

COMMISSION MEETING

APRIL 1, 1986

Commission Meeting - April 1, 1986

Chairman Wilkins called the meeting to order. Before the Commission discussed its agenda, he congratulated Commissioner Corrothers for receiving the William H. Hastie award from the National Association of Blacks in Criminal Justice for exceptional service in the field of corrections. Congratulations also went to Paul Martin for receiving the Associated Press' investigative reporting award. Paul placed fourth, behind USA Today, the Dallas Times Herald, and the New York Times.

Chairman Wilkins asked for amendments to the March 12 Commission meeting minutes. It was noted that Commissioner Corrothers had given Elizabeth Williams her changes to the minutes. He stated that there should be an orderly system for Commission meeting minutes changes. He suggested the minutes be distributed a few days before the following meeting and changes being presented to Elizabeth Williams at least 24 hours before the following meeting so the changes can be incorporated and the minutes redistributed. Commissioner Gainer added he thought the series of minutes were very good.

Chairman Wilkins mentioned that while he was on the subject of recording Commission activities that John Steer has been appointed the U.S. Sentencing Commission Historian. As Historian, he will collect and organize pertinent Commission material. Since the Commission will eventually write one or more reports indicating past activity, Chairman Wilkins feels it is important to forward all memoranda, as well as any other material

relating to Commission business, to John Steer so he can record it. Chairman Wilkins asked for any comments; there were none. He then asked the minutes to stand approved unless there is a later objection. Commissioner Corrothers so moved and Commissioner Block seconded. No objections were raised.

Chairman Wilkins called for a discussion of the U.S. Sentencing Commission public hearing, scheduled for April 15 at 10:00 a.m. He suggested a Commission meeting be held promptly at 9:30 a.m. to discuss any last minute briefing, should it be necessary. Communications Director Paul Martin and Deputy General Counsel David Tevelin will have primary responsibility for staffing the meeting. By next Thursday, they will have a list of those groups or individuals who will testify along with information about those groups. This list should give Commissioners and staff an idea of the specific subjects addressed and questions they might like to ask. Paul Martin said 250 information packets regarding the public hearing had been sent out. Chairman Wilkins asked Commissioner Gainer if he might be able to encourage District Attorney representatives to present ideas from the standpoint of the prosecution. Chairman Wilkins did not want them to feel they were excluded. Commissioner Gainer said it was a possibility.

Paul Martin stated he had spoken to two sections of the American Bar Association, the Criminal Justice and Anti-Trust divisions, and they said they would like to respond but due to internal hierarchy, their official response could not be prepared

before August. Chairman Wilkins emphasized the importance of developing a positive working relationship with those who are attending the public hearing. The hearing will be held in the Commission hearing room. Commissioner Block asked for the deadline for responses to Paul's hearing package, and Paul replied April 1. If the attender wished to speak, the deadline for written testimony is April 7.

Chairman Wilkins raised the topic of the Sentencing Institute in Arizona. A panel discussion is planned for the Wednesday morning of the program, and they would like one or two Commissioners to join the panel and assist in leading the discussion. Commissioner Baer is already scheduled to participate by virtue of his position with the Parole Commission. Chairman Wilkins proposed to have one representative from the Just Deserts work group and one representative from the Efficient Crime Control group participate in the panel discussion. He requested Commissioner Block and Commissioner Robinson participate as discussion group leaders, but noted that all Commission members will be seated in the front. Commissioner Block indicated he would not be in Arizona that day but Commissioner Nagel would be. Chairman Wilkins suggested Commissioner Nagel and Commissioner Robinson should take part in the panel. They both agreed.

Chairman Wilkins asked Research Director Bill Rhodes about progress on the research staff selection. Chairman Wilkins stressed the need to hire research personnel quickly because they

are needed immediately and asked the Commission to give Bill Rhodes and Kay Knapp authority to move on hiring additional staff. Judge Breyer agreed that hiring should proceed expeditiously. Chairman Wilkins suggested the matter be discussed further in an executive session. Everyone agreed.

Chairman Wilkins turned to the subject of the American Bar Association. A letter had been sent by the Commission to both their criminal and Anti-Trust divisions requesting pertinent information. The Anti-Trust group has an ad-hoc committee which has asked to meet with Commissioners and staff at 10:00 on April 9 at 1090 Vermont Avenue to discuss economic crime. Notice will be posted, and Chairman Wilkins asked Commissioners and interested staff members to attend. Both groups were extremely interested in the Commission's work. Paul Martin interjected that they will be meeting as individuals, not as representatives of the ABA. Commissioner Nagel asked if it were possible to reschedule that meeting. Chairman Wilkins said he would check but that certain ABA people would be in town only at that time and he did not know if that would be possible. Judge Breyer added that he had court that day and asked that the ABA members be so informed. Chairman Wilkins said that if the meeting could not be rescheduled, available Commissioners and staff would attend.

Chairman Wilkins turned to the topic of David Jones, a Commissioner of the Pennsylvania Sentencing Guidelines Commission. Dr. Jones has indicated in a letter to Commissioner

Block concern over the Commission's work. He feels that drafting guidelines is not a difficult task and that the Commission may be going about the drafting process incorrectly. Commissioner Nagel indicated that she and Commissioner Block had a meeting with him that afternoon at 3:30. Chairman Wilkins said any Commissioner interested in speaking with him should attend that meeting.

Chairman Wilkins said another concern of that continues to arise, is the question of whether the U.S. Sentencing Commission meetings are open to the public. Dr. Jones was under the misguided impression that meetings were 'secret.' Chairman Wilkins suggested a meeting schedule be posted by noon every Friday of the following weeks' meetings. He proposed that formal Commission meetings be open and that the Commission encourage outside attendance. Commissioner Corrothers thought the weekly posting of Commission meetings was a good idea. Commissioner Block asked if the Commission should notify the public of the regularly scheduled two-week meetings. Commissioner Gainer thought the bulletin board idea was fine. Judge Wilkins agreed, and added that as the deadline for submitting the guidelines looms closer, the Commission may need to call more meetings to work out the problems that may arise. Chairman Wilkins asked if it was agreed that Commission meetings were open, and that interested parties could call (202) 662-8800 and the receptionist could relay pertinent information. All Commissioners agreed on the meetings notification process. It was decided that a notice

explaining the posting procedure would be published in the Federal Register.

Commissioner Block said that Dr. Jones was interested in testifying at the April 15 hearing. Chairman Wilkins said if it was germane to the subject, he could testify. Commissioner Block pointed out that his subject is not related: he is interested in critiquing the Commission's procedure, which he feels is misguided. Judge Breyer suggested since his views were not on the subject addressed at the scheduled hearing that the Commission obtain his views in writing. Chairman Wilkins suggested asking him to attend a Commission meeting. Dr. Jones had replied to the questionnaire as a member of the Committee for a Free Congress. Commissioner Nagel mentioned that since she and Commissioner Block had a meeting with him this afternoon, they would discuss the matter.

Chairman Wilkins turned the meeting over to Commissioner Block to report on the progress of the Efficient Crime Control Project. Commissioner Block stated that because the Committee was still in its preliminary stage, he had nothing too specific to report. He has been working with Mark Cohen in an attempt to define the conceptual issues of the efficient crime control project. Toward that end, he and Mark had been sending a memo back and forth in an effort to clarify and solidify their ideas. In a later phase, this memo will serve to inform the Commission on the conceptual ideas behind the ECC project. He added that when more full time staff begins work and becomes available to

the ECC project, he hopes to accomplish more empirical work. In addition, he has been looking for different types of information available from government agencies. A questionnaire has been sent to a number of agencies, and the responses should be forthcoming by April 15.

Commissioner Nagel added two things: the first is that David Lombardero has taken responsibility for heading up the staff coordination for this project. Any questions or problems can be directed to him should Commissioners Block and Nagel be unavailable. Judge Breyer wanted to know how this group was organized. Commissioner Nagel responded that Commissioner Block and Mark Cohen were working on the conceptual plan and she was handling the empirical data. Working together, these two efforts should constitute a plan. Judge Breyer asked how far they had gotten. Commissioner Nagel said that both efforts are still in their early stages and she had not yet organized the information and would prefer to discuss it after it was organized. Judge Breyer asked what the conceptual plan was. Commissioner Block responded that he wanted to take the abstract Becker/Shavell/Polinsky ideas of efficient sentences and conceptualize them into measurable categories. When Judge Breyer questioned further, Commissioner Nagel interjected that they would be looking at issues such as the costs of the harm, secondary costs, costs of avoidance, the identity of the principle actors, costs of prosecution and investigation, rate of detection, the relationship between rate of detection and rate of



conviction, the present practices in terms of actual time served, the actual gain, and the difference between sentence and gain. Does crime pay, and if so, how can one make it not pay? Another analysis should be made concerning how to allocate resources so crime does not pay and still provide a sanction. Commissioner Block added the difficulty is in finding out what the work group can do in the limited time constraints of the commission. Commissioner Gainer added from the available evidence, crime does pay. Judge Breyer thought some crime pays more than others, and especially drugs. Commissioner Nagel brought up the fact that the Economic Harm section of the Department of Justice had been working hard to get more information on the subject. She noted, as an example, that they sent the Commission all sentencing memoranda to show which cases they argued for deterrence and why. Judge Breyer thought that if all harms and participation in a particular activity were listed, it may turn out that certain combinations are easily 'catchable' and justify a certain sentence. Commissioner Block emphasized the first priority is to discover if the criminal justice system works and if it is punitive. Having committed a crime and been caught, is the criminal truly any worse off than if he had not committed the crime. Commissioner Corrothers jokingly added he would not be worse off because of his big bank account in Switzerland. Commissioner Block interjected that the condition is a necessity. Judge Breyer said the answer is often no, at which point Commissioner Block noted that it would be helpful to know in

which areas the punitive condition does not hold, and noted that this information is applicable to more than the Efficient Crime Control model. He noted that, if prison terms were long enough or gains were always lost, the answer would be yes. Commissioner Nagel added that Commissioner Corrothers is working on the incapacitation aspect of the project.

Judge Breyer asked if Commissioners Block and Nagel had seen Sam Tompkins' report, which ranks different enforcement agencies' priorities while investigating white collar crime. He noted these were ranked by allocation of resources, not by the sentence, and that it may be difficult to translate. Nevertheless, it does provide a compendium of opinions from the law enforcement community on the order of priorities and provides a list of crimes which Thomkins labelled as "white collar." Commissioner Nagel replied that she had received the report and was looking for two or three others which covered the same topic. Judge MacKinnon asked if the report suggested ignoring any particular crime. Judge Breyer said they do not advocate ignoring anything but direct "focusing on" particular areas.

The meeting was then turned over to Commissioner Robinson. He stated the broad goal of his work group is to devise a system that generates a sentence which approximates the public consensus of what an offender deserves. If there is, in fact, a consensus on just, appropriate sentencing, they are trying to build a system to generate that sentence. The second goal is to shape the process to mirror how judges now go about that sentencing

decision process. The general principle underlying this effort is that the process under the guidelines should track the judges' intellectual process. Toward that end, he and his group have done several things. The first is to play with formats. He is in search of the most comfortable, understandable format, one that truly reflects the way people think about these issues. This requires talking and listening to judges. Last Thursday and Friday he attended Dan Freed's sentencing seminar at Yale. In Mr. Freed's program, case files are sent to a group of judges. Once circulated, he asks for sentences and reasons for those sentences. It is a way of hearing what is and is not important in the decision of sentencing, but more importantly it shows the process of what goes into making the sentencing decision. What do they talk about first, second, and is there a pattern in decision making? Commissioner Robinson thought it very enlightening to listen to judges discuss sentence disparity among themselves, although most of the disparity arose from a different interpretation of the facts. Judges will always have the all important decision of what facts are relevant in deciding what guideline to use, but the commission would like to replicate the process of decision making after the facts are decided. He mentioned that Denis Hauptly, Rusty Burress, Russell Ghent, and Susan Hayes have different backgrounds in sentencing. Their basic strategy is to get something down on paper, even if it is naive, to obtain a draft of the sentencing process. He would like to take this draft and ask the opinions of judges and

criminal justice people. Once a draft is complete, it can be refined. It will not be perfect but hopefully will generate fair, appropriate sentences. In the process, empirical studies of offense seriousness will be used. Instinct says the empirical studies are fairly gross. For example, most studies indicate that crimes against the person are more serious than crimes against property. Commissioner Robinson's group needs empirical information indicating how much worse crimes against person are than crimes against property. If empirical data showing this information is not available, the group will rely on common sense and proceed from there.

Commissioner Nagel thought he may be interested in the Peter Rossi study she had circulated. Commissioner Robinson expressed interest in this, and also added that once Marion Metcalf joined the Commission, the group would have a much better indication of what empirical data was statistically reliable. Until this point, his group was hesitant to rely heavily on any study because it was hard to judge the quality of the information.

Judge MacKinnon said the Chairman had asked him to arrange a Commission visit to a sentencing hearing. He found that on April 22, Judge Gerhard A. Gesell will sentence all of the white collar offenders in a case that involves defrauding the Postal Service of close to one billion dollars. He thought this was an important opportunity, but Commissioners will be attending the Arizona Sentencing Institute on the date it occurs. He suggested

the possibility of obtaining the transcripts and sending someone to attend the sentencing.

Commissioner Robinson agreed and reiterated that he hoped his group could develop a draft of the sentencing process and hoped that it will generate sufficient comments to be refined into a working document. He intends to test the document two ways. The first is to sort the factors and relative importance, and in addition decide how to structure the document so judges and probation officers will be comfortable with it and want to use it. His idea was to come up with mock scenarios but also take into consideration how judges will respond. He suggested that the Commissioners expose themselves to the judicial sentencing process as much as possible. Finally, he wanted to alleviate any problems by, for example, providing a table that tied the guidelines to current U.S. Code Sections.

Commissioner Corrothers thought that the process would be aided by the material from the Sentencing Institute, because it will contain a discussion of what alternatives to use and why. Commissioner Robinson agreed and indicated that he will attend the other sentencing seminars at Yale.

Judge Breyer said that Dan Freed thinks he might be able to put a conceptual framework on what judges do, but Freed is not certain to what extent that can be realized. If Freed sits with a group of judges, over a period of time they come to organize their thoughts. The significance of this is long term, say two to three years, because Freed will take federal judges and teach

them to create an organized conceptual format. Freed thinks the money to run the sessions can be obtained from foundations. Judge Breyer thought this was an issue to consider because the Commission guidelines may be revised somewhat after the initial Congressional passage, and these seminars may be a good exercise to undertake during that time period. Commissioner Robinson said one federal judge had attended the seminar he had attended, and that two more federal judges were scheduled to attend subsequent seminars. When he attended, he did not assign sentences (because he did not want anything to reflect on the Commission) but did explain reasons and give rankings. Dr. Freed thought that level of participation was necessary to truly learn from the exercise. Commissioner Robinson noted once judges go through this process, they seem to be more receptive to guidelines processes and principles.

Judge MacKinnon asked who attended the Freed seminar with Commissioner Robinson. Commissioner Robinson named Judge Berkman of New York, Judge Wiesberg of the Superior Court, Judge Cirelle from Connecticut, and judges from New York and Boston. Commissioner Robinson wanted to try out his working paper in one of Dan Freed's seminars in view of the fact that confidentiality could be maintained.

Chairman Wilkins expressed his personal belief that the ECC Model and JD Model were positive approaches for the Commission to take. He felt they gave the opportunity to compare methods and to get fresh ideas to approaching format. He cautioned that a

model must not be distributed as any type of final document of the Commission or of the Committee that constructed the models, but otherwise was delighted with the project.

Judge Breyer said the Offense Committee report by Denis Hauptly and Marla Wilson should provide the raw material for both Commissioner Robinson and Commissioners Block and Nagel. The report was sent to various groups to elicit detailed comments on the accuracy of the naming and qualifying features of each. It first gives a list of names, and each project is going to have to define what their guidelines pertain to. This report gives concrete names and attributes that will match project guidelines. He further noted that Bill Rhodes and Kay Knapp will be able to put in some numbers in two to three weeks. The numbers already in are the proposed Criminal Code Revision maximum, the Parole Commission guidelines, and he would like to add actual time served. Judge Breyer said the the report will enable anyone to see what happened to people--what their sentence was, how much time they served, or whether they were on probation. He pointed to the work done by David Lombardero. Other numbers added will be numbers of offenders. This information will then become raw material for the just deserts and efficient crime control models.

Commissioner Nagel wanted to know which data were being used and how it could be manipulated. Judge Breyer said Bill Rhodes and Kay Knapp would be the experts in this area, but he would suggest using a recent time frame and listing what happened during a given period. Commissioner Nagel asked about whether

you could start at the point of prosecution or case referral and then give the actual number that was fully prosecuted. Judge Breyer said they could be broken down by prior conviction.

Bill Rhodes stated that two sets of data could be used: the FPIPSIS data of 1984-5 showing estimated time served, or the Bureau of Justice Statistics data from 1980-81. The BJS data would indicate time served for those who had been released and projected time served for those who had not been released. Commissioner Nagel asked about whether the number of cases referred or fully prosecuted could be determined. Commissioner Block added that there was also a conceptual issue--whether conviction was different than conduct. Judge Breyer said some names will to some degree indicate actual conduct. Commissioner Block said it would be of interest to know the criminal conviction, what the criminal actually did, and how that affects time served. Judge Breyer replied that getting the right name and some numbers, and refining the names means changing some of them, to a degree, to reflect conduct. He used the example of obstructing a government function by fraud. In looking at what happened to people who did that, it may be interesting to know what kind of fraud was committed. Commissioner Block said he was interested in a different type of information. If, for example, someone was obstructing justice by physical interference and got convicted of impersonating an official, how would that issue be handled? Commissioner Nagel thought a better example was if someone were indicted on charges of bribery and racketeering and



the conviction is one count of mail fraud, and asked how the data would reflect that?

Chairman Wilkins indicated that this type of information could be obtained from Kay's study. Commissioner Block used the example that if the left column indicated average time served for the actual offense, then he would like to see a column indicating what the offense actually was. Judge Breyer emphasized that the Code violation and the time served would be shown, but any more than that would be difficult to find out.

Commissioner Block asked if more information would be available when the case study from the Federal Probation Officers' Association is completed. Kay Knapp said all the data from FPIPSIS is being sent to the Commission and from the 1985 data, approximately 10,000 geographically representative cases will be pulled. She added that once this process is completed, the Commission can select which offense types they are most interested in. If the offense type is very common, a sample can be drawn, or if the offense type is very uncommon, the whole population can be used. The important aspect is to define the sample very carefully to get information that is of most interest. She added that the probation officers were very helpful and receptive. Kay said she needed to wait for some refinements in the offense and offender characteristics before the data collection form is designed. It must be pretested, and if the data collection is to get started in May or June, offense and offender characteristics will have to be defined this month.

Chairman Wilkins asked Dave Lombardero for his report comparing GAO data and the Commission's data. Dave said he took a short GAO report that showed median sentences for bank robbery which was presented in different categories than the one in which the FJC data is presented. The GAO research was based on a sample of all prisoners in jail on a certain date in 1983. The FJC data included all cases sentenced in a particular time frame. Because cases with longer sentences tend to accumulate in prison, the GAO sample showed average sentences about 10 percent higher than the FJC data. This is reassuring because, given the differences in the samples, sentences reflected from GAO data should be longer than sentences in the FJC data.

Chairman Wilkins noted that the GAO data would be helpful when looking at the impact of the Commission's guidelines on prison population, because the Commission will primarily be concerned with people in prison for impact assessment. Judge Breyer said the FJC figures looked low to people not familiar with actual time served. People will ask why offenders are going to prison for such a short time, but at the same time, prisons are at 110 to 145% capacity. The Commission will have to produce alternatives that do not involve substantial expenditures to build new prisons. One area the Commission must look at is reconciling existing resources with crimes committed. The Commission must examine, for example, maximally supervised probation as a punishment just in case Congress does not allocate

more money for prisons. Judge Breyer felt proposed guidelines can include the use of fines, probation, electronic monitoring and community service alternatives as a backup to be explored and be put into effect if needed.

Judge MacKinnon noted that the Commission was already looking at alternatives to sentencing and had recently been given a presentation by the National Institute of Sentencing Alternatives. He added that the Brandeis report argues that intensive probation is not being applied and could work in some instances. Judge Breyer thought a book or paper by the staff must be written that examines, for example, the effectiveness of short, sharp sentences, among other sentencing alternatives. Commissioner Nagel asked if Judge Breyer was suggesting that prison population was a cap on the Commissions' guidelines. She understood it was not, and further that she recalled that at the Confirmation briefing, the Commissioners were told that the vote was 93 to 1 not to allow prison capacity be a cap on the guidelines.

Commissioner Gainer said when the Commission makes its recommendations to Congress, it must explain the effect of those recommendations on prison populations and therefore and must have a study of consequences and alternatives in place. Judge Breyer said that this was not to be construed that punishments should be limited to existing prison capacity, but reality says the Commission must consider the best way to run the sentencing system if Congress does not appropriate vast sums of money for

prison construction. Commissioner Nagel wondered if the Commission was working with Norm Carlson on re-figuring capacity in a way that was acceptable to everyone. Kay Knapp agreed and said the Commission needs to work on it because of existing capacity and the use of that capacity is defined by statute to be a joint study with the Federal Bureau of Prisons. Chairman Wilkins stated he would contact Norm Carlson regarding this project. Judge Breyer said much of the work is done but needs to be pulled together in a cohesive manner.

Commissioner Corrothers thought the Commission needed to consider, among other things, a strong educational process. She feels that the Commission must educate the public about alternatives and insure they realize we are talking about real, painful punishment. She said the Commission must organize a sufficient marketing job of the alternatives and differentiate between these and previous ineffective alternatives. Kay Knapp asked if the Brandeis people had considered any other labels besides 'Alternatives' since the connotations of that name are not very positive. Commissioner Gainer agreed that a new label would be helpful.

Commissioner Nagel asked if the Commission is collecting information about electronic monitoring. Chairman Wilkins said the Commission needs to move forward in this area. Chairman Wilkins said he has asked Rusty Burress to collect information from states regarding sentencing alternatives. Commissioner Corrothers suggested meeting with companies which process the

electronic monitoring devices to learn the capabilities and limitations of these devices. Denis Hauptly added that Prince George's County, MD is beginning to use this type of device on a select group. Judge Breyer said Dave Tevelin is working on a similar project at the staff level.

Commissioner Nagel requested a list of staff and the projects they are working on. Chairman Wilkins thought this a good idea and asked Denis Hauptly, Bill Rhodes, and Kay Knapp to provide a general list of that nature.

Chairman Wilkins asked Commissioner Corrothers for a report from the Federal Probation Officers Association. Commissioner Corrothers stated she attended their board meeting with David Tevelin and Rusty Burress. She, Dave Tevelin and Rusty Burress sought to assure them of the Commission's interest in their views and the Commission's recognition of their significant role in the guideline development, implementation, and research process. Commissioner Corrothers emphasized the importance of maintaining a strong communications link with them. She felt the meeting laid the ground work for a good relationship and cautioned not to take lightly the importance of the Probation Officers Association. She noted that they do not hesitate to voice problems when they occur, and she mentioned previous problems the association had with the Parole Commission. Chairman Wilkins supported this assertion by saying that probation officers will be significant players in our work because they will provide much

'real life' information. He stressed they are very willing to go to work and assist the Commission in its efforts.

Chairman Wilkins mentioned Kay Knapp had just returned from the Southeast Chief Probation Officers' meeting in Atlanta. Kay reported that after Commissioner Corrothers' positive meeting, they were very receptive to the presentation in Atlanta. They expressed no hesitation regarding the data collection effort, but did express concern about the sentencing process once the guidelines go into effect, particularly in regard to the sentencing hearing over the facts of the case.

Chairman Wilkins asked for any comments before the Commission meeting adjourned and the executive session began. Commissioner Corrothers said that in regard to the Probation Officers, Rusty Burress has been a great asset to our staff. His position and communications ability has aided the Commission's credibility and enhanced our image with probation officers. Chairman Wilkins agreed and mentioned Don Chamlee seemed receptive to the idea that a field officer always be assigned to the Commission, even after Rusty's term expires. Chairman Wilkins agreed that this was a good idea. He also mentioned his meeting with the National Association of Former U.S. Attorneys, and was pleased at their strong interest in our work. He said they are one group that is interested in helping the Commission examine the guidelines when they are in more advanced stages. Their prosecutorial and defense experience should be beneficial to the Commission.

The meeting was adjourned to Executive Session.