JUDGE HINOJOSA: Our next panel is composed of individuals from academia, and for someone who always dreaded being called on by a law professor, it's kind of a weird feeling to introduce law professors. But we do have Stephanos Bibas, who is an associate law professor at the University of Iowa, College of Law. We also have Stephen Saltzburg, who's a professor at George Washington University School of Law, and also recently served as Chair of the ABA Kennedy Commission, involving sentencing issues. And we have Professor Michael Goldsmith, who is a professor at Brigham Young University School of Law and a former member of the Sentencing Commission.

And Professor Bibas, if you don't mind, we'll start with you. This time I'm starting from my right.

MR. BIBAS: Thank you, Judge Hinojosa, Members of the Commission. Thank you for inviting me here to testify about the future of the sentencing guidelines after Blakely.

To give you a little bit of background, after serving as an Assistant U.S. Attorney for two years, I've made my academic career writing about, among other things, sentencing law, and published about half a dozen articles on Blakely. My writing has factored prominently in the Blakely decision itself among others.

We stand at a watershed moment in sentencing law, when Congress and the Commission have to confront some very fundamental issues about the appropriate roles of juries at sentencing, how complex the guidelines should remain, and the roles of rules and rules of thumb and wide open discretion.

The guidelines have done a lot to standardize sentencing and promote equality, and I have been a fan of them. But some other provisions appear to transgress the Supreme Court's understanding of Sixth Amendment values.

The Commission, I submit, should heed these concerns by simplifying and broadening the guidelines to leave more room for discretion, but not eliminate their binding force. Doing so would bring the guidelines closer to state sentencing guidelines, which have many fewer Blakely problems, in part because many fewer state cases require upward adjustments or departures to achieve a just sentence.

Now, as my starting point, I join most other commentators I predicting that the Court will apply Blakely to invalidate the guidelines, either in whole or in part. I find the severability issues very complicated. I am not sure what the Court will do with them to invalidate the guidelines in whole or in part, but either way, I believe the Commission must prepare to act quickly to limit the transitional period of chaos.

Let me divide my remarks into two areas. One of them is short term. I think it's appropriate for the Commission to have a short-term fix because a long-term thoroughgoing reform may require up to two years or 18 months, and I think it's appropriate to try to do something that might come close to the status quo ante in the short term--I even believe that would be consistent with ex post facto problems, as I've written about elsewhere, but in the longer term I think the Commission needs some more thoroughgoing reform of the guidelines.

So in the short term, first of all, the Bowman proposal. The easiest and most attractive short-term fix is known as the Bowman Proposal after Professor Frank Bowman, its author, who proposes just leaving the minima in place and raising all the guidelines maxima up to the statutory maxima. Obviously, this would require the Congress to amend or repeal the 25 percent rule. And one of the questions the Commission has asked is whether the Supreme Court will stand by its decisions in

McMillan and Harris, which held, of course, that judges can trigger mandatory minimum sentences and can do by a preponderance.

Many commentators have questioned the continuing validity of Harris. I predict that it will remain good law at least for as long as the composition of the Court remains as it is, which is a big if. Chief Justice Rehnquist, Justices O'Connor and Kennedy, have been consistent critics of the Apprendi and Blakely line of cases, and all of them join Justice Kennedy's opinion in Harris that distinguished minima from maxima. Justice Scalia, author of the Blakely majority, also joined Justice Kennedy's opinion in Harris. There are many people who see these as inconsistent, but I see Justice Scalia's own logic for this. He believes they're consistent because first there's no historical practice of having juries find facts that trigger minima. Second, minima, unlike maxima, don't exceed the punishment of which defendants have fair warning in the indictment. And third, minima can strain judicial discretion, but increased maxima increase judicial discretion.

So I seriously doubt that Justice Scalia would invalidate the Bowman proposal's so-called topless guidelines, in which the defendant's sentence never exceeds the guidelines or statutory maximum.

The only question mark in my mind is Justice Breyer, and there's a possibility that he, the fifth member of the Harris majority might change his vote. In his Harris concurrence, Justice Breyer said he could see no distinction between facts that raise minima and those that raise maxima. He was one of the dissenters in Apprendi, as well as Blakely, and he cannot yet accept Apprendi's rule for fear of Apprendi's adverse practical as well as legal consequences.

Now, I take that to mean that Justice Breyer might revisit his vote in Harris if Congress were to pass a proliferation of rigid mandatory minimum statutes, but I do not take that to mean that he would revisit Harris if this Commission were to try to create a more subtle and finely graduated set of sentencing guidelines, which is the way I view the Bowman Proposal. So I'm reasonably confident that five members of the current Court would reaffirm Harris and find the Bowman Proposal constitutional. But as I said, we don't know what will happen to the future of the Supreme Court that might shift the fine 5 to 4 balance on Harris. That's part of why I view the Bowman Proposal as a short-term, interim fix, something pretty close to the status quo ante. And I'm not going to go into detail unless the Commission asks me questions about it. But for similar reasons, I view the Bowman proposal as close enough to the status quo ante that I think it could survive some ex post facto challenges, or at least there's a good possibility of that.

Assuming that Harris remains good law, the Commission must take care not to work policy statements or appellate review in a way that might make them tantamount to maxima. I believe that mere suggestions or recommendations to sentence toward the lower end of the range in ordinary cases should suffice, though I would be wary of quantifying the breadth of that lower end.

That policy statement could include an illustrative, but not exhaustive, list of factors that a judge should consider in deciding to sentence,--whether to sentence substantially above the minimum, and those factors could include the some or all of the current grounds for upward departures.

But if, however, courts of appeals applied more stringent appellate review to sentences that were, say, 25 percent or more above the bottom end of the range, that number would start to look too much like a legal maximum.

Justice Scalia might interpret such a provision as giving a defendant notice of his ordinary maximum sentence, investing a right to a sentence no higher than that, absent jury findings beyond a

reasonable doubt.

I don't think this Commission needs to risk giving guidance that is that constricting, as the vast majority of current guideline sentences are at or below the bottom of the range and fewer than one percent of current sentences are above the range. Evidently, most judges find existing ranges adequate or even too harsh, and few seek to go higher.

Appellate review should suffice to police the relatively few judges who might incline to toward accepting harshness. And let me say on this point, I have wrestled myself and gone back and forth on to what extent the Bowman proposal would replicate the status quo ante, and to what extent it would change sentencing behavior and bargaining behavior. I'm not certain. If you just looked at the numbers, it would look like judges don't want to go much higher. There is an interesting possibility that it might change bargaining dynamics; that seeing a higher maximum would leave defendants thinking that they're getting a better deal by getting what was the old range; therefore, creating stronger incentives to plead guilty to possibly higher numbers.

I'm not sure about that. It's quite likely defense lawyers would tell them, well, the judge probably won't go much above the minimum anyway, but there's a real possibility that the Bowman proposal might lead to some increase in sentences. But I'm just not sure how likely that is or how big in effect it would be.

Okay. The guidelines would then need to be amended if there were to be the Bowman proposal, to permit appellate review of sentences within the range, not just of departures and adjustments to the range.

The Protect Act requires de novo review of the decision to depart, but differential review of the extent of justified departures. And I can see arguments for using either standard here. Now, an abuse of discretion standard would allow for more individualization and it would underscore the absence of vested rights within the sentencing range. But I think the Protect Act evidences Congress' desire for more stringent appellate oversight, and even this review I don't think would violate Blakely, so long as it applied over the whole range, and not just to the upper portion of the range.

The Bowman proposal strikes me as more desirable than the system of advisory guidelines that many guidelines critics have proposed. My understanding is that states with advisory guidelines have achieved only modest success in ensuring equality and reducing disparity. To second some testimony you're going to hear tomorrow from Professor Paul Rosenzweig, I think either advisory guidelines have teeth or they don't. If they have teeth, they're law-like, and they vest Apprendi rights. If they don't have teeth, then they do a very poor job I think of ensuring equality and uniformity, the prime goals of the Act, the Sentencing Reform Act.

Moreover, the Protect Act strongly suggests that Congress wants more, not less, limits on judicial discretion. And a system of voluntary or advisory guidelines might seem so soft as to be worthless.

If the guidelines lack teeth, Congress may feel it has no choice but to pass a series of mandatory minimum statutes. Even a series of rule of thumb guidelines, coupled with de novo appellate review probably would not be clear and stringent enough to guarantee uniformity and certainty.

I doubt, in short, that advisory guidelines will work or will satisfy Congress. Moreover, they seem to violate the rule of law spirit of Blakely. In order to avoid vesting enforceable rights in defendants, they would give even less fair warning and less legal notice and less protection against arbitrariness.

Blakely and Apprendi, at least for now, permit this dodge, but it seems to undercut the due process values that those cases purport to uphold.

The Bowman proposal also strikes me as sturdier than the proposals to invert the guidelines by rephrasing aggravators as mitigators. It's true that the wording of the holdings in Apprendi and Blakely would permit such an evasion, but Apprendi's footnote 16 hinted darkly that if legislatures were to try this kind wholesale evasion, the Court would likely extend its rule to reach mitigators.

I short, I think these--the inverted guidelines are too gimmicky. They might provoke the Court to extend Blakely even further to mitigators, and that would deprive courts of their existing flexibility to mitigate sentences.

Whatever the guidelines look like, I think they will require more procedural protections than the current ones do. Facts that underlie a court's decision to depart upward clearly qualify as elements under Blakely, as do aggravating specific offense characteristics--drug quantities, dollar amounts, weapon injury enhancements, aggravating roles in offenses, obstructing of justice. After Blakely, all of these facts are now elements that jury must find beyond a reasonable doubt. Even the multiple count rules might require these procedural protections in situations where the rules required judges to do more than the ministerial act of reading the face of the rap sheet and statutes. The sole possible exception is recidivism, of course.

Almendarez-Torres held that sentencing judges may find prior convictions by a preponderance, and Apprendi preserved this exception. That's on shaky ground, of course, as Justice Thomas has suggested that he erred in his--providing the fifth vote. In any event, Apprendi's wording suggest a narrow reading of Almendarez-Torres, limiting it to facts that have already enjoyed the safeguards of jury trial and proof beyond a reasonable doubt as early for proceeding.

If the judge can determine the recency of the prior conviction or the defendant's criminal justice status simply by looking at the rap sheet, the judge is finding no additional facts and the enhancement should fall within the exception.

But if an enhancement requires a judge to go beyond the face of the jury verdict or the defendant's admissions in a prior case, to determine whether a prior crime was violent, for instance, and it's not built into the definition of the crime, then Apprendi strictures would apply.

Blakely, of course, requires proof beyond a reasonable doubt to a jury. Currently, Federal District Judges have no clear statutory authority to convene sentencing juries, though many have found their inherent authority to do so, and Congress should pass a statute that authorizes this.

I don't think, however, that sentencing juries and bifurcation ought to be routine. Apprendi and Blakely make all facts that raise maximum sentences into elements. These elements belong in the indictment and the guilt phase of trial, like any other elements in ordinary cases.

Indeed, Congress should eventually codify them in the U.S. Code. There is something in Congress, I must say, about having this Commission as an agency creating wholesale many elements of crimes, and the principle of legality would favor giving clear notice of them in statute. And this Commission could serve a role in proposing them and having them in guidelines. But after, they've existed and been tried for a while, they should eventually be codified.

If a defendant has a particularized fear of prejudice, about proving one of these items at trial, he can consent to redaction of the indictment, stipulate to the item, or request a bifurcated second phase for sentencing facts, but I don't think that courts should grant the bifurcation motion routinely or even lightly, because bifurcation is cumbersome and very expensive, at least that's been our experience in

capital cases.

As a rule of thumb, I think all offense facts are relevant and ought to be tried together; and that those judges who are resisting it are not yet taking--really digesting Apprendi's teaching that these are now elements, and they are now relevant to the guilt phase of trial.

Facts about the offender's background, in contrast, personal circumstances, and criminal records seem more logically distinct and might deserve separate treatment.

By its terms, Blakely does not require the full panoply of evidentiary rules, discovery, et cetera at sentencing, though the Court might eventually extend Blakely there. But even if the Constitution doesn't require these protections, at a minimum, defendants should enjoy the rights to cross-examination, compulsory process and discovery of the facts underlying the PSR.

Some of these changes might require amendments to the Rules of Criminal Procedure, but I would not woodenly extend all the rules of evidence to sentencing, particularly for those facts still found by judges. Hearsay can be a valuable source of sentencing information. Many European criminal justice systems that we consider highly civilized rely on it extensively to give judges full information. As long as the defendant has advanced notice, discovery, opportunity to respond, and to subpoena the declarant, I see nothing fundamentally unfair in letting judges continue to use uncontradicted hearsay in PSRs.

A contrary rule would greatly disrupt the sentencing investigation process, and the Commission should not take that step unless the Court requires it.

Now, on the relevant conduct point, there are many critics of relevant conduct. I have defended the modified Rule Offense Sentencing System in the past, and the pre-Apprendi case law upheld it. But Apprendi and Blakely, by raising the standard of proof at sentencing, undercut the premise that the standard of proof at trial is higher than the standard of proof at sentencing and so the Government can reprove items.

Now, because the standards of proof are the same at trial and at sentencing, and acquittal should collaterally estop the Government from trying to reprove the acquitted conduct at sentencing. I suppose the judge could still consider the conduct in deciding to where to sentence within the range, but could not make findings on relevant conduct that increased the top of the range. It's less clear whether this is a problem for dismissed conduct. In theory, the estoppel argument should not apply. In practice, however, use of dismissed conduct plays into the Apprendi majority's fears that sentencing will circumvent trial protections.

To be on the safe side, the Commission may chose to exclude conduct underlying dismissed charges from the Relevant Conduct Rule. I do not, however, think the Commission should retreat wholesale from its Relevant Conduct Rule so long as the relevant conduct that raises the maximum enjoys the Apprendi and Blakely procedural safeguards where appropriate. These must include notice in the indictment, which in practice means the relevant conduct effectively becomes part of the offense of conviction.

But under the Bowman proposal, relevant conduct would never raise the maximum sentence. In that case, the concerns about relevant conduct are less constitutional than policy ones. How illegitimate is the use of relevant conduct? My own sense is that the use of acquitted, and to a lesser extent dismissed conduct--relevant conduct, is the real problem here. The use of other uncharged relevant conduct occurs all the time in indeterminate sentencing states, and the Court has not suggested that there is a problem with that.

Moreover, I fear that eliminating the Relevant Conduct Rules would give even freer rein to prosecutorial charge bargaining. The more that sentences depend on prosecutorial charging decisions, the less power judges have to check prosecutorial harshness or leniency. Wider ranges would give judges more of a counterweight to prosecutorial bargaining; eliminating relevant conduct would give them less, allowing more collusive charge bargains. These bargains disproportionately benefit defendants who can afford experienced and aggressive defense counsel, disadvantaging poor defendants who must rely on often overburdened court-appointed counsel.

The defense bar may like charge bargains because they result in lower sentences. Prosecutors may like charge bargains because they transfer power to prosecutors and lead to more guilty pleas. But they come at the cost of equality and uniformity, the prime goals of the Act.

The best way to offset prosecutorial dominance at plea bargaining process is to give trial judges more leeway. And the Bowman proposal, like the various advisory guideline proposals do exactly that for the short term.

Judges would be free to move upward to offset prosecutorial leniency in charging, and judges could perhaps receive some limited reviewable discretion to depart downward if the defendant's was substantially higher than that of almost all similarly situated defendants.

Now, the question is: what should long-term reform look like? And I want to second some of the questions and answers from the previous panel about what simplification would look like, and again some of the testimony you'll hear from Professor Rosenzweig tomorrow.

In the long term, and I don't think the Bowman proposal should be the long term. Maybe a sunset would be appropriate. In the long term, the cornerstones of sentencing reform ought to be those that have worked well in the states, our laboratories of experimentation. I would hope some serious study of the kinds and categories of aggravators would inform this Commission's decision.

First of all, guideline ranges ought to be moderately wider than the Federal guidelines are right now, as Professor Oso will propose to you.

Second, the guidelines ought to be simpler and more transparent, with fewer moving parts and adjustments over which prosecutors and defense lawyers can bargain. And if I had to take a rough guess at what those would be, those might coincide with the same ones that juries are most likely to find intuitively, intelligible, and commonsensical. The quantity of loss--dollar loss, drug quantity, passport, immigrants smuggled, et cetera--the number of victims and the amount of injury, the use of a weapon, the role in the offense are all relatively commonsense, straightforward, and gross characteristics that jurors can understand, and it could be written any more in plain English style, as Judge Sullivan says, and I would support.

But I think it's appropriate to expect a jury to deal with a special verdict interrogatory that deals with four or six enhancement questions. I do not think that in the long term it is wise to have juries deciding lists of 20, 30, or 40 special interrogatories. And those strike me as the ones that are most important.

If Almendarez-Torres falls, I would, of course, add criminal history to that list.

Third, I think searching appellate review ought to ensure consistency, checking the increased flexibility and preventing it from degenerating into rampant disparity. These three principles of moderately wider ranges, simple and more transparent and plain English guidelines on the most commonsensical characteristics, and searching appellant review would give prosecutors more plea bargaining chips; give trial judges more leeway to counterbalance prosecutors, and give appellate

judges more power over both of them.

Ultimately, history teaches us that rules alone cannot neither eliminate plea bargaining nor keep it in check. The best we can do is to create a balance of plea bargaining power so no one actor dominates the process. My fear is that an overly rigid and complex set of guidelines, or worse yet, a proliferation of new mandatory minima that might be provoked by commission in action or an overly flexible or voluntary set of guidelines would only exacerbate the imbalance of bargaining power. And I'm concerned about Congress's reaction.

Though I'm a former prosecutor, and I honestly believe most prosecutors are honorable, I also heed--act--is in power corrupts, and absolute power corrupts absolutely.

And enforceable, but moderately broader and more flexible set of sentencing rules, would best check unilateral prosecutorial control and restore some balance of plea bargaining power in the process.

JUDGE HINOJOSA: Thank you, professor. Professor Goldsmith.

MR. GOLDSMITH: Thank you, Judge. You know you're previous panel had a distinguished set of representatives from the judiciary, and each went out of their way to emphasize what hat they were wearing. I'm not wearing any hat. I'm just speaking for myself, so that should be clear from the very outset. I guess I might characterize myself as a commissioner in exile, living in Park City, Utah.

JUDGE HINOJOSA: And we won't ask you about the BCS.

MR. GOLDSMITH: Okay. I have a variety of observations to make. First, stressing the need for cooperative action with the Congress. I think that since the Commission's crack cocaine vote in the spring of 1995, the Commission suffered--has suffered from image problems with the Congress. Congress thinks that the Commission doesn't take crime seriously, doesn't issue tough sentences, and just cant' be trusted.

Of course, now you have apparently neither Congress nor the Supreme Court trusting you. Well, I think Congress can be your friend. But to make it your friend, the Commission really needs to conduct a full-scale public relations effort to better educate Congress to correct a variety of common misconceptions. One, for example, is that the guidelines have not worked.

In fact, I think that if the Commission undertakes an effort to document the degree to which the guidelines have, for example, reduced unwarranted sentencing disparity, have produced more proportional sentences, have produced fairness in sentencing, I think Congress, in fact, can be educated; and right now, of course, we're in the middle of lame duck session, so nothing is going to happen soon over there. You folks have some time. You have a great staff. I know that. You know that. And they can certainly churn out the work that you need to document the degree to which the guidelines have been a big success. I think Congress should also be educated about the fact that Federal Judges in recent years have given the guidelines very high, or at least generally favorable reviews.

I note also that the American Bar Association's Blakely Task Force draft report states that the Federal criminal justice system is better off with sentencing guidelines than without sentencing guidelines. And that position I think reflects a significant change from the way that the ABA previously viewed the sentencing guidelines.

In terms of potential options, I would concur with Professor Bibas that the Bowman proposal is probably constitutional. Justice Frankfurter, however, said the fact that something is constitutional doesn't necessarily make it wise. I have a lot of respect for Frank Bowman. I think his proposal,

however, is very unwise.

It does give you a technical fix to conform with Blakely. However, it creates unduly broad sentencing ranges with many, many guideline levels--with many guideline offense levels. In some cases, the range can exceed 20 years. And further, it really is a one-way street in favor of the prosecution. Now, Professor Bibas said that relevant conduct, for example, would not impact--would not produce an increase in penalties under the Bowman proposal. I don't think that's true, if I understand it.

In fact, if relevant conduct, for example, is considered that would produce an increase in the base offense level, so the minimum level would go up, although the maximum would stay the same. But relevant conduct would, as a result, therefore, produce a greatly increased sentence.

Before I address the other proposals that I had in mind, I also wanted to comment on the notion of including relevant conduct as part of the indictment. If I'm a defendant, and I'm taking a look at having to defend against not just the charges that the government files, but against relevant conduct, uncharged prior conduct, for example, it's going to be worse than a Ricco indictment. You're going to have something even broader than a pattern of racketeering activity. And I think what it will mean is the need for bifurcated trials as a matter of routine, whenever relevant conduct is an issue; otherwise, you really can't get a fair trial.

In terms of potential options, it seems to me that Bowman at least has the right idea of working from the top down. I don't like his notion of capping every guideline at the statutory maximum, but at least one possibility is for the Commission to approach things differently. Rather than establishing a base offense level, subject to upward adjustments based upon aggravating specific offense characteristics, you might go with a maximum offense level, subject to reduction for mitigating specific offense characteristics.

The burden of proof with respect to mitigating factors can be placed on the defendant. This approach would not violate Blakely and find substantial support in Supreme Court precedent, which allows defendants to carry to burden of proof with respect to affirmative defenses.

I think this would be constitutional. I frankly don't like it, but it at least gives you a different perspective on how this can be approached. It's very clear from Blakely that if you focus on mitigating on factors, that Blakely's concerns are not triggered.

I'm not going to address the notion of Blakelyizing the guidelines entirely. What I want to do is talk about two options that Blakelyize the guidelines partially.

The first option is to require a jury finding for the most frequently employed specific offense characteristics, in other words, have your staff identify which are the most frequently employed specific offense characteristics and require a jury finding as to those.

And also require jury findings for those crimes in which quantity determinations drive the sentence, in other words, drug quantity, for example, or monetary loss. What you might do with the remaining specific offense characteristics then is simply reduce them to discretionary status so that the Court may consider them with respect to work the sentence within the applicable range.

The second option, which is the one that I really like best, is don't just Blakelyize the guidelines. Simplify them. Don't just do this as a series of horribles that suggest that the sky is falling, but as long as 1994, when I first began to serve on the Commission, we talked about simplification. Maybe this decision will drive the Commission to simplify the guidelines in some reasonable fashion.

With that in mind, what I would suggest is the following: seek a statutory amendment increasing the 25 percent rule to anywhere from 33 percent to 50 percent. This will reduce the number of offense

levels, allow courts to exercise broader discretion and likely decrease the rate of judicial departures. It will also leave room for some wiggle room for judges who want to consider relevant conduct within the applicable guideline range.

Then what I would do is identify the most commonly used specific offense characteristics and build them into the base offense level. This, of course, will produce an increase in sentences commensurate with the value of those specific offense characteristics.

The Commission, I seem to recall, has done that in the past with other guidelines. I can't recall at this point which ones they were. I seem to recall they were in the context of the fraud guidelines. But the notion of building the specific offense characteristics into the guideline itself removes the need for a separate jury determination with respect to those specific offense characteristics.

I would then treat the absence of those specific offense characteristics as mitigating factors warranting reduced guideline levels. And there, again, you could put the burden of proof on the defendant.

I would then suggest Blakelyizing the remaining less frequently used specific offense characteristics, at least those that are sufficiently important to retain, and I would also continue to require jury determinations with respect to those guidelines that are quantity driven--drugs and monetary loss, for example.

That, in short form, is the proposal. I think it has the benefit of simplicity. It expands judicial discretion. It does produce some increased sentences, but I think that may be required for Congress to take you seriously and also will, thereby, diffuse any momentum towards a renewed effort for new congressional mandatory minimums. And finally, it does provide the defendant with an opportunity for some mitigation. Thank you.

JUDGE HINOJOSA: Thank you, Professor Goldsmith. And I'm glad to see somebody else find Blakelyizing as big a tongue twister as I do sometimes.

MR. GOLDSMITH: Really.

JUDGE HINOJOSA: Professor Saltzburg.

MR. SALTZBURG: Thank you, Judge Hino, Your Honor. Let me just try to be brief, because I don't know about my colleagues. I actually have to teach this afternoon, so I'll be brief, and I have an answer question you put to us, unfortunately not time to give them all to you.

But, you know, I've been--I'm looking at John Steer, and I'm thinking I've been in this process a long time. I mean, I sat where Deborah Rhodes sat back in 1989 and '90 as the ex officio member of the Commission. And before that, I was the reporter on the Advisory Committee on the Federal Rules of Criminal Procedure. I was on the Advisory Committee of the Federal Rules of Evidence, and we--so, I've looked at a lot of these issues from different perspectives, and I'm just going to share with you some ideas I have.

Much of what Professor Goldsmith said, I agree with, in terms of where you should come out, not exactly, and I don't think the exactitude matters that much here.

But first, I guess I should say, like everybody else, I did Chair the ABA Justice Kennedy Commission. And that is ABA policy. I'd just like to correct Professor Goldsmith on one, in one respect: ABA policy has supported sentencing guidelines for more than a decade. Guideline sentencing is what the ABA has stood for. It has supported. It just hadn't supported the Federal guidelines.

And when I chaired that Commission, I will tell you something that won't surprise any of you.

You look around the states that have guideline systems and you find defense lawyers, judges, and prosecutors, for the most part, really like their systems. You poll your fellow judges, poll the Federal defenders, and defense counsel, and they don't like our system very much. The only group that does is DOJ. And that's a fact. Congress, at least the majority, seems to like it. But it's different, because it is more complicated, more rigid, more cumbersome than any other guideline systems that's ever existed in America. It doesn't have to be that way.

I mean, the--in some ways, the Federal guidelines led the way, or at least helped to lead the way, and now the states have really shown that they know how to do this pretty well, too; and that there can be a real give and take. And I think Professor Goldsmith's correct about that.

But I also now chair the--and, by the way, our Kennedy Commission did recommend change--repeal of that 25 percent limit; recommended repealing the limit on the number of judges who can serve on the Sentencing Commission; and restoring the abuse of discretion standard for appellate review.

That is ABA policy. What's not ABA policy is anything my working group on Blakely has to say, even though I'll be talking about it, and Jim Felman tomorrow will be talking about it. We're just talking about our individual views at the moment. We're working hard, though to try to reach out to a broad band of people to help you and help Congress react to what we think is the likely Supreme Court decision.

You know, the betting, everybody knows, is the Court is likely to hold the guidelines unconstitutional either in toto or as applied.

The options are not that complicated for you or for Congress. You only have a couple. That's just the truth. If the guidelines are struck down, either way, what's going to happen, what that will mean is that if we want to take account of things like relevant conduct, drug quantity, amount of loss, harm to victim, and increase sentences as a result that that is going to have to be something that somehow or other is tried to a jury or built into a guideline system so that the factors disappear, which is think is difficult.

Now, if the guidelines fall, what are the options? Well, one of them is advisory guidelines. There's no chance of advisory guidelines over the long haul. I mean, it would be inconsistent with what happened in 1984. It wouldn't have teeth. And it just wouldn't sell. I don't think it would sell in Congress. I don't think it would sell to the American people. And I agree with Professor Bibas on that. It just doesn't work.

In the short term, advisory guidelines might not be a bad idea if it allowed you, the Commission to work with Congress to figure out how to change the guidelines to make them consistent with whatever the Supreme Court has to say.

The second option is this--what's been called the Bowman proposal. I couldn't agree more with Professor Goldsmith. It's a really bad idea. It's a bad idea in any one of the versions that we've heard about. But let me just tell you the bottom line and why it's such a bad idea: in 1984, if you told the people, I don't care whether it was Senator Thurmond or Senator Kennedy, that what they were going to have was a system that went up only; it didn't go down, equal amount, they would have said no. And they just said this was a guideline system. This wasn't no unidirectional system that said to judges you can go anywhere up to the statutory maximum, and you got discretion to do it. But you can't go down and give probation. It undermines everything that the guidelines sought to do, and it ought to be rejected for that reason.

As for the--there is the possibility that you sentence at the maximum level, as we heard. Set the guidelines at the maximum. Let people, you know, let defendants try to lower the sentences. It won't work, because if you do that you have to change completely the discovery system, and every time the discovery system has tried to be changed, the Department of Justice has said that's the one thing they want to protect against the most. It isn't going to happen and without equal discovery and equal access to evidence, that kind of system is just unfair.

You could go to--Congress could start imposing more mandatory minimum sentences and not worry so much about what happens after that, and you've already issued--you had a 1991 report that reached the same conclusion my Kennedy Commission did, which is mandatory minimum sentences are a bad idea. In fact, their very existence, beginning in 1986, is what drove the sentencing levels that we now have where they are for certain offenses like drug offenses, and it has plagued the guidelines ever since. We need fewer of them, not more.

The real answer I think is going to come in one version or another, as Professor Goldsmith said, with codification. And what I think Jim Felman will talk to you about tomorrow, what I recommend to you today is that you work with Congress to have Congress codify, that is create an aggravated form of offense for the sentencing factors that you know matter the most. They are roll in the offense, to the extent that drug quantity is, you know, important, and maybe it's time to look at the Rolland offense and drug quantity as one looks at that; and loss, which is the huge driving factor in fraud cases and in financial cases.

Those are things Congress could, in fact, codify, and I don't believe, by the way, it's that complicated for juries to make those findings. Judges ought to have the authority to bifurcate proceedings, but they don't need to bifurcate in every case. I think Professor Bibas is right about that. There's no reason when you talk about Rolland offense that that's not an element that a jury could decide, while deciding everything else.

Most importantly I think what you need to say to Congress, once the decision comes out, and we all have a chance to read it, you need to say we can do this job of coming up with a recommended change quickly, because what's going to happen is if Congress believes that it's going to take you three years to change a guideline system and to come up with a substitute, Congress is going to say, we'd better act on our own. And if Congress acts on its own, it's going to produce a bad product. It's liable to produce--my guess is it will produce a version of the Bowman proposal. Why? 'Cause it's there. It is a fix. I believe it is constitutional. It's just inconsistent with everything the guidelines were supposed to be, but that won't stop Congress if it decides it needs to fix something.

So, if Congress believes that within a year, you can come up with a product that will provide consistency, regulate the judges to an appropriate extent, we can debate forever how much discretion judges ought to have--it's a dream world to think we're ever going to have a vast amount of discretion, but there's room for more discretion I think on the part of judges; and the system, I think much like Professor Goldsmith described, is the right one, which is some factors codified and tried to juries, but they don't--we don't need to do that with all of them. I mean, Judge Paul Friedman here in the District has said he's examined the guidelines and has found 240 different enhancements that judges can now use. Now, I don't know whether that number if exactly right, but nobody would think you'd want to codify 240 sentencing enhancements. You'd pick the most important ones. I think that you could probably pick up what two of my--some points two of my colleagues made and provide guideline statements, you know, guidance to judges on a number of other factors which they could chose in their

discretion to use if you had a broader sentencing range, to go higher or lower in the range.

If you can reduce the number of offense levels from 43 down to a much more manageable level and expand the ranges somewhat, and I think there's a lot of support everywhere, but perhaps in the House of Representatives, for doing that, then you can actually I think have an appropriate mix of controlled guidance to judges and discretion, which doesn't bog the system down in jury trials that become unmanageable. I think that's the answer here.

John Steer asked earlier on, he asked the Judges, where the resources going to come from? Well, there are not going to be anymore resources. The judicial budget isn't going to be expanded. It's contracting. And, given the budget situation, it would be a dream world for everybody to assume we're going to have more money for more expensive jury trials, and we want more trials. You know, whether or not more trials would be desirable is a subject that, you know, need not concern us now. We probably all have different views on that. But the pressures on the system are going to be to keep the plea rate about where it is and keep trials about where they are in terms of cost, if not make them less costly.

I actually think that using this combination of codifying some of the elements and building--taking other of the sentencing factors that are not as big--they don't drive as much--and offering them to judges to consider, with suggestions as to whether they might consider going up or down--is a system that's workable. I don't think it would be unduly expensive. I don't think it's unduly protracted. I think it's quite doable. And I don't think you have much choice actually, you or the Congress, if the Supreme Court does strike these guidelines down.

I think the end result is going to be you're going to be choosing between an approach which involves either raising the maximum of each of the offense levels to the statutory max, which is one approach, or deciding to--I can't say the Blakelyization either, so--

MR. GOLDSMITH: Let's call it Bookerize.

MR. SALTZBURG: Yeah. Codifying. Codifying some sentencing--codifying sentencing factors. I believe that's where you'll come down in the end. And then, of course, you'll have all these other issues that you'll have to struggle with and you asked about in your questions, which is if you do that, which ones--Professor O'Neill was asking the question, you know, which--if we could simplify, what would we do the most simplification. I think there's a lot of agreement around this. Look at the factors that drive sentences. Look at the ones that raise the sentences to the level that Congress loves. Those are the ones that ought to be codified. Make Congress very happy, you know, and it will, in fact, do the job. You have some data. I think there's really interesting data from the Defenders that point out how infrequently some of the sentencing factors actually get used. Those are the ones that don't need to be codified. Those are the ones that could be included, you know, for judges to consider within a broadened guideline range.

And I'd say that when the decision comes down, and we know what it says, I'd just offer, and I've said this to Deborah Rhodes, I've said, our group is willing to sit down with the Department of Justice, look at that decision, and say can we agree that there are certain things that make sense; that we don't want to have a new system. You don't want to set up a new sentencing system that requires us to assume the continuing validity of Harris.

I mean, it is constitutional silliness to take a five to four decision, where one of the four--one of the five justices has said I don't know if this right or not. He's one of the justices who was there at the creation, Justice Briar, of the guidelines, who would be offended as much as anyone it seems to me by

a system that basically allowed you to go up, but not down, and destroy the purpose of the guidelines and their original intent. It doesn't make much sense to me to structure a new guideline system based on a Supreme Court five to four case, which, if it's overruled two years from now, requires you to do it all again.

That's my advice to DOJ, to Congress, and to you; would be don't--you don't need to do that. You don't need to rely on Harris and assume it's correct. You have the opportunity. And that's basically what Blakely is. It may be a curse in the sense that it throws a monkey wrench into everything I did many years ago, and you're now doing. But it's an opportunity to make it better, and I hope you will. Thank you.

MR. GOLDSMITH: Judge, just one final comment from me--

JUDGE HINOJOSA: Yes, sir.

MR. GOLDSMITH: If I could. Reflecting again on the Commission's experience with the crack cocaine issue in 1995, I felt back then that it was important for the Commission to take a position on this unanimously. We didn't. It was a four to three vote. And I think that was part of the major problem that the Commission encountered in subsequent years, the fact that we were so closely divided, This issue is even more crucial than the crack cocaine matter, and, to the degree, to the degree that you can somehow manage to come up with unanimous consent, all the better, to send a strong voice to Congress that you're united on this, and, again, as Professor Saltzburg has suggested, indicating to them that unanimously you can and are determined to get the job done.

JUDGE HINOJOSA: Thanks. Chair Sessions?

COMMISSIONER SESSIONS: Well, I really appreciate your testimony, and I'd like to ask Professor Bibas, 'cause you haven't had a chance to respond to what the others have said, Professor Goldsmith has offered an interesting approach of simplification, which can be done relatively quickly. We'll call it the Goldsmith Proposal; is that all right?

And essentially, it's--as I read it, as I hear what Professor Goldsmith is saying here. Five different elements. You repeal the 25 percent rule. You expand moderately the ranges, which is exactly what you talked about. You use the jury trial right for those enhancements which are significantly and commonly imposed. You fold in the frequently used enhancements into the base offense level, and then finally you make other enhancements like aggravating factors, which would be incorporated within an expanded range.

Now, that sounds as if it could be done relatively quickly. Would you advocate something like that or would you suggest that we go through this process of using a Bowman kind of fix, knowing full well that it's subject to some constitutional infirmity.

MR. BIBAS: I think--I think all of us here agree that those are the outlines of a good long-term solution. And lot of it--which factors are included will depend on your data about which enhancements are used most often and how much they driving sentencing.

Really, I think the only disagreement I heard here was on what a short-term solution would look like, and that ultimately depends on what the Commission thinks in terms of its time frame. If the Commission could implement something like that in nine months, I would say just go directly for that.

I--perhaps I'm a little skeptical as to whether something like that would get completed so quickly, which is why I suggested an interim solution, why there was a suggestion of the inverted interim solution by the professors to my right, and I've already expressed why I think that has some serious constitutional questions about it, maybe even more serious than Bowman in my mind.

But it's really a question of timing. If it's going to take this Commission 18 months to two years to implement that proposal or longer, I would support the Bowman proposal in the short term. But if this Commission can act significantly quicker than that, then maybe there's no need for an interim solution. It's your judgment, and you have more experience with that than I do.

MR. GOLDSMITH: This is a better Commission than mine, I might say.

COMMISSIONER SESSIONS: Commissioner in exile, do you think that the Commission could act that fast based upon your experience?

MR. GOLDSMITH: I think you have a superb staff, and lot of it is staff work, doing the analysis on those guidelines that are most often employed; and you have a window of opportunity in the next few months to get the job done. I think it's imminently possible, and frankly it might even be a better system than the one we have right now. So, I think it's doable.

COMMISSSIONER SESSIONS: Do you have a patent on this program?

JUDGE HINOJOSA: Vice Chair, Steer.

COMMISSIONER STEER: Thank you, all, but permit me one observation. I think the protests about the one-sided nature of the Bowman proposal, we'll call it that for a little longer, are a bit much. Nothing is more fundamentally one-sided than the, we'll call it the Blakelyization guidelines if that should happen in terms of the burden of proof. So this is a not a reason for a guideline system, perhaps with some reforms more like to what we have. I don't know whether the Court will allow that.

But this is my question that I would posed to you: do you think it is constitutionally permissible for Congress to authorize pilot projects, basically an experimental approach, which, design it however you want, might be Bowmanization in the majority of districts, partial Bookerization in other districts for certain offenses of conviction. You know, because if you do, then, that's probably something that can be done more quickly than taking the entire guidelines manual and all of the changes that might be necessary depending on which way you go in the rules of criminal procedure and so forth? So, that's my question: can you do a pilot project for sentencing?

MR. SALTZBURG: I think it's really constitutionally questionable. I mean, if there's ever--I mean, people would cite different cases on this, but if you can't have different election standards in a single state, the idea you could have different punishment standards throughout the country and on--I don't have any doubt Congress could authorize a nationwide experiment, if we'd call it--that is authorize a statute that would permit a certain kind of sentencing scheme to be imposed and take a look at it. But I think it would raise serious equal protection questions. The fundamental questions: I mean, you got liberty on the line. And rather substantial amounts of liberty on the line, and to say that two people who committed exactly the same offense could get sentences that would not vary in the old days, based on individual judges judgments or in the new days based on a guideline, but based on totally different systems, would seem to me to just raise a bunch of new questions that I don't think--I don't think many of us would like to see asked, let alone answered.

JUDGE HINOJOSA: I gather you think it would look kind of funny if we had pictures of judges staring at the guideline manual very closely.

[Laughter.]

MR. BIBAS: I'm not sure that the--

JUDGE HINOJOSA: For hours.

MR. BIBAS: I'm not sure the problems are as here. I think there would need to be litigation on equal protection issues, but it doesn't strike me as a suspect classification, the need for equality in

punishment is not the same as counting every vote the same.

Moreover, if this Commission were to propose something like that for, say, the District of Columbia, which is a traditional territorial enclave that has its own set of laws, it might be quite possible to engineer an experiment there.

I agree it would breed some litigation to try something like that. That might be a reason against trying it. I'm not sure that there would be a--that there would be--that the equal protection problem would be insurmountable.

JUDGE HINOJOSA: Professor O'Neill. Oh, Commissioner O'Neill.

COMMISSIONER O'NEILL: Either hat. Obviously, we've got a lot of practical difficulties, and I think each of you pointed out in your testimony. In many respects, we're caught in this whipsaw between the Department of Justice and Congress and just the need, frankly, if the Supreme Court renders a decision that's adverse to what the Commission has been promoting in Booker and Fanfan, we're going to have a fairly limited window of opportunity.

I guess the two-fold question that I would ask is that what do you think, just based upon your practical experience, the likelihood, if we engage in some sort of a short-term solution that everyone seems to be unified and agreeing that it's probably not the ultimate or best solution, what's the likelihood that if it's a solution that's ultimately acceptable, say, to the Department, acceptable to Congress as a short-term solution that it is de facto going to become the permanent solution, and it's going to be virtually impossible, then, to move us towards a better regime of sentencing.

And then secondly, if, in fact, it's going to be the case that it's simply going to take us a little bit longer to put together a proposal that's going to be, you know, even a second best proposal, what do you think strategically is the best way for the Commission to go about it, both in getting the cooperation of the Department of Justice and getting some sort of congressional push behind it to simply wait until cooler heads can prevail?

MR. SALTZBURG: Can I answer that and give my answer, anyway, and then I have to depart. I think it's a mighty important question, and I'd like to answer both parts of it.

What is the probability that if there's a short-term fix, like some version of the Bowman fix, it will remain long term? It approaches a hundred percent. My conversations with members of Congress is they dread having to deal with this. They dread having to deal with once, and they basically are inclined to want to deal with it only once. And, therefore, the idea that they'll have to come up with a solution and then come up and reconsider it; it's not impossible. But if the solution works, and, by works, I--don't get me wrong. Any version of Bowman ver--you know, Bowmanesque thing, establishing statutory max and having defendants have to mitigate, it'll work. I mean, can you make a system like that work? Sure. Is it a good system? No. But who will be complaining? I guarantee you as long as the Department of Justice is satisfied with whatever the interim solution is, it will remain likely the permanent solution.

Now, one of the reasons I think that the Department wisely is saying let's wait and look and see what the Supreme Court says is this: one of the things the Supreme Court could say is the guidelines are unconstitutional as applied, not in total. And it could signal that the Seventh Circuit remedy in Booker, which was to remand for empanelment of a jury to consider these factors, that that's constitutional.

Now, whether or not it violates the rules of criminal procedure as currently written, we could de--you know, I think there's a good argument it does, but a very simple solution if the Court were to say that would be for Congress to say, well, we'll have a quick statute authorizing prosecutors to charge

in the indictment sentencing factors and judges to empanel juries with discretion to bifurcate to hear the--to decide them. That system could work, and I think, by the way, it would likely result would be with plea--people would bargain just as they do now about it. The plea rate probably would remain somewhat stable. Judges would make--if prosecutors really were smart and they will be about this, because they don't want to over task juries or themselves--they'd pick the factors that matter the most to drive the sentences up. They're the ones they charge, and that system could remain in place while you work.

If the Supreme Court, though, says the guidelines are unconstitutional, totally, then I think we're in some ways the worst shape, because in that--if Congress could do the same, it could authorize these factors to be. But the--the inclination I think is going to be we got to put something in. We got to substitute something, and I would hope they'd consider the same solution, but they might not.

The--it comes, I think, when you ask how can you do this, I believe, and I think Professor Goldsmith is right about this, with the staff you have, and the amount of work I know you've done and the staff has done--it isn't like you've been sitting around not thinking about this. I mean, I--you've been thinking about nothing else, and it's appropriate. It's a major issue. I mean, Blakely through a monkey wrench into sentencing many places, but, I mean, with the number of defendants now sentenced in the Federal system, it's an enormous problem.

And, so, you focused on it. If you can be unanimous, as Professor Goldsmith said, if you think that you can come together and you can come up with a solution, and you don't have to know exactly how--the details right now--but if you can focus on that solution and signal to Congress that you can, in fact, give them a product, I think within a year. And it's to the Department so that they know whatever the--if they have to be indicting these things and proving them to juries that eventually there's going to be a more permanent solution, I think you may very well get cooperation.

But if the--if they believe that it's going to be like starting over, which it shouldn't, with the data you have and the expertise, it shouldn't, then there's going to be this compelling argument for a very fast solution.

And I think we all know what that fast solution is going to be.

JUDGE HINOJOSA: We have time for one more question if there is one? Well, thank you, all very much. We do appreciate your time. I have not done as good a job about keeping us on time as I do at the district court level. And, so, we'll take a very short, five-minute break before the next panel. But thank you, all, very much for taking the time.