

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#68, Page 73 -- #5K2.0

We object to deleting the third sentence in the first paragraph. It is important in the scheme of the Guidelines. We believe that it is important to reaffirm that the controlling decision with regard to departures can only be made by the judge at the time of sentencing.

We object to deleting the fourth paragraph. We believe it is very relevant to the issue of departures. The "Reason for Amendment" is pure boilerplate, "deletes surplus language, and improves the clarity of the policy statement." In fact, the Amendment is substantive.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
480 MAIN STREET
HARTFORD, CONN. 06103

F. Amendment 68. My major concern in the entire group of amendments is with the proposed deletion from § 5K2.0 of the fourth paragraph, which now reads:

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in § 1B1.3

In the first place, to say in the "Reason for Amendment" that this is a deletion only of "surplus language" is, in my judgment, highly misleading. This paragraph is what keeps the Guidelines consistent with the "modified real offense" approach that the Commission is using, if anything an approach that, as the Commission says, is closer to a "charge offense" system. Ch. 1, Pt. A(4)(a). I realize that a sentencing judge is authorized to consider any conduct, 18

U.S.C. § 3661, Guidelines, § 1B1.4, but the last paragraph of § 5K2.0 serves the valuable purpose of guiding the exercise of departure discretion so that the focus is on conduct relevant to the offense of conviction. Perhaps the Commission might wish to revise the wording slightly, but it should not be dropped entirely, and surely not dropped without a clear explanation of why this is occurring and what the Commission expects to happen in its absence.