

Minutes of the October 20, 1992  
United States Sentencing Commission Business Meeting

The meeting was called to order at 10:11 a.m. by Chairman William W. Wilkins, Jr. in the library of the Sentencing Commission. The following Commissioners, staff, and guests participated:

William W. Wilkins, Jr., Chairman  
Michael S. Gelacak, Commissioner  
A. David Mazzone, Commissioner  
Ilene H. Nagel, Commissioner  
Paul L. Maloney, Ex Officio Commissioner  
Phyllis J. Newton, Staff Director  
Paul K. Martin, Deputy Staff Director  
John R. Steer, General Counsel  
Winthrop Swenson, Deputy General Counsel  
Susan Katzenelson, Director of Policy Analysis  
Susan Winarsky, Senior Training Specialist

Chairman Wilkins announced that a Commission meeting will be held on October 28, 1992, at 4:00 p.m. in Tallahassee, Florida, and that a meeting will be held on November 17, 1992, at 10:00 a.m. at the Federal Judiciary Building, fourth floor agency conference room.

Chairman Wilkins welcomed to the Commission: David Levitt, visiting federal public defender from the Southern District of New York, on a six-month assignment to the Commission; Thomas Whitaker, visiting probation officer from the Middle District of Florida; and Cameron Counters, who joined the Commission's staff as a research associate. Chairman Wilkins introduced Henry Grinner, Jr., of the Parole Commission, sitting in for Edward Reilly, Jr., the new Ex-Officio member of the Sentencing Commission.

Motion by Chairman Wilkins to adopt the minutes of the September 21, 1992, Commission meeting. Commissioner Nagel requested specific revisions to the minutes. Chairman Wilkins agreed to recirculate the minutes for approval at a later time.

Working Groups

Susan Winarsky briefed the Commission on the activities and report of the working group established to study violent crimes, firearms and gang-related activities. Ms. Winarsky stated that in looking at the monitoring data, there were no serious difficulties or problems with the applications or penalties for violent crimes, and that many of the issues covered in the report could be covered in the MFAQ or with training approaches. In the area of violent crimes, Ms. Winarsky gave highlights of areas worthy of further consideration derived from the case law review, including:

- recent litigation by defendants as to the imposition of life sentences under 18 U.S.C. § 1111 (first-degree murder), in light of the Commission's wording of §2A1.1.
- a recent split among the courts, regarding the wording of the guidelines for enhancements for injury to victims, where injury to "a" victim might be treated differently than injury to "the" victim. Some courts have held that where the guidelines refer to "the" victim, for the enhancement to apply it must be the victim in the offense of conviction. Chairman Wilkins stated that the Commission did not intend any difference between "a" victim and "the" victim, and that the application intended was "a" victim, meaning there was no specificity of charge.
- an issue regarding multiple count grouping for §2A6.1, threatening communications, of whether several counts to one victim represents many harms or one harm.

Ms. Winarsky reported on the group's study of the firearms guidelines and a review of the caselaw regarding firearms, and stated that the group would like to see the Commission consider issues for public comment regarding DOJ's request for an examination of increases in penalties for firearm offenses. Ms. Winarsky then briefed the Commission on the group's work with regard to gangs; the group's review of the literature regarding gangs revealed difficulty in coming up with a working definition of "gang" or "gang crime." Ms. Winarsky expressed a concern that a definition of gangs might interfere with the constitutional right of freedom of association. Commissioner Nagel concurred in this concern, stating that increasing penalties for crimes because they are gang-related may pose constitutional problems. Commissioner Gelacak made a motion to table any amendments regarding violent crimes, firearms or gangs, so as to get a better handle on these issues and make more selective and targeted amendments. Commissioner Mazzone concurred in sentiment, but only as to gangs because of the local nature of gang activities and the difficulty of a gang definition. The motion failed for lack of a second.

Win Swenson briefed the Commission on the activities and report of the working group established to study the operation of the money laundering and structured transaction guidelines. Mr. Swenson stated that the group's report was divided into two parts: one part pertaining to offenses involving typical money laundering conduct covered by §2S1.1 and .2, and the second part pertaining to reporting and structured transaction offenses under §2S1.3 and .4. Starting with the traditional money laundering offenses, Mr. Swenson reported that the statutes and case law defining money laundering offenses are broad, and that conduct involved in the underlying offense may also be covered by these statutes; if a money laundering count is charged, the penalties are increased even though the harm may not necessarily be greater than for the underlying offense alone. Mr. Swenson suggested that the money laundering sentence could be tied to the sentence for the underlying conduct, increasing the level according to specific offense characteristics such as evidence of concealment or sophistication. The Commission would benefit through public comment to

determine the indicia of seriousness. Ex-officio Commissioner Maloney stated that Congress' intent was to allow a broad application of the money laundering statute. With regard to §2S1.3 and .4 offenses, Mr. Swenson reported that there wasn't much public comment. The enforcement community, however, expressed concern that similar conduct in this area seems to be treated dissimilarly, e.g., when the conduct involved in reporting violations is treated differently depending on whether the violator was an individual or a commercial enterprise. Mr. Swenson finally expressed the working group's concern that the guidelines do not make a sufficient distinction between legally and illegally derived money involved in structured transaction offenses.

Commissioner Nagel briefed the Commission on the activities of the working group established to study environmental offenses. Commissioner Nagel reported that the group listened to the comments of invited speakers who spoke on the blurring distinction between criminal and civil environmental liability. Commissioner Nagel reported that the issues the group studied in particular included:

- whether civil enforcement schemes should be integrated with criminal schemes;
- whether environmental sanctions should differ from non-environmental sanctions for organizations under the guidelines; and
- whether credit should be given to organizations for compliance programs when the statute requires such a program in the environmental context.

Commissioner Nagel stated that the group's subcommittees are looking at the definition of "effective compliance program," other bases for determining fines, and the question of how to justify a set of environmental sanctions different from fraud and antitrust sanctions. Commissioner Nagel stated that the group expects to distribute a subcommittee report on workable proposals to the Commission, once a consensus has been reached. The report would draw its own separate notice and comment period, so as to allay fears that the Commission would adopt its recommendations without debate.

Commissioner Mazzone moved that the cutoff date for amendment suggestions from sources outside of the Commission would be the close of business on November 30 for the 1992-93 amendment cycle, with the exception of the environmental group's own notice and comment period mentioned earlier. Commissioner Nagel seconded the motion; it passed unanimously. Commissioner Gelacak expressed concern that submitted suggested amendments would include already-rejected amendment proposals.

Commissioner Mazzone briefed the Commission on the proposed Commission-sponsored symposium on drugs and violent crime. Commissioner Mazzone stated that the purpose of the symposium, consistent with the Commission's mandate, would be to bring together experts in the area in a community setting, expanding the knowledge in the area and enlarging the Commission's presence. Commissioner Nagel made a motion that the

Commission approve of the general project and agenda, as outlined in the memorandum distributed to the Commission on October 14. Judge Mazzone seconded the motion; it passed unanimously. Judge Mazzone stated that the symposium would be held at the Capitol Hill Hyatt Regency, on the dates of June 16, 17, and 18, 1993. The motion passed. Commissioner Mazzone also expressed a desire to conduct a follow-up executive session with the Kennedy School of Government after the symposium, to study issues raised at the symposium. Commissioner Nagel expressed concern with committing to any specific group for the follow-up before full information is available.

Susan Katzenelson briefed the Commission on the proposed Commission-sponsored research conference on federal sentencing practices. Ms. Katzenelson stated that the conference's purpose would be to establish relations with the research community, encouraging independent research outside the Commission and posing questions relevant to criminal justice research. Staff Director Newton expressed concern over the proposed date of the conference, as it coincided with the presidential inauguration. Commissioner Nagel expressed a wish to invite traditional funding agencies and foundations to participate, to share with all attendees the full range of relevant empirical questions, and to encourage in particular research the Commission does not have the resources to undertake.

#### Legislative Update

General Counsel Steer reported on the unsuccessful passage of the crime bill and of the revocation legislation that the Commission had initiated in the 101st Congress. Mr. Steer reported that although the final cloture vote could not stop filibuster on the omnibus crime bill, a smaller crime bill including the revocation legislation did pass the Senate, but was not acted on by the House and subsequently died, despite Senator Thurmond's efforts to get the House to act on it. Win Swenson announced proposed legislation of interest to the Commission, including the carjacking bill awaiting the President's signature that provides a fifteen-year maximum, an environmental bill creating requirement of audit of companies violating environmental offenses and allowing a defense of a compliance program referenced in Chapter Eight of the Manual, a hate crimes bill that faced strong opposition, and a bill to repeal mandatory minimums.

Chairman Wilkins adjourned the meeting at 12:30 p.m.