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United States Sentencing Commission Meeting

April 19, 1988

The Commission met at 9:35 a.m. Chairman Wilkins presided, and Commissioners Block, Breyer, Corrothers, MacKinnon, Nagel and Baer were present. Also present were the Staff Director and various members of the Commission staff, along with Don Chamblee of the Administrative Office and Roger Pauley of the Department of Justice.

In response to a request by the Chairman, Sid Moore explained that, with two exceptions, all minutes of Commission meetings through 9/9/87 had been approved. Two sets (1/21/86 and 2/11/86) had apparently been discussed but never formally approved. Commissioner Corrothers moved that the two sets of minutes be approved, subject to the correction of the typographical errors contained in the draft. Commissioner Block seconded the motion. The motion was adopted unanimously. Judge MacKinnon requested that the minutes of 1/21/86 reflect that he was away on official business attending a meeting of the Criminal Law Committee of the Judicial Conference in Tucson, Arizona.

John Steer summarized the status of the constitutionality litigation. With the recent adverse decision from the District of Maryland, 25 District Court judges have ruled in favor of the Commission and 29 against. There are also cases on appeal in three or four circuits, with the case in the 9th Circuit moving

the most rapidly. The Solicitor General is expected to decide within a week or so about our request for an expedited petition to the Supreme Court. Judge MacKinnon stated that the judges in Baltimore were very complimentary about John Steer's argument before them.

The Chairman next mentioned the need to set plans for the balance of the year. He said that he understood the Commissioners to intend submitting a complete set of all proposed changes to Congress early next year, and after the expiration of the 180-day waiting period, mailing out to all interested parties a revised book containing all amendments and the amendment history. To meet this timetable and to allow time for the required public comment and hearings, all proposed amendments should be published soon. He recommended two Commission meetings for May 19 and June 14, with publication in the Federal Register to take place in June and public hearings in September and October. Judge Breyer questioned holding hearings on proposed changes at the very time that the Supreme Court might be considering the constitutionality of the Commission. On the other hand, Judge MacKinnon stated that hearings on the organizational sanctions were necessary. Commissioner Nagel recommended releasing the organizational sanctions proposals in July rather than June, with hearings in October and November, and Commissioner Corrothers agreed. Commissioner Block said he understood the Commissioners to be favoring release in July of

the guidelines for organizational sanctions. No vote was taken, but the Chairman said this subject would be raised again at the next Commission meeting on May 19. He asked all Commissioners to give further thought to planning the schedule for the balance of the year and to give any thoughts on the subject to Sid Moore. Commissioner Block stated that he is working on another draft of organizational guidelines, but wanted to be certain that he had collected the necessary data before the draft was circulated.

The Chairman stated that the Commission's proposed set of permanent amendments had been sent April 18 to the Congress for the mandatory 180-day review period. [These amendments consisted of the temporary amendments which had become effective January 15, 1988; the correction of certain typographical errors; and the adoption of two new guidelines: 2A2.4 (Obstructing or Impeding Officers) and 2A5.3 (Committing Certain Crimes Aboard Aircraft).] With that submission made, the Commission could now consider promulgating the emergency amendments which had tentatively been approved on April 12. Commissioner Block moved that the Commission adopt all the emergency amendments, tentatively approved on April 12, with the option for further amendments as each one was considered. Judge Breyer seconded, and the motion passed unanimously. They were:

Procedure for Sentencing

Sections 6A1.1 & 6A1.2

Determination of Loss

Sections 2B1.1; 2B1.2; 2B1.3;

Obscene Matter	Section 2G2.2
Deletion of Petty Offenses	
Cooperative Information	Chapter 5, Part K
Criminal Livelihood	Section 4B1.3
Multiple Counts	Section 3D1.2(d)
Multiple RICO Offenses	Sections 2E1.1 and 2E1.2

The Commission then began to consider the amendments individually. There was no discussion of the amendment to Section 6A1.1 and 6A1.2 making the Guidelines consistent with the Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference.

The Commission then considered at length the proposal to amend definition of loss in the Commentary to 2B1.1, particularly whether replacement cost was to be used as a measurement of loss, or whether the market value was to be the sole measurement. Commissioner Block stressed that replacement cost was a useful measurement in several instances, such as situations where a market value could not readily be ascertained. Judge MacKinnon disagreed, stating that fair market value was the appropriate measurement even if the owner was the only one able to testify as to value. Commissioner Corrothers inquired of Roger Pauley of the Department of Justice how U.S. Attorneys handled this concept of determining loss. Pauley responded that in some unusual

cases, the value of an item taken had a greater value to the taker than to the person from whom it was taken (i.e., theft of grand jury minutes). Commissioner Block replied that we should not use gain to the defendant as the measurement of the harm caused. After some further discussion, this proposal was deferred while substitute language drafted by Judge Breyer was typed.

Commissioner Corrothers moved the adoption of a change to Guideline 5K2.0 to conform the language to the revision made by the Sentencing Reform Act of 1987. The motion was seconded by Judge MacKinnon and unanimously adopted.

The Commission then considered modification to Chapter 5, Part J, to conform the text to changes made by the same statute and to correct other inaccuracies. Commissioner Corrothers moved adoption of this change, with Commissioner Nagel seconding the motion.

Returning to the issue of measuring loss, Judge Breyer moved to adopt substitute language for Commentary to 2B1.1. Commissioner Corrothers seconded the motion, and it was unanimously adopted. The substitute language was as follows:

Ordinarily, when property is taken or destroyed, the

loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. When property is damaged, the loss is the cost of repairs not to exceed the loss had the property been destroyed.

The next proposal was to amend 2X5.1, which deals with "Other Offenses." The proposed amendment was to reflect the removal of petty offenses from the Guidelines and to change 2X5.1's current designation from Policy Statement to Guideline. Commissioner Nagel moved adoption of the proposed change, with certain textual changes. The revised Guideline would read:

If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, apply the most analogous offense guideline.

Additionally, language in the accompanying Commentary would state that if there is no sufficiently analogous guideline, the provisions of 18 U.S.C. 3553(b) control. This motion was seconded by Commissioner Corrothers and unanimously adopted. [Judge Breyer was out of room at time of vote].

The next proposal was to amend the Commentary to 2B3.1 by inserting in the Application Notes the term "or attempted robbery" immediately preceding "of a bank or post office," thereby clarifying the Commission's intention make robbery or attempted robbery of a bank or post office one level higher than a similar robbery or attempt of a private institution. Judge MacKinnon asked if there was a specific federal statute governing attempted offenses. The Chairman acknowledged that strictly speaking there was no such statute, but that other crimes, such as entry with intent to rob, were prosecuted as "attempts." Commissioner Block moved that this change be made and Judge Breyer seconded. The motion was adopted unanimously.

The Chairman then stated that West Publishing Company was going to republish all of the sentencing reform legislation to incorporate all of the recent amendments. Judge MacKinnon moved that when that recodification was complete, the Commission distribute copies of the legislation to all judges, probation officers and others who received copies of the Guidelines in the past. Judge Breyer seconded and the motion passed unanimously. The Chairman made a motion to send out a new statutory index to the field at the time that the emergency amendments are sent. If the statutory recodification was available from West at that time it could be included; if not, the recodification could be mailed separately. Judge MacKinnon seconded the motion, which passed unanimously.

The Commission then returned for individual consideration of certain amendments which had been tentatively adopted on April 12 and re-adopted in a package earlier in this meeting. The first one to be reconsidered was 1B1.8 (Use of Information Provided as a Result of a Cooperation Agreement). Roger Pauley recommended modification of the Commission-approved version. He stressed that under current law and practice, courts enforced these agreements as contracts and that current prohibition (against using the information "in determining the guideline range") was not adequate. Judges Breyer and MacKinnon questioned whether any agreement between the prosecutor and the defense could prohibit the judge from considering certain information. Commissioner Corrothers added that in the pre-Guidelines practice where the judge did not have to state his reason for sentencing, it was not possible to know with certainty if a factor was considered or not. Donna Triptow stressed that under 18 U.S.C. 6002 the defendant could receive absolute immunity for information furnished to the prosecution. However, it was less clear if an "informal" immunity conveyed in a plea agreement could provide the same level of protection. Judge Breyer stated that he was against allowing prosecutors and defense counsel to agree to such an absolute prohibition because he opposes anything in the Guidelines which limits the departure power of a judge in an appropriate case. Further, there is no more reason to think that a judge would depart (by considering the information) under the

draft as written than he would under pre-Guideline practice.

Commissioner Block stressed that the Commission cannot write a guideline which applies to non-Guideline behavior; all the Commission can do is make this a policy statement. Judge MacKinnon stated that one of the major criticisms against the Guidelines is that they shift the sentencing power from the judge to the U.S. Attorney and the defense attorney, but that seems to be the thrust and purpose of Pauley's proposal. Commissioner Nagel agreed, arguing that there is a sensitive policy issue at stake concerning the perception that the Guidelines shift of power from the judges to defense and prosecuting attorneys. Judge Breyer moved a revision to the adopted language in paragraph 1 of the Commentary to 1B1.8, stating that though the guideline only refers to "determination of a guideline range," the intent was that the information not be used for an increased sentence. The motion was seconded by Commissioner Block and unanimously adopted.

Two final matters were addressed (additional fines to cover the cost of punishment; and abuse of position of trust or special skill). The Chairman said the Commission had to decide whether to issue as emergency amendments or put them out for the formal amendment process with public comment. On the first item, Commissioner Nagel said a working group consisting of representatives of the Administrative Office, the Senate Staff,

the House Staff, the Department of Justice, OMB, the Bureau of Prisons and the Commissions is at work on the problem. The intent is to come up with a series of proposals which can be put out for public comment at the next set of public hearings. Accordingly, Commissioner Nagel moved to defer consideration of any change to the guideline until those proposals were readied, and made a similar motion for the guideline dealing with abuse of position of trust. Commissioner Corrothers questioned whether issuance of an emergency amendment would prevent public comment, and the Chairman answered it would not. Commissioner Nagel said the working group tried to devise an emergency amendment but could not agree on the modifications required. The Chairman suggested that the proposed modification might not accomplish the intended goal of saving time for probation officers. Don Chamblee questioned whether the existing guideline on fines to cover the costs of imprisonment was workable at all, and the Chairman replied that if the evidence were later to show that the proposal is unworkable he would then vote to remove it. Judge MacKinnon said he was opposed to the imposition of fines for cost of punishment, not because of the burden on probation officers but rather because he feels the proposal is impractical. Commissioner Corrothers said a perfect criminal justice system would levy such a cost, but in reality most defendants are poor and unable to pay. The provision should be drafted to apply only to those who have the ability to pay. Commissioner Block asked if we could exclude, for example, those defendants with court

appointed counsel.

There was considerable additional discussion about the burden on probation officers and the importance of excluding indigents from the imposition of the fine. In the end, however, the decision was made not to take any action under the emergency amendment power. Instead, Don Chamblee was asked to include a mention in News and Views instructing probation officer that if defendants were determined to be indigent there is no need to perform the fine calculation. The Chairman instructed the staff to collect all proposals for modifying this guideline and present them to the Commissioners, including information about the amounts of fines levied and actually collected. Commissioner Corrothers referred to her earlier comments and expressed her objection to deferring action on this proposal. The Chairman inquired again about the abuse of position of trust, recommending that it be put out for comment. Judge MacKinnon moved that the abuse of trust guideline be placed on the list for public comment and change later in the year. Seconded by Commissioner Nagel. Proposal was adopted 5-1, with Commissioner Corrothers voting no and stating that the Commission should take action to clarify the guideline and commentary at this time.

Don Chamblee mentioned that since the Guidelines had gone into effect, defendants were suggesting that pretrial services interviews (to determine bail eligibility) not be held until

after defendants had an opportunity to consult with counsel. The question of the need to consult with counsel before the pretrial bail interview was not a new one, Chamblee said. However, since the Guidelines defense counsel are increasingly aware that facts disclosed by defendants can become factors in determining the level of their sentence.

It was agreed that the effective date of the emergency amendments would be June 15, 1988. Thereupon, after some informal discussion, the meeting was adjourned.

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U.S. Sentencing Commission Meeting

May 19, 1988

Chairman Wilkins called the Commission to order at 9:30 a.m.. Present were Commissioners Baer, Block, Breyer, Corrothers, Nagel, MacKinnon, and Gainer; guests Vicki Portney of the Justice Department and Bill Toney of the Bureau of Prisons; Staff Director Sid Moore and other members of the Sentencing Commission staff.

John Steer gave a status report on litigation. He indicated that, at the District Court level, approximately 68 judges have ruled the guidelines unconstitutional while 47 have upheld them. In terms of district courts, counting multiple judges as one court where the result is uniform in that district, 28 courts have invalidated the guidelines, while 22 courts have upheld them.

In addition, Mr. Steer reported that the Solicitor General's petition to the Supreme Court is expected to be filed on May 19th. Subsequent filings are expected to be made by the Public Citizen Litigation Group and also by the Sentencing Commission. The Solicitor General's office expects the petition to be considered by the Supreme Court during their mid-June conference. In the event this decision is favorable, briefing will occur over the summer with the argument in the early fall.