

THE UNITED STATES SENTENCING COMMISSION
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William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



*As
Minutes*

AGENDA

1. Approval of April 1 and April 15 Minutes
2. Sentencing Institute Report
3. Public Hearing Update
4. Report on Mail Fraud Sentencing
5. Organized Crime Commission - Discuss the possibility of meeting with former members
6. Meeting with General Accounting Office Officials
 - Arnold P. Jones
 - John Anderson
 - Mike Murphy
7. Report of Committees
8. Sentencing Practices Study
9. Research Advisory Committee
10. Commission Policies
 - Annual Leave and related Policies
 - Library
 - Centralized Filing System
 - Hatch Act and Outside Activities
 - Use of Commission Resources
11. Adjournment

April 29, 1986

Chairman Wilkins called the meeting to order. The Chairman formally welcomed Suzanne Conlon, a former Assistant U.S. Attorney, to the Commission staff.

The Chairman asked for amendments to the April 1 and April 15 Commission meeting minutes. No amendments were proposed. Chairman Wilkins suggested that if there were no objections, to let the minutes stand approved. All Commissioners agreed.

Chairman Wilkins reported the Ninth Circuit Sentencing Institute in Phoenix, attended by Commissioners Baer, Block, Corrothers, Nagel, Robinson, himself, and senior staff had been a very productive meeting. Chairman Wilkins thought a good deal was learned by both the Probation Officers and judges who participated, as well as Commission members.

At the Sentencing Institute, a tentative letter was circulated among the Commissioners concerning the Commission's next scheduled hearing. The first Commission hearing on offense characteristics was very successful. The next hearing topic is on offender characteristics and is to be held on May 22, 1986. The Chairman suggested that subsequent hearings deal with corporate sanctions, tentatively scheduled for June 10, and sentencing options, tentatively scheduled for July 15. He suggested the Commission begin to think about the plea negotiations hearing, but wait to set a definite date. Chairman Wilkins felt the offender characteristics hearing would be most beneficial if those who work within the federal system were

invited to testify. His examples were Probation Officers, U.S. Attorneys, and Federal Public Defenders, although testimony has been solicited from a wide range of groups. He asked for additional suggestions for the June 10 and July 15 hearings. Chairman Wilkins requested the names of proposed witnesses be forwarded to Paul Martin. Paul Martin will be responsible for contacting the witnesses.

Commissioner Block clarified that while the offender characteristics hearing may involve those familiar with the federal system, he thought the same criteria should not apply to the corporate sanctions hearing. Judge Breyer suggested calling the Conference Board, who run the round table organization, and solicit their recommendations for this hearing. Commissioner Gainer added that the Georgetown Institute for Strategic Studies was looking into the question of corporate sanctions and that perhaps they may be able to suggest appropriate individual witnesses. Judge MacKinnon thought contacting the Chamber of Commerce would also be helpful in this area. Judge Wilkins stated some Department of Justice officials could also provide valuable suggestions.

Commissioner Nagel asked if the Commission was interested in inviting academics and authors of intellectual studies on corporate sanctions. Chairman Wilkins said that all suggestions should be forwarded to Paul Martin and decisions would be made at a later time. He requested those suggestions by Friday, May 2.

Commissioner Nagel reminded the Commission that originally

there was some discussion about a hearing on sentencing philosophy. Chairman Wilkins asked if the Commission were still interested in holding a hearing on this matter. He thought it may be more effective to invite individuals to speak to the Commission through a less formal arrangement. Commissioner Corrothers said it was a good idea, but that it should have been the first of the Commission hearings. Judge MacKinnon thought such a hearing presupposes one particular sentencing philosophy that should be imposed. He believes every sentence is an amalgam that includes consideration of the offender, the victim, the public, and other relevant factors. He does not believe in one philosophy covering these factors. One element of sentencing is to consider as many of these factors as is necessary to achieve a fair sentence. Judge Breyer said he would not decide not to have a philosophy hearing. Commissioner Block said if the question only concerned timing, the issue should be decided now.

Chairman Wilkins reiterated that the issue is not whether knowledge about sentencing philosophies is important, because clearly it is, but rather whether the Commission's time might not be better spent reading material on different sentencing philosophies. Judge MacKinnon asked if the philosophy were not obvious in the sentence.

Commissioner Block stated that one object of the hearings is to encourage the public to express its views; perhaps the word "philosophy" was simply too strong in this situation. He thought solicitation of public opinion on the subject would be useful.

Dave Lombardero suggested soliciting written testimony without a hearing. Chairman Wilkins stated the Commission definitely wanted to do that because the development of a philosophy is a mandate of the statute. Commissioner Nagel thought that an alternate format may be the solution to this problem. Instead of simply soliciting public perceptions, she thought the Commission could ask how the various philosophies could be integrated in the guidelines. Commissioner Robinson thought any public hearing on sentencing philosophy should have occurred long before, and any hearing now on abstract ideas may seem peculiar. Commissioner Gainer agreed with Commissioner Nagel in that examination of how various sentencing philosophies could be combined can be important. Judge MacKinnon thought the issue should not be avoided, and that the idea of how to integrate philosophies may be a solution to the timing problem. He moved that the Commission call in individuals outstanding in the field to follow Commissioner Gainer's suggestion. Judge Breyer seconded. Chairman Wilkins suggested that the Commission put together four or five appropriate individuals and have a round table discussion on the purposes of sentencing and how they conflict. Commissioners Nagel, Block, Breyer, Corrothers, MacKinnon agreed. Chairman Wilkins asked Commissioner Nagel to coordinate the process with Kay and forward names to Kay. An afternoon following a Commission meeting might be a good time to have the discussion.

Commissioner Corrothers asked if written testimony would be

solicited from those groups who would not be invited to attend the scheduled hearings. Chairman Wilkins said a variety of groups would be asked for written testimony, and asked if the Commission could provide suggestions and also look at commission meeting dates to find a suitable time. He said written testimony for the May 22 public hearing would be distributed by May 15.

Commissioner Nagel asked if there were a body of rules governing the use and distribution of public hearing material. Commissioner Gainer commented that in the Executive branch everything is public. Judge Breyer mentioned the written testimony and the tapes of these hearings. Chairman Wilkins thought transcribing these would be too expensive, but they are available to the public if requested. Commissioner Block asked what materials should be preserved and asked about John Steer's role as historian. Chairman Wilkins said that his role has been defined as historian for a different reason; that of collecting Commission materials as they were produced as opposed to collecting them at a later time for the written report.

Susan Hayes gave a synopsis of the sentencing of a major mail fraud case by Judge Gerhard Gesell. (See Attachment 1, Memorandum from Susan Hayes). Commissioner Corrothers remarked that Susan's report was very well organized and presented.

Judge Breyer thought Susan's presentation related to Owen Walker's concern over what part each offender played in the conspiracy. He noted that the primary basis for the distribution of sentences was the hierarchy of the defendants, and the

knowledge of that hierarchy could be retained only through a hearing. Commissioner Gainer said 90% of those facts will come out on the merits. Judge Breyer said while this may be true, there is a possibility that a second hearing would be necessary to determine what role a defendant played in a crime. The appellate court will have to make that determination. Chairman Wilkins added that the guilty plea process will become much more complex and the role of the judge may change drastically. Judge Breyer added that this becomes a large problem in the federal system because federal crimes like bank robbery and drug offenses often involve conspiracy.

Chairman Wilkins moved on to the topic of the Organized Crime Commission. Commissioner Nagel thought it may make sense to have a meeting with them to hear their key findings and insure no duplication of effort. She suggested having a meeting at a time when interested parties could attend. Commissioner Corrothers asked if, instead, they could make a presentation at a regularly scheduled full Commission meeting. Commissioner Nagel said she expected their presentation to last several hours and thought it may be better to give Commissioners, as well as interested staff members, the option of attending. Commissioner Robinson agreed the meeting should take place at a time other than a Commission meeting.

Judge MacKinnon thought that another organization with pertinent information would be the Criminal Law Committee of the Judicial Conference. This committee includes one judge from each

circuit, and is set up to answer legal questions, but not policy questions, from Congress. They presently have no scheduled business for their July meeting. Commissioner Gainer thought they would be an excellent group to invite to the second public hearing and review any tentative conclusions of the Commission. Judge MacKinnon pointed out that there will be many legal issues the Commission could address toward the Criminal Law Committee. Commissioner Nagel added that at the Sentencing Institute, it had become clear that judges did not have one composite view of the legal issues raised by sentencing guidelines; therefore, the authority of this group could be quite useful to the Commission. Chairman Wilkins asked how these members could be approached since there was no definitive list of those legal issues yet. Commissioner Nagel said she could provide the list compiled at the Sentencing Institute, and other possibilities could be added.

Chairman Wilkins asked for a report from the Efficient Crime Control (ECC) work group. Commissioner Block said Mark Cohen had prepared a statement of the project (See Attachment 2, memorandum from Marc Cohen) which indicated that the project is working on two issues simultaneously. The first is to take the goals of the project and construct a more formal model. Part, but not all of this, had been done before. Commissioner Block mentioned that some outside assistance from the Economic Analysis Division of the Department of Justice had been solicited, and that they were handling a good part of the data for this part of the project. The second part of the project concerned questions about

implementation of the model, and determination of things such as the kind of data it will take, the specific cost of crime, the situation in which crime would not pay, and so forth. The third goal is to turn the model into an implementable set of sentencing principles and decide whether the penalties are punitive, which is a necessary condition for a deterrence model. Chairman Wilkins asked how far the project had to go before completion. Commissioner Block said the model was still a few months away.

He added that it is not sufficient for deterrence that the sentence be merely punitive, but one needs more to make crime a bad bet. Restitution is a minimum condition for deterrence. Commissioner Corrothers said inmates discussed this matter frequently; for example, embezzlers often say they are better off even though they had been caught and convicted of the crime because of the amount of profit realized. Judge MacKinnon added that some people say there is no such thing as "hard labor" in prison in America. Chairman Wilkins asked Commissioner Nagel if she had anything to add to Commissioner Block's report. Commissioner Nagel she did not, but would be glad to elaborate on the data collection effort if anyone would like to speak with her about it.

Commissioner Robinson went on to discuss the progress of the just deserts work group. He reported that the work group was attempting to identify relevant distinctions of crime, of offense and offender, and were starting with rankings and grading factors. They were looking at presentence investigation reports

in an attempt to establish typical federal fact patterns, to see available distinctions. The second aim of the just deserts work group is to quantify the distinctions, to give numbers or relational values to discern how much worse one harm is from another, or how the degree of involvement of a criminal should affect his culpability. Commissioner Robison said the group had used the proposed federal criminal code, Title 18, some state statutes, public perception literature, and time-served estimates to reach this point. His strategy is to generate estimates and match and compare them with other similar study results, or test them against all possible criteria. Once the distinctions are quantified, he would like a format developed that would be as flexible as the system requires; one that seems natural and easy to use. He added that a substantial amount of testing would need to be done. Commissioner Robinson stated the format had come a long way, and that the ease of implementation of the criteria was not extremely relevant now, because the Commission would surely make some modifications in this area. He thought the time frame was about the same as the ECC work group's limits. He suggested that an interim report could be provided if the Commission thought it would be helpful. Chairman Wilkins asked if the format of the ECC model would allow for that and further if both groups could walk the Commission through what has been done thus far. Commissioner Nagel said the project was progressing in parts, and as soon as her group has something the Commission can respond to, they will present a report. Chairman Wilkins asked

if the Commission were in agreement to provide the reports. Commissioner Corrothers agreed, adding that because of the tremendous amount of time and energy utilized with these projects, the full Commission should review the work of each group soon to ensure that the group is proceeding in the desired direction. Commissioner Robinson agreed, but added that he did not want the amount of resources required by the just deserts model to be exaggerated. Commissioner Gainer agreed that the common elements of each model seemed to dictate that an interim report may be useful.

Judge MacKinnon asked Judge Breyer, Commissioner Nagel and Commissioner Robinson if Section 2 of Title 1, the aiding and abetting section, had been dealt with in each of their respective projects. Neither Commissioner Nagel nor Judge Breyer had dealt with the topic in depth yet, however Commissioner Robinson had covered it to some degree. Judge MacKinnon stated that Section 2, Title 18 was the broadest statute on the books, and anticipated more problems with it than any other section. The magnitude of it dictated that it should be dealt with soon. Commissioner Robinson agreed that this statute added a challenge of trying to articulate or describe the specific blameworthiness of each offense. Bill Rhodes interjected that he was concerned about timing. The data collection format must be developed over the next few weeks. The FPIPSIS data, Probation Officer coded data, narrative, and PSI would all be useful, but if each group waited too long, they may not be able to obtain all the data they

required. Chairman Wilkins asked all Commissioners and staff to give Bill a list of all possible data they may need for their studies and suggested to Bill that he personally ask again later in the week.

Representatives from the General Accounting Office joined the Commission to make a presentation. Arnold Jones, who oversees the administration of Justice for GAO, introduced John Anderson, Mick Murphy, and Gaston Gianni. Mike Murphy explained GAO's two explicit responsibilities. The first is to provide Congress with an impact statement 150 days after the guidelines are submitted to Congress. The second is a report due four years after the guidelines are submitted on the effect of the guidelines on the sentencing process. Mr. Murphy stated GAO has done extensive work in the area of sentencing and parole, and some of that information had already been provided to the Commission. More recently, the GAO report on bank robbery had been provided. GAO has an ongoing investigation of the effectiveness of the Organized Crime and Drug Enforcement Task Force, concentrating on sentencing, criminal fines, seizures and forfeitures. He showed a chart from the Senate Judiciary Committee illustrating the use of fines. To date, they have looked at 1,442 defendants who were sentenced in 1983-84. The amount of fines possibly imposed, based on offense of conviction, is \$57 million. The amount actually imposed was about \$8 million on 320 defendants. The amount collected was \$542,000. Mr. Murphy mentioned databases that are available from GAO, some

going back several years, and that that information would be available to the Commission. He expressed the feeling that GAO is very willing to help the Commission in any way.

Mr. Jones said information from the Organized Crime and Drug Enforcement Task Force generally concerns initial charging. If, however, the sentencing outcomes of those offenders are examined, it becomes clear that they are organized crime chiefs as defined by the Justice Department and by DEA criteria, and are the target of the current administration's crime reduction policy. The result is that GAO has a database with the characteristics of the hard core federal criminal. Mr. Jones expressed his personal support for the Commission's goals.

Judge MacKinnon asked if the Commission should address the problem of disparity, generally, or if overall, sentencing is basically uniform and only certain judges are being too strict or too lenient. Mr. Jones said first, there is wide discretion exercised by individual judges. One way to determine median sentences is to look at past sentencing practices, and decide on a reasonable variation on that norm. He thought the differences in sentence length and time served were factors that might be considered. Chairman Wilkins asked how the Commission could obtain the data. Mr. Murphy said he would sit down with Kay to decide which would be most helpful. Mr. Jones agreed. Chairman Wilkins said he would also like GAO input on what they thought the Commission needed.

Mr. Jones mentioned that another matter to study is the

ability of the criminal justice system's capacity to handle what the guidelines will dictate. GAO has looked at portions of this problem. He suggested contracting this project out. He mentioned that the Organized Crime and Drug Enforcement Task Force had been making greater use of the RICO statutes and Criminal Enterprise clause of Title 21. Judge Breyer said that would be done, but probably in house. He brought up section 924, which mandates a 5 year penalty that must be served if the offender is carrying a gun in drug offenses. That statute has not been widely enforced. It now also applies to crimes like armed bank robbery, dictating a five year penalty in addition to the penalty for armed robbery. Judge MacKinnon asked how it applied to a conspiracy with two people and only one had a gun. Mr Murphy did not know how it would be handled if the gun was not in clear possession of one defendant or another, but it probably does not apply to both defendants if only one has the gun. Commissioner Robinson noted the major effect of the statute has been to obtain better pleas. Judge Breyer said it has the potential to swamp the system.

Judge MacKinnon said one of the Commission's primary duties is to stop U.S. Attorneys from plea negotiations where they did not get the sentences they thought they should get. Judge MacKinnon asked if they had suggestions in that area. Mr. Jones said the sentences should be appealable on both sides. Mr. Murphy said judges would like to be able to have the discretion to accept or reject plea negotiation agreements. The GAO thought

the Sentencing Commission should provide some guidance to federal judges in this area. It is unusual for a judge to reject a negotiated plea. Mr. Murphy thought that if one let defendants plead guilty to a lesser charge without the judge knowing what the total offense behavior is, a problem would be created. If guidelines in this area are not created, disparity will remain. Judge Breyer stated that plea bargaining could not be abolished. Mr. Murphy said there should be some review of plea agreements. Judge Breyer asked about the Department of Justice guidelines in that area. Mr. Murphy said they were so general that disparity could still exist. Judge MacKinnon asked whether they should concern number of years of a sentence, or charge bargaining. He noted South Carolina did not let the prosecutor talk in terms of years, but other districts allow it. Mr. Murphy said the prosecutor has no standing in determining the sentence. Judge MacKinnon asked how many divisions of the United States are like that. Mike Murphy said he did not know, but the information could be obtained easily from U.S. Attorneys. Commissioner Gainer said the Department of Justice had done that analysis in the mid seventies.

Chairman Wilkins asked if, under the guidelines, prosecutors should be allowed to participate in charge bargaining. Mr. Murphy said the danger is in that the judge could never sentence for the real offense, and that is what is happening now. Judge MacKinnon asked how this problem could be solved. Mr. Murphy thought the only way to do that was to sentence for the original,

higher crime. Judge Wilkins said that the judge does not learn all the details of the case during a plea hearing. After the sentence has been passed, the judge may learn that other offenses have been committed.

Commissioner Nagel added that at the Sentencing Institute, some judges indicated that they could not force the U.S. Attorney to go to trial on a case where they wanted to accept the plea. Apparently some Ninth Circuit judges thought plea rejection was intruding on the U.S. Attorney's discretionary powers. Commissioner Corrothers said some would accept the plea, then sentence with the higher offense in mind. She objected to this notion because it runs contrary to the "truth in sentencing" theory the Commission uses. Mr. Murphy said this is a particular problem in the federal system, where only about 15% of cases actually go to trial. Commissioner Robinson asked if Mr. Murphy thought plea negotiations would decrease as a result of real offense sentencing. He said he was concerned about the possibility of lesser occurrence of plea negotiations. Commissioner Robinson asked what incentive could be built into the system to convince the defendant to negotiate a plea. Under real offense sentencing, a judge would have to tell the offender that the real offense would be considered. Commissioner Corrothers said that one judge had suggested that, but a defense attorney said he would not deal under those circumstances. Commissioner Corrothers said all judges in her group at the Sentencing Institute indicated that they would like the

Commission to deal with real offenses in sentencing.

Commissioner Corrothers indicated concern over the increased power of the prosecuting attorney in such a system. She expressed concern over improper influencing of prosecutors in such situations. Mr. Murphy said that this situation exists now, and if the judge has no say over what is charged, then the system is open to injustice. At least now, the judge can reject the plea. Both Chairman Wilkins and Judge Breyer agreed that it is difficult to make a U.S. Attorney go to trial.

Commissioner Robinson said there are two approaches to the problem: one is to involve the judge in charging, or tell everyone this is real offense sentencing. He supposed the guidelines could take cooperation into account. He asked if there were other solutions. Mr. Murphy was not sure, but thought that defendants would be much more likely to go to trial if the guidelines are not flexible to individual circumstances. Commissioner Robinson said judges will not be authorized to sentence outside the guidelines unless the commission had not considered the mitigating factor involved in the case.

Bill Rhodes asked what the priorities of the first GAO report would be. He also asked that since it was an independent report, what type of cooperation would GAO need from the Commission. Mr. Murphy said they would keep an arm's length relationship, but were interested in working with the offense and offender characteristics and plea negotiations. Bill Rhodes asked how the guidelines will be evaluated. Mr. Jones said GAO's

relationship is no different than their relationship with any other government agency and that objectivity would be maintained.

Judge MacKinnon said plea negotiation, in his experience, did not generally involve actual time served. Both Judge Breyer and Mr. Murphy said this was common practice now. Judge Breyer further asked whether GAO would recommend written plea negotiations in advance of the acceptance of the plea. Mr. Murphy said it is much easier to monitor with written testimony. Mr. Jones interjected that these are not GAO views, but personal testimony.

Kay Knapp elaborated on what it appeared GAO intended to do. GAO indicated that they wanted good data to assess how guidelines change the system, and to estimate system impact. Kay said that, insofar as the Commission is able to compile that information before the drafting of the guidelines, that information would be made available to GAO, and asked GAO to please notify the Commission if they had further interests in other areas in which the Commission is working. She noted that the GAO priorities matched the Commission's in many ways.

Mr. Murphy mentioned GAO will not wait until the report to Congress to let the Commission know if there are problems with Commission policies or products. Mr. Jones said it is GAO policy to provide written, formal comments for government agencies. It assures Congress that they are getting fact; it assures GAO that they have not missed something, and gives the agency a chance to state a position different than that of GAO's. Mr. Jones said he

will provide drafts of the GAO report before it goes to Congress. The Chairman thanked the GAO representatives for joining the Commission.

Bill Rhodes gave a presentation on the Sentencing Practices study. He is attempting, along with Kay, to put together a plan, and solicit comments. Bill wants to know if the plan is what the Commission wants, it is a way of communicating with the legal staff, and is a way to communicate with his own staff. He said he would welcome comments on the research agenda. The past practices study is the priority study at this point. There are two components to it. The first is data collection, including FPIPSIS and other sources. Shelly Matsuba is working on a data file for sentencing practices, and Phyllis Newton is working on a probation and parole supervision practices data file. The priority now is to find out what other data are needed, some of which will be obtained from Probation Officer coding, and from obtaining some presentence investigation reports. The intention is to cover the data needed for future empirical work. Beyond that, the research group has been responding to the Crime Control work group and satisfying their agenda. He again asked for comments on the research agenda.

Chairman Wilkins brought up the Research Advisory Committee. Chairman Wilkins' candidate, James Q. Wilson, had declined due to previous obligations. Peter Hoffman, Commissioner Corrothers' candidate, had been hired by the Commission. Thus far the names of the Research Advisory Committee are Gary Becker, William

Landes, Norval Morris, Don Gottfredson and Michael Tonry. Jackie Cohen and Philip Cook have been added. All have agreed to serve. Kay Knapp said Gary Becker agreed to serve in a limited fashion. Kay said she offered James Q. Wilson that same option, and he agreed to help in an unofficial capacity in any way he could. Commissioner Corrothers suggested calling him a consultant.

Kay said she had contacted as many Research Advisory Committee members as she could reach and tried to arrange a meeting in May, and the only day possible had been May 14. She had five definite attendees, and had not heard yet from Gary Becker or Bill Landes. Commissioner Block asked about the role of the Committee. He said he understood that they were technical advisors and thought they would not help set the research agenda. Kay said they are definitely there to provide technical support and will not set the agenda, but could perhaps advise on different issues within the agenda. Commissioner Corrothers said that a written statement or charge of purpose would need to be provided. She thought this was important to set the tone and provide clear guidance to the RAC. Bill Rhodes said this may be important, but he also hoped to have the research agenda in place by May 14. He expected the RAC to react to it. He thought it was ineffective to have the RAC suggest topics, because they do not have to operationalize the research plan. In a technical sense, they will provide valuable information to the commission and also will raise issues the Commission may otherwise overlook. In addition, they will add credibility to the Commission Research

group, which will in turn provide more credibility to the entire Commission. Commissioner Block asked the Commission that if Mr. Becker and Mr. Landes could not attend that the Commission could solicit written comments from them. Kay said she expected to do this both before and after the meeting.

Commissioner Block also thought that, given the short amount of time in which the Commission must act, the RAC must appreciate the goals of the Commission, and not deal with tangential, interesting topics. He did not think they should set the objectives, but advise on how to achieve them. Commissioner Corrothers agreed they should provide the Commission with the most effective ways to reach the Commission's goals.

Commissioner Block added the Commission should agree on the goals before the RAC meets. Commissioner Nagel objected to the May 14 date because the technical mandate of the RAC could not be met since the Commission does not yet have those goals totally focused. She proposed that Bill submit a more refined version of the proposed research agenda, examining all factors in depth, and examining that agenda to insure that it will help the Commission meet its goals. She felt the Commission should have the opportunity to comment on it and make sure it meets Commission objectives. Then the agenda should be sent to the RAC so they can respond at the level for which they are qualified.

Commissioner Nagel felt that Bill was not yet able to provide such a refined technical research design and therefore the May 14 date was premature. In addition, she was not informed of the

proposed meeting, and cannot attend. She thought it was extremely important, at the first meeting, for all Research Advisory Committee Members and all Commissioners to be there. She also thought Bill's time would be split between writing the technical research plan and collecting data for the guidelines. Commissioner Nagel proposed postponing the meeting until the first week in June.

Judge Breyer said the Commission will lose an extra month that way, and that the RAC could be helpful for many different things in May. He thought they could meet again in June if necessary. Commissioner Nagel thought the meeting would be more productive if the research agenda were in place and the Commissioners were given a chance to respond to it before the RAC met. Bill noted that Commissioner Nagel had a valid point, but that if the research plan is not in place by May 14, the Commission may be extremely pressed for time in the long run. The solution would be to put the agenda in place by May 14. The research project will not be successful unless it gets off the ground soon.

Commissioner Nagel agreed but said she felt it important to get Commission reaction to it first. She also said it was a matter of professional courtesy for all Commissioners to attend the first RAC meeting. Judge MacKinnon said time was slipping away and the Commission must operate with what is available at the time. Commissioner Gainer asked if it would be more likely that they would be available in June. Commissioner Block asked,

assuming no date change were possible, how the Commission should structure the RAC meeting. He worried that the Commission would not have pointed questions to ask them. Judge MacKinnon thought if the Commission were too rigid, the Commission would not get much out of those attending. Commissioner Block thought the Commission should write some sort of document stating goals or objectives. Bill Rhodes said such a document could be done and responses solicited by next week. Commissioner Nagel proposed having a Commission meeting next week. Chairman Wilkins suggested Wednesday, May 7, to give Bill maximum time to incorporate comments. All Commissioners agreed.

Chairman Wilkins went on to discuss the annual leave policy. Commissioner Corrothers interjected that the format of all Commission policy would be proposed to the Commission for consideration at a later date, and the Commission would be approving only content at this point in time. Elizabeth Williams said she had combined input from other government agencies, such as the Parole Commission, Administrative office, and Department of Justice and that generally, the proposed policy is analogous to all other federal agencies. The only notable difference is the 13 days annual leave that is granted up front at the end of the first two weeks after an employee begins work with the Commission. Kay stated this was incorporated because so many professional people had previous commitments, and this would allow time for them to meet those obligations. Chairman Wilkins asked about a case where a new employee took 13 days leave and

quit. Kay said leave time has to be approved by the supervisor, and hopefully, that situation would not occur. Commissioner Corrothers noted that once a Commissioner had approved leave time for secretaries and staff, as a matter of courtesy, they should provide that information to Elizabeth Williams. She suggested a memo which the approving Commissioner would sign. Chairman Wilkins agreed, and in this manner Elizabeth Williams would be able to coordinate leave time. Elizabeth also pointed out that the policy stated that if sick leave time is needed, that the person call her or their supervisor before 9:00 a.m. on that day. Chairman Wilkins asked for any amendments. After clarification of other clauses, Judge Breyer made a motion to pass the policy. Commissioner Corrothers seconded. (See Attachment 3, U.S. Sentencing Commission Leave and Attendance Policy).

The subject of Centralized Filing system was addressed. Elizabeth Williams explained that by law all government agencies must maintain central files at the National Archives to keep track of public information. Commissioner Robinson asked what type of information they wanted. Elizabeth said they suggested sending a copy of everything from purchase order requests and work-related correspondence to completed working papers. Kay asked about the time delay in sending documents for central filing. Elizabeth said the Commission should keep a working file, and after a certain length of time, it should be sent to the Central File of the Commission. Commissioner Corrothers explained that there are strict rules pertaining to measurement

of files the Commission has, what is in the file, and time limits on when to send the material. Commissioner Robinson said he had no problem with those rules as they applied to official documents, but was concerned about unofficial documents. Judge MacKinnon thought everything that crossed Kay's desk should be sent to a central filing system. Judge Breyer suggested adopting this procedure and have the individual decide on which unofficial documents should go to the file. Commissioner Gainer pointed out that failing to keep a government record is a six month offense. Chariman Wilkins said that of course the Commission would comply with official standard federal regulations and that all Commission documents that are official in nature must be forwarded to the Central Filing System, and unofficial documents will be forwarded at the discretion of the writer. Judge Breyer moved to comply with the rules of the centralized filing system. Commissioner Robinson seconded. The motion passed.

The subject of the library policy was addressed. Janet Fitzpatrick explained the library policy, noting that both Commissioner Corrothers and Kay Knapp had provided extensive comments on the subject. Judge MacKinnon proposed that the judicial material be checked out like other library books. He also suggested that the librarian check books back in. Chairman Wilkins suggested the acquisitions request be approved by him, after review by Kay Knapp. The amendments were accepted, and the amended library policy was approved. (See Attachment 4, Library Policy).

Outside activities and use of Commission resources policies were addressed by Denis Hauptly. Use of Commission resources was a narrow issue because the rules within the memorandum are statutory requirements. The outside employment issue is addressed by the Judicial branch in the Judicial Canon of Ethics and included, for non-judicial officers, in Codes of Conduct. The Hatch Act question was one that, initially, did not seem to apply to the Commission because it generally applies to the executive branch and presidential appointees are exempt. However, after further investigation, Denis learned that in 1943, the Judicial Conference adopted the Hatch Act and says it applies to all judicial employees. Denis felt this obligated the Commission to adopt its mandates. Assuming that the Commission were not bound by these rules, it would still be best to adopt them. One reason is that some Commissioners, by virtue of their judicial positions, are bound by much more stringent rules. Congress also put the Commission in the Judicial branch specifically to keep it out of the mainstream of politics. Under those circumstances, Hatch Act standards seem appropriate. Finally, the nature of the work dictates that the Commission should stay out of politics so there will never be charges that the Commission's results were politically motivated.

Commissioner Robinson asked if other members of the Judicial branch, appointed by the President and confirmed by the Senate, do not conform to the more stringent Federal Judicial Canon rules that apply to federal judges. He stated that he was concerned

that the Commission was only acting on what is minimally required, when perhaps its obligation may be to adopt a more stringent set of rules. Judge Breyer said there was not enough of a significant difference to create a problem with federal judges. Commissioner Robinson asked for the differences.

Denis said that Hatch Act employees may attend fundraisers, wear a political button, publicly state support for a candidate, and run for office on a non-partisan ticket. Chairman Wilkins asked what the rules prohibited. Denis stated a member could not solicit funds. Judge MacKinnon added that members could not manage a political campaign or make public speeches. Commissioner Robinson said he was sensitive to some skepticism of the Commission's work, and would be more comfortable if the Commission worked under the same rules as federal judges. Commissioner Block asked how employees of the Commission were affected, since there were some exemptions for non-Commissioners. Denis said the Sentencing Commission employees are exempt from the Hatch Act by statute, but the Judicial Conference policy does apply to the Commission and does use Hatch Act regulations. Commissioner Robinson said the Judicial Conference could decide if the Commission were bound by Hatch Act rules.

Judge Breyer said there are three scenarios raised. The first is that there is no Hatch Act. He thought this was not a good position to take. The second possible situation is to leave it up to the Commissioner to just obey Hatch Act standards, or thirdly, obey Judicial Conference standards. He thought Hatch

Act Standards were enough, but if the non-judicial Commissioners wanted to, they could use Judicial Conference standards.

Commissioner Robinson pointed out that if three Commissioners were already bound by the Judicial Canon, that standard should be uniform within the Commission. Commissioner Nagel asked if it were possible to move to take this matter up in another week to allow time for collecting further information. Commissioner Corrothers and Judge Breyer thought sufficient information was present. Commissioner Corrothers said she could not attend next week's meeting. Commissioner Robinson said this issue was important to the Commission's image and thought it was sufficiently important to have all Commissioners present to vote. Commissioner Corrothers said in her experience, people react much more positively to a non-partisan identification than a partisan organization. Commissioner Block protested that party affiliation had an effect on the Commissioner selection process. Judge Breyer said he thought Commissioners should be treated as other independent Commission members are treated. Commissioner Nagel asked what that was. Judge Breyer said they were bound by the Hatch Act. Commissioner Robinson said other organizations need not enlist the support of the federal judiciary, and that made a difference. Commissioner Nagel used the example of a Federal Trade Commissioner who made a speech for a Republican candidate, and concluded that the FTC is not bound by all Hatch Act regulations.

Chairman Wilkins asked if the Commission would agree to

decide the question at next week's meeting. Commissioner Nagel clarified that she meant the entire package Denis had distributed. Judge Breyer said since he and Commissioner Corrothers would be absent from that meeting, the issues would have to wait until June. Commissioner Corrothers said the issues could be decided in her absence. Commissioner Robinson thought they were important enough to obtain everyone's opinion. Judge Breyer said the outside income issue should not be left undecided for another six weeks, since it may cause substantial public relations problems for the Commission. Chairman Wilkins asked if the Commission could meet later in the day. Commissioner Nagel was not sure if that would allow sufficient time to gather the information. She also asked if the entire Commission needed to vote on the issue, or if only the non-judicial members who were affected by the decisions were to vote. Commissioner Corrothers said the statute calls for all Commission members to vote on all Commission policy. Commissioner Block was not sure this could be deemed Commission policy. Judge Breyer said the question of political activity was not urgent since very little public campaigning was going on now, but the outside income issue should be decided as soon as possible. The Commission took a recess.

The meeting reconvened. Judge Breyer made the following motion:

"The United States Sentencing Commission shall be governed by those standards of conduct that govern the Federal Judiciary." Commissioner Corrothers seconded. Because Judge MacKinnon was

absent, Judge Breyer announced that Judge MacKinnon had agreed to the proposal during a previous telephone conversation. Chairman Wilkins added that should Commissioner Gainer, who also was not present at the reconvened meeting, object to any portion of the proposal, another discussion on the issue could be presented by Commissioner Gainer. Chairman Wilkins asked that the proposal be circulated to all staff and Commissioners. The meeting was adjourned.