

United States Sentencing Commission
Minutes of March 23, 2000, Commissioners' Meeting

Morning Session

The Chair opened the meeting at 8:30 a.m. with a discussion of procedures for the public hearing. The commissioners indicated that they wanted to use the limited time available questioning and that they did not want to spend that time listening to the witnesses repeat their written testimony.

Chair Murphy reported on her presentation to the United States Judicial Conference. She covered the following points with the Conference: the need for an adequate budget; the Commission has a full agenda and is working well; and the Commission wants to hear any concerns judges have about sentencing; we want to help. At the reception that evening, the Chair spoke about the Border Conference with Chief Judge Carolyn King who again said they had not wanted outsiders because she wanted to encourage open discussion among the judges. We don't want judges to feel that our role is to police their procedures without understanding the problems presented.

Chair Murphy reported that Judge Heyburn, the Chair of the Judicial Conference Budget Committee, included the Sentencing Commission in his oral testimony before the appropriations subcommittee. He also included text about the Commission's serious budget needs in his written submission.

Vice Chair Sessions reported on the May retreat. Staff was asked to submit a list of possible items for next year's agenda. The retreat will begin with dinner on Monday evening, May 22; the commissioners will meet Tuesday and Wednesday, and finish early on Thursday, May 25.

Vice Chair Steer reported on two recent Hill visits. Vice Chair Sessions arranged a very cordial visit with Senator Leahy for the Chair, Commissioner O'Neill, himself, and Tim. Senator Leahy gave advice on building a relationship with Congress. Commissioner O'Neill said the Senator stressed the importance of getting unanimity on issues. They discussed the benefit of a friendly Senate oversight hearing. The Senator's top aide, Bruce Cohen, said the commissioners should be careful not to take on too much at any one period. On the same day, the group met with Representative McCollum who was positive and supportive. He said that he would use his remaining time in the House to do what he could. He thought it would be good to have an oversight hearing and that he would sign a letter on behalf of our budget to Congressman Rogers. Both Senator Leahy and Representative McCollum said they would help with the appropriations process.

Vice Chair Castillo brought a Seventh Circuit case to the Commission's attention - *U.S. v. Tomasino*. The commissioners asked staff to check with the Justice Department on its intention to petition for rehearing *en banc*, and to look back in the files for any documents on the relevant amendment.

The Chair adjourned the meeting around 9:15, to resume following the public hearing.

March 23 Afternoon Session

Following the public hearing and a short break, the Chair convened the meeting around 12:30.

It was the consensus of the Commission to remove the precursor chemical P2P from the methamphetamine guideline.

With regard to the NET Act amendment, it was the recommendation of staff and the consensus of the Commission to go with Option 3. Commissioner O'Neill suggested that staff work on crafting an upward departure for organized crime involvement. Commissioners also asked staff to add enhancements for risk of serious bodily injury and possession of a dangerous weapon in connection with the offense. Commissioners asked that the infringement definition be removed because it was confusing, and that an application note regarding the infringed value be revised. There was a discussion about the burden of proof in options 3 (on the government) and 4 (on the defendant).

The Commission turned to identity theft/cloning. The main point is to punish "breeders." Commissioners decided to defer the issue of cloned phones used in other crimes until after May 1.

Around 3:00 p.m. the Chair adjourned the meeting so that the room could be set up for the Probation Advisory Group meeting, which began at 3:30.

Probation Advisory Group

With regard to identity theft/cloning, the group was concerned with the provision on consequential damages, because it would cause long drawn out hearings.

The Probation Group supported NET Act Option 3 - although it was complicated it was the most fair, and they could handle it.

In the discussion on methamphetamine, the members discussed how difficult it is to get lab reports from the state labs. They also indicated their general concern that the drug sentences are too high.

The group asked the Commission not to defer on aberrant behavior. Members did not like the violence and criminal history prohibitions; they thought that decision should be within the judge's discretion. They thought the "otherwise law abiding citizen" language was too vague.

The group preferred option 1 prohibiting downward departure for post-sentencing rehabilitation, because it was not fair that some prisoners could get back to court and others didn't.

The meeting finished at 4:30 p.m.

March 24, 2000
Commissioners Meeting Minutes

Chair Murphy began the meeting at 8:30 a.m.

The commissioners discussed revisions to the NET Act option 3. Vice Chair Castillo stated that Congress and the industry would like to see a departure for involvement with a criminal organization. He thought judges would use the departure in a common sense manner. He also expressed his view of the importance of using defined terms in guideline construction.

The discussion turned to identity theft/cloning. Commissioners directed that an upward departure be added for harm to reputation and that consequential damages be dropped from the guidelines and written instead as a departure.

The Commission agreed on the new clone language.

The Commission next discussed the firearms provisions. There was consensus not to count the weapon in the underlying offense. Staff was directed to check the retroactivity impact of that decision.

The Commission decided to defer on considering 924(c) as an instant offense until there is a total review of the firearm guidelines. There was a discussion about the definition of dangerous weapon; it was suggested not to use a statutory definition in a different way.

The Commission then turned to circuit conflicts. With regard to drug sales in a protected location, the Commission decided it could not consider the Criminal Law Committee's suggestion to add an enhancement to the drug guideline because it was beyond the scope of publication. There was consensus that the statutory index should direct the user to the proper guideline - it is an offense of conviction system.

The Commission reached consensus to propose a new guideline that would provide an enhancement for an offender who falsely completed bankruptcy forms. A question was raised whether clarifying language was needed for the old guideline that had caused the circuit split.

The Commission discussed the post-sentencing rehabilitation split. It was unanimous that presentencing rehabilitation should be considered for a downward departure. The commissioners were not unanimous with regard to postsentencing rehabilitation. Almost all thought the departure should be prohibited. Staff was directed to solicit the view of the Bureau of Prisons on this question.

The Commission reached consensus that dismissed or uncharged conduct could be considered in determining a sentence under a plea agreement. The commissioners directed staff to do further work on the aberrant behavior option and the sexual predators option. The meeting was adjourned at approximately 2:30.