate federal sentencing that Congress implemented in the Sentencing Reform Act of 1984, does allow judges to consider all of the factors that go into formulating a just sentence, but within the parameters set out generally by Congress and specifically by the United States Sentencing Commission. To quote the Chief Justice's recent comments again, "Congress establishes the rules to be applied in sentencing . . . [and] [j]udges apply those rules to individual cases." I agree with that principle.

10. For years, civil rights groups and sentencing experts have been concerned about the substantial sentencing disparities that result from the different federal mandatory minimum sentences for crack cocaine and powder cocaine trafficking offenses. For example, five years imprisonment is mandated for both (1) 500 grams of powder cocaine (worth about \$40,000 on the street), and (2) 5 grams of crack (worth about \$500). Because African Americans comprise 84 percent of those convicted on crack cocaine charges, but only 31 percent of those convicted of powder cocaine charges, the lower threshold for crack cocaine has the effect of disproportionately punishing African-American defendants.

In March 2001, the Administration announced that it will oppose any reduction in drug sentences, including those in a bill introduced by Senator Sessions and Senator Hatch. The Administration acknowledges that actual sentences for crack cocaine are more than five times longer than sentences for equivalent amounts of powder cocaine, but argued that any reduction in penalties would "send the wrong message" on drugs. Do you agree that any effort to lower drug sentences must be opposed because it will "send the wrong message"? Isn't it the responsibility of the government not only to "send the right message" on drugs, but also ensure equal justice for all Americans? If you are confirmed, what steps will you take to address this problem?

The Department of Justice is committed to ensuring that the laws of the United States are enforced in a just, non-discriminatory manner. I am aware that federal sentencing policy with respect to cocaine powder and cocaine base ("crack") has been controversial, because a given quantity of crack incurs the same mandatory

minimum sentence as a larger quantity of cocaine powder, and because many defendants whose offenses involve crack are African-American.

It is my understanding that after extensive study and internal consultation and deliberation, including career prosecutors and agents, the Department determined that current federal penalties for cocaine offenses are appropriate and just. To the extent that any change in the federal cocaine penalty levels may be warranted due to perceived disparity, the Department believes the differential should be lessened by increasing the relative penalties for powder cocaine.

If I am confirmed as Assistant Attorney General, I would be open to considering different viewpoints, from within and outside the Department, and I would welcome additional information bearing on the important and sometimes controversial issues surrounding federal sentencing, including the crack/powder issue.