

COMMISSION MEETING

JUNE 10, 1986

Chairman Wilkins called the meeting to order. The Chairman mentioned that Commissioner Gainer would like to invite Mr. Ginsburg from the Department of Justice to testify at the Commission hearing on Sentencing Options on July 15. Commissioner Gainer said Mr. Ginsburg is particularly knowledgeable about past use of sentencing options such as community service and charitable contributions. The Chairman stated he believed Mr. Ginsburg would be a valuable addition to that hearing. All Commissioners agreed that an invitation should be extended to Mr. Ginsburg.

Chairman Wilkins raised the topic of the preliminary draft guidelines approach. He noted that the working group of federal judges who had met with the Commission earlier that week supported the concept. The Chairman felt the approach should be officially sanctioned by the Commission at least for the next month. He asked if Commission efforts should be concentrated on refining the current document, or if a secondary or alternate approach should be developed.

Commissioner Corrothers asked if by "refining" the Chairman meant that the Commission could make definitive changes to the document. The Chairman stated that the entire document could be altered. She stated that she had no problem accepting the structure as proposed, but did not want to limit the Commission when it came to changing the current draft. Commissioner Block agreed with the framework, but wanted it understood that everything was subject to reevaluation. He stated that he had submitted a list of areas where he identified possible problems,

and did not want to inhibit resolution of those problem areas. He proposed proceeding with the current approach, leaving open the possibilities of changes in content.

Judge Breyer said that throughout the drafting process, he had referred to the draft as an approach. Then the draft became the mechanism to generate the guidelines. He now felt everyone perceives them as "the guidelines" and he does not think the draft will work as the guidelines. The Chairman asked if Judge Breyer could accept the structure of the draft guidelines. Judge Breyer said he thought it would be possible to revise the draft in such a way that it could become a useful guideline system. He noted he would like to see the Commission undertake such refinements. In addition, he mentioned the possibility of taking one or two staff members and devising an alternate, "failsafe" method for guideline drafting. Judge Breyer said that since he was in the minority on this issue, he would reserve asking the Commission for this project for one month.

Judge Breyer said he had problems with the draft on three levels. The first was that there are too many glitches in the draft, also there are a few general anomalies that this system develops, and finally there are seven rather general problem areas. He stated that the Chairman has a memorandum about the first and will have a memorandum about the last two. Commissioner Corrothers stated she would like a copy. Chairman Wilkins said he will make it available to all who are interested. Judge Breyer stated he hoped his comments would be helpful in achieving the Commission's final goal.

Commissioner Corrothers asked if revisions to the document were going to be conducted in the conference area because now was the time to blend all ideas about the guidelines. That way, Commissioners could easily see the progress that has been made and can make suggestions more efficiently. Commissioner Nagel said she had an alternate proposal which would set aside a time where nothing but revisions to the guidelines were discussed. Her thought had been to circulate memoranda concerning proposed changes and that they be discussed at this proposed meeting time. Chairman Wilkins agreed that individual ideas should be reduced to writing so each Commissioner is aware of all proposed changes. Everyone agreed with Chairman Wilkins.

Commissioner Robinson stated that the more comments made on the document, the better. He mentioned there were two types of revisions: the technical drafting issues and the policy issues. He was concerned that the technical issues may not warrant Commissioners' time. To keep the Commission on its schedule, he suggested letting staff work on the technical issues, and have Commissioners address the policy questions. Commissioner Corrothers agreed and stated that, as a matter of course, all policy decisions must always be made with full Commission approval and, further that these staff/working group meetings be open to all interested staff and Commissioners.

Commissioner Block suggested that distinguishing between the technical and the policy issues may not be easy. He suggested that to distinguish changes, they should be circulated in highlighted form. Commissioner Robinson agreed, but still

maintained that examining every amendment in a full Commission meeting would be too time consuming. Commissioner Robinson suggested starting that sort of meeting in one month. He noted that the full Commission will ultimately have to approve every line of the guidelines, and this would be the safeguard on each change. He invited comments at any point. He stated that, at this time, he would incorporate only those technical changes that are clearly not policy-related. He again suggested having the discussions on policy issues start in one month. He suggested either sending a memo to him, or having a staff person sit down and talk to each Commissioner to discuss the suggestions they may have.

Commissioner Corrothers said a memo could certainly be written if a Commissioner had a problem with an aspect of the draft. Commissioner Gainer said that each new draft would incorporate many small changes, and it would be time-consuming to have each Commissioner find each modification. He supported the idea of "red-lining" each change to clearly mark added material. Commissioner Robinson said time could be saved if all the suggestions could be fully incorporated into the draft, then the Commission could have one final draft over which debate could be developed. He envisioned that, in one month, the Commission would have a draft in which every subsequent change would be discussed. Judge Breyer agreed that the many technical changes were obvious and could be done without full Commission discussion.

Chairman Wilkins asked if proposed changes could be

preserved so that if a certain change were not incorporated, it could be discussed at a later time. Commissioner Robinson said he would like all proposed changes in writing so they could be preserved. Chairman Wilkins said that a time would be set aside to discuss those debatable changes. Commissioner Robinson agreed, but noted that time could be saved if some preliminary work could be done now. Judge MacKinnon agreed that the writer should have latitude, initially, to incorporate changes before the document must be defended. Both Judge MacKinnon and Commissioner Block noted that "red-lining" changes would be helpful. Commissioner Robinson agreed. Commissioner Nagel thought weekly meetings to discuss policy issues should be held before the month is up, because major policy differences may be difficult and time-consuming to resolve. Chairman Wilkins said that issue could be discussed at the next Commission meeting.

The Chairman asked if the Commission agreed on the document as a framework through which the Commission should direct its energies and that changes be highlighted for easy identification. The Chairman stated that each Commissioner had the responsibility to note areas in which their particular changes were not incorporated, and raise that issue at a future Commission meeting. All Commissioners agreed.

The meeting was adjourned.