

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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FRIDAY, OCTOBER 16, 2009

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The Commission convened in Room 540 at
624 Ninth Street, Northwest, Washington, D.C., at
9:30 a.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman (via telephone)

ABIGAIL THERNSTROM, Vice Chairman

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

ARLAN D. MELENDEZ, Commissioner (via telephone)

ASHLEY L. TAYLOR, JR., Commissioner

(via telephone)

MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC

CHRISTOPHER BYRNES

DEMITRIA DEAS

PAMELA A. DUNSTON, Chief, ASCD

MAHA JWEIED

ROBERT LERNER, Asst. Staff Director for OCRE

EMMA MONROIG, Solicitor

LENORE OBSTROWSKY

KIMBERLY TOLHURST

AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

TIM FAY

DOMINIQUE LUDVIGSON

JOHN MARTIN

ALISON SCHMAUCH

RICHARD SCHMECHEL

KIMBERLY SCHULD

TABLE OF CONTENTS

	PAGE
I. Approval of Agenda	4
II. Program Planning	11
-- National Conference Subcommittee Issues	11
-- Update on Status of 2010 Enforcement Report	28
-- Approval of First Quarter FY 2010 Briefing Report Topic	51
-- Update on Status of Briefing Reports; Approval of Commissioner Deadlines for Consideration of Briefing Reports	78
-- Approval of Calendar of 2010 Commission Meetings	105
-- Discussion of Title IX Project	109
III. State Advisory Committee Issues	72
IV. Approval of Minutes of September 3, September 11, and September 24, 2009 Meetings	--
V. Staff Director's Report	--
VI. Adjourn	129

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:33 a.m.)

3 CHAIRMAN REYNOLDS: This is a meeting of
4 the U.S. Commission on Civil Rights.

5 It is 9:33 a.m., Eastern Standard Time, on
6 October 16, 2009.

7 The meeting is being held at 624 9th
8 Street, N.W., Room 540, in Washington, D.C.

9 Commissioners Thernstrom, Yaki, Heriot,
10 and Gaziano are present in person, with Commissioners
11 Melendez, Taylor, and myself participating by
12 telephone.

13 To assist the Court Reporter and
14 facilitate our discussion, I would ask that all
15 Commissioners participating by phone identify
16 themselves by name before they begin their comments.

17 I. APPROVAL OF AGENDA

18 CHAIRMAN REYNOLDS: The first item on the
19 agenda is the Approval of the Minutes. I move that we
20 approve the minutes. Is there a second?

21 STAFF DIRECTOR DANNENFELSER: Mr.
22 Chairman, I think you have to approve the agenda.

23 CHAIRMAN REYNOLDS: Oh, I'm sorry. I
24 meant to say "agenda." Is there a second to approve
25 the agenda?

1 COMMISSIONER GAZIANO: Second. Gaziano
2 here.

3 CHAIRMAN REYNOLDS: Okay. I hope -- well,
4 has Dominique distributed the proposed amendment?

5 STAFF DIRECTOR DANNENFELSER: She is just
6 getting it together here.

7 VICE CHAIR THERNSTROM: Yes, and I have a
8 proposed amendment to the agenda.

9 CHAIRMAN REYNOLDS: Okay.

10 VICE CHAIR THERNSTROM: This is
11 Commissioner Thernstrom.

12 CHAIRMAN REYNOLDS: Okay. I am going to
13 walk through some proposed changes. I would like to
14 move Program Planning as numeral -- Roman numeral two
15 on the agenda, followed by the State Advisory
16 Committee issues as Roman numeral three. Under this
17 motion, we would have no announcements, and the
18 Minutes and the Staff Director's report will appear as
19 Items IV and V on the agenda -- on the agenda,
20 respectively.

21 Under Program Planning, I would like to
22 move discussion of the National Conference
23 Subcommittee issues to the first bullet. I would also
24 like to add a discussion of the Title IX project as
25 the last bullet under Program -- under the Program

1 Planning section.

2 Is there a second? Pretty please.

3 COMMISSIONER HERIOT: Second.

4 COMMISSIONER GAZIANO: Second. But would
5 you mind repeating -- oh, I'm sorry, Gail -- I suppose
6 Gail beat me to the punch.

7 CHAIRMAN REYNOLDS: Not at all. Is
8 Dominique in the process of distributing the proposed
9 amendment?

10 COMMISSIONER GAZIANO: She's out of the
11 room. I presume she is obtaining them --

12 CHAIRMAN REYNOLDS: Okay.

13 COMMISSIONER GAZIANO: -- to pass out.

14 CHAIRMAN REYNOLDS: All right. Well, let
15 me walk you through it once again. The first change
16 would entail moving Program Planning to Roman numeral
17 two on the agenda. And it would be followed by the
18 State Advisory Issues as Roman numeral three. We
19 would scratch the Announcements, and the Minutes and
20 the Staff Director's report would appear as Items IV
21 and V on the agenda, respectively.

22 And under Program Planning, we would move
23 the National Conference Subcommittee issues to the
24 first bullet. And then, finally, we would add under
25 Program Planning another bullet, and that would be for

1 a discussion of the Title IX project.

2 So if you -- I mean, it would go Program
3 Planning, and under Program Planning you would have --
4 the first bullet would be the National Conference
5 Subcommittee issues, followed by an update on the
6 status of the 2010 enforcement report, followed by
7 approval of the first quarter 2010 briefing report
8 topic, followed by an update on the status of briefing
9 reports and approval of Commissioner deadline for
10 consideration of briefing reports, followed by
11 approval of the calendar for 2010 for Commission
12 meetings, and then we've added a bullet, discussion of
13 the Title IX project.

14 And then, the next Roman numeral, Roman
15 numeral three, would be the State Advisory Committee
16 issues. Then, the approval of the minutes, then the
17 Staff Director's report, and then we go home.

18 COMMISSIONER GAZIANO: Sounds great.

19 CHAIRMAN REYNOLDS: Comments?

20 COMMISSIONER YAKI: I have a question.

21 This is Commissioner Yaki. Mr. Chair, I was just
22 wondering, how does the Title IX topic relate to this
23 agenda, insofar as we were ranking briefing report
24 topics and -- in other words, why are we bringing this
25 out separately?

1 COMMISSIONER GAZIANO: Title IX is the one
2 we already approved for 2010.

3 VICE CHAIR THERNSTROM: Well, this is
4 Commissioner Thernstrom. I have a question about
5 that. I don't understand in the minutes where it
6 says, "Commissioners approved a motion to approve both
7 the New Black Panther Party proposal and the Title IX
8 proposal for the enforcement report for this year."
9 But we don't have two statutory reports; that implies
10 that we do.

11 COMMISSIONER HERIOT: But we approved
12 both.

13 VICE CHAIR THERNSTROM: Well, but only one
14 is our statutory report.

15 COMMISSIONER GAZIANO: We can issue two.
16 We can issue two.

17 COMMISSIONER HERIOT: Nothing in the
18 statute says you can have only one enforcement report.

19 COMMISSIONER GAZIANO: But as the
20 transcript reflects, Vice Chair Thernstrom, that gives
21 us flexibility to designate one or the other,
22 depending on how they turn out, as, you know, more
23 like our traditional enforcement reports, but that
24 means that we can continue one if it's not finished by
25 September. But we can -- hopefully, we can complete

1 two this year.

2 COMMISSIONER YAKI: This is Commissioner
3 Yaki. I am puzzled about that, given that we have --
4 so two potential national reports. At some point we
5 are going to decide which one may be issued. We have
6 a national conference coming up. I have no idea if we
7 have -- how we discussed the budgetary impacts of all
8 three going on at the same time, but I just wanted to
9 raise that issue, because it -- as with Commissioner
10 Thernstrom, I was somewhat surprised to see that you
11 -- folks went ahead and did two.

12 So let's go on. That was my question.

13 CHAIRMAN REYNOLDS: Okay. Any other
14 comments?

15 (No response.)

16 Okay. Commissioner Yaki, how do you vote?

17 COMMISSIONER YAKI: No.

18 CHAIRMAN REYNOLDS: Commissioner
19 Thernstrom, how do you vote?

20 VICE CHAIR THERNSTROM: What --

21 STAFF DIRECTOR DANNENFELSER: On the
22 agenda, amending the agenda.

23 VICE CHAIR THERNSTROM: Simply on the
24 agenda, I -- fine.

25 CHAIRMAN REYNOLDS: Commissioner Melendez?

1 COMMISSIONER MELENDEZ: I'll abstain. I'm
2 not current on this enforcement stuff.

3 CHAIRMAN REYNOLDS: Commissioner Taylor?

4 COMMISSIONER TAYLOR: Aye.

5 CHAIRMAN REYNOLDS: Commissioner Heriot?

6 COMMISSIONER HERIOT: Yes.

7 CHAIRMAN REYNOLDS: Commissioner Gaziano?

8 COMMISSIONER GAZIANO: Yes.

9 CHAIRMAN REYNOLDS: And I vote in the
10 affirmative. We have one abstention, Commissioner
11 Melendez. Commissioner Yaki voted against the motion.

12 The remaining Commissioners voted in favor of the
13 motion. The motion passes.

14 Vice Chair Thernstrom, I understand that
15 you have proposed an amendment to the agenda?

16 VICE CHAIR THERNSTROM: Well, I think,
17 actually, my proposed amendments to the agenda were
18 taken care of by your -- I was going to propose
19 precisely what you already did, so that's not a
20 problem. I will have a motion to amend the minutes,
21 but that's down the road.

22 CHAIRMAN REYNOLDS: Okay. So looking at
23 the revised agenda, the next item is the National
24 Conference Subcommittee issues.

25 II. PROGRAM PLANNING

1 NATIONAL CONFERENCE SUBCOMMITTEE ISSUES

2 CHAIRMAN REYNOLDS: On September 4th,
3 Commissioner Yaki indicated in a e-mail that he would
4 like to offer two motions with respect to the --

5 VICE CHAIR THERNSTROM: Well, wait a
6 minute. We --

7 CHAIRMAN REYNOLDS: -- National Conference
8 Subcommittee. The first is a motion to add to the
9 already-appointed subcommittee members to include Vice
10 Chair Thernstrom. The second is to delegate to the
11 subcommittee the authority to set the national
12 conference date.

13 Commissioner Yaki, would you please offer
14 your motions?

15 VICE CHAIR THERNSTROM: Excuse me, Mr.
16 Chairman. Have we gone over the minutes?

17 STAFF DIRECTOR DANNENFELSER: They're
18 coming later in the agenda.

19 VICE CHAIR THERNSTROM: Oh, you've now put
20 them later in the agenda. I'm sorry. Okay. My
21 apologies.

22 CHAIRMAN REYNOLDS: No apology necessary.
23 Commissioner Yaki?

24 COMMISSIONER YAKI: Whatever you said, I
25 just move.

1 CHAIRMAN REYNOLDS: Okay. Discussion?

2 Oh, second. Discussion?

3 COMMISSIONER MELENDEZ: Do you second both
4 motions?

5 COMMISSIONER HERIOT: What are the
6 motions?

7 CHAIRMAN REYNOLDS: One is to add Vice
8 Chair Thernstrom to the subcommittee, and the second
9 is to delegate the authority to the subcommittee to
10 select a date for the national conference.

11 COMMISSIONER YAKI: Well, I move -- let me
12 clarify. I move to consolidate the two motions into
13 one motion, and to nominate Vice Chair Thernstrom as
14 the additional member of the committee. As you know,
15 Vice Chair Thernstrom and myself have both expressed
16 some concerns about the manner in which the --

17 PARTICIPANT: Hello? Hello? I'm sorry.
18 Continue.

19 COMMISSIONER YAKI: As you know, I think
20 Commissioner Thernstrom and myself were -- along with
21 Commissioner Melendez, were the most vociferous
22 critics of the manner in which the prior version,
23 National Conference 1.0, was put together.

24 I believe that in order to provide
25 necessary balance, as well as to bring the experience

1 of Commissioner Thernstrom and her viewpoint and
2 experience to the fore, that it would be not just
3 useful but I think necessary that I have her as an
4 additional member of the committee. And that's why I
5 propose Commissioner Thernstrom.

6 VICE CHAIR THERNSTROM: You've got a
7 second part to your motion.

8 COMMISSIONER YAKI: Well, the second part
9 -- second part of my motion is simply that the -- this
10 committee not be tied down to whenever the Press Club
11 is or is not available, but can make a decision based
12 upon its progression and its discretion as to when the
13 national conference should occur.

14 I think that we should not be held to any
15 artificial deadlines imposed by a booking agent at any
16 particular facility, but rather use our own best
17 judgment based on what we believe the progress is of
18 sending setting such a conference together.

19 That's my motion. Is there a second?

20 COMMISSIONER MELENDEZ: Second.
21 Commissioner Melendez.

22 CHAIRMAN REYNOLDS: Okay. The --

23 COMMISSIONER YAKI: Discussion?

24 CHAIRMAN REYNOLDS: -- creation of a
25 subcommittee and the postponement of the conference

1 was the result of some tough negotiations between
2 Ashley and Pete on one hand, myself on the other. And
3 I -- we reached that compromise with the understanding
4 that we would not reopen these issues.

5 The subcommittee is free to work with any
6 Commissioner, or anyone else for that matter, in
7 putting together the recommendations. And as for the
8 date, the ultimate date I believe should -- well, the
9 ultimate decision should remain within the purview of
10 the entire Commission.

11 So I don't have any concerns about the
12 subcommittee making recommendations as for the date or
13 any other matter. But the ultimate decision I believe
14 should remain with the entire -- it should be
15 determined by a vote of the entire Commission.

16 COMMISSIONER YAKI: Mr. Chairman -- this
17 is Commissioner Yaki -- I would accept that as a
18 friendly amendment, that the subcommittee would
19 recommend for approval to the full body the date that
20 they suggest for it. I would like to respond to the
21 first point that you made, and that is while I applaud
22 and appreciate the negotiation, as you describe it,
23 between yourself, Commissioner Taylor, and
24 Commissioner Kirsanow, I was not a part of that
25 negotiation.

1 And because I was not a part of that
2 negotiation, I am somewhat uncomfortable being the
3 only member of that subcommittee who held dissenting
4 views on the direction in which the conference was
5 initially going. I believe that the addition of
6 Commissioner Thernstrom will add the necessary
7 balanced point of view and experience to that
8 subcommittee.

9 I realize that all Commissioners will be
10 able to consult and add their own experience. But to
11 the extent that a subcommittee acts as a subcommittee,
12 it does so according to the rules of parliamentary
13 procedure. And I believe that having the addition of
14 Commissioner Thernstrom adds a necessary balance in
15 order that a full and fair exchange of views,
16 compromised negotiation, what have you, will occur
17 rather than in a committee where two of the three
18 members have already had discussions with the chair
19 about what exactly those negotiations were supposed to
20 be about.

21 CHAIRMAN REYNOLDS: Any other comments?

22 COMMISSIONER GAZIANO: The right of the
23 full Commission to affirm the date is important to me.

24 Let me just make sure I understand that at least that
25 has been taken care of by the friendly amendment. I

1 have other concerns with the motion, but I just want
2 to at least understand what that -- that portion of
3 it.

4 COMMISSIONER HERIOT: That means it's a
5 two-step process now. The subcommittee has to come to
6 a decision, and then to recommend it. That's likely
7 to be unwieldy.

8 COMMISSIONER GAZIANO: I -- you know, I
9 thought that pending -- one concern I have, of course,
10 is that four-member subcommittees present, you know, a
11 variety of quorum and other problems. But I am also
12 concerned that the subcommittee was supposed to report
13 back in November, so that we could keep this in track
14 -- on track. And opening up a new series of rules and
15 new members does give me some concern as well.

16 But where do we stand with the -- the
17 previous motion was that the Chairman -- barring some
18 change, the Chairman can pick the location, subject to
19 our advice and input, and the date of the national
20 conference. What is the status of the current motion
21 on those two issues?

22 COMMISSIONER YAKI: Are you asking me?

23 COMMISSIONER GAZIANO: Yes, it's your
24 motion.

25 COMMISSIONER YAKI: Well, thank you,

1 Commissioner Gaziano, for your questions. The answer
2 to your question is, no, the Chairman would not have
3 discretion to set the agenda and set the time of the
4 meeting --

5 COMMISSIONER GAZIANO: I didn't --

6 COMMISSIONER YAKI: -- meeting place.

7 COMMISSIONER GAZIANO: We are going to
8 collectively talk about the agenda after the
9 subcommittee --

10 COMMISSIONER YAKI: Well, just the whole
11 point, I believe, of the subcommittee was to empower a
12 representative group of the Commission to make those
13 decisions. And I accepted an amendment to make it
14 subject to ratification.

15 CHAIRMAN REYNOLDS: Commissioner Yaki, I
16 think we have a fundamental misunderstanding. The
17 subcommittee was making -- was empowered to meet,
18 discuss, and to formulate recommendations, but the
19 decisions ultimately would be made by a vote of the
20 entire Commission.

21 COMMISSIONER YAKI: Then, what is the
22 point of the subcommittee? If just to talk and then
23 come back -- come back and have talk about all over
24 again. Commissioner Heriot said that --

25 CHAIRMAN REYNOLDS: I have no idea of --

1 COMMISSIONER YAKI: Mr. Chairman, may I
2 finish? Commissioner Heriot just said that even
3 picking a date by the subcommittee, subject to full
4 ratification by the Commission, was unwieldy. I don't
5 see how -- in that vein, why would we then spend time
6 at the subcommittee level doing something that could
7 be wholly overturned at the full committee?

8 That did not sound -- that certainly was
9 not the objection that I raised at the -- throughout
10 the spring and the summer regarding this -- regarding
11 this particular conference in that it was not going
12 forward in a truly bipartisan manner.

13 And to have -- and to add one more point
14 to this, it just strikes me as odd that, if that is
15 the case, why anyone who would object to the addition
16 of Commissioner Thernstrom then is beyond me, because,
17 then, if you are saying this subcommittee really has
18 no power ultimately to make any decision on the
19 composition, makeup, agenda, direction of this
20 conference, then it is just window-dressing. And why
21 anyone would object to Commissioner Thernstrom being
22 on as window-dressing is beyond me.

23 I have my own objections to being used as
24 a window-dressing, but that's for --

25 CHAIRMAN REYNOLDS: Commissioner Yaki, if

1 you are being used, it's because you -- this is the
2 vehicle that you -- I mean, you passionately argued
3 for the creation of a subcommittee. The subcommittee,
4 against my better judgment, was created. I don't
5 think -- well, I did not and do not support the
6 concept of a subcommittee.

7 And as for being a window-dressing, I
8 don't know how you get there. Ultimately, all
9 decisions at the Commission are made by a majority of
10 the Commissioners. I assume that the subcommittee
11 will work in a fashion to garner a majority of -- a
12 majority of votes by the full Commission. And if the
13 subcommittee fails to do that, then the majority of
14 the Commissioners will have to make amendments to
15 whatever is recommended -- recommended by the
16 subcommittee.

17 But this structure, this approach, the
18 postponement, the creation of a subcommittee, that was
19 what you asked for. The fact that -- the fact that
20 the subcommittee does not have the -- does not have
21 ultimate decision-making power, that was known from
22 the beginning. When the compromise was first
23 discussed on the record, it was perfectly clear that
24 the subcommittee was making recommendations.

25 COMMISSIONER YAKI: Mr. Chair, from what

1 you've just told me, the first discussions about the
2 subcommittee were discussed off the record with the
3 other two members of the proposed committee,
4 Commissioner Taylor and Commissioner Kirsanow.

5 I would -- when I talked about a
6 subcommittee, I talked about a body that would be
7 charged with creating and shaping the direction and
8 content of the Commission. I would think that you,
9 being -- given the contentious nature of this -- of
10 this item, given the fact that it has had collateral
11 consequences to the other items as we have gone
12 forward, would want to move forward in a way that
13 provided the best opportunity for there to be
14 consensus on this project as it goes forward.

15 I think it --

16 CHAIRMAN REYNOLDS: Commissioner Yaki, our
17 --

18 COMMISSIONER YAKI: Please. Mr. Chair?
19 Mr. Chair, would you just let me please -- allow me to
20 finish? I did not interrupt you, and I would like to
21 give you -- ask you to give me the same courtesy.

22 And I just want to restate that the
23 addition of Commissioner Thernstrom is, I believe, not
24 only desirable but necessary in order to help achieve
25 that consensus going forward. And if that is not the

1 case, then I question the entire point of the
2 subcommittee altogether.

3 CHAIRMAN REYNOLDS: Any other comments?

4 (No response.)

5 Commissioner Yaki, how do you vote?

6 COMMISSIONER YAKI: Aye.

7 CHAIRMAN REYNOLDS: Commissioner
8 Thernstrom, how do you vote?

9 VICE CHAIR THERNSTROM: Aye.

10 CHAIRMAN REYNOLDS: Commissioner Melendez?

11 COMMISSIONER MELENDEZ: Aye.

12 CHAIRMAN REYNOLDS: Commissioner Taylor?

13 COMMISSIONER TAYLOR: Nay.

14 CHAIRMAN REYNOLDS: Commissioner Heriot?

15 COMMISSIONER HERIOT: Nay.

16 CHAIRMAN REYNOLDS: Commissioner Gaziano?

17 COMMISSIONER GAZIANO: Nay.

18 CHAIRMAN REYNOLDS: Okay. With my vote,
19 there are four votes against it. The motion does not
20 carry.

21 COMMISSIONER YAKI: I hereby submit my
22 resignation from the subcommittee.

23 COMMISSIONER MELENDEZ: Can I make a
24 motion to add Abby Thernstrom to the Commission at
25 least?

1 CHAIRMAN REYNOLDS: I'm not following.

2 COMMISSIONER MELENDEZ: I would like to
3 add her to the subcommittee.

4 CHAIRMAN REYNOLDS: We just voted on that.

5 COMMISSIONER MELENDEZ: But that was a
6 combined motion, and I was wondering whether or not if
7 that motion was by itself it would -- it might have a
8 chance of passing, without the other part of it, as we
9 combined the two motions. That was my worry at the
10 beginning.

11 CHAIRMAN REYNOLDS: Okay. Is there a
12 second?

13 COMMISSIONER YAKI: Second.

14 COMMISSIONER GAZIANO: This isn't on the
15 agenda. Is it out of order? I question whether it's
16 out of order.

17 COMMISSIONER HERIOT: I'm not sure we can
18 -- can we ask whether one can break down a motion into
19 pieces like that --

20 COMMISSIONER YAKI: Sure.

21 COMMISSIONER HERIOT: -- if it isn't on
22 the agenda? Can we get an opinion on that?

23 COMMISSIONER YAKI: All the chair has to
24 do, technically, is to move to rescind the vote, and
25 then -- and then move -- and then, I would move to

1 sever the vote to -- in two parts, to --

2 COMMISSIONER HERIOT: But we've already
3 voted. We've already voted. It's out of order. You
4 can't sever a motion after it has been defeated.

5 COMMISSIONER YAKI: You can sever a motion
6 if you undo the original motion by reconsideration.

7 COMMISSIONER HERIOT: Well, then, you've
8 got to move to do that.

9 COMMISSIONER YAKI: I just said --

10 COMMISSIONER HERIOT: Only someone who
11 voted in favor of -- who voted in the majority can do
12 that.

13 COMMISSIONER YAKI: I know. Obviously,
14 you weren't listening to me.

15 COMMISSIONER HERIOT: So it's out of
16 order.

17 COMMISSIONER YAKI: No. Obviously, you
18 weren't listening to me, because I said if the chair
19 did that. So if you listened to me a little bit,
20 perhaps you would understand that I do know
21 parliamentary procedure, and it is the chair's --
22 since I assume --

23 COMMISSIONER HERIOT: In other words --

24 COMMISSIONER YAKI: -- I assume neither
25 one of the motions --

1 COMMISSIONER HERIOT: -- the motion on the
2 floor --

3 COMMISSIONER YAKI: The motion is not out
4 of order. Good Lord. Can we just --

5 CHAIRMAN REYNOLDS: Commissioner Yaki, are
6 you saying that this depends on me?

7 COMMISSIONER YAKI: I'm saying -- I am
8 saying, Mr. Chair, that it is obvious that the two
9 people sitting across from me aren't going to move to
10 reconsider to accommodate Commissioner Melendez. You
11 could, as chair, for the purposes of comity, or
12 comedy, depending on how these other two people decide
13 to play it, to move to reconsider the motion.

14 I will vote in favor of that motion. That
15 will leave the original motion back on the table. We
16 can then move to sever it. Commissioner Melendez can
17 then move to sever it to only address Commissioner
18 Thernstrom's appointment, and we can move forward and
19 get this thing done with in two minutes, rather than
20 go into this out of order stuff that apparently the
21 Commissioners across from me do not understand.

22 COMMISSIONER HERIOT: Jerry, someone who
23 voted no on that motion can move to reconsider, so
24 that we can sever it. But if no one who voted no on
25 the motion does that, makes that motion, the motion

1 that is currently on the floor is out of order.

2 CHAIRMAN REYNOLDS: Okay. I'm not going
3 to support opening this up. I want to put this to
4 bed.

5 COMMISSIONER YAKI: Okay. Then,
6 Commissioner -- Mr. Chair, I am resigning from the
7 subcommittee as of now.

8 CHAIRMAN REYNOLDS: Commissioner Melendez,
9 will you serve?

10 COMMISSIONER MELENDEZ: I thought the
11 motion I presented to try to get -- I'm trying to --
12 just a simple thing, trying to get Abigail to serve on
13 that committee. That's what I'm trying to do, and
14 however we can do that. I mean, we can argue back and
15 forth about parliamentary procedure, but I think my
16 main issue was whether or not there was some
17 consideration by the rest of the group to take that
18 issue alone.

19 That's all I was trying to do. I wasn't
20 trying to get into a debate on parliamentary
21 procedure. I think we all have an understanding of
22 what we are trying to do here.

23 CHAIRMAN REYNOLDS: I understand.

24 COMMISSIONER MELENDEZ: And if you voted
25 against it, then I would understand that this wasn't

1 an issue that all parts of it were basically opposed,
2 and that there was no chance of kind of subdividing it
3 down to maybe just adding her to the committee.

4 That's all I'm trying to do. I'm not
5 trying to get into this big debate on parliamentary
6 procedure. I'm trying to kind of meet everybody
7 halfway, if everybody wants to do that. If you don't,
8 then we are just going to continue to be at an
9 impasse.

10 CHAIRMAN REYNOLDS: Well, unfortunately, I
11 think it is going to be the latter, or at least on
12 this particular point. Commissioner Melendez, I
13 appreciate the way you have always conducted yourself
14 during our debates. And I -- the fact that you are
15 making a request, it does resonate with me, and I do
16 struggle with it. But ultimately, though, I am going
17 to stand by my decision. It is unfortunate that this
18 is the issue where you raise your hand and make this
19 request.

20 After having said that, Commissioner Yaki
21 has resigned from the subcommittee. One of the
22 arguments, one of the primary arguments for the
23 compromise was to respond to the claim that all views
24 and political affiliations weren't a part of the
25 process.

1 So it's -- if I accept the arguments that
2 were made, it's important to have a Democrat to serve
3 on the subcommittee. And since you're the remaining
4 Democrat, I ask, will you serve on the subcommittee?

5 COMMISSIONER MELENDEZ: The only way I
6 would serve is if Abigail Thernstrom serves also to
7 broaden out our -- you know, our points of view on
8 this whole issue. So that's just -- that's my
9 position. Otherwise, I won't serve.

10 CHAIRMAN REYNOLDS: Okay. All right. So
11 we don't have a subcommittee. And at the next meeting
12 --

13 COMMISSIONER GAZIANO: We do have a
14 subcommittee. If people choose not to serve, that's
15 their choice.

16 COMMISSIONER HERIOT: But it exists.

17 COMMISSIONER GAZIANO: And they can no
18 longer claim that their input was not received. I
19 think if the subcommittee wants to conclude its
20 business, or if we want to eliminate it we can, but we
21 have one right now.

22 CHAIRMAN REYNOLDS: Okay. All right.
23 Well, I will -- this is a lot of wasted time.

24 In any event, we will -- this issue will
25 be on the agenda for the next business meeting.

1 COMMISSIONER HERIOT: This issue? What is
2 "this issue"?

3 CHAIRMAN REYNOLDS: Well, we were supposed
4 to receive a report from the subcommittee.

5 COMMISSIONER HERIOT: Yes. I mean, I
6 assume you are going to get the report from the
7 subcommittee at our next meeting. There is nothing --
8 there has been no decision on the part of the
9 Commission that this says anything to the contrary.

10 CHAIRMAN REYNOLDS: Okay. Next up is an
11 update on the status of the 2010 enforcement report.

12 UPDATE ON STATUS OF 2010 ENFORCEMENT REPORT

13 CHAIRMAN REYNOLDS: Mr. Staff Director,
14 would you or the General Counsel please provide the
15 update on the status of our investigation of the New
16 Black Panther voter intimidation case and its
17 implications for future Voting Rights Act enforcement?

18 STAFF DIRECTOR DANNENFELSER: Thank you,
19 Mr. Chairman. The General Counsel has been looking
20 into these matters, and I would like him to make the
21 presentation on this subject.

22 MR. BLACKWOOD: This is David Blackwood.
23 First, this is to confirm, at least of this date, we
24 haven't received a response from the Department of
25 Justice to the Commission's letter requesting

1 information with regard to this issue. In the
2 meantime, the Office of General Counsel has begun
3 research with regard to hearing procedures and
4 updating the existing hearing manual, which is
5 severely out of date.

6 We have identified and attempted to locate
7 relevant witnesses. We have collected and compiled
8 video evidence of the incidents in question. We have
9 compiled a log of all press reports on the incident.
10 We have begun research on the legislative history of
11 the Voting Rights Act with regard to the specific
12 section, 11(b), as well as a review of prior
13 enforcement of 11(b) cases by the Department of
14 Justice.

15 We have also collected and reviewed past
16 Commission reports on voting matters, which serve as
17 background information. And we have begun drafting
18 discovery requests that would be directed towards the
19 Department of Justice.

20 There are two matters that I want to bring
21 to your attention that I am not presenting as of this
22 date, but hope to issue to the Commission shortly,
23 which is a project outline and discovery plan. The
24 concept paper of course has been approved, but a
25 project outline with hard dates needs to be issued,

1 along with the discovery plan for the Commission's
2 approval. And I hope to have that out relatively
3 quickly.

4 At the same time, I want to point out one
5 issue that I want to bring to your attention that
6 would be included in the project outline, is that in
7 my view the A.I. 1-6 would have to be modified with
8 regard to the project outline. And I say "modified,"
9 "not done away with," but modified in that this is a
10 different kind of enforcement report that was
11 originally contemplated under -- when the A11-6 was
12 drafted.

13 It would still include the Commission
14 having more than enough time to review various drafts,
15 but the dates -- I just want to indicate to you the
16 dates of the project outline will probably be
17 different than would be contemplated under A11-6 in
18 its current form. Again, I hope to have that to you
19 shortly.

20 CHAIRMAN REYNOLDS: Questions? Comments?

21 COMMISSIONER MELENDEZ: Yes, Commissioner
22 Melendez. On the A.I. 1-6 Section 8, having to do
23 with the discovery plan, are you saying that there is
24 nothing in place right now? We are modifying this to
25 expedite the situation? Or what are we saying?

1 MR. BLACKWOOD: No. Commissioner, I want
2 to be clear, because I don't have something to show
3 you. We are trying to follow A.I. 1-6 as much as we
4 can, but this is in the nature almost of an
5 investigation as opposed to, as we have called them
6 before in the past, these battleship enforcement
7 review reports that we have done the last several
8 years.

9 So it is going to follow a different
10 format. Under the concept plan as adopted, there are
11 going to be two hearings. The report itself, I think
12 it has been openly discussed, is unlikely to be the
13 200-page type of report that we have done before.

14 Therefore, the report or the time required
15 to draft the report, as opposed to take evidence and
16 hold hearings, needs to be adjusted. And we are
17 working to try to come up with some realistic
18 deadlines. I realize it has to be approved by you all
19 first. In the meantime, though, we are trying to
20 initiate and begin our investigation.

21 COMMISSIONER MELENDEZ: A question -- this
22 is Commissioner Melendez. Are you saying that any
23 modification to A.I. 1-6 Section 8 would be done by
24 you sending that out to us and some type of
25 teleconference? Or are you saying that we are going

1 to do this at the next meeting?

2 COMMISSIONER GAZIANO: If you wouldn't
3 mind me asking a question. What I understood you to
4 say is you are going to propose a discovery plan. And
5 if we adopt it, we will thereby be making slight
6 modifications for this particular year to A.I. 1-6.

7 MR. BLACKWOOD: That is correct,
8 Commissioner Gaziano. Commissioner Melendez, the idea
9 is that you all would see exactly what we are
10 proposing as far as the changes, and you all would
11 have to approve it. It is not a unilateral act by
12 OGC.

13 COMMISSIONER MELENDEZ: Thanks.

14 COMMISSIONER GAZIANO: Mr. Chairman, I
15 just wanted to ask about the first of the proposed
16 hearings under the concept paper. I wondered what you
17 have been able to discover so far, what you would be
18 able to tell us in the near future, or when you would
19 likely -- whether we might be able to make the
20 December 4 date for fact witnesses that were present
21 in Philadelphia on the last Presidential election.

22 I imagine that entails, you know,
23 interviewing the potential witnesses, or at least
24 contacting them, seeing -- I don't even know whether
25 Philadelphia is within 100 miles of our offices. And

1 if they are all willing to travel here, that's moot,
2 or that doesn't matter. But what kind of factors
3 would you need to determine before we know whether we
4 can have that fact hearing in -- on December 4, and
5 whether we need to have it in Philadelphia, or whether
6 we can have it here in our offices?

7 VICE CHAIR THERNSTROM: Can I just ask a
8 prior question? Since when have we arrived at a
9 December 4 date as a -- or decided on a December 4th
10 date or --

11 COMMISSIONER GAZIANO: It's in the concept
12 paper that we approved.

13 VICE CHAIR THERNSTROM: The date,
14 December 4, is in the concept paper?

15 COMMISSIONER GAZIANO: That there would be
16 a December hearing. Since we are meeting on
17 December 4, that seems like the best date for --

18 VICE CHAIR THERNSTROM: It would be a
19 substitute for our regular meeting.

20 COMMISSIONER GAZIANO: We could have a
21 business meeting afterwards, but we have briefings and
22 hearings before a business meeting. And, obviously,
23 if the majority of the Commission wants to add an
24 extra hearing day, or an extra meeting day in
25 December, other than December 4th, that just seems

1 logical to me.

2 And so I'm just asking the General Counsel
3 what it would take for you to be able to confirm or
4 whether you would be able to take the steps to see
5 whether the relevant witnesses, or enough of the
6 relevant witnesses to make it worthwhile would be
7 willing to come to Washington.

8 And I would also like to hear from other
9 Commissioners at this time whether they think we
10 should go to Philadelphia anyway, whether they are
11 willing to go to Philadelphia, and what the
12 practicalities of that is, or whether we should
13 suggest to the General Counsel to see if witnesses
14 would be willing to come to Washington if it's beyond
15 100 -- does anyone know if Philadelphia is more than
16 100 miles?

17 STAFF DIRECTOR DANNENFELSER: It is about
18 100.

19 COMMISSIONER GAZIANO: Whether witnesses
20 would be willing to come to Washington. So maybe that
21 is a first step or -- is to check with the witnesses
22 to see whether they are willing to come to Washington,
23 assuming that's the preference of the Commissioners to
24 -- it's certainly more convenient to staff and court
25 reporters and whatever to have the hearing here.

1 COMMISSIONER YAKI: This is Commissioner
2 Yaki. Mr. Chair, I just wanted to follow up on
3 Commissioner Thernstrom's comment, which is we have
4 scheduled on our calendar a business meeting on
5 December 4th. If we are going to change that, modify
6 it, what have you, to accommodate a hearing -- and I
7 would note that the last hearing that we did a long --
8 I don't even know if it was called -- I guess it was a
9 field hearing, the one in Omaha, lasted the better
10 part of a day.

11 I think that is a -- these are threshold
12 questions. If, indeed, it is the Commission as a
13 whole that ratifies these decisions, which you seem to
14 imply it does, that we should be discussing rather
15 than asking the General Counsel to go about making
16 inquiries about dates that he has no firm guidance
17 from this body on whether we even want it to be in
18 December, or why we even want it to be on
19 December 4th, if we want it to be on a different day.

20 COMMISSIONER GAZIANO: When we approved --

21 COMMISSIONER YAKI: If we -- well, it's a
22 concept paper, Commissioner Gaziano, if you would stop
23 interrupting me. And the question is -- you know, the
24 threshold question is whether we would want to
25 substitute that hearing for our regular meeting date

1 on the 4th.

2 CHAIRMAN REYNOLDS: I think it's a
3 legitimate point. Personally, I have no concerns
4 about using the date that we have designated for a
5 business meeting to have a hearing, either in
6 Washington or Philadelphia. I don't know how other
7 folks feel, but this is an opportunity to have a
8 discussion, and, if necessary, we can make it official
9 by having a vote or reaffirming what I thought was the
10 plan.

11 COMMISSIONER GAZIANO: Mr. Chairman, just
12 to be clear, I was just assuming that Commissioners
13 would find that convenient. I was inviting
14 Commissioners, like Commissioner Yaki, to express his
15 view. Obviously, a majority of the Commission can
16 change the concept in the concept paper. But I think
17 that it's -- it seems doable to me. The General
18 Counsel may have to confirm that.

19 But I would at least prefer that he try to
20 see that we have the hearing as scheduled in the
21 concept paper, and I see no reason why we should not
22 at least try to do so.

23 VICE CHAIR THERNSTROM: Mr. Chairman,
24 Commissioner Thernstrom here. Look, last I knew we
25 were scheduling telephonic meetings because we

1 couldn't get our business done at the regularly-
2 scheduled business meetings. These -- obviously,
3 these telephonic meetings are a problem from a number
4 of points of view, which I -- you know, and I
5 expressed that point when we first discussed the
6 matter.

7 So now we are talking about crossing off a
8 business meeting. We can't have a business meeting in
9 Philadelphia in addition to the hearing, it doesn't
10 seem to me. We are talking about crossing off a
11 business meeting in order to have this hearing on that
12 date.

13 And, frankly, I am just totally bewildered
14 by the nature of this particular hearing that is what
15 we are going to learn. I understand the question --
16 the question of finding out what happened in the
17 Justice Department, but with respect to what happened
18 at the polling place, anybody who wants to get on
19 YouTube knows what happened at the polling place.

20 So, you know, I am concerned about missing
21 a business meeting for what I don't see as a
22 potentially very productive meeting in Philadelphia.

23 CHAIRMAN REYNOLDS: If it were productive,
24 would you have any concerns about missing the business
25 meeting?

1 VICE CHAIR THERNSTROM: Yes. I would say
2 that if we are scheduling telephonic meetings because
3 we can't get our business done here, which is the
4 place we should get our business done, because it's
5 the way to properly do it, I would have a concern
6 about substituting that date, absolutely.

7 CHAIRMAN REYNOLDS: So you are saying that
8 even if you believe we would have a productive --

9 VICE CHAIR THERNSTROM: I would say we
10 would have to come up with a different date.

11 COMMISSIONER GAZIANO: Mr. Chairman?

12 COMMISSIONER YAKI: I would agree with
13 that.

14 COMMISSIONER GAZIANO: Mr. Chairman, when
15 we designate --

16 CHAIRMAN REYNOLDS: Okay. Well, how about
17 this as a compromise?

18 COMMISSIONER GAZIANO: Mr. Chairman, can
19 I --

20 CHAIRMAN REYNOLDS: Why don't we have the
21 business meeting on the 3rd, and move forward with the
22 hearing on the 4th, to address Vice Chair Thernstrom
23 and Commissioner Yaki's concern.

24 COMMISSIONER GAZIANO: Mr. Chair, we would
25 have the business meeting in Philadelphia or

1 Washington?

2 COMMISSIONER YAKI: Mr. Chair, I would --
3 out of respect, I have flown out of Philadelphia
4 before. I would actually -- I would actually urge
5 that you flip that, and that the -- Philadelphia be
6 the 3rd and the regular business meeting on the 4th be
7 here, for one very simple reason.

8 If there is any weather at all, the number
9 of flights that go out of Philadelphia to the West
10 Coast are extremely, extremely limited. The last time
11 there was a little bit of weather I ended up having to
12 take a train back to Dulles, back to D.C., to Union
13 Station, take a cab out to Dulles, because there is
14 frequently only one or less flights per day from
15 Philadelphia to the West Coast.

16 So I would say if you are going to do it,
17 I would do it 3rd/4th, with the 4th being the regular
18 business meeting here, or pick an entirely different
19 day not connected to the 4th entirely.

20 CHAIRMAN REYNOLDS: Well, I am just trying
21 to see if there is opposition or support for the idea
22 of having both a business meeting and the hearing.

23 COMMISSIONER MELENDEZ: This is
24 Commissioner Melendez. I think --

25 COMMISSIONER GAZIANO: Mr. Chairman, I

1 have been in line.

2 COMMISSIONER MELENDEZ: -- is going to be
3 enough, in my opinion, let alone try to have a
4 business meeting to coincide with it.

5 COMMISSIONER GAZIANO: Mr. Chairman?

6 CHAIRMAN REYNOLDS: Other comments?

7 COMMISSIONER GAZIANO: When we designated
8 December 4th as a meeting time, we did not designate
9 it as a business or briefing or hearing. That is what
10 we decided about this time. I am fine if the rest of
11 the Commission -- I am perfectly happy to have a
12 separate business meeting on another day, if that
13 proves necessary.

14 I don't think we need to make that
15 decision yet. We have had, as I recall, briefings
16 with as many as 11 witnesses followed by business
17 meetings. I don't know how many witnesses we would
18 necessarily get. There are disputed facts. We are
19 the finder of fact, and it's important for us to
20 determine them. But I don't imagine that a hearing
21 would necessarily go longer than our 11-person
22 briefings followed by business meetings.

23 That said, if the business portion is
24 important, I am certainly comfortable with having it
25 on a separate day than the proposed hearing.

1 COMMISSIONER YAKI: Point of order. Did
2 we -- someone join, or did we lose someone on the
3 phone?

4 CHAIRMAN REYNOLDS: I'm still here.
5 Ashley?

6 COMMISSIONER TAYLOR: I'm still here.

7 CHAIRMAN REYNOLDS: Arlan? Arlan?

8 (No response.)

9 COMMISSIONER HERIOT: Looks like we lost
10 Arlan. Mr. Chairman?

11 CHAIRMAN REYNOLDS: Yes.

12 COMMISSIONER HERIOT: I have no problem
13 with scheduling for both the 3rd and 4th. I can do
14 that. It will require that I take the Red Eye out
15 Wednesday night, because I've got a class that
16 evening. But I can do it.

17 CHAIRMAN REYNOLDS: Okay. It seems to me
18 that there is something close to a consensus. Well,
19 people are open to the idea of having a business
20 meeting in December, as well as the hearing. But at
21 this point, there are a number of variables that need
22 to be nailed down.

23 For example, will this meeting take --
24 will the hearing take place in Philadelphia or
25 Washington? And that could have some bearing on when

1 we decide to have the business meeting. So --

2 MR. BLACKWOOD: Mr. Chairman, this is
3 David Blackwood. If I could, I will try to answer, or
4 at least identify some of the variables, because I do
5 not have a set answer for you at this stage. We have
6 not attempted, number one, to actually contact the
7 witnesses. We have been in the process of identifying
8 and trying to locate them. Approximately of those
9 individuals I notified in the concept plan, we have
10 identified a little over half. That is, we have a
11 verifiable address.

12 I can now begin the process of contacting
13 these individuals, even with or without a subpoena,
14 but hopefully everybody would cooperate, and find out
15 if they are available on December 4th.

16 There are two other variables that we
17 have, or that you should be aware of. One is that to
18 be in Philadelphia -- and my view is by definition we
19 are going to have to be in Philadelphia. About half
20 the witnesses are in the Philadelphia area. Some of
21 the witnesses are not in the Philadelphia area or
22 within 100 miles. These were campaign workers who
23 came to the city of Philadelphia to work for a
24 campaign and then return to their homes.

25 But it seems to me it would have to be in

1 Philadelphia, unless a large number of these
2 individuals would voluntarily agree to show up in the
3 District of Columbia. And it would have to be
4 voluntary.

5 Next, we have the issue of renting space.

6 In talking with staff about past experience, renting
7 space as opposed to holding it in a government
8 building makes the most sense, because we need to take
9 over the building or the space, and courthouses have
10 problems letting us do that. So most likely we will
11 have to obtain hotel space.

12 If I have your authority, we will at least
13 start trying to determine, is it available, and what
14 kind of prices we can get for the 4th.

15 COMMISSIONER GAZIANO: There are no
16 government -- I mean, I would suggest that you try to
17 locate, whether it's a county building, court --
18 federal courthouse, federal -- other federal building.

19 MR. BLACKWOOD: We have -- the history of
20 the Commission has been, at least originally, was
21 using federal buildings. There are problems with
22 getting federal buildings, in that especially the
23 courthouses with current-day security you are in and
24 out 9:00 to 5:00. Our staff needs to be in there
25 longer to set up. If media is contemplated, that

1 becomes an issue for courthouse security as well. So
2 we can look at those options, but I just want you to
3 be aware of that.

4 VICE CHAIR THERNSTROM: Mr. Blackwood, I
5 have a question as well. This is Commissioner
6 Thernstrom. You just mentioned that witnesses would
7 have to show up voluntarily if --

8 STAFF DIRECTOR DANNENFELSER: If it was
9 here.

10 VICE CHAIR THERNSTROM: -- if it was here.
11 Well, but witnesses have to show up voluntarily in
12 Philadelphia as well.

13 MR. BLACKWOOD: No, they would be
14 subpoenaed.

15 VICE CHAIR THERNSTROM: Well, wait a
16 minute.

17 COMMISSIONER GAZIANO: They could be
18 subpoenaed.

19 VICE CHAIR THERNSTROM: Well, wait a
20 minute. Who enforces that subpoena?

21 MR. BLACKWOOD: The Department of Justice,
22 in the event that someone doesn't comply with the
23 subpoena.

24 VICE CHAIR THERNSTROM: Well, and you are
25 assuming that the Department of Justice will enforce

1 that subpoena.

2 MR. BLACKWOOD: I am assuming that the
3 people will comply with the subpoena.

4 VICE CHAIR THERNSTROM: Well, I mean --

5 MR. BLACKWOOD: But the subpoena will even
6 be effective if --

7 VICE CHAIR THERNSTROM: -- you are
8 building this on a bunch of assumptions that I don't
9 -- I don't think can be made with any kind of
10 confidence.

11 COMMISSIONER GAZIANO: What's your basis
12 for assuming that the witnesses we want wouldn't show
13 up voluntarily or comply with the subpoena?

14 VICE CHAIR THERNSTROM: Well, I haven't
15 seen the list of witnesses.

16 COMMISSIONER GAZIANO: It's in the concept
17 paper we approved.

18 VICE CHAIR THERNSTROM: Well, wait a
19 minute. Mr. Blackwood just said there were other
20 witnesses.

21 COMMISSIONER GAZIANO: No. The ones we
22 identified, some of them no longer live in
23 Philadelphia, but they're identified in the concept
24 paper.

25 VICE CHAIR THERNSTROM: The whole entire

1 list of witnesses? As I understood what he said, that
2 is not correct.

3 COMMISSIONER GAZIANO: Not by name. Not
4 by name, but the --

5 VICE CHAIR THERNSTROM: Well --

6 COMMISSIONER GAZIANO: -- the poll
7 workers --

8 VICE CHAIR THERNSTROM: -- unless you are
9 talking about witnesses that are -- only witnesses
10 that are friendly to our inquiry are on the list, then
11 you may have a problem with voluntary compliance.

12 CHAIRMAN REYNOLDS: Vice Chair Thernstrom
13 is right. It is possible that we will not have folks
14 willing to voluntarily participate. But it is also
15 likely that everyone that we contact would be willing
16 to participate.

17 COMMISSIONER GAZIANO: Or comply with the
18 subpoena.

19 CHAIRMAN REYNOLDS: I can see a scenario
20 where some people would be eager to -- to clear the
21 record. So, yes, there are some variables out there,
22 but they are -- that's always the case.

23 MR. BLACKWOOD: This is one more item that
24 you should be aware of, Mr. Chairman, which is that
25 the Federal Register notice for a hearing, unlike a

1 briefing or a regular meeting, is 30 days. So it
2 is --

3 COMMISSIONER GAZIANO: Is that according
4 to our AIs, or some other statute?

5 MR. BLACKWOOD: That's under the statute.

6 COMMISSIONER GAZIANO: Okay.

7 MR. BLACKWOOD: So --

8 CHAIRMAN REYNOLDS: So when is the last
9 date?

10 MR. BLACKWOOD: I believe November 3rd for
11 December 4th. Now, you can always issue a notice and
12 then cancel it later on. But I would hope in the next
13 two weeks to get information to the Commission about
14 -- we have talked to individuals, we have X number of
15 people that can show up, we have tried to locate space
16 for the hearing, this has been our success. But we
17 would have to get that to you in the next two weeks.

18 VICE CHAIR THERNSTROM: And, Mr.
19 Blackwood, I understand from the experience of the
20 last statutory meeting that it was extremely useful to
21 have interim, as it were, briefings for the Special
22 Assistants. And I wonder if you would be willing to
23 do that in this case as well, so we don't have to --
24 so that there is a flow of information that --

25 MR. BLACKWOOD: I have no problem with

1 that.

2 COMMISSIONER GAZIANO: General Counsel,
3 Mr. Blackwood, we have a business call scheduled for
4 October 30th, two weeks from today. So do you think
5 you would be prepared to make a report? And if we
6 needed to take any -- make a decision at that time we
7 could?

8 MR. BLACKWOOD: I will be ready on
9 October 3rd to tell you where we stand.

10 COMMISSIONER GAZIANO: October 30th.

11 MR. BLACKWOOD: 30th, where we stand.

12 COMMISSIONER GAZIANO: Okay.

13 VICE CHAIR THERNSTROM: I, for one, cannot
14 -- will be in Portland, Oregon, on the 30th, and
15 completely unable to join a call. I don't know what
16 -- obviously, I am only one person.

17 COMMISSIONER YAKI: I have a question, Mr.
18 Chairman. This is Commissioner Yaki.

19 CHAIRMAN REYNOLDS: Yes, Commissioner
20 Yaki.

21 COMMISSIONER YAKI: Since concept papers
22 are simply concept papers, and we have enumerated a
23 class of individuals who we wish to contact, I think
24 it important -- this was an issue that, as I have said
25 before, was confined to a fairly narrow geographic

1 region, to put it mildly.

2 I am wondering to what extent we should,
3 as part of our hearing process, if we are going to go
4 forward with this, situate our hearing in such a way
5 as to make it convenient for people from that area,
6 particular area of Philadelphia, to attend if they so
7 wish, and to, therefore, look for a location proximate
8 to that polling area, if one is available, in order to
9 make ourselves available to the neighborhood as a
10 whole. I just want to put that forward.

11 Sometimes I think going -- going directly
12 to that place on a very localized, specific, incident-
13 specific issue, as we have here today, versus --
14 because as far as we know, it was not city-wide, it
15 was not in mainline Philadelphia, it was in a certain
16 portion of the city of Philadelphia, I think it would
17 be very useful for us to show that, if we are going to
18 go in there, we are going to go where this particular
19 incident or incidents were purported to have occurred,
20 and I would suggest that as a possibility.

21 Again, because this is not a -- as far as
22 I can tell, a city-wide, a state-wide, as I have said
23 before, I don't think it's a national issue, I think
24 it's one simple, confined incident that we have chosen
25 to devote a substantial amount of resources to for

1 purposes that I cannot fathom. But if we are going to
2 do so, we might as well do it right and go directly to
3 where it occurred.

4 And could I get another -- a quorum call
5 on those on the phone? Because I keep on hearing
6 beeps.

7 CHAIRMAN REYNOLDS: This is Gerry. I'm
8 here. Ashley?

9 COMMISSIONER TAYLOR: I am here.

10 COMMISSIONER YAKI: Okay.

11 CHAIRMAN REYNOLDS: Arlan? Arlan?

12 (No response.)

13 We have lost Arlan.

14 COMMISSIONER YAKI: Okay.

15 CHAIRMAN REYNOLDS: Hello?

16 COMMISSIONER HERIOT: We're here.

17 MR. BLACKWOOD: I have nothing further to
18 report.

19 CHAIRMAN REYNOLDS: Okay. Any other
20 comments?

21 COMMISSIONER YAKI: No.

22 CHAIRMAN REYNOLDS: All right. Thank you,
23 David, for the update.

24 Next up is the approval of the first
25 quarter 2010 briefing report topic.

1 APPROVAL OF FIRST QUARTER FY 2010

2 BRIEFING REPORT TOPIC

3 COMMISSIONER GAZIANO: Would the chair --
4 the Chairman wasn't clear where the discussion of the
5 Title IX project was.

6 COMMISSIONER HERIOT: Last.

7 COMMISSIONER GAZIANO: Was it last?

8 COMMISSIONER HERIOT: It's last under --

9 COMMISSIONER GAZIANO: Okay. Sorry.
10 Never mind.

11 CHAIRMAN REYNOLDS: Okay. On
12 October 14th, the Staff Director sent us a list of
13 potential 2010 briefing topics based on rankings that
14 were provided by Commissioners. All of the topics
15 receiving any votes were reflected in that document.

16 Mr. Staff Director, would you please
17 discuss the results of those rankings?

18 VICE CHAIR THERNSTROM: Mr. Chairman, just
19 a correction there. I mean, the votes were tallied
20 without -- without my amended proposal having been
21 circulated. So I understand we can, in this process,
22 reorder our priorities. But the fact is that votes
23 were taken on the basis of a list, one item --
24 important item, in my view -- which was missing.

25 CHAIRMAN REYNOLDS: So have you since

1 provided this information to the Staff Director?

2 VICE CHAIR THERNSTROM: Well, yes, and you
3 should have had it yourself. Mr. Staff Director --

4 STAFF DIRECTOR DANNENFELSER: Yes, it was
5 circulated yesterday to all Commissioners, with a copy
6 of Vice Chair Thernstrom's more detailed explanation
7 of her proposal.

8 CHAIRMAN REYNOLDS: Okay. And is the --
9 does the tally reflect Vice Chair Thernstrom's --

10 STAFF DIRECTOR DANNENFELSER: It was
11 counted -- the tally that was distributed previously
12 counted her proposal as her first choice under the
13 area, "Do federal contracting statutes produce viable
14 minority-owned businesses?" And it noted that there
15 were -- that there was a Commissioner who ranked an
16 amended version of -- what I described as an amended
17 version of this topic, and then gave the title of that
18 topic, so it was counted there. But it turns out that
19 Vice Chair Thernstrom intended for that to be
20 considered a new and separate topic --

21 VICE CHAIR THERNSTROM: Well --

22 STAFF DIRECTOR DANNENFELSER: -- which is
23 described as regulatory and other barriers to
24 entrepreneurship that impede minority business
25 startups and her -- the more detailed explanation of

1 that proposal was distributed yesterday.

2 VICE CHAIR THERNSTROM: And that is a very
3 different topic, and I was substituting it for --
4 trying to get away from another vote on -- and another
5 briefing on an affirmative action issue, and trying to
6 move towards one that I think would be of equal
7 interest across partisan lines and, in fact, is more
8 important.

9 CHAIRMAN REYNOLDS: Mr. Staff Director,
10 would you like to --

11 STAFF DIRECTOR DANNENFELSER: Yes. The
12 topic that received the most votes -- and, again, this
13 was -- I guess you could question the vote count here.
14 It was combining the votes of people who voted for
15 racially-based incidents on U.S. colleges and
16 university campuses.

17 Several Commissioners proposed that -- I
18 believe four Commissioners proposed that that topic be
19 expanded to also include religiously-based incidents,
20 and then there were also three other Commissioners or
21 three -- I think there were some -- three of those
22 four Commissioners I believe who suggested that First
23 Amendment issues such as speech codes also be
24 considered as part of that overall examination about
25 racially-based and religiously-based incidents on

1 college campuses.

2 So it is not entirely clear whether the
3 people who voted just for racially-based incidents
4 would be supportive of the idea of expanding that
5 topic, or if they would prefer to just keep it as
6 racially-based incidents, but I suppose that would be
7 part of the discussion that would take place here.

8 COMMISSIONER HERIOT: Mr. Staff Director,
9 when you say "the most votes," do you mean the
10 weighted version of that?

11 STAFF DIRECTOR DANNENFELSER: I'm sorry.
12 Yes, this is based on weighted -- the point system
13 here, if you will, was based on Commissioners
14 submitting up to five of their top five choices. One
15 Commissioner submitted three, and the other -- top
16 three, and all of the other Commissioners submitted
17 top five.

18 And the top choice of any Commissioner was
19 given five points, their second choice four points,
20 third choice three points, fourth choice two points,
21 and fifth choice one point. So that is what went into
22 the calculation of how many points.

23 In the case of racially-based incidents or
24 religiously-based incidents, when you combine the two,
25 there were seven Commissioners who voted for that

1 proposal, and there was a total of 30 points for the
2 idea of one or the other or a combination of the two.

3 COMMISSIONER YAKI: What was the -- I'm
4 sorry, just a question. What was the actual split in
5 terms of people who just voted for it as is versus
6 people who voted for it with amending it? And how
7 would that have affected the overall ranking and
8 score, if you just separated it out?

9 STAFF DIRECTOR DANNENFELSER: There were
10 three who voted for it, and I'm not sure if it was
11 their first choice. I'm not sure exactly how the
12 points came out, but this was at least the first -- I
13 believe the first or second choice of all of the
14 people who voted for it.

15 But there were four Commissioners who I
16 believe made it their first choice, if it was
17 conditioned on the idea that it would be more
18 expansive, that it would also include these
19 religiously-based incidents as well as the racially-
20 based incidents.

21 CHAIRMAN REYNOLDS: Marty, what are the --
22 what's the second-highest vote-getting topic?

23 STAFF DIRECTOR DANNENFELSER: The next
24 topic, which got 16 points, was employment
25 discrimination on the basis of age, in the context of

1 the economic crisis. And then, after that, with 12
2 points, there was the role of race in the 2008
3 election results and analysis of racial attitudes.

4 Now, there were some caveats that people
5 put when they voted for that as well. There were two
6 Commissioners who ranked an amended version of the
7 topic that addresses the roles of both race and gender
8 in the election, and one of those Commissioners ranked
9 an amended version that also addressed both the
10 primary and general elections. But there were 12
11 points all together for some variation of that
12 particular topic as described.

13 CHAIRMAN REYNOLDS: Okay. And --

14 STAFF DIRECTOR DANNENFELSER: And then,
15 after that was minority youth -- well, there are two
16 that got -- well, no, actually -- the next one would
17 be minority youth in the juvenile justice system.
18 That received nine points.

19 And the one about federal contracting
20 statutes was listed here as nine points, but would
21 actually be four points if Commissioner Thernstrom's
22 first place vote is taken out from that and then --
23 and then added to just standing alone. But, as she
24 said, it -- Commissioners did not have an opportunity
25 to vote on that topic on its own because it had not

1 been circulated as a separate topic at that point.

2 Then, there were seven points for race-
3 neutral alternatives to achieving diversity in higher
4 education. That received seven points. Conflict
5 between civil rights and religious liberty, five
6 points. Racial bias in the media, five points.
7 Police, fire, and municipal employment, in Title VII
8 enforcement, that received four points.

9 Implementation of the Individuals with
10 Disabilities in Education Act received four points.
11 Funding, staffing, and workload levels of federal
12 agencies, civil rights enforcement in 2010, received
13 three points. The question of, "Does the implicit
14 association test measure implicit racism" received
15 three points.

16 Private employer racial and ethnic
17 preferences in Title VII enforcement received three
18 points, and that was a new topic. That was not on the
19 list of topics that was circulated. That was a new
20 topic that was proposed by a Commissioner.

21 Compliance with the Supreme Court's
22 decision in the Seattle and Louisville cases received
23 three points. School choice as a civil right received
24 two points. The Commissioner who voted for this topic
25 recommended an updated description and focus on the

1 Washington, D.C. School Choice Program.

2 There was federal and state enforcement of
3 hate crime laws. That received two points. And
4 denying minority residents in high-crime neighborhoods
5 get fundamental Second Amendment rights received one
6 point. And those were all the topics that received at
7 least one point.

8 VICE CHAIR THERNSTROM: Mr. Staff
9 Director, I perhaps should know this, but I don't,
10 what is the maximum number of briefings we are talking
11 about in 2010? So, you know, we've got a potentially
12 long list here.

13 STAFF DIRECTOR DANNENFELSER: Well, there
14 is the hope that we will at least pick out one. But I
15 would say that probably the maximum, given the other
16 things that the Commission will be doing, I assume
17 would be three. That we would probably be talking
18 about two or three in addition to the hearings that we
19 may be doing in relation to -- possibly two in
20 relation to the New Black Panthers issue. And then,
21 there is also I think a potential hearing in relation
22 to the Title IX issue as well.

23 COMMISSIONER GAZIANO: Mr. Chairman?

24 CHAIRMAN REYNOLDS: Yes.

25 COMMISSIONER GAZIANO: I would certainly

1 propose that we have a discussion. And whether we
2 select one or not, I don't mean to -- I will out
3 myself as the Commissioner who suggested the new
4 topic. I didn't necessarily need everyone else to see
5 it in advance, because I understood we were just going
6 to be discussing these.

7 But I suggest that we -- if we even commit
8 to one, that we not commit to more than one, but that
9 the general discussion of all of these topics would be
10 useful for when we take it up again.

11 CHAIRMAN REYNOLDS: Well, I like the
12 proposal made by Vice Chair Thernstrom looking at
13 various entrepreneurships. In fact, the first time I
14 appeared before the Civil Rights Commission, this is
15 the topic that I -- that I discussed.

16 So I like it. I would ask that Vice Chair
17 Thernstrom expand on the concept paper.

18 VICE CHAIR THERNSTROM: I would be glad
19 to, and I think -- I don't have it in front of me, but
20 we do have a written expansion -- but anyway, I would
21 be glad to talk about it. Evidently, it was passed
22 out. I don't have it in front of me, but I would be
23 glad to talk about it, particularly -- it's less in
24 two of the Sun Belt states, but particularly in the
25 Rust Belt states, the northeast cities -- I'm sorry,

1 and northeastern cities, there is a regulatory maze
2 that would-be entrepreneurs need to navigate. And
3 that maze has been -- has been built up over decades
4 through one municipal administration and another.

5 And it has a particular impact on would-be
6 entrepreneurs in both the black and Hispanic
7 communities. Much less so in the Asian communities,
8 and for a reason I'll state in a minute. But -- well,
9 I'll state that right up front.

10 You've got -- the Asian communities have
11 an internal networking system which includes loans for
12 businesses, it's an inter-ethnic group support system,
13 as it were, for entrepreneurship. That does not exist
14 to the same degree, particularly in inner city black
15 communities. And it is a -- it is a real problem in
16 navigating, as I say, the regulatory maze that allows
17 would-be heads of -- those who would like to start up
18 businesses.

19 And I think that a discussion of the
20 difficulties that have a disparate impact on inner
21 city, black, and Hispanic residents with some
22 aspirations to start businesses would be an extremely
23 useful topic.

24 Now, having said that, I just in front of
25 me put my own proposal as it was written out now

1 several days ago, and all of the rest of you -- has
2 this been circulated?

3 STAFF DIRECTOR DANNENFELSER: It was e-
4 mailed.

5 VICE CHAIR THERNSTROM: It was e-mailed,
6 okay. So all the rest of you have -- should have that
7 as well. But I was just talking off the cuff just
8 now.

9 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,
10 does this concept paper contemplate looking at things
11 like bonding requirements?

12 VICE CHAIR THERNSTROM: Absolutely.

13 CHAIRMAN REYNOLDS: We have these
14 licensing systems when it comes to women who -- well,
15 and men, who braid hair.

16 VICE CHAIR THERNSTROM: Exactly.

17 CHAIRMAN REYNOLDS: Okay.

18 VICE CHAIR THERNSTROM: Exactly. Where,
19 you know, and the hair-braider case is a very famous
20 one, in that there were hair braiders -- I can't even
21 remember the exact location. It may have been here in
22 Washington, D.C.

23 COMMISSIONER HERIOT: There was one in San
24 Diego.

25 VICE CHAIR THERNSTROM: There was one in

1 San Diego. Where the -- they were told -- they
2 started their business in their home. All they were
3 doing was hair braiding. And they were told that they
4 needed cosmetology licenses, 900 hours of training in
5 bleaching hair and doing all of the things that people
6 do in regular salons. And they said, "Wait a minute.
7 We've got one skill, and we want to do one thing."
8 But there are lots of licensure and other requirements
9 of this sort.

10 COMMISSIONER GAZIANO: Mr. Chairman?

11 CHAIRMAN REYNOLDS: Yes.

12 COMMISSIONER GAZIANO: I think this is a
13 very good topic as well. There is an additional
14 synergy I am aware of. Since I resigned from the
15 Virginia SAC, as I pledged, I remain active as an
16 ex officio member. And a very similar topic I think
17 was tentatively accepted recently by the Virginia SAC.

18 So when we can receive information and work with the
19 SAC, I think that is one of our -- I think we call it
20 -- what is it? Strategic goals. But I like this
21 topic in general.

22 But Commissioner Yaki was very persuasive
23 in his proposal on college discrimination. And I was
24 one of those that ranked the discrimination high, but
25 I wanted to explain why I qualified it -- that it

1 should include racial -- I mean religious.

2 It is very difficult to distinguish
3 between some religious and ethnic discrimination when
4 we are dealing with Jewish and Muslim students. And
5 so I would hope if we pursue that topic that we --
6 they are also, obviously, motivated by the same sort
7 of invidious animus between religious and ethnic and
8 racial discrimination, that we clarify that it is
9 racial, ethnic, and religious discrimination.

10 I was not one of those that, in casting my
11 vote, specifically said it should include speech
12 codes. But now that it has been brought to my
13 attention that some other Commissioners do, I think
14 that if we choose that topic we should include that as
15 well.

16 And so I like having -- hearing the
17 presentations of other Commissioners and reading their
18 prior concept papers, these are the two that I think
19 are the most doable for us. And I don't have a strong
20 preference between them. I am certainly subject to
21 other people's thoughts and comment.

22 VICE CHAIR THERNSTROM: This is
23 Commissioner Thernstrom. Commissioner Gaziano, I
24 wonder on the religious discrimination whether you
25 would like to confine it to religious discrimination

1 when it overlaps with questions of ethnic --

2 COMMISSIONER GAZIANO: No. I think that
3 it's hard to distinguish it. But, for example,
4 discrimination against fundamentalist Christians isn't
5 necessarily linked to race. It might be, I suppose,
6 by some. But I still think it's part and parcel of
7 the same type of invidious animus, and that those sort
8 of discrimination and hostility, you know, shouldn't
9 be excluded either.

10 VICE CHAIR THERNSTROM: I just wonder if
11 the topic is not getting awfully broad.

12 COMMISSIONER YAKI: Well, I was going to
13 -- Mr. Chair?

14 CHAIRMAN REYNOLDS: Yes.

15 COMMISSIONER YAKI: This is Commissioner
16 Yaki. I was going to say the same thing, which is
17 that in our initial canvas of this issue, it is clear
18 that there is a geographic breadth to this topic that
19 I think needs to be fully explored. I don't think
20 that having just one talking head talking about it
21 gives it the same kind of gravity or importance that
22 it deserves.

23 While I would be -- with regard to
24 religious, we obviously have had some issues regarding
25 that on -- with our national report via the year

1 without -- in the prison context of course. But we
2 have never really gone to, at the college campus level
3 -- and this is something where I think that if -- if
4 it gets -- if it starts getting added on to, will
5 become overbroad and will lose I think the singular
6 power that a focused -- a tightly-focused briefing can
7 bring to this issue.

8 I am not averse to the Commission in the
9 future addressing the other topics, and certainly we
10 have touched upon some of those when we had our
11 briefing on -- that led to our campaign on anti-
12 semitism on college campuses. But I am very concerned
13 with the rise of ethnic-targeted, racially-targeted
14 incidents, speech, and conduct, on college campuses.

15 I would like to keep the focus of it
16 tightly wound on that. And if in the future we have
17 -- we can have the resources and the time to -- to
18 expand the inquiry elsewhere, I would be glad to.
19 But I just think that this is such an important topic
20 from the point of view of what is happening nowadays
21 on college campuses that I would ask my colleagues to
22 try and keep it tightly focused to provide the most
23 important -- to give it the importance and the power
24 that a report arising from this would have.

25 VICE CHAIR THERNSTROM: Would you -- as

1 part of that topic, would you include some
2 consideration of speech codes that certainly, you
3 know, impact the whole atmosphere or -- I mean, they
4 are part of the picture, it seems to me.

5 COMMISSIONER YAKI: I don't know, quite
6 frankly. I mean, I -- I understand the issue. I just
7 -- I think that, certainly, what we have found in a
8 lot of our hearings, the followup hearing to that,
9 that we draw issues out of it. That may be a -- that
10 may be reference. That may be a part. I certainly
11 don't think it needs to be a primary focus of the
12 hearing.

13 VICE CHAIR THERNSTROM: I just think it's
14 so integral to the whole question of the racial
15 atmosphere on campuses, and the response of
16 institutions of higher education to the whole problem.

17 COMMISSIONER YAKI: Well, I think that can
18 be part of how we examine what institutions have done,
19 but I don't want to go into a lengthy examination of
20 how people feel about different speech codes and
21 different campuses, when it's not related to a direct
22 incident or assault or whatever that happens on
23 college campus that originates in the racial -- in a
24 racial context.

25 So I would agree -- I would agree that

1 that should be part of any response, or we should
2 elicit that and see what it does and have commentary
3 on that. But I don't want it to be like, "Now we're
4 going to do speech codes" --

5 VICE CHAIR THERNSTROM: No, I understand.

6 COMMISSIONER YAKI: -- as a separate that.

7 VICE CHAIR THERNSTROM: I understand.

8 COMMISSIONER YAKI: Okay.

9 CHAIRMAN REYNOLDS: This is Chairman
10 Reynolds. I like Commissioner Yaki's proposal. But I
11 would like to see that religious component remain as a
12 part of the topic. And I understand, Commissioner
13 Yaki, your desire to have it tightly focused, but I
14 think that we can include the religious aspect and do
15 it in a way that doesn't detract from the overall --
16 from your overall goal.

17 COMMISSIONER YAKI: Mr. Chairman, I mean,
18 I would be -- I understand. I would be willing -- I
19 just don't want it to get into -- become a three-
20 headed monster here. If we are going to do -- you
21 know, I could agree to the religious aspect and maybe
22 that would be Panel 2, but I would want at least one,
23 you know, separate complete panel on the race issue,
24 and then the second panel could perhaps be the
25 religious panel, and then we could just conclude from

1 there. Otherwise, this could be a hearing that would
2 go on, you know, forever and --

3 CHAIRMAN REYNOLDS: No. I appreciate your
4 concern.

5 COMMISSIONER YAKI: Okay.

6 CHAIRMAN REYNOLDS: But I --

7 COMMISSIONER YAKI: I would be willing --
8 I would be willing to do a two-panel where we do it
9 that way. And if that would work with you, Mr. Chair,
10 I would accede to that request.

11 CHAIRMAN REYNOLDS: The approach that you
12 laid out I am comfortable with. I mean, we are not --
13 I don't believe we are going to vote. But if -- I
14 don't believe we are going to vote today, but the
15 approach that you just laid out I am comfortable with.

16 COMMISSIONER YAKI: Okay. Thank you.

17 VICE CHAIR THERNSTROM: Mr. Chairman, why
18 aren't we voting today? I'm sorry.

19 CHAIRMAN REYNOLDS: It wasn't clear to me
20 that we were intending to vote.

21 VICE CHAIR THERNSTROM: Okay.

22 COMMISSIONER GAZIANO: I would also prefer
23 to have Commissioner Kirsanow's views. And if we are
24 trying to have a hearing in December, it seems January
25 is the earliest. It seems like this discussion has

1 been very helpful maybe to narrow down to two topics
2 that we seem most interested in.

3 I want to -- you know, I will add that if
4 the college campus topic is chosen, I think there are
5 ways to accommodate Commissioner Yaki's concerns, but
6 I think there are probably several of us who want to
7 -- again, make sure the ethnic component is also
8 included. And it is hard to distinguish what is on
9 one panel or another.

10 But I agree with also Vice Chair
11 Thernstrom that the speech codes issue relates to the
12 race discrimination. But that is the kind of thing
13 that maybe we can flesh out in e-mails before the next
14 meeting, and we can vote in November.

15 COMMISSIONER YAKI: Mr. Chair, I would
16 also just like to raise, on behalf of Commissioner
17 Melendez, that he was very interested, from his own
18 personal experience, of the impact of the economic
19 freefall on job discrimination among older Americans.

20 I think that certainly what you are seeing in places
21 like Detroit and elsewhere is that a large percentage
22 of people who are being laid off are people in their
23 early to late fifties, towards sixties, a few years
24 away from retirement age.

25 And while it may not rise to the level of

1 the Older Americans Act in terms of the age, certainly
2 it is on the borderline and their ability -- the
3 ability of these folks to find gainful employment in
4 this economy is extremely difficult.

5 I just wanted to raise that as a topic
6 that I also am interested in, as well as the topic
7 posed by Commissioner Thernstrom, because when I was
8 on the Board of Supervisors in San Francisco we often
9 dealt with the problem of how do you expand
10 entrepreneurship, and what are the barriers with
11 regard to bonding or with regard to insurance
12 requirements, how you formulate contracts in a way
13 that don't create -- that create basically an
14 advantage for those companies that have always been at
15 the till, but not the people who are just trying to
16 get there.

17 So I want to express my support for that
18 as well as for Commissioner Melendez's older Americans
19 economic impact briefing concept paper as well.

20 VICE CHAIR THERNSTROM: Mr. Chairman, I
21 like the older Americans as well. I had not -- I had
22 not thought about the layoff problem before. I like
23 that topic a lot.

24 CHAIRMAN REYNOLDS: Okay. Well, I -- the
25 age discrimination is an issue, and I also read a few

1 articles concerning the number -- well, the
2 disproportionate number of males who are experiencing
3 -- well, the allegations that males are being
4 discriminated against -- during the layoff process.

5 But this topic -- I think that it is -- it
6 is definitely timely, and it has the added advantage
7 of being spearheaded by Commissioner Melendez. So the
8 -- it seems that the -- that we have at least three
9 topics that appear to have a significant amount of
10 support.

11 So any further discussion on briefing
12 topics?

13 COMMISSIONER HERIOT: Should we not vote
14 on one of these now?

15 VICE CHAIR THERNSTROM: No. Why don't we
16 just -- I agree. Let's just wait. We've got time.

17 COMMISSIONER HERIOT: Because I think we
18 have a lot of consensus here.

19 CHAIRMAN REYNOLDS: We can wait, or we
20 could agree that the -- that we are going to narrow
21 our focus to the top three. My only concern was that
22 approach in fact -- Commissioner Kirsanow is not on
23 the line, and I would like to give him an opportunity
24 -- if there is -- for example, the minority youth and
25 juvenile justice issue. If he had an interest in

1 that, I would like to hear him out.

2 So my preference is to --

3 COMMISSIONER GAZIANO: I'd prefer to get
4 his input on -- you know, we've had our input on
5 modifying these topics, and that might influence our
6 final vote. So I would prefer if we -- you know, we
7 could focus on the top three, and then try to vote on
8 November.

9 VICE CHAIR THERNSTROM: Why don't we have
10 concept papers on those top three developed --

11 CHAIRMAN REYNOLDS: Yes. I think it would
12 be a good idea to have these ideas fleshed out some
13 more for the next meeting. And if there is -- if we
14 have no other comments, I would also like to rearrange
15 the schedule once again. I know that we are going to
16 start losing Commissioners, and I would like to deal
17 with the Hawaii SAC issue.

18 III. STATE ADVISORY COMMITTEE ISSUES

19 CHAIRMAN REYNOLDS: So I move that we
20 consider it right now. Is there a second?

21 COMMISSIONER GAZIANO: Second.

22 COMMISSIONER YAKI: Point of order.
23 Quorum call on the phone.

24 CHAIRMAN REYNOLDS: Okay. Commissioner
25 Taylor? Ashley?

1 (No response.)

2 Arlan?

3 COMMISSIONER MELENDEZ: Yes, I'm back on.

4 My phone -- I'm on cell phone in Palm Springs. I'm
5 heading for the airport, but I'm going to be in and
6 out. So do you want my vote?

7 CHAIRMAN REYNOLDS: Well, we haven't --
8 we're just making sure that we know who is on the
9 line.

10 COMMISSIONER MELENDEZ: Okay. I'm back
11 on, but I'm going to be off and on.

12 CHAIRMAN REYNOLDS: Okay. All right. Do
13 we need to vote on this issue, moving this issue up?

14 (No response.)

15 Hearing no comment, at the September 3,
16 2009 meeting, Commissioner Gaziano brought a motion to
17 sever consideration of Daphne Barbee-Wooten from the
18 rest of the proposed members of the Hawaii State
19 Advisory Committee. That was --

20 VICE CHAIR THERNSTROM: Mr. Chairman?

21 CHAIRMAN REYNOLDS: -- of racially
22 offensive statements attributed to her. Commissioners
23 voted to table consideration of Ms. Barbee-Wooten --
24 of Ms. Barbee-Wooten's nomination unless she could
25 establish that the news accounts described by

1 Commissioner Gaziano were inaccurate, and that she did
2 not say the things that have been attributed to her.

3 VICE CHAIR THERNSTROM: Mr. Chairman, can
4 I just ask a question? When we left the last topic --
5 that is, these briefing reports -- have we agreed that
6 there will be some fleshing out of the three top --
7 our three top choices before the next meeting? Is
8 that --

9 CHAIRMAN REYNOLDS: We did not vote on it,
10 but I walk away from our exchange with the
11 understanding that right -- as of today, the three
12 items that we spent the most time talking about are
13 the three items that are the front runners, and that
14 staff would flesh out each of those topics.

15 VICE CHAIR THERNSTROM: Okay. Thank you
16 very much. I'm sorry to interrupt you.

17 COMMISSIONER HERIOT: Staff will do that,
18 or the sponsors will do that?

19 CHAIRMAN REYNOLDS: I'm sorry?

20 VICE CHAIR THERNSTROM: Or some
21 combination.

22 COMMISSIONER GAZIANO: Or some
23 combination.

24 COMMISSIONER HERIOT: Yes. You know,
25 that's -- okay. And those three topics are the campus

1 one, Abby's, and the age discrimination.

2 VICE CHAIR THERNSTROM: Yes.

3 COMMISSIONER HERIOT: Okay.

4 CHAIRMAN REYNOLDS: Okay. Commissioners
5 voted to place consideration of Ms. Barbee-Wooten's
6 nomination on the October 2009 meeting agenda. The
7 Acting Western Regional Director, Peter Minarik,
8 called Ms. Barbee-Wooten to inform her of the
9 Commission's action.

10 Ms. Barbee-Wooten sent a letter dated
11 September 23, 2009, which is in your meeting
12 materials. In the letter she admits that while she
13 was a member of a Hawaii ACLU she called Justice
14 Clarence Thomas an "Uncle Tom," but denies having been
15 motivated by or making any derogatory comments
16 regarding his interracial marriage.

17 Is there a motion to appoint Ms. Barbee-
18 Wooten to the Hawaii SAC?

19 (No response.)

20 Will anyone support the motion?

21 (No response.)

22 COMMISSIONER HERIOT: I think we can go
23 on.

24 CHAIRMAN REYNOLDS: Okay. At this point,
25 we are going to jump back -- bear with me.

1 COMMISSIONER GAZIANO: Could I have a
2 quorum call again, just to make sure I know who was on
3 the phone, who did not support the motion?

4 CHAIRMAN REYNOLDS: Sure. Commissioner
5 Melendez?

6 COMMISSIONER MELENDEZ: I'm here, but I
7 thought the question was whether or not we were
8 supposed to not have her on the SAC.

9 CHAIRMAN REYNOLDS: I was asking for a
10 Commissioner to move to vote -- to have a vote on
11 her --

12 COMMISSIONER HERIOT: Not to have a vote.

13 CHAIRMAN REYNOLDS: -- on the SAC.

14 COMMISSIONER GAZIANO: Does anyone --

15 COMMISSIONER HERIOT: It has to be -- if
16 they are going to be placed on the SAC --

17 COMMISSIONER GAZIANO: Yes, we are -- we
18 have tabled that. And if someone wants to move to put
19 her on the SAC, they have got to make that motion.
20 Commissioner Melendez, are you interested in making --
21 in supporting that motion?

22 VICE CHAIR THERNSTROM: And, otherwise,
23 she is not on the SAC.

24 COMMISSIONER HERIOT: Right.

25 COMMISSIONER MELENDEZ: Well, I'll make

1 the motion, so we can vote on it.

2 CHAIRMAN REYNOLDS: Okay.

3 VICE CHAIR THERNSTROM: Commissioner
4 Melendez, do you understand, nobody else has wanted to
5 even make the motion to have a vote on this.

6 COMMISSIONER HERIOT: We don't need a vote
7 on it.

8 VICE CHAIR THERNSTROM: We don't need a
9 vote on it.

10 COMMISSIONER HERIOT: Unless you want it.

11 COMMISSIONER GAZIANO: It sounds like
12 Commissioner Melendez wants a vote on it.

13 COMMISSIONER MELENDEZ: No. I don't
14 really want a vote on it. I just want to move the
15 meeting --

16 COMMISSIONER HERIOT: Let's just skip it.

17 VICE CHAIR THERNSTROM: Let's skip it.

18 COMMISSIONER HERIOT: Commissioner, we
19 don't need to vote on it, unless you want us to.

20 COMMISSIONER GAZIANO: I just wanted
21 clarity that you were still on the phone and whether
22 you wanted -- really wanted to vote on this or not.
23 That's it.

24 VICE CHAIR THERNSTROM: Well, nobody else
25 has wanted to make that motion. Why don't we just

1 move on.

2 COMMISSIONER MELENDEZ: Okay. Let's move
3 on.

4 UPDATE ON STATUS OF BRIEFING REPORTS;
5 APPROVAL OF COMMISSIONER DEADLINES FOR
6 CONSIDERATION OF BRIEFING REPORTS

7 CHAIRMAN REYNOLDS: Okay. Next item is an
8 update by the Staff Director on the briefing reports
9 and the approval by Commissioners of deadlines for
10 Commissioners to review pending briefing reports,
11 three of which have been sent to Commissioners for
12 their consideration, and those items are the Multi-
13 Ethnic Placement Act briefing report, the illegal
14 immigration briefing report, and, finally, the STEM
15 briefing report.

16 Mr. Staff Director, please provide us with
17 an update on the items.

18 STAFF DIRECTOR DANNENFELSER: Thank you,
19 Mr. Chairman. I distributed a list last evening to
20 Commissioners that listed the briefing reports that
21 are still pending that have not yet been the subject
22 of a Commission vote. And they are listed
23 chronologically by the order in which the briefing
24 date occurred, the first one being May 5, 2006, and
25 then the most recent one being June 12, 2009, relating

1 to health disparities between minorities and non-
2 minorities.

3 And, as you noted, Mr. Chairman, there are
4 three that were recently sent out to Commissioners,
5 during September that were sent out to Commissioners
6 for consideration in terms of possibly scheduling one
7 or more of those briefing reports. There is also the
8 HBCU topic. There had been some sentiment for joining
9 that with the STEM report when that is considered.
10 And then, there is the -- covert wiretapping was on
11 the agenda I guess back in May, and that then is up to
12 your discretion to reschedule that at an appropriate
13 time. We have --

14 CHAIRMAN REYNOLDS: Okay. Marty, please
15 remember, let's discuss that issue next week.

16 STAFF DIRECTOR DANNENFELSER: Okay. And
17 then --

18 VICE CHAIR THERNSTROM: Wait a minute.
19 What discussion next week? Are we having a discussion
20 next week?

21 CHAIRMAN REYNOLDS: I am going to have a
22 discussion with the Staff Director next week about the
23 covert wiretapping briefing report.

24 STAFF DIRECTOR DANNENFELSER: Okay. We
25 have two other --

1 VICE CHAIR THERNSTROM: A covert
2 discussion on a covert wiretapping briefing report.

3 (Laughter.)

4 COMMISSIONER YAKI: It's on a need-to-know
5 basis, Commissioner Thernstrom.

6 STAFF DIRECTOR DANNENFELSER: We have two
7 other briefing reports that are in the pipeline, so to
8 speak. One is the School Choice Blaine Amendments and
9 Anti-Catholicism briefing report. That is now in the
10 Editorial Review Board and legal sufficiency review
11 process.

12 The discrimination against Native
13 Americans in border towns was sent in September for
14 editorial review. We had three members of the
15 Editorial Review Board, and it received their reviews.

16 The third member had a death in the family, and her
17 review will probably be in by the end of next week.

18 So that one is -- but we have begun the
19 process of looking at those reviews that have come in
20 so far. So I think that once we get that final review
21 in we will be able to wrap that one up pretty soon,
22 and make that one available for Commissioners to
23 review and to factor into their consideration of how
24 they would like to schedule these reports.

25 So, at this point, I would just be happy

1 to answer any questions that Commissioners may have on
2 any specific topics. And, again, just hope that
3 perhaps one or two reports can be decided upon today,
4 that Commissioners may want to begin the review
5 process and then submit their comments on how they
6 think the report may be revised, and then we can go
7 from there to perhaps have a vote, and the
8 Commission's --

9 CHAIRMAN REYNOLDS: Okay.

10 STAFF DIRECTOR DANNENFELSER: --
11 statements and rebuttals, and so on.

12 CHAIRMAN REYNOLDS: Okay. I would suggest
13 -- well, we have three -- we have three reports that
14 we have to consider. I would suggest that we defer a
15 discussion on when we select the dates for the STEM
16 briefing report, and address the Multi-Ethnic
17 Placement Act briefing report and the illegal
18 immigration and its impact on wages and employment
19 opportunities for black workers, that briefing report.

20 It is -- I have some proposed dates that I
21 would like to throw out. I would appreciate it if we
22 had some discipline and not start -- well, if I were
23 there, you could throw things at me. But since I'm
24 participating by phone, I may not have to worry about
25 this. We soon will be into the holiday season; that's

1 why I made the comment.

2 In any event, I propose that the initial
3 Commissioner edits be received by November 9th, that
4 staff return the edited draft to Commissioners by
5 November 13th, that Commissioners vote on the report
6 at the November 20th teleconference, and that
7 concurring and dissenting statements be due 30 days
8 from the date of the teleconference.

9 COMMISSIONER HERIOT: You're talking about
10 MEPA?

11 CHAIRMAN REYNOLDS: I'm sorry?

12 COMMISSIONER HERIOT: You're talking about
13 the MEPA?

14 CHAIRMAN REYNOLDS: Yes.

15 COMMISSIONER HERIOT: Okay.

16 CHAIRMAN REYNOLDS: And, finally,
17 rebuttals would be due on January 20th.

18 VICE CHAIR THERNSTROM: Mr. Chairman, I am
19 a little bewildered by we are -- why we are still
20 holding up the briefing report on the historically
21 black colleges and universities. That was a briefing
22 held in 2006, and I just think it's -- you know, in
23 terms of the functioning of this Commission, we should
24 not be holding reports up with -- for this length of
25 time. I mean, you hold briefings and you get reports

1 out.

2 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,
3 I agree. We do have a problem with the backlog. I
4 think that Marty has -- Marty and the staff have shown
5 -- have demonstrated some progress in whittling down
6 the backlog, and --

7 VICE CHAIR THERNSTROM: But I don't think
8 that Marty and the staff are the reason why the
9 briefing -- the report on historically black colleges
10 and universities is being held up.

11 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,
12 I didn't suggest -- I didn't go into who was at fault.
13 I was just making the comment that we have a problem
14 with a backlog, and that Marty and staff have -- they
15 have shown progress in terms of whittling that backlog
16 down.

17 I think that it would be more productive,
18 at least at this point -- we can do a forensic
19 analysis and determine who is at fault.

20 VICE CHAIR THERNSTROM: No, I don't want
21 to do that. I just want to get that topic -- a report
22 on that topic out. It is now more than three years
23 since we had the briefing.

24 COMMISSIONER HERIOT: Mr. Chairman, this
25 is -- it's Gail here. The historically black colleges

1 and universities report, I thought everyone understood
2 that some time ago I suggested -- I believe it was to
3 Ken Marcus -- that this would be a much -- have much
4 more impact if it were released in connection with the
5 STEM sort of issue. If people objected to that, they
6 should have made a motion.

7 COMMISSIONER GAZIANO: Well, not only
8 that, it was discussed since I came on the Commission,
9 and there seemed to be consensus that -- on that
10 point. So --

11 COMMISSIONER HERIOT: Yes. I thought
12 everyone knew. That's why --

13 COMMISSIONER GAZIANO: -- I thought we
14 discussed it.

15 COMMISSIONER HERIOT: I thought everyone
16 knew that's why the HBCU issue had been held back. If
17 that's something that people object to, make a motion.

18 VICE CHAIR THERNSTROM: Well --

19 COMMISSIONER HERIOT: I think votes would
20 be much more likely to impact public policy if they
21 come out together. If someone disagrees, make a
22 motion. But I think it has been made very clear in
23 many meetings that's why that particular report has
24 not come out.

25 VICE CHAIR THERNSTROM: Well, at the point

1 at which -- I mean, a lot of time has now passed. I
2 don't think when we discussed --

3 COMMISSIONER HERIOT: Make a motion.

4 VICE CHAIR THERNSTROM: All right. I move
5 that we get the report on the historically black
6 colleges and universities out, and we do not wait
7 further for a -- for whatever we are waiting for with
8 respect to the STEM briefing.

9 COMMISSIONER YAKI: Second.

10 CHAIRMAN REYNOLDS: Do we need more
11 discussion?

12 COMMISSIONER HERIOT: No, I don't think
13 so.

14 COMMISSIONER YAKI: I would just add -- I
15 would just add that, with regard to the proposed
16 schedule that the chair had laid out before, that he
17 is asking for comments at approximately the same time
18 that the second round statements are due on the
19 Title IX briefing report. There is a date -- a day's
20 difference between them.

21 And I would -- I would say that regardless
22 of what other reports are out there, I believe the
23 HBCU report should be out there, because I certainly
24 do not contemplate that this -- that it would be two
25 years later that we would be waiting for this, because

1 it would -- but I'm saying at the time that -- at the
2 time that we allegedly agreed to even hold it with the
3 STEM thing, the fact is is that at the current rate
4 we're going that is not going to be produced until
5 early next year anyway.

6 Now, I think that while there may -- some
7 folks may believe there is some synergy between the
8 two, the fact is a by then four year-old report is
9 extremely stale. And there has been lots of movement
10 and changes regarding the HBCUs during that period of
11 time. So I wholeheartedly second Commissioner
12 Thernstrom's motion.

13 CHAIRMAN REYNOLDS: Well, in terms of
14 prioritizing, I mean, one way to sort this is to do
15 the oldest reports first. But I think that -- and
16 that has a certain logic to it. But I also think that
17 we need to -- another factor to consider is whether,
18 like in this instance, there could be some beneficial
19 synergies by linking certain briefing reports or, in
20 other instances, moving a briefing report past an
21 older report because it is more timely.

22 So the first-in-time, first-in-rank rule,
23 while I understand it, I think that there are other
24 factors that come into play.

25 COMMISSIONER YAKI: Mr. Chair, it is

1 Commissioner Yaki. I would agree that there are
2 always exigent circumstances that should be taken into
3 account. But the fact is that the HBCU report sat on
4 the shelf for an inordinately long period of time to
5 begin with, without any regard to those exigent
6 circumstances.

7 Then, it was brought up that perhaps it
8 might have some relevance to the STEM report. But I
9 would say at this point in time it is -- its relevance
10 would be severely diminished given that we are talking
11 about a moment in time, by the time this report will
12 probably get out, of four years. And I think any
13 relevance will quickly be dismissed as saying, "Well,
14 that was a four-year-ago snapshot." Great they did it
15 together, but -- just because they think that the two
16 should be linked. But the data informed in that
17 report is -- is pretty stale.

18 CHAIRMAN REYNOLDS: Okay.

19 COMMISSIONER GAZIANO: Mr. Chairman, just
20 to clarify one basis of my vote. The STEM report, I
21 don't think it is going to be four years that the HBCU
22 report would be -- between the briefing and the
23 release. But whatever the period, the real question
24 is whether the marginal extra time is worth it to link
25 the two reports. How close are we on the STEM

1 briefing report? If we chose to put that one on
2 the --

3 STAFF DIRECTOR DANNENFELSER: It's out.
4 That was one of those that was submitted -- sent to
5 Commissioners, not with any timetable, but it was --
6 the illegal immigration and STEM were recently sent in
7 September to Commissioners. So it is one that could
8 be scheduled. The Chairman is proposing MEPA come
9 first, then illegal immigration.

10 COMMISSIONER GAZIANO: No, no, I
11 understand that. So there is no real reason now that
12 we can't in pretty close order marry the two together.

13 STAFF DIRECTOR DANNENFELSER: No. It's
14 just a matter of Commission scheduling.

15 COMMISSIONER GAZIANO: Okay. Thank you.

16 VICE CHAIR THERNSTROM: And just to
17 underscore this kind of general point about the lag of
18 time, I mean, when we are today talking about briefing
19 topics for 2010, I mean, we are voting on these on the
20 assumption that the reports will come out in a timely
21 way, because otherwise there really is no point to
22 having these briefings, which can end up, as I think
23 is a problem with the historically black colleges and
24 universities, with stale data, stale information. I
25 mean, we've got to get these things out with some --

1 expeditiously.

2 CHAIRMAN REYNOLDS: I share Vice Chair
3 Thernstrom's concern. At the same time, I also
4 acknowledge the efforts made by Marty and the rest of
5 the staff to deal with the backlog. But at this
6 point, we have Vice Chair Thernstrom's motion on the
7 table. Commissioner Yaki, how do you vote?

8 COMMISSIONER HERIOT: Commissioner Yaki,
9 you have been asked to vote.

10 COMMISSIONER YAKI: I'm sorry. I'm
11 conferring. By the way, speaking of -- oops.

12 CHAIRMAN REYNOLDS: Commissioner Yaki?

13 COMMISSIONER YAKI: I'm sorry. I was
14 talking about a matter with my temporary Special
15 Assistant, Mr. Schmechel. What was the -- what is the
16 matter at hand? What is the vote on?

17 CHAIRMAN REYNOLDS: Correct me if I'm
18 wrong, Vice Chair Thernstrom, you had moved to --

19 COMMISSIONER YAKI: Is this for
20 Commissioner Thernstrom -- the motion I seconded?
21 Then, aye.

22 VICE CHAIR THERNSTROM: You seconded it,
23 yes.

24 COMMISSIONER YAKI: Aye.

25 CHAIRMAN REYNOLDS: Okay. Vice Chair

1 Thernstrom?

2 VICE CHAIR THERNSTROM: Aye.

3 CHAIRMAN REYNOLDS: Vice Chair -- I'm
4 sorry. Commissioner Melendez? Commissioner Melendez?

5 (No response.)

6 VICE CHAIR THERNSTROM: I think we lost --

7 CHAIRMAN REYNOLDS: Commissioner Taylor?
8 Commissioner Taylor?

9 (No response.)

10 Commissioner Heriot?

11 COMMISSIONER HERIOT: No.

12 CHAIRMAN REYNOLDS: Commissioner Gaziano?

13 COMMISSIONER GAZIANO: No, with the
14 understanding that there is not going to be any time
15 lost at this point in marrying the two together.

16 CHAIRMAN REYNOLDS: Okay. The vote is
17 three to two. I vote against the motion.

18 Now, we can return to the dates that I had
19 thrown out there. Do folks have alternate dates that
20 they would like to discuss for the Multi-Ethnic
21 Placement Act briefing report?

22 (No response.)

23 Is there concern about the fact that these
24 dates will cover both the Thanksgiving season, the
25 Hanukkah/Christmas season, and also the New Year?

1 VICE CHAIR THERNSTROM: Yes, I have some
2 concern about that.

3 COMMISSIONER GAZIANO: Could you add five
4 days to the comment periods to reflect Thanksgiving
5 and other December holidays?

6 CHAIRMAN REYNOLDS: Okay. Help me out.

7 COMMISSIONER GAZIANO: So that would be
8 November 25th for -- I'm sorry, we vote November 20th
9 on Part A. And so what was your -- what were your two
10 comment dates?

11 COMMISSIONER HERIOT: Let the record
12 reflect that Commissioner Yaki has left the room and
13 has taken his materials with him.

14 VICE CHAIR THERNSTROM: Well, but, I mean,
15 you have no idea whether he is coming back or not.

16 COMMISSIONER HERIOT: I didn't say I had
17 an idea.

18 VICE CHAIR THERNSTROM: Well, we don't
19 need that. I mean, if I head for the women's room, do
20 you need to put it in the record?

21 STAFF DIRECTOR DANNENFELSER: Well,
22 there's a quorum issue.

23 COMMISSIONER HERIOT: Well, yes.

24 CHAIRMAN REYNOLDS: Hold on. We no longer
25 have a quorum, and I assume that that's why the issue

1 was raised.

2 VICE CHAIR THERNSTROM: I see. I'm sorry.
3 I wasn't counting.

4 CHAIRMAN REYNOLDS: Okay. Is Commissioner
5 Yaki -- is his temporary Special Assistant still in
6 the room?

7 COMMISSIONER HERIOT: No. He left the
8 room with him. There is a bag sitting in a chair. I
9 believe it is Mr. Schmechel's, but I might be wrong.

10 CHAIRMAN REYNOLDS: Well, could someone
11 check?

12 VICE CHAIR THERNSTROM: I will go and
13 check what is happening.

14 STAFF DIRECTOR DANNENFELSER: He did cast
15 his vote before he left, but you can't complete the
16 vote without him.

17 COMMISSIONER HERIOT: Why not? Yes, we
18 can.

19 STAFF DIRECTOR DANNENFELSER: Well, you
20 can, if you have a quorum.

21 COMMISSIONER HERIOT: We completed the
22 vote.

23 CHAIRMAN REYNOLDS: No, we completed the
24 vote.

25 STAFF DIRECTOR DANNENFELSER: Oh, we did

1 complete the vote. Okay. That's right. You're
2 right, I'm sorry.

3 COMMISSIONER GAZIANO: We were just trying
4 to set the date for MEPA, which I think that we can
5 just have a --

6 COMMISSIONER HERIOT: We can do that
7 without a vote.

8 COMMISSIONER GAZIANO: Yes, we can do that
9 without a vote. We can do that just what -- what the
10 intent is, and we can -- we can ratify any comment
11 periods at our next meeting, since the comment periods
12 won't even begin -- Commissioner statement comment
13 periods -- until after the next meeting.

14 But I would suggest, Mr. Chair, that if
15 you just add five days each to the two comment
16 periods, that would -- that would allow the additional
17 time for us to enjoy our holidays in peace.

18 STAFF DIRECTOR DANNENFELSER: And the vote
19 would still occur on November 20th, but then under
20 Commissioner Gaziano's proposal the -- the initial
21 comment period and the rebuttal period would be
22 extended by five days apiece?

23 COMMISSIONER GAZIANO: Correct.

24 CHAIRMAN REYNOLDS: So before I get into
25 the mechanics, does that create any problems for

1 staff?

2 STAFF DIRECTOR DANNENFELSER: No, I don't
3 think so. I think if the vote is still on
4 November 20th, I think that moves the process along
5 pretty well. And I don't think the addition of a few
6 extra days on each comment period is a problem.

7 CHAIRMAN REYNOLDS: So if I understood --
8 if I understood you right, Todd, the concurring and
9 dissenting statements would be due on Christmas.

10 (Laughter.)

11 COMMISSIONER GAZIANO: Sure.

12 COMMISSIONER HERIOT: We could have nice,
13 festive statements.

14 CHAIRMAN REYNOLDS: Okay. So that's --
15 everyone is comfortable with that? We won't be able
16 to vote on this, but just for discussion purposes --

17 COMMISSIONER GAZIANO: These are extra
18 days.

19 COMMISSIONER HERIOT: Yes, we don't --

20 COMMISSIONER GAZIANO: So it doesn't make
21 someone turn it in on Christmas.

22 CHAIRMAN REYNOLDS: Okay.

23 COMMISSIONER GAZIANO: It just gives them
24 five extra days.

25 CHAIRMAN REYNOLDS: All right.

1 COMMISSIONER GAZIANO: And that means the
2 rebuttal periods have --

3 CHAIRMAN REYNOLDS: Everything gets pushed
4 out five days.

5 STAFF DIRECTOR DANNENFELSER: We might
6 have to push the rebuttal period out a few days if
7 staff is not here to distribute. Well, actually, we
8 can -- we can circulate the statements, nonetheless.
9 Well, it probably --

10 COMMISSIONER GAZIANO: At the next
11 meeting --

12 STAFF DIRECTOR DANNENFELSER: We'll work
13 that out.

14 COMMISSIONER GAZIANO: At the next
15 meeting, we can -- we can allow an extra day to
16 circulate the --

17 (Laughter.)

18 VICE CHAIR THERNSTROM: Well, Commissioner
19 Yaki is conferring with Richard Schmechel, and --

20 COMMISSIONER GAZIANO: Yes. Would you
21 state that for the record? Gerry probably couldn't
22 hear you.

23 COMMISSIONER HERIOT: Yes. You need your
24 microphone to --

25 CHAIRMAN REYNOLDS: Do we have an update

1 on Commissioner Yaki?

2 COMMISSIONER HERIOT: We are about to get
3 it.

4 STAFF DIRECTOR DANNENFELSER: The Vice
5 Chair is going to give us an update.

6 VICE CHAIR THERNSTROM: Commissioner Yaki
7 is conferring with -- with Special Assistant Richard
8 Schmechel at the moment. And I don't have a sense of
9 whether they --

10 CHAIRMAN REYNOLDS: So he knows that he is
11 needed to maintain a quorum.

12 VICE CHAIR THERNSTROM: Well, as I
13 understood it just now, my -- am I wrong that the vote
14 that was just taken was completed? Are there more
15 votes, Mr. Chairman?

16 CHAIRMAN REYNOLDS: Well --

17 COMMISSIONER GAZIANO: There always could
18 be a motion.

19 COMMISSIONER HERIOT: Yes, people can --

20 CHAIRMAN REYNOLDS: I don't believe so. I
21 --

22 VICE CHAIR THERNSTROM: I think we are
23 finished.

24 COMMISSIONER GAZIANO: We are going to
25 approve the calendar, so that's an item that we --

1 CHAIRMAN REYNOLDS: We should not have
2 need for a vote, but I have been wrong in the past. I
3 thought that we were just going to have a conversation
4 and negotiation over dates for the various briefing
5 reports, that we would have a conversation/negotiation
6 over dates for the 2010 Commission meetings, and so
7 on.

8 VICE CHAIR THERNSTROM: The Commission
9 meeting --

10 COMMISSIONER HERIOT: Do we not need to
11 vote on that?

12 VICE CHAIR THERNSTROM: The Commission
13 meeting dates --

14 COMMISSIONER HERIOT: Do we not need to
15 vote on the Commission meeting dates?

16 CHAIRMAN REYNOLDS: Well, I would hope
17 not.

18 VICE CHAIR THERNSTROM: Yes, and they --
19 that can certainly wait, but I don't think we need a
20 vote on that.

21 I mean, I do think, with all due respect,
22 Mr. Chairman, that these -- that the pile-up of work
23 around the holidays is -- it's a problem for me.
24 Maybe it isn't for anybody else. And I certainly am
25 only one person.

1 CHAIRMAN REYNOLDS: Well, it's a problem
2 for all of us, and Commissioner Gaziano attempted to
3 improve the burden, at least lighten the burden, by
4 adding five days to certain milestones in the
5 schedule.

6 So the concurring and dissenting
7 statements, there will be an additional five days
8 tacked on to it. Yes, it would be due on Christmas
9 day. And then, subsequent milestone dates would be
10 pushed out five days.

11 VICE CHAIR THERNSTROM: Well, I mean,
12 look, there is something -- we have arrived at dates
13 in the past which have not been honored, and I have a
14 feeling that when we put -- place them at a time when
15 people are traveling, you know, getting together with
16 family, blah, blah, blah, I mean, the result is we are
17 just -- that these dates are going to become somewhat
18 meaningless.

19 CHAIRMAN REYNOLDS: Well, there are two
20 important factors that we need to consider. These
21 briefing reports, the Commissioners have had them for
22 quite a bit of time.

23 VICE CHAIR THERNSTROM: I agree with that.

24 CHAIRMAN REYNOLDS: And, in addition to
25 that, this time around each Commissioner, with the

1 exception of Pete and I, have their own Special
2 Assistant. Pete and I still share.

3 So I would think that, you know, taking
4 those two points into consideration, that the schedule
5 shouldn't be so daunting.

6 VICE CHAIR THERNSTROM: I don't know
7 whether that's true or not. Speaking --

8 CHAIRMAN REYNOLDS: For --

9 VICE CHAIR THERNSTROM: -- for myself,
10 look, I have been for -- for more than a year now
11 complaining about the postponement of these briefing
12 reports. But speaking for myself, I have a superb
13 Special Assistant. I am crazy about him. But,
14 nevertheless, I have to go over the work, because --

15 (Laughter.)

16 -- I am -- at the end of the day, the buck
17 stops on my desk, and I think that is probably true
18 for everybody else.

19 COMMISSIONER GAZIANO: Ms. Vice Chair, I
20 would suggest we first do have -- we are just talking
21 about --

22 VICE CHAIR THERNSTROM: How did I get a
23 "Ms." here?

24 (Laughter.)

25 COMMISSIONER GAZIANO: Mrs., Miss --

1 PARTICIPANT: Madam.

2 COMMISSIONER GAZIANO: -- Madam. Sorry.

3 (Laughter.)

4 VICE CHAIR THERNSTROM: The Honorable Vice
5 Chair.

6 COMMISSIONER GAZIANO: The Honorable Vice
7 Chair --

8 (Laughter.)

9 -- might I suggest that we are going to
10 first have to vote on Part A. We can't vote on these
11 targets right now unless a certain Commissioner comes
12 back in the room, who likes to walk out to defeat
13 quorum. And on November 20th, if you want to propose
14 other dates, I would be open to it, but I agree with
15 you that we should -- we should do so thoughtfully,
16 and we should stick with them. But I don't know that
17 we need to --

18 COMMISSIONER HERIOT: No, we --

19 COMMISSIONER GAZIANO: -- stuck to comment
20 periods pretty much with -- usually the -- it is good
21 to get them set -- have some idea ahead of time, but
22 normally we -- we come closer to binding ourselves at
23 the point we adopt Part A, and findings and
24 recommendations. And so we can revisit that on
25 November 20th.

1 CHAIRMAN REYNOLDS: Okay. I -- moving
2 ahead, looking at the other two items, the other two
3 briefing reports, I suggest that we not attempt to
4 pick some dates at this point, but give some serious
5 thought to coming up with a schedule for those
6 reports.

7 VICE CHAIR THERNSTROM: Why doesn't the
8 Staff Director circulate, via e-mail, proposals with
9 respect to dates?

10 CHAIRMAN REYNOLDS: Yes. And, in fact,
11 going forward, Staff Director should provide us with
12 some recommended dates, and that would be the starting
13 point for negotiations over the schedule.

14 STAFF DIRECTOR DANNENFELSER: I can do
15 that, Mr. Chairman.

16 VICE CHAIR THERNSTROM: And maybe we can
17 adjourn. No, I have the minutes, we have the minutes.
18 I have a correction to the minutes.

19 COMMISSIONER HERIOT: We still have
20 several things.

21 COMMISSIONER GAZIANO: We talked --
22 recommended --

23 COMMISSIONER HERIOT: We can't vote on
24 that, but we can have our discussion.

25 VICE CHAIR THERNSTROM: All right. We'll

1 vote on it next time. It's all right. We can
2 retroactively correct the minutes.

3 CHAIRMAN REYNOLDS: I'm sorry. What is
4 being proposed?

5 VICE CHAIR THERNSTROM: I will have to
6 wait until next time. I want a small correction in
7 the minutes that I don't think anybody will object to.

8 CHAIRMAN REYNOLDS: Okay.

9 VICE CHAIR THERNSTROM: I just have to
10 wait until next time.

11 CHAIRMAN REYNOLDS: Have we concluded that
12 Commissioner Yaki will not rejoin us?

13 COMMISSIONER HERIOT: We have not, but Mr.
14 Schmechel is here and may be able to clarify that for
15 us. Mr. Schmechel is just shaking his head and
16 looking perplexed.

17 (Laughter.)

18 COMMISSIONER GAZIANO: Now he's smirking.

19 COMMISSIONER HERIOT: And he is not
20 looking up to make eye contact. There he goes.

21 (Laughter.)

22 CHAIRMAN REYNOLDS: Mr. Schmechel, do you
23 know if Yaki intends to return?

24 COMMISSIONER HERIOT: I think it may
25 depend upon whether or not Commissioners Taylor,

1 Kirsanow, or Melendez comes here.

2 COMMISSIONER GAZIANO: That's speculation
3 on your part, Commissioner, based on a long train of
4 similar occurrences, I might add --

5 (Laughter.)

6 -- but it's still speculation,
7 nevertheless.

8 COMMISSIONER HERIOT: Do I detect a sense
9 of humor in Commissioner Gaziano's statement there?

10 (Laughter.)

11 CHAIRMAN REYNOLDS: I will wield the gavel
12 to regain control over this mob.

13 VICE CHAIR THERNSTROM: Yes. And I object
14 to talking about anybody as smirking. I just -- I
15 think that's out of line.

16 CHAIRMAN REYNOLDS: I'm sorry, Vice Chair
17 Thernstrom?

18 VICE CHAIR THERNSTROM: I object to any of
19 us talking about any other member in the room as
20 smirking. I think it's out of line.

21 CHAIRMAN REYNOLDS: Well, if we judge by
22 historical standards, I mean, that -- that insult is
23 not so bad.

24 (Laughter.)

25 COMMISSIONER GAZIANO: I would invite said

1 Special Assistant who was so accused of smirking to
2 respond for the record, if he chose to, and I would
3 apologize if he requested. He is shaking his head no.

4 CHAIRMAN REYNOLDS: All right. We need to
5 make a decision. I am not there. I don't have a
6 sense of -- did he remove his personal belongings?

7 COMMISSIONER HERIOT: No, I think that we
8 can go on with the meeting, since we don't have any
9 vote right now. And if Commissioner Yaki,
10 Commissioner Taylor, Commissioner Kirsanow, or
11 Commissioner Melendez don't show up, then we won't be
12 able to vote. But there is nothing that prevents us
13 from having an informational meeting.

14 CHAIRMAN REYNOLDS: Okay. That is true.
15 Okay. So, well, the next item up would
16 have been a discussion of the three sets of minutes.
17 And in addition to Vice Chair Thernstrom's --

18 COMMISSIONER HERIOT: Wait. Did we have
19 our Title IX discussion?

20 COMMISSIONER GAZIANO: No. No.

21 COMMISSIONER HERIOT: Or our calendar
22 discussion?

23 COMMISSIONER GAZIANO: We didn't have our
24 Title IX or calendar discussion.

25 CHAIRMAN REYNOLDS: Okay. All right.

1 Let's go to the calendar.

2 APPROVAL OF CALENDAR OF 2010

3 COMMISSION MEETINGS

4 CHAIRMAN REYNOLDS: I assume that everyone
5 has a list of the proposed dates in front of them.

6 COMMISSIONER HERIOT: Yes. Mr. Chairman,
7 I actually have a request on that for the March date.
8 I would strongly prefer the 12th rather than the
9 19th.

10 CHAIRMAN REYNOLDS: Okay. Bear with me.
11 The 12th. Any objections?

12 (No response.)

13 Okay. Okay. Any other changes?

14 STAFF DIRECTOR DANNENFELSER: Mr.
15 Chairman, just as a point of information, on the
16 January date, Commissioners should be aware that that
17 is the Friday before Martin Luther King holiday. And
18 we discussed that when we were developing this, and it
19 is -- there was just concern about getting far enough
20 away from the holidays and also not getting too far
21 into the month.

22 So I just wanted to bring that to
23 Commissioners' attention. And if that's problematic,
24 then perhaps it could be moved a week in one direction
25 or the other, but I just wanted to bring that to

1 Commissioners' attention.

2 COMMISSIONER GAZIANO: Thank you. If and
3 when we ever vote on these, I think that it's good
4 that we meet at around the time of Martin Luther King
5 holiday. People can still enjoy three days. I would
6 be open if someone had a -- wanted to take an even
7 longer vacation, and wanted a different time. But
8 otherwise, I think it is good for us to meet around
9 that weekend.

10 COMMISSIONER HERIOT: That's actually a
11 good date for me, too, for my teaching schedule.

12 COMMISSIONER GAZIANO: Okay.

13 COMMISSIONER HERIOT: That would be better
14 than the other January dates.

15 CHAIRMAN REYNOLDS: Okay. Any other
16 suggested changes?

17 COMMISSIONER GAZIANO: Should we -- we did
18 meet in August this year. I know that the Commission
19 didn't in the past. Do we want to put in a
20 provisional day, with the thought that we might skip
21 it, but that we might have to go with it?

22 CHAIRMAN REYNOLDS: Yes. Do you have a
23 date in mind?

24 COMMISSIONER GAZIANO: Does August 6th
25 make sense? I don't really -- between August 6th and

1 August 13th. I don't have a strong --

2 VICE CHAIR THERNSTROM: You know what? I
3 would like to leave the question of an August meeting
4 and its date until we all have holiday plans settled
5 and --

6 COMMISSIONER HERIOT: Well, it's actually
7 the other way around, isn't it? That if we have the
8 date, then we can all coordinate. Otherwise, if
9 people make plans --

10 VICE CHAIR THERNSTROM: No. I can't
11 coordinate my holiday plans on --

12 COMMISSIONER HERIOT: -- there could be no
13 dates.

14 VICE CHAIR THERNSTROM: -- the basis of a
15 Commission meeting, but I can -- I can coordinate a
16 Commission meeting with what I know -- when I know I
17 am --

18 COMMISSIONER HERIOT: But there are eight
19 of us. That's the thing.

20 VICE CHAIR THERNSTROM: Well, I assume
21 that's true of other people, too. They just --

22 COMMISSIONER HERIOT: We'll all make plans
23 for the long weekend, and there won't be any date that
24 we have all left free, if we don't make the decision
25 now.

1 COMMISSIONER GAZIANO: Yes. And we have
2 to -- we have to -- if we are going to vote for these,
3 we have to do so at a subsequent meeting. But do you
4 have a -- right now, in the absence of anything else,
5 do you have a preference for the 6th or the 13th?

6 VICE CHAIR THERNSTROM: I have a
7 preference for no August meeting.

8 CHAIRMAN REYNOLDS: Okay. How about this?
9 We're not voting on this apparently. The positions
10 on this are staked out. Vice Chair Thernstrom has a
11 -- I don't know if -- my characterization is you have
12 a strong position, and Gail and/or Todd have a strong
13 position, but we need to decide at this date. And
14 maybe with the passage of a few weeks, either side may
15 change their mind.

16 COMMISSIONER GAZIANO: It was helpful to
17 have these dates supplied to us at this point, and to
18 hear potential conflicts that Commissioners are aware
19 of. So I'm glad you got this list to us when you did,
20 Mr. Staff Director.

21 CHAIRMAN REYNOLDS: Okay. Will someone --
22 where are we on the agenda?

23 COMMISSIONER GAZIANO: Next is the
24 discussion of our gender discrimination in colleges
25 project.

1 DISCUSSION OF TITLE IX PROJECT

2 CHAIRMAN REYNOLDS: Okay. Marty, will you
3 take the lead on that?

4 STAFF DIRECTOR DANNENFELSER: Well, I
5 would like to ask Dr. Lerner to provide us with an
6 update based on some of the research that he has done
7 and some the logistics that he has looked into.

8 DR. LERNER: Right. Thank you.

9 STAFF DIRECTOR DANNENFELSER: Talk into
10 the mic.

11 DR. LERNER: Okay. We have basically done
12 some initial research on -- well, a couple of things.
13 We have actually started to do some background
14 research on the sex discrimination in liberal arts
15 college admissions. Some of it has been --

16 CHAIRMAN REYNOLDS: Excuse me. Dr.
17 Lerner, could you please speak into the microphone?

18 DR. LERNER: My apologies, yes. I'll see
19 if I can -- all right. Let's try that again.

20 We have been doing some background
21 research, initially to get a sense of what is out
22 there, and that is comprised of several things.
23 First, some review of the -- the court cases and
24 whatever literature discussion there is. There is
25 actually relatively little of that, at least so far

1 that we have been able to discover.

2 Second, what we have done is built a
3 database, and we have been looking at college and
4 universities that might potentially, including the
5 ones mentioned in the concept paper, but also
6 including others, both in the D.C. area and elsewhere,
7 we get a sense of some of the colleges and
8 universities that might be or might -- might be
9 discriminating against women in order to admit a
10 balanced -- "balanced" enrollment for men. So we
11 started to pull that together.

12 Third, I did some preliminary analysis of
13 the studies that I could find on sex discrimination in
14 undergraduate education. There are none, of course,
15 available, easily available, for private schools.

16 For public schools that I was able to
17 refer to reports done for the Center of Equal
18 Opportunity, which in fact it did include gender or
19 sex in their prediction equations, the best and most
20 direct way to study whether there is discrimination or
21 not is simply to treat it as a statistical problem and
22 seeing if in fact you can predict admissions as a
23 function of the background variables and the
24 prohibited status -- or not prohibited, but at least
25 the -- ones that seem discriminatory and see what

1 happens.

2 And when we did that, when I looked
3 through the results that had been done by the Center
4 for Equal Opportunity, they were very modest. It was
5 unclear to me, initially at any rate, whether there
6 was some -- perhaps no sex discrimination at all, or,
7 if there was, it would be very difficult to detect.

8 The results were very modest, let's put it
9 that way. Or in some cases, it appeared as though
10 there was discrimination against men, in other cases
11 there would be discrimination against women.

12 However, we decided on another -- so that
13 suggests in general that either it is not necessarily
14 an issue, in other words we may not find anything, or
15 it is hidden sufficiently that we have to do a lot
16 more work to try to ferret it out. And I'm not sure
17 we can do that.

18 So the second thing, as I had suggested,
19 based on the concept paper, we came up with the idea
20 was -- where is the obvious place to look for this, if
21 we are going to find sex discrimination? And like the
22 paper suggests, rightly I think, that it would be
23 private, selective, co-ed liberal arts colleges that
24 might do -- some of them might do that. Might, I say,
25 because there is no direct proof of it at this point,

1 and the evidence that we have is sketchy.

2 So we are trying to put together a list of
3 colleges and universities that would be -- well, we
4 obtained the data, and that is one of the big issues
5 also we have been debating and discussing. And we are
6 going to need some guidance from everybody here.

7 Of course, public universities can -- will
8 provide data in response to a FOIA request, but
9 private ones, of course, are not covered by that. So,
10 as it was suggested in the concept paper, we would
11 have to have -- we would have to subpoena the data in
12 a document subpoena. I forget the specific legal
13 phrase that's used, but nonetheless there is a process
14 for doing that.

15 Now, the Commission has done that before.

16 In 1995, as part of a larger study, the Commission
17 did that with respect to financial institutions in New
18 York City. And they held a hearing, and they obtained
19 data from 35 firms. They subpoenaed them, as it turns
20 out, and they did get some information and they
21 published it, I think it was four or five years later,
22 as part of a larger report. So that definitely can be
23 done. And, in fact, it -- to get the kind of data
24 that's in the concept paper, we are going to have to
25 do that.

1 So, basically, we have been doing a lot of
2 preliminary research and trying to figure out what we
3 could do -- what we could get and what we couldn't
4 get, what we have to plan in effect to get. And in
5 the process of doing that, we are in the middle of
6 drafting the discovery plan and a chapter outline,
7 even though this -- it was unclear -- we were unclear
8 whether this is an actual statutory report or just a
9 report anyway. It seemed to me that was a useful
10 tactic to take regardless. And did this in
11 consultation with the Staff Director.

12 So that is pretty much where it stands.
13 We are basically exploring -- building this database,
14 we are doing literature review, and we are putting
15 together the plans for how we go about securing the
16 data from private and/or public liberal arts colleges.

17 STAFF DIRECTOR DANNENFELSER: Okay. Are
18 there any questions for Dr. Lerner?

19 COMMISSIONER GAZIANO: I suppose I have
20 one sort of concern with what seems to be a slight
21 departure from the concept. I think it's valuable to
22 obtain data that shows particular types of
23 institutions, are not discriminating on the basis of
24 gender. And I thought that was, you know, one of the
25 results we were -- we don't necessarily assume to know

1 what the data will show.

2 And we shouldn't necessarily target only
3 -- we should target institutions we think might have
4 -- that the literature or admissions by some of these
5 admissions officers -- I understand, for example,
6 certain institutions have admissions officers that
7 claim or admit that they are discriminating --

8 DR. LERNER: Excuse me, Commissioner.

9 COMMISSIONER GAZIANO: -- on the basis of
10 gender.

11 DR. LERNER: There's one that I know of.

12 COMMISSIONER GAZIANO: And that the
13 reasoning of that admissions officers suggested that
14 similar institutions that are in a similar admissions
15 situation might be doing the same thing. So that's
16 one key.

17 But I was hoping that we would be able to
18 -- to, you know, look at a variety of different types
19 of institutions, as Commissioner Heriot set out in the
20 proposed concept paper, and be able to say one way or
21 the other, "Well, it looks like the lead institutions,
22 private, public, do, don't."

23 So that's why I am interested in, you
24 know, as broad a request as we can, and certainly, you
25 know, consistent with civil litigation practices, us

1 sending subpoenas duces tecum is probably what we
2 should do regardless -- that's my other comment --
3 regardless of what kind of institution it is.

4 FOIA, whether we proceed under state FOIA
5 law -- and we shouldn't have to worry about that. We
6 are a federal agency who Congress has given really a
7 non-threatening power that every single private lawyer
8 in America has and exercises, and that we should be
9 uniform in how we request the data, with a nice,
10 polite letter saying, "Here is your subpoena. Please
11 submit the data, documents. We'll work with you to
12 get it in the right form within 30 days." Or
13 something like that.

14 VICE CHAIR THERNSTROM: Mr. Lerner -- Dr.
15 Lerner, what would, in your mind, constitute reliable
16 evidence of a negative, as it were, that an
17 institution is not engaging in behavior that we might
18 question? I mean, I can -- I understand finding
19 evidence that they are, but finding evidence that is
20 reliable, and that we would want to go with, that they
21 are not, when -- that seems to me extremely
22 problematic.

23 DR. LERNER: Well, yes, let me answer
24 that. I think it is problematic for several reasons.
25 In the first place -- well, there is the simple

1 statistical point that normally one tests the null
2 hypothesis of no difference. You could in fact do the
3 reverse, but it's statistically rather more
4 complicated.

5 And, I mean, second of all, you could
6 simply arbitrarily decide that such and such a result
7 is equivalent to that. But, again, you would have to
8 have some basis upon which to set that. My --

9 VICE CHAIR THERNSTROM: That certainly
10 wouldn't satisfy me.

11 DR. LERNER: Well, I mean, that's the
12 problem. I mean, what would be a satisfactory answer
13 -- the problem is that I would think it would really
14 lead to an indeterminate situation. You can't show it
15 one way or the other. You can show that there would
16 be some kind of differences or no differences, just
17 the same way you can think of the raw admissions
18 rates.

19 Let me just use an example that was one of
20 the examples in the concept paper. You take a look at
21 Johns Hopkins University's most recent data. The male
22 acceptance rates are about 25 percent, as is the
23 female acceptance rate. Can you conclude they are not
24 discriminating on the basis of that? No. Can you
25 conclude that they are discriminating based on that?

1 Not really. Because we don't know what else is in
2 here.

3 And without knowing that, without having
4 the other information, we are not going to be able to
5 do it. And, even then, I don't know, my -- maybe it's
6 just an aesthetic thing, I have always preferred to
7 find something when I've done my research. We don't
8 have to --

9 COMMISSIONER GAZIANO: Perhaps you will
10 with every institution. But unless you ask, we won't
11 know.

12 DR. LERNER: Well, I wasn't suggesting we
13 shouldn't ask. Not at all. I mean, this calls for us
14 -- this calls for us to in fact find out.

15 VICE CHAIR THERNSTROM: Well, what is the
16 question you ask, then? I'm confused about it. How
17 do you get reliable data here? What is the question?

18 DR. LERNER: Well, basically, I think
19 whether you want to show that you are someone who is
20 not discriminating -- it's sort of an unusual thing.
21 Normally, as I said, in either legal or another
22 context, you would be interested in showing that
23 someone is discriminating or rebutting that
24 presumption.

25 You would basically want to be able to

1 predict who is admitted on the basis of whatever the
2 characteristics are, and that is the kind of data
3 that, for example, the Center for Equal Opportunity
4 has gotten. And it is the kind of data that ideally
5 we would be able to get, too.

6 COMMISSIONER GAZIANO: Sure. And I don't
7 want to, you know, suggest the appropriate term that
8 you would give us, but it's fine to say, "There is
9 strong evidence of gender discrimination at these
10 institutions. There isn't a strong correlation at
11 these institutions." You know, that's fine. That's
12 something.

13 DR. LERNER: Well, that's right.

14 COMMISSIONER GAZIANO: And then, plenty of
15 other scholars can look at it and, you know,
16 potentially make their data available for others to
17 tease out. But, you know, we don't -- just saying
18 whether there is a strong correlation here, there is
19 not a strong correlation there, that is a valuable
20 starting point.

21 DR. LERNER: Well, that is basically what
22 we have to do in any case, and that's what we would do
23 in any case. I mean, it's not so much -- it's not so
24 much that I would disregard other institutions, I mean
25 necessarily it's some kind of prejudicial selection.

1 It's that the concept paper provides in effect a
2 background, which I think at least initially is
3 plausible.

4 Where might you find this sort of thing?
5 The answer being -- I would qualify this a little bit
6 -- liberal arts colleges that may be not the most
7 prestigious, somewhere a little bit less prestigious
8 perhaps than the very top ones, you might very well
9 find something like that.

10 So at least it's a good place to look. It
11 gives us a starting point. We are not adverse to
12 looking all kinds of places, but this is the scope
13 that we are working on at this point.

14 COMMISSIONER HERIOT: I would strongly
15 second what Commissioner Gaziano has said here, and
16 that is it is useful to be able to make that
17 comparison. You know, with more elite liberal arts
18 schools, state schools, you know, if we believe that
19 this is more likely to be occurring in private liberal
20 arts schools that are somewhat selective, but not
21 intensely selective, that doesn't mean we are not
22 interested in the other schools. In fact, we are very
23 interested.

24 DR. LERNER: No, it's -- right. I'm not
25 saying one shouldn't be, and I -- I would agree with

1 that. The only question is how many institutions --
2 the issue, which is not really resolved in the concept
3 proposal here, is, how many institutions should we
4 look at, and of what kinds?

5 Right now, there are approximately in the
6 greater -- on the assumption that this is going to be
7 a hearing, on the assumption that this 100-mile limit
8 applies, there are approximately -- we decided it was
9 130 institutions in this area that might qualify. And
10 of those, we wouldn't necessarily subpoena all of
11 them, although I suppose we could. But we would want
12 to -- we would want to send subpoenas to a fair number
13 of them, and then see what happens.

14 That's kind of how I viewed it, but as the
15 actual carrying out of the data part of this project,
16 because it -- to me that is the most difficult part of
17 it all, actually obtaining the information in a way we
18 can use. To me, that's by far the hardest part. Once
19 we have actually gotten the information, I'm not that
20 concerned about being able to analyze it properly.
21 But getting information is a hard thing, and that's
22 what I helped to do.

23 VICE CHAIR THERNSTROM: Well, I would just
24 like to stress here that I hope and I -- and you are
25 such a good social scientist that I -- I know this is

1 not necessary for me to say to you, but I just want to
2 put it on the record. That you will really stress the
3 limits of the information that the data provide,
4 because I'm going to be impressed with that at the end
5 of the day, I'm sure.

6 DR. LERNER: Well, there are going to be
7 limitations. There are going to be -- we are going to
8 have to -- what's going to be interesting is we are
9 going to find out exactly what they will give us in
10 response to our subpoena.

11 In principle, this is the way I see it.
12 This is -- an institutional discrimination study is a
13 study of decisionmaking essentially. This is my
14 personal view -- what you want to know and what you
15 want to get into your head here is the number of
16 factors that enter into it.

17 In theory, if you could enter into the
18 brains, the minds, of people making the decision, you
19 could have a complete answer to a question. They may
20 or may not -- but one is -- at least in the past, one
21 has generally assumed that you don't have access to
22 all of the information. Even in adversary
23 proceedings, that is often not the case.

24 So the question is: what will we be able
25 to conclude? Now, I will say this. We will be able

1 to conclude more from a study like this than pretty
2 much any other kind of study we would do. So that's
3 -- this is our best shot at being able to answer that
4 question.

5 As far as drawing definite conclusions, it
6 would have to depend on the strength of the evidence.

7 If it looks like it is very strong, we draw
8 conclusions. If it doesn't, this is what we found,
9 and there are -- this is one way you could look at it,
10 this is another way you could look at it. And the
11 Commissioners then might decide to make their own
12 interpretations. I think we have to leave it at that.

13 One of the things that did -- as I said,
14 in my initial survey of these -- of these matters is
15 that the correlations were very small with respect to
16 gender or sex in admissions. And they seem to go --
17 they seem to bounce around. Sometimes they favored
18 me; sometimes they favored women. All of that tends
19 to lead me to the intuition that there is not
20 necessarily very much here, at least in these places.

21 COMMISSIONER HERIOT: These are all state
22 schools, is that correct?

23 DR. LERNER: They are all state schools,
24 that's right.

25 COMMISSIONER HERIOT: Schools that would

1 be covered by Title IX.

2 DR. LERNER: That's right. That's right.

3 But I don't -- what I was not assuming there would be
4 ruled out of consideration here.

5 COMMISSIONER HERIOT: Yes, I believe they
6 should be included. Yes.

7 DR. LERNER: Well, no. Not only do I
8 believe it, but the proposal -- the contact paper, as
9 approved, is written -- specifically lists, for
10 example, as an example George Mason. So I'm assuming
11 that we will include them, unless instructed
12 otherwise.

13 COMMISSIONER HERIOT: I had thought that
14 you were going to make a proposal at our next meeting,
15 which would be this meeting, about which schools you
16 wanted to do. I take it you are not making that
17 proposal.

18 DR. LERNER: Well, I am making kind of a
19 tentative one, which is I want to get -- I don't have
20 the specific schools, and I -- but I think we can come
21 up with that fairly quickly. I would like to do a
22 whole range of schools within the 100-mile radius.

23 COMMISSIONER GAZIANO: What's a reasonable
24 number, I mean, or do you need a further discussion?
25 Since Commissioner Heriot was the sponsor of this, you

1 know, maybe she and you --

2 DR. LERNER: Yes.

3 COMMISSIONER GAZIANO: -- can talk about
4 what --

5 DR. LERNER: That would be fine.

6 COMMISSIONER GAZIANO: -- what a
7 reasonable number of schools are, so that it's
8 manageable. We can, you know --

9 COMMISSIONER HERIOT: Well, let's have
10 that conversation now. How many do you think would be
11 manageable?

12 DR. LERNER: Well, let me think. The more
13 you get the more -- assuming a constant rate of
14 response. In other words, assuming that there is a
15 certain set responding to the subpoena, we would
16 obviously want more. And I think what you want to do
17 is probably do something like you have here, which is
18 to sort of stratify them kind of by categories.

19 And I think if we did that -- I don't have
20 an exact number. I would actually have to sit down
21 with a list. But I can probably come up with one.

22 STAFF DIRECTOR DANNENFELSER: Let me put
23 another question that might be related. Would this
24 get into the issue of OMB clearance? After the
25 certain threshold, is this considered a survey in

1 effect? Are you surveying the college to get
2 information? And is there a threshold of nine at
3 which if you do the same kind of survey that once you
4 get beyond nine, if you need to get OMB clearance, is
5 that --

6 DR. LERNER: I would think not, but I'm
7 not a lawyer.

8 COMMISSIONER GAZIANO: OMB clearance
9 really is -- it's by executive branch agencies.

10 DR. LERNER: Well, not only that, that is
11 a survey. This is a subpoena.

12 COMMISSIONER GAZIANO: Yes. I think
13 there's probably three --

14 DR. LERNER: I would guess that probably
15 doesn't apply. I would like a lawyer -- one of our
16 legal people to clarify that. I think they can
17 probably subpoena as many as they want. I'll come
18 back to the example of what the Commission did in
19 1995. They subpoenaed 35 financial institutions in
20 New York City. I believe they got full responses from
21 31 of them.

22 So I don't -- and there is no discussion
23 in the report, having just recently reread it, that --
24 of any particular limitations. So I think we can just
25 send them out.

1 The only issue would be our capacity to
2 analyze them in a report in a timely fashion.

3 COMMISSIONER HERIOT: And what's your
4 thought on that?

5 DR. LERNER: Well, at one level it is a
6 fairly straightforward process to do. On another
7 level, of course, it depends on what else we have to
8 do. And, you know, we are sort of -- our OCRE staff
9 is sort of shrinking, so -- we have not replaced one
10 of our members who retired, so it would be -- oh, I
11 would guess -- I don't see why we couldn't do 10, or
12 maybe more. But I don't think necessarily it would be
13 any more than that.

14 Again, the key here would be a kind of
15 stratified sampling. It's not a stratified sample,
16 but we would have -- we would get within a bunch of
17 categories, our estimation of the prestige levels on
18 the one hand, the control on the other hand, and, I
19 mean, some of the examples -- we are not -- I mean,
20 that you have included here, which I was assuming we
21 were going to include all of them, could -- you know,
22 we have an HBCU, we have Catholic University, and so
23 on and so forth.

24 You know, I think in the area of 10 or 15
25 would probably be reasonable, and assuming we'd get

1 like 11. We've got -- this is just a guess. I have
2 no way of knowing.

3 COMMISSIONER HERIOT: That sounds about
4 right to me, that the target is about 15. I figure
5 that maybe some schools, for whatever reason, they are
6 not able to produce the data as quickly as we hope.
7 And so if it shrinks back to 12, it's not the end of
8 the world?

9 DR. LERNER: No. It won't be the end of
10 the world.

11 COMMISSIONER GAZIANO: If you have been
12 constructing your database, I assume you have been
13 preparing instructions on what form you want the data
14 to be received.

15 DR. LERNER: Yes.

16 COMMISSIONER GAZIANO: And how you will
17 work with the --

18 DR. LERNER: Yes.

19 COMMISSIONER GAZIANO: -- institutions --

20 DR. LERNER: Yes, yes, yes.

21 COMMISSIONER GAZIANO: -- to deliver
22 the --

23 DR. LERNER: Yes, because --

24 COMMISSIONER GAZIANO: -- the data.

25 DR. LERNER: Right. Because unlike just a

1 document subpoena, this would be a subpoena for a data
2 set, database. And our thought is to ask for the most
3 recent one.

4 I mean, granted, they simply -- they just
5 completed doing the process, and they wouldn't have
6 time to throw it right back in the archives. And we
7 can just start with that, make it simple enough.

8 COMMISSIONER GAZIANO: That makes sense,
9 but I assume you would -- or I recommend, if you
10 hadn't thought about it, that you -- within whatever
11 period you give them, you encourage them to contact
12 you as soon as possible if there are any questions,
13 and that you remain -- you express a willingness, an
14 openness to be flexible, in, you know, data transfer
15 issues and that you -- so that you get the information
16 as soon as possible.

17 DR. LERNER: Right. We are --

18 COMMISSIONER GAZIANO: And that you do it
19 with as little cost to the institution as possible.

20 DR. LERNER: Right. Well, that's another
21 reason for insisting on the most recent, because we
22 won't have to dig it out of archives. Yes, we can
23 definitely put all of those caveats and qualifications
24 in our letters. Absolutely.

25 CHAIRMAN REYNOLDS: Okay.

1 COMMISSIONER HERIOT: Can we hope to have
2 the list by the telephone conference?

3 DR. LERNER: Which is?

4 COMMISSIONER GAZIANO: The 30th.

5 DR. LERNER: Absolutely. No problem.
6 Earlier would -- I would prefer earlier, but --

7 COMMISSIONER HERIOT: Yes, we would prefer
8 earlier, too. At least I would.

9 VICE CHAIR THERNSTROM: Just for the
10 record, it doesn't make any difference in terms of
11 your planning, but I want everybody to know there is
12 no possibility of my coming in from Oregon on the
13 telephone conference.

14 TIM FAY: You can pre-record it.

15 VICE CHAIR THERNSTROM: My assistant is
16 saying he can pre-record my comments.

17 CHAIRMAN REYNOLDS: Okay. At this point,
18 I propose that we adjourn.

19 (No response.)

20 Hearing no objection, folks, thank you.
21 Until we meet again.

22 (Whereupon, at 12:04 p.m., the proceedings in the
23 foregoing matter were adjourned.)

24

25

A				
Abby 21:24	12:7 15:6,10	affirm 15:23	6:9 10:15 14:18	26:13 68:3 81:21
Abby's 75:1	18:13 21:24 22:3	affirmative 10:10	15:25 17:13 53:23	approach 19:17
Abigail 1:14 25:12	33:23 69:3 85:14	53:5	58:5	68:11,15 71:22
27:6	85:15 91:3 93:15	age 55:25 69:24	amendments 10:17	appropriate 79:12
ability 70:2,3	103:4	70:1,25 75:1	19:14 80:8	118:7
able 15:10 32:17,18	added 7:12 56:23	agencies 57:12	America 115:8	approval 3:2,6,7,8
32:19 34:3,4	65:4 71:6	125:9	Americans 69:19	3:11 4:17,19 7:7,9
80:21 94:15	adding 26:3 98:4	agency 115:6	70:1,18,21 80:13	7:11,16 14:19
102:14 104:12	addition 15:5,13	agenda 3:2 4:17,19	amount 49:25 71:9	30:2 50:24 51:1
110:1,16 114:17	18:15 20:23 37:9	4:22,24,25 5:8,15	analysis 56:3 83:19	78:5,9 105:2
114:20 117:4,25	58:18 94:5 98:24	5:19,19 6:17,21	110:12	approve 4:20,22,24
118:5 119:16	104:17	7:23 9:22,22,24	analyze 120:20	8:6 32:11 96:25
120:20 121:24,25	additional 12:14	10:15,17,23 11:18	126:2	approved 8:2,6,11
122:3 127:6	13:4 62:13 93:16	11:20 17:3,8	and/or 108:12	29:24 31:18 33:12
absence 108:4	98:7	18:19 22:15,22	113:16	35:20 45:17 123:9
absolutely 38:6	address 24:17	27:25 75:6 79:11	animus 63:7 64:7	approximately
61:12 128:24	38:22 42:11 81:16	108:22	announcements	42:8 85:17 120:5
129:5	addressed 56:9	agent 13:15	5:17 6:19	120:8
abstain 10:1	addresses 56:7	ago 61:1 84:2	answer 17:1 42:3,5	arbitrarily 116:6
abstention 10:10	addressing 65:9	agree 38:12 43:2	81:1 115:23	archives 128:6,22
accede 68:10	adds 15:14	66:25,25 67:21	116:12 119:5	area 42:20,21 49:5
accept 14:17 27:1	adjourn 3:14	69:10 71:16,20	121:19 122:3	49:6,8 52:13
acceptance 116:22	101:17 129:18	83:3 87:1 98:23	anti 65:11	110:6 120:9
116:23	adjourned 129:23	100:14 119:25	Anti-Catholicism	126:24
accepted 17:13	adjusted 31:16	agreed 74:5 86:2	80:9	argue 25:14
62:17	administration	ahead 9:11 100:21	anybody 37:18	argued 19:2
access 121:21	60:4	101:2	97:24 102:7	arguments 26:22
accommodate	admissions 109:15	airport 73:5	103:14	26:22 27:1
24:10 35:6 69:5	110:22 114:4,5,6	AIs 47:4	anyway 34:10	arising 65:24
account 87:3	114:13,14 116:17	AII-6 30:11,17	59:20 86:5 113:9	Arlan 1:17 41:7,7
accounts 73:25	122:16	ALISON 2:17	apiece 93:22	41:10 50:11,11,13
accused 104:1	admit 110:9 114:7	allegations 71:3	apologies 11:21	73:2
achieve 20:24	admits 75:12	allegedly 86:2	109:18	arrived 33:8 98:12
achieving 57:3	admitted 118:1	allow 20:19 93:16	apologize 104:3	articles 71:1
acknowledge 89:4	adopt 32:5 100:23	95:15	apology 11:22	artificial 13:15
ACLU 75:13	adopted 31:10	allows 60:16	apparently 24:20	arts 109:14 111:23
act 28:17 29:11	advanced 59:5	already-appointed	108:9	113:16 119:6,17
32:11 57:10 70:1	advantage 70:14	11:9	appear 5:18 6:20	119:20
78:13 81:17 90:21	71:6	alternate 90:19	71:9	ASCD 2:5
Acting 75:7	adversary 121:22	alternatives 57:3	appeared 59:14	Ashley 1:18 14:2
action 53:5 75:9	adverse 119:11	altogether 21:2	111:9	41:5 50:8 72:25
active 62:15	advice 16:19	amend 10:20	applaud 14:21	Asian 60:7,10
acts 15:11	Advisory 3:10 5:15	amended 51:20	applies 120:8	asked 19:19 89:9
actual 55:4 113:8	6:18 7:15 72:18	52:16,16 56:6,9	apply 125:15	asking 16:22 32:3
120:15	73:19	amending 9:22	appoint 75:17	34:2 35:15 76:9
add 5:24 6:24 11:8	aesthetic 117:6	55:6	appointment 24:18	85:17
	affiliations 26:24	amendment 5:4,8	appreciate 14:22	aspect 67:14,21

aspirations 60:22	aware 42:17 44:3	107:14 113:23	32:7 42:2,3 43:19	broaden 27:7
assault 66:22	46:24 62:14	114:9 116:8,24	44:4,13,21 45:2,5	brought 63:12
assist 4:13	105:16 108:18	118:1	45:19 46:23 47:5	73:16 87:7
assistant 89:15	awfully 64:11	battleship 31:6	47:7,10,19,25	buck 99:16
92:5 96:7 99:2,13	aye 10:4 21:6,9,11	bear 75:25 105:10	48:3,8,11 50:17	budgetary 9:7
104:1 129:15	89:21,24 90:2	bearing 41:25	blah 98:16,16,16	building 43:8,9,17
Assistants 2:13	A.I 30:7,22 31:3,23	beat 6:6	Blaine 80:8	43:18 45:8 113:13
47:22	32:6	bed 25:4	bleaching 62:5	buildings 43:21,22
association 57:14	a.m 1:10 4:2,5	beeps 50:6	Board 70:8 80:10	built 60:3 110:2
Asst 2:7		beginning 19:22	80:15	bullet 5:23,25 6:24
assume 19:10	B	22:10	body 14:19 20:6	6:25 7:4,12
23:22,24 28:6	back 16:13 17:23	begun 29:2,10,17	35:17	bunch 45:8 126:16
58:16 91:25 105:4	17:23 24:15 25:14	80:18	bonding 61:11	burden 98:3,3
107:20 113:25	39:12,12 73:3,10	behalf 69:16	70:11	business 27:20,25
127:12 128:9	75:25 79:11 84:16	behavior 115:17	booking 13:15	33:21,22 35:4
assumed 121:21	91:15 100:12	believe 12:24 13:17	border 80:13	36:5 37:1,2,8,8,11
assuming 34:23	125:18 127:7	14:8,13 15:5,13	borderline 70:2	37:21,24 38:3,4
36:12 44:25 45:2	128:6	17:11 20:23 38:8	bounce 122:17	38:21,25 39:6,18
45:12 123:3,10	background 29:17	47:10 53:18,22	braid 61:15	39:22 40:4,9,12
124:13,14 126:20	109:13,20 110:23	55:13,16 68:13,14	braiders 61:20	40:16,22,23 41:19
126:25	119:2	84:2 85:22 86:7	braiding 62:3	42:1 48:3 52:24
assumption 88:20	backlog 83:3,6,14	92:9 96:20 119:18	brains 121:18	62:2
120:6,7	83:15 89:5	123:5,8 125:20	branch 125:9	businesses 52:14
assumptions 45:8	bad 103:23	belongings 104:6	breadth 64:18	60:12,18,22
atmosphere 66:3	bag 92:8	Belt 59:24,25	break 22:18	BYRNES 2:3
66:15	balance 12:25	beneficial 86:18	briefing 3:6,7,8 7:7	
attempt 101:3	15:14	best 13:16 20:13	7:8,10,23 40:9	C
attempted 29:6	balanced 15:7	33:17 110:19	47:1 50:25 51:2	cab 39:13
42:6 98:2	110:10,10	122:3	51:13 53:5 65:6	calculation 54:22
attend 49:6	Barbee 75:17	better 19:4 35:9	65:11 70:19 71:11	calendar 3:8 7:11
attention 29:21	Barbee-Wooten	106:13	74:5 78:4,6,8,10	35:4 96:25 104:21
30:5 63:13 105:23	73:17,23 75:8,10	bewildered 37:13	78:13,14,15,20,23	104:24 105:1,2
106:1	Barbee-Wooten's	82:19	79:7,23 80:2,7,9	call 48:3,15 50:4
attitudes 56:3	73:24 75:5	beyond 18:16,22	81:16,17,19 82:20	62:19 72:23 76:2
attributed 73:22	barriers 52:23	34:14 125:4	82:21 83:9,23	called 31:5 35:8
74:2	70:10	bias 57:6	85:8,19 86:19,20	75:8,13
AUDREY 2:11	barring 16:17	big 26:5 112:4	87:22 88:1,18	calls 117:13,14
August 106:18,24	based 13:11,17	binding 100:22	90:21 97:4 98:21	campaign 42:22,24
106:25 107:1,3	51:13 54:12,13	bipartisan 18:12	99:11 101:3	65:11
108:7	55:20 103:3 109:6	bit 23:19 39:11	briefings 33:21	campus 65:2 66:23
authority 11:11	111:19 116:25	98:22 119:5,7	40:15,22 47:21	69:4 74:25
12:9 43:12	basically 26:1	black 8:7 28:16	58:10 82:25 88:22	campuses 53:16
available 13:11	70:13 109:11	58:20 60:6,14,21	bring 12:25 29:20	54:1 65:12,14,21
42:15 43:13 49:8	113:1,13 117:18	81:19 82:21 83:9	30:5 65:7 105:22	66:15,21
49:9 80:22 110:15	117:25 118:21	83:25 85:5 88:23	105:25	cancel 47:12
110:15 118:16	basis 45:11 51:23	Blackwood 2:2	bringing 7:24	canvas 64:17
averse 65:8	55:25 80:5 87:20	28:22,22 31:1	broad 64:11 114:24	capacity 126:1

care 10:18 15:25	63:22 64:10,13	46:12,19,24 47:8	charged 20:7	close 41:18 87:25
carry 21:20	65:25 66:13 67:5	48:18,19 50:7,11	check 34:21 92:11	88:12
carrying 120:15	67:7 68:9,17,21	50:15,19,22 51:4	92:13	closer 100:22
case 18:15 21:1	69:10,15 70:20	51:11,18,25 52:8	Chief 2:5	Club 13:10
28:16 46:22 47:23	71:15 72:9 73:20	53:9 55:21 56:13	choice 27:15 52:12	Coast 39:10,15
54:23 61:19	74:3,15,20 75:2	58:23,24 59:11	54:18,19,20,20,21	codes 53:23 63:12
118:22,23 121:23	76:22 77:3,8,17	61:9,13,17 62:10	55:11,13,16 57:23	66:2,20 67:4
cases 29:13 57:22	77:24 79:18 80:1	62:11 64:14 67:9	58:1 80:8	69:11
109:23 111:9,10	82:18 83:2,7,11	67:9,17 68:3,6,11	choices 54:14 74:7	coincide 40:4
cast 92:14	83:20 84:18,25	68:17,19 70:20,24	choose 27:14 63:14	collateral 20:10
casting 63:10	85:4,16 86:25	71:19 72:11,19,24	chose 88:1 104:2	colleagues 65:21
categories 124:18	88:16 89:2,6,18	73:7,12,20,21	chosen 49:24 69:4	collected 29:7,15
126:17	89:22,25 90:2,3,6	74:3,9,19 75:4,24	Christians 64:4	collectively 17:8
Catholic 126:22	91:1,14,18 92:2,8	76:4,9,13 77:2	Christmas 94:9,21	college 54:1 62:23
caveats 56:4	92:12 93:14 95:18	78:7,19 79:3,14	98:8	65:2,12,14,21
128:23	96:5,6,12,22 97:8	79:21 81:9,12	CHRISTOPHER	66:23 69:4 109:15
cell 73:4	97:12,18 98:11,23	82:11,14,16,18	2:3	110:3 125:1
Center 110:17	99:6,9,19,22	83:2,11,24 85:10	chronologically	colleges 53:15
111:3 118:3	100:4,5,7 101:7	86:13 87:18,19	78:23	82:21 83:9,25
certain 49:15 86:16	101:16,25 102:5,9	88:8 89:2,12,17	circulate 95:8,16	85:6 88:23 108:24
86:19 98:4 100:11	103:13,16,18	89:25 90:3,7,12	101:8	110:7 111:23
114:6 124:15,25	104:17 107:2,10	90:16 91:6,24	circulated 51:21	112:3 113:16
certainly 18:8	107:14,20 108:6	92:4,10,23 93:24	52:5 57:1,19 61:2	119:6
34:24 40:24 58:25	108:10 115:14	94:7,14,22,25	circumstances 87:2	Columbia 43:3
63:20 65:9 66:2,7	116:9 117:15	95:3,25 96:10,15	87:6	combination 55:2
66:10 69:20 70:1	120:23 129:9,15	96:16,20 97:1,16	cities 59:25 60:1	74:21,23
85:23 97:19,24	Chairman 1:10,13	97:22 98:1,19,24	city 42:23 49:16	combine 54:24
114:24 116:9	1:14 4:3,18,22,23	99:8 101:1,10,15	60:14,21 112:18	combined 22:6,9
chair 5:7,10 7:21	5:3,9,12 6:7,12,14	102:3,8,11,22	125:20	combining 53:14
8:3,13,20 9:20,23	7:19 9:13,18,25	103:11,16,21	city-wide 49:14,22	come 16:5 17:23,23
10:14,16 11:5,10	10:3,5,7,9,22 11:2	104:4,14,25 105:4	civil 1:1 4:4 57:5,12	31:17 34:7,14,20
11:15,19 12:8,13	11:7,16,22 12:1,7	105:6,10,15	57:23 59:14	34:22 38:10 80:19
12:15 13:6 15:18	13:22,24 14:16	106:15,22 108:8	114:25	84:21,24 86:24
19:25 20:18,19	15:21 16:17,18	108:21 109:2,16	claim 26:23 27:18	88:8,20 100:22
21:9 22:23 23:18	17:2,15,25 18:1	128:25 129:17	114:7	123:20 124:21
24:8,11 25:6 33:7	18:25 20:16 21:3	chair's 23:21	Clarence 75:14	125:17
33:13,18 35:2	21:7,10,12,14,16	chance 22:8 26:2	clarify 12:12 63:8	comedy 24:12
36:23 38:1,9,22	21:18 22:1,4,11	change 6:15 16:18	87:20 102:14	comes 61:14
38:24 39:2 44:4	24:5 25:2,8,23	35:5 36:16 108:15	125:16	100:11 103:1
44:10,15,19,24	26:10 27:10,22	changes 5:13 32:10	clarity 77:21	comfortable 40:24
45:4,7,14,18,25	28:3,10,13,19	86:10 105:13	class 41:15 48:23	68:12,15 94:15
46:5,8,12 47:18	30:20 32:14 36:2	106:16	clear 19:23 31:2	coming 9:6 11:18
48:13 51:3,18	36:11,23 37:23	chapter 113:6	36:12 46:20 51:4	91:15 101:5
52:2,6,9,19,21	38:7,11,14,16,18	characteristics	54:2 64:17 68:19	129:12
53:2 58:8 59:12	38:20 39:20,25	118:2	84:22	comity 24:11
59:16,18 61:5,9	40:5,6 41:4,7,10	characterization	clearance 124:24	comment 35:3
61:12,16,18,25	41:11,17 42:2	108:11	125:4,8	63:21 73:15 82:1

83:13 91:4,10 93:10,11,12,15,21 94:6 100:19 115:2 commentary 67:2 comments 4:16 7:19 9:14 15:21 21:3 30:20 40:6 50:20 72:14 75:15 81:5 85:17 129:16 Commission 1:1,8 3:9 4:4 7:11 14:10,15 15:23 17:12,20 18:4 19:9,12 20:8 21:24 28:9 29:16 29:22 30:13 33:23 35:12 36:15 40:11 43:20 47:13 58:16 59:14 65:8 78:22 82:23 84:8 88:14 97:6,8,12,15 105:3 106:18 107:15,16 112:15 112:16 125:18 Commissioner 1:15,16,17,18,20 2:13 3:7 5:1,11 6:3,4,10,13 7:9,18 7:20,21 8:1,4,11 8:15,17,19 9:2,2,9 9:16,17,18,25 10:1,3,4,5,6,7,8 10:10,11 11:3,13 11:23,24 12:3,5 12:11,19,20,21 13:1,5,8,20,21,23 14:6,16,17,23,24 15:6,14,22 16:4,8 16:22,23,25 17:1 17:5,6,7,10,15,21 17:24 18:1,2,16 18:21,25 19:25 20:4,4,16,18,23 21:5,6,7,10,11,12 21:13,14,15,16,17 21:21,23 22:2,5 22:13,14,17,20,21	22:23 23:2,5,7,9 23:10,13,15,17,23 23:24 24:1,3,5,7 24:10,16,17,22 25:5,6,8,10,24 26:12,20 27:5,13 27:16,17 28:1,5 30:21,21 31:1,21 31:22 32:2,8,8,13 32:14 33:11,15,20 34:19 35:1,1,3,20 35:21,22 36:11,14 36:24 38:11,12,14 38:18,23,24 39:2 39:23,24,25 40:2 40:5,7 41:1,6,9,12 43:15 44:5,17 45:11,16,21 46:3 46:6,17 47:3,6 48:2,10,12,17,18 48:19,21 50:9,10 50:14,16,21 51:3 51:6,7,8,9 52:15 54:8,15,18 55:3 56:21 57:20,24 58:23,25 59:3 61:23 62:10,12,22 63:23,23 64:2,12 64:15,15 66:5,17 67:6,8,10,12,17 68:5,7,16,22,23 69:5,15,16 70:7 70:18 71:7,13,17 71:22 72:3,21,22 72:24 73:3,10,16 74:1,17,22,24 75:3,22 76:1,4,6 76:10,12,14,15,17 76:20,24,25 77:3 77:6,10,11,12,13 77:16,18,18,20 78:2,5 80:4,5 82:3 82:9,12,15 83:24 84:7,11,13,15,19 85:3,9,12,14 86:11,25 87:1,19 88:10,15 89:7,8,8	89:10,12,13,19,20 89:24 90:4,4,7,8 90:10,11,12,13 91:3,7,11,12,16 91:23 92:4,7,17 92:21 93:3,6,8,12 93:20,23 94:11,12 94:17,19,20,23 95:1,10,14,18,20 95:23 96:1,2,6,17 96:19,24 97:10,14 98:2,25 99:19,25 100:2,6,11,18,19 101:19,21,23 102:12,13,18,19 102:24 103:2,3,8 103:9,25 104:7,9 104:10,10,11,18 104:20,21,23 105:6 106:2,10,12 106:13,17,24 107:6,12,18,22 108:1,16,23 113:19 114:8,9,12 114:19 117:9 118:6,14 119:14 119:15 122:21,25 123:5,13,23,25 124:3,6,9 125:8 125:12 126:3 127:3,11,16,19,21 127:24 128:8,18 129:1,4,7 Commissioners 4:9 4:10,15 8:6 10:12 15:9 19:10,14 24:21 34:9,23 36:12,14 51:14 52:5 53:17,18,20 53:22 54:13,16,25 55:15 56:6,8,24 63:13,17 72:16 73:22 75:4 78:9 78:10,11,20 79:4 79:5 80:22 81:1,4 82:4,5 88:5,7 98:21 102:25	105:16,23 106:1 108:18 122:11 Commission's 28:25 30:1 75:9 81:8 commit 59:7,8 committee 3:10 5:16 7:15 12:14 13:4,10 15:17 18:7 20:3 25:13 26:3 72:18 73:19 communities 60:7 60:7,10,15 companies 70:14 comparison 119:17 compiled 29:7,9 complaining 99:11 complete 8:25 67:23 92:15 93:1 121:19 completed 92:21 92:23 96:14 128:5 completely 48:15 compliance 46:11 57:21 complicated 116:4 comply 44:22 45:3 45:13 46:17 component 67:11 69:7 composition 18:19 comprised 109:22 compromise 14:3 19:22 26:23 38:17 compromised 15:16 concept 19:6 29:24 31:10 32:16 33:11 33:14 35:22 36:16 36:16,21 42:9 45:16,23 48:21,22 59:17 61:10 63:18 70:19 72:10 110:5 111:19 112:10,24 113:21 114:20 116:20 119:1 120:2	concern 16:9,15 38:5,23 68:4 71:21 89:3 90:23 91:2 105:19 113:20 concerned 16:12 37:20 65:12 120:20 concerning 71:1 concerns 12:16 14:11 16:1 36:3 37:24 69:5 conclude 27:19 67:25 116:23,25 121:25 122:1 concluded 102:11 conclusions 122:5 122:8 concurring 82:7 94:8 98:6 conditioned 55:17 conduct 65:14 conducted 26:13 conference 3:4 5:22 6:23 7:4 9:6 10:24 11:1,7,12 12:10,23 13:13,18 13:25 15:4 16:20 18:11,20 129:2,13 conferring 89:11 95:19 96:7 confidence 45:10 confine 63:25 confined 48:25 49:24 confirm 28:23 34:3 36:18 Conflict 57:4 conflicts 108:18 confused 117:16 Congress 115:6 connected 39:19 connection 84:4 consensus 20:14,25 41:18 71:18 84:9 consequences 20:11
--	---	---	--	---

consider 72:20 81:14 86:17 98:20	cooperate 42:14	19:18	47:9 78:24 82:8	122:11
consideration 3:8 7:10 25:17 66:2 73:17,23 75:5 78:6,12 79:6 80:23 99:4 123:4	coordinate 107:8 107:11,15	crime 58:3	85:19 93:4 105:7 105:16 106:11,23 107:4,8,23 108:13	decided 33:9 40:10 81:3 111:12 120:8
considered 52:20 53:24 79:9 124:25	copy 52:5	crisis 56:1	dated 75:10	decision 13:11 14:9 14:13 16:6 18:18 26:17 28:8 40:15 48:6 57:22 104:5 107:24 121:18
consistent 114:25	correct 32:7 46:2 89:17 93:23 102:2 122:22	critics 12:22	dates 29:25 30:15 30:16 35:16 81:15 81:20 90:18,19,24 91:10 97:4,6,13 97:15 98:9,12,17 100:14 101:4,9,12 105:5 106:14 107:13 108:17	decisionmaking 121:13
consolidate 12:12	correction 51:19 101:18 102:6	crossing 37:7,10	current 10:2 16:20 30:18 86:3	decisions 17:13,19 19:9 35:13
constant 124:13	correlation 118:10 118:18,19	cuff 61:7	currently 25:1	decision-making 19:21
constitute 115:15	correlations 122:15	current-day 43:23		defeat 100:12
constructing 127:12	cosmetology 62:4		D	defeated 23:4
consult 15:10	cost 128:19	D 1:17	daunting 99:5	defer 81:14
consultation 113:11	Counsel 2:2 28:14 28:19 29:2 34:2 34:13 35:15 36:18 48:2	DANNENFELS...	David 2:2 28:22 42:3 50:23	definite 122:5
contact 42:6 46:15 48:23 102:20 123:8 128:11	count 53:13	1:22 4:21 5:5 9:21 11:17 28:18 34:17 44:8 52:4 52:10,22 53:11 54:11 55:9,23 56:14 58:13 61:3 78:18 79:16,24 80:6 81:10 88:3 88:13 91:21 92:14 92:19,25 93:18 94:2 95:5,12 96:4 101:14 105:14 109:4,9 113:17 124:22	day 33:24,24 35:10 35:19 39:14,19 40:12,25 95:15 98:9 99:16 106:20 121:5	definitely 71:6 112:22 128:23
contacting 32:24 42:12	counted 52:11,12 52:18	Daphne 73:17	days 47:1 61:1 82:7 91:4 93:15,22 94:6,18,24 95:4,6 98:4,7,10 106:5 115:12	definition 42:18
contemplate 61:10 85:24	counting 92:3	data 87:16 88:24 112:4,8,11,19,23 113:16,22 114:1 115:9,11 116:21 117:17 118:2,4,16 120:15 121:3 127:6,13,24 128:1 128:14	day's 85:19	degree 60:14
contemplated 30:11,17 43:25	county 43:17	database 110:3 113:13 127:12 128:2	deadline 7:9	delegate 11:10 12:9
content 20:8	couple 109:12	date 11:12 12:10 14:8,8,12,19 15:23 16:19 18:3 28:23 29:5,22 32:20 33:9,10,13 33:17 35:25 36:4 37:12 38:6,10	deadlines 3:7 13:15 31:18 78:5,9	deliver 127:21
contentious 20:9	course 16:9 29:24 65:1 110:14 112:7 112:9 126:7		deal 72:16 89:5	DEMITRIA 2:4
CONTENTS 3:1	court 4:13 34:24 43:17 109:23		dealing 63:4	Democrat 27:2,4
context 55:25 65:1 66:24 117:22	courtesy 20:21		dealt 70:9	demonstrated 83:5
continue 8:24 12:18 26:8	courthouse 43:18 44:1		DEAS 2:4	denies 75:14
contracting 52:13 56:19	courthouses 43:9 43:23		death 80:16	denying 58:4
contracts 70:12	Court's 57:21		debate 25:20 26:5	Department 28:24 29:13,19 37:17 44:21,25
contrary 28:9	cover 90:24		debates 26:14	departure 113:21
control 103:12 126:18	covered 112:9 123:1		debating 112:5	depend 102:25 122:6
convened 1:8	covert 79:10,23 80:1,2		decades 60:3	depending 8:22 24:12
convenient 34:24 36:13 49:5	co-ed 111:23		December 32:20 33:4,9,9,14,16,17 33:25,25 35:5,18 35:19 40:8 41:20 42:15 47:11 68:24 91:5	depends 24:6 126:7
conversation 97:3 124:10	crazy 99:13		decide 9:5 24:12 42:1 108:13 116:6	derogatory 75:15
conversation/neg... 97:5	create 70:13,13 93:25			describe 14:22
	created 19:4			described 52:16,23 56:12 73:25
	creating 20:7			description 57:25
	creation 13:24 19:3			deserves 64:22
				designate 8:21 38:15 40:8
				designated 36:4

40:7	92:19,25 93:18	79:19,19,22 80:2	127:25 128:17,20	elite 119:17
desire 67:13	94:2 95:5,12 96:4	81:15 85:11 94:16	129:3,5	EMMA 2:8
desirous 20:24	101:8,11,14	101:24 104:16,19	draft 31:15 82:4	employer 57:16
desk 99:17	105:14 108:20	104:22,24 108:24	drafted 30:12	employment 55:24
detailed 52:6,25	109:4,9 113:11,17	109:1,24 123:24	drafting 29:17	57:7 70:3 81:18
detect 103:8 111:7	124:22	125:22	113:6	empower 17:11
determine 33:3	Director's 3:13	discussions 15:18	drafts 30:14	empowered 17:17
40:20 43:13 83:19	5:18 6:20 7:17	20:1	draw 66:9 122:7	encourage 128:11
determined 14:15	Disabilities 57:10	dismissed 87:13	drawing 122:5	ended 39:11
detract 67:15	disagrees 84:21	disparate 60:20	duces 115:1	enforce 44:25
Detroit 69:21	discipline 81:22	disparities 79:1	due 82:7,17 85:18	enforcement 3:5
developed 72:10	discover 32:17	disproportionate	94:9 97:21 98:8	7:6 8:8,18,23 10:2
developing 105:18	110:1	71:2	Dulles 39:12,13	28:11,12,17 29:13
devote 49:25	discovery 29:18,23	disputed 40:18	DUNSTON 2:5	30:10 31:6 57:8
Diego 61:24 62:1	30:1,23 32:4	disregard 118:24	D.C 1:9 4:8 39:12	57:12,17 58:2
difference 85:20	113:6	dissenting 15:3	58:1 61:22 110:6	enforces 44:20
116:2 129:10	discretion 13:12	82:7 94:9 98:6	<hr/>	engaging 115:17
differences 116:16	17:3 79:12	distinguish 63:2	E	enjoy 93:17 106:5
116:16	discriminated 71:4	64:3 69:8	<hr/>	enrollment 110:10
different 30:10,17	discriminating	distribute 95:7	e 61:3	entail 6:16
31:9 35:19 38:10	110:9 113:23	distributed 5:4	eager 46:20	entails 32:22
39:18 53:3 66:20	114:7 116:24,25	52:11 53:1 78:19	earlier 129:6,6,8	enter 121:16,17
66:21 106:7	117:20,23	distributing 6:8	earliest 68:25	entire 14:10,14,15
114:18	discrimination	District 43:3	early 69:23 86:5	17:20 21:1 45:25
difficult 63:2 70:4	55:25 62:23,24	diversity 57:3	easily 110:15	entirely 39:18,19
111:7 120:16	63:3,8,9,24,25	doable 36:17 63:19	Eastern 4:5	54:2
difficulties 60:20	64:4,8 69:12,19	document 51:15	economic 56:1	entrepreneurs 60:2
dig 128:22	70:25 75:1 80:12	112:12 128:1	69:18 70:19	60:6
diminished 87:10	108:24 109:14	documents 115:11	economy 70:4	entrepreneurship
direct 66:21 110:20	110:13,20 111:6	doing 18:6 58:16	edited 82:4	52:24 60:13 70:10
111:25	111:10,11,21	58:19 62:3,5	editorial 80:10,14	entrepreneurships
directed 29:18	118:9 121:12	109:20 112:14	80:15	59:13
direction 15:4	discriminatory	113:1,5,14 114:15	edits 82:3	enumerated 48:22
18:19 20:7 105:24	110:25	128:5	education 57:4,10	equal 53:6 110:17
directly 49:11 50:2	discuss 17:18 51:17	Dominique 2:15	66:16 110:14	111:4 118:3
Director 1:22 2:7	79:15 90:20	5:4 6:8	effect 113:4 119:1	equations 110:19
4:21 5:5 9:21	discussed 9:7 19:23	Dr 109:5,8,11,16	125:1	equivalent 116:7
11:17 28:13,18	20:2 31:12 37:5	109:18 113:18	effective 45:6	especially 43:22
34:17 44:8 51:12	59:15 84:8,14	114:8,11 115:14	efforts 89:4	essentially 121:13
51:16 52:1,3,4,10	85:2 105:18	115:23 116:11	eight 107:18	establish 73:25
52:22 53:9,11	discussing 35:14	117:12,18 118:13	either 36:5 64:9	estimation 126:17
54:8,11 55:9,23	59:6 112:5	118:21 119:24	108:14 111:13	ethnic 57:16 63:3,7
56:14 58:9,13	discussion 3:9 4:14	121:6 122:23	117:21	63:9 64:1 69:7
61:3 75:7 78:8,16	5:22,24 7:1,12	123:2,7,18 124:2	election 32:21 56:3	78:13
78:18 79:16,22,24	12:1,2 13:23 36:8	124:5,12 125:6,10	56:8	ethnic-targeted
80:6 81:10 88:3	51:4 54:7 59:1,9	125:14 126:5	elections 56:10	65:13
88:13 91:21 92:14	60:19 68:25 71:11	127:9,15,18,20,23	elicit 67:2	evening 41:16
			eliminate 27:20	

78:19	47:19 69:18	49:21 80:20	14:21 19:22 20:1	format 31:10
event 27:24 44:22	experiencing 71:2	105:19,20 109:25	28:23 31:19 32:15	formulate 17:18
82:2	explain 62:25	120:18 122:5	34:21 37:5 50:24	70:12
everybody 26:6,7	explanation 52:6	fashion 19:11	51:1 52:12 53:22	forth 25:15 126:23
42:14 99:18 112:6	52:25	126:2	55:11,12,13,16	forward 18:12
129:11	explored 64:19	fathom 50:1	56:22 59:13 78:24	20:12,12,14,25
evidence 29:8	exploring 113:13	fault 83:12,19	86:15 88:9 99:20	24:18 38:21 49:4
31:15 112:1	express 36:14	favor 10:12 23:11	100:10 109:23	49:10 101:11
115:16,19,19	70:17 128:13	24:14	115:25	found 66:7 122:8
118:9 122:6	expressed 12:15	favored 122:17,18	first-in-rank 86:22	four 21:19 53:18,22
Evidently 59:21	37:5	FAY 2:14 129:14	first-in-time 86:22	54:19 55:15 56:21
ex 62:16	extended 93:22	federal 43:18,18,18	five 54:14,14,17,19	57:8,10 86:8
exact 61:21 124:20	extent 15:11 49:2	43:21,22 46:25	57:5,6 91:3 93:15	87:12,21 112:21
exactly 15:19 32:9	extra 33:24,24	52:13 56:19 57:11	93:22 94:24 95:4	fourth 54:20
55:11 61:16,18	87:24 94:6,17,24	58:2 115:6	98:4,7,10 112:21	four-member
121:9	95:15	feel 36:7 66:20	flesh 69:13 74:14	16:10
examination 53:24	extremely 39:10,10	feeling 98:14	fleshed 72:12	four-year-ago
66:19	47:20 60:22 70:4	female 116:23	fleshing 74:6	87:14
examine 66:18	86:9 115:21	ferret 111:16	flexibility 8:21	Francisco 70:8
example 41:23 64:3	eye 41:14 102:20	festive 94:13	flexible 128:14	frankly 37:13 66:6
71:24 114:5	e-mail 11:3 101:8	field 35:9	flights 39:9,14	free 14:5 107:24
116:19 118:3	e-mailed 61:5	fifth 54:21	flip 39:5	freefall 69:19
123:10,10 125:18	e-mails 69:13	fifties 69:23	floor 24:2 25:1	frequently 39:14
examples 116:20		figure 113:2 127:4	flow 47:24	Friday 1:5 105:17
126:19	F	final 72:6 80:20	flown 39:3	friendly 14:18
exception 99:1	F 1:15	finally 6:24 78:14	focus 57:25 65:15	15:25 46:10
exchange 15:15	facilitate 4:14	82:16	66:11 71:21 72:7	front 59:19,22 60:9
74:10	facility 13:16	financial 112:17	focused 65:6,22	60:24 74:13 105:5
excluded 64:9	fact 19:19,19 20:10	125:19	67:13	full 14:19 15:15,23
Excuse 11:15	26:14 32:20 33:4	find 36:13 42:14	FOIA 112:8 115:4	18:3,7 19:12
109:16 114:8	40:19 51:22 53:7	70:3 110:13	115:4	125:20
executive 125:9	59:13 71:22 86:3	111:14,21 117:7	folks 9:11 36:7	fully 64:19
exercises 115:8	86:8 87:3 90:23	117:14 119:4,9	46:13 70:3 86:7	function 110:23
exigent 87:2,5	101:10 110:18,22	121:9	90:19 129:20	functioning 82:23
exist 60:13	112:23 116:2	finder 40:19	follow 31:3,9 35:2	fundamental 17:16
existing 29:4	117:14 119:22	finding 37:16	followed 5:15 6:17	58:5
exists 27:16	factor 80:23 86:17	115:18,19	7:5,6,8,10 40:16	fundamentalist
expand 59:17	factors 33:2 86:24	findings 100:23	40:22	64:4
65:18 70:9	98:20 121:16	fine 9:24 40:10	following 22:1	Funding 57:11
expanded 53:19	facts 40:18	118:8,11 124:5	followup 66:8	further 50:17
expanding 54:4	fails 19:13	finish 18:2 20:20	fore 13:2	71:11 85:7 123:24
expansion 59:20	fair 15:15 120:12	finished 8:24 96:23	foregoing 129:23	future 28:17 32:18
expansive 55:18	fairly 48:25 123:21	fire 57:7	forensic 83:18	65:9,16
expedite 30:25	126:6	firm 35:16	forever 68:2	FY 3:6 51:1
expeditiously 89:1	family 80:16 98:16	firms 112:19	forget 112:12	
experience 12:25	famous 61:19	first 3:6 4:18 5:23	form 30:18 115:12	G
13:2 15:7,10 43:6	far 32:10,17 49:14	6:15,24 7:4,7 11:8	127:13	Gail 1:16 6:5,6

83:25 108:12	114:10 118:9	49:3,11,11,17,18	92:13	8:11,17 10:5,6
gainful 70:3	122:16	50:1 59:5 64:12	happens 66:22	12:5 16:4 17:24
garner 19:11	general 2:2 28:14	64:16 67:4,20	111:1 120:13	18:2 21:14,15
gavel 103:11	28:19 29:2 34:2	68:13,14 71:20	happy 40:11 80:25	22:17,21 23:2,7
Gaziano 1:15 4:10	34:13 35:15 36:17	72:15 73:5,11	hard 29:25 64:3	23:10,15,23 24:1
5:1,1 6:4,10,13	48:2 56:10 59:9	75:25 76:16 79:21	69:8 120:21	24:22 27:16 28:1
7:18 8:1,15,19	62:21 88:17	86:4,4 87:21	hardest 120:18	28:5 41:9,12
10:7,8 15:22 16:8	111:13	90:14 96:5,24	hate 58:3	50:16 51:6,8 54:8
16:23 17:1,5,7	generally 121:21	97:3 98:17 100:9	Hawaii 72:17 73:18	61:23 71:13,17
21:16,17 22:14	geographic 48:25	101:11 108:2	75:13,18	74:17,24 75:3,22
27:13,17 32:2,8	64:18	111:21 112:6,24	HBCU 79:8 84:16	76:12,15,24 77:6
32:14 33:11,15,20	George 123:10	117:4 120:6 121:4	85:23 87:3,21	77:10,16,18 82:9
34:19 35:20,22	Gerald 1:10,13	121:6,7,7,8,9	126:22	82:12,15 83:24
36:11 38:11,14,18	Gerry 50:7 95:21	123:14 126:21	HBCUs 86:10	84:11,15,19 85:3
38:24 39:25 40:5	getting 5:6 43:22	good 24:4 62:13	head 64:20 91:19	85:12 89:8 90:10
40:7 43:15 44:17	64:11 65:4 98:15	72:12 100:20	102:15 104:3	90:11 91:11,16,23
45:11,16,21 46:3	105:19,20 120:21	106:3,8,11 119:10	121:15	92:7,17,21 93:6
46:6,17 47:3,6	give 16:15 20:21,21	120:25	headed 67:20	94:12,19 95:23
48:2,10,12 51:3,7	65:23 71:23 96:5	gotten 118:4	heading 73:5	96:2,19 97:10,14
51:9 58:23,25	101:4 118:8 121:9	120:19	heads 60:17	100:18 101:19,23
62:10,12 63:23	128:11	government 43:7	health 79:1	102:13,19,24
64:2 68:22 72:3	given 9:3 20:9,10	43:16	hear 34:8 72:1	103:8 104:7,18,21
72:21 73:16 74:1	54:19 58:15 87:10	granted 128:4	95:22 108:18	105:6 106:10,13
74:22 76:1,14,17	115:6	gravity 64:21	hearing 29:3,4 33:4	107:6,12,18,22
77:11,20 84:7,13	gives 8:20 64:21	great 7:18 87:14	33:16,24 34:25	114:19 119:14
87:19 88:10,15	94:23 119:11	greater 120:6	35:6,7,9,25 36:5	122:21,25 123:5
90:12,13 91:3,7	glad 59:18,21,23	group 17:12 25:17	36:20 37:9,11,14	123:13,25 124:9
93:3,8,23 94:11	65:18 108:19	60:12	38:22 39:22 40:9	126:3 127:3 129:1
94:17,20,23 95:1	go 7:2,17 9:12	guess 35:8 53:13	40:20,25 41:20,24	129:7
95:10,14,20 96:17	24:20 34:10,11	79:11 125:14	46:25 47:16 49:3	hidden 111:15
96:24 98:2 99:19	35:15 39:9 40:21	126:11 127:1	49:4 50:5 58:21	high 62:24
99:25 100:2,6,19	49:3,18,18 50:2	guidance 35:16	63:16 66:8,12	higher 57:3 66:16
101:21 102:18	66:19 68:2 75:22	112:6	68:1,24 73:15	high-crime 58:4
103:2,25 104:20	81:6 83:12 92:12	<hr/>	112:18 120:7	Hispanic 60:6,21
104:23 106:2,12	99:14 104:8 105:1	H	129:20	historical 103:22
106:17,24 108:1	106:21 113:15	hair 61:15,20 62:3	hearings 31:11,16	historically 82:20
108:16,23 113:19	115:20 122:16	62:5	32:16 33:22 58:18	83:9,25 85:5
114:9,12 117:9	goal 67:16	hair-braider 61:19	66:8	88:23
118:6,14 119:15	goals 62:20	half 42:10,19	held 4:7 13:14 15:3	history 29:10 43:19
123:23 124:3,6	goes 20:14 102:20	halfway 26:7	82:22 83:10 84:16	hold 31:16 82:25
125:8,12 127:11	going 5:12 9:5,8	hand 14:2 26:18	112:18	86:2 91:24
127:16,19,21,24	10:18 15:5 17:7	89:16 126:18,18	Hello 12:17,17	holding 43:7 82:20
128:8,18 129:4	18:11 20:25 24:9	Hanukkah/Chris...	50:15	82:24
Gaziano's 93:20	25:2 26:8,11,16	90:25	help 20:24 91:6	holiday 81:25
103:9	28:6 31:9,11,25	happened 37:16,17	helped 120:22	105:17 106:5
gender 56:7 108:24	32:4 35:5 37:15	37:19	helpful 69:1 108:16	107:4,11
110:18 113:24	39:16 40:2 42:19	happening 65:20	Heriot 1:16 4:9 6:3	holidays 91:5 93:17

97:23 105:20 home 7:17 62:2 homes 42:24 Honorable 100:4,6 honored 98:13 hope 5:3 29:22 30:2 30:18 47:12 58:14 63:5 81:2 97:16 120:24 127:6 129:1 hopefully 8:25 42:14 hoping 114:17 Hopkins 116:21 hostility 64:8 hotel 43:11 hours 62:4 humor 103:9 hypothesis 116:2	57:9 implications 28:17 implicit 57:13,14 implies 8:9 imply 35:14 importance 64:21 65:23 important 15:23 27:2 40:19,24 48:24 51:24 53:8 65:19,23 98:20 imposed 13:15 impressed 121:4 improve 98:3 inaccurate 74:1 incident 29:9 49:12 49:19,24 66:22 incidents 29:8 49:19 53:15,19,25 54:3,6,23,24 55:19,20 65:14 include 11:9 30:13 53:19 55:18 63:1 63:11,14 66:1 67:14 110:18 123:11 126:21 included 30:6 69:8 123:6 126:20 includes 60:11 including 110:4,6 indeterminate 116:14 indicate 30:15 indicated 11:3 individuals 42:9,13 43:2 47:14 48:23 57:9 influence 72:5 inform 75:8 information 29:1 29:17 47:13,24 52:1 62:18 88:24 105:15 112:20 117:4 120:17,19 120:21 121:3,22 125:2 128:15 informational	104:13 informed 87:16 initial 64:17 82:2 93:20 109:12 122:14 initially 15:5 109:21 111:5 119:2 initiate 31:20 inner 60:14,20 inordinately 87:4 input 16:19 27:18 72:4,4 inquiries 35:16 inquiry 46:10 65:18 insisting 128:21 insofar 7:23 instance 86:18 instances 86:20 institution 115:3 115:17 117:10 128:19 institutional 121:12 institutions 66:16 66:18 112:17 113:23 114:3,6,14 114:19,21 118:10 118:11,24 120:1,3 120:9 125:19 127:19 instructed 123:11 instructions 127:13 insult 103:22 insurance 70:11 integral 66:14 intended 52:19 intending 68:20 intends 102:23 intensely 119:21 intent 93:10 interest 53:7 71:25 interested 69:2,17 70:6 76:20 114:23 117:22 119:22,23 interesting 121:8	interim 47:21 internal 60:11 interpretations 122:12 interracial 75:16 interrupt 20:20 74:16 interrupting 35:23 interviewing 32:23 inter-ethnic 60:12 intimidation 28:16 intuition 122:19 investigation 28:15 31:5,20 invidious 63:7 64:7 invite 103:25 inviting 36:13 issue 8:15,16 9:9 25:16,18 26:1,18 27:8,24 28:1,2 29:1,22 30:5 43:5 44:1 47:11 48:24 49:13,23 53:5 58:20,22 64:17 65:7 66:6 67:23 69:11 70:25 71:25 72:17 73:13,13 79:15 84:5,16 91:22,25 111:14 120:2 124:24 126:1 issued 9:5 29:25 issues 3:4,10 5:16 5:23 6:18,23 7:5 7:16 10:24 11:1 14:4 16:21 53:23 64:24 66:9 72:18 112:4 128:15 item 4:18 10:23 20:10 46:23 51:23 51:24 78:7 96:25 104:15 items 5:19 6:20 20:11 74:12,13 78:12,17 101:2 IV 3:11 5:19 6:20 IX 3:9 5:24 7:1,13	7:22 8:1,7 51:5 58:22 85:19 104:19,24 109:1 123:1 <hr/> J <hr/> January 68:24 82:17 105:16 106:14 Jerry 24:22 Jewish 63:4 job 69:19 JOHN 2:16 Johns 116:21 join 41:2 48:15 joining 79:8 JR 1:18 judge 103:21 judgment 13:17 19:4 jump 75:25 June 78:25 justice 28:25 29:14 29:19 37:17 44:21 44:25 56:17 71:25 75:13 juvenile 56:17 71:25 JWEIED 2:6 <hr/> K <hr/> keep 16:13 50:5 54:5 65:15,22 Ken 84:3 key 114:16 126:14 KIMBERLY 2:10 2:19 kind 26:2,6 30:10 33:2 43:14 45:9 64:21 69:12 88:17 112:23 115:3 116:16 118:2,4,25 120:14 122:2 123:18 124:18 125:3 126:14 kinds 119:12 120:4 King 105:17 106:4 Kirsanow 14:24
--	---	---	---	--

20:4 71:22 103:1 104:10 Kirsanow's 68:23 knew 36:24 84:12 84:16 know 8:22 12:14,19 16:8,10 19:8 23:13,20 27:7 32:22,24 33:3 34:15 35:8,23 36:6 37:4,20 40:17 48:15 49:14 58:9,11 61:19 64:8 66:3,5 67:21 67:23 68:2 69:3 72:4,6,15 73:8 74:24 76:2 82:22 98:15 99:3,6 100:16 102:23 106:18 107:2,16 107:16 108:11 113:24,25 114:11 114:18,24,25 117:1,5,11 118:7 118:11,15,17 119:17,18 120:25 121:14 124:1,8 126:8,21,24 128:14 129:11 knowing 117:3 127:2 known 19:21 knows 37:19 96:10	103:10,24 law 115:5 laws 58:3 lawyer 115:7 125:7 125:15 layoff 70:22 71:4 lead 109:3 114:21 116:14 122:19 learn 37:15 leave 24:15 107:3 122:12 led 65:11 left 74:4 91:12 92:7 92:15 107:24 legal 80:10 112:12 117:21 125:16 legislative 29:10 legitimate 36:3 length 82:24 lengthy 66:19 LENORE 2:9 Lerner 2:7 109:5,8 109:11,17,18 113:18 114:8,11 115:14,15,23 116:11 117:12,18 118:13,21 119:24 121:6 122:23 123:2,7,18 124:2 124:5,12 125:6,10 125:14 126:5 127:9,15,18,20,23 127:25 128:17,20 129:3,5 letter 28:25 75:10 75:12 115:10 letters 128:24 letting 43:10 let's 9:12 71:16 77:16,17 78:2 79:15 105:1 109:19 111:8 124:9 level 18:6 65:2 69:25 126:5,7 levels 57:11 126:17 liberal 109:14	111:23 113:16 119:17,19 liberty 57:5 licenses 62:4 licensing 61:14 licensure 62:8 lighten 98:3 likes 100:12 limit 120:7 limitations 121:7 125:24 limited 39:10 limits 121:3 line 40:1 71:23 73:9 103:15,20 lines 53:7 link 87:24 linked 64:5 87:16 linking 86:19 list 45:15 46:1,10 51:12,23 57:19 58:12 78:19 105:5 108:19 112:2 124:21 129:2 listed 56:20 78:20 78:22 listened 23:19 listening 23:14,18 lists 123:9 literal 119:6 literature 109:24 113:14 114:4 litigation 114:25 little 23:19 39:11 42:10 82:19 109:25 119:5,7 128:19 live 45:22 loans 60:11 localized 49:12 locate 29:6 42:8 43:17 47:15 location 16:18 49:7 61:21 log 29:9 logic 86:16 logical 34:1	logistics 109:7 long 35:7 58:12 87:4 103:3 107:23 longer 27:18 40:21 43:25 45:22 91:24 106:7 look 36:24 44:2 49:7 98:12 99:10 111:20 114:18 116:20 118:15 119:10 120:4 122:9,10 looked 109:7 111:2 looking 10:22 28:19 59:12 61:10 80:19 101:2 102:16,20 110:3 119:12 looks 41:9 114:21 122:7 Lord 24:4 lose 41:2 65:5 losing 72:16 lost 41:9 50:13 90:6 90:15 lot 27:23 66:8 70:23 71:18 85:1 111:15 113:1 lots 62:8 86:9 Louisville 57:22 LUDVIGSON 2:15 Luther 105:17 106:4	32:5 35:15 73:8 75:15 76:20 83:13 121:18 123:16,18 male 116:21 males 71:2,3 manageable 124:8 124:11 manner 12:16,22 18:12 manual 29:4 March 105:7 Marcus 84:3 marginal 87:24 marriage 75:16 marry 88:12 marrying 90:15 Martin 1:22 2:16 105:17 106:4 Marty 55:21 79:14 83:4,4,8,14 89:4 109:2 Mason 123:10 materials 75:12 91:13 matter 14:6,13 33:2 37:6 88:14 89:14,16 129:23 matters 28:20 29:16,20 122:14 maximum 58:10,15 maze 60:1,3,16 mean 7:2 19:2 25:14 28:5 43:16 45:4 51:19 54:9 59:2 63:1 66:3,6 67:17 68:12 82:25 85:1 86:14 88:18 88:19,25 91:14,19 97:21 98:11,16 103:22 115:18 116:5,11,12 117:13 118:23,24 119:21 123:24 126:19,19 128:4 meaningless 98:18 means 8:24 16:4 95:1
L			M	
L 1:16,18 lag 88:17 laid 68:12,15 69:22 85:16 large 43:1 69:21 larger 112:16,22 lasted 35:9 late 69:23 Laughter 80:3 94:10 95:17 99:15 99:24 100:3,8 102:17,21 103:5			Madam 100:1,2 MAHA 2:6 mailed 61:4 main 25:16 mainline 49:15 maintain 96:11 majority 19:9,11 19:12,13 23:11 33:23 36:15 makeup 18:19 making 14:12 17:17 19:24 26:15	

meant 4:24	73:18 80:14	modify 35:5	N	15:19 101:13
measure 57:14	126:10	modifying 30:24	nailed 41:22	neighborhood 49:9
mechanics 93:25	men 61:15 110:10	72:5	name 4:16 46:3,4	neighborhoods
media 43:25 57:6	111:10	moment 87:11 96:8	narrow 48:25 69:1	58:4
meet 17:17 26:6	mentioned 44:6	MONROIG 2:8	71:20	neither 23:24
106:4,8,18 129:21	110:5	monster 67:20	national 3:4 5:22	networking 60:11
meeting 1:3 4:3,7	MEPA 82:10,13	month 105:21	6:23 7:4 9:4,6	neutral 57:3
17:4,6 27:11,25	88:8 93:4	moot 33:1	10:23 11:1,7,11	never 51:10 65:2
28:7 32:1 33:16	mic 109:10	motion 5:17 8:6	12:10,23 13:13	nevertheless 99:14
33:19,21,22,24	MICHAEL 1:20	10:11,13,13,20	16:19 49:23 64:25	103:7
35:4,25 36:5 37:8	microphone 95:24	11:8 12:13 13:7,9	Native 80:12	new 8:7 16:14,15
37:8,11,21,22,25	109:17	13:19 16:1,17,20	nature 20:9 31:4	28:15 52:20 57:18
38:21,25 39:6,18	middle 113:5	16:24 21:19,24	37:14	57:19 58:20 59:3
39:22 40:4,8,12	mildly 49:1	22:6,7,18 23:4,5,6	navigate 60:2	90:25 112:17
41:20,23 42:1	miles 32:25 34:16	24:1,3,13,14,15	navigating 60:16	125:20
47:1,20 69:14	42:22	24:23,25,25,25	Nay 21:13,15,17	news 73:25
72:13 73:16 74:7	milestone 98:9	25:11 73:16 75:17	near 32:18	nice 94:12 115:9
75:6,11 77:15	milestones 98:4	75:20 76:3,19,21	necessarily 40:18	night 41:15
93:11,13 95:11,15	Minarik 75:7	77:1,5,25 84:6,17	40:21 59:4 64:5	nine 56:18,20 125:2
97:9,13,15 104:8	mind 6:5 32:3	84:22 85:3 86:12	111:13 113:25	125:4
104:13 107:3,15	51:10 106:23	89:6,20 90:17	114:2 118:25	Ninth 1:9
107:16 108:3,7	108:15 115:15	96:18	120:10 122:20	nominate 12:13
123:14,15	minds 121:18	motions 11:4,14	126:12	nomination 73:24
meetings 3:9,12	minorities 79:1,2	12:4,6,12 22:9	necessary 11:22	75:6
7:12 36:25 37:2,3	minority 52:24	23:25	12:25 13:3 15:6	non 79:1
38:2 40:17,22	56:15,17 58:4	motivated 63:6	15:14 20:24 36:8	non-threatening
84:23 97:6 105:3	71:24	75:15	40:13 121:1	115:7
Melendez 1:17 4:11	minority-owned	move 4:19 5:14,22	need 33:3,5 40:14	normally 100:22
9:25 10:1,11 12:3	52:14	6:22 11:25 12:11	41:21 43:8 59:4	116:1 117:21
12:21 13:20,21	minute 11:6 44:16	12:12 20:12 22:24	60:2 73:13 77:6,8	northeast 59:25
21:10,11,23 22:2	44:20 45:19 60:8	22:25,25 23:8	77:19 85:10 86:17	northeastern 60:1
22:5 24:10,16	62:6 79:18	24:9,13,16,17,18	91:19,20 95:23	Northwest 1:9
25:8,10,24 26:12	minutes 3:11 4:19	24:23 38:21 53:6	97:2,10,14,19	note 35:7
27:5 30:21,22	4:20 5:18 6:19	72:19 76:10,18	98:20 100:17	noted 52:14 79:3
31:21,22 32:8,13	7:16 8:5 10:20	77:14 78:1,2 85:4	104:4 108:13	notice 46:25 47:11
39:23,24 40:2	11:16 24:19	moved 89:18	112:6 123:24	notified 42:9
69:17 71:7 73:3	101:17,17,18	105:24	125:4	November 16:13
73:10 76:5,6,20	102:2,7 104:16	movement 86:9	needed 48:6 62:4	47:10 69:14 72:8
76:25 77:4,12,13	missing 37:20,24	moves 94:4	96:11	82:3,5,6 91:8,8
78:2 90:4,4 103:1	51:24	moving 6:16 73:13	needs 29:25 31:16	93:19 94:4 100:13
104:11	misunderstanding	86:20 101:1	43:24 64:19 66:11	100:25
Melendez's 70:18	17:16	Multi 78:12	need-to-know 80:4	nowadays 65:20
member 12:14 13:4	mob 103:12	Multi-Ethnic 81:16	negative 115:16	null 116:1
15:3 62:16 75:13	modest 111:4,8	90:20	negotiation 14:22	number 37:3 39:8
80:16 103:19	modification 31:23	municipal 57:7	14:25 15:2,16	41:21 42:6 43:1
members 11:9	modifications 32:6	60:4	97:4	47:14 58:10 71:1
15:18 16:15 20:3	modified 30:7,8,9	Muslim 63:4	negotiations 14:1	71:2 120:12

121:15 123:24 124:7,20 numeral 5:14,14,16 6:16,18 7:14,15 N.W 4:8	oh 4:23 6:5 11:19 12:2 92:25 126:10 okay 5:3,9,12 6:12 9:13,16 10:22 11:20 12:1 13:22 21:18 22:11 25:2 25:5 27:10,22 28:10 38:16 41:17 47:6 48:12 50:10 50:14,19 51:9,11 52:8 56:13 61:6 61:17 67:8 68:5 68:16,21 70:24 72:24 73:10,12 74:15,25 75:3,4 75:24 77:2 78:2,7 79:14,16,24 81:9 81:12 82:15 87:18 88:15 89:25 90:16 91:6 92:4 93:1 94:14,22 101:1 102:8 104:14,15 104:25 105:10,13 105:13 106:12,15 108:8,21 109:2,11 113:17 128:25 129:17 older 69:19 70:1,18 70:21 86:21 oldest 86:15 Omaha 35:9 OMB 124:24 125:4 125:8 once 6:15 72:15 80:20 120:18 125:3 ones 45:21 110:5 110:25 112:9 119:8 oops 89:11 open 41:19 100:14 106:6 opening 16:14 25:3 openly 31:12 openness 128:14 opinion 22:22 40:3 opportunities	81:19 opportunity 20:13 36:7 56:24 71:23 110:18 111:4 118:3 opposed 26:1 31:5 31:15 43:7 opposition 39:21 options 44:2 order 12:24 15:15 20:24 22:15,16 23:3,16 24:4,20 25:1 37:11 41:1 49:8 72:22 78:23 88:12 110:9 Oregon 48:14 129:12 original 23:6 24:15 originally 30:11 43:20 originates 66:23 outline 29:23,25 30:6,8,16 113:6 overall 53:24 55:7 67:15,16 overbroad 65:5 overlaps 64:1 overturned 18:7	parcel 64:6 parliamentary 15:12 23:21 25:15 25:20 26:5 part 13:7,8,9 14:24 15:1 22:8 26:24 28:8 35:10 49:3 53:24 54:7 64:6 66:1,4,10,18 67:1 67:12 91:9 100:10 100:23 103:3 112:16,22 120:15 120:16,18 PARTICIPANT 12:17 100:1 participate 46:14 46:16 participating 4:11 4:15 81:24 particular 13:16 18:11 26:12 32:6 37:14 49:6,18 56:12 60:5 84:23 113:22 125:24 particularly 59:23 59:24 60:14 partisan 53:7 parts 23:1 26:1 Party 8:7 pass 6:13 passage 108:14 passed 59:21 85:1 passes 10:13 passing 22:8 passionately 19:2 peace 93:17 pending 16:9 78:10 78:21 people 24:9,12 27:14 41:19 45:3 46:20 47:15 49:5 53:14 54:3 55:5,6 55:14 56:4 62:5 66:20 69:22,22 70:15 84:5,17 96:19 98:15 106:5 107:9,21 121:18	125:16 people's 63:21 percent 116:22 percentage 69:21 perfectly 19:23 40:11 period 86:10 87:4 87:23 93:21,21 94:6 95:6 128:11 periods 91:4 93:11 93:11,13,16 95:2 100:20 perplexed 102:16 person 4:10 48:16 97:25 personal 69:18 104:6 121:14 Personally 36:3 persuasive 62:22 Pete 14:2 99:1,2 Peter 75:7 Philadelphia 32:21 32:25 33:5 34:10 34:11,15 36:6 37:9,22 38:25 39:3,5,9,15 41:24 42:18,19,20,21,23 43:1 44:12 45:23 49:6,15,16 phone 4:15 41:3 50:5 72:23 73:4,4 76:3 77:21 81:24 phrase 112:13 pick 16:18 39:18 58:14 101:4 picking 18:3 picture 66:4 pieces 22:19 pile-up 97:22 pipeline 80:7 place 17:6 30:24 37:18,19 38:4 41:24 49:12 54:7 56:22 75:5 98:14 111:20 115:25 119:10 placed 76:16
<hr/> O <hr/>				
object 18:15,21 84:17 102:7 103:13,18 objected 84:5 objection 18:9 129:20 objections 18:23 105:11 OBSTROWSKY 2:9 obtain 43:11 113:22 obtained 112:4,18 obtaining 6:11 120:17 obvious 24:8 111:20 obviously 23:13,17 33:22 36:15 37:2 48:16 63:6 64:24 124:16 occur 13:13 15:16 93:19 occurred 49:19 50:3 78:24 occurrences 103:4 occurring 119:19 OCRE 2:7 126:8 October 1:5 4:6 48:4,9,10 51:12 75:6 odd 18:14 offensive 73:22 offer 11:4,13 Office 29:2 officers 114:5,6,13 offices 32:25 33:6 official 36:8 officio 62:16 OGC 2:2 32:12	older 69:19 70:1,18 70:21 86:21 oldest 86:15 Omaha 35:9 OMB 124:24 125:4 125:8 once 6:15 72:15 80:20 120:18 125:3 ones 45:21 110:5 110:25 112:9 119:8 oops 89:11 open 41:19 100:14 106:6 opening 16:14 25:3 openly 31:12 openness 128:14 opinion 22:22 40:3 opportunities	<hr/> P <hr/> PAGE 3:2 Palm 73:4 PAMELA 2:5 panel 67:22,23,24 67:25 69:9 Panther 8:7 28:16 Panthers 58:20 paper 29:24 32:16 33:12,14 35:22 36:16,21 45:17,24 59:17 61:10 70:19 110:5 111:19,22 112:10,24 114:20 116:20 119:1 123:8 papers 48:21,22 63:18 72:10	<hr/> P <hr/> parcel 64:6 parliamentary 15:12 23:21 25:15 25:20 26:5 part 13:7,8,9 14:24 15:1 22:8 26:24 28:8 35:10 49:3 53:24 54:7 64:6 66:1,4,10,18 67:1 67:12 91:9 100:10 100:23 103:3 112:16,22 120:15 120:16,18 PARTICIPANT 12:17 100:1 participate 46:14 46:16 participating 4:11 4:15 81:24 particular 13:16 18:11 26:12 32:6 37:14 49:6,18 56:12 60:5 84:23 113:22 125:24 particularly 59:23 59:24 60:14 partisan 53:7 parts 23:1 26:1 Party 8:7 pass 6:13 passage 108:14 passed 59:21 85:1 passes 10:13 passing 22:8 passionately 19:2 peace 93:17 pending 16:9 78:10 78:21 people 24:9,12 27:14 41:19 45:3 46:20 47:15 49:5 53:14 54:3 55:5,6 55:14 56:4 62:5 66:20 69:22,22 70:15 84:5,17 96:19 98:15 106:5 107:9,21 121:18	125:16 people's 63:21 percent 116:22 percentage 69:21 perfectly 19:23 40:11 period 86:10 87:4 87:23 93:21,21 94:6 95:6 128:11 periods 91:4 93:11 93:11,13,16 95:2 100:20 perplexed 102:16 person 4:10 48:16 97:25 personal 69:18 104:6 121:14 Personally 36:3 persuasive 62:22 Pete 14:2 99:1,2 Peter 75:7 Philadelphia 32:21 32:25 33:5 34:10 34:11,15 36:6 37:9,22 38:25 39:3,5,9,15 41:24 42:18,19,20,21,23 43:1 44:12 45:23 49:6,15,16 phone 4:15 41:3 50:5 72:23 73:4,4 76:3 77:21 81:24 phrase 112:13 pick 16:18 39:18 58:14 101:4 picking 18:3 picture 66:4 pieces 22:19 pile-up 97:22 pipeline 80:7 place 17:6 30:24 37:18,19 38:4 41:24 49:12 54:7 56:22 75:5 98:14 111:20 115:25 119:10 placed 76:16

Placement 78:13 81:17 90:21	polling 37:18,19 49:8	63:17	problematic 105:23 115:22,24	32:4 59:1 82:2 100:13 129:18
places 69:20 119:12 122:20	portion 16:2 40:23 49:16	presented 25:11	problems 16:11 43:10,21 93:25	proposed 5:4,8,13 6:8 10:15,17 20:3 32:15 40:25 53:17 53:18 57:20 73:18 81:20 85:15 102:4 105:5 114:20
plan 29:23 30:1,23 31:10 32:4 36:10 42:9 113:4,6	Portland 48:14	presenting 29:21	procedure 15:13 23:21 25:15,21 26:6	proposing 32:10 88:8
planning 3:3 5:14 5:21 6:1,16,22,25 7:3,3 10:25 129:11	posed 70:7	Presidential 32:21	proceeds 29:3	proves 40:13
plans 107:4,9,11,22 113:15	position 27:9 108:12,13	presiding 1:10	proceed 115:4	provide 12:24 28:14 65:22 78:16 101:11 109:5 112:8 121:3
plausible 119:3	positions 108:9	press 13:10 29:9	proceedings 121:23 129:22	provided 20:13 51:14 52:1
play 24:13 86:24	possibility 49:20 129:12	prestige 126:17	process 6:8 16:5 26:25 42:7,12 49:3 51:21 71:4 80:11,19 81:5 94:4 112:13 113:5 126:6 128:5	provides 119:1
please 6:2 11:13 20:18,19 28:14 51:16 78:16 79:14 109:17 115:10	possible 46:13 128:12,16,19	prevents 104:12	produce 52:13 127:6	provisional 106:20
pledged 62:15	possibly 58:19 79:6	previous 16:17	produced 86:4	proximate 49:7
plenty 118:14	postponement 13:25 19:18 99:11	previously 52:11	productive 37:22 37:23 38:8 83:17	public 84:20 110:16 112:7 113:16 114:22
point 9:4 14:21 15:7 17:11,22 18:13 21:1 26:12 30:4 36:3 37:5 41:1,21 54:12,21 57:1 58:6,7 65:20 72:22 75:24 80:25 83:18 84:10,25 87:9 88:17,21 89:6 90:15 100:23 101:4,13 105:15 108:17 111:25 116:1 118:20 119:11,13 129:17	potential 9:4 32:23 51:13 58:21 108:18	pre-record 129:14 129:16	Program 3:3 5:14 5:21,25,25 6:16 6:22,25 7:2,3 10:25 58:1	published 112:21
pledged 62:15	potentially 37:22 58:11 110:4 118:16	prices 43:14	progress 13:17 83:5,15	pull 110:11
plenty 118:14	power 18:18 19:21 65:6,23 115:7	primary 26:22 56:10 66:11	progression 13:12	punch 6:6
point 9:4 14:21 15:7 17:11,22 18:13 21:1 26:12 30:4 36:3 37:5 41:1,21 54:12,21 57:1 58:6,7 65:20 72:22 75:24 80:25 83:18 84:10,25 87:9 88:17,21 89:6 90:15 100:23 101:4,13 105:15 108:17 111:25 116:1 118:20 119:11,13 129:17	practicalities 34:12	principle 121:11	prohibited 110:24 110:24	purported 49:19
points 27:7 37:4 54:19,19,20,20,22 55:1,12,24 56:2 56:11,18,20,21 57:2,4,6,6,8,10,13 57:15,18,23,24 58:3 99:4	practices 114:25	prior 12:22 29:12 33:8 63:18	project 3:9 5:24 7:1 7:13 20:14 29:23 29:25 30:6,8,16 51:5 108:25 109:1 120:15	purposes 24:11 50:1 94:16
Police 57:7	precisely 10:19	priorities 51:22	proof 111:25	pursue 63:5
policy 84:20	predict 110:22 118:1	prioritizing 86:14	properly 38:5 120:20	purview 14:9
polite 115:10	prediction 110:19	prison 65:1 110:15 111:23 112:9 113:16 114:22 115:7 119:19	proposal 8:7,8 51:20 52:7,12 53:1 55:1 59:12 60:25 62:23 67:10 93:20 120:3 123:8 123:14,17	push 95:6
political 26:24	prefer 36:19 54:5 68:22 72:3,6 105:8 129:6,7	private 57:16 110:15 111:23 112:9 113:16 114:22 115:7 119:19	proposals 101:8	pushed 95:3 98:10 put 11:19 12:23 25:3 49:1,10 56:5 60:25 76:18 88:1 91:20 98:14 106:19 111:8 112:2 121:2 124:22 128:23
poll 46:6	preference 34:23 63:20 72:2 108:5 108:7	probably 30:16 58:15,17 69:6 80:17 87:12 95:9 95:21 99:17 115:1 124:17,21 125:13 125:14,17 126:25	propose 10:18 13:5	putting 14:7 113:14
	preferences 57:17	problem 10:20 37:3 41:12 46:11 47:25 60:15 66:16 70:9,22 83:3,13 88:23 94:6 97:23 98:1 110:21 116:12,13 129:5		puzzled 9:3
	preferred 117:6			P-R-O-C-E-E-D-... 4:1
	prejudicial 118:25			p.m 129:22
	preliminary 110:12 113:2			
	prepared 48:5			
	preparing 127:13			
	present 1:12 2:1,13 4:10 16:10 32:20			
	presentation 28:21			
	presentations			

Q				
qualifications 128:23	raise 9:9 26:18 69:16 70:5	57:4,8,10,12,14 57:17,22,23 58:3 58:5,6 80:15 82:3 127:14	124:23 relates 69:11	86:20,21 87:3,8 87:11,17,20,22 88:1 90:21 112:22 113:8,9 125:23 126:2
qualified 62:25	raised 18:9 92:1	receiving 51:15	relating 78:25	Reporter 4:13
qualify 120:9	range 123:22	recommend 14:19 16:6 128:9	relation 58:19,20 58:21	reporters 34:25
quality 119:5	ranked 52:15 56:6 56:8 62:24	recommendations 14:7,12 17:18 19:24 100:24	relatively 30:2 109:25	reports 3:7,8 7:9 7:10 8:9,23 9:4 29:9,16 31:7 74:5 78:4,6,8,10,20 79:7 80:7,24 81:3 81:13 82:24,25 85:22 86:15,19 87:25 88:20 97:5 98:21 99:12 101:3 101:6 110:17
quarter 3:6 7:7 50:25 51:1	ranking 7:23 55:7	recommended 19:15,15 57:25 101:12,22	release 87:23	representative 17:12
question 7:20 8:4 9:12 17:2 21:1 22:15 29:8 31:21 32:3 33:8 35:23 35:24 37:15,16 44:5 48:17 53:13 55:4 57:13 66:14 74:4 76:7 87:23 107:3 115:18 117:16,17 120:1 121:19,24 122:4 124:23	rankings 51:13,17	reconsider 24:10 24:13,23	released 84:4	request 26:15,19 68:10 105:7 112:8 114:24 115:9
questions 17:1 30:20 35:12 64:1 81:1 113:18 128:12	rate 86:3 111:5 116:23 124:13	reconsideration 23:6	relevance 87:8,9,13	requested 104:3
quickly 30:3 87:13 123:21 127:6	rates 116:18,22	record 19:23 20:2 46:21 91:11,20 95:21 104:2 121:2 129:10	relevant 29:7 34:5 34:6	requesting 28:25
quite 66:5 98:22	ratification 17:14 18:4	Red 41:14	reliable 115:15,20 117:17	requests 29:18
quorum 16:11 50:4 72:23 76:2 91:22 91:25 92:20 96:11 100:13	ratifies 35:13	refer 110:17	religious 57:5 63:1 63:3,7,9,24,25 64:24 67:11,14,21 67:25	require 41:14
	ratify 93:10	reference 66:10	religiously-based 53:19,25 54:24 55:19	required 31:14
	raw 116:17	reflect 52:9 91:4,12	remain 14:9,14 62:15 67:11 128:13	requirements 61:11 62:8 70:12
	reached 14:3	reflected 51:15	remaining 10:12 27:3	research 29:3,10 109:6,12,14,21 113:2 117:7
	read 70:25	reflects 8:20	remember 61:21 79:15	residents 58:4 60:21
	reading 63:17	regain 103:12	remove 104:6	resignation 21:22
	ready 48:8	regard 29:1,3,11 30:8 64:23 70:11 70:11 85:15 87:5	renting 43:5,6	resigned 26:21 62:14
	reaffirming 36:9	regarding 18:10,10 64:24 75:16 86:10	reopen 14:4	resigning 25:6
	real 60:15 87:23 88:11	regardless 85:21 113:10 115:2,3	reorder 51:22	resolved 120:2
	realistic 31:17	region 49:1	repeating 6:5	resonate 26:15
	realize 15:9 31:18	Regional 75:7	replaced 126:9	resources 49:25 65:17
	really 18:17 65:2 77:14,22 88:21 106:25 115:6 116:13 117:1 120:2 121:2 125:9	Register 46:25	report 3:5,6,13 5:18 6:20 7:6,7,17 7:23 8:8,14,18 16:12 28:4,6,11 28:12 30:10 31:11 31:13,14,15 48:5 50:18,25 51:2 64:25 65:24 78:13 78:14,15 79:9,23 80:2,9 81:6,16,17 81:19 82:5,20 83:9,21 84:1,23 85:5,19,23 86:8	respect 11:4 37:17 39:3 85:8 97:21
	rearrange 72:14	regular 33:19 35:25 39:6,17 47:1 62:6		
	reason 36:21 39:7 60:8 83:8 88:11 127:5 128:21	regularly 37:1		
	reasonable 123:23 124:7 126:25	regulatory 52:23 60:1,16		
	reasoning 114:13	rejoin 102:12		
	reasons 115:24	relate 7:22		
	rebuttal 93:21 95:2 95:6	related 66:21		
	rebuttals 81:11 82:17			
	rebutting 117:23			
	recall 40:15			
	receive 28:4 62:18			
	received 27:18 28:24 53:12 56:18			
R				
race 56:2,7 57:2 64:5 67:23 69:12				
racial 56:3 57:6,16 63:1,8,9 66:14,23 66:24				
racially 55:19 73:21				
racially-based 53:15,25 54:3,6 54:23				
racially-targeted 65:13				
racism 57:14				
radius 123:22				

101:9 112:17 122:15 respectively 5:20 6:21 respond 14:20 26:23 104:2 responding 124:15 response 9:15 21:4 28:24 41:8 50:12 66:15 67:1 73:1 73:14 75:19,21 90:5,9,22 105:12 112:8 121:10 124:14 129:19 responses 125:20 rest 25:17 40:10 61:1,6 73:18 89:4 restate 20:22 result 14:1 98:16 116:6 results 51:17 56:3 111:3,8 113:25 retired 126:10 retirement 69:24 retroactively 102:2 return 42:24 82:4 90:18 102:23 reverse 116:3 review 29:12 30:14 31:7 78:10 80:10 80:10,14,15,17,20 80:23 81:4 109:23 113:14 reviewed 29:15 reviews 80:15,19 revised 10:23 81:6 revisit 100:24 Reynolds 1:10,13 4:3,18,23 5:3,9,12 6:7,12,14 7:19 9:13,18,25 10:3,5 10:7,9,22 11:2,7 11:22 12:1,7 13:22,24 15:21 17:15,25 18:25 20:16 21:3,7,10 21:12,14,16,18	22:1,4,11 24:5 25:2,8,23 26:10 27:10,22 28:3,10 28:13 30:20 36:2 37:23 38:7,16,20 39:20 40:6 41:4,7 41:11,17 46:12,19 47:8 48:19 50:7 50:11,15,19,22 51:11,25 52:8 53:9 55:21 56:13 58:24 59:11 61:9 61:13,17 62:11 64:14 67:9,10 68:3,6,11,19 70:24 71:19 72:11 72:19,24 73:7,12 73:21 74:9,19 75:4,24 76:4,9,13 77:2 78:7 79:14 79:21 81:9,12 82:11,14,16 83:2 83:11 85:10 86:13 87:18 89:2,12,17 89:25 90:3,7,12 90:16 91:6,24 92:4,10,23 93:24 94:7,14,22,25 95:3,25 96:10,16 96:20 97:1,16 98:1,19,24 99:8 101:1,10 102:3,8 102:11,22 103:11 103:16,21 104:4 104:14,25 105:4 105:10 106:15,22 108:8,21 109:2,16 128:25 129:17 Richard 2:18 95:19 96:7 right 6:14 15:22 27:10,21,22 30:24 46:13 50:2,22 57:23 60:9 72:20 73:12 74:11 76:24 85:4 93:1,2 94:8 94:25 100:11	101:25 102:1 104:4,9,25 108:4 109:8,19 115:12 118:13 119:24 120:5 122:24 123:2,2 127:4,25 128:6,17,20 rightly 111:22 rights 1:1 4:4 28:17 29:11 57:5,12 58:5 59:14 rise 65:13 69:25 road 10:21 ROBERT 2:7 role 56:2 roles 56:7 Roman 5:14,16 6:16,18 7:14,14 room 1:8 4:8 6:11 91:12,19 92:6,8 100:12 103:19 round 85:18 rule 86:22 ruled 123:4 rules 15:12 16:14 runners 74:13 Rust 59:25	<hr/> S <hr/> SAC 62:15,17,19 72:17 75:18 76:8 76:13,16,19,23 salons 62:6 sample 126:15 sampling 126:15 San 61:23 62:1 70:8 sat 87:3 satisfactory 116:12 satisfy 116:10 saying 18:17 24:6,7 24:8 30:23,25 31:22,25 38:7 86:1 87:13 115:10 118:17 119:25 129:16 says 8:6,18 28:9	scenario 46:19 schedule 72:15 80:24 85:16 98:5 99:4 101:5,13 106:11 scheduled 35:4 36:20 37:2 48:3 88:8 scheduling 36:25 38:2 41:13 79:6 88:14 SCHMAUCH 2:17 Schmechel 2:18 89:15 95:19 96:8 102:14,15,22 Schmechel's 92:9 scholars 118:15 School 57:23 58:1 80:8 schools 110:15,16 119:18,18,20,22 122:22,23,25 123:15,20,22 124:7 127:5 SCHULD 2:19 scientist 120:25 scope 119:12 score 55:8 scratch 6:19 season 81:25 90:24 90:25 Seattle 57:22 second 4:20,24 5:1 6:2,3,4 11:10 12:2 12:3,8 13:7,8,9,19 13:20 22:12,13 54:19 55:13 58:5 67:24 72:20,21 85:9,18 86:11 110:2 111:18 116:5 119:15 seconded 89:20,22 second-highest 55:22 section 6:1 29:12 30:22 31:23 securing 113:15	security 43:23 44:1 see 9:10 18:5 32:9 34:4,13,22 36:20 36:21 37:21 39:21 46:19 59:4 67:2 67:11 92:2 109:18 110:25 120:13 121:11 126:11 seeing 32:24 69:20 110:22 seen 45:15 select 12:10 59:2 81:15 selection 118:25 selective 111:23 119:20,21 semitism 65:12 send 120:12 125:25 sending 13:18 31:24 115:1 sense 43:8 96:8 103:8 104:6 106:25 109:21 110:7 128:8 sent 51:12 75:10 78:11 79:4,5 80:13 88:4,6 sentiment 79:8 separate 40:12,25 52:20 57:1 67:6 67:23 separated 55:8 separately 7:25 September 3:11,12 3:12 8:25 11:2 73:15 75:11 79:5 80:13 88:7 series 16:14 serious 101:4 serve 25:9,12 27:2 27:4,6,9,14 29:16 serves 27:6 set 11:11 17:3,3 42:5 43:25 93:4 100:21 114:19 116:8 124:15 128:2
---	--	---	---	---	--

sets 104:16	skip 77:16,17 106:20	spent 74:12	state 3:10 5:15 6:18 7:15 58:2 60:8,9 72:18 73:18 95:21 115:4 119:18 122:21,23	strongly 105:8 119:14
setting 13:18	slight 32:5 113:20	split 55:4	statement 93:12 103:9	structure 19:17
settled 107:4	small 102:6 122:15	sponsor 123:25	statements 73:22 81:11 82:7 85:18 94:9,13 95:8 98:7	struggle 26:16
seven 54:25 57:2,4	smirking 102:18 103:14,20 104:1	sponsors 74:18	states 59:24,25	stuck 100:19
sever 23:1,4,5 24:16,17,24 73:17	snapshot 87:14	spring 18:10	state-wide 49:22	students 63:4
severely 29:5 87:10	social 120:25	Springs 73:4	Station 39:13	studies 110:13
sex 109:14 110:13 110:19 111:6,21 122:16	Solicitor 2:8	staff 1:22 2:1,7 3:13 4:21 5:5,18 6:20 7:17 9:21 11:17 28:13,18 34:17,24 43:6,24 44:8 51:12,16 52:1,3,4,10,22 53:9,11 54:8,11 55:9,23 56:14 58:8,13 61:3 74:14,17 78:8,16 78:18 79:16,22,24 80:6 81:10 82:4 83:4,8,14 88:3,13 89:5 91:21 92:14 92:19,25 93:18 94:1,2 95:5,7,12 96:4 101:8,11,14 105:14 108:20 109:4,9 113:11,17 124:22 126:8	statute 8:18 47:4,5	study 110:20 112:16 121:12,13 122:1,2
shaking 102:15 104:3	somewhat 9:10 15:2 98:17 119:20	staffing 57:11	statutes 52:13 56:20	stuff 10:2 24:20
shaping 20:7	soon 80:21 81:25 128:12,16	stage 42:5	statutory 8:9,14 47:20 113:8	subcommittee 3:4 5:23 6:23 7:5 10:24 11:1,8,9,11 12:8,9 13:25 14:5 14:12,18 15:3,8 15:11,11 16:5,12 17:9,11,17,22 18:3,6,17 19:3,3,6 19:10,13,16,18,20 19:24 20:2,6 21:2 21:22 22:3 25:7 26:21 27:3,4,11 27:14,19 28:4,7
share 89:2 99:2	sorry 4:23 6:5 11:20 12:17 51:9 54:11 55:4 59:25 68:18 74:16,19 82:11 89:10,13 90:4 91:8 92:2 93:2 100:2 102:3 103:16	staked 108:10	statute 8:18 47:4,5	subcommittees 16:10
shelf 87:4	sort 62:9 63:6 64:7 84:5 86:14 113:20 117:20 119:4 124:18 126:8,9	stale 86:9 87:17 88:24,24	statutes 52:13 56:20	subdividing 26:2
shortly 29:22 30:19	sound 18:8	stand 16:16 26:17 48:9,11	statute 8:18 47:4,5	subject 16:18 17:14 18:3 28:21 63:20 78:21
shot 122:3	sounds 7:18 77:11 127:3	Standard 4:5	statute 8:18 47:4,5	submit 21:21 81:5 115:11
show 31:2 43:2 44:7,11 45:12 47:15 49:17 104:11 114:1 116:14,15 117:19	space 43:5,7,9,11 47:15	standards 103:22	statute 8:18 47:4,5	submitted 54:15,16 88:4
showing 117:22	speak 80:8 109:17	standing 56:23	statute 8:18 47:4,5	submitting 54:14
shown 83:4,15	speaking 89:11 99:7,12	stands 113:12	statute 8:18 47:4,5	subpoena 42:13 44:20,23 45:1,3,5 45:13 46:18 112:11,12 115:10 120:10 121:10 124:15 125:11,17 128:1,1
shows 113:22	spearheaded 71:7	start 43:13 60:17 60:22 72:16 81:22 128:7	statute 8:18 47:4,5	subpoenaed 44:14 44:18 112:19 125:19
shrinking 126:9	Special 47:21 89:14 92:5 96:7 99:1,13 104:1	started 62:2 109:13 110:11	statute 8:18 47:4,5	subpoenas 115:1 120:12
shrinks 127:7	specific 29:11 49:12,13 81:2 112:12 123:20	starting 101:12 118:20 119:11	statute 8:18 47:4,5	
side 108:14	specifically 63:11 123:9	starts 65:4	statute 8:18 47:4,5	
significant 71:9	speculation 103:2,6	startups 52:25	statute 8:18 47:4,5	
similar 62:16 103:4 114:14,14	speech 53:23 63:11 65:14 66:2,20 67:4 69:11		statute 8:18 47:4,5	
simple 25:12 39:7 49:24 115:25 128:7	spend 18:5		statute 8:18 47:4,5	
simply 9:23 13:9 48:22 110:21 116:6 128:4			statute 8:18 47:4,5	
single 115:7			statute 8:18 47:4,5	
singular 65:5			statute 8:18 47:4,5	
sit 124:20			statute 8:18 47:4,5	
sitting 24:9 92:8			statute 8:18 47:4,5	
situate 49:4			statute 8:18 47:4,5	
situation 30:25 114:15 116:14			statute 8:18 47:4,5	
sixties 69:23			statute 8:18 47:4,5	
sketchy 112:1			statute 8:18 47:4,5	
skill 62:7			statute 8:18 47:4,5	

subsequent 98:9 108:3	synergy 62:14 86:7	teleconference 31:25 82:6,8	63:22,23 64:10 65:25 66:13 67:5 67:7 68:17,21 69:11 70:7,20 71:15 72:9 73:20 74:3,15,20 75:2 76:22 77:3,8,17 77:24 79:18 80:1 80:5 82:18 83:2,7 83:11,20 84:18,25 85:4 88:16 89:18 89:20,22 90:1,2,6 91:1,14,18 92:2 92:12 95:18 96:6 96:12,22 97:8,12 97:18 98:11,23 99:6,9,22 100:4 101:7,16,25 102:5 102:9 103:13,17 103:18 107:2,10 107:14,20 108:6 108:10 115:14 116:9 117:15 120:23 129:9,15	53:6,21 58:21 59:19 60:19 62:12 62:16,19,19 63:13 63:18 64:2,6,19 64:19 65:3,5,19 66:7,11,13,17 67:14 69:4,6,20 71:5,17 72:11 75:22 80:20 81:6 82:22 83:4,7,17 84:19,22 85:2,12 86:6,15,16,23 87:12,15,21 88:22 90:6 93:4 94:3,3,4 94:5 96:22 97:19 97:21 99:3,17 102:7,24 103:15 103:20 104:7 106:3,8 111:22 112:21 113:21 114:3 115:24 116:13,17 117:18 119:2 122:12 123:20 124:10,12 124:16,19 125:6 125:12,16,24 126:12,24
substantial 49:25	system 54:12 56:17 60:11,12	telephone 1:13,17 1:19 4:12 129:2 129:13	Thernstrom's 24:18 35:3 52:6,9 56:21 86:12 89:3 89:6 104:17	
substitute 33:19 35:25	systems 61:14		thing 24:19 25:12 62:7 64:16 69:12 86:3 107:19 111:18 114:15 117:6,20 119:4 120:21	
substituting 38:6 53:3	T	telephonic 36:25 37:3 38:2	things 58:16 61:10 62:5 74:2 81:23 88:25 101:20 109:12,22 122:13	
success 47:16	table 3:1 24:15 73:23 89:7	tell 32:18 48:9 49:22	think 4:22 10:16 12:19 13:3,14 17:16 19:5 20:8 20:15 25:15,21 26:11 27:19 31:11 34:9 35:11 36:2 36:16 39:24 40:14 45:9 48:4,23 49:11,16,23,23	
sufficiency 80:10	tabled 76:18	temporary 89:14 92:5	thought 16:9 25:10 36:9 70:22 76:7 84:1,11,13,15 97:3 101:5 106:20 113:24 123:13 126:4 128:2,10	
sufficiently 111:15	tacked 98:8	tends 122:18	thoughtfully 100:15	
suggest 14:20 34:13 43:16 49:20 59:7 81:12,14 83:12 93:14 99:20 100:9 101:3 118:7	tactic 113:10	tentative 123:19	thoughts 63:21	
suggested 53:22 59:3 84:2 106:16 111:18 112:10 114:13	take 25:17 31:15 34:3,4 39:12,13 41:14,23,24 43:8 48:6 54:7 59:10 106:6 109:3 113:10 116:20 123:16	tentatively 62:17	three 5:16 6:18 7:15 9:8 15:17 53:20,21,21 54:15 54:16,20 55:10 57:13,15,17,23 58:17,18 67:19 71:8,21 72:7,10 74:6,7,11,13,25	
suggesting 117:12	taken 10:18 15:25 51:23 56:22 87:2 91:13 96:14	term 118:7		
suggests 111:13,22	talk 17:8,22,23 59:21,23 109:9 124:3	terms 55:5 70:1 79:6 82:23 83:15 86:13 129:10		
summer 18:10	talked 20:5,6 47:14 101:21	test 57:14		
Sun 59:24	talking 37:7,10 43:6 46:9 58:10 58:17 61:7 64:20 64:20 74:12 82:9 82:12 87:10 88:18 89:14 99:20 103:14,19	tests 116:1		
superb 99:12	tally 52:9,11	thank 16:25 28:18 50:22 68:16 74:15 78:18 88:15 106:2 109:8 129:20		
Supervisors 70:8	target 114:2,3 127:4	Thanks 32:13		
supplied 108:17	targets 100:11	Thanksgiving 90:24 91:4		
support 19:5 25:3 39:21 60:12 70:17 71:10 75:20 76:3	Taylor 1:18 4:11 10:3,4 14:23 20:4 21:12,13 41:6 50:9 72:25 90:7,8 102:25 104:10	theory 121:17		
supporting 76:21		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
supportive 54:4		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
suppose 6:5 54:6 64:5 113:19 120:11		theory 121:17		
supposed 15:19 16:12 28:3 76:8		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
Supreme 57:21		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
sure 15:24 22:17,20 55:10,11 69:7 73:8 76:2,4 94:11 111:16 118:6 121:5		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
surprised 9:10		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
survey 122:14 124:25 125:3,11		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
surveying 125:1		Thernstrom 1:14 4:9 5:7,10,11 8:3 8:4,13,20 9:10,19 9:20,23 10:14,16 11:5,10,15,19 12:8,13,15,20 13:1,5,6 15:6,14 18:16,21 20:23 21:8,9,24 27:6 33:7,13,18 36:23 36:24 38:1,9,22 44:4,6,10,15,19 44:24 45:4,7,14 45:18,25 46:5,8 46:12 47:18 48:13 51:18 52:2,19,21 53:2 58:8 59:12 59:17,18 61:5,9 61:12,16,18,25		
synergies 86:19	tecum 115:1			

78:11 79:4 80:14 81:13,13 83:22 90:17 104:16 106:5 125:13 threshold 35:11,24 124:25 125:2 throw 81:21,23 128:6 thrown 90:19 tied 13:10 tightly 65:16,22 67:13 tightly-focused 65:6 till 70:15 TIM 2:14 129:14 time 4:5 9:8 17:3 18:5 27:23 30:4 30:14 31:14 34:9 39:10 40:8,10 48:6 59:13 65:17 71:16 74:12 79:13 82:25 84:2 85:1 85:17 86:1,2,11 87:4,9,11,11,24 88:18 89:3 90:14 93:17 98:14,22,25 100:21 102:1,6,10 106:4,7 128:6 timely 71:6 86:21 88:20 126:2 timetable 88:5 title 3:9 5:24 7:1,13 7:22 8:1,7 51:5 52:17 57:7,17 58:22 85:19 104:19,24 109:1 123:1 today 48:4 49:13 68:14,18 74:11 81:3 88:18 Todd 1:15 94:8 108:12 told 20:1 62:1,3 TOLHURST 2:10 Tom 75:14 top 54:14,15,17,18	71:21 72:7,10 74:6,7 119:8 topic 3:6 7:8,22 50:25 51:2 52:17 52:18,20 53:3,12 53:18 54:5 55:22 55:24 56:7,12,25 57:1,18,20,24 59:4,15 60:23 62:13,16,21 63:5 63:14 64:11,18 65:19 66:1 67:12 69:4 70:5,6,23 71:5 74:4 79:8 83:21,22 topics 7:24 51:13 51:14 57:19 58:6 59:9 65:9 69:1 71:9,12 72:5 74:14,25 81:2 88:19 total 55:1 totally 37:13 touched 65:10 tough 14:1 towns 80:13 track 16:13,14 traditional 8:23 train 39:12 103:3 training 62:4 transcript 8:20 transfer 128:14 travel 33:1 traveling 98:15 treat 110:21 tried 47:15 true 99:7,17 104:14 107:21 truly 18:12 try 25:11 31:17 36:19,22 40:3 42:3 43:16 65:22 72:7 109:19 111:16 trying 25:11,12,13 25:19,20,22 26:4 26:5,6 31:3,19	39:20 42:8 43:13 53:4,5 68:24 70:15 93:3 112:2 113:2 turn 8:22 94:21 turns 52:18 112:19 two 5:14 6:17 8:9 8:15,16 9:1,4,11 11:4 12:12 15:17 16:21 20:3 22:9 23:1 24:8,12,19 29:20 31:11 42:16 47:13,17 48:4 54:20,24 55:2 56:5,15 57:24 58:3,18,19 59:24 63:18 69:1 79:25 80:6 81:3 85:24 86:8 87:15,25 88:12 90:15,17 91:9 93:15 98:19 99:4 101:2,2 two-panel 68:8 two-step 16:5 type 31:13,24 64:7 types 113:22 114:18 <hr/> U <hr/> ultimate 14:8,9,13 19:21 ultimately 17:19 18:18 19:8 26:16 unable 48:15 Uncle 75:14 unclear 111:5 113:7,7 uncomfortable 15:2 undergraduate 110:14 underscore 88:17 understand 8:5 10:14 15:24 16:2 23:20 24:21 25:23 25:25 37:15 47:19 51:21 66:6 67:5,7	67:12,18 77:4 86:23 88:11 114:5 115:18 understanding 14:3 25:21 74:11 90:14 understood 32:3 46:1 59:5 84:1 94:7,8 96:13 undo 23:6 unfortunate 26:17 unfortunately 26:10 uniform 115:9 unilateral 32:11 Union 39:12 universities 82:21 83:10 84:1 85:6 88:24 110:4,8 112:3,7 university 53:16 126:22 University's 116:21 unusual 117:20 unwieldy 16:7 18:4 update 3:5,7 7:5,8 28:11,12,15 50:23 78:4,8,17 95:25 96:5 109:6 updated 57:25 updating 29:4 urge 39:4 use 13:16 116:19 120:18 useful 13:3 47:20 49:17 59:10 60:23 113:9 119:16 usually 100:20 U.S 1:1 4:4 53:15 <hr/> V <hr/> V 3:13 5:19 6:21 vacation 106:7 valuable 113:21 118:19 variables 41:21 42:4,16 46:21	110:23 variation 56:11 variety 16:11 114:18 various 30:14 59:13 97:4 vehicle 19:2 vein 18:5 verifiable 42:11 version 12:22 52:16,17 54:10 56:6,9 versus 49:13 55:5 VI 3:14 viable 52:13 Vice 1:14 5:7,10 8:3,13,20 9:20,23 10:14,16 11:5,9 11:15,19 12:7,13 12:15 13:6 21:9 33:7,13,18 36:23 38:1,9,22 44:4,10 44:15,19,24 45:4 45:7,14,18,25 46:5,8,12 47:18 48:13 51:18 52:2 52:6,9,19,21 53:2 58:8 59:12,16,18 61:5,9,12,16,18 61:25 63:22 64:10 65:25 66:13 67:5 67:7 68:17,21 69:10 70:20 71:15 72:9 73:20 74:3 74:15,20 75:2 76:22 77:3,8,17 77:24 79:18 80:1 82:18 83:2,7,11 83:20 84:18,25 85:4 88:16 89:2,6 89:18,22,25 90:2 90:3,6 91:1,14,18 92:2,12 95:18 96:4,6,12,22 97:8 97:12,18 98:11,23 99:6,9,19,22 100:4,4,6 101:7
--	--	--	--	---

101:16,25 102:5,9 103:13,16,18 104:17 107:2,10 107:14,20 108:6 108:10 115:14 116:9 117:15 120:23 129:9,15 video 29:8 view 15:7 27:7 30:7 36:15 37:4 42:18 51:24 65:20 121:14 viewed 120:14 viewpoint 13:1 views 15:4,15 26:23 68:23 VII 57:7,17 Virginia 62:15,17 vociferous 12:21 voluntarily 43:2 44:7,11 45:13 46:14 voluntary 43:4 46:11 vote 9:16,19 10:9 14:15 17:19 21:5 21:8,18 22:24 23:1 24:14 36:9 53:4,13 56:22,25 63:11 68:13,14,20 69:14 71:13 72:6 72:7 73:6,13 74:9 76:10,10,12 77:1 77:5,6,9,12,14,19 77:22 78:22 81:7 82:5 87:20 89:7,9 89:16 90:16,17 91:8 92:15,16,22 92:24 93:1,7,9,18 94:3,16 96:13 97:2,11,15,20 100:10,10 101:23 102:1 104:9,12 106:3 108:2 voted 10:11,12 22:4 23:3,3,11,11 24:23,24 25:24	53:14 54:3,25 55:5,6,10,14 56:5 57:24 73:23 75:5 voter 28:16 votes 19:12 21:19 51:15,19,22 53:12 53:14 54:9 84:19 96:15 vote-getting 55:22 voting 28:17 29:11 29:16 68:18 88:19 108:9 <hr/> W <hr/> wages 81:18 wait 11:5 44:15,19 45:18 62:6 71:16 71:19 79:18 85:6 97:19 102:6,10 104:18 waiting 85:7,25 walk 5:13 6:15 74:10 100:12 want 16:1 20:12,22 25:3 27:20 29:20 30:4,5,15 31:1 35:17,18,19,24 44:2 45:12 49:10 62:7 66:19 67:3 67:19,22 69:3,6 70:17 73:6 77:10 77:14,14,19 81:4 83:20,21 100:13 102:6 106:19 115:20 117:19,25 118:7 120:11,12 121:1,14,15 123:19 124:16,16 125:17 127:13 129:11 wanted 9:8 32:15 35:2 62:25 70:5 77:4,20,22,22,25 105:22,25 106:6,7 123:16 wants 26:7 27:19 33:23 37:18 76:18	77:12 Washington 1:9 4:8 34:7,14,20,22 36:6 39:1 41:25 58:1 61:22 wasn't 25:19,25 51:4 68:19 92:3 117:12 wasted 27:23 way 20:12 26:13 27:5 38:5 49:4 67:15 68:9 70:12 86:14 88:21 89:11 107:7 110:20 111:9 114:20 116:15,17 120:17 121:11 122:9,10 127:2 ways 69:5 weather 39:8,11 Wednesday 41:15 week 79:15,19,20 79:22 80:17 105:24 weekend 106:9 107:23 weeks 47:13,17 48:4 108:14 weighted 54:10,12 went 9:11 54:21 weren't 23:14,18 26:24 West 39:9,15 Western 75:7 We'll 95:12 101:25 107:22 115:11 we're 50:16 67:3 73:8 86:4 108:9 we've 7:12 23:2,3 58:11 62:7 71:16 72:4 88:25 127:1 whittling 83:5,15 wholeheartedly 86:11 wholly 18:7 wield 103:11 willing 33:1 34:7	34:11,14,20,22 46:14,15 47:22 67:18 68:7,8 willingness 128:13 window-dressing 18:20,22,24 19:7 wiretapping 79:10 79:23 80:2 wish 48:23 49:7 witnesses 29:7 32:20,23 34:5,6 34:13,19,21 40:16 40:17 42:7,20,21 44:6,11 45:12,15 45:20 46:1,9,9 women 61:14 110:9 111:11 122:18 women's 91:19 wonder 47:22 63:24 64:10 wondered 32:16 wondering 7:22 22:6 49:2 Wooten 75:18 words 7:24 23:23 111:14 124:14 work 14:5 19:11 42:23 62:18 68:9 95:12 97:22 99:14 111:16 115:11 127:17 workers 42:22 46:7 81:19 working 31:17 119:13 workload 57:11 world 127:8,10 worry 22:9 81:24 115:5 worth 87:24 worthwhile 34:6 wouldn't 32:2 45:12 116:10 120:10 128:5 would-be 60:2,5,17 wound 65:16 wrap 80:21	WRIGHT 2:11 written 59:20 60:25 123:9 wrong 89:18 92:9 96:13 97:2 <hr/> X <hr/> X 47:14 <hr/> Y <hr/> Yaki 1:20 4:9 7:20 7:21 9:2,3,16,17 10:11 11:3,13,23 11:24 12:11,19 13:8,23 14:16,17 16:22,25 17:6,10 17:15,21 18:1,25 19:25 20:16,18 21:5,6,21 22:13 22:20,23 23:5,9 23:13,17,24 24:3 24:5,7 25:5 26:20 35:1,2,21 36:14 38:12 39:2 41:1 48:17,18,20,21 50:10,14,21 55:3 62:22 64:12,15,16 66:5,17 67:6,8,13 67:17 68:5,7,16 69:15 72:22 80:4 85:9,14 86:25 87:1 89:7,8,10,12 89:13,19,24 91:12 92:5 95:19 96:1,6 102:12,23 104:9 Yaki's 38:23 67:10 69:5 year 8:8 9:1 32:6 64:25 86:5 90:25 99:10 106:18 years 31:8 69:23 83:22 85:25 87:12 87:21 112:21 year-old 86:8 yesterday 52:5 53:1 York 112:18 125:20
---	---	--	---	--

youth 56:15,17 71:24 YouTube 37:19 <hr/> 1 <hr/> 1-6 30:7,22 31:3,23 32:6 1.0 12:23 10 126:11,24 100 32:25 34:15,16 34:18 42:22 100-mile 120:7 123:22 105 3:8 109 3:9 11 3:3,4,12 40:16 127:1 11(b) 29:12,13 11-person 40:21 12 56:1,10 78:25 127:7 12th 105:8,11 12:04 129:22 129 3:14 13th 82:5 107:1 108:5 130 120:9 14th 51:12 15 126:24 127:4 16 1:5 4:6 55:24 19th 105:9 1995 112:16 125:19 <hr/> 2 <hr/> 2 67:22 20th 82:6,17 91:8 93:19 94:4 100:13 100:25 200-page 31:13 2006 78:24 82:22 2008 56:2 2009 1:5 3:12 4:6 73:16 75:6,11 78:25 2010 3:5,6,8 7:6,7 7:11 8:2 28:11,12 50:25 51:1,13 57:12 58:11 88:19	97:6 105:2 23 75:11 24 3:12 25 116:22 25th 91:8 28 3:5 <hr/> 3 <hr/> 3 3:11 73:15 3rd 38:21 39:6 41:13 47:10 48:9 3rd/4th 39:17 30 47:1 55:1 82:7 115:12 30th 48:4,10,11,14 129:4 31 125:21 35 112:19 125:19 <hr/> 4 <hr/> 4 3:2 32:20 33:4,9 33:14,17 4th 11:2 33:9,25 35:5,19 36:1 38:22 39:6,17,19 40:8 41:13 42:15 43:14 47:11 <hr/> 5 <hr/> 5 78:24 5:00 43:24 51 3:6 540 1:8 4:8 <hr/> 6 <hr/> 6th 106:24,25 108:5 624 1:9 4:7 <hr/> 7 <hr/> 72 3:10 78 3:7 <hr/> 8 <hr/> 8 30:22 31:23 <hr/> 9 <hr/> 9th 4:7 82:3	9:00 43:24 9:30 1:10 9:33 4:2,5 900 62:4		
--	---	---	--	--