

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

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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

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