

Minutes of the October 19, 1989 United States Sentencing Commission  
Business Meeting

The meeting was called to order at 9:15 A.M. by Chairman William W. Wilkins, Jr.

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

William W. Wilkins, Jr., Chairman  
Stephen G. Breyer, Commissioner  
Helen G. Corrothers, Commissioner  
George E. MacKinnon, Commissioner  
Ilene H. Nagel, Commissioner  
Stephen Saltzburg, Ex Officio Member  
John R. Steer, Staff Director/General Counsel  
Nolan Clark, Deputy Chief Counsel  
Peter Hoffman, Principal Technical Advisor  
Mary Hogya, Director of Administration  
Candace Johnson, Director of Monitoring  
Phyllis Newton, Associate Research Director  
Roger Pauley, Criminal Division, DOJ  
Vicki Portney, Criminal Division, DOJ

Chairman Wilkins introduced Probation Officers Ray Owens and Josh Wyne, both on temporary detail to the Commission. Also introduced was U.S. Attorney Joe Brown, liaison to the Commission.

Candace Johnson summarized the memorandum on data collection plans for the monitoring unit and reported that the Research Advisory Group had approved use of sampling as a technique for the monitoring data. She reported that because of resource and budget considerations, the monitoring staff reprioritized the various modules and variables associated with the system. A discussion ensued concerning the possibility of accomplishing coding through programs such as work-study or borrowing staff from other agencies as a solution to the problem of collecting the data required by statute now that the sentencing portion of FPSSIS will no longer be collected by AO. Commissioner Corrothers emphasized the extreme importance of determining which tasks ought to be accomplished and why, along with which of these goals can be accomplished within current resources, and identifying additional resources necessary to do what ought to be done. Commissioner Saltzburg volunteered DOJ's help on this effort. Chairman Wilkins stated his intention to set up meetings with DOJ, AO, and FJC representatives to work jointly on the problem.

Charles Betsey stated that a memorandum of updated 1988 case data relating to sentences imposed on organizations had been submitted to the Commission and that additional information on 50 cases was being gathered. There was discussion of research needed for

working groups.

Nolan Clark stated that the Organizational Sanctions staff working group followed the directive of the Commission and combined the best features of its draft with those of DOJ and then added some options. Commissioner Corrothers entered into the record her October 12, 1989, memorandum on Draft Introductory Commentary for Organizational Sanctions. A discussion ensued on options I and II of the draft. Commissioner Nagel requested examples of fines resulting from both options.

-- Motion made by Commissioner Breyer to place the question of whether the guidelines should include the cost of prosecution upon motion of the government in the end notes; seconded by Commissioner Corrothers. Passed. Chairman Wilkins and Commissioners Breyer and Corrothers voted "yes." Commissioners MacKinnon and Nagel voted "no."

-- Motion made by Chairman Wilkins to make (E) on page 21 of the Organizational Sanctions draft \$25,000; seconded by Commissioner Breyer. Passed unanimously.

-- Motion made by Chairman Wilkins to make (H) on page 21 of the Organizational Sanctions draft \$250,000; seconded by Commissioners Breyer and Corrothers. Passed.

-- General consensus to delete the language, "in the immediate future" found on page 22, application note 2 of the Organizational Sanctions draft.

-- Motion made by Commissioner Breyer to flag the question of whether to apply aggravating and mitigating factors dealing with management to a closely held corporation in the end notes; seconded by Commissioner Corrothers. Passed unanimously.

-- Motion made by Commissioner Corrothers to delete (d) and commentary on page 35 of the Organizational Sanctions draft and to make some language changes in (c)(3); seconded by Commissioner Breyer. Passed. Commissioner MacKinnon tentatively approved.

-- General consensus to delete option (4) on page 38 of the Organizational Sanctions draft.

-- Motion made by Commissioner Breyer to delete those items which would require amendments in the guideline for individuals and deal with them later; seconded by Commissioner Nagel. Passed unanimously.

-- Motion made by Commissioner Breyer to follow Chairman Wilkins' suggestion of recirculating the introduction, incorporating the suggested changes, and then distributing the revised organizational sanctions draft to judges and other interested parties, as well as

publishing for a minimum of 60 days in the Federal Register for public comment; seconded by Commissioner Corrothers. Passed unanimously.

A discussion ensued on which materials of the Penalties Review project to send to Congress in November. Commissioner Corrothers suggested that, since the timeframe is so tight, the Commission should not attempt to send a portion of its recommendations this fall and the remainder at some future date. General consensus was to send a memorandum to Congress with the project description and a compilation of the statutes. As each phase of the staff's review is completed, results and recommendations will be circulated to the Commission; completion of the project is targeted for February, and the Commission's recommendations will be submitted to Congress early in 1990. Commissioner Corrothers requested that her memorandum on the Penalties Review project be attached for the record.

Chairman Wilkins adjourned the meeting at 12:49 P.M. The Commissioners reconvened in Executive Session at 2:00 P.M.

UNITED STATES SENTENCING COMMISSION

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Ilene H. Nagel  
Benjamin F. Baer (ex officio)  
Ronald L. Gainer (ex officio)



October 18, 1989

MEMORANDUM

TO: All Commissioners

FROM: Helen G. Corrothers   
Commissioner

SUBJECT: Draft Introductory Commentary for Organizational  
Sanctions Dated October 12, 1989

Reference the current draft introductory commentary for Chapter Eight - Sentencing of Organizations, beginning with the first sentence, the word corporation is used almost throughout. ("The guidelines in this chapter determine sentences when a convicted defendant in a federal criminal case is a corporation and not an individual.") To the extent that the term corporation is deemed to be restrictive or limiting the term is problematic. In any event, the guidelines are developed for organizations. Therefore, I recommend that the word corporation, wherever it is found, be replaced with the word organization. (It is found several times in this commentary.)

The rest of the first paragraph in its totality appears to discredit the notion or necessity to develop guidelines for organizations. I recommend two changes to eliminate this problem. Specifically, the statistics pertaining to the number of organizational defendants in 1988 are relevant in general, but would be more appropriately placed in the third paragraph concerning the discussion dealing with the limitation of the value of past practice. (I am pleased to see the information included in the third paragraph as I very strongly recommended this action.) As to the next and last sentence in the first paragraph, beginning with the word "indeed", I would recommend deletion.

Concerning paragraph two, the first sentence is a bit troubling especially in connection with the 1988 statistics that had already been included in the first paragraph. Together they

might be viewed as discrediting the need to develop organizational guidelines or perhaps discourage their use, as well as appearing to be predicting the future based on the past. Obviously, this is inappropriate because among other things there have been a number of systemic changes, including the current availability of harsher sanctions than in the past, that preclude our ability to accurately predict the future. Perhaps the sentence could read "Although the number of cases that call for application of these Organizational Guidelines is small relative to the total number of guideline cases, their subject matter is critically important."

Concerning the remaining portions of the second paragraph, in general we appear to be dealing with the purposes of prosecution rather than the purposes of sentencing. Dealing with the purpose of prosecution undercuts the purpose of sentencing guidelines. Possibly if you are not confident that behavior which has occurred should result in a conviction and be punished then there is difficulty in determining what the punishment ought to be. In any event our concern is with sentencing. The decision to define behavior as criminal lies within the legislative branch. Prosecution decisions come under the purview of the executive branch. Conviction and sentencing decisions are made by the judicial branch. As a judicial branch agency, our job is not to undercut the decisions of the other branches, but to provide judges with guidelines to follow when sentencing convicted organizational defendants.

Beyond that general comment, I would comment concerning the remainder of that paragraph. I noted the following rationale for prosecuting organizations: for the purpose of dissolving those organizations that are organized for the purpose of committing crimes; for the purpose of accessing assets in order to compensate victims; for the purpose of determining guilt and appropriate punishment in the instance where it is difficult to ascertain the individual(s) responsible; and for the purpose of providing a strong incentive for shareholders to encourage lawful management of the organization. I read this a number of times, each time feeling that something was missing and finally decided that the purpose of punishment is not included.

The first rationale should reflect that the sanction is for the purpose of punishing the organization for its criminal behavior (18 U.S.C. § 3553 (a)(2)). I recall hearing during our public hearings on organizational sanctions, that large corporations were willing to agree to pay extremely large fines, in order to settle out of court to avoid the stigma of conviction. It is clear to me that the adverse publicity associated with a criminal prosecution and conviction has a punitive impact associated with stigmatization. I recall Professor Coffee discussing the danger that a "pricing" approach to sentencing will undercut the moral authority of the criminal

law by suggesting that "you may do the crime if you're willing to pay the fine". He commented that a world of difference does and should exist between taxing a disfavored behavior and criminalizing it, using as an example that we tax cigarettes but outlaw drugs. Both are disincentives but the criminal sanction carries a unique moral stigma. He pointed out that that stigma should not be overused but when properly used it is society's most powerful force for influencing behavior and defining its operative moral code. Notwithstanding and recognizing our commitment to the other purposes just stated to include the importance of compensating the victims, we need to articulate that we see beyond the cited purposes to the principle that in the words of Professor Coffee "there is no price that when paid entitles you to engage in the prohibited behavior".

If in paragraph four we decide to adopt my suggestion and reference the purposes of sentencing rather than the purposes of prosecution, then perhaps we should not indicate that it is a point of reference for setting the guideline punishment rather than prior practice. Maybe the language in the following sentence, "to a greater extent", is a wiser choice of words since we would not want to imply that we did not use the established purposes of sentencing as points of reference when developing the guidelines for individuals.

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October 11, 1989

MEMORANDUM

TO: All Commissioners

FROM: Helen G. Corrothers  
Commissioner

SUBJECT: Penalties Review Project

At our meeting of September 26, 1989, I voiced my concern that the Commission may be moving too fast in attempting to present the Congress with an interim report on statutory penalties for crimes of violence by the first of November. It took Congress more than ten years of deliberation before it acted on sentencing reform. Surely it would not be unreasonable for the Commission to take a few additional weeks to fully deliberate any recommended changes in maximum penalties for violations of federal criminal law. Moreover, the Commission should consider soliciting public comment on its recommendations prior to sending them to Congress.

Although more time may be necessary before the Commission can make fully deliberated recommendations to the Congress, it nevertheless can meet the November 1 deadline. Jeff Standen and other staff members have worked hard to prepare a comprehensive compilation of the statutory criminal penalty provisions within the federal code and to cross-reference them according to title and section, crime group, and severity of the current maximum penalty provided. It is my understanding that the staff's product is the most complete compilation of federal criminal penalty statutes ever to be assembled. Indeed, the Justice Department has already requested that copies of the compilation be provided to every United States Attorney's office in the nation. In my view, providing copies of the staff's compilation to the Congress on November 1 would be an impressive achievement in itself; an achievement that could then be followed by additional reports complete with recommendations for statutory changes.

My concern with moving too quickly in making recommendations is several-fold. First, I am not satisfied that the Commission has before it sufficient information to determine with confidence those maximum statutory penalties that not only in theory, but also in fact, pose a threat of requiring or allowing disparate sentences for similar offenses. Even where such information is present, I lack confidence that sufficient time remains between now and the first of November for the Commission to fully review it.

Another of my concerns related to the statutory penalties project involves the composition of the staff working group. There were a number of research issues discussed in connection with the project. However, it is not clear whether members of our research staffs are represented on the committee. Phyllis Newton informs me that she, Charles Betsey, Sharon Henegan, John Lott, and Alain Sheer were on the working group initially, but that they have not been involved in subsequent meetings even though extensive research data is being requested and provided. I suggest that the report might benefit from the input of staff other than attorneys.

Finally, and perhaps most importantly, are the policy implications of the Commission's recommendations regarding statutory maximums. Those recommendations may reflect policy decisions by the Commission which would affect future decisions with respect to guideline amendments. Less than fully considered recommendations may have the unintended effect of tying our hands for the future. Also, our recommendations should be made in awareness of any pending changes in statutory maximums in the Congress.

The Commission has an obligation to give any proposals it presents to Congress the fullest possible consideration. The effort the Commission undertook in writing the sentencing guidelines should guide our approach to proposing changes in statutory maximums. Our report to Congress should be at least as well informed and articulate about the rationale for any proposed change as was the Commission's report on the initial guidelines. Changes in statutory maximums may have an even greater effect on the entire criminal justice system than the guidelines, in part because such changes may cause us to make future guideline changes.

Although the staff has done an excellent job thus far, the Commission may need more than staff can reasonably be expected to provide if it is to properly complete its tasks. The Commission should consider actively soliciting the views of acknowledged authorities, including the Department of Justice and state and local law enforcement officials, defense advocates, and academics. The Commission might consider scheduling a separate



public hearing for each of the potential penalty review areas: violent crimes; property crimes, fraud, and corruption; and drug offenses. Hearings could be held at minimal expense here in Washington, D.C., and could be limited to one day per hearing. Those unable to attend could submit written testimony. Should we decide for whatever reason that a public hearing is not feasible, then a designated period for receipt of written comment should be established.

The penalties review project is a very important undertaking and its fruits could have broad implications for the criminal justice system. A project report complete with recommendations cannot write itself. Consequently, the Commission must allow sufficient time to fully review the information it does possess and to develop recommendations that reflect the full range of its expertise. It would be a mistake for the Commission to rush head-long into completing its report solely to meet what is in essence a self-imposed deadline.