

Minutes of the November 15, 1988 U.S. Sentencing Commission  
Business Meeting

The meeting was called to order at 9:43 A.M. by Chairman William W. Wilkins, Jr.

The meeting was held in the library at the U.S. Sentencing Commission. The following commissioners and staff members were present:

William W. Wilkins, Jr., Chairman  
 Benjamin F. Baer, Commissioner  
 Michael K. Block, Commissioner  
 Stephen G. Breyer, Commissioner  
 Helen G. Corrothers, Commissioner  
 George E. MacKinnon, Commissioner  
 Ilene H. Nagel, Commissioner  
 Winston S. Moore, Staff Director  
 John R. Steer, General Counsel  
 David Anderson, Deputy General Counsel  
 Charles Betsey, Senior Research/ Economist Associate  
 Rusty Burress, Special Consultant  
 Peter Hoffman, Principal Technical Advisor  
 Candace Johnson, Training Specialist  
 David Lombardero, Chief Counsel  
 Paul K. Martin, Communications Director  
 Phyllis Newton, Director of Training  
 Roger Pauley, Representative from DOJ  
 Vicki Portney, Representative from DOJ  
 Andy Purdy, Deputy General Counsel  
 Bill Rhodes, Researcher  
 Eric Simon, Associate Director, Office of Research  
 Donna Triptow, Deputy General Counsel  
 Ronald Weich, Special Counsel

Chairman Wilkins recognized Gary Combs, Paul Lastrapes, Paul Larned, Dave Miller, and John Shevlin, probation officers on temporary detail to the Commission, for their work. Commissioner Corrothers also introduced Paul Pierrot, a part-time law clerk with the Commission.

Commissioner Breyer moved to approve the minutes of the September 29, 1988 and October 25, 1988 meeting. Commissioner MacKinnon seconded the motion. The minutes were approved unanimously on the condition that the November 15, 1988 minutes reflect the clarifications of the Commissioners' intentions regarding analysis of data on robbery and revision of the robbery guideline. Commissioner Block indicated that the minutes for the October 25, 1988 Commission meeting should reflect that he voted "no" on a proposal to raise the base offense level of armed robbery from level 18 to level 24 because of inadequate notice and inadequate

analysis. Also, at the October 25, 1988 meeting, Commissioner MacKinnon requested that staff examine data on sentencing and time served for robbery for geographic disparities. Therefore, the intention of the Commissioners was that staff obtain the data, conduct a study, and then draft language for the proposal.

John Steer gave a report on litigation in which he stated that the Third Circuit decision was beneficial to the Commission since it upheld our approach to the constitutional question and rejected the "due process" challenge. Another favorable decision for the Commission was from the Second Circuit which upheld an upward departure in a drug sentencing "telephone count" case and also upheld the concept of real offense in terms of the conduct that is to be considered. Also, an in-house tracking system is being established in order to provide the Commission with all decisions that come down on any particular guideline or issue relating to the guidelines.

A discussion ensued on the telephone count issue and the question of whether it should be cross referenced to the drug offense table. The Drug Working Group was directed to make this a priority on their agenda.

Ron Weich and Donna Triptow reported on the Omnibus Anti-Drug Abuse Act which had not yet been signed. Strategic and substantive issues concerning the amendments before the Commission were discussed. A proposal for the following process was made: (1) an immediate letter to all judges and others in the judicial family calling attention to the passage of the Drug Bill and highlighting pertinent amendments; (2) a set of priorities for guideline amendments --a) special directions from Congress, b) mandatory minimums, c) new offenses, d) maximums and anomalies; (3) a period for public comment; and (4) after the Supreme Court decision, inform the Congress of how we are implementing their directives and what we project the impacts of these new provisions to be; (5) obtain congressional review of guideline amendments. Motion made by Commissioner Corrothers; seconded by Commissioner MacKinnon. Passed. Sid Moore was directed to follow up on the general consensus of the need to determine the facts regarding impacts on various types of prison facilities by types of offenses and to approach other agencies and private groups to seek their assistance and to encourage research on alternatives to incarceration.

Phyllis Newton reported on training plans. She stated that Judge Becker would be having a meeting of his Coordinating Group on November 29, 1988, to consult with the DOJ and defense bar representatives on their training needs. Newton also reported that the training packages the staff had been working on would go to the printer in January, and training will occur during January, February, and March, if the U.S. Supreme Court rules favorably in December. There was also a consensus that the Commission wants to encourage attendance of the judges at training workshops.

David Anderson and Charles Betsey introduced a proposed policy on public access to the Commission's monitoring data by private individuals and private organizations, with drafting of a proposal on intergovernmental access being the next logical step. The proposal envisions that the data will be sent to the Inter-University Research Consortium at Ann Arbor, Michigan for public distribution. Sid Moore requested feedback on the proposal in order to bring something back for possible final action at the January Commission meeting. A request was made that staff confer further with the Administrative Office to assure that appropriate Administrative Office personnel have the opportunity to discuss and coordinate their views within the Administrative Office. John Steer was directed to submit a legal memorandum on what sentencing data are available to the public and what data are not.

Paul Martin gave an update on the hearing in Los Angeles, listing several private witnesses and agencies (EPA, DOD, FDA) to be heard. Martin was directed to send out Mark Cohen's study to potential witnesses prior to the hearing, with the disclaimer that the Cohen study does not represent views adopted by the Commission.

Bill Rhodes gave a report on robbery; the previous analysis on bank robbery was replicated and then repeated with Eastern and Southern New York and Middle California deleted to attempt to define geographic disparities. Further, the New York and California districts were placed back in the data set and three southern circuits deleted, and inferences were drawn. Some disagreement surfaced concerning the premise for the analysis. Sid Moore was directed to form a working group to look at all the concerns which were expressed and to determine what can be done to make bank robbery a more effective guideline.

The Commission proceeded to consider a series of proposed guideline amendments for later publication.

ITEM 1: Interpolation - motion made by Commissioner Nagel to adopt option #1; seconded by Commissioner MacKinnon. Passed.

ITEM 2: §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) - tabled for further staff consideration to calculate what option #1 and #2 will do.

ITEM 3: §2A2.1 (Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder) -tabled for further staff consideration.

ITEM 4: §2A2.3 (Minor Assault) - motion made by Chairman Wilkins

to replace "bodily injury" with "physical contact"; seconded by Commissioner Nagel. Passed.

ITEM 5: §3A1.1 (Vulnerable Victim) - motion made by Commissioner Nagel to take out "to terminally ill patients" and change "the" to "a" in the first sentence; seconded by Commissioner Block. Passed.

ITEM 6: §3A1.2 (Official Victim) - motion made by Chairman Wilkins; seconded by Commissioner Corrothers. Passed.

ITEM 7: §5G1.1 (Sentencing on a Single Count of Conviction) - motion made by Commissioner MacKinnon to adopt option #1; seconded by Commissioner Block. Passed.

ITEM 8: §6B1.2 (Standards for Acceptance of Plea Agreements) - Commissioners Breyer and Nagel presented verbal amendments. Motion made by Commissioner Breyer; seconded by Commissioner Corrothers. Passed as amended. (The Commentary to §6B1.2 is amended in the second paragraph by deleting "and does not undermine the basic purpose of sentencing." and inserting in lieu thereof "(i.e., that such departure is authorized by 18 U.S.C. §3553(b)). See generally chapter 1, Part A(4)(b) (Departures).

ITEM 9: Minor Miscellaneous Amendments - motion made by Commissioner Nagel; seconded by Commissioner Breyer. Passed.

ITEM 10: Multiple Objective Conspiracies - Judge MacKinnon's memorandum - tabled for further staff consideration.

Chairman Wilkins adjourned the meeting into executive session at 2:06 P.M.