

Minutes of the October 25, 1988 U.S. Sentencing Commission Business Meeting

The meeting was called to order at 9:37 a.m. in the Commission's Conference Room by Chairman William W. Wilkins.

The following Commissioners and staff members were present:

William W. Wilkins, Jr., Chairman
Michael K. Block, Commissioner
Stephen G. Breyer, Commissioner
Helen G. Corrothers, Commissioner
Ronald L. Gainer, Commissioner
George E. MacKinnon, Commissioner
Ilene H. Nagel, Commissioner
Winston S. Moore, Staff Director
John R. Steer, General Counsel
Charles Betsey, Senior Research/Economist Associate
Rusty Burress, Special Consultant
Peter Hoffman, Principal Technical Advisor
Paul K. Martin, Communications Director
Phyllis Newton, Director of Guidelines Training
Vicki Portney, Representative from DOJ
Melissa Selick, Assistant Training Specialist
Eric Simon, Associate Director, Office of Research
Donna Triptow, Deputy General Counsel
Ronald Weich, Special Counsel

Ronald Weich gave an oral presentation on legislation in which he announced that the Commission's legislative proposals had been approved with some negotiated changes as part of the Omnibus Drug Bill.

Vicki Portney stated, in response to Commissioner questions, that the death penalty provisions in the bill were limited to drug-type offenses. Ronald Weich will circulate the death penalty provisions and the provisions of the bill which affect the responsibilities of the Commission. Chairman Wilkins suggested that the Commission respond immediately to the action of Congress and circulate the new drug statute to all district judges, magistrates and possibly U.S. Attorneys. He also suggested that the Commission may wish to use its emergency authority to make some of the necessary guideline amendments.

John Steer informed the Commission that the Drug Bill included not only statutory minimums and four directives to the Commission, but also a dozen or more increases in statutory maximums, which may or may not necessitate amending the guidelines. Steer suggested that the Commission coordinate distribution of material concerning the legislation with the Administrative Office. The sentiment of the

Commission was to coordinate with the AO but also, that it was proper for the Commission to proceed independently to distribute information concerning sentencing provisions in the bill.

John Steer reported on litigation-related matters. Commission staff will be working with the Administrative Office's General Counsel staff on a letter for Judge Becker to distribute concerning post-Mistretta sentencing procedures. Also, in discussion with the Department of Justice, the Commission hopes to identify priority areas (e.g., relevant conduct, challenges to the guidelines, or to the guidelines structure, itself) in which the Department should be urged to exercise vigilance in appealing adverse court decisions.

Phyllis Newton gave a report on training, in which she recognized Paul Larned and Mike Piotrowski, probation officers on temporary detail to the Commission, for their work. Ms. Newton also stated that the Commission's efforts had raised the level of consciousness regarding the need for future training.

A discussion ensued concerning efforts to tie Commission guideline training into workshops and meetings in each Circuit. It was agreed that a letter would be written to the Chief Judge of each Circuit, offering to be of assistance in such training efforts. The forthcoming decision of the Supreme Court would be the basis for the Commission writing such a letter.

The Commission discussed the status of ASSYST. Eric Simon stated that the system received rave reviews from the field and that the next release of an updated software program would probably be the time to change from experimental to official status.

Charles Betsey reported that the Commission had received reports on 3,900 cases, as of last week. Commissioner Block stated a desire for summaries on a regular basis. Staff and the Commission discussed the process for putting in place a monitoring system.

Phyllis Newton in her report on monitoring stated that various people were developing proposals for evaluating the effects of the guidelines (e.g., disparity, plea negotiations and plea bargainings, process and impact, use of alternatives and process and implementation).

Melissa Selick gave a report on a proposed case review project to meet the statutory directive regarding monitoring probation officers in their application of the guidelines. It was suggested that a letter would be sent to all chief probation officers informing them of the Commission's case review efforts. On the advice of John Steer, general common problems, as opposed to errors in a specific case, should be addressed.

Paul Martin reported that a transcript of the New York Public Hearing on Organizational Sanctions was available in the library of the U.S. Sentencing Commission. Martin stated that the California Public Hearing would be on December 2, 1988 at 9:30 a.m. in Courtroom #3 of the U.S. Court of Appeals in Pasadena.

The Commission proceeded to consider a series of proposed guideline amendments for later publication. (Commissioner Breyer was not present for this portion of the meeting.)

ITEM 1: §2A3.4 (Abusive Sexual Contact...)--Motion made to tentatively approve with the understanding that this guideline would come back before the Commission with the considerations of recent legislative increases in various maximum penalties, and that staff would place forced perversion in sexual offenses on the agenda for an increase. Motion made by Commissioner Corrothers; seconded by Commissioner Nagel. Passed.

ITEM 2: §§2B1.1, 2F1.1, 2T4.1 (Loss Tables)--Motion made by Commissioner Block; seconded by Commissioner MacKinnon. Passed. (Commissioner Corrothers' proposal, which failed, is attached.)

ITEM 3: §§2C1.1, 2C1.2 (Bribery and Gratuity Offenses)--Commissioner Nagel offered an alternative proposal (13A attached) but withdrew it after discussion. Motion to table this amendment for redrafting made by Commissioner Nagel; seconded by Commissioner Corrothers. Motion to table passed.

ITEM 4: Commentary to §2D1.1 (Drug Equivalency and Dosage Tables)--Motion made by Commissioner Corrothers; seconded by Commissioner MacKinnon. Passed.

ITEM 5: Commentary to §2D1.4 (Drug Conspiracies)--Motion made by Commissioner Block; Commissioner MacKinnon offered an alternative proposal but withdrew it after discussion. Seconded by Commissioner MacKinnon. Passed.

ITEM 6: §2H3.1 (Interception of Communications or Eavesdropping)--Motion made by Commissioner Corrothers; seconded by Commissioner Block. Passed. Commissioner Nagel not present for this vote.

ITEM 7: §2J1.1 (Contempt)--Motion made by Commissioner Block; seconded by Commissioner Corrothers. Passed.

ITEM 8: §2L1.1 (Smuggling, Transporting or Harboring an Unlawful Alien)--Motion made by Commissioner Block, seconded by Commissioner Nagel to table for further staff consideration. Passed.

ITEM 9: §2L2.1 (Trafficking in Evidence of Citizenship...)-- Motion made by Commissioner MacKinnon; seconded by Commissioner Nagel. Passed.

ITEM 10: §3A1.3 (Restraint of Victim)--Motion made to delete from consideration and keep as general adjustment at two levels and to add to commentary that if the restraint was sufficiently egregious, a departure, under §5K2.4 may be warranted. Moved by Commissioner Corrothers; seconded by Commissioner MacKinnon. Passed.

ITEM 11: §5F5.3 (Community Service)-- Approved as amended by motion made by Commissioner Corrothers; seconded by Commissioner Nagel.

ITEM 12: Commentary to §2E1.1 (RICO)--Motion made by Commissioner Block; seconded by Commissioner Corrothers. Passed.

ITEM 13: Miscellaneous Minor Corrections/Clarifications-- Approved as amended by motion made by Commissioner MacKinnon; seconded by Commissioner Block.

Amendment to Robbery Guideline --

The Chairman initiated a discussion concerning the need to revise the guideline for robbery (§2B3.1). On motion of the Chairman, seconded by Commissioner MacKinnon, the Commission tentatively approved to publish for public comment an amendment changing the base offense level from 18 to 24. Commissioners Corrothers, MacKinnon, Nagel and Wilkins voted "aye." Commissioner Block, explaining that he believed there was inadequate notice and inadequate analysis for the proposal, voted "no." Commissioner Nagel explained her "yes" vote by recalling that past practice data served as guides but were not necessarily dispositive in determining guideline sentences. On motion of Commissioner MacKinnon, adopted by consensus of the Commission, staff was directed to prepare an analysis of past practices data for robbery which would demonstrate the impact on the overall national mean, the individual jurisdictional mean sentence served for the Central District of California (Los Angeles area) and the Southern District of New York (New York City area). Staff was also requested by Commissioner Block to summarize for the Commission available data concerning application of the sentencing guidelines to robbery offenses to date.

Chairman Wilkins adjourned the meeting into executive session at 12:36 p.m.