

THE UNITED STATES SENTENCING COMMISSION
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Rev and g Dec

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Garner (ex officio)



Agenda
Commission Meeting
August 6, 1986

1. Call to Order
2. Chapter III Adjustments
3. Chapter II
 - Offenses Involving Criminal Enterprise
4. Adjournment

The following persons attended U.S. Sentencing Commission Meeting
on August 6, 1986

Commissioners

Chairman William W. Wilkins, Jr.
Commissioner Michael Block
Judge Stephen Breyer
Commissioner Helen Corrothers
Commissioner Ronald Gainer
Judge George E. MacKinnon
Commissioner Ilene H. Nagel
Commissioner Paul H. Robinson

Staff

Denis J. Hauptly, General Counsel
Kay A. Knapp, Staff Director
Bill Rhodes, Research Director
Suzanne Conlon, Deputy General Counsel
David Tevelin, Deputy General Counsel
Mary Ellen Abrecht, Deputy General Counsel
David Lombardero, Special Counsel
Peter Hoffman, Senior Research Associate
Alan Chaset, Parole Commission Representative
Susan Hayes, Associate General Counsel
Paul Martin, Communications Director
Elizabeth H. Williams, Assistant Staff Director
Janet Fitzpatrick, Librarian

Commission Meeting August 6, 1986

Chairman Wilkins called the meeting to order. The allocation of sanction units was briefly discussed. Concern was expressed that there was not enough flexibility in assigning sanction units for intensive supervision and post-incarcerative supervision at the low end of the scale. Additional work on chapter four is necessary.

The sentence adjustments contained in chapter three were discussed. Threatened harms was the first issue raised. One aspect of the issue is whether threat should be established by subjective standards, e.g., the victim's perspective, or by a more objective standards, e.g., a "reasonable person" standard. One approach suggested was to focus on the amount of credible fear generated rather than the threat itself. The advantage of a reasonable person standard for establishing the level of fear generated is that it alleviates the victim from having to testify to the level of fear experienced. Similar concerns were expressed with respect to victim testimony regarding psychological harms. A second aspect of the threat issue is whether there should be a general adjustment factor for threats, whether they should be included in an offense specific context, or whether there should be a base level of threat incorporated in specific offenses with higher levels factored in with a general adjustment. One of the difficulties with incorporating a base level of threat into the specific offense is having to explicitly state how much threat was incorporated so it would not be double

counted in the adjustment for higher levels. Also, having threats incorporated in some crimes and not others precludes the formulation of a rule. On the other hand, the seriousness of the threat appears to many to be context specific and therefore is not amenable to a general rule or to a general adjustment factor. A third aspect of the threat issue is how to treat specific statutory offenses that include threat as an essential element. It was suggested that the statutes incorporating threat be segregated and dealt with specifically in the guidelines and that a general adjustment for threats be developed where threat above a base line value at the lowest level would be an add-on. The issue of modified real offense sentencing was discussed in terms of what threatened related harms might be considered in establishing the sentence. The roadmap will provide some guidance in what related harms should be incorporated, but the roadmap will not be perfect and therefore the articulation of a general rule such as "in furtherance of" will probably also be necessary. It was noted that the Proposed Criminal Code Revision and Model Penal Codes all had developed general rules for dealing with most threat situations and inchoate crimes. It was also noted that crime control factors needed to be factored into the threat area. There was some disagreement concerning whether the philosophy would affect format.

Conspiracy, attempt, and solicitation were grouped together for comment. It was noted that the guidelines should not provide a substantial downward adjustment for an offense which was

prevented only by virtue of law enforcement intervention. Similarly, a downward adjustment may not be appropriate in narcotics violations, in order to provide adequate punishment for the kingpin. Apart from circumstances such as those, concern was expressed that completed and incompletd offenses should be differentiated based on how close the crime came to being completed. It was agreed that areas of attempt, conspiracy, and solicitation that should perhaps be treated as completed harms be flagged. Other such offenses would be given a base harm value with an add on for any aggravating factor.

The meeting was temporarily adjourned.

The meeting reconvened.

The next issue for discussion was renunciation. The policy question presented was whether or not the Commission wanted to give a downward adjustment for an offender who did not meet the legal standard for renunciation. One view articulated is that an offender who decides not to participate in the offense because it was not a right thing to do, satisfies the requirements for inchoate offense. Due to the moral struggle, however, the blameworthiness factor is much different than an inchoate offense without such a struggle. It was noted that in the situation where the offender goes to the police, an adjustment could be made for cooperation. The opinion was expressed that, apart from an adjustment for cooperation, renunciation should be excluded as a reason for departure. The opposite opinion was also expressed. It was noted that renunciation is only a defense for conspiracy

and that there is no such defense for attempts, nor is there consistent interpretation among circuit courts. Concern was voiced that if renunciation were to be included as a basis for departure or built in as an adjustment, defense would be obligated to raise it in almost every conspiracy or attempt case, or else be liable for ineffective counsel. It was pointed out that if that were true for renunciation, it would be equally true for every mitigating adjustment or circumstance. It was determined that the issue would be raised for public comment.

The issue of multiple related harms was briefly discussed. The issue includes a merger overlap problem and a concurrent consecutive problem. It was decided that full discussion of the issue would be postponed until a future meeting.

The questions of reckless, negligent, blameless conduct or mistake factors were raised. It was proposed that reckless and negligent modifiers would be moved from chapter three to homicide and regulatory offenses in chapter two. It was noted that very few offenses go below the Model Penal Code definition of reckless or knowing. The major question is whether to aggravate for a more culpable state of mind. It was suggested that a policy statement might help guide the courts in this area. Another suggestion was to give all regulatory and strict liability offenses a base harm value of six and have one multiplier.

Extreme indifference and fortuitous injury were addressed. It was noted that the Commission must provide a mechanism for considering extraordinary circumstances, but not let the

extraordinary circumstances overpower the rest of the guidelines. On the subject of abnormal characteristics and conditions, it was suggested that a downward adjustment be reserved for property crimes. The opinion was also expressed that mitigation must be allowed for abnormal conditions in offenses against a person, such as a euthanasia case. The sociopathic and psychopathic personalities also need to be addressed because incapacitation may be warranted. It was suggested that the extent of aggravation or mitigation in these kinds of cases be limited, to avoid abuse, but that it was important to have symmetry in the policy.

The meeting was adjourned.