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**REMARKS BEFORE SENTENCING COMMISSION**
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I should begin with a confession. I am one of those federal judges who strongly believes in the virtues of sentencing guidelines. A common view among federal judges is that they must be granted broad discretion in order to do justice in the particular case. Although I have never had to sentence anyone, I think I can understand that point of view. But my experience as an appellate judge, both on a state court and on a federal court, has given me a different perspective. On the New Mexico Court of Appeals I saw harsh sentences handed down in some parts of the state for offenses that would only incur probation elsewhere. As a federal judge, I see persons sentenced to death in one state for offenses that would be punished in other states by terms of imprisonment of only a few years. I am confident that both those handing down the harsher sentences and those handing down the lighter sentences believe that they are acting justly. From the perspective of only one courtroom, they are certainly right. But when one sees such a diversity of punishment for indistinguishable offenses, one can question whether the system as a whole is just.

During the mandatory-guideline regime, I saw sentences that I disagreed with. But it was a source of considerable comfort to me that punishment in the federal criminal-justice system was evenhanded. My comments today reflect my thoughts about how to maintain that evenhandedness in an advisory-guidelines

regime.

My impression, which you may be able to correct because of your access to the relevant data, is that even under the advisory guidelines most judges in most types of cases sentence within the guidelines range, so that federal sentencing is in the main evenhanded. But there are outliers. As a result, the sentences for some defendants may vary greatly depending on who the sentencing judge is. When the guidelines were mandatory, appellate review was a useful, and by-and-large successful, tool to obtain evenhandedness. That tool has disappeared. Now that appellate courts review the length of sentences only for substantive reasonableness, appellate review will rarely result in setting aside the sentence below.

Is there, then, anything new that could be done to enhance evenhandedness under the advisory regime? I think so. It would, however, impose additional burdens on an already very busy Sentencing Commission.

What I would recommend for consideration is an expansion of the guidelines manual to include additional commentary providing the rationale for various provisions. The Sentencing Guidelines provide a thorough, accessible compilation of the conclusions of the Sentencing Commission. Under a mandatory regime the sentencing judge, as well as the appellate tribunal, needed little more than conclusions. But now that the guidelines are only advisory, they

must not only be understandable, but also persuasive. A judge who is unaware of why the Sentencing Commission determined that a factor should be disfavored, or why a particular fact should significantly increase or decrease the offense level, will be more likely than an informed judge to vary from the guidelines sentencing range. Even if the sentencing judge disagrees with the Commission's rationale, the judge may well recognize that the rationale applies to the particular case before the judge and, in the interest of evenhandedness, will impose a guidelines sentence. And an appellate judge will certainly be more likely to affirm a within-guidelines sentence if that rationale applies to that case (although I realize that appellate courts have almost never overturned within-guidelines sentences). Of course, if a judge understands the rationale behind a guideline, he or she may be more likely to vary from the guidelines in cases where the rationale does not apply. But such variances are quite proper and should even be encouraged; treating unlike cases the same is not the sort of evenhandedness one should strive for.

As an example of what I have in mind, and a possible subject for a pilot project to see whether implementing my suggestion would be a useful effort, consider USSG §2L1.2(b)(1). I assume that the offense-level enhancements in that provision are justified primarily by concerns about the alien's repeating the prior offenses rather than by the belief that the reentry itself is a more serious

offense because the alien had committed earlier offenses in this country. If this is so, then a judge's decision whether to vary will likely depend on such matters as how old the prior conviction is and whether the alien can convince the judge that he or she has led a law-abiding life. A second example would be § 5A1.1. The discussion in that section of specific offender characteristics could be usefully expanded to explain why such matters as charitable contributions and a disadvantaged upbringing should ordinarily not be considered in sentencing.

Thank you for the opportunity to appear before you.