

U.S. SENTENCING COMMISSION MEETING, MARCH 10, 1987

Addendum - Verbatim Transcript of Discussion
Concerning Capital Punishment Guidelines

Judge Wilkins: Let's go back to item two on the agenda for discussion today which is death penalty guidelines. For the record, this issue has been addressed by the Commission the same way we've addressed everything else. We solicited public comment, held a public hearing and received a lot of input from a large number of people about it. I know that all the Commissioners have given it a great deal of serious thought and consideration. Any discussion about this issue?

Commissioner Block: I circulated a memo yesterday (copy attached) in one particular area that, through the testimony and through my own work on prison impact, is of a particular concern to me. That is the death penalty for murder by an inmate serving a life sentence. I circulated a proposal yesterday stating that I felt that it was irresponsible for us in confronting the issue of the death penalty (not to provide for its availability) in this particular area. The abolition of parole, coincident with the career offender provisions, the Anti-Drug Abuse Act and of more than one statute that requires life, will force an increase, a significant increase, in the number of people in prison who have no eventual hope for release. I think that there is testimony that I quoted in this memo from the Bureau of Prisons and a follow-up statement yesterday from Norm Carlson suggesting

that this is a problem. There is a problem of not having adequate punishment for people serving life sentences, both in terms of deterrence and I would assume in terms of just punishment. If someone is serving a life sentence, there is no threat to control them from killing people, killing guards, staff in the prison. It is not a dreamed up concern of mine. Michael Quinlan, the Deputy Director, testified to that effect that it was a real concern now and it was going to be a larger concern under our guidelines, and I would assume from a punishment perspective once a person has a life sentence, a real life sentence, in that they have a small likelihood of ever leaving prison, that another life sentence on top of that is not adequate punishment for punishment purposes.

I've not been deaf in the last month or so. We've heard quite a bit of testimony about the fact that there should be Congressional action on this particular issue. My proposal I think tries to accommodate what I think a responsible position on our part in terms of looking at the implications of our own guidelines and a problem that exists in the federal prison system, and that is that I would suggest that we vote to draft an amendment to the guidelines that we are proposing, or separate guideline for murder by an inmate serving a life sentence. That separate guideline would be put out for public comment and that it be submitted separately so that Congress has adequate time and focus to deal with that issue directly. So, I would propose that we vote to draft the death penalty guidelines for murder by an

inmate serving a life sentence and that we try to get that in the hands of the Commission so that by say March 20th or so we could vote to publish it. We could at least start down that road now. Now, we did in December I know vote to look into the question and to draft. I don't think there's been any drafting since then. We held that up. But I would move that we do in fact draft and vote on or about March 20th to publish, with a thirty day comment period.

Judge Wilkins: You are making a motion? Go ahead and state it again now that we draft death penalty guidelines for whom?

Commissioner Block: For murder by an inmate serving a life sentence, a Federal life sentence.

Judge Wilkins: A Federal life sentence. Does that mean a life sentence previously imposed or imposed under the guidelines?

Commissioner Block: I would say we'd have to work out a definition of what a life sentence meant today, but the import of Quinlan's testimony has that there were people now serving sentences that had small likelihoods of ever being released from prison. Those people should also be covered under this guideline. At least that would be my proposal. I think that is a technical point that we need to work out.

Judge MacKinnon: Well, recognizing all of that, I think there is a larger consideration here and that is that if we get into writing a guideline for a death sentence on any particular offense at this time, this is going to just kill the bill. As a practical matter, it is an inopportune time politically to do it. And if we get into it, that is the only thing that is going to be talked about here for the next six months. I think that we've got a big enough job to get these guidelines out, and I think that we ought to from here on out spend our time on the guidelines and my motion would be that we spend all of our time on the guidelines and leave the death sentence to some later time after the guidelines have been presented to Congress and Congress has acted. I just don't see that we can ever get any place with our guidelines if we are going to add a death sentence provision on any matter at this time. Now I did think at one time that we might be able to present it separately, but if you know how Congress operates, it won't be separate. It will get up there and it will all be... the tail will go with the hide. And the bill, our guidelines, and all of our work will just be killed. Now, I don't necessarily rely on what some of these people have been writing about, every person writes against it and so on. But I get up on the Hill everyday, and I don't hear any sentiment for it, and I see a lot of sentiment expressed (including by) leaders in the Senate that are more leaders today than when we started on this. So I just think its an inopportune time politically to do it. My motion would be that from here on out

to spend all our time on writing the guidelines. And I'm sure that will take all our time.

Commissioner Corrothers: Mr. Chairman, I second that motion, and...

Commissioner Block: I think there was a motion on the floor.

Judge Wilkins: There was a motion on the floor by Commissioner Block first, and do you second that (motion) Commissioner Nagel?

Commissioner Nagel: Yes, I will second the motion. Let me just make a point in response to Judge MacKinnon's point which I think is an important point and that is that we do have to consider the political ramifications of our actions and the intent of Congress as well. But I also think that there is an onus of responsibility on us as Commissioners to do what we think is right in the area of sentencing. And I won't make a lengthy speech, but for the reasons articulated in the proposal distributed by Commissioner Block, I would echo the same sentiments -- that this is a very special case and I think that for the reasons in the memo I would second the motion -- that we go ahead at this point and draft -- with a special provision that we try to do everything possible to bifurcate these, so that Congress has an opportunity to consider them separately and to make sure that Congress is aware that we want them to have every

opportunity to consider this as a separate amendment. And that it is the intention of the Commission that it be considered separately. So that Congress can fully debate that issue and that we would hope that they would not tie them together, because that was not our intention.

Judge Wilkins: Lets do it procedurally. Commissioner Block has made a motion, seconded by Commissioner Nagel. Judge MacKinnon has made a motion. As I understand, George, your motion was...we'll discuss these topics together and then we'll vote separately.

Judge MacKinnon: That we do not consider the death sentence at all and that we spend all of our time on writing the guidelines.

Commissioner Corrothers: And I did second the motion.

Judge Wilkins: So that we know -- Georges' motion that we not address the death penalty issue with the guidelines we are working on now, and that has been seconded by Commission Corrothers. Alright, now is there other discussion? Paul?

Commissioner Robinson: To some extent I think most of you have heard my position on this before, but let me state it again. I support the death penalty and in certainly the case that Michael gives us, there's I think, a need for it. I think it's

appropriate. I believe the death sentence is deserved when people do some relatively horrifying things. I think it can deter, and I suppose this is an example of where the deterrent capability is most obvious. At the same time, it is equally clear to me that when we impose the death penalty we have to do it as part of the sentencing system that is absolutely fair, above reproach, and rational, and even more than that a sentencing system that is perceived to be that way. It seems to me that there has to be public confidence that the decisions on who to execute are being made in a thoughtful, careful and rational way. That puts me in something of a difficult situation. As everyone knows I've been critical of the Commission's work to date, and if the death penalty were to be imposed as part of the sentencing system based on the Revised Draft, I would have to oppose it. I am persuaded, on the other hand, that I ought not prejudge the Commission's final guidelines. The Commission has in the past had some relatively dramatic changes in approach. It seems appropriate to wait and see what the Commission actually comes up with. We don't have guidelines... (gap in tape recording, not due to any erasure) As I understand the question is whether we ought to proceed in working toward developing a system that would have the confidence and respectability that's needed. That doesn't strike me as being an inappropriate. I think I can support the Block motion. There are still these unresolved questions...

Commission Corrothers: Which motion?

Commissioner Robinson: The motion, I think I can support Michael's motion. There are these remaining unresolved questions about our authority to do it, and I hope that we'll have some sort of definitive resolution of those as well. But my own view on the question of whether we should continue trying to develop guidelines that really would be of the high standards and (would be) perceived as being of the high standards that I think are needed for death penalty. I can't see how that would be something harmful. Once I heard about this going on the agenda yesterday afternoon I did write a brief, just a few paragraphs statement of my views just to make it clear. So let me pass those out as well. It essentially summarizes some of what I just said. (The Robinson written statement is attached).

Judge Wilkins: Alright, Commissioner Corrothers.

Commissioner Corrothers: Well, with utmost respect to my fellow Commissioners and not withstanding my deep concern for my correctional colleagues, because I've been in corrections for a number of years. The issue before us today as I see it is not whether we should or should not have capital punishment nor whether the death penalty is a deterrent. The real question before us today as I see it is whether sentencing reform is going to be placed on a shelf -- whether our major guideline effort

that has already consumed a tremendous amount of our time and energy and which is of great significance to this country-- whether that will all be lost in a sea of controversy -- is as I see it the real issue for us today. And that's my rationale for voting in favor of Judge MacKinnon's motion.

Judge Wilkins: Alright fine. Any other discussion? Judge Breyer.

Judge Breyer: Well, as you know, I voted against going into this in the first place, and my reason, I'm rather surprised, Paul, that given your connection with this and your general emphasis on the legal nature of the Commission's authority and the statute-- we had initially and we have heard over the last week, statement after statement from 1976 up through the present, of Senators, Senator Kennedy, Senator Thurmond, Senators on both sides of the aisle -- who seem to me have suggested that the death penalty was not in the bill that was enacted into law and that became our statutory mandate. Now, we've heard, piece after piece of evidence on that question and we know the language isn't here. So I've just been reinforced in what I think of as the three points. (1) This is not the right institution, we are not elected to resolve that serious political issue. (2) We do not have the mandate politically to do it, and really I come down on the third point exactly to what George said. (3) That no one will focus on the merits of what we are doing. Everyone will

focus only on the death penalty, if we get into this and that detracts from the serious primary mission of this Commission. I've said that before. I know I did.

Commissioner Robinson: Let me just respond if I could. I think you're right of course. There are significant legal questions that are not resolved and we have to resolve those before we promulgate guidelines. But in a sense, that's the least of our problems in promulgating death penalty guidelines. We have to have guidelines that merit having the death sanction attached. I think both of those conditions have to be satisfied before we can promulgate guidelines for the death penalty.

Judge Wilkins: Any other comments? Alright, well. Let me state my position. I don't think its any secret to anyone that I strongly support capital punishment, and I've held this position for many years and have not changed. With regard to your motion and Commissioner Block, I support that in concept. We do need (the) death penalty for inmates who commit murder in prison, but I would suggest that we need it not only for the protection of correctional officials who are dealing with those serving life imprisonment or long terms but (also) for anyone in prison who commits a first degree murder, either against a correctional official or against another inmate, because as you know and you have seen the statistics, that has happened more than we would like to recognize. But we also have the same situation with law

enforcement officers who have to arrest individuals who have committed sentences that will, under our guidelines, or under the statute, impose life imprisonment or very long sentences. So the individual who has committed a serious offense, and as an FBI agent or an DEA agent or United States Marshall or other federal police officers confront this individual, that individual, will probably feel no reason not to kill again. And so, as I think you agree, we need it to protect those people as well as all of our citizens. So this is not really an issue of whether or not to, at least as far as I'm concerned, we support or do not support capital punishment. I support it, but I also recognize the political realities of the situation in which we are dealing and I am convinced that if we submit the death penalty issue with this submission of guidelines in April to the Congress that it will seriously jeopardize the implementation of these guidelines and we will lose all of the many, many significant improvements in our justice system that these guidelines, and the implementing legislation (offer) with the abolishment of parole, with the uniformity of sentencing, the elimination of unwarranted disparity, the certainty in punishment. These goals are very important, and I know we all share their attainment.

I simply think that we should first start in our guidelines, first submission, should not forward them. We cannot afford to lose this opportunity.

Alright, all positions having been stated, are we ready to vote? All those in favor of Commissioner Block's motion that we

have death penalty guidelines drafted for review and perhaps submission, dealing with murder by an inmate serving a long prison term, those in support say "AYE" -- Alright, let the record show that Commissioners Block, Nagel, and Robinson voted in favor of that motion. All those opposed say "NO" -- The record shows that Commissioner Corrothers, Judge Breyer, Judge MacKinnon and I voted against that motion. Now we have Commissioner Corrothers, (I mean) Judge MacKinnon's motion that we not address the death penalty issue with this submission of the guidelines. All those in favor of that motion say "YES"-- Let the record show that Commissioner Corrothers, Judge MacKinnon, Judge Breyer and I voted in favor of that motion. All those opposed say "NO" -- Let the record show that Commissioners Block, Nagel and Robinson voted against that motion. Alright, any further discussion on this issue?

The next agenda item was then considered.