

Commission Meeting - May 13, 1986

Chairman Wilkins called the meeting to order. The Chairman asked for amendments to the April 29 Commission meeting minutes. When there were no amendments suggested, he proposed to let the minutes stand approved. All Commissioners agreed.

The Chairman distributed a timetable of Commission activities for the next few months. (See Attachment 1, Timetable). He noted the working groups of Probation Officers, U.S. Attorneys, state U.S. Attorneys, and Defense Attorneys, and federal judges that will be meeting with the Commission to comment on draft guidelines. The Chairman suggested the Commission begin preparation for those meetings in order to obtain the maximum benefit of the participants' knowledge. He also noted the September 15 date, which is the date the draft guidelines will be published in the Federal Register. He asked the Commissioners to note that the regional hearings are scheduled in the fall. Chairman Wilkins mentioned the Fifth Circuit workshop to be held in November, and mentioned that one morning will be set aside to discuss the draft guidelines. Since both district court and circuit court judges will attend, that meeting should solicit a broad range of opinion on the draft guidelines.

Judge Breyer asked if all the dates on the schedule were fixed. The Chairman said the dates had some flexibility, but had been selected with Commissioners' schedules in mind and not arbitrarily. He suggested that if there was a substantial

conflict between the timetable and an individual's schedule, that he should be notified in the next few days so a new time may be arranged.

Chairman Wilkins stated the May 22 hearing agenda was now posted. The Organizational Sanctions hearing, scheduled for June 10, is still being organized. Those groups discussed at the May 7 meeting are being contacted. The Commission is having to make a few adjustments with the original list, but generally there was little to report at this time. The Chairman said the Commission would be updated on which groups would definitely attend the hearing as that information became available.

Commissioner Block asked if the working paper on sentencing options had been completed. Denis Hauptly said the paper was still in draft form. Chairman Wilkins said the working paper, as well as other sentencing options literature, would be distributed to all Commissioners at least one week in advance of the sentencing options hearing.

Chairman Wilkins asked Bill Rhodes about the research plan. Bill distributed a memorandum he had prepared which summarized the research plan and reflected the Commission's May 7 discussion of the research agenda. (See attached Research Plan memorandum, May 13, 1986).

The Chairman asked Commissioner Block for a report from his meeting with Judge Easterbrook, Judge Posner, Bill Landes and Gary Becker. Commissioner Block said Judge Posner had been unable to attend the full meeting with Commissioner Nagel, Bill

Rhodes, and himself in the afternoon, but they held a short meeting with him in the morning. While the proposed research agenda was not discussed at that meeting, Judge Posner had confirmed the difficulty of refining the existing crime control model. Commissioner Block noted that Judge Posner was not as optimistic about the efficiency of the present sentencing system as Commissioner Block had expected. At the meeting with Commissioners Block and Nagel, Bill, Judge Easterbrook, Bill Landes, and Gary Becker, the discussion centered on the aspects of the crime control model that are easily applicable and areas that present difficulty. While the meeting produced no clear resolution to the difficulties, the group did concentrate on economic crime, where the theory is easily applicable. Judge Easterbrook identified some structural problems in existing sentencing practices. He added that current sentencing practice does not accurately measure judges' opinions of crime seriousness, since judges involved in many trials tended to have a disproportionately small impact on current practices.

Chairman Wilkins asked if Bill would advise that the Research agenda be adopted by the Commission. Bill so advised. The Chairman asked for comments before adoption. Chairman Baer asked for clarification of point E of the memorandum. Bill replied that the research group will help to set up the process for federal judges, prosecutors and defense attorneys to test the guidelines. Before showing it to the judges, Bill will have research staff members help test that process. Chairman Baer

asked what data will be used. Chairman Wilkins said the presentence reports obtained from Probation Officers will be used.

Commissioner Gainer expressed continued concern over the lack of a concrete measurement of offense harm. He said that while he was perhaps overly optimistic about what empirical research can accomplish, good empirical data for both work groups' projects was essential. He said the assumption of the research group that the past practices study will synthesize adequate data is not entirely true. Commissioner Gainer stated he did not think the past practices study should be the Commission's primary vehicle for measuring judges' views of offense seriousness. While he agreed in principle that past practice study may be reasonable, he suggested the Commission needs a systematic means for independent thought. He would like to see a scale reflecting an independent assessment of harm rankings to compare with past practice. Since past practice may not reflect offense seriousness, he suggested looking at the differences in the two rankings. The differences should indicate the areas that need particular attention. The need for this type of data will be great when judges, Congress, and scholars study the guidelines.

Judge Breyer said there were a number of ongoing studies to help answer these questions. He listed the Commission studies on the following: 1) the actual sentence given, 2) the statutory minimum and maximum, 3) U.S. Parole Commission guidelines, 4)

state penalties, 5) proposed Federal Criminal Code Revision, 6) public opinion, 7) rankings from groups, and 8) the intuitive judgment of the Commission. Judge Breyer suggested that if more input is needed, Commissioner Gainer should specify what he would like to see.

Commissioner Gainer suggested that the first six categories Judge Breyer named were little more than past practice research. The other two were based on value judgment. He asked if there could not be one which is based on an intellectual exercise.

Judge Breyer agreed, but stated that he did not see how such a study could be done without relying on past practices data, since the future cannot be polled or studied quantitatively. Commissioner Gainer acknowledged the difficulty of specifying the details of such a study, but believed that the Commission should, nonetheless, attempt to undertake a study of harm values.

The Chairman asked Bill Rhodes for comments on the discussion. Bill said he would like to undertake such a study. He proposed drawing on the economic crime control model's dollar values, looking at exercises of jury experiences, and other similar harm measurements. He stated that some crimes, such as rape, are extremely difficult to quantify. In situations where values are placed on life and limb, numbers can be obtained from various sources, but those sources vary greatly. When the situations involve "disruption of social fabric" or "threatening to the government order", he was not sure of the quantification process.

Chairman Baer asked about a common federal offense, drug dealing. Commissioner Gainer said one way to quantify this offense was to take the amount of drugs involved, estimate the number of crimes committed to pay for the street value of the drug, and determine the social impact of those crimes. Judge MacKinnon said it seemed like an exercise in evaluating the public concept of crime seriousness. He noted that failure to prosecute would have to be included in the final determination of harm values. No grand jury information could be provided since those hearings are confidential. He noted that regional disparities would affect the way the public perceives different crimes. Offense seriousness is evaluating how the public views the harm and the sentence imposed.

Chairman Wilkins stated that the offense seriousness study should be as detailed as possible. He cautioned against spending a large block of time putting monetary values on life and limb, since different organizations would have vastly different ways of determining that value. He proposed to use those values on crimes that easily lend themselves to monetary valuations: drug trafficking, anti-trust cases, and the like.

Chairman Baer asked if the Commission had considered how it would handle the subject of plea negotiation in the guidelines. And in conjunction with that issue, would the Commission accept the negotiated plea or consider total offense behavior? He also asked about the recent Washington, D.C. law which required mandatory time served. Due to the volume of cases, the law is

presently being ignored. Judge MacKinnon said that was not negotiated pleas, but the prosecutor selecting which offense to prosecute. Chairman Baer asked if the prosecutor, defense attorney, and judge agreed, whether plea negotiations should be accepted. Judge Breyer noted that Mr. Owen Walker did not express a firm conviction on this issue, but rather pointed out that the plea negotiation process is complex and must consider the public defenders' point of view. Chairman Wilkins said Suzanne Conlon was working on that issue and the Commission has a committee which will begin studying the issue. The plea negotiations will not be allowed to circumvent the guidelines but must be flexible enough so that they may still be used.

Chairman Wilkins asked Judge Breyer how far his offense seriousness study had progressed. Denis Hauptly and Paul Martin said that they had spoken with a number of groups involved in the survey, but had not yet received the results from any of those groups. Chairman Wilkins said those results would be helpful in assessing harm values.

In response to Commissioner Gainer's concern over offense seriousness rankings, Bill Rhodes stated that he could identify the aspects of crime which cause harm. Once identified, it may be possible to place a value on those aspects. He noted that he would most likely put values on crimes that are easily translatable to monetary terms, such as bank embezzlement and anti-trust cases, and stay away from values on life and limb. Judge Breyer said conferring with Commissioner Gainer and

consulting the Research Advisory Committee could produce a study concerning crime seriousness. Commissioner Gainer agreed that this study should be undertaken, but a large amount of resources should not be expended to determine value of life and limb. Bill added that Phil Cook is considered an expert in that area. Dave Lombardero stated that in the area of drug dealing, knowing the monetary gain of a defendant would be useful. Commissioner Block asked if U.S. Attorneys priorities could be used. Judge Breyer said those guidelines are qualitative, not quantitative.

Commissioner Block noted that U.S. Attorneys were also bound by limited resources and a set list of priorities, but looking at their behavior could be useful. Commissioner Gainer said jury nullification and percentage of prosecution should also be factored in. Judge MacKinnon suggested looking at cases rejected by the U.S. Attorneys.

Chairman Wilkins asked for further comments. Bill said the research agenda was largely acceptable, with slight modifications in the area of crime seriousness. He stated that he would like to talk to the Research Advisory Committee about it. A motion was made to accept the plan. The motion was seconded. A vote was taken and the plan approved. Commissioner Block abstained from voting.

Chairman Baer asked if drug use would be an aggravating or mitigating circumstance under the guidelines. His personal feeling was that it should be considered an aggravating circumstance because of the recidivism rate of drug users. He



noted that many judges feel drug addiction is a mitigating factor. Chairman Wilkins agreed this is an important issue, but that they would have to be addressed after the Commission had progressed further in its research.

Chairman Wilkins reminded the Commission of the September 15 deadline to send the draft guidelines to the Federal Register. The Chairman said the draft may not address all issues, but that the best possible draft should be sent at that time. Chairman Wilkins noted that Commissioner Block should study the research agenda and if he had any objections to it, he should notify both him and Bill Rhodes as soon as possible. The meeting was adjourned until 9:30 May 22.