JUDGE HINOJOSA: Thank you all very much, and we'll go on to the next panel.

Our next panel is people in different fields but who have come up with ideas, with specific suggestions, and their thoughts on suggestions, and we have Professor David Yellen, who is a Professor at Hofstra University School of Law, making a quick appearance; Professor Bowman, Frank O. Bowman, Professor at Indiana University School of Law; James E. Felman, a partner at Kynes, Markman & Felman, and used to work very hard with the Practitioners' Advisory Group that works with the Commission; and Mr. Mark Osler, who is an Associate Professor at Baylor Law School, which is very close to Austin.

We'll start with Professor Yellen.

MR. YELLEN: Thank you, Judge. Thank you for the invitation to testify again before the Commission. It's been a while since I've been here, and it's very nice to be here at this watershed moment.

I have a long relationship with the Commission, starting back when I was an assistant counsel to the House Judiciary Committee in the 1980s, when the guidelines were first promulgated, and continuing through my academic career. In fact, I consider myself to have been the Commission's lawyer on one occasion when I unsuccessfully defended in the Supreme Court in United States v. LaBonte, the Sentencing Commission's revisions to the career offender provision. And I continue to have great respect for the members and staff of the Commission with whom I've worked over the years.

I should also mention that Frank and I, as I think many of you know, are serving as co-reporters to a Sentencing Initiative sponsored by the Constitution Project, a nonpartisan, Washington-based, nonprofit organization affiliated with Georgetown University. The Sentencing Initiative is co-chaired by former Attorney General Ed Meese and former Deputy Attorney General Phil Heymann, and we're hard at work with a broad bipartisan group trying to develop recommendations for sentencing, particularly at the federal level, after Blakely and Booker and Fanfan. I should mention that both Frank and I are obviously here speaking on our own behalf and not on behalf of the Constitution Project.

I have often heard that the Chinese word for "crisis" is made up of the characters reflecting both danger and opportunity. And I think it's not an overstatement to say that the federal system is in or facing a crisis right now. But it's facing both of those parts of the Chinese structure of the word "crisis." The danger I think is obvious. Congress, unfortunately, in my view--the consensus and coalition that led to the establishment of the Sentencing Reform Act was a brief one. It evaporated almost as soon as the ink was dried on the Sentencing Reform Act of 1984 with the mandatory minimums that began to be passed, the restrictive directives that have been directed at this Commission, and what for me is the lowest moment in the history of the federal sentencing reform movement, the PROTECT Act. So the danger is apparent that Congress may respond to this crisis by doing any number of things that I think would be poor policy.

The opportunity is that it's not very often that a well-established system gets a fresh look. It's very hard to generate the enthusiasm for many Members of Congress to pay attention to this stuff, as you well know. And now it's being forced upon us, and although bad things may happen, there's also the opportunity, at least, for some fresh thinking and some good ideas to come out.

Just very briefly, this is what my road map would be in the sense of you counting heads of what we all think. I agree with a lot of what was said in the first panel. I think it's important to go slowly

while the courts define the contours of the post-Blakely world. I think that some version of Blakelyizing the guidelines is far preferable to any of the other options that are out there. I think it's essential that the guidelines over time be significantly simplified. And along with that, there ought to be a moderate increase in the guidelines' flexibility.

More broadly, I think the goals of sentencing reform ought to be somewhat redefined to be more in line with the more modest, attainable objectives that have led--that many states have successfully pursued over the last 20 years.

And, finally--and this is my main point here today--I think that the Commission has to vigorously, courageously, boldly engage Congress and educate Congress as to the value of this approach.

Let me just spend my remaining couple minutes talking about the last two points: the goals of sentencing reform and what the Commission should do in connection with Congress.

I think by far the two major problems with the federal sentencing system today are, number one, the mandatory minimums, which obviously you bear no responsibility for; and, second, the overly ambitious nature of the federal guidelines. And there are many sources of that, and this ties in very much to the complexity of the guidelines. Some of it was necessary. Federal guidelines have to be more complex than state guidelines, if for no other reason than the absence of a coherent criminal code. But there are other reasons why the federal guidelines are so complex and so rigid. Part of it was the intellectual aspirations of some of the original members of the Commission and those who were guiding them in the process. There are other reasons as well which I'll explain a little more in detail in writing.

But I think if you look at what the states have done, they have been so successful in crafting guidelines that have rounded out the edges, have gotten rid of the disparately high and low sentences without trying to micromanage all of the decisionmaking and without getting fixated on a very narrow definition of disparity.

I was recently at a presentation regarding the new D.C. advisory guidelines, and let me say that I share the view of the earlier panel that advisory guidelines do not make sense in the federal system because of how far-flung it is and I don't think it would be much guidance at all. In the D.C. system, obviously every judge in the system is in the same courthouse. They all have lunch together. There's a culture of compliance that may well develop that wouldn't in the federal system. But what's most intriguing about the D.C. guidelines for federal purposes is what their goal was. Their goal was to take the 25 percent of the highest sentences and the 25 percent of the lowest sentences and bring them into the middle.

That's sort of the sum total of what their goal was, not to very carefully micromanage every sentencing decision, not to build up an elaborate system of rules that's essentially designed to prevent prosecutors from entering into overly lenient plea bargains. I would have left that issue, if it's a problem, I would have left that to the Justice Department to regulate. And I think that going forward, simpler guidelines that are more based on the offensive conviction with sufficiently broad ranges to allow judges to aggravate or mitigate sentences on appropriate circumstances would be much more the way to go.

Now, the big question is whether Congress is going to give you the time and the statutory tools to do that, and I have to confess I'm not extremely optimistic about that for reasons that we all know. But I think if it's going to happen--and I think it will happen over time. I think over time Congress' attitude toward sentencing will change, just like many conservative state legislatures with admittedly greater financial pressures than the federal system faces have built in more flexibility. But that's not

going to happen unless this Commission takes a very activist role, including taking some chances of being slapped down by Congress when you say, in the polite deferential way that I'm sure you can, when you tell them the knowledge that has been built up in the federal system and the state systems leads you to conclude.

I know for myself, the times I was personally most proud of the work the Commission did, and not just because I agreed with what you said on those two occasions, was first when the mandatory minimum report was written in the early '90, which I think is still a brilliant exposition about everything that's wrong with mandatory minimum penalties as a basis for sensible sentencing reform; and then, second, when you attempted to reduce the disparity in the treatment of crack and powder cocaine. That proposal obviously lasted all of five minutes before a Democratic Department of Justice spoke out vigorously against it and killed it. But I think that's the kind of bold leadership that is essential at this moment, and I think that the basic contours of a system, if we were creating it today from start, I think it's pretty clear that there's a very broad consensus that it would be a simpler, more flexible guideline system than the one we currently have today. And I urge you to point in that direction in your dealings with Congress.

With all due respect to my good friend Frank--we're working very closely together--I don't think the proposal that somewhat reluctantly bears his name is the way to go, for a lot of the reasons that were stated earlier. Imagine that if in only 10 percent of the cases judges exercised this new discretion to go as high as they want up to the statutory maximum, that to me would be a disaster in terms of uniformity and fairness. And I don't think that any system that only regulates the bottom of the sentencing range and not the top of the sentencing range is the right way. I would prefer that in this interim period that Blakelyizing the guidelines moves forward rapidly. I think plea bargaining will work to get rid of most of the difficult issues. I would hope the Justice Department would in this period, because of these special circumstances, allow prosecutors to have a little more flexibility to bargain about particular factors than they have in the past, and that would give you the year or two necessary to work on a comprehensive simplification project.

Thank you.

JUDGE HINOJOSA: Thank you, Professor Yellen.

Professor Bowman? Or is it Professor Fix?

[Laughter.]

JUDGE HINOJOSA: Go ahead, sir.

MR. BOWMAN: I think I deserve extra time or something.

[Laughter.]

JUDGE HINOJOSA: At least equal.

MR. BOWMAN: Thank you, as always, for inviting me. It's always a pleasure to be here to see so many good friends and colleagues from years of doing work in this area.

I will get around to talking about what I prefer to call "topless guidelines," or as Doug Berman christened them, "guidelines gone wild." But I want to step back a moment and talk a little bit more generally for a few minutes.

As we all know, criminal sentencing is a messy and imprecise business, and it's very difficult to draft rules of general application covering so many different kinds of conduct committed by so many different kinds of offenders under so many different circumstances. It's even harder to apply these general rules to thousands of individual cases with any assurance that these sometimes divergent

objectives of controlling crime, ensuring that punishment is proportional to the offense, achieving reasonable equity between similarly and dissimilarly situated defendants are going to be even roughly achieved.

Over the last ten years or so of thinking about this messy and imprecise business, I've arrived at one overriding conclusion about the design of sentencing systems, and that conclusion can be expressed both positively and negatively.

The positive way to put it is that a sentencing system in which authority, both the authority to make sentencing rules and the authority to mandate sentencing outcomes in particular cases, a sentencing system in which these kinds of authority are distributed reasonably evenly among the institutional sentencing actors is likely to work pretty well over time.

Expressed negatively, my general conclusion after all these years is that any system which concentrates sentencing authority disproportionately in the hands of one or even two institutional sentencing actors is headed for trouble.

This perspective I think explains a great deal of federal sentencing policy over the last few decades. For example, the principal critique of the pre-guidelines federal sentencing system was that it concentrated too much power in the hands of individual sentencing judges, power that was unconstrained either by a priori legislative rules or even by post-hoc appellate review. This critique was, as we know, somewhat overstated inasmuch as it ignored the counter-balancing effect of back-end release authority of parole boards. But it is, nonetheless, true that the old system gave neither Congress nor prosecutors nor appellate courts nor defendants any meaningful power to either set or to dispute sentences.

The Sentencing Reform Act was designed to remedy the old system's institutional imbalance. In theory, it distributes sentencing authority in an extraordinarily sensible way. At the rulemaking level, it created you, the Sentencing Commission, which was to serve as an expert neutral rulemaker, reasonably insulated from direct political pressure, but equally importantly, serving as a forum for policy debate among the other institutional actors.

Congress was supposed to have ultimate authority over the Commission's rules but would in theory stay out of the details of sentencing policy, or at least would give substantial deference to your conclusions.

Prosecutors would have a seat at the Sentencing Commission table to have their views on rules and policy heard. Prosecutors, of course, also gained an immense measure of authority over particular sentences because the guidelines are mandatory, they're fact-driven, and prosecutors are largely in control of sentencing facts.

Nonetheless, the Department of Justice was intended to be only one among many voices at the rulemaking level, and the relevant conduct rules were designed to ensure that prosecutors didn't manipulate their control of the facts into absolute control of sentencing outcomes at the individual case level.

Trial judges, as we know, lost their former plenary authority over front-end sentencing. But appellate judges gained an unprecedented role in sentencing through the review function. And even trial judges really retained, at least in theory, substantial sentencing discretion through the unconstrained power to sentence within ranges, through the departure power, and through the hidden but, I would submit, very real power, de facto discretionary authority that they are given in the power to find sentencing facts. And, of course, the act affected other institutional players as well--the probation

officers and parole boards. But that's a story for another day.

Now, as you know, I've long been a vocal supporter of the guideline system and this Commission. However, the last year or so I've come, reluctantly, to the conclusion that the guideline system as now constituted has failed and needs to be substantially overhauled or replaced. Its principal substantive failures, in my view, are two:

First, the guidelines rulemaking power has become a one-way upward ratchet in which the sentences nominally required by the rules are raised easily and often and lowered only rarely and only with the greatest difficulty.

Second, there is an ever increasing disconnect between the sentences that the rules ostensibly require and the sentences actually imposed as all the front-line sentencing actors find ever more excuses and mechanisms for evading the rules.

The government in particular has increasingly treated the guidelines and other sentencing laws less as binding rules for determining actual sentences and more as a set of levers to induce cooperation and manage caseloads through plea bargaining.

The substantive failures of the guidelines system have occurred because the institutional balance the Sentencing Reform Act was supposed to create has broken down. The power that pre-guidelines was concentrated unduly in the hands of trial judges and parole boards has migrated in my view to an equally unbalanced concentration in the hands of prosecutors at the case level and an alliance of the Department of Justice with Congress at the policy level.

The day-to-day realities of the sentencing policymaking environment are, of course, too familiar to this group to require any elaboration from me. And, likewise, this audience knows quite well the degree to which prosecutors can exercise control over sentences in particular cases. It may be worth pausing, however, to analyze how the current situation evolved from the very different vision of the designers of the Sentencing Reform Act and the Commission. The three most important factors in my view are: complexity, a rigidity or mandatoriness, and, of course, money. And I want to spend a little bit of my time talking about complexity because we all talk about that a lot, for a variety of reasons, but I think even as much as we talk about it, complexity's role in all of this may be somewhat underappreciated.

Of course, lots of people have criticized the guidelines for being more complex than they need to be. But to the extent that those critics have claims the guidelines are too complicated to understand or apply, I think they're wrong.

Nonetheless, complexity is in my view the central flaw of the federal system, but for entirely different reasons. Complexity in combination with mandatoriness has two institutional effects. At the district or case level, complex, binding, fact-based rules transfer authority to prosecutors and away from everybody else in the system. The more different crimes that can be charged covering the same conduct, the more mandatory sentencing provisions based on drug quantity or weapon possession or second offender status the prosecutor can choose to charge or not charge, the more complex the guideline sentencing scheme is, and the more aggravators and mitigators might apply to any single class of case. The more fact-based decision points there are between case intake and sentence imposition, the greater direct control prosecutors will exercise. The fewer such decision points there are, the less direct control prosecutors exercise.

Now, at the policy and rulemaking level, complexity also has a bad effect. It provides a mechanism for both the Department of Justice and Congress to fiddle with sentences. The natural

inclination of all prosecutors is to seek tougher rules. That's just the way prosecutors tend to feel. And they know that they de facto have a power now to employ the tougher rules if they think it's inappropriate to do so.

Likewise, the political incentives for Congress are in the direction of being tough on crime, but in a very simple sentencing system, there are very few ways for either the Department of Justice or Congress to express their instincts. If there were six or ten levels on the offense table--six or ten offense levels on the table rather than 43, Congress could only push sentences up for the crime du jour so far and so often before exceeding the balance of the plainly ridiculous.

The guidelines' complexity, therefore, has been a primary course of the evolving institutional imbalance, the other obvious factor, of course, being money, the lack of budgetary constraints that have forced state legislators to reconsider some of their excess.

So where does all this leave us in the wake of Blakely? Sadly, I'm not really sure that I have much to offer that I haven't said or written before. Despite all the thrashing around in the last five months, the constitutional prognosis for the guidelines and options for what comes after looks pretty much the same to me as it did on June 25th. In sum, I suspect, with everyone else, that Booker is going to invalidate the guidelines, at least as now applied. The question with which the Court is wrestling is remedy. They basically only have two choices, really, broadly speaking, though there are lots of sub-possibilities: one of them, Blakelyize the guidelines; or, two, find that the guidelines are unseverable from the process of post-conviction judicial fact-finding, and through the whole darn thing out and, I suppose, convert the guidelines into some advisory or--essentially purely advisory system.

In my view, Blakelyization is a bad idea, even if Congress--even if the Court essentially requires us to do it. It's not only difficult and complex, but the rulemaking process, of which I have just been critical, that produces the bad policy outcomes would stay the same. The same incentive structures are in place. The same complexity exists. And, indeed, the institutional problems in my view have become more exacerbated because, in my view, a Blakelyized system gives even more authority to prosecutors than now exists and certainly almost takes the judges completely out of the sentencing game, because under a Blakelyized system operating the current guidelines, judges would have virtually no control whatsoever over any sentencing decision at all, except the ultimate sentence, the range at which the parties negotiated.

I think in answer to Commissioner O'Neill's question, I think you get more disparity than either the current system or the so-called Bowman fix. I think this is a system that would be worse in most every respect than the current one.

For reasons that have been enunciated by others, I think advisory guidelines are a bad thing. I think they would be an interesting short-term solution if we could get them for a year and a half or two years to see what judges will do. But I think that's politically unlikely, and long term, it's bad because, again, it creates an institutional imbalance. It not only would, as some people suggested earlier, revert to the situation that existed pre-guidelines, inasmuch as it would give judges very wide authority to sentence, but in a situation in which the guidelines are advisory, we've thrown out parole and there's now no back-end constraint on front-end judicial sentencing discretion.

I think the upside-down guideline suggestion is unseemly and unworkable. In my view, the so-called topless guidelines or, God help me, the Bowman fix if something has to be done in the near term remains the best and most attractive solution, not because it's great, but because it is the one thing that most closely replicates the system that we now have, a system which, as I've said, I'm no longer

confident is good enough to survive. But I also think that this so-called Bowman fix, the topless guidelines, is infinitely preferable to Blakelyization. It's preferable to advisory guidelines, and it's certainly preferable to what Paul Rosenzweig earlier suggested Congress might well do if left to its own devices.

I've probably taken more than my share of time, so I'm going to stop right here and leave for question time any cross-examination you may wish to engage in about the alleged Bowman fix.

JUDGE HINOJOSA: Mr. Felman?

MR. FELMAN: May I use my time to cross-examine Mr. Bowman?

[Laughter.]

MR. FELMAN: The last time I was here before you all, I thought that it would be my last and did not expect to be back here and certainly not this soon. And then Blakely was decided, and after about, I guess, a week of just being in a funk and thinking about the 16 years of my career down the toilet that I've used in specializing in this stuff and looked at the contract that said that I owed $70,000 if I didn't run a guidelines seminar next May, then I sort of, you know, settled down and I thought, you know, I really have some duty to myself to get back involved in this and, unfortunately for my partner, have done so with a vengeance. Now, I guess, I've been fortunate enough to be asked to chair the ABA's Sentencing Committee, and I'm a member of their Blakely Task Force with Professor Saltzburg, and it's been a real honor to get to know him and work with him, and Frank and Dave were kind enough to ask me to join their Constitution Project group. So now I've been doing Blakely.

I don't know whether anything I'm going to say today is my own original thought. I've talked to so many people about so many of these different issues, but I do think that among most everybody that I talked to, there is at least some general consensus on at least five things, and I think almost everybody who's testified, with the exception of Frank, has basically agreed with all five of these things. And I think Frank agrees with most of them.

Number one, the federal criminal justice system is better off with Sentencing Guidelines than without them. I guess there are some people who push for the advisory approach but not too many. I think most people feel like guidelines are better than no guidelines.

Number two, the only way to really have meaningful Sentencing Guidelines in the sense that you're cabining both the high and the low end after what we expect to be the Supreme Court's ruling, is to present additional factual issues to a jury. I don't know of any other way to do it and have what I call guidelines, and guidelines to me mean that there's both a top end and a low end. That's what guidelines mean to me. A system in which there's only a low end looks like a really complicated, cumbersome system of mandatory minimums to me. I don't call that guidelines.

I think the only way to have guidelines after what the Supreme Court is about to tell us is to pick some facts and put them to a jury and to have the result of that system yield some sentencing range.

The third point about which I think there's basic consensus is that the present Sentencing Guidelines in their existing form are unduly complex for that purpose. They were never written for that purpose, and, sure, you might be able to make it work. You might be able to put all that stuff to a jury, and I'm sure we probably could find some way to do it if we had to. But I think the general consensus is that that really isn't how they were intended and we really need to simplify them tremendously if we're going to start putting things to juries.

Number four is, I guess, related to that, which is that you need to reduce the number of factors

that cause the range to be determined. You need to probably reduce dramatically the number of offense levels. It seems to me unnecessary to have a system that is so complex that it allows juries to slice culpability 43 different ways. You know, I ran some numbers and--in any event, there needs to be a reduction in the number of offense levels, the number of factors that we're going to put to a jury.

Number five is that the result of that simplification and the reduction in offense levels is that unless you want to have gaps between the ranges, the ranges need to be widened. And I ran some numbers, and I put them in at 50 percent. Let's say we change it from 25 percent to 50 percent. If you eliminate any overlap in the ranges, you can get it down from 43 levels to 10. And, you know, I guess my hope would be that the folks on the Hill would trust judges to sentence within a 50-percent range. They don't have to. I mean, what I'm saying doesn't require that. You could tell the folks, Listen, we won't change it one bit, we'll keep the 25-percent rule and we'll have gaps between the ranges. And if they really feel that strongly that judges can't be trusted, fine, you know, nothing I'm saying is inconsistent with keeping judicial discretion exactly where it is right now. It just seems to me like it would be preferable to not have gaps in the ranges, and the only way to simplify and not have gaps is to make the ranges a little bigger. And you don't have to make them a lot bigger to make it work.

So those are five points of what I think to be general consensus out there among most of the people that I talk to.

MR. BOWMAN: What is it that we disagree about?

MR. FELMAN: I think that you believe that that is less preferable to not having--you know, to the top--I think I heard you say that you prefer the topless guidelines.

MR. BOWMAN: No, I--

MR. FELMAN: Okay.

MR. BOWMAN: Long term I agree with you 100 percent.

MR. FELMAN: Well, I'm glad you said that because I think that that's important. And I think that that means that now everybody agrees that the long-term solution is just that which I have generally described, which is not my proposal, and I don't even remember whether I thought of it or not.

COMMISSIONER SESSIONS: Shall we call it the Bowman long-term proposal?

MR. FELMAN: I would prefer that, yes.

MR. BOWMAN: Please don't.

[Laughter.]

MR. FELMAN: Now, I was intrigued yesterday by the discussion, though, because I had assumed when I read Scalia's opinion that there would be elements--that by definition if you're talking about something that has to be put to a jury and proved beyond a reasonable doubt to them, you know, that that would have to be an element. And I really have been struggling with that. Some of the judges that I've talked to have said, listen, some of this stuff is going to be kind of prejudicial when you put it in the indictment and you're going to have to bifurcate and what-not. And I worry about that. I don't know all those answers yet. It does seem to me that just because it goes in the indictment doesn't mean the jury has to see it. It can be redacted. That's not the purpose of a grand jury's indictment. It's just to give defendants notice and to make sure that a grand jury has, in fact, found probable cause.

My own sense is that bifurcation would not really need to be routine. But I don't know. I worry about that. I think the judges might have a better sense of that. I mean, defendants are put in awkward situations frequently as it is. I mean, if you're charged with first-degree murder and your defense is "I wasn't there and I didn't shoot him," it's pretty awkward to argue in the alternative that, "If

I did, I didn't mean to," or "I did it in self-defense."

I mean, so, you know, the existing situation can sometimes cause those problems, and so given that the alternative is you get the stat max for no reason, I'd rather go ahead and get prejudiced by having some stuff, you know, put to the jury. But, anyway, I worry about that issue about elements. I probably come down thinking they need to be elements, which means that I think I would have answered the question asked yesterday a little differently. I don't think you can plead guilty to some elements and not all of them. I think once you call them elements, you're talking about now grades of offense. And if I'm charged with first-degree murder, I don't get to go in and plead guilty to manslaughter and call the case over. You know, the government's entitled to prove their case.

I am troubled by it. I'm not clear. Last night I was rereading Scalia's opinion in Blakely, and he actually says even a defendant who stands trial may consent to judicial fact-finding as to sentence enhancements which may well be in his interest if relevant evidence would prejudice him at trial. And that baffled me because every other part of his opinion seemed so logically consistent that they were all elements, and this isn't sentencing factors, you dummies, this is elements of the crime. And you've violated the Sixth Amendment right by moving him out of the elements and into sentencing factors. But there's a line in his opinion that talks about somebody could conceivably plead guilty to the elements and still have judicial fact-finding--it's not clear to me. And it may be that once Booker and Fanfan we'll get some additional guidance. But I have been traveling on the assumption that there would be elements, and I am troubled that--and I've talked to a number of people about this. There doesn't seem to be any legal precedent for some animal that has to be proved beyond a reasonable doubt to a jury, but does not come with the other protections that are included in the Fifth and Sixth Amendments. And I think we're really traveling on some pretty thin ice if we try to create that new animal called a sentencing factor, and I think it's going to invite a lot of litigation on whether we're doing an end run around these other parts of the Constitution.

Unfortunately for me, the conclusion that they're elements leads me to conclude that you can't write them. That's my reading of Mistretta. Now, I hope I'm wrong because when it comes to sentencing policy, it's as simple as ABC: Anybody but Congress. But I think that--I don't think you can write elements. I think that's what Mistretta stands for. So that's why I call it codified. I still believe that if we're going to add things that have to go to the jury, we've got to call them elements, and they've got to be written by the Congress.

And so, you know, I do think it's important to make the point, though, that while the Congress was doing that, it's not all bad. I mean, this is an opportunity to basically say we don't need mandatory minimums anymore. There would be no need for any more mandatory minimums. You would be able to look at the particular drug quantity or whatever--I hate--you know, I think a lot of people think those severity levels in some cases are too high, but nothing I'm saying today is about severity. I want to keep everything I'm saying as apolitical as possible. You guys can fill in the numbers wherever you want to at the end of the day. I'm just outvoted on that. But you could tell the Congress, look, there's just no more need for a mandatory minimum because it's going to be inherent in the jury's verdict.

At the same time, you could address things like the crack/powder disparity. I mean, there wouldn't be any reason why at that opportunity you could fix some things while you're at it, and things that are bad wrong that everybody knows. And so it's not all bad that we have to go back to Congress and have them enact this new system of additional elements to go to a jury.

I want to stress, though, that this is not jury sentencing. I think that really confuses the issue.

Juries are not going to be told what sentence follows from the facts that they find. What we're really not--and it really isn't about sentencing. I think properly understood, what we're really saying here is that we are adding elements of the offense, that we're redefining the crime, and that sentencing is what's going to happen afterwards on the basis of the elements of these new offenses that are found to be either true or not true by a jury. I think that's what Scalia is telling us. You guys have taken elements of the offense and masqueraded them as sentencing factors, and you need to put them back into the elements.

And so it doesn't change anything about the traditional role of judges and juries. It just makes sure that in order to have a fact that causes a change in punishment, it's got to be proved that it's an element. So I don't think it changes anything about the role of juries traditionally.

I need to address what's wrong with the so-called Bowman proposal or topless guidelines, because that is the other alternative, I think, in the short term, and even potentially in the long--

MR. BOWMAN: Oh, leave me alone, would you?

MR. FELMAN: Okay. Topless guidelines, then. Frank has already disavowed "the Bowman proposal," at least as a long-term solution.

Why it shouldn't be done even in the short term? First of all is obviously the--I can't replicate all the discussion of the 414 opinion in Harris and what Justice Breyer may do and what Justice Kennedy may do, but we're clearly treading on some potentially unconstitutional ground here. But basically it's just bad policy, it seems to me. I was stunned by the question of why anybody would think that this is a one-way system. Imagine if I stood before you and said how about I propose--and forget about Blakely. How about I propose a new system where we'll keep the top of all the ranges where they are and we'll get rid of the bottoms, and so judges will now be able to go as low as they want to, as long as they don't go above a certain amount?

I mean, you would think that's a one-way-looking proposal. Well, I'm sorry, you know, if you're talking about only taking off the tops and leaving the bottoms there, it sure looks one way to me. It will increase disparity in the long run. There are judges in my district who will hammer you if you go to trial, and they're going to make use of that. The government is going to make use of that. We just talked about how they already have so many tools in their arsenal. Now I'm going to go to a prosecutor that's going to say, "If you don't plead, I'm going to tell the judge to give you 20 years." You know, of course, that's going to happen. I mean, I don't know how often. It's going to vary judge by judge. Some of my judges will continue to give the low end of the range. Others will not. And sometimes it will depend on what they had for breakfast, and you'll be back to the old system.

I mean, how could you possibly say that supports the views of the Sentencing Reform Act? The only way you could do that is if you did a search and replace on the whole legislation and replaced the word "disparity" with the word "lenience," because all it would be about now is avoiding undue leniency. That would be the only objective of the system. The Sentencing Commission would just be charged with the task of identifying unduly lenient sentences and fixing them because the top end would be out of your control and nobody would care, essentially. I mean, it sends a message that we really don't care about unduly severe sentences.

In the short term it may well be that judges would tend to continue to sentence where they are because they're used to it. But think about where we'll be 10 years from now or 20 years from now if this is the system, when judges come in who never sentenced under the guidelines. And what do you think will occur? I mean, there's no doubt that that new range is going to be the rage, and some judges

are going to feel like the middle of that range is what's fair and that's the middle of the range.

The bottom line, it strike me that it is essentially a Band-aid that is--it's a desperate effort to stick a fix on an old system that has been gutted. It is not the best system that this country can have, and we owe it to the people of this country and to the world to have the best system for federal sentencing that we can devise, and that is not it. And so we need to step back and try to do the best we can given the constraints that the Supreme Court has just handed us.

There are no interim solutions because of the ex post facto clause. It's crystal clear to me. There are two ways the court can rule. The court can either throw them out as a whole--let's say that the guidelines are gone, so tomorrow I'm entitled to a judge who can give me probation. You enact Bowman the next day, it is just dead on arrival. There's no way that it doesn't violate ex post facto because now I've got a judge who can't give me probation anymore. So there's no way that that interim solution is going to fix the cases that are in the pipeline.

But if you think that it's an interim solution and you think a year later or two years later you guys are going to come along with this new Blakelyized system, here's what will happen. It will now be the time when the cases covered by the topless guidelines are there before the sentencing court, and the new system will be here. And I would hope the new system would be such that it will be the one used on the date of sentencing unless it violates ex post facto.

So we will then get the pleasure of running the old guidelines and the new guidelines in order to see which is better or which is worse for the defendant. Imagine the complexity. And for what? All in order to have an interim solution that may itself by unconstitutional. If the Court only strikes him down as applied, it is equally dead or arrival from a ex post facto standard, because now I am entitled to no more than the top end of the range because, you know, they're only unconstitutional as applied. It doesn't mean that they're thrown out, and you can try and apply them in a constitutional manner. There's no way you can give me more than the top of the old range.

And so it's dead on arrival as an interim solution because of ex post facto concerns, even if it did survive Harris.

The bottom line is that I think that you all are already at work and have the staff already at work on ways to try to identify the core critical factors, and I can talk some more about the nuts and bolts of how this would work if you have the time in the question and answer session. But you're already at work and you already have your staff at work on trying to figure out how it would work to Blakelyize the guidelines. You need to be able to tell the people on the Hill that this can be done quickly. Everybody has said that. I don't know how quickly. I don't know how much they give you, but I would hope that if they understand the ex post facto problems, if they understand the Harris problems, that they would give you a year or nine months or something, but I think if you're ready to--you know, you've got a window here because Congress is going to leave before the Court rules, they won't be back until January, you've got a few more months to keep working on something so that you'll have something ready to go, and you can tell Congress, "Listen, give us six months, give us nine months," and we'll have a fix for you. And I think that's your best hope, to let them give you time to come up with the best system we can come up with.

Thank you.

JUDGE HINOJOSA: I'm going to break my own rule. Thank you, Mr. Felman, by asking the question. What breakfast food should I avoid that would make me--

MR. FELMAN: Well, I don't know. Mike Goldsmith did a great job of that, you

know, Froot Loops.

JUDGE HINOJOSA: Professor Osler.

MR. OSLER: Thank you.

More than anything, what I am is a teacher--Baylor's that way--and last spring I was teaching--

JUDGE HINOJOSA: Well, you do a very good job of it at Baylor.

MR. OSLER: Thank you, sir.

Last spring I was teaching sentencing, and I had a very conservative group of students. Almost all of them want to become ex-prosecutors. Talking about the guidelines, talking about relevant conduct, and specifically going over a case in which someone who is caught with less than five grams of crack was sentenced to 20 years, based on relevant conduct included in a PSI coming from a co-defendant. One of my students, one of these future prosecutors, banged his hand on the table, and he said, "That's not fair." He immediately turned red in the face and looked like he wanted to run out of the room for having made that outburst, but I patiently explained Apprendi and chalked it up to the naivete of youth.

But of course, somewhere, roughly the same time, Justice Scalia was coming to the same conclusion. And we now do have to take that sense and the right to a jury trial seriously as a goal of structuring a sentencing system.

Now, if you look at page 1 of my written testimony, I've got a very simple grid there, and it accommodates four goals of structuring a sentencing system, one of which is this Blakely idea, that improving certain things, there's the right to the jury trial. Offsetting that, and in tension with that, is the goal of efficiency. And there's a second axis from the east to the west between uniformity and discretion, and of course, there's tension between those as well. As we move towards discretion, we move away from uniformity, and vice versa.

Now, I picked these four, not because they're the only goals in structuring the sentencing system. In fact, I've left out the one that I focused on the most in my own work, which is proportionality. I picked these four because each is backed by a force which has the ability to impose its will on the system. The right to a jury trial, I think is going to be backed by the Supreme Court. We don't have a choice about that once Booker and Fanfan come down. They're going to enforce that through their rulings.

Efficiency is going to be demanded by budgets. Having read what Judge King has said recently about the effect of budget cuts, we must take that seriously, and those two are offsetting.

Uniformity is a goal, has been and will be pursued by Congress. Many other speakers have addressed that, and I agree with them. And they'll do that through legislation.

Finally, the discretion of trial courts is backed by the trial courts themselves. Very often they pursue this expanding their own discretion through the disparate ways in which downward departures are used, very disparate bases for findings on sentencing issues, the willingness to accommodate relevant conduct.

What we need is a balanced solution, something that's going to be in the middle of that graph. Otherwise, it's going to be undermined by one of those powerful forces. And like I said, what I'm arguing for here doesn't address probably in the long term what's most important to me. But if we want a system--to borrow a phrase--that's fair and balanced, probably first we have to come up with something that's balanced, and then when there's a lull in the warfare, focus on those incremental

changes that Doug Berman talked about to make it more fair.

Now, what I'm proposing is what I've called the 3X idea, and it has four components. First of all, tripling the size of the current guideline ranges from the bottom of the guideline range.

Second, strike from the guidelines what is offensive in Blakely, and presumably in Booker and Fanfan. That would be upward departures. There may be an exception to that which I'll talk about in a minute. Relevant conduct, cross-references that result in higher sentences, and upward adjustments. Now, each of these could be kept as advisory to operate within that expanded guideline range, and allowing judges discretion to employ them.

The third change that would help to make this work would be to simplify 2D1.1 and 2B1.1, and consolidating them into three levels, three sentencing levels. It would be a natural in 2D1.1 to have those correlate to the levels that are already included in 21 USC 841. You'd be able to do that because now you'd have the broader ranges so you wouldn't have gaps between them.

The fourth element, which is really an option, would be if there seemed the need to accommodate the extraordinary case. You could maintain the ability to have upward departures with jury fact findings. The advantages to this proposal are primarily two. Number one, it's pretty simple. It requires little legislative change. The primary change would be the tripling of the guidelines and the amendment that would be necessary to 18 USC 944. But if you think about it, what are you asking the Congress for? We want to expand the guidelines upward. They would probably be amenable to that.

What is the tradeoff? And there is a tradeoff. The tradeoff is that the truly unfair uses of relevant conduct that would take it above that tripled range would no longer be available to prosecutors. And I think most of us would be comfortable with that. Judge Sullivan yesterday, I think appropriately emphasized the importance of the Commission as an independent body of experts that's insulated to some degree from the constant ratcheting upward that occurs in Congress, when it deals with sentences with specificity. Under this proposal, it's this Commission that would do almost all of the work, instead of, as with the codification proposal, put it in the hands of Congress, which is taking a risk in several ways.

Now, you can use this graph that I've offered to analyze some of the other proposals as well, and they all end up in different quadrants. If you think about the pre Blakely system, and you were to put a dot on that graph, it would be at the bottom towards efficiency, and obviously, it didn't accommodate the rights to a jury trial that Justice Scalia believes are warranted. Professor Bowman's proposal, which I'm still going to call it, if you are to graph that, or advisory guidelines, it would be on the far right towards discretion at the expense of uniformity. Jury determinations, and to some degree the codified proposal, would be at the top towards the right to a jury trial, to the detriment of efficiency in sentencing. And mandatory minimums, something that no one in either of these two days has spoken in favor of that I recall, would be at the far left. All those are in balance proposals. And there's a strong force that's going to resist it, that's going to lead to more instability in federal sentencing.

If we favor one of these goals over another in one of those ways, a voice is going to cry out, "That's not fair," but this time it's not going to be a second-year law student.

Thank you.

JUDGE HINOJOSA: Thank you, sir.

Open it up for questions. Vice Chair Steer.

COMMISSIONER STEER: I guess I'd like to ask Professor Bowman a question. You didn't hear the testimony yesterday, but I think the near to consensus view in talking about your

proposal with the offense guidelines and the ex post facto clause, was that it would raise--that there would be ex post facto obstacles to its immediate implementation. I wondered if you would like to have the opportunity to comment on do you concede that is true?

MR. BOWMAN: I don't think so. Although the answer depends largely on the point in time to which the--let's assume that the Court, in Booker and Fanfan, finds the guidelines unconstitutional as now applied. But does not--so long as they don't find them retroactive back to--unconstitutional retroactive back to say Apprendi, then I think the ex post facto analysis change is pretty dramatic. And the reason is that. contrary to what Jim was saying just a moment ago, the ex post facto clause basically simply says that in effect a new law can't adversely affect you in comparison to the new that was in effect at the time you committed the offense.

But if you committed the offense prior to the date at which Booker becomes effective, then the law that is applicable--and Booker doesn't make it retroactive very far--then the comparison is not between no guidelines at all and the new topless guidelines. The comparison is between the guidelines to which you were legally subject at the time you committed the offense, and the topless guidelines, and in effect there, so long as--I think Jim's right in this respect--the ex post facto clause would have the effect of essentially precluding a judge from sentencing you to, even under the allegedly topless guidelines, to a sentence higher than the top of the old ones. But from the point of view of ex post facto analysis, as long as a judge doesn't do that--he's not going to because he understands the ex post facto implications--I mean the comparison is essentially apples to apples. So there's no adverse effect under those circumstances.

Now, there's going to be a window of cases in which between whatever point the new Booker rule becomes effective, forward to the point at which you adopt the topless guidelines, there's going to be a window of cases where, yeah, I think you've got an ex post facto problem.

But I pointed this whole issue out back in July. One of the things I said at the time was, look, if you adopt this proposal now, that window is very narrow. It's a matter of a couple of days or weeks. The longer you wait, the bigger the window gets, the bigger the interim group of cases get where you really do have a legitimate ex post facto problem, so do it now. Of course, that advice was not taken. But I think the same is true. I mean the longer you wait, the bigger your ex post facto problem gets. The sooner somebody acts, if the people decided they want to do that, the smaller the number of cases for which there's a genuine ex post facto problem.

So I really think that, you know, the confident declaration that there's a huge ex post facto problem here that governs all the cases or would affect all the cases that involve conduct prior to the decision in Booker is just wrong, but there is a window in which there would be an ex post facto problem.

JUDGE HINOJOSA: Commissioner Horowitz.

COMMISSIONER HOROWITZ: I have a general question for the panel, but I just want to clarify something with Professor Bowman.

The indication that you support long term Jim Felman's proposal, or something along those lines, I just want to clarify if that's the case why that's the case, give you an opportunity to explain that.

MR. BOWMAN: Thank you. I mean it's really the reason why I went through the whole discourses at the beginning of my prepared remarks about problems that I see with the existing system. I mean as I've said, I reluctantly, after years as a vocal supporter of the guidelines, come to the

conclusion that the system does not, as we have it, does not work.

The proposal that for better or worse now bears my name has the defects of its qualities, as they say. By which I mean, its qualities are that it replicates the existing system almost exactly. The problem I see with that--and I think there are reasons for trying to do that in the short term, and I think Paul Rosenzweig explained them as well or better than I can. But once you recognize, as at least I do, that the system should not be maintained indefinitely, then I think you need to say, okay, where do we go? And I think the answer is, you know, if not in every detail, substantially the same outlines that Jim had announced.

COMMISSIONER HOROWITZ: Let me ask the more broader then substantive question to any of the panelists. But since it bears your name for better or worse, if you want to jump in.

The question I asked the last panel about the standard of review for a sentence that would be within this new range, is there a standard that could be fashioned that would allow any meaningful appellate review? Part one. Part two is, should that standard be the same if the judge went below the bottom of the range?

MR. BOWMAN: I think that's the key question. I mean, assuming, as I sort of do, that there's at least some likelihood that this proposal, by whatever name, will become the subject of legislative discussion. It seems to me that one of the principal issues for debate is exactly this one, the standard of review of sentences within the range, the newly-expanded range. And we wrestled with various possibilities. One possibility would be to try to, in essence, replicate, you know, the current ceiling, by saying, well, on the one hand saying you get an enhanced right or a right of appellate review that is triggered only if a judge were to impose a sentence, say, 25 percent higher than the minimum. I think after we kicked that around, I think most people agree that to do that, to put any number on it, and to say that a sentence higher than that number or higher than that percentage above the minimum triggers an appellate right probably violates Blakely, and therefore, you probably constitutionally can't do it.

That leaves, I think, one option, and that is to say that a defendant would have a right of review of any sentence imposed above the minimum of the newly-expanded range. I think that you could give a defendant a right of review of any sentence in that range from one day higher than the minimum all the way up to the maximum, and probably on an abuse of discretion standard. Now, I know there are those who have argued, well, you can't do that because, you know, any meaningful review, whether you call it abuse of discretion or otherwise, requires the Court of Appeals to make some determinations about something that the judge did, you know, what fact did the judge find? What did he rely upon? What value did he assign that fact, or constellation of factors in setting a sentence?

And I think if you take the Blakely opinion to at least its logical, or in my view, somewhat illogical conclusion, you would probably say, you can't even do that, that's unconstitutional.

But first of all, of course, I don't much care for the Blakely opinion for a lot of reasons. One of them is that its logical implication is precisely that absurd result, and I don't think the Court will go there. I think that if you were to say that a defendant has a right of appeal on abuse discretion for any sentence above the minimum up to the maximum, there's just no way that the Supreme Court is going to say, no, you can't do that. There's just no way that a Court of Appeals can review any decision within that range.

Now, I think the practical question becomes--and it's one I think that was raised by

Nancy King in the last panel--is, is that a meaningful standard of review? Are you actually going to get anything out of that? I think it's meaningful in two respects. It's meaningful, first of all, inasmuch as the existence of any possibility of review will tend to drive sentences to the bottom of the range, because as a sentencing judge, if you know--if you sentence Mr. X at the bottom of the range, you've just eliminated a ground for appeal. However tenuous or impossible a successful appeal is likely to be, you've eliminated one ground for appeal.

That's an incentive to go to the bottom of the range, and I think in fact for that reason, if no other, if you were to adopt topless guidelines with a standard of review of the kind I've talked about, in fact, sentences aren't going to go up, sentences will go down, because most of the sentences now in the middle of the range will be driven to the bottom. Not all of them; there will be outliers. But by and large--and I think the Justice Department, and I'm not asking Ms. Rhodes to comment on this--but certainly folks that I've talked to in DOJ I think broadly agree with that, and that's their assessment of what's going to happen. If you do this, sentences will go down on average.

MR. YELLEN: I don't agree with what Frank's saying. I think it's very dangerous to predict that judges are going to move their sentences to avoid appeals in this environment. I think there's a real risk that any standard of appellate review with any meaning at all would be unconstitutional under this logic. I don't know what abuse of discretion would possibly mean in terms of a judge saying, you know, in my view, this is the kind of offense that warrants a sentence near the statutory maximum. Is that an abuse of discretion?

I think that would result in a dramatic increase over time in regional disparities, because in the same circuits where judges over time would be more likely to go farther above the point that this proposal would get at, those would be the same circuits where those circuit courts would be very likely to find almost anything to be an abuse of discretion. And similarly in other circuits, virtually all the sentences would be right at or about the lowest point. So I think it's of suspect constitutionality, and I think it's not really full of great content anyway.

Then the last point I want to make on this is--I know it's been commented on before--I actually think it's quite likely that Harris will be overturned, not as part of Booker and Fanfan itself, but in a subsequent decision.

I don't usually go in for guessing about the behavior of individual Justices, but it's not a lot of guesswork to reread Justice Breyer's concurrence in Harris, and see that as mostly a vote against Apprendi and the damage he saw that as doing to the business of the sentencing guidelines, and less a notion that there was some logical limit, logical distinction between minimums and maximums, so I think Harris is likely to fall. And then as Frank has acknowledged, if Harris falls, then this proposal is not useful anyway.

JUDGE HINOJOSA: We have time for two quick questions. Vice Chair Castillo and then Commissioner O'Neill.

COMMISSIONER CASTILLO: I'd like to thank all the panelists for their testimony. It's been helpful. My question is directed to Professor Bowman. I'm going to ask it to you in a leading way and you're free to answer it in a nonleading way. Should I take from your testimony here that you would be disappointed if your proposal, which you've identified as a temporary one, for political reasons somehow becomes the permanent solution that Congress adopts?

MR. BOWMAN: Yes. And I think that--to be honest, I think most of the opposition to it, heartfelt though it is, is based on the fear that that's precisely what would happen. I mean I

understand the Harris concern. I actually, you know, if I want to psychoanalyze Justice Breyer, I psychoanalyze him another way, and that is, I don't think he likes what happened in Blakely because--not only for the narrow parochial reason that it endangers his baby, but because he understands better than anybody else on that Court that Blakely, by doing what it's done, endangers the entire project of structured sentencing reform throughout the country. He may not be able to reverse Blakely, because he probably doesn't got the votes, but what I think he will understand, because he's a sophisticated person who understands this better than anyone else on the Court, is that Blakely takes away one of the tools of structured sentencing. If you knock out Harris, you've essentially--you've knocked out the other possible tool for structuring sentencing, and therefore, much of structured sentencing architecture, both in the federal government and in the states become darn near impossible.

Now, I suspect that his more likely response is to say, you know, I don't like this very much. It means that we've got this oddity in federal constitutional law for the moment, as I've characterized it before, we've got this boulder that we've got to build the house around, but we can still build houses. It will be a funny house, but it's still a house. If I knock out Harris, then, you know, another important tool that we use in structured sentencing is gone and I'm not sure we can build houses any more.

So I mean in answer to your basic question, I would be sad to see the thing become permanent, because I think federal sentencing needs a major overhaul along the lines that virtually everybody's talked about. It needs to be simpler, okay? The ranges need to be broader, and more importantly, it needs to be simpler because complexity causes institutional imbalance. It has to be simpler in order for all of the institutions of federal sentencing to work better together. And I agree with that 100 percent.

So, you know, I would not like to see this proposal that bears my name become permanent, but I do think Paul Rosenzweig may well be right, that it's the best thing that we can get in the near term. What I would like to see ideally is a sunsetted provision, and I think two years is right. I think Paul's absolutely right about that. I think you need at least two years. I've made that point on the Hill, not necessarily to any effect yet, but that's what I'd like to see.

JUDGE HINOJOSA: Commissioner O'Neill, a question that will require a short response.

[Laughter.]

COMMISSIONER O'NEILL: It's a compound question though, so it requires two short responses. And that is, if the proposal, do you think--and I'll open this up to each member of the panel--do you think that the proposal, whose name shall not be uttered, is going to result in greater disparity or less disparity, than a proposal in which we simply collapse the tables, have subsets, essentially new ranges of sentencing within the statutory minimums and maximum?

Secondarily, do you think the Commission has the authority to change the ranges, to create ranges that are within the statutory minimum and maximum, we can do that without any sort of legislative authority?

MR. FELMAN: The first one is obvious to me, and you're obviously going to have much greater disparity under this topless guideline system because judges can sentence wherever they want to within a huge range. If you do what we're talking about doing by having juries find some additional facts in order to yield a sentencing range, as opposed to just, you know, one half of a range, that will be much less disparity. I don't think that's a closed question at all.

I'll let Frank answer the second.

MR. BOWMAN: I disagree, but for perhaps different reasons. I simply--despite what everybody is saying, at least in the short term, it's simply not going to happen that the federal judges are going to start sentencing people at the top of the range in large numbers. And the reason why is because, as everyone here knows, federal judges, as a class at least, think sentences are generally too high. Okay? They're not as a group going to start sentencing people to the top. There may be a few. There may even be districts in which it's, you know, more common than others. But the reason that people don't like the Federal Sentencing Guidelines, the reason that most of the people in this room want reform, is because they know that the guidelines constrain judges as a class to sentence higher than if they were given their choice they generally would. And to suggest that somehow that these same judges are now going to start sentencing everybody at the top is just nonsense.

Now, I agree that there may be judges in some places who may vary from that norm, and I think that's a concern. But, you know, there's a tremendous internal inconsistency in the historical positions of the people who are now saying the judges are going to go wildly off the reservation, because they've been saying exactly the opposite for a very long time.

MR. OSLER: You know, there's one thing that's flying under the radar in the discussion about disparity, and that's relevant conduct. Usually when we look at disparity numbers, it's after the application of relevant conduct. The way relevant conduct is applied varies a lot.

I was a prosecutor in Detroit, defense attorney in Texas, which is bad for self-esteem--I should have done it the other way around.

[Laughter.]

MR. OSLER: But I can tell you, relevant conduct practices vary greatly, and one of the problems with the Bowman Proposal, it's going to allow what some of us see as abuses of relevant conduct to continue.

COMMISSIONER STEER: That assume no changes in the rules.

MR. YELLEN: Could I give a 30-second response to the second part of your question? I think you do have the authority to make some of the changes you're talking about without statutory change. I've thought this for a long time. I think you have the authority to make the guidelines call for--to give judges a range of points that they could add or subtract for a particular factor, whether it's quantity or role in the offense. I think that would have the result of giving judges more discretion in, say, role, you know, if someone's a leader or a big leader. You could say, if someone's a leader you can increase one to three levels. If they're a big leader you could increase three to six levels. Same on the downside. I don't think that violates the 25 percent rule.

JUDGE HINOJOSA: Thank you all very much, and I'm going to break the rule here.

Professor Osler, I have one final question for you. By the way you described your plan, is it the Fox News Channel?

MR. OSLER: I prefer to avoid that.

[Laughter.]

JUDGE HINOJOSA: Thank you all very much, and thank you for your time.