

Minutes of the January 4, 1990 United States Sentencing Commission
Business Meeting

The meeting was called to order at 9:04 A.M. By Chairman William W. Wilkins, Jr.

The meeting was held in the library at the U.S. Sentencing Commission. The following Commissioners, staff, and guests participated:

William W. Wilkins, Jr., Chairman
Helen G. Corrothers, Commissioner
George E. MacKinnon, Commissioner
Stephen G. Saltzburg, Ex Officio Member
Sharon Henegan, Director of Training and Technical Assistance
Peter Hoffman, Principal Technical Advisor
Paul Martin, Communications Director
Andy Purdy, Chief Deputy Counsel
Roger Pauley, Criminal Division, DOJ
Vicki Portney, Criminal Division, DOJ

Staff Director Newton and General Counsel Steer were not present because they were attending a meeting of the Judicial Conference Criminal Law and Probation Administration Committee.

Chairman Wilkins announced that Commission meetings are scheduled for January 16 at 9:00 A.M., January 22 at 2:30 P.M., January 24 at 9:00 A.M. and February 13 at 9:00 A.M. He also announced that the public hearing on Organizational Sanctions would be held February 14 and the public hearing on Amendments would be held on March 15, both at 9:30 A.M. at the Ceremonial Courtroom of the U.S. Courthouse.

Chairman Wilkins introduced Benson Weintraub and Alan Chaset, members of the Practitioners' Advisory group.

Amendments

Prior to the Commission meeting, Commissioner Nagel articulated her comments on the proposed amendments to Chairman Wilkins via Staff Director Newton.

Chapter One, Part A

General consensus to tentatively approve for publication, subject to Commissioner MacKinnon's proposed changes.

Item 1: \$4A1.2 - Definition and Instructions for Computing
Criminal History

Commissioner Corrothers stated, for the record, her objections to the proposal: 1) adoption of proposal will increase disparity as its application is dependent on the efficiency of the

Records Division of the appropriate jurisdiction in carrying out the court's directive to expunge or destroy records; 2) questioned the justification for the additional burden to the Probation Officer who must search for rationale for expungement in order to determine whether to include it in criminal history computation. Noted the likelihood that the search would be unsuccessful since the information is not easily accessible to the Probation Officer; 3) the underlying moral issue associated with the concept of a system's planned cancellation of a judicial order. Commented that more integrity is reflected in promoting legislation which prohibits expungement for certain offenses; and 4) questioned the proposal's implication that "expunged convictions", "vacated", "pardon" and "set asides" should be treated the same. Provided the example that a pardon represents a decision to discontinue a portion of the punishment as in restoring the right to vote rather than a decision to erase the conviction as in the case of expungement.

The Commission directed Peter Hoffman to draft a proposed question for publication asking whether expunged convictions should count for criminal history consistent with "set asides" and pardons as proposed in the amendment, or whether that whole category of convictions should be explicitly excluded from consideration.

General consensus to tentatively approve for publication subject to Commissioners MacKinnon and Corrothers' review of the proposed language.

Item 2: §2B1.1 - Larceny, Embezzlement, and Other Forms of Theft, §2F1.1 - Fraud and Deceit

General consensus to tentatively approve for publication.

Item 3: Chapter Two, Part H, Subpart 1, Civil Rights

General consensus to defer for further staff consideration. Commissioner Corrothers requested determination as to whether the amendment inadvertently lowers the offense level for Hate Crimes.

Item 4: Chapter Two, Part L, Subpart 2

General consensus to tentatively approve for publication.

Item 5: Extortion by Force or Threat of Injury or Serious Damage

-- Motion made to tentatively approve for publication option #1. Failed. Chairman Wilkins and Commissioner Corrothers voted "no."

-- Motion made to tentatively approve option #2 for publication. Passed. Commissioner MacKinnon voted "no."

Item 6: §2B3.1 - Robbery

General consensus to tentatively approve option #2 for publication. Subsequently amended to include a (2)-level enhancement if a financial institution or post office was involved and the deletion of "robbery or attempted robbery of" from (b)(1).

Item 7: §3D1.2 - Multiple Counts

General consensus to tentatively approve for publication.

Item 8: §5K2.0 - Departure

General consensus to tentatively approve for publication.

Item 9: §5E1.2 - Fines for Individual Defendants

General consensus to defer for further staff consideration.

Item 10: §2D1.6 - Use of a Communications Facility in Committing Drug Offense

General consensus to tentatively approve for publication.

Andy Purdy reported on the proposed statutory changes regarding the statement of reasons. Although no formal action was taken at this time, objections were not made by the Commission concerning the proposed changes.

Paul Martin reported on the proposed publications policy. Commissioner MacKinnon commented, for the record, that the Commission is an agency of the Judicial branch, not the Executive branch. The members of the Commission are working in a more confidential capacity than members of the Executive branch since the Commission's work is the equivalent of law. He further stated that the Commission should not take action on this issue until the full Commission met. A question arose as to the problem associated with former Commission employees who give speeches or write articles. Commissioner MacKinnon stated that a defendant might pick this up and raise on appeal an issue stating that the Commission did not properly consider empirical data in connection with the robbery change and therefore, the conviction should be set aside. Chairman Wilkins, for the record, stated that he did not believe that this argument would be successful. Chairman Wilkins, subject to Commissioners Corrothers and MacKinnons' approval, will draft a memorandum to the staff to ensure that the Commission is notified when someone is invited to speak or write in connection with the work of the Commission, that a disclaimer accompany same, that the Commission receive the written material in advance, and that permission be given by the Chairman or his designee in advance. Commission action will be deferred on the proposal.

Chairman Wilkins adjourned the meeting at 11:46 A.M.