

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Martin D. Ginsburg to Michael S. Berman re: Honorable Ruth (3 pages)	07/01/1993	P5 1219

COLLECTION:

Clinton Presidential Records
Counsel's Office

OA/Box Number: 3912

FOLDER TITLE:

Ruth Bader Ginsburg: RBG General Bio

2006-1067-F
ds395

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

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July 1, 1993

By Hand

Mr. Michael S. Berman
The Duberstein Group
2100 Pennsylvania Avenue, NW
Suite 350
Washington, D.C. 20037

~~Handwritten notes:~~
 Lions: Smith, Coleman, Millst
 acedins: Soren, Guther, HMK
 friends: 7 clerk, litig, coll, 2

Re: Honorable Ruth

Dear Mike:

I greatly enjoyed, and appreciated, our lunch today.

I have been thinking further on your question of possible witnesses, individuals of stature (rather than notoriety) who know Ruth personally as well as professionally. I will repeat the thoughts that came to me during lunch and add some other, perhaps better ones.

1. Chesterfield Smith -- I would, and should have, put Chesterfield first among non-academics. Chesterfield is a Floridian, senior partner of the Holland & Knight law firm, a former President of the American Bar Association, and a truly warm and admiring friend of Ruth going back at least 15 years. I have no doubt he would be delighted to testify for her and would be injured if he were not asked. Chesterfield is a good friend and perhaps even a close friend of a number of the members of the Senate Judiciary Committee who are from southern states.

2. William Coleman -- an excellent and renowned (but not notorious) Washington lawyer who has been and is hugely supportive of Ruth. Some of the best advice I received over the 12 weeks preceding the nomination came from Bill. He is of course a Republican but, I discovered, he had better access to reliable White House information than virtually anyone.

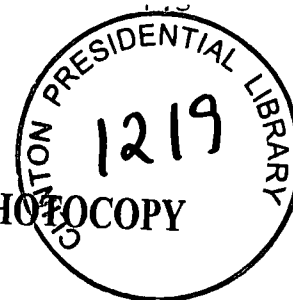
Mr. Michael S. Berman

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July 1, 1993

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3. Michael Sovern -- the Columbia Law School Dean who hired Ruth in or about 1972, later President of the University, just recently back to the Law School. A man of great stature whose letter to the President, copy to Pat Moynihan, had much to do with the Senator's decision to promote Ruth for the Court.

4. Gerhart Casper -- formerly the dean of University of Chicago Law School and later Provost of that university, currently the recently installed President of Stanford. A man of great personal and professional stature and a friend and warm supporter of Ruth for many years. (I do not have a copy of it but the White House on June 14 distributed copies of a supportive letter Gerhart had written the President.)

5. Gerald Gunther -- Professor of Law at Stanford and probably the leading constitutional law scholar in America (some would say Larry Tribe but I would not). As a young professor, then at Columbia Law School, Gerry had Ruth as a student (she was, as always, first in the class), and later was instrumental in obtaining for Ruth her first job (with a Federal District Judge in New York). A very warm friend and supporter for over 30 years; he was the only person invited by Ruth to speak at her D.C. Circuit investiture.

6. Wendy Williams -- Professor of Law at Georgetown, of great stature in the law generally and particularly in the field of sex discrimination. Wendy is about a decade younger than Ruth and viewed Ruth initially as a mentor, more recently as a scholar of coincident interests.

7. Sylvia Law -- a very distinguished professor of law at NYU and the recipient some years ago of one of the prestigious MacArthur Awards (lots of cash). Sylvia is the intellectual guru of the freedom of choice movement. She and Ruth do not agree on all things but Ruth thinks Sylvia is a wonderful scholar and a fine thinker and Sylvia, I know, fully reciprocates. If we want a witness who is an important player on the free choice side of the abortion issue, Sylvia is an obvious choice. (Another would be Janet Benshoof, the leading abortion rights litigator in America, who runs the Center for Reproductive Law & Policy in New York City and who was, 22 years ago, Ruth's student when Ruth visited at Harvard Law School.)

8. Vincent McKusick -- the former and very highly regarded Chief Justice of Maine, now retired to private practice. If you decide you want on the panel a blend of accents, Vince is the perfect tall spare Yankee. He is also very smart, very well liked, and very supportive of Ruth for decades.

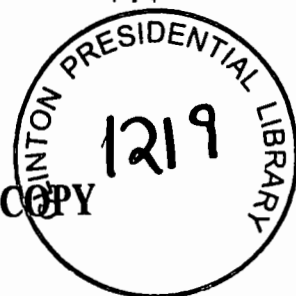
Mr. Michael S. Berman

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July 1, 1993

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At lunch I mentioned as a possible witness Herma Hill Kay, Dean of Bolt (Berkeley) Law School. As a very old friend and co-author of Ruth's, she would indeed be a great choice -- one of the very first women law school professors and law school deans in America -- but it turns out she will be in Korea during the period July 20-23. Herma would fly back if we really need her, but I do not think we need her that much. If you think differently, however, I am good at taking orders.

I enclose in a convenient binder copies of some of the letters that were sent prior to the nomination. There are plenty of more of course -- one from Ann Richards is spectacular but I received it after this package was bound -- but most of the people I would think about as witnesses are in this bunch. As a separate but hardly unrelated matter, I call your attention to the second letter in the binder, written by Patricia King (my colleague and Roger Wilkin's wife) on May 18; I thought about this letter in connection with concerns that relate to the Junior Senator from Illinois.

Two last thoughts.

-- My good friend and former partner (at Weil, Gotshal & Manges in New York City), Ira M. Milstein, tells me that Senator Hatch has suggested that Ira testify at the hearing. Ira, who represents the Business Roundtable among other industrial interests, introduced Ruth to Hatch back in 1980. Ira will be happy to testify if we would like him to do so -- it is not so much that he enjoys the podium as that he likes Hatch and likes to accommodate him -- and unless you tell me differently I will give Ira a green light. Of course, Senator Hatch may change his mind about who is to testify, but that is not in our hands.

-- I mentioned that for some 12 weeks I received nearly daily advice from two close friends. At lunch I named one, Steve Hess of Brookings. I should have named the other, it occurs to me, because he knows you and holds you in the warmest regard going way back to Senator Mondale days. It is Bill Josephson, and his current advice is that I ought to pay attention to what you tell me.

Best regards.

Sincerely,

Martin D. Ginsburg

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. talking points	Talking Points related to Supreme Court Nomination Hearing (2 pages)	n.d.	P5 1220
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COLLECTION:

Clinton Presidential Records
Counsel's Office
Victoria Radd
OA/Box Number: 6763

FOLDER TITLE:

Ginsburg - Hearing Prep. [Preparation]

2006-1067-F
ds396

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

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"Talking Points"

You are playing fifty-two year old Senator William ("Bill") Cohen, a member of Congress since 1972. The following list of comments about the Senator may help you get into your role:

1. He projects a very youthful, enthusiastic image (which you will, of course, have no trouble emulating).
2. He is a Republican, but tends to have liberal views on many social issues. He cosponsored the Violence Against Women Act, the Freedom of Choice Act, and other women's equality measures. He spent virtually all of his time questioning Webster Hubbell during confirmation about Hubbell's membership in a golf club that had no African-American members. He spoke strongly in favor of equal rights for blacks.
3. He has previously said that he "expect[s] an overwhelming, if not unanimous, vote," on RBG and that "she's an outstanding nominee." He also called her "a centrist, in a way beyond controversy. I don't think the quality of this nomination is at all at issue." (June 14, 1993).
4. He has not taken a clear stand on gays in the military. He seems to support ending the ban. During Senate Hearings, he spent most of his time arguing with Gen. Schwarzkopf about how the ban was motivated by prejudice and stereotypes of gays. In particular, he compared those stereotypes to earlier ones about women and blacks.
5. Cohen has a tendency to make bizarre analogies. For instance, his only comment to the press regarding gays in the military was that "he found it curious that an expression of one's sexual orientation could be regarded as 'behavior' by the military, while the Constitution protects burning of American flags as free speech."
6. He confirmed Clarence Thomas, despite "overwhelming constituent calls against it." He was not a member of the Judiciary Committee (this is his first term on the committee).
7. He has a reputation as a hawk on military issues, and serves on the Armed Services Committee.
8. Cohen hates the confirmation process, which drags people through the mud. He is very close friends with John Tower.

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I also sat in on some of the mock trial in order to get a feel for the questioning. Here are some observations:

1. The questioning process is very slow on both ends. The Senators typically take quite a while to ask a question, and often spice up the story with various anecdotes. However, Cohen, from what I have seen, may tend to be a much faster interrogator than his colleagues. Moreover, Cohen will not need to make up for a poor performance during the Thomas hearings, unlike most of the other members of the Judiciary Committee. RBG, on the other hand, is a very slow answerer. She pauses, takes deep breaths, and then answers.
2. RBG's answers are typically shorter than the questions. However, she has clearly been coached to tell stories, and when she begins a story, it is usually several minutes before she finishes.
3. RBG has incredible powers of recollection. She will clearly know all of the law. She is, however, worried that if questions are presented too quickly, then they will catch her off guard which will prompt her to forget something in her answer. You may want to throw a couple short questions her way to prepare her for this.
4. Sometimes, Senators have a short introduction before their questions. Others delve right into the questioning. During the confirmation hearings of Webster Hubbell, Sen. Cohen made virtually no introduction.
5. One thing the organizers of the Mock Trial seem to want is for each Senator to proceed right after the other one has finished. So it would be advantageous to arrive as much before 5 P.M. as possible.
6. You have one-half hour for your questions, and they would like you to stay for the half-hour after that to critique RBG.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	re: Suggested Panel Members [for Ruth Bader Ginsburg] (1 page)	07/06/1994	P6/b(6)
002. memo	Lloyd Cutler, Joel Klein, Clifford Sloan to Mack McLarty re: Breyer Nomination (3 pages)	07/06/1994	P5 1221

COLLECTION:

Clinton Presidential Records
Counsel's Office

OA/Box Number: 3715

FOLDER TITLE:

Judge Stephen Breyer Vol. [Volume] 2 [5]

2006-1067-F
jp3033

RESTRICTION CODES

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Freedom of Information Act - [5 U.S.C. 552(b)]

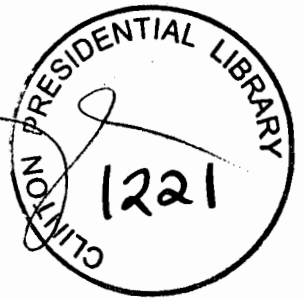
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THE WHITE HOUSE

WASHINGTON

July 6, 1994

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MEMORANDUM FOR MACK MCLARTY

FROM:

LLOYD N. CUTLER *Inc*
SPECIAL COUNSEL TO THE PRESIDENT

JOEL I. KLEIN *JK*
DEPUTY COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN *CS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT:

Breyer Nomination

In response to your request, we are setting forth the Breyer nomination plan, with particular reference to David Dreyer's memo of May 14, 1994. We agree with all of David's recommendations, and believe that we have already put them into effect.

First, David suggests an internal team with "political, Congressional, and Communications people," as well as Counsel's office representatives. Immediately after the nomination, we asked Legislative, Communications, and Public Liaison to designate representatives to the confirmation team. Accordingly, Susan Brophy, Arthur Jones, and Doris Matsui have been active participants in the confirmation process since the Breyer announcement. Joel Klein and Cliff Sloan are coordinating on behalf of the Counsel's office. The group also includes outside political experts, specifically Mike Berman and Carolyn Osolinik. You also may be interested to know that, in the first week after the Breyer announcement, Cliff and David Dreyer met to discuss David's suggestions at length.

Second, David suggests using the confirmation process "as a vehicle to put the President and his staff in the best possible light." As part of the public outreach and press strategy, we regularly encourage and elicit praise for the President for the nomination. A report on Judge Breyer which we distributed to the Senate and to the press includes praise for the President from a wide range of individuals. (A copy of the report is attached.) Commentary in the press has also included praise for the President.



Third, David suggests "early collaboration with Senator Kennedy's staff, the ring of friends around Breyer like Ken Feinberg, Robert Pitofsky, and Alan Morrison, and various interest groups."

We are working closely with Senator Kennedy's staff. (Cary Parker, the Senator's top aide, has repeatedly stated that he has been delighted and impressed by the White House's effectiveness on the nomination and confirmation process). We are also working closely with a wide range of Breyer's friends, including not only Feinberg, Pitofsky, and Morrison, but many others as well. Additionally, we have an ongoing outreach program to interest groups, directed by Doris Matsui and assisted by others at the White House and Justice Department.

Fourth, David suggests an "op/ed strategy." We have solicited and assisted with several op/ed pieces on Judge Breyer's personal background and record on economic regulation, criminal law, and civil rights, and we are pursuing other op/ed pieces as well. (I enclose the pieces that already have been published.)

Fifth, David recommends "talkers" on various subjects to praise Breyer and the President. We have a stable of surrogates in various areas who have made phone calls, submitted statements, and spoken to the press. They include former FTC Commissioner Bob Pitofsky, environmental leader Doug Foy, AFL-CIO President Lane Kirkland, long-time friend Peter Edelman, and Professors Kathleen Sullivan and Charles Ogletree.

Sixth, David recommends "the production of talking points about the nomination" and the recruitment of speakers in Congress. We have distributed to Congress and the press the attached report, as well as favorable press and statements about Breyer and the President. We are also preparing additional materials for distribution to Congress and the press. We have consulted closely with Legislative Affairs on all aspects of our Hill Strategy.

Seventh, David recommends "shutting down critics," such as Metzenbaum. We have worked closely with Senator Kennedy and his office on an effort to reassure Senator Metzenbaum. We also have had various outside people and groups who know Metzenbaum well write or call him. At least until now, since the few days following the nomination, Metzenbaum has not been publicly critical of Breyer.

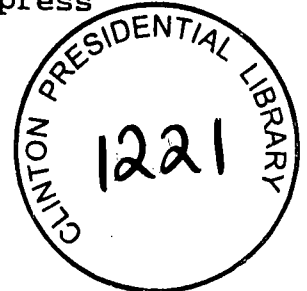
Eighth, David suggests that we "decide what we want said about the President when this debate is over." One of the messages that we are trying to get across is that the President deserves praise and credit for removing rancor from the Supreme Court selection process by naming Supreme Court nominees of

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unquestioned excellence. (A copy of a recent Washington Post book review making this point is attached.) In addition, we want to make the point that the President deserves praise and credit for a far-sighted, forward-looking appointment of a Justice who will be a catalyst on the Court and lead it into the next Century. We are working on getting this theme into press coverage and op/ed pieces.

We hope that this information is helpful.

cc: David Dreyer



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. report	Summary of Sentencing Commission Minutes and Judge Breyer's Articles (34 pages)	06/02/1994	P5 1224
002. list	re: Interview Requests for Stephen G. Breyer (partial) (1 page)	06/02/1994	P6/b(6)
003. memo	To Cheryl (Mills); re: Personal Issues Concerning Stephen Breyer (1 page)	n.d.	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office

OA/Box Number: 3913

FOLDER TITLE:

Stephen Breyer - 1994 Memoranda [Binder] [2]

2006-1067-F

jp2268

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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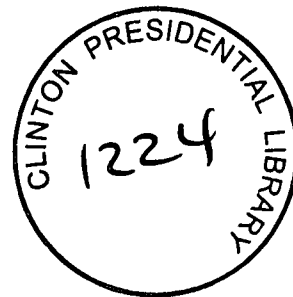
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**SUMMARY OF SENTENCING COMMISSION MINUTES °
AND JUDGE BREYER'S ARTICLES**

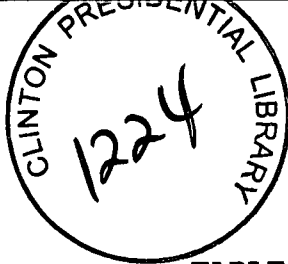


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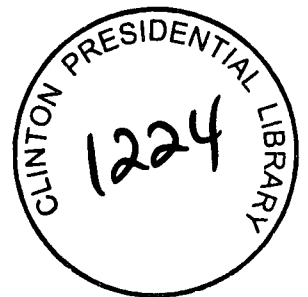
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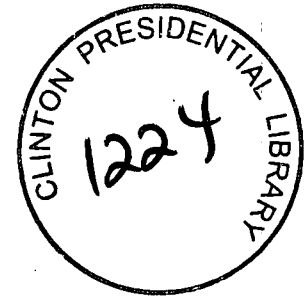
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MEMORANDUM



TO: James Hamilton
FROM: Summer Associates
DATE: June 2, 1994
RE: Judge Breyer Sentencing Commission Minutes and Articles

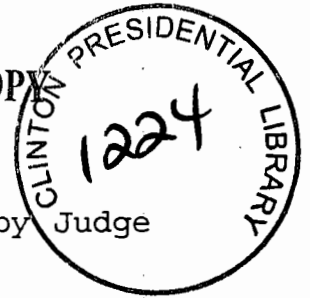
I. Introduction

In the following analysis of the minutes of the Sentencing Commission and two related articles the following issues merit special attention:

● **Departures:** Judge Breyer leaves himself vulnerable to criticism through his support of judicial discretion in the departure process. This issue is most clearly raised in the Dialogue with Kenneth Feinberg in which Judge Breyer explains that while the Commission had the power to limit judicial power to depart, they chose not to do so (see Feinberg, 16-17.). While he proceeds to clarify these comments, many of his statements could be read to encourage judicial assertion of sentencing discretion, incurring the wrath of those who fear excessive judicial leniency.

● **Death Penalty:** While this issue is carefully avoided in the articles and the majority of the minutes, the Commission meeting of December 16, 1986 contains a highly sensitive discussion concerning the reasons why the death penalty was not covered by the Guidelines. Judge Breyer submitted an addendum to the minutes of that meeting stressing his opposition to inclusion of the death penalty in the Guidelines. This passage includes the following: "[Judge Breyer] said regardless of his personal feelings, . . . [i]t is a legislative decision, not a judicial decision, as to whether the death penalty, which is unconstitutional as written, should or should not be made constitutional." Judge Breyer then analogized this 'congressionally worthy' issue to other issues, including abortion. This addendum requires careful analysis and consideration.

The body of this memo includes two sections. The first is comprised of an analysis of two articles containing Judge Breyer's views on the Guidelines. The second section contains an indexed topical review of the minutes of the Sentencing Commission meetings of 1986-1989.



II. Article Analysis

Review: The Federal Sentencing Guidelines: A Dialogue by Judge Stephen G. Breyer and Kenneth R. Feinberg, 1990

This piece, in the format of a question and answer dialogue, provides a practical, fundamental explanation of how the Guidelines work. The conversation between Judge Breyer and Feinberg basically provides Judge Breyer the opportunity to present the Guidelines in the most favorable light and to clarify relevant issues which have engendered popular misconceptions and negative press.

The largest overarching problem that I can identify in the piece is a substantial, if predictable, bias in favor of judicial power. The first instance of this appears on pg. 8 where Judge Breyer blames the parole system for a previous lack of 'honesty' in the sentencing process. Judge Breyer describes the dual purposes of the Guidelines to enforce honesty in sentencing and to reduce sentencing disparity. Concerning the issue of honesty, on pg. 8 Judge Breyer explains that the law enacting the Guidelines commanded "widespread support" because of this perceived increase in honesty. Judge Breyer then roundly condemns the expired parole system, saying that previously the parole board would "fool" the judges. He implies that the lack of honesty emanated exclusively from the parole authority, skirting the issue of judicial leniency and disparity in sentencing, a popular rallying cry of the 'tough on crime' crowd. While the parole authority may have been unpopular with those seeking longer sentences, parole is not the only reason inmates were released or given lenient sentences.

The second indication of Judge Breyer's judicial bias appears on pg. 12 in the discussion of consideration of remorse. Feinberg asks how an offender might show remorse and Judge Breyer responds: "through cooperation, through a guilty plea, and through a **variety of ways that are largely left up to the Judge.**" While I recognize that the judges do retain ultimate control over the remorse issue, Judge Breyer's repetition of the judicial control of these factors might trigger fears of return to judicial lenience through the back door of departures.

Dangerous fodder for these fears appears in the "Departure" section of the article. On page 16 where Feinberg says: "Let me ask a rhetorical question. **Can [a judge] depart whenever he chooses?**" Judge Breyer responds, "**Basically, yes.**" Although he clarifies this, explaining the judicial review process for departures, certain factions might not care to look past this bold assertion of judicial freedom in departures. He looks very weak on the departures issue. On pg. 17 when Feinberg asks, "**What if my client, the bank robber, says, 'Yes, I robbed a bank, but I did it to get money to feed my starving children.'**" Judge Breyer responds: "**Sounds like a good reason for departing.**" He continues

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to describe the nature of the departure process: "Whether in fact you will win a departure will depend on how well you argue your case to the judge. This is an area where advocacy and careful mustering of the facts will be at a premium."

Judge Breyer really opens himself up to severe criticism here. Feinberg says: "The Guidelines are presumptive and the judge is not required to follow them rigorously or without exception." Judge Breyer responds: "Yes, that's true." Judge Breyer then clarifies this, explaining that while the Commission has the "power" to "limit departures", in the "initial set of Guidelines the Commission did not limit the court's departure powers." He then concludes "the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the Guidelines, that might constitute grounds for departure in an unusual case."

When Feinberg asks for clarification Judge Breyer responds: "It is going to be very much up to the bar and the bench to arrive at what is unusual." Judge Breyer then qualifies all of this language by describing the factors that cannot be used as a basis for departure, including race, sex, religion, national origin, creed and socioeconomic status. He explains that the Commission does limit judicial discretion in departures by excluding certain bases.

After all of this qualification, Feinberg tries to nail Judge Breyer down with some "black letter law" concerning departures. Feinberg asks whether departures will be the exception rather than the norm and elicits a response of "I think so" from Judge Breyer. This is very weak.

Other Important Issues To Watch in this Article:

- On pg. 8 Judge Breyer refers to the good time credits as a "minor exception". Tough on crime people might feel that 54 days credit for each 'good time' year is more than a minor exception.
- On pg. 13 Judge Breyer discusses the offender characteristics chapter and explains that "the only thing this chapter is interested in is the offender's prior record of conviction." However, §4A1.3(e) explicitly states that "prior similar adult criminal conduct not resulting in a criminal conviction" may warrant an upward departure where "the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes." The pg. 13 comment in the article seems to directly contradict this use of non-conviction related criminal behavior.



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- In an issue related to the question of criminal history, on pp. 22-23 Judge Breyer looks somewhat tough on crime as he explains that elements of a crime not included in the actual counts charged may be used by the court to depart upward, reflecting past practice of judicial interpretation of presentence reports. He admits that this may be "unfair" but emphasizes that it is still an improvement over the previous system.

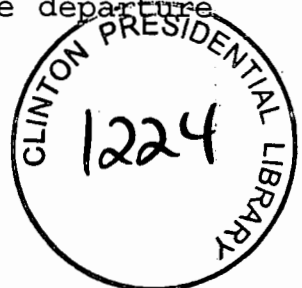
- On pg. 15 Judge Breyer responds to questions concerning the projected increase in the prison population and explains the methodology by which the Commission determined that a 6% increase was most likely. He then blames the bulk of increased prison population problems on mandatory minimum drug sentences and three strikes legislation. While he may be right about this, those in support of these measures may be displeased by Judge Breyer's fingerpointing.

- On pg. 19 Judge Breyer sounds tough on white collar crime. On pg. 21 he explains how the new tougher probation sentences will impact upon the white collar criminals. (As noted below, Judge Breyer echoes this tough attitude toward white collar crime in the other article.)

- On pg. 30 Judge Breyer rapidly dismisses one of the most fundamental criticisms of the entire Guidelines system with a wave of his hand. In response to assertions that the Guidelines merely divert discretion/power from the judiciary into the hands of the prosecutor, Judge Breyer responds: " I haven't been able to get anyone to explain to me just why that's true. . . . The Guidelines, by making more information available to the judge, should either be neutral or work the other way." This issue of prosecutorial discretion is far too important to be dismissed this easily. Judge Breyer needs a more substantive response to this claim.

- The article ends with an afterward, consisting of a follow-up interview of Judge Breyer conducted in 1989. In the beginning of the afterward Judge Breyer discusses his opposition to an amendments in the Guidelines mandating an increase in the sentences for robbery. This opposition to the harsher penalties imposed in 1989 does make him seem less than tough on crime.

- In conclusion Judge Breyer claims that the Guidelines are "achieving their objective of creating greater uniformity of sentencing in federal courts and thus eliminating the unfairness of disparity." This is up for debate. Judge Breyer's second to last sentence certainly raises some eyebrows, depending upon how it's read: "[the Guidelines] are flexible enough to produce fair results through a sensitive use of departure powers in nearly every case." Taken out of context this could aggravate the departure issue.



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In sum, this article poses its greatest harm through its exploration of Judge Breyer's opinions concerning judicial discretion. Many of his comments seem to indicate that he favors judicial power in the departure process. This could be very damaging to his image.

Review: The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra Law Review 1 (1988), Stephen Breyer

This article does not really touch upon any of the truly controversial Guidelines issues. The piece is essentially background concerning the construction of the Guidelines. In one section Judge Breyer does echo his policy statements mentioned in the Feinberg article concerning the Guidelines' 'get tough' stance with regard to white collar criminals (see pp. 7-8). On this point, Judge Breyer sounds great. Judge Breyer lists six areas of compromise which were mediated in the course of the construction of the Guidelines. He emphasizes the fact that most of these compromises involved conflicting managerial and administrative concerns, rather than political differences. In sum, this article does not seem to contain any glaring issues of concern.

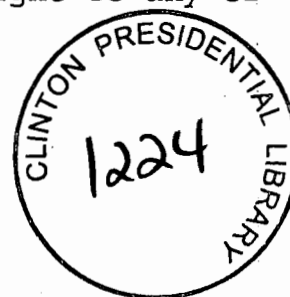
III. MINUTES ANALYSIS

No. 4. 1/86

- In the list of offending characteristics of January, 1986, several characteristics may be labeled controversial. This may be just a draft list; it was created just two months after the first meeting of the Sentencing Commission. The list includes consideration of the following:

- low intelligence
- poor socio-economic environment
- sex
- race
- fairness issues
 - i.e., loss of job, professional license, or public office
- tragic background
 - i.e., abused child/spouse, extreme poverty
- potential vulnerability in prison setting
- effect of punishment on offender's family

The list, at this stage, does not give weight to any of these considerations.



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No. 21. 5/13/86

- Breyer stated that reliance on past practices could not be avoided in measuring judges' views of offense seriousness. He also did not comment on a discussion of whether drug use should be considered an aggravating or a mitigating circumstance under the guidelines. A resolution of this question was reserved for a time when more research could be completed. Breyer mentioned that an outside party consulted as to plea negotiations, stated that the plea negotiation process is complex and that the public defenders' point of view must be considered.

No. 26. 6/10/86

- Judge Breyer stated that he had problems with the draft on three levels. First, it contained too many glitches; second, the system generated a few general anomalies; and, third, there were seven general problem areas. He mentioned that he had provided memos to the Chairman on the first two levels and would submit a memo regarding the last set of problems.

No. 27. 6/12/86

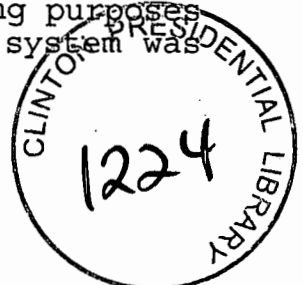
- The minutes include a reference to J. Breyer's "**black book**" and a hundred-page response to it. The Commission voted unanimously to support the House version of legislation concerning the Commission, which contained a higher minimum for a life sentence than did the Senate version. For lesser sentences, the House version contained a greater maximum range than did the Senate version.

No. 29. 7/15/86

- Judge Breyer suggested that the technical amendments to the House bill would not pass if the appellate court provisions (i.e., appellate review) were included in the package of amendments.

No. 30. 7/18 - 29/86

- The Commissioner's discussed varying standards of proof. They agreed that the law provided a lesser standard (preponderance of the evidence) for sentencing purposes but that a modified real offense sentencing system was



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needed so that prosecutors could not avoid the higher standard for major offense elements. The Commission wanted to prevent the process of plea bargaining for an offense with a lesser statutory maximum.

The Commissioners noted the low statutory maximum for regulatory (i.e., tax) offenses. They indicated that Congress would have the opportunity to adjust statutory maximums and the Commission shouldn't adjust its thinking to fit statutory maxima.

No. 31. 8/4/86

- The Commissioners discussed the allocation of sanction units among sentencing options and the suggestion was made to provide the judge with considerable discretion in allocating sanction units.

A suggestion was made to include a policy statement that would require a judge to sentence at the top of the 25% range for civil rights violations committed by members of law enforcement. Another suggestion involved increasing the harm value for the offense if perpetrated by a member of law enforcement, or to provide for aggravation outside of the guidelines.

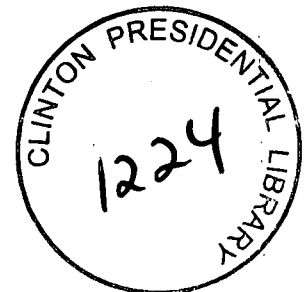
No. 32. 8/6/86

- It was noted that the guidelines should not make a downward adjustment for narcotics violations in order to provide adequate punishment for drug kingpins. Adjustments for cooperation with law enforcement authorities was suggested. It was also noted that the Commission must provide a mechanism for considering extraordinary circumstances, but not let the extraordinary circumstances overpower the rest of the guidelines. The opinion was expressed that mitigation must be allowed for abnormal conditions in offenses against a person, and that sociopaths and psychopathic personalities need to be addressed because incapacitation may be warranted.

No. 33. 8/12/86

- Judge Breyer did not attend this meeting but a discussion occurred as to the possibility of add-on ranges.

No. 37. 12/16/86



• Judge Breyer voted to amend a paragraph of the guidelines to allow for courts to depart from the guidelines in cases of plea agreements so long as the parties provide adequate reasons for the agreement and the court agrees with the reasons.

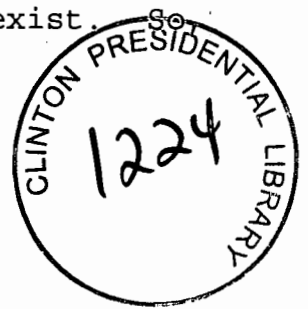
Concerning guidelines for the death penalty, Judge Breyer opposed drafting such guidelines saying he thought it was the biggest mistake the Commission could make. He could not conceive of a bigger mistake. He felt it would sink the Commission. Judge Breyer stated that to have a constitutional death penalty statute, there must be standards that state when the death penalty is to be applied compared to other sentences, like a term of years or life. The federal system does not have those standards. If the Commission would supply those standards, he felt that there would be a strong argument that the death penalty provisions which are now unconstitutional would become constitutional. The fact that the Commission may have the legislative authority to do that, was, to Breyer, the strongest argument for not doing it because it is one of the most divisive issues in the United States. He did not think that Congress felt it was delegating that authority.

Judge Breyer also stated that as a judge, he should not decide the death penalty issue, abortion, AIDS or any other controversial issue. He felt this was a job for the legislature, regardless of his personal beliefs. He reiterated that it was a legislative decision, not a judicial decision, as to whether the death penalty, which is unconstitutional as written, should or should not be made constitutional.

Judge Breyer further stated that death penalty guidelines would mean the end of the guidelines, as a whole, in Congress. He believed that an effort to attack death penalty guidelines was outside the Commission's political mandate.

He added that standards are required to make the death penalty constitutional and that these guidelines must come from Congress. If the Commission is a judicial agency, that was one more reason not to include death penalty guidelines.

Judge Breyer did concede, though, that there was a very strong argument that the authority to make death penalty guidelines by the Commission was within the legislative language, and moreover there was a good chance that the Commission could cure the unconstitutional problem. It is just that the political mandate did not exist.



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while setting death penalty guidelines is outside the political scope of the Commission's authority, it is not outside the legal scope of its authority. He agreed with another Commissioner's restatement of his argument which said that the Commission should not look for controversy.

Judge Breyer felt that the Commission needed positive legislation to render the death penalty provisions constitutional. However, even if the Commission did not need positive legislation, it did not change his opinion.

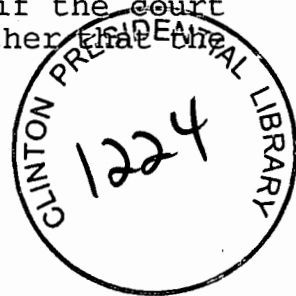
Furthermore, he felt that even beginning to draft the guidelines would attract the support of pro-death penalty groups which would prevent the Commission from being able to reverse its course without generating animosity.

Judge Breyer continued to emphasize that regardless of one's opinions of the death penalty, the single most powerful reason for not drafting (or even beginning preliminary work to draft) death penalty guidelines is that it would be outside the Commission's political mandate and would threaten the viability of the Commission's very important task.

* (After the Commission passed a motion to go forward with the preliminary death penalty guideline work over Judge Breyer's objections, he stated that the only hope was to keep such activity secret and then not submit the guidelines for final implementation.

No. 38. 1/13/87

- The meeting began with the Committee making a number of unanimously approved legislative amendments, including: (1) permitting an organization which commits a Class A or B felony to be put on probation as well as fined; (2) conforming the maximum terms of supervised release with the maximums for probation; (3) permitting revocation of supervised release for failure to pay restitution and modification of probation conditions as a remedy short of probation revocation; and (4) substituting a "clearly inapplicable" standard for the present "incorrect" standard of appellate review.
- Judge Breyer then moved to strike all of §A412(b) and replace it with the following proposal: if a plea agreement includes a nonbinding sentencing recommendation, the court shall advise the defendant that it is not bound by the recommendation, but if the court accepts the recommendation, it must state either that the



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recommendation is within the applicable guideline range or state the reason for the departure. The motion was passed 6-1.

- Judge Breyer also moved to amend Commentary (16) page 4, so the body of the statement would read "The court may impose a condition prohibiting the defendant, should he fail to make the scheduled payments under the installment schedule from incurring new credit charges . . ." The motion was unanimously passed.
- Judge Breyer was the sole opposition vote for a sentence inserted after §A521(c) that provided that the section is "generally inapplicable for defendants who have a criminal history category greater than Category 2". There is no indication of the reason for Judge Breyer's opposition.
- Judge Breyer was again the only opposing vote (without noted explanation) on a motion to allow confinements for addiction to be used as a substitute for imprisonment "where the defendant's dependence on an addictive substance contributed to the commission of the offense, and there is reasonable likelihood that completion of a treatment program will eliminate that dependence."

No. 40. 1/20/87

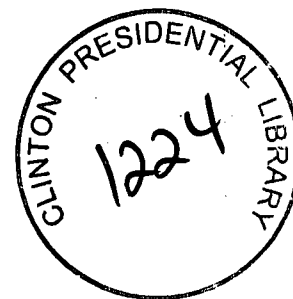
- Death Penalty - Judge Breyer stated his concern that the controversial nature of the death penalty might dwarf the work accomplished by the Commission. Judge Breyer recommended that the Commission not address capital punishment.
- Departures - Judge Breyer recommended that general provisions in the guidelines be used as possible reasons for departure.

Judge Breyer moved that all of the departures include the word "may" rather than "shall."

Judge Breyer recommended commentary stating that the judge may depart in unusual cases of victim conduct in cases other than homicide and assault. The Commission agreed.

Judge Breyer voted to reject special solicitude for the victim as a basis for departure.

No. 42 1/22/87



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- Breyer expressed his opinion and moved that if a Commissioner ultimately decided to dissent from a document published by the Commission, the Commission may elect to publish his or her dissent with that document. He stated that minority opinions have as much right to be heard as those expressing the majority. Passed 5-0.

Environmental Offenses

- Breyer stated that an offense level of 9 for a recordkeeping offense was excessive. He recommended that business community leaders be consulted when promulgating guidelines dealing with the environment to get opposing viewpoints.

Prison Offenses

- Breyer recommended that the commentary explain that the guidelines were higher than current sentencing practice due to the lack of parole time a prisoner can earn in prison under the new guidelines and that most of the deterrent effect will be placed on the guidelines.

Money Laundering

- Breyer recommended that the base level offense for § 5211 be changed to 10 with a 4 level increase if known unlawful activity was involved and a 6 level increase if narcotics were involved. He stated the guidelines contained an excessive penalty for recordkeeping offenses.

Taxes

- Breyer recommended removing a specific offense characteristic concerning organized tax evasion schemes, because it may serve to punish minor offenders too severely.

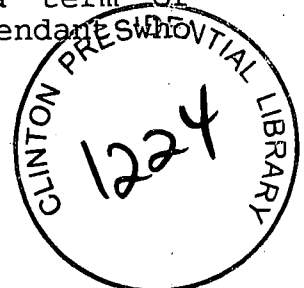
Antitrust Violations

- Breyer suggested a mandatory one month of incarceration for antitrust offenses.

Breyer moved to adopt an increase in levels for certain specific offense characteristics and voted against changing the base offense levels for other offenses.

Determining the Sentence

- Breyer recommended language stating that a term of probation may be imposed in sentencing a defendant who



has an offense level greater than 6 only when the court is willing to depart and state its reasons for imposing probation.

Violations of Probation and Supervised Release

- Breyer suggested that language be added to encourage the judge to depart up to the statutory maximum if the defendant committed a category in violation of probation only for offenses that are unusually serious.

No. 43 1/28/87

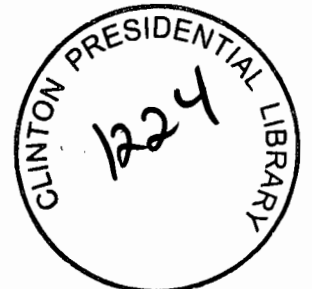
- Breyer stated that there was a "double-counting" problem in the criminal history section.

No. 46 3/10/87

- In the March 10, 1987 Commission meeting, Commissioner Block moved that the Commission draft and consider publishing guidelines for the imposition of capital punishment for federal inmates accused of murder while serving a life sentence. These guidelines would be submitted to Congress separately from the sentencing guidelines to be submitted in April. Judge MacKinnon, in opposition, moved that the Commission not address the death penalty in the April deadline. Judge Breyer commented that he opposed Commissioner Block's proposal for three reasons. First, there was doubt that the Commission was the correct institution to resolve "that serious political issue." Second, he did not believe that establishing death penalty guidelines was mandated by statute. Third, there was the fear that the issue of death penalty guidelines would detract Congress' attention from the merits of the sentencing guidelines being proposed to a debate over the death penalty. In a final vote concerning both Commissioner Block's and Judge MacKinnon's motions, Judge Breyer voted against Block's proposal and in favor of the motion by MacKinnon.

No. 49. 3/20/87

- Breyer moved to amend Subsection A311(c) of the criminal history section of the guidelines by substituting "3" for "6" (as the maximum points to be counted for prior sentences not counted in (a) or (b)). Breyer then modified his motion by changing "3" to "4". The motion failed by a vote of 3-4.



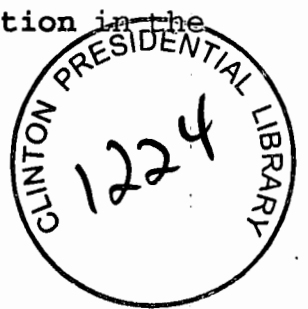
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- Breyer initiated a discussion of the need for upper limits on the number of points which could be accumulated in § A311 (a), (b) and (c). After several reformulations, the Commission approved a modified motion that the maximum criminal history category would not apply except in the case of a recent conviction.
- Breyer moved that the list of **exclusions** in §A312(c) should at a minimum contain all misdemeanors excluded by the Parole Commission. The motion failed for lack of a second. Breyer moved to exclude "contempt of court" misdemeanors. The motion failed. Breyer moved to add "Furnishing False Information to a Police Officer." The motion failed by a vote of 3-4. Breyer moved to add "Criminal Non-Support." The motion failed by a vote of 3-3. Breyer moved to add "Prostitution." The motion failed by a vote of 2-4. Breyer moved to add "Resisting Arrest, Evade & Elude." The motion failed by a vote of 2-3. There was a reconsideration of the votes taken on Breyer's previous motions to amend the list in A312(c) (1). On reconsideration, the motion to add "False Information to Police Officer" was carried. As a result, all Breyer's above stated motions, except "false information to a police officer" were not added to the list and were not to be excluded except under the terms of the guideline provisions.

No. 50. 3/25/87

Chapter 3

- The Commission discussed Chapter 3 on cooperation. The Chairman recommended that the policy statement apply to defendants who provide usable information and then only upon a motion by the government. Breyer stated that making the reduction available only on the government's motion took too much **discretion** away from the judges. The Commission approved restricting the use of the provision upon government's motion without objection.
- Breyer was the only one to vote against a motion to change the commentary of C311 from "willingness to assist" to "assistance to." The motion passed by a vote of 5-1.
- Breyer agreed with Gainer that it was difficult to conclusively determine the relevancy of **age** as a factor in sentencing. Breyer voted "yes" to making age a neutral factor in sentencing under § D311. The motion passed by a vote of 4-2.
- Breyer voted "yes" on a motion to allow **mitigation** in the



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offense level if the defendant was "elderly and infirm."
(The vote was 6-0).

- Breyer suggested that the phrase "or where within the guidelines" be deleted from every section in Part D. He stated that these factors should be directed at avoiding departures from the guidelines.

Part Y: Departures & General Provisions

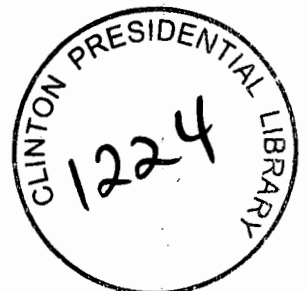
- During a discussion of Part Y: Departures and General Provisions, Breyer discussed the problems relating to giving a factor a uniform increase in levels, regardless of the nature of the offense involved.
- Breyer moved to provisionally consider all adjustments as departures; place the general provisions in the guidelines as specific offense characteristics where applicable; and if questions remain, to revisit the need for general provisions. The motion was amended to include commentary on the departures suggesting the amount of the departure. The motion passed by a vote of 4-3.

No. 51. 3/27/87

Role in the Offense

- In discussing Section Z212, the discussion turned to the difference between a "minimal participant" in § 212(b) and a "minor participant" in § 212(c). The Commission adopted a motion by Judge Breyer to resolve the problem in the following manner: (1) separate the section into two guidelines, one pertaining to withdrawal from a conspiracy and the other covering the minor/minimal roles; (2) re-draft the Commentary to clarify the difference and to indicate that a defendant could get the benefit of a **mitigating adjustment** for withdrawal from a conspiracy or for minor/minimal role in the offense, but not both; (3) make clear in the Commentary that a mitigating adjustment for withdrawal from a conspiracy would not preclude an additional downward adjustment under Acceptance of Responsibility, provided that there were factors other than the withdrawal from the conspiracy to justify mitigation for Acceptance of Responsibility. The Commission also generally agreed that a floor would not be necessary if a defendant could qualify for only one of the mitigating adjustments (for minor/minimal role or withdrawal from conspiracy).

No. 52. 4/1/87



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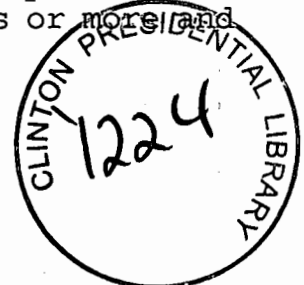
- Breyer discussed the manner in which **criminal history points** are counted in the guidelines for recent offenses and for offenses committed while in custody or upon release. He stated that the possibility of "double counting" some defendants appeared to be warranted by the data. However, he stated that no more than 4 minor offenses should be counted. Breyer moved to amend A311(c) to replace the "6" (total points counted from minor offenses) with a "4". The motion passed by a vote of 5-1.

- Breyer discussed the list of minor offenses counted in totalling prior criminal history points. He proposed making the list at least as inclusive as the list currently used by the Parole Commission. The issue was put aside till the next morning.

No. 53. 4/3/87

- Specific Offense Characteristics; Aggravating Factors; Mitigating Factors: The general provisions section to the Guidelines had been omitted and there was discussion about adding all aggravating and mitigating factors into each guideline in order that judges could distinguish the seriousness of the offense among the levels of the guidelines. Judge Breyer consistently asserted that specific offense characteristics should only be included where relevant data existed to support its inclusion as a pertinent sentencing factor. He stated his belief that any adjustments would be included as specific offense characteristics only if data demonstrated that those characteristics were factors in sentencing in 3-4% of the cases. Judge Breyer opposed a motion to restore the general provisions to Part V. Breyer's tone was clearly one of restraint with regard to specific offense characteristics. This is particularly interesting because these characteristics replaced the deleted general provisions and were to serve as points of departure in some instances. The Commission then considered each guideline in turn, weighing the necessity of including adjustments. Judge Breyer opposed the addition of adjustments in nearly every motion. Although there was a cautious word from a staff member on relying heavily on the data, Breyer reiterated his desire to make decisions based on data. He stressed that though the data has imperfections, it would be easier to defend the Guidelines based on slightly flawed data than on subjective decisions and choices made by the Commission.

Judge Breyer also staked the position that certain prior offenses should not be included in a person's past record if they did not lead to a sentence of 30 days or more and



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if they were unrelated and dissimilar to the present offense. He pressed for the adoption of a list of prior excluded offenses at least as comprehensive as that of the Parole Commission. (Offenses the Sentencing Commission had not included: driving while intoxicated; contempt of court; resisting arrest; failure to obey a police officer; prostitution; gambling; non-support).

Guidelines discussed and voted on:

Homicide Abduction

- Breyer voted against including abduction in homicide section (standard for departure as rarity of occurrence was discussed)

Vulnerable Victim

- Breyer voted against including vulnerable victim in homicide section

Extreme Conduct

- Breyer voted for maintaining extreme conduct in homicide section as a basis for departure (Breyer noted that all state guidelines have extreme conduct listed as a basis for departure in homicide cases)

Entire Part A section (including Homicide, Assault, Criminal and Sexual Abuse, Kidnapping, Abduction, Unlawful Restraint, Air Piracy)

Official Victim

- Breyer voted against giving an official victim a 3-level increase adjustment (Breyer proposed an amended version which did not pass to give a 1-level increase)

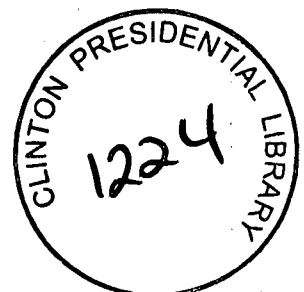
Extreme Psychological Injury

- Breyer voted against including extreme psychological injury in Part A as a mandatory adjustment when a judge found it had occurred

Physical Injury Beyond Normal Result of Offense

- Breyer voted against including this physical injury criteria in Part A

Assault: Psychological Injury Demonstrated by Articulated Dysfunctions Resulting from Offense



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- Breyer was not present for vote
Kidnapping: Account for Length of Abduction
- Breyer voted for this accounting.
Air Piracy: Restore prior adjustment for Physical Injury
- Breyer voted against the restoration of that adjustment.

Part B (including Burglary and Other Offenses Against Property)

2-Level Increase for Use or Possession of Weapon in Certain of these Crimes.

- Breyer voted for such adjustment.
Vulnerable Victim
- Breyer voted against including a vulnerable victim adjustment in Part B. Breyer was noted as saying that vulnerable victims were not present in the data as a sentencing factor in burglaries. Commissioners Gainer and Robinson countered that vulnerable victims should be included as an adjustment on the basis of common sense).

Death in Burglary

- Breyer proposed that the homicide guidelines be cross-referenced to the robbery guidelines.

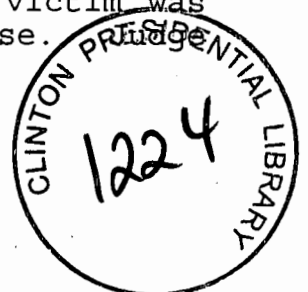
Threatening Communications

- Breyer voted for the reinclusion of a proposal to re-insert a guideline which was previously omitted.

No. 54. 4/7/87

In this particular meeting, the Commissioners suggested and voted on amendments to various provisions under the section titled Omissions of General Characteristics.

- Commissioner Nagel moved to add three new sections to the guidelines which would increase sentencing because 1) the defendant selected the victim because of vulnerabilities due to age or physical or mental condition; 2) the victim's status as to any type of law enforcement or the victim's familial relations to such an officer was a motivating cause for the crime; or 3) the victim was abducted during the commission of an offense.



Breyer amended the motion to read that there should be no other general adjustments in this section that apply throughout the guidelines. Judge Breyer voted in favor of the motion.

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Public Officials

- Judge Breyer voted against a motion by Commissioner Garner to increase the base offense level for bribery due to public outcry over current practice. Judge Breyer suggested that offense levels not be mandated by public opinion. He also proposed adding commentary that would substitute for the itemized increases in the draft guideline.

Sexual Offenses

- Judge Breyer voted in favor of a proposal which would offset the pecuniary gain of pornography offenses, particularly organized crime. Judge Breyer suggested adding commentary which would insure that this section would be applied to all aspects of production and distribution. Breyer rejected the suggestion that the base offense level be set at 10, with a decrease for offenses not involving pecuniary gain, stating that this was inconsistent with the current guideline structure. Breyer moved and voted to keep the base level at 6.

Civil Rights

- Breyer voted in favor of a motion which would increase the level of specific offense characteristics for public officials engaged in denying benefits to further discrimination. Judge Breyer rejected a motion that the base offense level for § H213 be increased from 10 to 12 stating that an offense level of 12 would be beyond the statutory maximum. Breyer recommended and voted that the level should remain at 10 and the Commission should then recommend to Congress that the statutory maximum be increased.

Drugs

- Judge Breyer voted in favor of a suggestion that weapons be included in Part D on drugs. Breyer rejected a motion which would have included physical injury in the guideline for continuing criminal enterprise.

Criminal Enterprises and Racketeering

- The Commission sought to prevent non-forcible extortion from being overlooked. Breyer suggested that in cases such as organized crime, where a threat to destroy property, even though not be force, is equivalent to a threat to destroy by force. The judge should apply the higher level.



The Administration of Justice

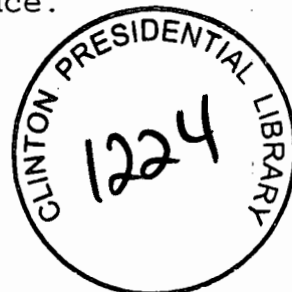
- Judge Breyer suggested that factors such as weapons, physical injury, and abduction should only be included in the guidelines where they play an important role in a number of cases. Breyer also voted against increasing the base offense level for obstruction of justice from 10 to 12.

Offenses Involving Public Safety

- Judge Breyer, considering a motion which would increase penalties for regulatory offenses resulting in physical injury, recommended including this distinction in the commentary because of the infrequency of physical injury in the case studies.

No. 55. 4/8/87

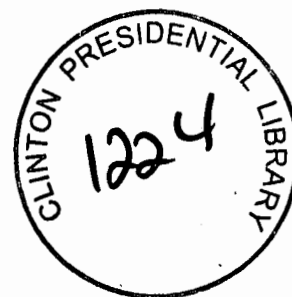
- §§ A221-A222: The Assault Guideline - Judge Breyer voted with a 5-1 majority to change §A221(3) and §A222(3) to read "shall not exceed 9 levels," increasing the ceiling by one level.
- Part Q: Environmental Offenses - Representatives from the Lands Division of the Department of Justice spoke to the Commission, suggesting a base offense level of 8 for offenses under this section. After some discussion, Judge Breyer suggested a compromise of splitting the base level so that "simple" recordkeeping violations would be level 6 violations while all other violations would be level 8. There was no vote on his motion.
- Judge Breyer voted with a 5-2 majority to make deaths in convictions under 19 U.S.C. §2113(e) be a reason for departing from the guidelines.
- Part X: Other Offenses - Judge Breyer suggested a reduction of 3 levels for not completing the offense which is the subject of a conspiracy. There was no vote on the suggestion. He also moved to treat withdrawal due to factors beyond the defendant's control the same as if the conspiracy had been completed. The motion passed 5-1.
- Chapter 5: Determining the Sentence - Judge Breyer voted with a 5-1 majority to adopt Peter Hoffman's proposal to allow straight probation for offenses with a minimum sentence of zero months, and probation in conjunction with prison alternatives when the minimum sentence is 1-6 months or imprisonment with a split sentence.



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No. 56. 4/9/87

- Chapter 5: Determining the Sentence - Judge Breyer proposed allowing a sentence of straight probation in offense levels 1-6, and probation in addition to intermittent or community confinement for at least the minimum sentence in offense levels 7-10. The alternative for imprisonment in levels 11-12 would be at least the minimum prison term or thirty days, whichever is greater, followed by supervised release. The motion was unanimously adopted.
- Part X: Other Offenses - The Commission unanimously passed Judge Breyer's motion that language of §X211 (b)(1) be changed to read, "If the attempt failed at completion for reasons beyond the defendant's control, there is no reduction in the defense levels. In all other instances, decrease by 3 levels." He also suggested providing a reduction of 3 levels for uncompleted attempts, 4 levels for uncompleted conspiracies and 5 levels for uncompleted solicitations. No vote was taken on his motion.
- §A211: Homicide - Judge Breyer, noting that the base offense level for first degree murder was 11 levels higher than the current average time served, suggested that commentary be added that the guideline not be applied to defendants convicted of felony murder. In the alternative, he proposed changing the base offense level from 43 to 42 and applying it in all cases arising under this section. No vote was taken on these proposals.
- Chapter 5 - First Offenders - Instead of Judge MacKinnon's suggestion to amend language in this chapter, Judge Breyer suggested adding a sentence in Chapter 1 that would "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." No vote was taken.
- Part Y - Departures - Judge Breyer proposed allowing judges to depart from the guidelines when the defendant had an altruistic purpose ". . . that either makes the defendant's conduct less harmful or that significantly diminishes society's interest in punishing or preventing that conduct." Also, a "lesser harms" provision drafted earlier by Judge Breyer passed 6-0. Judge Breyer was not present for discussions about mistake of fact and law or restraint of victim.



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No. 58. 4/28/87

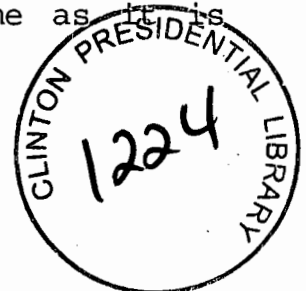
- Judge Breyer voted with 6-0 majority to adopt a change in the departures section. The amended sentence read: "Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of substantially more than 5 units."
- Judge Breyer also joined a 5-1 majority to add the following sentence: "Drug abuse may not be a basis for a departure below the guidelines."

No. 63. 6/10/87

- The first item on the agenda was to discuss how best to train probation officers and judges on the implementation of the Sentencing Guidelines. After some discussion, Judge Breyer moved that the Commission approve in principle the development of teaching and implemental programs for the sentencing guidelines by the Federal Judicial Center in conjunction with the Commission. His suggestions were unanimously approved. Specifically, they included: (1) setting a price ceiling for the educational programs at \$868,000; (2) making the development and implementation of the programs a joint venture between the Judicial Center and the Commission; and (3) reserving the power of approval and disapproval over individual programs with the Commission.
- A draft of Chapter Seven of the Supplementary Report was distributed to the Commissioners for their comments. The title of the Chapter was "Prison Impact." Judge Breyer proposed that a footnote be added to Chapter Seven concerning how many person-years there are likely to be in community treatment centers or in intermittent confinement, compared with the present.

The draft of Chapter Seven was appended to the day's minutes. Judge Breyer's comments on it, aside from the one mentioned above, were not attached. In brief summary the draft Chapter made the following predictions about the effect that the Guidelines would have on future prison populations:

- "'Straight' probationary sentences, i.e. sentences that require no form of confinement, will be reduced significantly under the guidelines. For most property crimes, however, the overall incidence of probation and split sentences will remain about the same as it is currently."

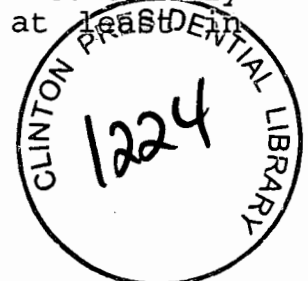


- "Average time served for violent offenses will increase substantially under the guidelines. Average time served for most property crimes, however, will remain at about current levels. The major exceptions here are burglary and income tax fraud, for which there will be substantial increases in average time served under the Guidelines."
- "Federal prison populations are likely to grow dramatically by the end of this century. However, the sentencing guidelines in themselves will contribute only marginally to such growth. Of far greater importance are the Anti-Drug Abuse Act of 1986 and the career-criminal provision of the Comprehensive Crime Control Act of 1984. (Judge Breyer reiterates this point in the June 30, 1987 meeting)."
- The Commission in this draft enumerated the problems it encountered in attempting to forecast future prison populations, including problems of method, the uncertainty of the level of departure and the effect the guidelines might have on negotiated settlements. To accommodate these problems, the data used to make the predictions was based on several alternative "scenarios". Taken together the results of these scenarios bound the Commission's estimates of prison impact.

No. 65

6/30/87

- Judge Breyer was in attendance at this meeting which was highlighted by a presentation by representatives from the American Correctional Association ("ACA") and the Commission on Accreditation for Corrections. Mr. Anthony Travisono of the ACA presented a statement on national standards for adult correctional institutions. His position was that national standards for correctional institutions would provide safer, more secure and constitutionally adequate facilities. He urged the Commission to incorporate the standards into their deliberations. The standards essentially limit the discretion of corrections administrators by mandating due process hearing procedures and access to the Courts by inmates. They also call for a more structured method of matching inmates with their optimal correctional institutions. Judge Breyer suggested that the ACA investigate and gather research on alternatives to imprisonment in preparation for an imminent debate in Congress over appropriations for new prisons.
- Off the immediate topic, Judge Breyer expressed the opinion that the sentencing guidelines would only increase the prison population slightly, at least in the



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comparison with the new federal drug law and the special offender provisions.

There were a couple areas of interest discussed at the meeting with no noted input by Judge Breyer:

- There was concern expressed about staff personnel providing technical input on the Guidelines without soliciting Commission review. Judge Wilkins assured the Commission that this would not be done.
- Judge Wilkins discussed adding corporate sanctions for organizational offenses to the guidelines, and instructed that initial planning be done on the topic.

No. 66. 7/22/87

- Representatives from the Bureau of Prisons discussed the assignment of inmates to institutions. They had been working on a classification system for the purposes of administrative efficiency, cost-effectiveness and safety that would place inmates in the lowest security classification consistent with their behavior and with both institutional and community safety. The relevant criteria for the system would be: severity of current offense, type of detainers, expected length of incarceration, type of prior commitments, history of escapes or attempts, history of violence, and pre-commitment status. The security classification was to be objective, but the level of custody within the institution was to be relatively subjective.
- The Bureau representatives mentioned that the Bureau of Prisons was not authorized by law to spend money on prisoners sentenced to community confinement. Judge Breyer suggested solving the problem either by legislation or by expressly sentencing the offender to the custody of the attorney general.
- The Commission also discussed marketing restrictions on prison-made goods. Judge Breyer discussed the effect of legislation repealing the current prohibition on such sales. His opinion on the matter is not reflected in the minutes, nor is the opinion of the Commission in general.

No. 68. 9/15/87

The Commission, with Judge Breyer in attendance, considered certain changes to a draft of the Guidelines. Of special note:

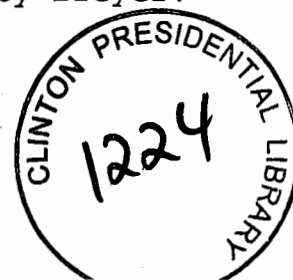


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- The Commission declined to include definitions of "reckless" and "criminal negligence" but did add language indicating that the list of statutory provisions was not exclusive. (Chapter 2, Part A).
- Judge Breyer suggested, and the Commission agreed, to add language to the commentary for insider trading to insure that the Chapter 3 adjustment for the use of special skill or trust would not be double-counted except in special cases. (Chapter 2, Part F).
- The Commission agreed to insert a sentence in the commentary stating that the upward adjustment for leadership role in a crime does not apply to someone who merely suggests or suggested committing the offense. (Chapter 3, Part B).
- Language was suggested by Judges Wilkins and MacKinnon, with no indication of whether it was approved, that judicial departure from the guidelines "may be warranted when independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines." (Chapter 5).
- But the Commission, upon the suggestion by Commissioner Corrothers, struck language inviting courts to depart from the guidelines, calling the language unnecessary and inappropriate. (Chapter 2, Part H).
- A clarification was made on the application of abduction: "abduction means that a victim was forced to accompany an offender to a different location." (Chapter 1).
- Judges MacKinnon and Breyer suggested including judges in the list of officials holding a high level decision-making or sensitive position in the commentary for Chapter 2, Part C. The Commission agreed.

No. 71. 10/20/87

- The Commission adopted language amending 18 U.S.C. § 3553(b) by striking the first sentence and inserting language to the effect that the court shall impose a sentence according to the guidelines unless there is an aggravating or mitigating circumstance that provides a compelling reason for imposing a different sentence than the one stated in the guidelines in order to meet the purposes of sentencing set forth in subsection (a)(2) and is not expressly addressed in the guidelines, official policy statements and commentary of the Commission. This motion passed unanimously and was seconded by Breyer.



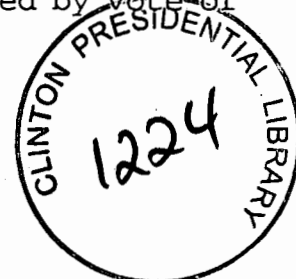
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§§ 2L1.1 & 2L1.2

- There was a problem from the Commission's standpoint in the disparity between 2L1.1 (Smuggling, Transporting or Harboring an Unlawful Alien) and 2L1.2 (Unlawfully Entering or Remaining in the U.S.), which is not in keeping with the gravity of the offenses as Congress described them. 2L1.1 addresses a 5 year felony for a first offense for each alien the statute specifies. The statutes covered in 2L1.2 are 2 year felonies for the second offense. The guidelines reverse this severity and give a greater base offense level to the 2L1.2 offense than to the 2L1.1 offense.
- After discussion, a motion by Nagel to remove petty offense from Immigration offenses passed by a 7-0 vote. A motion by Block to change 2L1.2 so that it doesn't apply to petty offenses passed by a vote of 7-0. A motion by Breyer that the Base Offense Level in 2L1.1 be retained at Level 6 failed by a vote of 4-2. A motion by Nagel that the Base Offense Level in 2L1.2 be changed to 8 passed by a vote of 6-0. A motion by Nagel that the Base Offense Level in 2L1.1 be increased to 9; that (b)(1) be reworded to say if the defendant committed the offense not for profit, and without knowledge, his sentence would be decreased by 3 levels; that the Commentary be changed; that 2L1.2 be increased to offense level 8; and that (b)(1) under 2L1.2 be deleted. The motion passed by a vote of 5-2. Breyer & Corruthers voted no.

Emergency Amendments

- The Commission considered emergency amendments, some of which are discussed below. Breyer's motion to delete the word "trafficking" from the third line of 4B1.1 dealing with Career Offenders, stating that the offense of conviction was a felony that was either a crime of violence or a controlled substance offense other than simple possession passed unanimously. The motion by Breyer to conform the Career Offenders Sentencing Table (4B1.1) to the existing statutory maximum terms thus having the effect of setting the guideline sentencing range at or near the current statutory maximum and allowing the judge to give the maximum but also allowing him or her to give a sentence slightly below the maximum passed by a vote of 5-2. A motion by MacKinnon to change 2D2.1 to reclassify LSD in the drug table from the same level as heroin to the same level as cocaine (conditioned on confirmation from DOJ and DEA that change is appropriate) was seconded by Breyer and passed by vote of



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5-1. A motion by Breyer to reject a proposed change to the Commentary to 1B1.1(j) (inserting "substantial" in front of the word "impairment") passed by a vote of 6-0.

No. 75. 1/5/88

- During this meeting, Breyer participated by phone due to inclement weather but desired the record to reflect that if he had been present he would have voted for the amendments to the guidelines adopted by the Commission.
- A motion to add commentary to 1B1.4 passed by a vote of 5-0. The commentary stated that a court is not precluded from considering information that the guidelines do not take into account. Further, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to **depart** from the guidelines.

No. 79. 4/12/88

- Motion by Breyer unanimously passed to delete from guideline coverage all **petty offenses**, by adding 1B1.8 and accompanying Commentary as an emergency guideline.

Criminal Livelihood

- Breyer voted against motion by MacKinnon to modify one of proposals to have it address a defendant who derived "substantial income" from criminal conduct rather than a "substantial portion of his income." The motion failed by a vote of 2-4. Block moved, and Breyer seconded motion to adopt the proposed language to read "substantial portion of his income" but deleting the reference to probation and all examples in Application Note 1. The motion passed by a vote of 5-1.

No. 80. 4/19/88

- After a lengthy discussion by Commission about amending the definition of loss in Commentary to 2B1.1, Breyer moved to adopt substitute language for Commentary to 2B1.1 which was unanimously adopted. The substitute language was: "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



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to exceed the loss had the property been destroyed."

- Breyer seconded a motion which was adopted unanimously to amend the Commentary to 2B3.1 by clarifying the Commission's intention to make attempted robbery of a bank or post office one level higher than a similar robbery or attempt of a private institution.
- During a discussion where the Commission reconsidered amendments, the first of which was 1B1.8 (use of Information Provided as a result of a Cooperation Agreement), Breyer and MacKinnon questioned whether any agreement between the prosecutor and the defense could prohibit the judge from considering certain information. 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. Breyer moved for a revision to the adopted language in paragraph 1 of the Commentary to 1B1.8 which was adopted unanimously, 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

No. 87 11/15/88

- Proposal to amend the Robbery Guideline was tentatively approved for publication as a proposed guideline amendment. Breyer not present for the vote.

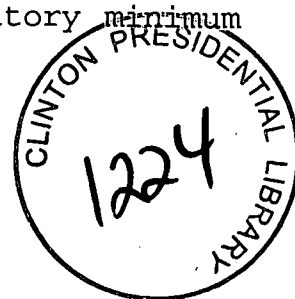
Commission considered and passed a number of proposed guideline amendments for publication.

No. 88 12/13/88

- Commission considered and passed a number of proposed guideline amendments for later publication relating to the 1988 Anti-Drug Abuse Act and a series of additional proposed guideline amendments.

No. 89 1/24/89

- Commission considered and passed a number of proposed guideline amendments for later publication in the Federal Register relating to the Omnibus Anti-Drug Abuse Act of 1988 including amendments mentioning mandatory minimum penalties.



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Commission considered and passed a series of proposed technical guideline amendments for later publication.

No. 92 4/18/89 and 4/19/89

- Commission considered and passed a number of technical amendments to the guidelines.

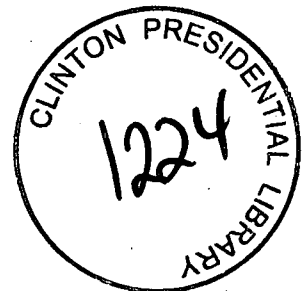
Breyer seconded a motion to permit a career offender to receive Acceptance of Responsibility reduction and to commit Commission resources to study Career Offenders. Passed unanimously.

Breyer made a motion to increase the base offense level for obscene or indecent telephone communications, with a higher increase for offenses involving a minor. Passed.

Breyer made a motion to amend the bank robbery guidelines with an increase in the base offense level. Motion did not carry.

No. 98. 6/26/89

- The Commission had recently discovered that a researcher originally asked by the Commission to conduct research in the area of reputation and income loss suffered by incarcerated persons but subsequently asked to discontinue the research, had proceeded despite the instruction. Judge Breyer asked to be put on the record expressing the fact that the Commission never voted to approve the "reputation" research. Commissioner Corrothers, also on the record, expressed opposition to the Commission using a study for the Penalties Review Project that would penalize those defendants who did not have a high socio-economic status.



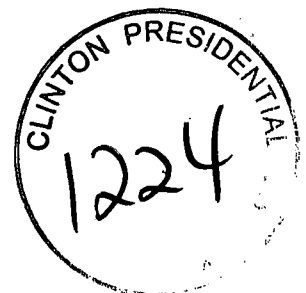
M E M O R A N D U M

TO: Jim Hamilton
CC: Cliff Sloan
FROM: Don Verrilli
DATE: May 31, 1994
SUBJECT: Sentencing Commission Minutes

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This memo provides guidance for review of the Sentencing Commission minutes. The minutes need to be reviewed with care, even though much of the information may not ultimately be relevant to the proceedings. Readers should identify and discuss the following topics:

1. The death penalty and its exclusion from the Guidelines.
2. Mandatory minimum sentences, or the severity of sentence levels under the Guidelines.
3. Any topic on the Commission that appears to be a matter of substantial controversy.
4. Any important topic as to which the minutes reveal Breyer taking a definite position.
5. Any other matter that may subject Breyer to attack, either from the right (e.g. as too lenient) or the left (e.g. as too harsh).
6. Anything reflecting racial or gender insensitivity, or suggesting that the process of formulating the Guidelines was not open to all interested parties.



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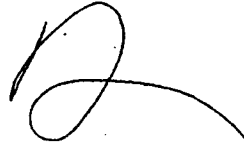
Dear Jim:

Enclosed with this letter are the following items:

1. Materials distributed at this morning's meeting.
2. Memorandum re reviewing minutes of Sentencing Commission.
3. Minutes of Sentencing Commission.
4. Breyer articles on sentencing.

Please call if you need anything further on sentencing.

Best regards,



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	Paul Gewirtz to Laura Radack; re: Stephen Breyer's Philosophy (partial) (1 page)	07/14/1994	P6/b(6)
001b. letter	Paul Gewirtz to Joel Klein; re: Stephen Breyer's Philosophy (partial) (1 page)	07/14/1994	P6/b(6)
002. memo	Victoria L. Radd to Lloyd N. Cutler and Joel I. Klein re: preparations (pages 3-4 closed in whole b(6)) (4 pages)	05/10/1994	P5, b(6) 1225
003. memo	Lloyd Cutler, Joel Klein, & Victoria Radd to POTUS; re: Candidates for Discussion at Today's Meeting (1 page)	04/15/1994	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 8880

FOLDER TITLE:

Breyer Press [1]

2006-1067-F
jp2368

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

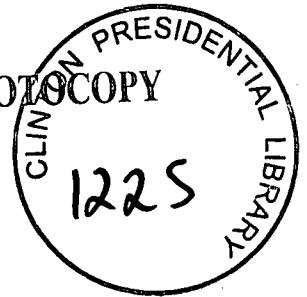
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

May 10, CLINTON LIBRARY PHOTOCOPY



MEMORANDUM FOR LLOYD N. CUTLER AND JOEL I. KLEIN

FROM: VICTORIA L. RADD

SUBJECT: PREPARATIONS FOR SUPREME COURT ANNOUNCEMENT

The following is a list of potential "to do" items in preparation for an announcement of our Supreme Court nominee.

1. Personal Contact and Vetting

Depending upon the identity of the nominee, the Counsel's Office should follow-up on the President's decision with a "vetting" call or visit.

2. Preparation of Announcement Materials

At the very least, we will need announcement remarks for the President and a prepared biography of the nominee. We should also work with the nominee on his remarks. It would be useful as well to have some anticipatory responses to the potential attacks on the nominee.

Inside the White House, we should make very clear the "message" of this selection and ensure that all those who will be in contact with the press are adequately briefed on message, key positives, and potential negatives of the selection.

3. Notification Calls

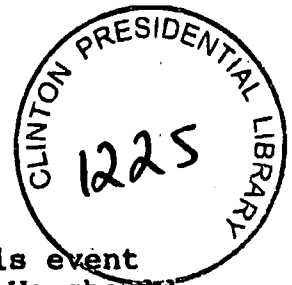
Prior to the announcement, we should notify key individuals and constituencies. These would include:

- Candidates considered and not selected
- Leadership & home-state senators & congressmen
- Hispanic groups
- Judiciary Committee
- Groups interested in judicial selection
- Civil rights leaders
- Organized labor
- Police/prosecutor groups
- ABA Committee
- Women's groups

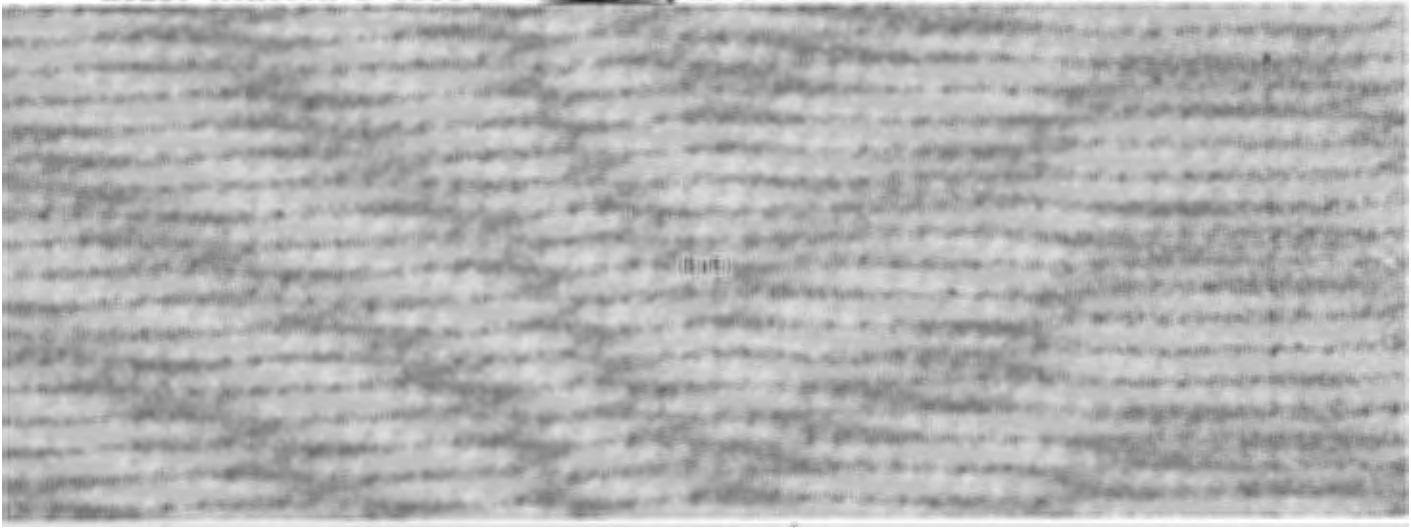
Obviously, certain calls are more important than others. We could use the resources of Public Liaison, Legislative Affairs, and the Justice Department to follow through on most of these calls.

4. Rose Garden Event

THE WHITE HOUSE
WASHINGTON



Most of the organization and planning of this event will be done by presidential scheduling and advance. We should make sure that among the invitees are: (a) the top political appointees at the Justice Department; (b) the entire Counsel's Office; (c) Jim Hamilton and his "vettors"; and (d) those in Eldie Acheson's office that prepared candidate reviews.



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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	re: Questions from Jim McGee (partial) (1 page)	n.d.	P6/b(6)
002. memo	David Dreyer to Patricia A. McHugha and Paul A. Toback (2 pages)	05/14/1994	P5 Dup 1229
003. memo	Cliff Sloan to Lloyd Cutler re: Jim McGee (3 pages)	06/22/1994	P5 1226

COLLECTION:

Clinton Presidential Records
Counsel's Office
Victoria Radd
OA/Box Number: 5336

FOLDER TITLE:

Counsel - Supreme Court 1994/Supreme Court Potential Judges: Stephen Breyer [1]

2006-1067-F

jp3034

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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THE WHITE HOUSE
WASHINGTON
June 22, 1994



MEMORANDUM FOR LLOYD CUTLER CLINTON LIBRARY PHOTOCOPY Breyer.

FROM: CLIFF SLOAN

SUBJECT: JIM MCGEE, WASHINGTON POST

McGee is scheduled to interview you by phone at 12:30 today.

BACKGROUND

McGee has met with us twice. He has asked a long list of questions about Judge Breyer and the vetting process. We have given him answers to some questions, but we have drawn a line at responding to speculative personal questions and at commenting on the vetting process. A list of the questions and answers to date is attached.

MCGEE'S INTERVIEW REQUEST

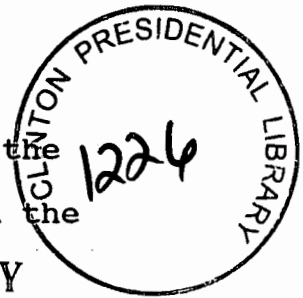
McGee wants to interview you about the policy reasons for not answering speculative personal questions and for not answering questions about the vetting process.

TALKING POINTS FOR THE MCGEE INTERVIEW

- * It is important, as a matter of principle and policy, that we not comment on unfounded questions about a nominee's personal life. This is a significant institutional matter. If we commented on every question about a candidate's

personal life, there would be no confidentiality in the vetting process. Every candidate would be vetted in the press.

CLINTON LIBRARY PHOTOCOPY



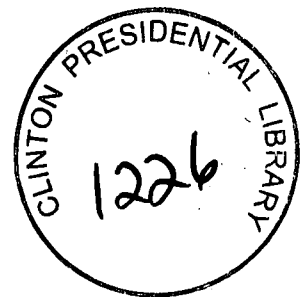
- * The current process includes confidentiality with respect to highly personal questions about a candidate. The vetting process is confidential; the FBI investigation is confidential; and the Senate Judiciary Committee process includes confidentiality about personal questions. Commenting on every personal question, regardless of whether there is any basis for it, would destroy that confidentiality.
- * This issue extends beyond Supreme Court nominees to all Presidential nominees. Questions along these lines would be raised with respect to every Cabinet nominee and every other Presidential nominee.
- * For the same reason, we cannot comment on the details of the vetting process, including what questions were asked in the vetting process.
- * If there are particular questions based on particular facts or incidents, we'll be happy to review them and try to get you an appropriate response.

ADDITIONAL ISSUES

You should be aware of three additional points. First, you should be aware that McGee's justification for some of the questions is that the questions have been public matters with respect to past nominees (e.g., sexual harassment, prior drug

use). Second, you should be aware that McGee asks for a statement from Judge Breyer's doctor (see question 15) -- he says that we've put this question in issue by our comments about Arnold. Third, you should be aware that, with respect to each of the questions that we're declining to answer, McGee has asked, that we ask Judge Breyer if he will respond. (We have not gotten back to him on this point, but we will strongly recommend to Steve that he decline for the same reasons that we're declining).

CLINTON LIBRARY PHOTOCOPY



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Ron Klain to Bernie Nussbaum; re: Areas of Discussion for the President (3 pages)	06/11/1993	P5	1228

COLLECTION:

Clinton Presidential Records
WHORM Subject File-General
FG001-06
OA/Box Number: 21808

FOLDER TITLE:

023711SS

Jimmie Purvis
2006-1067-F
jp2157

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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023711SS

FG 001-06

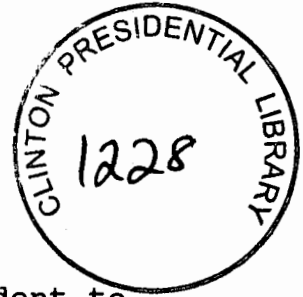
June 11, 1993

MEMORANDUM FOR BERNIE NUSSBAUM

FROM: RON KLAIN

CLINTON LIBRARY PHOTOCOPY

SUBJECT: AREAS OF DISCUSSION FOR THE PRESIDENT



Here are the areas that I would encourage the President to cover -- or to avoid -- in his discussion with Judge Breyer.

Questions for Judge Breyer

I think the President can put the following questions to Judge Breyer, and expect these answers:

- What guides your overall constitutional philosophy? Breyer will likely speak of "human dignity" and a need to take a non-literal view of the Constitution's phrases.
- How do you define the scope of liberty in the Constitution? Breyer will talk about the need to balance the text's language with an expansive view of liberty.
- Why have you devoted your career to the dry subject of economic regulation? Breyer will discuss how these regulatory issues touch people's lives.
- Some say that your writings suggest an over-emphasis on economics: putting a cost on lives, for example. Breyer will talk about the limits of economic analysis, and the need to make hard choices among safety options.
- How does he respond to the criticism that his opinions are "bloodless"? Breyer will discuss his admiration for John Minor Wisdom, who had a similar writing style.
- How do you deal with your Republican colleagues on the bench? Breyer will talk about how he goes about persuading them to join him in cases.
- You are the architect of the Sentencing Guidelines. How do you defend them from criticism? Breyer will speak of how he "did good" by fighting "worse" versions of the Guidelines.
- What are the most significant Supreme Court decisions in your lifetime? Breyer will cite a variety of cases involving civil rights and personal liberties.
- Who are the great Justices in history? Breyer will cite a variety of Justices, past and present.

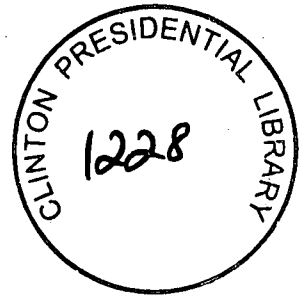
CLINTON LIBRARY PHOTOCOPY

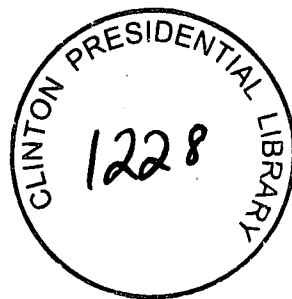
Areas Not to be Raised

I would discourage the President from questioning Judge Breyer on specific legal issues or specific cases. These would obviously include questions like:

- What is your view on the constitutionality of the death penalty?
- Do you agree with Bakke v. Regents of California, or Roe v. Wade?
- What test would you use to determine when an Establishment Clause violation has occurred?
- How do you define the "right to privacy?"
- When can race-conscious remedies be used under the civil rights laws?

While we can debate whether these questions are proper or not, they would indisputably be controversial, and I think, imprudent.





CLINTON LIBRARY PHOTOCOPY

THE PRESIDENT HAS SEEN 6/11

Kleinbauer

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. memo	David Dreyer to Patricia McHugh & Paul Toback; re: Breyer Nomination (2 pages)	05/14/1994	P5	1229
001b. memo	David Dreyer to Patricia McHugh & Paul Toback; re: Breyer Nomination (2 pages)	05/14/1994	P5	Dup of 1229

COLLECTION:

Clinton Presidential Records
WHORM - Subject File - General
FG051
OA/Box Number: 21853

FOLDER TITLE:

069028

Jimmie Purvis
2006-1067-F
jp2171

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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Mack

MACK

Need to do this

Need to do this -

EXECUTIVE OFFICE OF THE PRESIDENT

CLINTON LIBRARY PHOTOCOPY 14-May-1994 10:03pm

TO: Patricia A. McHugh
TO: Paul A. Toback

FROM: David Dreyer
Office of Communications

SUBJECT: Breyer Nomination

① Lloyd } Not
② Jock } possible
 } response
 } Mof
③ D. Sl. } D. Sl.

Memorandum to Mack McLarty
Regarding the Nomination of Judge Breyer

I am writing to urge that you name an internal team as quickly as possible to manage the Breyer nomination from here to confirmation. I believe that political, Congressional, and communications people should be added to complement the Counsel's team as soon as possible.

Obviously from the reaction this nomination is not in doubt. Just because it is a slam dunk, doesn't mean we should be anything but aggressive in pursuing it. To the contrary, because it is a slam dunk it offers us the opportunity to use it as a vehicle to put the President and his staff in the best possible light. Thus far, the President is taking a beating on style points even as the nominee is being praised. It is reminiscent of the President getting low marks for managing an economic recovery. Here is an opportunity to show competence, thoroughness and really highlight the White House.

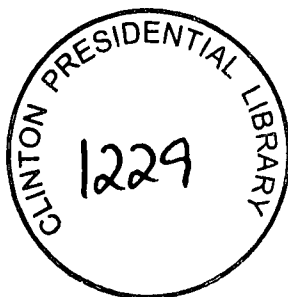
I recommend early collaboration with Senator Kennedy's staff, the ring of friends around Breyer like Ken Feinberg, Robert Pitofsky, and Alan Morrison, and various interest groups who can be persuaded to endorse the nomination early.

I recommend an op-ed strategy.

I recommend beginning Monday organizing "talkers" to make calls about Breyer and about the seriousness with which the President is treating the nomination.

I recommend the production of talking points about the nomination, the recruitment of House and Senate speakers for one-minutes and morning business in the respective chambers.

I recommend shutting down critics -- someone should talk with



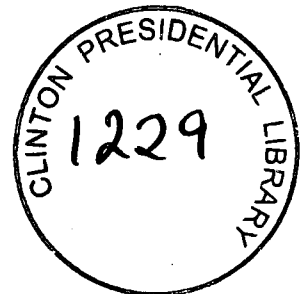
Metzenbaum, for example, -- so that the confirmation hearings can be as pleasant as possible.

Most of all, we should decide what we want said about the President when this debate is over and determine the strategy from there. We begin with the need to clean up first impressions (spooked out of Babbitt by the right wing, took too long to make up his mind, etc.). And that might begin by getting some of the incredibly unhelpful comments from White House aides out of the newspaper first.

Hope this is useful.

D2/Dreyer

CLINTON LIBRARY PHOTOCOPY



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Ron Klain to David Gergen; re: Judge Ginsburg - Performance Pitfalls (2 pages)	07/14/1993	P5 1230

COLLECTION:

Clinton Presidential Records
Chief of Staff
David Gergen
OA/Box Number: 4281

FOLDER TITLE:

Ginsburg, Ruth

Jimmie Purvis
2006-1067-F
jp2186

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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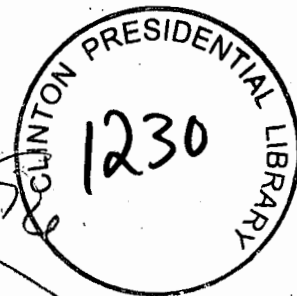
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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CLINTON LIBRARY PHOTOCOPY July 14, 1993



MEMORANDUM FOR DAVID GERGEN

FROM: RON KLAIN

SUBJECT: JUDGE GINSBURG: PERFORMANCE PITFALLS

Based on our preparation thus far, here are the potential dangers in Judge Ginsburg's hearing performance:

1. Stalwart Defense of the ACLU

When asked about her support for ACLU policies to legalize prostitution, decriminalize the distribution of pornography to minors, decriminalize marijuana, and ban the death penalty, Judge Ginsburg has a strong tendency to defend the ACLU position. She has an instinct for defending some rather extreme liberal views on these questions.

She also relishes defending the ACLU as an institution, and its importance in American society.

2. Rejection of the Souter Approach

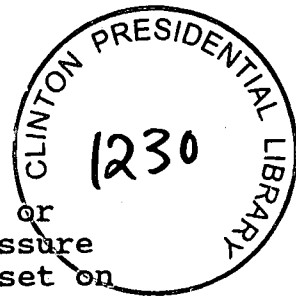
When shown videotapes of confirmation hearing answers by Judges Souter and Bork to similar questions, Judge Ginsburg's reaction has been that Judge Souter "demeaned" himself in giving "political" answers, while Judge Bork was "unjustly crucified" for his "candid" responses.

Her answering style is more akin to Bork than Souter: her answers tend to be legalistic and doctrinal -- even when dealing with crucial issues -- rather than conveying core values.

3. Disdain for Confirmation Process

At the same time, Judge Ginsburg believes that Judge Souter answered "too many" questions of the Committee about specific legal issues -- like religious freedom and free speech -- and intends to be less responsive than he was in an effort to "restore dignity" to the confirmation process.

Her hostility to the process -- to the Committee's "victimizing" of Judge Bork (on the one hand) and Anita Hill and Lani Guinier (on the other) -- is evident. She believes (and may publicly state) that the current process should be replaced by the one used for Chief Justice Burger: a one-hour hearing with no substantive questioning.



4. Failure to Reassure in Answers

When asked a specific question about a prior decision or writing, Judge Ginsburg seems unable (or unwilling) to reassure that questioner's underlying concerns, and instead, seems set on answering the specific charge (or, more often, nitpicking some aspect of the question's premise).

As noted above, the Judge has trouble addressing larger issues and speaking to core values.

5. Style Problems

And finally, Judge Ginsburg's technique -- her failure to make eye contact, her halting speech, her "laconic" nature (to use Jim Hamilton's phrase) -- is not helpful.

* * * * CLINTON LIBRARY PHOTOCOPY

You should be cautious in dealing with her on these and other points. Judge Ginsburg views the White House's interest and her interests as being at odds with each other: she sees us as having a stake in presenting her as a moderate and in getting along well with the Senate; she sees her interests as "being herself," preserving her "dignity," and promoting her "independence."

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Ron Klain to Bruce Lindsey et al; re: Supreme Court Vacancy - Timing & Process (3 pages)	03/19/1993	P5 1231
002. memo	Ron Klain to Bruce Lindsey et al; re: Supreme Court Vacancy - Timing & Process (3 pages)	03/19/1993	P5 Dup of 1231
003. form	re: Senate Judiciary Committee - Initial Questionnaire (Supreme Court) - Biographical Information - Ruth Bader Ginsburg (partial) (3 pages)	ca., 06/1993	P6/b(6)
004. form	re: Senate Judiciary Committee - Initial Questionnaire (Supreme Court) - Financial Data & Conflict of Interest - Ruth Bader Ginsburg (partial) (2 pages)	ca., 06/1993	P6/b(6)
005. form	re: Senate Judiciary Committee - Initial Questionnaire (Supreme Court) - Biographical Information - Ruth Bader Ginsburg (partial) (2 pages)	ca., 06/1993	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Victoria Radd
OA/Box Number: 6763

FOLDER TITLE:

[Material Relating to the Nomination of Ruth Bader Ginsburg for Supreme Court Justice] [1]

Jimmie Purvis
2006-1067-F
jp2225

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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March 19, 1993



MEMORANDUM FOR BRUCE LINDSEY, BERNIE NUSSBAUM, VINCE FOSTER

FROM: RON KLAIN

CLINTON LIBRARY PHOTOCOPY

SUBJECT: SUPREME COURT VACANCY; TIMING AND PROCESS

At Bruce's request, I have prepared this memo setting forth the timing and process issues concerning the selection of Justice White's replacement.

Overall Timing Strategy

The challenge is to pace the process so that we avoid the mistake of moving too slowly -- or too quickly.

With respect to "too slowly," if we want a vote in the Senate by July 1st, here is the approximate "no later than" timetable for our action:

- Announce nominee: April 15th
- Commence hearings: June 8th
- Committee vote: June 23rd
- Committee report: June 29th

Again, these are the latest dates we should aim for; each of these should be moved up if possible.

At the same time, there are dangers in moving the overall confirmation process too quickly. Haste in selection will undermine the President's statement that he intends to act deliberately.

Moreover, because the Senate cannot confirm a Justice until a vacancy exists (approximately June 30th), we want to avoid rusting the process to prevent an overly long gap between the end of the nominee's hearings and the Senate confirmation vote. Thus, while we want the nominee's hearings no later than June 8th, we do not want them earlier than May 26th.

Specific Elements of the Selection Process

Glossing over the single most difficult question -- of how internally we intend to take a long list and narrow it to three to five finalists -- here are the steps and issues presented by the selection and confirmation process.

CLINTON LIBRARY PHOTOCOPY

1. Consultation

Senate leaders, particularly Chairman Biden, have previously made strong statements about their desire to be consulted on Supreme Court nominations; if we fail to do so, we will engender considerable ill-will towards our nominee.

Our options include the following:

- Inviting in Senate leaders to for a meeting with the President, to solicit possible names (very little risk);
- Sharing a list of 8-12 names with key Senators, for their reaction and response (the historical practice until the Bush administration, though certain to produce leaks);
- Including Republican Senators in consultations (which will draw criticism from the left -- and be called unnecessary, since Democrats control the Senate -- but will make confirmation an easier task).

Consultation does not mean that we need to heed the Senators' preferences, but it does carry one additional risk: if they strongly disapprove of someone, and the President chooses to nominate that person anyway, Senatorial ire will be further stirred. (This is precisely what happened when Senators Byrd and Biden were consulted about -- and recommended against -- the selection of Judge Bork by President Reagan).

2. Vetting

A second procedural concerns at which point we ask potential nominees to submit themselves to the "vetting" (i.e., personal background check) process. To date, we have only done this for presumptive nominees, but there is an argument for asking multiple candidates (perhaps three) to go through this process:

- By preventing the search from centering on a single person, we can "fuzz" the reasons offered for why one person was selected in lieu of another (i.e., it avoids the Kimba Wood problem, of public second-guessing of a decision "against" someone);
- It prevents a delay if a single candidate "flunks" the vetting, by having multiple potential candidates at equal stages of readiness.

In essence, this would be similar to the approach taken in the Vice Presidential search, when multiple candidates were "vetted."



A collateral issue concerns which forms -- including medical and financial forms -- we are going to ask prospective nominees to complete, and at what point in the process.

3. American Bar Association

CLINTON LIBRARY PHOTOCOPY

In a previous era (e.g., when President Nixon selected Lewis Powell, and when President Ford selected John Paul Stevens), the ABA was used as a selection mechanism, in addition to its screening role. Specifically, Presidents Nixon and Ford submitted multiple names to the ABA, prior to their selection of a nominee, for ABA evaluation. The Presidents withheld their selection of a nominee until the ABA reported.

The more common practice -- both before and since the Powell and Stevens selections -- has been for the President to select his nominee, announce him/her publicly, and then submit the single name to the ABA for an evaluation. This ABA evaluation -- involving the use of reading and professional evaluation committees to make recommendations to the official Standing Committee on the Federal Judiciary -- will take approximately four weeks to complete.

We have an additional option, used by President Bush informally. We can ask the ABA Standing Committee for a confidential, pre-announcement "poll" of its 15 members, to give us a rough idea of what evaluation it will give to a potential nominee. Though this runs some risk of a leak, it is probably a prudent step to take if your nominee is going to be someone other than an established federal judge.

4. FBI Investigation

For lower court nominations, both the ABA and the FBI investigations are done before a public announcement of an intention to nominate is made. But, as with the ABA, in recent years, the practice has been to conduct an FBI check only after the nomination is announced, relying on administration "vetting" instead.

Because we have a more generous time frame, we could consider doing an FBI report on a prospective nominee before announcement -- or even on multiple nominees, in lieu of "vetting." Of course, once names are sent to the FBI, leaks are certain (which may be the reason for sending multiple names to the Bureau): far too many people become involved in the background checks to preserve confidentiality.

