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UNEDITED

MEETING

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FRIDAY, AUGUST 16, 2013

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The Commission convened in Suite 1150 at  
1331 Pennsylvania Avenue, Northwest, Washington,  
D.C. at 9:30 a.m., Martin R. Castro, Chairman,  
presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner (via  
telephone)

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner (via telephone)

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner (via telephone)

MARLENE SALLO, Staff Director

JENNIFER CRON HEPLER, Parliamentarian

STAFF PRESENT:

MARGARET BUTLER, Acting Chief, OCRE

IVY L. DAVIS, Director, ERO

BARBARA DELAVIEZ, ERO

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

LENORE OSTROWSKY, Acting Chief, PAU

JOHN RATCLIFFE, Chief, Budget and Finance

MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

ALEC DEULL (via telephone)

TIM FAY

KENESHIA GRANT

JOHN MARTIN

CARISSA MULDER

JUANA SILVERIO

ALISON SOMIN

KIMBERLY TOLHURST

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

(9:33 a.m.)

CHAIRMAN CASTRO: This meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. It is currently 9:33 on August 16, 2013. Our meeting is taking place at the Commission's Offices at 1331 Pennsylvania Avenue, Northwest in Washington, D.C. and I'm Chairman Marty Castro.

The Commissioners who are present with us in the meeting are myself, Vice Chair Thernstrom, Commissioner Klandney, and Commissioner Gaziano. Commissioners who are participating by phone are Commissioner Kirsanow, Commissioner Achtenberg, Commissioner Yaki. And is Commissioner Heriot participating?

COMMISSIONER HERIOT: Yes, I am here.

CHAIRMAN CASTRO: Okay, great. So a quorum of the commissioners is present.

Is the person the Staff Director present?

MS. SALLO: Present.

CHAIRMAN CASTRO: Okay, is the court reporter present?

COURT REPORTER: Present, Mr. Chair.

1 CHAIRMAN CASTRO: And that is a  
2 response. Great.

3 VICE CHAIR THERNSTROM: Did you announce  
4 that I was here at the beginning?

5 CHAIRMAN CASTRO: Yes, I did.

6 VICE CHAIR THERNSTROM: Okay, good.

7 CHAIRMAN CASTRO: I did, yes.

8 So the first item is to approve the  
9 agenda.

10 I. APPROVAL OF AGENDA

11 CHAIRMAN CASTRO: So I move that we  
12 approve the agenda. Is there a second?

13 VICE CHAIR THERNSTROM: Second.

14 CHAIRMAN CASTRO: Okay, are there any  
15 amendments? Any amendments?

16 COMMISSIONER ACHTENBERG: Mr. Chairman?

17 CHAIRMAN CASTRO: The Chair recognizes  
18 Commissioner Achtenberg. Go ahead.

19 COMMISSIONER ACHTENBERG: I would like  
20 to propose that we amend the Washington State SAC  
21 and the Mississippi State SAC to the Staff Director  
22 for additional work.

23 CHAIRMAN CASTRO: Okay, is there a  
24 second to that motion?

25 COMMISSIONER HERIOT: I second the

1 motion. Sorry, this is Gail.

2 CHAIRMAN CASTRO: That was Commissioner  
3 Heriot. Yes, those on the phone, if you could  
4 introduce yourself or mention your name before you  
5 speak so the Court Reporter can keep an accurate  
6 record, that would be great.

7 COMMISSIONER GAZIANO: Mr. Chair?

8 CHAIRMAN CASTRO: Yes, Commissioner  
9 Gaziano.

10 COMMISSIONER GAZIANO: Can I just ask a  
11 question about the nature of the amendment? Is the  
12 amendment to the agenda to take them off at this  
13 point or are we going to discuss that?

14 CHAIRMAN CASTRO: No, to take them off  
15 and then to bring them back next month.

16 COMMISSIONER ACHTENBERG: Bring them  
17 back in September.

18 COMMISSIONER GAZIANO: Well I would like  
19 a discussion as to why we should recommit those.  
20 Those were about the only two that I thought looked  
21 balanced. So why are we taking the only two that  
22 look balanced off?

23 I'm sorry, Washington State and what  
24 other State?

25 CHAIRMAN CASTRO: Mississippi.

1                   COMMISSIONER GAZIANO:     Yes, those are  
2     the only two that are worthy of approving.     So is  
3     that why we want to get rid of them?

4                   CHAIRMAN CASTRO:     No.

5                   VICE CHAIR THERNSTROM:     No, but I had  
6     the same reaction.     This is Commission Thernstrom,  
7     Vice Chair.

8                   COMMISSIONER GAZIANO:     What is the issue  
9     that you want recommitted?     There are too balanced?

10                  COMMISSIONER ACHTENBERG:     Each has some  
11     problematic numbers that we would like some  
12     additional information on.     And assuming the  
13     additional information is acceptable, they will be  
14     moved forward.

15                  I mean if you want to go into a detailed  
16     discussion, which we were hoping to avoid having to  
17     spend the time doing, we can do that.     But it is not  
18     about whether or not they are balanced.     That has  
19     nothing to do with it.

20                  COMMISSIONER GAZIANO:             This is  
21     Commissioner Gaziano.     Thank you for the  
22     clarification, Commissioner Achtenberg.     If that is  
23     the basis of your motion, I won't oppose it and I  
24     will vote with you.     I will support your request for  
25     more information.

1                   But I want to register if we are taking  
2                   them off that I think other slates aren't and these  
3                   are balanced. So if in the process of looking into  
4                   other people, I hope we don't unbalance those  
5                   slates.

6                   CHAIRMAN CASTRO: Madam Vice Chair?

7                   VICE CHAIR THERNSTROM: More information  
8                   about what, precisely? And then we are back to the  
9                   balance and balance question. I mean -- well, my  
10                  question stands. More information about what? What  
11                  don't you know?

12                 CHAIRMAN CASTRO: I will let the Staff  
13                 Director, did you want to respond to that?

14                 MS. SALLO: Not directly.

15                 CHAIRMAN CASTRO: Okay.

16                 MS. SALLO: I would just request that  
17                 any information as to any particular concern not be  
18                 put on the record or the names of any potential  
19                 appointees. I would be more than happy to  
20                 disseminate any information or any concerns but at  
21                 this point in time, I would prefer not to put that  
22                 information out there.

23                 VICE CHAIR THERNSTROM: Well, I mean it  
24                 is very hard for me to vote on this when I don't  
25                 understand it. I need to know what is it. Is it

1 about people's history? Is it about people's  
2 political leanings? Is it about whatever? It is  
3 too vague for me.

4 CHAIRMAN CASTRO: Okay. Any other  
5 discussion? If not, this is on the motion to amend  
6 the agenda, all those in favor say aye.

7 (Chorus of aye.)

8 CHAIRMAN CASTRO: Any opposed?

9 VICE CHAIR THERNSTROM: Yes, I am  
10 opposed.

11 CHAIRMAN CASTRO: Okay, any abstentions?

12 (No audible response.)

13 CHAIRMAN CASTRO: In the opinions of the  
14 Chair, the amendment passes.

15 So now if there are no further  
16 amendments, let's vote to approve the agenda. All  
17 those in favor say aye.

18 (Chorus of aye.)

19 CHAIRMAN CASTRO: Any opposed?

20 (No audible response.)

21 CHAIRMAN CASTRO: Any abstentions?

22 (No audible response.)

23 CHAIRMAN CASTRO: That passes.

24 Prior to moving into the formal agenda,  
25 I do want to acknowledge a few folks. We are

1 actually very fortunate to have with us a member of  
2 our Texas State Advisory Committee with us today,  
3 Professor Josh Blackman who happens to be here on  
4 the hill and thought he would come by. So I wanted  
5 to acknowledge you and thank you for being here.

6 Thank you also for your service at the  
7 Texas State Advisory Committee. We really  
8 appreciate all our SAC members and we especially  
9 appreciate you being here today. So thank you.

10 I also want to welcome two new members  
11 to the Commission team. My special assistant, Juana  
12 Silverio is back here and Commissioner Dave  
13 Kladney's new special assistant, Keneshia Grant, who  
14 is over here. So we now have a full team back  
15 behind us and we want to welcome them to the team.

16 Also, prior to moving into the agenda,  
17 when we meet once a month we have important  
18 milestones in civil rights that occur either before  
19 our meetings or shortly after our meetings. And  
20 there are two that I think is important for this  
21 Commission to acknowledge; one that occurred a  
22 couple of weeks ago on July 26, 2013, which was the  
23 23rd anniversary of the Americans With Disabilities  
24 Act.

25 This Commission has played an important

1       role in the ADA and in monitoring its enforcement.  
2       We have been doing reports on disability issues  
3       since the mid-'80s. And even today some of the  
4       reports we have done in the last couple of years  
5       like the bullying report, we looked at students who  
6       are disabled and we determined that those are the  
7       students that tend to be the most vulnerable for  
8       bullying.

9                We also recently in our military --  
10       rights of military returning servicemembers focused  
11       on issues of disability, particularly our returning  
12       servicemembers who are coming back with profound  
13       disabilities.

14               So there have been many strides in the  
15       last almost quarter century with the ADA. Yet,  
16       there remains many obstacles that exist,  
17       particularly in the area of employment, housing,  
18       income. And so while work has been done, much  
19       remains to be done. It is my hope, and I will  
20       recommend at some point in the not too distant  
21       future that for the 25th anniversary of the ADA,  
22       that this Commission take on a project that  
23       highlights not only our historic involvement in that  
24       issue but also in the status of the issue and what  
25       else needs to be done. So there will be more on

1       that.

2                   And then in a couple of weeks on August  
3       28th, we are going to be celebrating the 50th  
4       anniversary of the March on Washington, an historic  
5       event where we all know Dr. King set forth his "I  
6       have a dream" speech. And clearly we have, in these  
7       last 50 years made tremendous strides. But as with  
8       the issue of ADA, there is much to do.

9                   So I am hopeful that as many of us as  
10      possible can observe and participate in the 50th  
11      anniversary, not only commemorating it but doing  
12      everything that we can do to ensure that that dream  
13      continues to move forward and becomes a reality.

14                  So I just thought it was important to  
15      acknowledge those two historic milestones. So now  
16      we will move on to the formal agenda.

17                  VICE CHAIR THERNSTROM:     I have a  
18      question.

19                  CHAIRMAN CASTRO:    Yes, Madam Vice Chair?

20                  VICE CHAIR THERNSTROM:    So when you  
21      talk about participation in the --

22                  CHAIRMAN CASTRO:    I mean individually.  
23      I don't mean as a Commission, unless we wanted to do  
24      something formally.

25                  VICE CHAIR THERNSTROM:    Right. And do

1       you know of specific events that individuals --

2                   CHAIRMAN CASTRO:    I believe there are  
3       some events on the 28th or the 24th on The Mall.

4                   MS. SALLO:    The 24th.  It's a Saturday.

5                   CHAIRMAN CASTRO:  Yes, it is open to the  
6       public.

7                   MS. SALLO:    It is at 8:00 in the morning  
8       and I have the information.  And I will be more than  
9       happy to disseminate it to the Commissioners.

10                  VICE CHAIR THERNSTROM:  Yes, please do.

11                  MS. SALLO:    Okay.

12                  CHAIRMAN CASTRO:  Thank you.  And so now  
13       we have various agenda items under Program Planning.

14                                    II.  PROGRAM PLANNING

15                   VOTE TO APPROVE AND ADOPT THE FINAL DRAFT OF THE

16                                    "CIVIL RIGHTS IMPLICATIONS OF

17                                    EMINENT DOMAIN ABUSE" REPORT

18                  CHAIRMAN CASTRO:    The first is the  
19       consideration of the approval of the final draft of  
20       Part A of the Civil Rights Implications of Eminent  
21       Domain Abuse Report.  This does not include findings  
22       and recs.  Rather, it is just limited to Part A of  
23       the report, the substantive contents of the  
24       Executive Summary, the summary of proceedings and  
25       panelists' written statements and biographies.

1                   It is my understanding, from talking to  
2                   the Staff Director, that Part Bs will be considered  
3                   at our September meeting.

4                   MS. SALLO:     Or we can discuss it if  
5                   anyone has any objection.

6                   CHAIRMAN CASTRO:   Okay.   So having said  
7                   that, do any commissioners wish to offer any  
8                   amendments to the draft report on Civil Rights  
9                   Implications of Eminent Domain Abuse?

10                  Madam Vice Chair.

11                  VICE CHAIR THERNSTROM:   I don't have any  
12                  amendments.   I want to just mention that I thought  
13                  that was a very well written, very clean, very  
14                  straightforward summary.   And so, you know, thanks  
15                  to those who worked, I am sure, very hard to get  
16                  that in the shape that it is because I was  
17                  impressed.

18                  CHAIRMAN CASTRO:   Thank you.   Well we  
19                  will consider that a motion to approve and I will  
20                  second it.   And then we can have further discussion,  
21                  which is probably what we should do anyway.

22                  So any other comments or questions or  
23                  changes for the report Part A?

24                  (No audible response.)

25                  CHAIRMAN CASTRO:   If not, then we will

1 call the question. I will ask for a roll call vote.

2 Madam Vice Chair, how do you vote?

3 VICE CHAIR THERNSTROM: Yes.

4 CHAIRMAN CASTRO: Commissioner Kirsanow,  
5 how do you vote?

6 COMMISSIONER KIRSANOW: Yes.

7 CHAIRMAN CASTRO: Commissioner Heriot,  
8 how do you vote?

9 COMMISSIONER HERIOT: Yes.

10 CHAIRMAN CASTRO: Commissioner Gaziano,  
11 how do you vote?

12 COMMISSIONER GAZIANO: Yes and with my  
13 commendation for the staff that worked on it. I  
14 agree with Vice Chair Thernstrom. Both reports that  
15 we are voting on today are very well done.

16 CHAIRMAN CASTRO: Thank you.  
17 Commissioner Achtenberg, how do you vote?

18 COMMISSIONER ACHTENBERG: Yes.

19 CHAIRMAN CASTRO: Commissioner Yaki, how  
20 do you vote?

21 COMMISSIONER YAKI: Aye.

22 CHAIRMAN CASTRO: Commissioner Kladney,  
23 how do you vote?

24 COMMISSIONER KLADNEY: Yes.

25 CHAIRMAN CASTRO: And I vote yes. So

1 the report passes unanimously. Great, thank you.

2 VOTE TO APPROVE AND ADOPT THE FINAL DRAFT OF THE  
3 "ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS  
4 AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S  
5 CONVICTION RECORDS POLICY" REPORT.

6 CHAIRMAN CASTRO: Next we have a  
7 consideration of the report on "Assessing the Impact  
8 of Criminal Background Checks and the Equal  
9 Employment Opportunity Commission's Conviction  
10 Records Policy" Report.

11 Again, this vote is limited to Part A of  
12 the report, the substantive content of the summary,  
13 the introduction and background, and panelists'  
14 written statements and biography.

15 So do I have a motion on that proposal?

16 COMMISSIONER KLADNEY: I will make a  
17 motion, Mr. Chair. I do have some comments and  
18 amendments I would like --

19 CHAIRMAN CASTRO: Right. We will do the  
20 motion for purposes of discussion. Is there a  
21 second?

22 COMMISSIONER GAZIANO: Second.

23 CHAIRMAN CASTRO: Okay, the Chair  
24 recognizes Commissioner Kladney.

25 COMMISSIONER KLADNEY: I believe the

1 report is well written and presented well. There  
2 are three changes I would like to make.

3 And if I can direct the Commission's  
4 attention to page five of the report, after the  
5 words "identified as a best practice." The words  
6 after that speak about public comments of people and  
7 only present one position on the comments that were  
8 submitted. And the second sentence really has  
9 nothing to do with the rest of the paragraph.

10 VICE CHAIR THERNSTROM: I'm sorry.  
11 Where are you looking? Where should I be looking?

12 MS. SALLO: Top of page five.

13 VICE CHAIR THERNSTROM: Yes?

14 MS. SALLO: Second line, after the  
15 footnote.

16 VICE CHAIR THERNSTROM: Right, okay. I  
17 get it.

18 COMMISSIONER GAZIANO: I'm sorry.  
19 Commissioner Kladney, would you mind repeating your  
20 proposal?

21 COMMISSIONER KLADNEY: Yes. I would  
22 like to strike after the footnote to the end of the  
23 paragraph.

24 COMMISSIONER GAZIANO: Which footnote,  
25 11?

1 COMMISSIONER KLADNEY: Footnote 11.

2 COMMISSIONER GAZIANO: Okay.

3 COMMISSIONER KLADNEY: And the reason is  
4 is it talks about some members of the public. And  
5 then it also talks about other public comments. I  
6 think those that are in the record stand for  
7 themselves because there were public comments the  
8 other way as well.

9 COMMISSIONER HERIOT: I'm sorry. I'm  
10 having trouble finding my copy of the report here.

11 COMMISSIONER KLADNEY: Do you want me to  
12 read it, Commissioner?

13 COMMISSIONER HERIOT: Yes, could you?

14 COMMISSIONER KLADNEY: Okay. Well the  
15 paragraph is a long paragraph. Let me start with  
16 this part of the sentence at the bottom of page  
17 four, the beginning of the last sentence.

18 "The EEOC does not prohibit or restrict  
19 employers from asking for or obtaining background  
20 histories. Although eliminating the question from  
21 the face of an application is identified as a best  
22 practice."

23 The question would be, have you been  
24 convicted or have you ever been arrested. That is  
25 the box that they are talking about eliminating.

1                   And then the sentence goes on to read,  
2        "And some members of the public who submitted  
3        comments appear to believe that it is still  
4        considering doing so." And then it goes on to say  
5        "Many of the comments sent to the EEOC concerning  
6        its new guidance objected strongly to any  
7        restriction or prohibition against obtaining  
8        background checks."

9                   There is comments the other way as well  
10       as the fact that some members of the public who  
11       submitted comments believe that it is still  
12       considering doing so. Doing so what? It is not  
13       cogent, especially to the rest of the paragraph.

14                   VICE CHAIR THERNSTROM: Isn't the doing  
15       so eliminating the question from the face of an  
16       application?

17                   COMMISSIONER KLADNEY:        Doing so  
18       eliminated what, Madam Vice Chair?

19                   VICE CHAIR THERNSTROM:        I am just  
20       looking at the top of page five and I thought the  
21       doing so referred to eliminating the question from  
22       the face of an application.

23                   COMMISSIONER KLADNEY:        Well I actually  
24       thought it was talking about eliminating background  
25       checks but I am not sure.

1                   VICE CHAIR THERNSTROM:     Oh, I didn't  
2     read it that way.

3                   COMMISSIONER GAZIANO:     Could I ask a  
4     question, perhaps, of staff?   If staff who drafted  
5     this could come to the table.

6                   I have less concern about eliminating  
7     the part of the sentence after footnote 11.   But the  
8     next sentence seems to me to be a little bit more  
9     relevant.                   If a great number of the  
10    public comments expressed strong reservations  
11    regarding the prohibition against obtaining  
12    background checks, I think that is a perfectly  
13    relevant point to include.

14                  MS. SALLO:     And what would be the  
15    question for staff?

16                  COMMISSIONER GAZIANO:   The staff would  
17    be, did you review -- the footnote says there were  
18    300 comments that the EEOC made available to us.   I  
19    would like to speak to the staff about the nature of  
20    those -- how closely this sentence fits the 300  
21    comments, whether the 300 comments were kind of all  
22    read.

23                  MS. SALLO:     The problem -- we don't have  
24    a microphone up there.

25                  COMMISSIONER GAZIANO:   Someone can

1 borrow mine.

2 MS. OSTROWSKY: My name is Lenore  
3 Ostrowsky.

4 The purpose of that sentence, the Vice  
5 Chair is correct, it refers to eliminating the  
6 question. The point was that quite a few members of  
7 the public mistakenly believed that the point -- one  
8 of the elements of the EEOC guidance was to  
9 eliminate the question and it was not. And the EEOC  
10 was very clear that it was not.

11 Nonetheless, quite a few people who  
12 wrote in appeared to believe that that was what was  
13 going on. And that is why that sentence that you  
14 objected to, Commissioner Kladney, many of the  
15 public comments under the EEOC concerning his new  
16 guidance objected strongly. It is just to flesh out  
17 the nature of the reaction, that mistaken  
18 impression, if you see what I mean.

19 COMMISSIONER KLADNEY: So it would be,  
20 although eliminating the question, that would be the  
21 arrest of the question, from the face of the  
22 applications identified as a best practice, it does  
23 not require such and even though some members of the  
24 public thought that was the purpose.

25 So why don't we say something like

1       contrary to public belief, the EEOC does not want to  
2       get rid of the question.

3                   VICE CHAIR THERNSTROM:   At least on some  
4       members of the public.  It is not the whole public.  
5       We don't know what the public's belief is.

6                   COMMISSIONER KLADNEY:   Well that is why  
7       I'm saying -- that is actually one of the reasons  
8       why I want to strike the part, I mean, to begin  
9       with.  But I understand what Ms. Ostrowsky is  
10      saying.  So there might be a way to amend the  
11      sentence just to say contrary to -- how did she put  
12      it -- the strong belief of the public that is not  
13      their purpose to get rid of the box.

14                  MS. OSTROWSKY:   I could say many of the  
15      public comments sent to the EEOC concerning its new  
16      guidance mistakenly objected to the removal.

17                  VICE CHAIR THERNSTROM:   Good, I like  
18      that.

19                  COMMISSIONER KLADNEY:   That would be  
20      fine but strike -- well and after maybe the rest of  
21      that sentence after footnote 11 to the period.  I  
22      don't know.

23                  MS. OSTROWSKY:   If I could read the  
24      sentence as amended, maybe you can tell me if you  
25      like it.

1 COMMISSIONER KLADNEY: Yes.

2 MS. OSTROWSKY: Many of the public  
3 comments sent to the EEOC concerning its new  
4 guidance mistakenly objected to any restriction or  
5 prohibition -- mistakenly objected to prohibiting  
6 any use of background checks -- mistakenly objected  
7 to the EEOC's practice of requiring background  
8 checks.

9 VICE CHAIR THERNSTROM: No, that doesn't  
10 quite do it.

11 CHAIRMAN CASTRO: Give it another shot.

12 MS. OSTROWSKY: Mistakenly objected to  
13 the perceived restriction --

14 VICE CHAIR THERNSTROM: Perceived  
15 restriction is right.

16 MS. OSTROWSKY: -- perceived restriction  
17 --

18 VICE CHAIR THERNSTROM: Yes.

19 MS. OSTROWSKY: -- against obtaining  
20 background checks. Is that okay?

21 COMMISSIONER KLADNEY: If it's fine with  
22 everybody else.

23 CHAIRMAN CASTRO: That sounds like a  
24 motion.

25 COMMISSIONER KLADNEY: But what about

1 the rest of the sentence after -- there is the "and"  
2 after footnote 11. I think that becomes superfluous  
3 at that point.

4 VICE CHAIR THERNSTROM: I'm sorry,  
5 Commissioner Kladney, what are you looking at now?

6 COMMISSIONER KLADNEY: The rest of the  
7 sentence after "best practice."

8 VICE CHAIR THERNSTROM: Oh, I see.  
9 Okay, yes.

10 MS. SALLO: And the motion would be to?

11 COMMISSIONER KLADNEY: To eliminate that  
12 to the end of that sentence. So to the word so,  
13 period.

14 MS. OSTROWSKY: The problem is that I  
15 think it is important to let people know that many  
16 of the public comments, which will be available were  
17 mistaken that the public comments going to  
18 eliminating the background check box.

19 COMMISSIONER KLADNEY: Okay, so maybe a  
20 period after the footnote and saying many public  
21 comments were mistakenly just almost like --

22 VICE CHAIR THERNSTROM: Mistakenly  
23 believed.

24 COMMISSIONER KLADNEY: -- mistakenly  
25 believed that the EEOC wanted to get -- was going to

1 strike the box from applications or something like  
2 that.

3 MS. OSTROWSKY: I could combine. I  
4 would put a period after "best practice." And then  
5 I could combine the sentence, some members of the  
6 public who submitted comments appear to believe that  
7 it is still doing so. I could combine that with the  
8 new sentence, "Many of the public comments sent to  
9 the EEOC concerning its new guidance mistakenly  
10 objected to the perceived restriction --

11 COMMISSIONER KLADNEY: Of blank and  
12 blank.

13 MS. OSTROWSKY: -- against obtaining  
14 background checks.

15 VICE CHAIR THERNSTROM: Yes, now that  
16 sounds good to me.

17 COMMISSIONER KLADNEY: Okay, so you are  
18 striking --

19 MS. OSTROWSKY: I'm not striking it.  
20 The point --

21 COMMISSIONER KLADNEY: You are putting a  
22 period after "best practice."

23 MS. OSTROWSKY: Yes. But the point  
24 about people, many people making a big mistake about  
25 what the EEOC did I think is important to include.

1 COMMISSIONER KLADNEY: Yes.

2 VICE CHAIR THERNSTROM: I agree with  
3 that.

4 COMMISSIONER KLADNEY: So after the  
5 period it reads -- the period is after "best  
6 practice." And then it reads --

7 MS. OSTROWSKY: I would just leave it.  
8 "Some members of the public who submitted comments  
9 appear to believe that it is still considering doing  
10 so. Many of these public comments mistakenly  
11 objected to the perceived restriction or prohibition  
12 against obtaining background checks."

13 COMMISSIONER KLADNEY: Okay, how about  
14 some members of the public who submitted comments,  
15 also mistakenly appeared to believe that it was  
16 considering striking the --

17 MS. OSTROWSKY: The two groups are the  
18 same.

19 COMMISSIONER KLADNEY: Oh, okay.

20 MS. OSTROWSKY: And it was not just a  
21 few. It was lots.

22 COMMISSIONER KLADNEY: Okay.

23 MS. SALLO: This is Marlene Sallo. I  
24 believe that what he was honing in on was the "doing  
25 so." So if perhaps we can identify what doing so

1 means within the sentence, then I think it might  
2 clarify the matter.

3 MS. OSTROWSKY: Okay, take out doing so  
4 and put in the elimination.

5 MS. SALLO: So eliminating the box or --

6 MS. OSTROWSKY: No, considering the  
7 elimination.

8 MS. SALLO: Okay.

9 COMMISSIONER KLADNEY: My green light  
10 keeps going out. Is it on a timer or is someone  
11 trying to tell me something?

12 CHAIRMAN CASTRO: I do have the ability  
13 to control your microphone but I am not doing it,  
14 Commissioner Kladney.

15 VICE CHAIR THERNSTROM: Why aren't you  
16 doing it?

17 CHAIRMAN CASTRO: Because I like what I  
18 am hearing.

19 COMMISSIONER KLADNEY: Okay and then if  
20 I may move on to page five of the report.

21 CHAIRMAN CASTRO: Do you want to do  
22 these as individual motions to amend these?

23 COMMISSIONER KLADNEY: Oh, okay. We can  
24 move on them individually.

25 CHAIRMAN CASTRO: Okay, so we have a

1 motion as has just been stated to adopt the changes  
2 that have just been wordsmithed. Do we have a  
3 second?

4 VICE CHAIR THERNSTROM: Second.

5 CHAIRMAN CASTRO: Okay, all those in  
6 favor -- well, you know maybe I should do a voice --  
7 I mean a roll call vote, just to be safe.

8 Vice Chair, how do you vote on that?

9 VICE CHAIR THERNSTROM: Yes.

10 CHAIRMAN CASTRO: Commissioner Kirsanow,  
11 how do you vote?

12 COMMISSIONER KIRSANOW: Yes.

13 CHAIRMAN CASTRO: Commissioner Heriot,  
14 how do you vote?

15 COMMISSIONER HERIOT: Yes.

16 CHAIRMAN CASTRO: Commissioner Gaziano,  
17 how do you vote?

18 COMMISSIONER GAZIANO: Yes.

19 CHAIRMAN CASTRO: Commissioner  
20 Achtenberg, how do you vote?

21 COMMISSIONER ACHTENBERG: Yes.

22 CHAIRMAN CASTRO: Commissioner Yaki, how  
23 do you vote?

24 COMMISSIONER YAKI: Aye.

25 CHAIRMAN CASTRO: Commissioner Kladney,

1 how do you vote?

2 COMMISSIONER KLADNEY: Yes.

3 CHAIRMAN CASTRO: And I vote yes. So  
4 that change passes unanimously.

5 Okay, your next one?

6 COMMISSIONER KLADNEY: The next change  
7 is on page five. The paragraph begins at the bottom  
8 of the page. I believe that is unclear and will  
9 confuse the reader. It draws an opinion and a  
10 conclusion at the end of the paragraph that has not  
11 been endorsed or found by the Commission to be a  
12 fact. Rather, it is really still at issue.

13 VICE CHAIR THERNSTROM: Wait a minute.  
14 This is the paragraph that starts, "Still in force?"

15 COMMISSIONER KLADNEY: Yes, ma'am.

16 VICE CHAIR THERNSTROM: And tell me  
17 which words exactly concern you.

18 COMMISSIONER KLADNEY: Well, the whole  
19 paragraph, I believe, is confusing. But at the end  
20 of the paragraph on page six, it says taken as a  
21 whole, it emphasizes the judgment of the EEOC over  
22 that of employers in the selection or retention of  
23 employees with criminal histories. I mean, we  
24 haven't done that.

25 COMMISSIONER HERIOT: Could you read

1       that again? I'm afraid I did find my document but I  
2       can't find that.

3                   COMMISSIONER KLADNEY:       Okay, let me  
4       start. The last sentence. I mean I think the first  
5       part of the paragraph is confusing and the last  
6       sentence says although the 2012 guidance  
7       acknowledges as a legitimate selection concern the  
8       physical or other security risks to customers or  
9       other employees inherent in hiring an employee.  
10      Taken as a whole, it emphasizes the judgment of the  
11      EEOC over that of employers in the selection or  
12      retention of employees with criminal histories.

13                   COMMISSIONER HERIOT:       That is true.

14                   COMMISSIONER KLADNEY:       It is not true.

15                   COMMISSIONER HERIOT:       But we didn't make  
16      any such finding. I don't believe that is true.

17                   CHAIRMAN CASTRO:       It's a statement of  
18      opinion.

19                   COMMISSIONER KLADNEY:       It is an opinion  
20      and that is for us to vote on.

21                   COMMISSIONER HERIOT:       On the memo to  
22      what the guidance is. That is why they call it a  
23      guidance.

24                   COMMISSIONER KLADNEY:       No, a report is  
25      supposed to be objective from what our testimony was

1 and the documented we received and all the  
2 information we received. It doesn't draw an  
3 opinion.

4 VICE CHAIR THERNSTROM: Well does the  
5 2012 guidance acknowledge, as it says here, as a  
6 legitimate selection concerning the physical and  
7 other security risk to customers and other  
8 employees. Is that a factually accurate statement?

9 COMMISSIONER KLADNEY: That is factually  
10 accurate.

11 VICE CHAIR THERNSTROM: Okay, so then  
12 your problem is simply --

13 CHAIRMAN CASTRO: Taking off that last  
14 clause then. So ending it at hiring any employee.  
15 Right?

16 COMMISSIONER KLADNEY: Right. Taken as  
17 a whole.

18 CHAIRMAN CASTRO: Yes, so from taken as  
19 a whole to histories, you want that stricken.

20 COMMISSIONER KLADNEY: I would like the  
21 whole paragraph stricken, if you are only going to  
22 give me the last part, I will take what I can get.

23 VICE CHAIR THERNSTROM: Well, taken as a  
24 whole, it emphasizes the judgment of the EEOC. Is  
25 that factually accurate if you look at the 2012

1 guidelines?

2 COMMISSIONER KLADNEY: I believe no.

3 VICE CHAIR THERNSTROM: Guidance, I  
4 mean.

5 It doesn't emphasize the judgment of the  
6 EEOC over that of the employer?

7 COMMISSIONER KLADNEY: No. That's an  
8 opinion, Madam Vice Chair.

9 VICE CHAIR THERNSTROM: Well, I am not  
10 sure it is an opinion. If you can come up with a  
11 quotation from the guidance that substantiates that  
12 as a legitimate reading of what the guidance says.

13 COMMISSIONER HERIOT: The whole point of  
14 the guidance is that employers come up with their  
15 own judgment on when they get information about the  
16 criminal background of an employee. They are  
17 limited. They are limited by what? By the judgment  
18 of the EEOC. I mean, that is inherent.

19 COMMISSIONER KLADNEY: That is not true.  
20 The entire --

21 COMMISSIONER HERIOT: I am telling you  
22 an employer can give --

23 CHAIRMAN CASTRO: One at a time.  
24 Commissioner Kladney has the floor and then  
25 Commissioner Heriot.

1                   COMMISSIONER   KLADNEY:           Go    ahead,  
2    Commissioner Heriot.

3                   CHAIRMAN   CASTRO:    All   right,   continue  
4    Commissioner Heriot until you are finished.

5                   COMMISSIONER   HERIOT:    Are   you   telling   me  
6    that   an   employer   is   completely   free,   under   this  
7    guidance,   to   check   into   a   criminal   background   and  
8    draw   its   own   judgment,   if   its   judgment   includes,   of  
9    course,   we   don't   hire   people   with   criminal  
10   backgrounds?

11                  COMMISSIONER   KLADNEY:    Actually,   --

12                  COMMISSIONER   HERIOT:    That   is   many  
13   employers'   judgment.   They   just   don't   hire   people  
14   with   criminal   backgrounds.   Are   you   telling   me   that  
15   they   still   can   do   whatever   they   want?

16                  COMMISSIONER   KLADNEY:    Actually   there  
17   are   many   positions,   tens   of   thousands   of   positions  
18   that   prohibit   ex-offenders   from   taking   those  
19   positions   in   the   law.

20                  COMMISSIONER   HERIOT:    That   is   not   an  
21   answer   to   the   question.   Does   the   employer   have   more  
22   discretion,   less   discretion,   or   the   same   amount   of  
23   discretion   they   had   before   after   the   EEOC   has  
24   spoken?

25                  COMMISSIONER   KLADNEY:    Actually,   yes.

1                   COMMISSIONER   HERIOT:        It    is    more  
2           sensible to give an obvious answer.  Let's curtail  
3           employer discretion, period.

4                   COMMISSIONER   KLADNEY:     May I have the  
5           floor?

6                   CHAIRMAN CASTRO:    Yes, you may.

7                   COMMISSIONER   KLADNEY:        Thank    you.  
8           Clearly, for the last 25 years, all this guidance is  
9           restate what the employers have had for the last 25  
10          years.

11                   COMMISSIONER   HERIOT:        But    if    it    --  
12          lacking full discretion it is because the EEOC has  
13          said so.

14                   COMMISSIONER   GAZIANO:     Mr. Chair, may I  
15          be recognized?

16                   COMMISSIONER   KLADNEY:     Mr. Chair --

17                   CHAIRMAN CASTRO:    Hold on.

18                   COMMISSIONER   KLADNEY:     -- it's obvious I  
19          can't complete any sentence that I want to make, so  
20          Commissioner Heriot, you can have the floor for the  
21          rest of the meeting.

22                   CHAIRMAN        CASTRO:            No,        wait.  
23          Commissioner Heriot, please let Commissioner Kladney  
24          finish and then you will speak.        And then  
25          Commissioner Gaziano.

1 Commissioner Kladney, please proceed.

2 COMMISSIONER KLADNEY: Basically, it  
3 doesn't emphasize the judgment of the EEOC over that  
4 of employers. What it does is sets out guidance for  
5 employers to look at and it restates the guidance  
6 that has been there for 25 years. It doesn't limit  
7 employers.

8 What it does is it asks them to take  
9 certain things into effect. They cannot have a  
10 rule, absent a law supporting them, to strike and  
11 not consider ex-offenders completely. In other  
12 words, 100 percent. But that has been the guidance  
13 for 25 years. This guidance does not change that.

14 CHAIRMAN CASTRO: Commissioner Heriot?

15 COMMISSIONER HERIOT: It is so  
16 contradictory there. If there is something that  
17 they can't do, if they can't exercise their own  
18 discretion on this issue, then common law give them  
19 that right. Title VII itself doesn't say a word  
20 about any of this. The word comes from the EEOC.  
21 The EEOC has reviewed this report top to bottom.  
22 They have looked at it and they approved it. They  
23 obviously agree.

24 CHAIRMAN CASTRO: Commission Gaziano?

25 COMMISSIONER GAZIANO: That was actually

1 going to be the question I posed. Did the EEOC  
2 object to this actual characterization?

3 MS. OSTROWSKY: This sentence was  
4 reworked at the suggestion of the EEOC. In the  
5 guidance, there is but one statement acknowledging  
6 security risks and other sorts of risk. The  
7 guidance as a whole, which is very long, concerns  
8 the EEOC's recommendations, suggestions for how to  
9 consider the histories of applicants.

10 This particular sentence, this phrase  
11 you are objecting to, the EEOC did not see. So you  
12 are correct that the EEOC -- well, people who are  
13 saying the EEOC approved this, they didn't. They  
14 didn't see the sentence because I reworked the  
15 paragraph at their suggestion.

16 So, let's get that -- you know I don't  
17 think they would have approved this sentence.

18 Here is the reason that this was put in  
19 there is that if you just read the guidance, as  
20 opposed to the earlier guidance, there is a new part  
21 to it. It isn't just the Green factors. Individual  
22 consideration has been added.

23 So the question -- and those are  
24 subjective factors, which means that there will be  
25 much more scope for an individual applicant who has

1       been rejected or an employee who has had an adverse  
2       action taken against them. There will be much more  
3       scope for them to bring a suit against an employer  
4       for failure, for instance, to do this individual  
5       check.

6                So it was an attempt. I am happy to  
7       rework it, of course, to indicate the weight of the  
8       guidance taken as a whole. That's all. The  
9       sentence, of course, you can rework it. But the  
10      EEOC did not see it.

11               COMMISSIONER KLADNEY: Well why don't we  
12      -- you said -- excuse me.

13               COMMISSIONER KIRSANOW: I can't hear  
14      you.

15               COMMISSIONER KLADNEY: Yes, I'm sorry  
16      Commissioner Kirsanow.

17               So what you are saying basically is that  
18      it doesn't emphasize the judgment of the EEOC but  
19      rather it added the fact that individual assessments  
20      should be made.

21               MS. OSTROWSKY: Actually I am saying  
22      that it emphasizes the judgment of the EEOC because  
23      individual consideration is inherently a subjective  
24      judgment. And there is nothing in the guidance to  
25      indicate what the rules are for making such a

1 judgment. That means, if it is open to question, it  
2 is going to be much easier for any enforcement body  
3 or an individual applicant to bring a case. That's  
4 all.

5 So there is a change in the --

6 COMMISSIONER HERIOT: -- that they do  
7 bring a case to the EEOC.

8 COMMISSIONER KLADNEY: So why if that is  
9 what the guidance says, it doesn't say it is easier  
10 to bring a case but it says that individual  
11 assessments are to be made.

12 MS. OSTROWSKY: Virtually, yes, that is  
13 what it says.

14 COMMISSIONER KLADNEY: And then you  
15 added what else after that?

16 MS. OSTROWSKY: I was trying to make a  
17 summary statement that indicated the effect of the  
18 overall change and why it is now the case that the  
19 guidance is much more subjective.

20 COMMISSIONER KLADNEY: So perhaps if you  
21 said something along the lines of the new guidance  
22 requires individual assessments, however, the  
23 guidance does not give clear guidelines, that would  
24 be much more acceptable as to how those assessments  
25 are to be resolved.

1 MS. OSTROWSKY: Right. I do say that  
2 but it is later.

3 COMMISSIONER KLADNEY: That may be in my  
4 next paragraph.

5 MS. OSTROWSKY: I would be happy to  
6 clarify that sentence.

7 COMMISSIONER KLADNEY: Yes. Well, I  
8 mean what bothers me is that it says that the EEOC  
9 is making the judgment, rather than the employer.  
10 And the employer makes the judgment.

11 Now, whether in fact a suit or a  
12 complaint or something revolves from that, that is  
13 to be seen. Don't you think?

14 MS. OSTROWSKY: Well, like I say --

15 COMMISSIONER KLADNEY: I mean if it  
16 makes it easier.

17 MS. OSTROWSKY: -- I don't -- I think  
18 that there has been a change. And the change has  
19 been in the direction of subjectiveness. And  
20 whenever the law is made more objective, it means  
21 that --

22 COMMISSIONER HERIOT: I can't hear you.

23 MS. OSTROWSKY: Whenever a law is made -  
24 -

25 COMMISSIONER HERIOT: Can't hear you.

1 MS. OSTROWSKY: Whenever a law is made  
2 more subjective, it means that there is more room  
3 for an enforcement agency to bring an action to  
4 start an investigation based on their  
5 interpretation, as opposed to what a clear guidance  
6 or law would state.

7 COMMISSIONER KLADNEY: Right but I still  
8 --

9 COMMISSIONER HERIOT: And that is an  
10 important point. That is inherent in this kind of  
11 regulation and it is a point that needs to be made.

12 COMMISSIONER KLADNEY: Well then the  
13 Commission should make that point, not in the  
14 report.

15 COMMISSIONER GAZIANO: Mr. Chair, the  
16 Commission is making it through our staff.

17 COMMISSIONER KLADNEY: Well, my --

18 MS. OSTROWSKY: I would be happy to  
19 rework it.

20 COMMISSIONER KLADNEY: I would --

21 COMMISSIONER HERIOT: I would be very  
22 unhappy if you reworked it.

23 CHAIRMAN CASTRO: So what is the exact  
24 motion, Commissioner Kladney?

25 COMMISSIONER KLADNEY: Well my initial

1 motion was to strike the whole paragraph because the  
2 paragraph was not clear.

3 CHAIRMAN CASTRO: Right.

4 COMMISSIONER KLADNEY: But I would amend  
5 my motion to have this sentence reworked to state  
6 factually what the guidance says and not speculate  
7 as to whether it brings more lawsuits or not.

8 COMMISSIONER GAZIANO: Mr. Chair?

9 CHAIRMAN CASTRO: Yes, Commissioner  
10 Gaziano?

11 COMMISSIONER GAZIANO: I think that  
12 misses the important point that is in the staff  
13 draft that the kind of subjective -- as our counsel  
14 has suggested that the addition of these additional  
15 factors weighs heavily in granting EEOC discretion  
16 that used to be the employer's discretion. And so I  
17 would oppose taking out that very important point.

18 CHAIRMAN CASTRO: How would you rework  
19 that if you were to --

20 VICE CHAIR THERNSTROM: Well wait a  
21 minute. Let's see how many people want this  
22 reworked at all.

23 CHAIRMAN CASTRO: So we have a motion.  
24 Let's get a second on the motion. I will second  
25 your motion.

1 COMMISSIONER HERIOT: Second.

2 CHAIRMAN CASTRO: Okay. So, we will  
3 vote on removing that section taken as a whole. We  
4 will see where we are and then come back and see if  
5 we can reword it. Okay? So that way we have an  
6 idea of who is -- will that give you your answer as  
7 to who is in favor of changing this?

8 COMMISSIONER GAZIANO: Yes, if the  
9 motion fails, we will just keep it in and move on.

10 CHAIRMAN CASTRO: We will then move on  
11 to another motion that we will try to rework it.

12 So I am going to take a vote on the  
13 motion to take out from "taken" to "history." So  
14 that last clause. I am going to do a roll call vote  
15 here.

16 So Madam Vice Chair, how do you vote?

17 VICE CHAIR THERNSTROM: No.

18 CHAIRMAN CASTRO: Commissioner Kirsanow,  
19 how do you vote?

20 COMMISSIONER KIRSANOW: No.

21 CHAIRMAN CASTRO: Commissioner Heriot,  
22 how do you vote?

23 COMMISSIONER HERIOT: No.

24 CHAIRMAN CASTRO: Commissioner Gaziano,  
25 how do you vote?

1 COMMISSIONER GAZIANO: No.

2 CHAIRMAN CASTRO: Commissioner  
3 Achtenberg, how do you vote?

4 COMMISSIONER ACHTENBERG: Yes.

5 CHAIRMAN CASTRO: Commissioner Yaki, how  
6 do you vote?

7 COMMISSIONER YAKI: Yes.

8 CHAIRMAN CASTRO: Commissioner Kladney,  
9 how do you vote?

10 COMMISSIONER KLADNEY: Yes.

11 CHAIRMAN CASTRO: And I vote yes. So  
12 the motion fails four to four. Do you have a motion  
13 to reword that clause, Commissioner Kladney?

14 COMMISSIONER KLADNEY: Yes, I would like  
15 to make a motion to have the staff rework it by  
16 taking the verbiage out, "Taken as a whole it  
17 emphasizes the judgment of the EEOC over that of  
18 employers in the selection or retention of employees  
19 with criminal histories."

20 That could be worded even as the  
21 opponents of the last motion wish to state. It  
22 could also be stated that the individual assessments  
23 just address them, the individual assessments made  
24 by employers can be reviewed by the EEOC or  
25 something along those lines.

1 MS. OSTROWSKY: How about leave them  
2 open to actions by the EEOC, the disagreements by  
3 the EEOC. Leave them open. It is actually --

4 COMMISSIONER KLADNEY: Pardon me?

5 MS. OSTROWSKY: Leave them open. It  
6 isn't that the EEOC sits in judgment over every  
7 employment decision.

8 CHAIRMAN CASTRO: It exposes them to.

9 MS. OSTROWSKY: It exposes them, yes.  
10 It exposes them to interference.

11 CHAIRMAN CASTRO: So why don't we try to  
12 reword that right now and then see if we can get  
13 language that everyone is comfortable with to make  
14 the point that you are trying to make?

15 MS. OSTROWSKY: It leaves employers --  
16 I'm just writing this down so I have it -- open or  
17 susceptible -- did you say susceptible? I'm sorry --  
18 - exposed to --

19 CHAIRMAN CASTRO: Exposes them to.

20 MS. OSTROWSKY: -- to the subjective  
21 judgment of the EEOC as to individual hiring  
22 decisions.

23 CHAIRMAN CASTRO: Okay. So could you  
24 read that, please?

25 MS. OSTROWSKY: All right may I read

1 this?

2 CHAIRMAN CASTRO: Yes, please.

3 MS. OSTROWSKY: All right. Taken as a  
4 whole, it leaves employers exposed to the subjective  
5 judgment of the EEOC as to individual hiring  
6 decisions.

7 COMMISSIONER HERIOT: No. Subjective  
8 judgment. I mean you have to have subjective in  
9 there?

10 CHAIRMAN CASTRO: Could you take out  
11 subjective?

12 MS. OSTROWSKY: Well that is the  
13 problem. It is subjective. It is not clear. That  
14 what employers --

15 VICE CHAIR THERNSTROM: It is a  
16 redundancy, however. It is judgment. It is going  
17 to be subjective.

18 COMMISSIONER HERIOT: Yes, I agree with  
19 that.

20 CHAIRMAN CASTRO: So if you could take  
21 out --

22 MS. OSTROWSKY: If I may quarrel with  
23 that.

24 CHAIRMAN CASTRO: Sure, you may.

25 MS. OSTROWSKY: If there is a rule --

1 let's say there were a rule promulgated that said  
2 you may not summarily reject or refuse to hire  
3 anyone who had a criminal history going back over  
4 seven years. The EEOC could exercise its judgment,  
5 its discretionary judgment in bringing a suit, even  
6 in the case of someone refusing to hire someone  
7 whose criminal history went back. However,  
8 subjective judgment is different from a  
9 prosecutorial judgment made in response to a clear  
10 regulation or rule.

11 COMMISSIONER HERIOT: Yes, and I don't  
12 think that in law the word judgment, subjective  
13 judgment is a redundancy. We are talking about a  
14 body that is quasi-adjudicatory. So they render  
15 judgments. That is what they do. It is a  
16 subjective judgment and that matters.

17 CHAIRMAN CASTRO: Yes, in the sentence  
18 that the Democratic Caucus objected to, the word  
19 judgment is there and it is not modified by  
20 subjective. So, I would ask that --

21 COMMISSIONER GAZIANO: I don't  
22 understand.

23 COMMISSIONER HERIOT: It's not always  
24 significant.

25 COMMISSIONER GAZIANO: Yes, I don't -- I

1 understand your point in that. I agree, too, that  
2 in this case it is important to have subjective.  
3 And I would support the sentence as is or as our  
4 counsel has reworded it.

5 CHAIRMAN CASTRO: Commissioner Kladney?

6 COMMISSIONER KLADNEY: I don't know if  
7 subjective is that important. I think if they make  
8 a judgment that it is contrary to the employer's  
9 thought and bring an action, that is what they are  
10 doing. And now subjective means that they can say  
11 oh, no, one year after conviction is enough or this  
12 or that. I actually believe it is going to be a  
13 matter of proof and subjective gives the idea it is  
14 a willy-nilly kind of judgment.

15 COMMISSIONER KIRSANOW: Mr. Chair, we  
16 had witnesses that testified that the guidance was  
17 somewhat clear that it could be left to the  
18 individual judgments of whoever was sitting in  
19 adjudication of that particular policy. It didn't  
20 know if one year in a particular case would work or  
21 and if a certain type of crime or conviction would  
22 necessarily burn someone, it was the latitude of  
23 that person sitting in judgment was so expansive  
24 that no one had a real idea of what was expected of  
25 them.

1                   COMMISSIONER KLADNEY:   Actually we also  
2           had testimony -- excuse me.   Madam Vice Chair, did  
3           you want to say something?

4                   VICE CHAIR THERNSTROM:   I am just going  
5           to withdraw my objection to the term subjective.   I  
6           have now been convinced that --

7                   COMMISSIONER KLADNEY:   Well you haven't  
8           heard my argument, Madam Vice Chair.

9                   VICE CHAIR THERNSTROM:   Well that is  
10          true.   Are you going to change my mind?   Why don't  
11          you make it?

12                   COMMISSIONER KLADNEY:   We had testimony  
13          as well saying that a matrix could be drawn up that  
14          would be able to -- by employers to assist them in  
15          making these kinds of judgments.   And I think that  
16          the word subjective is pretty strong.

17                   I think judgment -- I can agree with  
18          judgment.   Subjective, I have a problem with.

19                   VICE CHAIR THERNSTROM:   Well I withdrew  
20          my objection to subjective.

21                   CHAIRMAN CASTRO:   Okay, so --

22                   MS.   OSTROWSKY:           Would anyone like  
23          subjective decision better?   Would judgment that is  
24          bothering you because it sounds so formal?

25                   COMMISSIONER KLADNEY:   No, no --

1                   COMMISSIONER HERIOT:    Well your motions  
2           have the word subjective.   Why not just go for it?

3                   CHAIRMAN CASTRO:    Would you read that  
4           back again one more time, Ms. Ostrowsky?

5                   MS. OSTROWSKY:    After the comma and  
6           footnote 19 -- I will read the whole sentence.

7                   "Although the 2012 guidance acknowledges  
8           as a legitimate selection concern, the physical or  
9           other security risks to customers or other employees  
10          inherent in hiring any employee, it leaves employers  
11          exposed to the subjective judgment of the EEOC as to  
12          individual hiring decisions."

13                  COMMISSIONER HERIOT:   Subjective is the  
14          offending word there, in my opinion.   I'm not going  
15          to vote for anything that says it.    It is  
16          argumentative and unnecessary.

17                  COMMISSIONER KLADNEY:    Judgment is  
18          sufficient.

19                  COMMISSIONER HERIOT:    So I am not going  
20          to vote for it.   Judgment is sufficient.

21                  VICE CHAIR THERNSTROM:    Why did I  
22          withdraw it?   I am convinced.

23                  MS. OSTROWSKY:    If we can put in  
24          something --

25                  CHAIRMAN CASTRO:    How about the

1 individual judgment of the EEOC? Would that --

2 VICE CHAIR THERNSTROM: Well wait a  
3 minute. EEOC is not an individual.

4 CHAIRMAN CASTRO: I'm trying to find  
5 some synonyms here.

6 MS. OSTROWSKY: The word subjective  
7 refers to this individual consideration. So that  
8 sentence is telescoping --

9 COMMISSIONER HERIOT: I understand. But  
10 that is objective in the statutory interpretation.  
11 I understand what you are trying to get at.

12 Unfortunately, subjective suggests  
13 things that I am not interested in seeing our  
14 Commission report reflect. So I am not interested  
15 in interjecting --

16 CHAIRMAN CASTRO: How about  
17 discretionary? Would discretionary work?

18 COMMISSIONER HERIOT: Read the sentence.

19 COMMISSIONER KLADNEY: How about  
20 considered?

21 MS. OSTROWSKY: I like discretionary  
22 better.

23 (Laughter.)

24 CHAIRMAN CASTRO: Let's try  
25 discretionary. Would you read it back with

1 discretionary?

2 MS. OSTROWSKY: Sure.

3 "Although the 2012 guidance acknowledges  
4 as a legitimate selection concern, the physical or  
5 other security risks to customers or other employees  
6 inherent in hiring any employee, it leaves employers  
7 exposed to the discretionary judgment of the EEOC as  
8 to individual hiring decisions."

9 COMMISSIONER HERIOT: What was wrong  
10 with the first formulation, then, the very first?

11 CHAIRMAN CASTRO: Yes. I'm just trying  
12 to find a happy medium here, folks. If not, we  
13 could just put it to a vote and see what happens.

14 COMMISSIONER KLADNEY: Okay, can we pass  
15 on this for a second? Well, no, no, no.

16 What you are saying here is what you are  
17 actually repeating that I am objecting to in my next  
18 motion. So if we say it here, do we have to say it  
19 again or would that be a redundancy?

20 CHAIRMAN CASTRO: I don't know what you  
21 next motion is.

22 COMMISSIONER KLADNEY: Let me say okay,  
23 if I accept subjective judgment, if we turn to page  
24 eight, the last paragraph of that page -- I am kind  
25 of moving along now -- that says the exact same

1 thing.

2 CHAIRMAN CASTRO: Oh yes, subjective  
3 individualized assessment?

4 MS. OSTROWSKY: Yes, the point --

5 COMMISSIONER KLADNEY: So why is it said  
6 twice in the report?

7 MS. OSTROWSKY: Because that is the big  
8 change. And it differs from the characterization  
9 that the EEOC placed on the guidance as a whole.

10 My understanding, after reading it, is  
11 that the reason that they changed this was that they  
12 wanted employer to be more careful about coming up  
13 with rules that disqualified a great number of  
14 people. And it is reasonable for them to want  
15 employers to look at each individual, if you look at  
16 it just from their point of view.

17 From the employers' point of view,  
18 especially employers who hire a great many people,  
19 it makes their lives not only more difficult  
20 administratively, but in fact it leaves them open,  
21 which is what we were saying before, to an  
22 investigation by the EEOC, if the EEOC disagrees  
23 with their individual judgment that has been made  
24 pretty much on their own because there is no real  
25 set of instructions in that guidance as to how to

1 make an individual assessment.

2 COMMISSIONER KLADNEY: That is the same  
3 presentation you just made on the last paragraph.

4 MS. OSTROWSKY: Right.

5 COMMISSIONER KLADNEY: So what I am  
6 saying is, if I accept that sentence in that  
7 paragraph, I would like to strike this one because  
8 it says the same thing. And actually, this third  
9 paragraph is even more speculative because it  
10 doesn't give the other -- I'm sorry my microphone is  
11 off -- it doesn't give the other perspective. This  
12 only draws one conclusion, this third paragraph.

13 MS. OSTROWSKY: I understand what you  
14 are saying about the text itself drawing conclusions  
15 because that is a function of the Commission. What  
16 I was attempting to do was to give a fair reaping of  
17 how this would strike an employer or in fact anyone,  
18 even someone who was working, what it gives them  
19 that the earlier guidance did not give them.

20 COMMISSIONER KLADNEY: I understand that  
21 but I also understand that if you say it in one  
22 place --

23 COMMISSIONER KIRSANOW: Can't hear.

24 COMMISSIONER KLADNEY: Pardon?

25 CHAIRMAN CASTRO: He's back.

1 COMMISSIONER KIRSANOW: Can't hear.

2 CHAIRMAN CASTRO: Oh, he can't hear.

3 COMMISSIONER KLADNEY: Okay. We are  
4 saying it in one place and we are saying it again.  
5 We are overemphasizing the point. I mean if we are  
6 going to make the point, we make the point and move  
7 on. This is like --

8 COMMISSIONER HERIOT: Can't hear.

9 VICE CHAIR THERNSTROM: I don't  
10 understand what the harm is in saying it twice.  
11 What is the harm? Why are we talking about whether  
12 it is once or twice? You said it once. There is no  
13 harm in saying it twice.

14 COMMISSIONER KLADNEY: Well sure it is.  
15 It is overemphasis. I mean and you are drawing it  
16 -- you are making an opinion.

17 COMMISSIONER HERIOT: It's the core of  
18 the report.

19 COMMISSIONER KLADNEY: You are making an  
20 opinion and you think it is the core of the report.  
21 See, I think the core of the report is different.  
22 So -- what are you laughing at?

23 CHAIRMAN CASTRO: Good-natured  
24 camaraderie, that's all.

25 COMMISSIONER KLADNEY: So I would be

1 more than willing to accept subjective -- the word  
2 subjective in the first paragraph, as long as we  
3 strike the second paragraph, which is repetitive.

4 CHAIRMAN CASTRO: That is a motion. Do  
5 we have a second? I'll second it for you.

6 VICE CHAIR THERNSTROM: What is the  
7 motion now?

8 CHAIRMAN CASTRO: So the motion is to  
9 read the initial revision that included subjective  
10 judgment on the paragraph at the top of page six.  
11 Ms. Ostrowsky, could you read that part again,  
12 please?

13 MS. OSTROWSKY: I'm sorry, page six?

14 CHAIRMAN CASTRO: Yes, using the  
15 subjective judgment rewrite that you used earlier.

16 MS. OSTROWSKY: "Although the 2012  
17 guidance acknowledges as a --

18 COMMISSIONER HERIOT: Can't hear.

19 COMMISSIONER ACHTENBERG: Can't hear.

20 MS. OSTROWSKY: "Although the 2012  
21 guidance acknowledges as a legitimate selection  
22 concern, the physical or other security risks to  
23 customers or other employees inherent in hiring any  
24 employee, it leaves employers exposed to the  
25 discretionary or subjective judgment of the EEOC as

1 to individual hiring decisions."

2 CHAIRMAN CASTRO: And so you were using  
3 subjective. And then Commissioner Kladney, your  
4 suggestion --

5 VICE CHAIR THERNSTROM: Or discretionary  
6 she said.

7 MS. OSTROWSKY: Or discretionary.

8 CHAIRMAN CASTRO: Oh, she is using both.

9 MS. OSTROWSKY: I am happy to use  
10 either. Discretionary is fine.

11 COMMISSIONER KLADNEY: And I am happy to  
12 let you all choose which one you want or both.

13 However, I do with --

14 CHAIRMAN CASTRO: Let's go with  
15 discretionary.

16 COMMISSIONER ACHTENBERG: Let's go with  
17 discretionary.

18 COMMISSIONER HERIOT: Let's go with  
19 subjective.

20 CHAIRMAN CASTRO: The motion is with  
21 discretionary. Right? And so the second part of  
22 your motion is to delete paragraph -- or do you just  
23 want to deal with these individually right now?

24 COMMISSIONER KLADNEY: No, might as well  
25 just --

1 COMMISSIONER HERIOT: No.

2 CHAIRMAN CASTRO: Okay, let's do it all.

3 COMMISSIONER KLADNEY: To delete the  
4 repetitive paragraph that begins at page eight,  
5 which begins as a result of to unfair reading  
6 because it doesn't -- and to eliminate the paragraph  
7 that begins at page eight that says as a result one  
8 fair reading which is opinionated and restates what  
9 we just said, without giving any other opinions. I  
10 want to --

11 COMMISSIONER HERIOT: Could you read  
12 that?

13 MS. OSTROWSKY: May I say something  
14 first?

15 CHAIRMAN CASTRO: Yes.

16 MS. OSTROWSKY: This is something the  
17 EEOC did not object to.

18 CHAIRMAN CASTRO: Okay.

19 COMMISSIONER HERIOT: Could you read the  
20 paragraph you are talking about deleting?

21 MS. OSTROWSKY: On page eight, the EEOC  
22 did not object to that characterization.

23 CHAIRMAN CASTRO: And that paragraphs  
24 reads -- and that is because you don't have access  
25 to your report. Is that right, Commissioner Heriot?

1                   COMMISSIONER HERIOT:  It won't download,  
2       I'm afraid.  It's spinning around and spinning  
3       around.

4                   CHAIRMAN CASTRO:  I will read it for  
5       you.  "As a result one fair reading of the 2012  
6       guidance suggests strongly that employers use a two-  
7       pronged approach, the first being the objective  
8       Green factors and the second a more subjective  
9       individualized assessment.  The EEOC's instruction  
10      to perform and individualize, assessment may render  
11      employers more open to disparate treatment lawsuits,  
12      however.

13                  For example, an applicant might view the  
14      conclusions  of  an  individualized  assessment  
15      differently from that of an employer, particularly  
16      as to risk of future offenses or the relation of the  
17      past offense to the job, or the employer's judgment  
18      as to its business necessity.

19                  The net result is that employers may be  
20      more likely to be sued under the new guidance  
21      whether or not they perform individualized  
22      assessments."

23                  So the motion is to make the revision to  
24      the end of paragraph six, as previously read and to  
25      delete the paragraph that begins on paragraph eight

1 and continues to the top of paragraph nine.

2 We have a second on that motion. WE  
3 have discussed it thoroughly. So I am going to take  
4 a roll call vote on that.

5 Madam Vice Chair, how do you vote?

6 VICE CHAIR THERNSTROM: I'm going to  
7 pass at the moment.

8 CHAIRMAN CASTRO: Pass? Okay.

9 Commissioner Kirsanow, how do you vote?

10 COMMISSIONER KIRSANOW: No.

11 CHAIRMAN CASTRO: Commissioner Heriot,  
12 how do you vote?

13 COMMISSIONER HERIOT: No.

14 CHAIRMAN CASTRO: Commissioner Gaziano,  
15 how do you vote?

16 COMMISSIONER GAZIANO: No.

17 CHAIRMAN CASTRO: Commissioner  
18 Achtenberg, how do you vote?

19 COMMISSIONER ACHTENBERG: Reluctantly,  
20 yes.

21 CHAIRMAN CASTRO: Commissioner Yaki, how  
22 do you vote?

23 COMMISSIONER YAKI: Aye.

24 CHAIRMAN CASTRO: Commissioner Kladney,  
25 how do you vote?

1 COMMISSIONER KLADNEY: Yes.

2 CHAIRMAN CASTRO: I vote yes.

3 Madam Vice Chair?

4 VICE CHAIR THERNSTROM: And I'm voting  
5 no on this. I'm just staring at it here again.

6 CHAIRMAN CASTRO: Well the motion fails  
7 four to four.

8 Okay, any other motions to amend the  
9 report?

10 Actually let me -- may I make one  
11 suggestion? Let us go back to the taken and just  
12 make a -- I would make a motion that we just deal  
13 with that revision with the language discretionary  
14 judgment as you previously sent.

15 So do I have a second on that motion?

16 COMMISSIONER KLADNEY: Second.

17 CHAIRMAN CASTRO: And I know we have  
18 discussed that pretty thoroughly. So I am just  
19 going to go ahead and take a roll call on that.

20 Madam Vice Chair, how do you vote on  
21 that one?

22 VICE CHAIR THERNSTROM: So what you are  
23 suggesting is --

24 CHAIRMAN CASTRO: Just changing this  
25 last one and not taking out the other paragraph.

1 So could you read how I have suggested?

2 MS. OSTROWSKY: Sure. This is back on  
3 page six.

4 VICE CHAIR THERNSTROM: Yes.

5 MS. OSTROWSKY: The sentence that  
6 starts, "although."

7 VICE CHAIR THERNSTROM: Yes, I  
8 understand.

9 MS. OSTROWSKY: Okay. After footnote 19  
10 it says, "It leaves employers exposed to the  
11 discretionary judgment --

12 VICE CHAIR THERNSTROM: And the  
13 discretionary is the point you are making, right?  
14 Yes, go on. I'm sorry.

15 MS. OSTROWSKY: "It leaves employers  
16 exposed to the discretionary judgment of the EEOC as  
17 to individual --

18 COMMISSIONER KIRSANOW: Can't hear.

19 COMMISSIONER ACHTENBERG: Now I really  
20 can't hear.

21 COMMISSIONER KIRSANOW: I apologize. I  
22 really wasn't yelling.

23 CHAIRMAN CASTRO: Everybody, you know  
24 what? I withdraw my motion. We are going to just  
25 leave it like it is in the original draft.

1 COMMISSIONER HERIOT: Why?

2 CHAIRMAN CASTRO: Well I just consulted  
3 with Commissioner Kladney.

4 COMMISSIONER KLADNEY: It's fine with  
5 me. Let's just move on and approve the report.

6 VICE CHAIR THERNSTROM: And did we say  
7 that you substituted the word discretionary?

8 CHAIRMAN CASTRO: No, no. We are not  
9 going to do that. We are just leaving it the way  
10 is. Okay?

11 COMMISSIONER HERIOT: Are you sure? I  
12 think it makes it quite a bit better, actually.

13 CHAIRMAN CASTRO: You do?

14 COMMISSIONER HERIOT: I do.

15 CHAIRMAN CASTRO: Okay, well then I am  
16 going to ask Ms. Ostrowsky to reread that one more  
17 time, please with the discretionary in it.

18 MS. OSTROWSKY: Okay. "Although the  
19 2012 guidance acknowledges as a legitimate selection  
20 concern, the physical or other security risks to  
21 customers or other employees inherent in hiring any  
22 employee, it leaves employers exposed to the  
23 discretionary judgment of the EEOC as to individual  
24 hiring decisions."

25 CHAIRMAN CASTRO: Okay, so that will be

1 my motion. Do I have a second?

2 VICE CHAIR THERNSTROM: Second.

3 CHAIRMAN CASTRO: Okay, we will take a  
4 roll call vote on that, since we have debated that  
5 question earlier.

6 Madam Vice Chair, how do you vote?

7 VICE CHAIR THERNSTROM: And so just to  
8 clarify this, the only issue is the word  
9 discretionary, right?

10 CHAIRMAN CASTRO: Well, it rewords it a  
11 little bit. I think it makes it clearer as to what  
12 Ms. Ostrowsky was getting at, compared to the  
13 original in terms of opening up potential liability  
14 to the employers.

15 VICE CHAIR THERNSTROM: All right, I  
16 will vote yes on that.

17 CHAIRMAN CASTRO: All right.  
18 Commissioner Kirsanow, how do you vote?

19 COMMISSIONER KIRSANOW: I will vote yes.

20 CHAIRMAN CASTRO: Commissioner Heriot,  
21 how do you vote?

22 COMMISSIONER HERIOT: I did prefer the  
23 earlier wording but I will vote yes on it.

24 CHAIRMAN CASTRO: Commissioner Gaziano,  
25 how do you vote?

1                   COMMISSIONER GAZIANO:    I will yield on  
2           this one and vote yes.

3                   CHAIRMAN        CASTRO:                Commissioner  
4           Achtenberg, how do you vote?

5                   COMMISSIONER ACHTENBERG:  I was going to  
6           vote yes, Mr. Chairman, but now that all my foes  
7           have voted yes, I am reconsidering.  I am going to  
8           pass.

9                   COMMISSIONER GAZIANO:  I really prefer  
10          the original, if it makes you feel any better,  
11          Commissioner Achtenberg.        But how did you  
12          characterize us?  All your foes?  Are we your foes?

13                  COMMISSIONER ACHTENBERG:  My faux foes.

14

15                  COMMISSIONER GAZIANO:  Oh, okay.

16                  COMMISSIONER ACHTENBERG:  My F-A-U-X F-  
17          O-E-S.

18                  CHAIRMAN CASTRO:  Commissioner Yaki, how  
19          do you vote?  Commissioner Yaki?

20                  COMMISSIONER YAKI:  I am under the same  
21          dilemma as Commissioner Achtenberg.  So I am going  
22          to pass.

23                  CHAIRMAN CASTRO:  You are going to pass.  
24                                        Commissioner Kladney, how do you vote?

25                  COMMISSIONER KLADNEY:  No.

1                   CHAIRMAN CASTRO:     I will vote yes  
2     because I think it is better than the original  
3     version.

4                   So I am going to come back to  
5     Commissioner Achtenberg.

6                   COMMISSIONER ACHTENBERG:    Yes, I will  
7     vote yes.

8                   CHAIRMAN CASTRO:     Okay.     Commissioner  
9     Yaki?

10                  COMMISSIONER YAKI:    I pass again.

11                  CHAIRMAN CASTRO:     So you abstain?    You  
12     are the last one we are waiting for.

13                  COMMISSIONER YAKI:    Well I am going to  
14     defer to Commissioner Kladney's vote.

15                  CHAIRMAN CASTRO:     So you are going to  
16     say no because that is how he voted?

17                  COMMISSIONER YAKI:    Yes.

18                  CHAIRMAN CASTRO:     Okay.     So the motion  
19     passes, one, two, three, four, five, six yeses to  
20     two nos.

21                  Okay.     Any other changes on the report  
22     or the draft report?

23                  Hearing none, do I have a motion to  
24     approve Part A of this report as amended?    Do I have  
25     a motion?    Anybody?

1                   COMMISSIONER GAZIANO: I move to approve  
2     the report.

3                   CHAIRMAN CASTRO: Is there a second?

4                   VICE CHAIR THERNSTROM: Second.

5                   CHAIRMAN CASTRO: Okay. I don't know  
6     that there is any --

7                   COMMISSIONER GAZIANO: Naturally, the  
8     report as recently amended.

9                   CHAIRMAN CASTRO: That is exactly how,  
10    yes.

11                  So I am going to take a roll call vote  
12    here.

13                  COMMISSIONER YAKI: I just have a  
14    question about it for clarification.

15                  CHAIRMAN CASTRO: Yes, Commissioner  
16    Yaki, go ahead.

17                  COMMISSIONER YAKI: If this report does  
18    not get a majority at this time, can we table it for  
19    future consideration?

20                  CHAIRMAN CASTRO: I don't know.

21                  COMMISSIONER HERIOT: We need to approve  
22    it today in order to have the schedule for rotating  
23    off commissioners.

24                  CHAIRMAN CASTRO: But what you are  
25    saying, Commissioner Yaki, is if it fails today,

1       could we at some point in the future bring this  
2       report back for further consideration?

3                   COMMISSIONER YAKI:    Yes.

4                   VICE CHAIR THERNSTROM:    I don't think  
5       so.

6                   CHAIRMAN CASTRO:    You don't think so?  
7       You do think so.

8                   COMMISSIONER GAZIANO:    In parliamentary  
9       procedure, there is probably a way of doing that but  
10      I hope, I certainly hope we get that approved.  
11      There was an understanding that we had with fellow  
12      commissioners that --

13                  COMMISSIONER YAKI:    I was not party to  
14      that understanding, Commissioner Gaziano, so --

15                  COMMISSIONER GAZIANO:    That may be but I  
16      am still talking --

17                  CHAIRMAN CASTRO:       Gentlemen, order!  
18      Commissioner Yaki, let Commissioner Gaziano finish  
19      and then you will have the floor, please.  
20      Commissioner Gaziano.

21                  COMMISSIONER GAZIANO:    I am still  
22      allowed to talk to other commissioners about the  
23      understanding that at least some of us have that we  
24      would approve last year's statutory report with an  
25      understanding that certain other reports would be

1 released so that those of us whose terms were  
2 expiring could participate in comment.

3 So that was certainly an important  
4 understanding --

5 COMMISSIONER YAKI: Mr. Chairman, this  
6 is Commissioner Yaki.

7 CHAIRMAN CASTRO: Yes, Commissioner, go  
8 ahead.

9 COMMISSIONER YAKI: I was not part of  
10 that understanding because if I recall correctly,  
11 that deal was made during a time when my nomination  
12 was being held up so these kinds of deals could be  
13 made.

14 And I am not going to agree to that.  
15 And I am not happy with the way this report is being  
16 viewed as is, as being reshaped in any way shape or  
17 form. And I strongly urge my colleagues to vote no  
18 and take another crack at it.

19 And if Commissioner Gaziano is concerned  
20 about time, well we can bring it back in an  
21 expedited fashion and perhaps truncate some of our  
22 deadlines in order to accommodate his need to vent  
23 his spleen at the appropriate opportunities for this  
24 report.

25 COMMISSIONER GAZIANO: The understanding

1 that was reached --

2 COMMISSIONER HERIOT: Can't hear.

3 COMMISSIONER GAZIANO: The understanding  
4 that was reached was well after you were back on the  
5 Commission, Commissioner Yaki. It was about last  
6 August or September but the exact month I don't  
7 remember for sure.

8 You may not have agreed to it. I don't  
9 really remember, nor right now, given your insults,  
10 do I care. But there were other Commissioners who  
11 reached that understanding with us.

12 COMMISSIONER HERIOT: Well that would  
13 not be a truncated period to write statements. I  
14 mean, that is the whole point.

15 CHAIRMAN CASTRO: Commissioner Kladney,  
16 you have the floor.

17 COMMISSIONER KLADNEY: Thank you. Quite  
18 honestly, I am inclined to go along with  
19 Commissioner Yaki that we have independent  
20 consideration of whether the report as a whole  
21 should pass.

22 We did agree to a time line in terms of  
23 getting reports done. We didn't agree to approving  
24 them all. And approval depends on the  
25 consideration of each individual commissioner.

1                   For instance, I was just defeated on two  
2                   of my motions.    So maybe I am unhappy with the  
3                   report and I don't want to pass the report.    An  
4                   agreement to pass the report was never made.    A time  
5                   line is to get the report completed by the staff  
6                   was.

7                   So I think we should have clarity on  
8                   that point and that each commissioner can, in their  
9                   considered judgment vote as they wish on this  
10                  report.    And I believe that we have the power under  
11                  the rules of the Commission to bring it up later  
12                  after -- at a later time as to whether we wish to  
13                  pass it or not.

14                  CHAIRMAN CASTRO:    Okay, so I am going to  
15                  move forward on a vote on Part A of the EEOC report,  
16                  as amended.

17                  Vice Chair Thernstrom, how do you vote?

18                  VICE CHAIR THERNSTROM:    This is just to  
19                  accept Part A, right?

20                  CHAIRMAN CASTRO:    Yes.

21                  VICE CHAIR THERNSTROM:    Yes.    I vote  
22                  yes.

23                  CHAIRMAN CASTRO:    As amended.

24                  VICE CHAIR THERNSTROM:    As amended.

25                  CHAIRMAN CASTRO:    Commissioner Kirsanow,

1 how do you vote?

2 COMMISSIONER KIRSANOW: Yes.

3 CHAIRMAN CASTRO: Commissioner Heriot,

4 how do you vote?

5 COMMISSIONER HERIOT: Yes.

6 CHAIRMAN CASTRO: Commissioner Gaziano,

7 how do you vote?

8 COMMISSIONER GAZIANO: Yes.

9 CHAIRMAN CASTRO: Commissioner

10 Achtenberg, how do you vote?

11 COMMISSIONER ACHTENBERG: I'm going to

12 pass, Mr. Chair.

13 CHAIRMAN CASTRO: Commissioner Yaki, how

14 do you vote?

15 COMMISSIONER YAKI: No.

16 CHAIRMAN CASTRO: Commissioner Kladney,

17 how do you vote?

18 COMMISSIONER KLADNEY: No.

19 CHAIRMAN CASTRO: I am passing for the

20 moment.

21 Madam Commissioner Achtenberg?

22 COMMISSIONER ACHTENBERG: I will vote

23 no.

24 CHAIRMAN CASTRO: Okay. And I will vote

25 no.

1                   So we have four nos and four yeses. The  
2 motion fails.

3                   Okay, next then we move on to determine  
4 for planning purposes the discussion of a 2014 --

5                   COMMISSIONER GAZIANO: Mr. Chair, I  
6 think we need to continue on this topic for a little  
7 longer, given the understandings we have had about  
8 not just whether we would have a vote but getting  
9 this out in time so that Commissioners cycling off  
10 could participate and file their statements.

11                  So what is the proposal of those people  
12 who defeated this report?

13                  COMMISSIONER KLADNEY: Commissioner  
14 Gaziano, if I may, I would like to see if we can  
15 adjourn for ten minutes and maybe caucus on this  
16 issue.

17                  CHAIRMAN CASTRO: Okay. We will take a  
18 ten-minute caucus adjournment.

19 (Whereupon, the above-entitled matter went off the  
20 record at 10:43 a.m. and resumed at  
21 11:05 a.m.)

22                  CHAIRMAN CASTRO: We are back on the  
23 record. We just took a recess. It is 11:05 a.m.  
24 Can we get order?

25                  We are still on the topic of the EEOC

1 report and I believe we have a motion. Commissioner  
2 Kladney, would you like to make the motion or shall  
3 I?

4 COMMISSIONER KLADNEY: You can, Mr.  
5 Chair.

6 CHAIRMAN CASTRO: Okay. I would move  
7 that we accept the EEOC criminal background check  
8 report with the following changes. Is Ms. Ostrowsky  
9 here? If I could ask her to read paragraph -- the  
10 end of paragraph six -- I'm sorry -- the end of the  
11 paragraph at page six, as previously suggested to be  
12 revised using the discretionary language.

13 MS. OSTROWSKY: It starts, "Although the  
14 2012 guidance acknowledges as a legitimate selection  
15 concern, the physical or other security risks to  
16 customers or other employees inherent in hiring any  
17 employee, it leaves employers exposed to the  
18 discretionary judgment of the EEOC as to individual  
19 hiring decisions."

20 CHAIRMAN CASTRO: Okay. And then we  
21 will, included in this motion is to delete the  
22 paragraph that begins on page eight, which starts  
23 "as a result" and ends on page nine with the words  
24 "individualized assessments." That would be deleted  
25 from the report.

1                               So that is the motion.    Is there a  
2    second?

3                               COMMISSIONER KLADNEY:    Second.

4                               COMMISSIONER HERIOT:    Second.

5                               CHAIRMAN CASTRO:    Okay, we are going to  
6    take a roll call vote on this.

7                               Madam Vice Chair, how do you vote?

8                               VICE CHAIR THERNSTROM:    Yes.

9                               CHAIRMAN CASTRO:    Commissioner Kirsanow,  
10   how do you vote?

11                              COMMISSIONER KIRSANOW:    Yes.

12                              CHAIRMAN CASTRO:    Commissioner Heriot,  
13   how do you vote?

14                              COMMISSIONER HERIOT:    Yes, but very much  
15   under protest.

16                              CHAIRMAN CASTRO:    Commissioner Gaziano,  
17   how do you vote?

18                              COMMISSIONER GAZIANO:    Yes.

19                              CHAIRMAN CASTRO:    Did you say yes?

20                              COMMISSIONER GAZIANO:    Yes.

21                              CHAIRMAN CASTRO:    Okay.    Commissioner  
22   Achtenberg, how do you vote?

23                              COMMISSIONER ACHTENBERG:    Yes.

24                              CHAIRMAN CASTRO:    Commissioner Yaki, how  
25   do you vote?

1 COMMISSIONER YAKI: Aye.

2 CHAIRMAN CASTRO: Commissioner Kladney,  
3 how do you vote?

4 COMMISSIONER KLADNEY: Yes.

5 CHAIRMAN CASTRO: And I vote yes.

6 So the report passes. Part A passes  
7 unanimously.

8 DISCUSSION AND VOTE ON 2014 USCCR

9 BUSINESS MEETING CALENDAR

10 CHAIRMAN CASTRO: Okay, now we move on  
11 to the next item on the agenda, which is the  
12 consideration of the 2014 business meeting calendar  
13 that was circulated yesterday by Ms. Silverio. And  
14 I hope folks have had a chance to look at it.

15 And let's discuss what works and what  
16 doesn't. Anybody have any issues?

17 COMMISSIONER KLADNEY: Mr. Chairman?

18 CHAIRMAN CASTRO: Yes.

19 COMMISSIONER KLADNEY: I just haven't  
20 checked with my wife on this.

21 CHAIRMAN CASTRO: You just did or you  
22 haven't?

23 COMMISSIONER KLADNEY: No, I haven't had  
24 the opportunity.

25 CHAIRMAN CASTRO: Okay.

1                   COMMISSIONER KLADNEY:   So I will abstain  
2           on the calendar and if there is an issue, I will  
3           bring it up later.

4                   CHAIRMAN CASTRO:   Okay.

5                   COMMISSIONER ACHTENBERG:   Mr. Chairman?

6                   CHAIRMAN   CASTRO:           Yes,   Commissioner  
7           Achtenberg?

8                   COMMISSIONER ACHTENBERG:   I will be out  
9           of the country on March 28th.   So I would like to  
10          ask for reconsideration of that date.

11                  CHAIRMAN CASTRO:   Okay.

12                  COMMISSIONER ACHTENBERG:   And I have a  
13          problem with July 18th as well.   I have an occasion  
14          that is already planned on that date.   So I would  
15          like it if the Commission would reconsider that date  
16          as well.

17                  CHAIRMAN CASTRO:   Okay, let's stick with  
18          March for the moment.   And I believe, Commissioner  
19          Heriot, you have something on the 21st.   Is that  
20          right?

21                  COMMISSIONER HERIOT:   I don't have my  
22          faculty list in front of me right now.   It is not  
23          crucial that I make every one of those.

24                  CHAIRMAN CASTRO:   Okay.

25                  COMMISSIONER HERIOT:   But I prefer to

1 not hit the 21st if we don't have to.

2 CHAIRMAN CASTRO: How about the 14th of  
3 March? It's not my preferred date but I can work  
4 with that.

5 MS. SALLO: March 14th would only give  
6 us two weeks from the February date if we adopt the  
7 February date.

8 CHAIRMAN CASTRO: Okay. And what was  
9 the conflict? You just have a conflict on the 28th?  
10 Is that it, Commissioner Achtenberg?

11 COMMISSIONER ACHTENBERG: Yes, I am  
12 going to be in Israel.

13 CHAIRMAN CASTRO: Okay and Commissioner  
14 Heriot, you do have a staff meeting on the 21st.

15 COMMISSIONER HERIOT: Okay.

16 CHAIRMAN CASTRO: Do we want to move  
17 this to a Monday like the 31st?

18 COMMISSIONER HERIOT: No.

19 CHAIRMAN CASTRO: No? Well, then I  
20 guess it is going to be the 7th -- I'm sorry, the  
21 14th. How does the 14th look?

22 COMMISSIONER HERIOT: The 14th is fine  
23 with me. Okay, so then we will move it to the 14th  
24 of March.

25 Commissioner Achtenberg, you also

1 mentioned July. So let's go to July. You had a  
2 problem with the 18th?

3 COMMISSIONER ACHTENBERG: Yes, I am out  
4 that whole week beginning on the 12th through the  
5 19th.

6 CHAIRMAN CASTRO: Okay, how about July  
7 25th? How does that work for folks?

8 COMMISSIONER ACHTENBERG: That works for  
9 me.

10 CHAIRMAN CASTRO: July 25th?

11 COMMISSIONER ACHTENBERG: Works for me.

12 CHAIRMAN CASTRO: Okay, so let's move it  
13 to July 25th.

14 Okay, any other dates that are conflicts  
15 for commissioners?

16 Hearing none, then with those two  
17 changes, I will move to adopt the calendar as  
18 circulated. Is there a second?

19 VICE CHAIR THERNSTROM: As amended?

20 CHAIRMAN CASTRO: Pardon me?

21 VICE CHAIR THERNSTROM: As amended?

22 CHAIRMAN CASTRO: As amended, yes.

23 COMMISSIONER HERIOT: Second.

24 CHAIRMAN CASTRO: Okay, all those in  
25 favor, say aye.

1 (Chorus of aye.)

2 CHAIRMAN CASTRO: Any opposed?

3 (No audible response.)

4 CHAIRMAN CASTRO: Any abstentions?

5 Okay, that is our calendar for 2014 for the moment.

6 COMMISSIONER GAZIANO: For the record, I  
7 will just --

8 CHAIRMAN CASTRO: Abstain?

9 COMMISSIONER GAZIANO: -- record my  
10 abstention.

11 CHAIRMAN CASTRO: Okay.

12 COMMISSIONER YAKI: And could someone  
13 send it out, I mean recirculate it with the new  
14 dates?

15 CHAIRMAN CASTRO: Yes.

16 MS. SALLO: I will send it out,  
17 Commissioner Yaki.

18 CHAIRMAN CASTRO: The Staff Director  
19 will do that.

20 COMMISSIONER YAKI: Thank you.

21 MS. SALLO: You're welcome.

22 CHAIRMAN CASTRO: Next we have a motion  
23 -- I'm sorry -- next we have to discuss the action  
24 on Commissioner Kladney's -- or on the Action on  
25 2014 Statutory Enforcement Report topic.

1 DISCUSSION AND VOTE ON 2014 STATUTORY

2 ENFORCEMENT REPORT TOPIC

3 CHAIRMAN CASTRO: As you know, there was  
4 some -- there has been an issue raised as to whether  
5 or not the version that we passed previously falls  
6 within our jurisdiction or not. And in order to  
7 avoid that open question on our part, we wanted to  
8 propose an alternative, which I believe Commissioner  
9 Kladney's assistant distributed last night to the  
10 commissioners.

11 Commissioner Kladney, would you like to  
12 speak to that issue?

13 COMMISSIONER KLADNEY: I think that what  
14 we distributed says what I am interested in. I was  
15 just trying to take the second half of the report --  
16 of the concept paper that was originally adopted and  
17 go with alternative sentencing using the federal --  
18 in the federal government the alternative sentencing  
19 that the federal government uses as compared to the  
20 states and the kinds of things that they do versus  
21 what the DOJ does and how that affects the different  
22 rights of prisoners in the different systems.

23 CHAIRMAN CASTRO: Okay.

24 COMMISSIONER KLADNEY: Do my colleagues  
25 on the other side of the table --

1                   COMMISSIONER GAZIANO: I have a couple  
2 of questions. And I think it is an appropriate  
3 focus but I have to concerns with narrowing it at  
4 this point. It is always -- first of all I think  
5 certainly we should focus on it and the staff can  
6 pay extra attention to anything that we want them to  
7 pay attention to. But my understanding of this  
8 area, and I spent some time in it in my prior job is  
9 that there are so many connections and that if you  
10 narrow what you are looking at too much, then you  
11 are not really understanding the problem.

12                   There is so much sentencing discretion,  
13 for example, that if you were to look -- let's just  
14 say one focus that has gotten a lot of attention in  
15 the press is mandatory minimums. And let's say we  
16 eliminated every one. I'm not saying that is even a  
17 great idea but -- these microphones are really bad  
18 for those on the phone.

19                   There are some that are problematic.  
20 Even if we were to eliminate them, that wouldn't  
21 necessarily eliminate the problem because  
22 prosecutors may choose the mandatory minimums  
23 because they are easy to get pleas on but they would  
24 charge at a much higher rate. There may be  
25 unintended consequences.

1                   So I would just want to keep -- suggest  
2           -- my bias at least at this point is until the staff  
3           does the literature review, until the staff comes up  
4           with a -- I'm trying to think of the next step --  
5           the plan that we remain somewhat open and that we  
6           carefully review the literature because one small  
7           angle that we focus on -- it may be more important  
8           that we talk about the whole criminal sentencing  
9           structure as a whole, rather than trying prematurely  
10          to eliminate one area.

11                   COMMISSIONER KLADNEY:    So your proposal  
12          is?

13                   COMMISSIONER GAZIANO:    To keep it as it  
14          is and ask the staff to focus particularly on this  
15          issue that you have concerns about in the literature  
16          review but to also give us a broader picture as  
17          well.  And then we can kind of revisit this in a few  
18          months.  And one alternative is that we just make it  
19          a special emphasis in our larger focus.  Some of us  
20          may be more concerned about other aspects of this.

21                   Another option is, at that time, we have  
22          a little bit more confidence that if we narrow it,  
23          we are narrowing it to something that we can  
24          properly report on, without looking at these other  
25          pieces.

1 MS. SALLO: Mr. Chair?

2 CHAIRMAN CASTRO: Madam Staff Director.

3 MS. SALLO: The original paper, as it  
4 was written, what it requested was that we look into  
5 the monitoring devices that are in place by state  
6 and local law enforcement, which is outside the  
7 scope of what we are supposed to be looking at. And  
8 so that is why they are coming back with the more  
9 revised version of their proposal because the way it  
10 was written, it was to look at state and local law  
11 enforcement and that doesn't fall under our mission  
12 at this point in time.

13 COMMISSIONER KLADNEY: Mr. Chairman?

14 CHAIRMAN CASTRO: Yes, Mr. Gaziano.  
15 Excuse me.

16 COMMISSIONER KLADNEY: I guess what I am  
17 trying to say here in this little blurb is that we  
18 take the Department of Corrections DOJ and look at  
19 what they are doing in terms of what they do with  
20 prisoners and sentencing and see if there are other  
21 alternatives that they can be using.

22 You are saying --

23 COMMISSIONER GAZIANO: Maybe I  
24 misunderstood your proposal then. Because I have  
25 gotten a few things over the email the last few days

1 as to what proposed -- if -- I thought we were  
2 looking at sentencing.

3 If we want to just focus on federal  
4 sentencing, that is okay with me. By the way and I  
5 take the Staff Director's point in the Enforcement  
6 Report we are supposed to look at.

7 But the federal government claims all  
8 kinds of power to look at state sentencing under  
9 various strained civil rights theories. So I am not  
10 saying it wouldn't be within our power to look at  
11 state sentencing through the federal enforcement  
12 lens but I am willing to.

13 There were some -- I haven't read your  
14 latest blurb. So if you have it for me -- or maybe  
15 I haven't read your latest blurb.

16 John, my special assistant is telling me  
17 that it is in the book that he gave me this morning.  
18 I'm sure he sent it to me, too.

19 VICE CHAIR THERNSTROM: And nothing that  
20 goes to my USCCR address gets to me.

21 COMMISSIONER GAZIANO: Give me 45  
22 seconds to regroup.

23 CHAIRMAN CASTRO: Let's recess.

24 COMMISSIONER GAZIANO: No, 45 seconds.  
25 We can go on.

1 (Pause.)

2 COMMISSIONER GAZIANO: I still think is  
3 a lot more narrow than the proposal that we adopted  
4 a few months ago. So I am willing, at this point,  
5 to narrow it to federal sentences. So maybe we can  
6 do that by agreement. But what I have just seen  
7 still seems to limit it a little too much for my  
8 comfort zone.

9 COMMISSIONER KLADNEY: Well I would be  
10 willing to accept changes as we go along if we adopt  
11 this.

12 I mean the only reason I wrote this up  
13 yesterday afternoon, it wasn't my choice to have to  
14 narrow it, Commissioner Gaziano, I was told to  
15 narrow it. So that is what I did.

16 CHAIRMAN CASTRO: In fact, I would like  
17 Counsel Hepler to please come forward and explain  
18 the opinion that she provided with regard to the  
19 original concept that everyone understands why we  
20 are --

21 MS. HEPLER: I don't have it in front of  
22 me. But I researched the legislative history of our  
23 statutory report provision. And what it is, it is  
24 monitor federal civil rights enforcement. And it is  
25 specified in the Congressional Record Executive

1 Branch. When I saw the original paper concept, it  
2 had state and local, which was not within that  
3 mandate.

4 COMMISSIONER GAZIANO: Thank you for  
5 that. And I think that I am certainly willing, I  
6 hope other commissioners are, to just look at  
7 federal sentencing. But it still is within federal  
8 enforcement.

9 Federal enforcement looks all the time  
10 at how state law enforcement operate. And so if we  
11 were to look at how DOJ, Executive Branch enforces  
12 those laws as applied, but there is a way to  
13 sometimes to look at and we have done that.

14 But the Section 5 that we just completed  
15 is a perfect example of that. The federal  
16 government Civil Rights Authority is being used to  
17 second guess state decisions.

18 But anyway --

19 VICE CHAIR THERNSTROM: And local.

20 COMMISSIONER GAZIANO: Yes, and local.

21 But anyway, I think that we have, it  
22 sounds like a friendly agreement to at least limit  
23 the topic to federal sentencing and maybe we can  
24 further narrow it at a later time. But I just want  
25 to do so after we have had a chance to consider it

1 and read some of the literature in the area that  
2 suggests that fixing mandatory minimums was part of  
3 your suggestion, I know that is not all of it, but  
4 that there are bigger drivers in sentencing. And if  
5 we were to change mandatory minimums, I am not sure  
6 that they would have the effect that some people  
7 think they have.

8 COMMISSIONER KLADNEY: Very well, then,  
9 I would like to make a motion that we approve my  
10 proposal for the 2014 statutory report.

11 CHAIRMAN CASTRO: Do we have a second?

12 VICE CHAIR THERNSTROM: Now wait a  
13 minute. I don't understand. We have got --

14 CHAIRMAN CASTRO: This will replace it.  
15 See that blurb?

16 VICE CHAIR THERNSTROM: Commissioner  
17 Gaziano, --

18 COMMISSIONER GAZIANO: Well I don't like  
19 this language. Why don't we just -- my counter is  
20 why don't we stick with the original but eliminate  
21 any examination of state and local?

22 MS. HEPLER: Well the original one  
23 focused on state and local. I don't have the blurb  
24 so I don't know what the revised one says.

25 CHAIRMAN CASTRO: It did not include

1 federal is what you are saying?

2 MS. HEPLER: Well, it was mainly  
3 focusing on state and local and that was the issue.

4 I don't have what you have in front of  
5 you so I don't know what it says.

6 COMMISSIONER KLADNEY: My proposal says  
7 we look at the federal sentencing, not just minimum  
8 mandatory and guidelines but we look at all kinds of  
9 alternative sentencing federal courts do and then  
10 examine what other kinds of alternative sentencings  
11 are done say in the states. And it would be  
12 available or made available to the federal  
13 government, Department of Corrections and judiciary.

14 COMMISSIONER GAZIANO: Your focus  
15 though, as it is written, is on alternative  
16 sentencing. And I think that is a little narrow.  
17 So maybe what we should do is just pass on this  
18 until we could work together on something that maybe  
19 is -- you know I don't know that we should change  
20 our enforcement report based on a blurb with a few  
21 sentences without having an opportunity to talk to  
22 each other a little bit more and developing a  
23 concept paper. And I suspect we could come to an  
24 agreement on that.

25 CHAIRMAN CASTRO: Madam Staff Director,

1       where does that put you and your staff in terms of  
2       the timing for this to meet our annual deadline?

3               MS. SALLO:     Time is of the essence,  
4       simply because we would need to start the legwork to  
5       prepare for the briefing by early next year.

6               So I would propose that staff work on  
7       possibly amending the concept paper and then the  
8       Staff Director's Office would disseminate it to the  
9       commissioners to see if we have been able to capture  
10      the desire of both parties.

11              COMMISSIONER KLADNEY:   I would just note  
12      that our next meeting is not until the last week in  
13      September.

14              COMMISSIONER ACHTENBERG:   Yes, we don't  
15      want to wait until the last meeting. I mean that is  
16      not fair to the staff. And if we are close, we will  
17      just try to get there.

18              CHAIRMAN CASTRO:   Madam Vice Chair?

19              VICE CHAIR THERNSTROM:    What I think  
20      Commissioner Gaziano is saying, but he should  
21      correct me if I am wrong, he is saying look, the  
22      staff should begin to work. And when we see what  
23      they start to come up with and look at what the  
24      literature says, we can then, after we have a  
25      further grasp of the landscape, as it were, we can

1       then talk about ways in which we want to now or not  
2       now I guess. Is that correct?

3                   COMMISSIONER GAZIANO:     That's correct.  
4       And I think that if we are telling our staff we are  
5       going to choose something broadly in federal  
6       sentencing, federal sentencing reform, that they  
7       would not be losing a lot of time. We have been  
8       late in choosing statutory reports before and our  
9       excellent has come --

10                   But I don't think that time would  
11       necessarily be wasted with that kind of literature.

12       It may be much better that we think about things in  
13       a thoughtful manner. But I am also open to if we  
14       reach consensus, an occasional vote, or telephone,  
15       brief telephone meeting before September if our  
16       Staff Director and others think that we should  
17       settle on it sooner.

18                   COMMISSIONER KLADNEY:     Commissioner  
19       Gaziano, so I understand your point about not just  
20       having alternative sentencing. You are also  
21       speaking about looking at minimum mandatories, their  
22       effect, and things like that. Is that what I am  
23       hearing?

24                   COMMISSIONER GAZIANO:     I am certainly  
25       open to all of those things. There is a -- I want

1 to make sure that we don't pick something that A) is  
2 we don't know what we are picking. And today  
3 without this being fleshed out, I don't know what we  
4 are picking.

5 Secondly, I want to allow us to have  
6 some confidence that we have picked something that  
7 we can concretely study. And we haven't picked  
8 something too broad or too narrow.

9 VICE CHAIR THERNSTROM: And can I just  
10 add to that? Look, he said not necessarily wasting  
11 time. I had changed that to we will not be wasting  
12 staff's time if they start now on a literature  
13 review and so forth and giving us a firmer  
14 foundation on which to decide the scope of this  
15 study.

16 COMMISSIONER ACHTENBERG: Well, I'm  
17 persuaded.

18 CHAIRMAN CASTRO: Commissioner Kladney?

19 COMMISSIONER KLADNEY: I missed that  
20 comment.

21 CHAIRMAN CASTRO: Commissioner  
22 Achtenberg is persuaded.

23 COMMISSIONER KLADNEY: If Commissioner  
24 Achtenberg is persuaded, I guess I am persuaded.

25 CHAIRMAN CASTRO: Okay.

1                   COMMISSIONER ACHTENBERG:     Well, Madam  
2     Vice Chair, might they be in a position to report  
3     back any progress that they have made at the  
4     September meeting so that if we can --

5                   VICE CHAIR THERNSTROM:    I would think  
6     that we could be notified by emails and through our  
7     assistants of exactly what the literature picture  
8     looks like, for instance, that would be helpful.

9                   CHAIRMAN CASTRO:     And ideally, if we  
10    could have a revised concept paper that includes  
11    some of that by the September meeting, that would be  
12    the best.

13                  MS. SALLO:     That would be the plan.

14                  VICE CHAIR THERNSTROM:   Yes, okay. That  
15    would be fine.

16                  COMMISSIONER ACHTENBERG:     And if  
17    Commission Gaziano and Kladney might put their ample  
18    brains together and agree on something, that  
19    certainly would make it easier for the rest of us to  
20    have confidence that we have chosen correctly.

21                  CHAIRMAN CASTRO:     Indeed.

22                  COMMISSIONER KLADNEY:     I would be a  
23    delight.

24                  COMMISSIONER GAZIANO:     It would  
25    absolutely be a delight.

1                   CHAIRMAN CASTRO: Well it sounds like we  
2           have a plan then. I don't think we need to vote on  
3           that. We have consensus here. So we will proceed  
4           in that manner.

5           DISCUSSION ON SUBMISSION OF STATEMENTS AND REBUTTALS  
6                   FOR COMMISSION REPORTS

7                   CHAIRMAN CASTRO: The next item on our  
8           agenda for Program Planning is to set timing for the  
9           Part B of both the Eminent Domain and EEOC  
10          Background Check Reports, as well as submissions of  
11          statements and rebuttals for the reports.

12                   Madam Staff Director?

13                   MS. SALLO: Yes. First, I would like to  
14          remind everyone that your rebuttals for the sexual  
15          assault in the military are due Tuesday, September  
16          3rd by midnight. So once I receive those, I will  
17          disseminate them the following morning.

18                   I also wanted to move forward in  
19          scheduling when we would like to submit Part B for  
20          both reports that were adopted today and then take a  
21          look further into 2013 as to when the statements and  
22          rebuttals will be submitted, keeping in mind that at  
23          the present time I have three reports on my desk  
24          that I have to review for any potential edits prior  
25          to dissemination to the commissioners. And that

1 would be the Entrepreneurship Report, the Sex  
2 Trafficking Report, along with the Engagement of  
3 Arab and Muslim Americans. And most likely by the  
4 end of September, I will also have the NVRA Report,  
5 along with the Peaceful Coexistence Report.

6 So we have a lot of reports in the  
7 pipeline. Obviously, to get everyone to submit  
8 statements, rebuttals, and to complete Part B of  
9 every single report before the end of this calendar  
10 year will be most difficult. But at the very  
11 minimum, I would like for us today to set the dates  
12 for the Part B for the two reports adopted today and  
13 also for the statements and rebuttals to follow.

14 CHAIRMAN CASTRO: So should we say Part  
15 B should be voted on at our September meeting?

16 MS. SALLO: That would be best, unless  
17 anyone was amenable to a sooner vote via notation or  
18 telephonic.

19 VICE CHAIR THERNSTROM: I think it is  
20 best to meet in person to vote on these things  
21 because then there is a decent discussion. There is  
22 not a decent discussion on a telephonic meeting,  
23 which is why I have boycotted all telephonic  
24 meetings with the previous Staff Director.

25 MS. SALLO: Yes, ma'am.

1                   CHAIRMAN CASTRO:   Okay.   So Part B is at  
2                   the September meeting.

3                   COMMISSIONER GAZIANO:   What is -- I'm  
4                   sorry.   I was momentarily distracted.   What would be  
5                   -- I suppose that works if we think we are likely to  
6                   get a Part B.   We have had a problem with Part Bs  
7                   recently.   But as long as -- I just don't want a  
8                   futile effort and then further delay in statements.

9                   But if my calendar counting is roughly accurate, we  
10                  still have time to have statements and rebuttals in  
11                  the normal course.   Do we not, before early  
12                  December?

13                  MS. SALLO:   Yes.

14                  COMMISSIONER GAZIANO:   Okay, then --

15                  COMMISSIONER HERIOT:   That's surrebuttal  
16                  time that won't be.

17                  CHAIRMAN CASTRO:   Correct.

18                  COMMISSIONER GAZIANO:           Unless we  
19                  compress it slightly, I suppose.   But we have had  
20                  good operation with that.   We haven't had  
21                  essentially surrebuttals.

22                  COMMISSIONER HERIOT:   That's true.

23                  COMMISSIONER GAZIANO:           So our early  
24                  prediction that that would be unlikely to be used  
25                  has proven correct.

1                   So let's just keep that schedule in mind  
2                   and factor in, I think, sometime early December to  
3                   get this done, or to at least have all commissioner  
4                   statements finalized.

5                   CHAIRMAN CASTRO:     Does that work for  
6                   everyone?

7                   COMMISSIONER HERIOT:   I don't quite know  
8                   what we have just agreed.

9                   COMMISSIONER GAZIANO:   We are going to  
10                  try to do Part B in late September.

11                  COMMISSIONER HERIOT:   And that is the  
12                  27th.  Is that correct?

13                  CHAIRMAN CASTRO:   That is correct.  That  
14                  is our meeting.

15                  COMMISSIONER GAZIANO:   We haven't been  
16                  successful with a lot of Part Bs but our colleagues  
17                  are really optimistic.

18                  MS. SALLO:        So if we were to move  
19                  forward with what was just discussed, September 27th  
20                  we would vote on the Part B for the two reports that  
21                  were adopted today, which would then, counting  
22                  moving forward 30 days ahead, the statements would  
23                  be due by Sunday, October 27th and the rebuttals  
24                  would be due by Tuesday November 26th.  Please keep  
25                  in mind that that is also Thanksgiving week.

1 COMMISSIONER HERIOT: And that is for  
2 two reports. Correct?

3 CHAIRMAN CASTRO: Correct.

4 MS. SALLO: Yes.

5 COMMISSIONER HERIOT: Okay. And we will  
6 actually have a few days for surrebuttal if it was  
7 necessary. And again, I have no reason to believe  
8 it would be.

9 MS. SALLO: Correct.

10 CHAIRMAN CASTRO: Correct.

11 COMMISSIONER HERIOT: I'm okay with  
12 that.

13 MS. SALLO: So I will repeat the dates  
14 again. September 27th is when we would vote on the  
15 findings and recommendations for the two reports  
16 adopted today, the Civil Rights Implications of  
17 Eminent Domain, as well as the Assessing the Impact  
18 of Criminal Background Checks.

19 Then the statements from commissioners  
20 would be due by midnight on Sunday, October 27th.

21 COMMISSIONER GAZIANO: Pacific time.

22 COMMISSIONER KLADNEY: Hey, hey, no! I  
23 am not going to give you three extra hours.

24 COMMISSIONER HERIOT: Pacific time?

25 COMMISSIONER GAZIANO: That's been the

1 prior rule, in deference to those of our colleagues  
2 who do live in the west, if you want to live by our  
3 -- never mind. Let's not reopen up the

4 COMMISSIONER KLADNEY: Old wounds.

5 COMMISSIONER HERIOT: Old wounds.

6 MS. SALLO: Okay, so everybody's in  
7 agreement with that. All right.

8 So then the rebuttals would be due on  
9 Tuesday, November 26th --

10 CHAIRMAN CASTRO: Correct.

11 MS. SALLO: -- for both reports that  
12 were adopted today.

13 CHAIRMAN CASTRO: Correct.

14 VICE CHAIR THERNSTROM: And will you  
15 send out an email reminding --

16 MS. SALLO: Absolutely.

17 VICE CHAIR THERNSTROM: -- us of these  
18 dates?

19 MS. SALLO: Yes, ma'am.

20 VICE CHAIR THERNSTROM: Thank you very  
21 much.

22 MS. SALLO: However, I would request  
23 that if we are going to vote on the findings and  
24 recommendations on Friday, September 27th, that we  
25 provide the findings and recommendations by

1 Wednesday, September 18th, which would give  
2 commissioners slightly over a week to review them  
3 and possibly have discussions prior to adoption.

4 COMMISSIONER KLADNEY: I'll make that a  
5 motion.

6 CHAIRMAN CASTRO: Yes. Do we need to  
7 make this in the form of a motion or do you have the  
8 discretion to do this, Madam Staff Director?

9 MS. SALLO: I have the discretion.

10 CHAIRMAN CASTRO: Okay, so we don't need  
11 a motion.

12 Okay, I think that works for everyone.

13 MS. SALLO: So then while we are on the  
14 2013 calendar, as you know I have three reports on  
15 my desk and another two coming through the pipeline.

16 I don't want to inundate the commissioners' inbox  
17 with reports but at the same time, I don't want to  
18 sit on them.

19 So, I am proposing to send out the first  
20 draft of the three reports that are currently on my  
21 desk, the Entrepreneurship Report, the Sex  
22 Trafficking, and Engagement in September. The  
23 question to the commissioners that I would pose is,  
24 would you like for me to stagger the dissemination,  
25 do one every week, or do you want all three at the

1 same time?

2 Because once I give them to you, then I  
3 am going to give a deadline to do the edits.

4 CHAIRMAN CASTRO: Stagger them, then.

5 COMMISSIONER HERIOT: Yes.

6 MS. SALLO: Okay. And I will try to  
7 stagger so that it falls in-between the submission  
8 of statements and rebuttals as well.

9 CHAIRMAN CASTRO: Okay.

10 MS. SALLO: But I really would like to  
11 at least get the Entrepreneurship Report underway as  
12 soon as possible. So I will send that first.

13 CHAIRMAN CASTRO: Okay, great. Anything  
14 else on this topic?

15 MS. SALLO: No.

16 CHAIRMAN CASTRO: Okay, great. Thank  
17 you.

18 So now we will move on to management  
19 operations.

20 MANAGEMENT OPERATIONS

21 STAFF DIRECTOR'S REPORT

22 CHAIRMAN CASTRO: Staff Director, your  
23 monthly report?

24 MS. SALLO: Yes, I disseminated the  
25 monthly report and I am sorry that it did not come

1 all in bulk.

2 I was traveling. I was visiting our  
3 Rocky Mountain Office as well as our Western Office  
4 during the week that I was sending out the updates  
5 for this meeting. And the meetings went very well.

6 I was able to meet with staff at both locations. I  
7 also met with civil rights representatives from both  
8 federal agencies, as well as local non-profits on  
9 the ground in Denver, as well as in LA.

10 I received some very positive feedback  
11 from the work that is being done on the ground,  
12 especially in LA. And I had the opportunity to also  
13 speak with the chairs that are currently, that have  
14 been appointed through both the Western Office and  
15 the Rocky Mountain Office. And they had some great  
16 ideas and great suggestions as to how they can have  
17 access to more information of the work that we are  
18 currently doing here at headquarters and how they  
19 would love to be able to participate more or at  
20 least open up more lines of communications with  
21 headquarters.

22 So if the material came through in  
23 pieces rather than in bulk for today's meeting, I  
24 apologize but that was the reason behind it.

25 I also wanted to take an opportunity to

1        remind everyone that we are quickly coming to the  
2        end of fiscal 2013 so as a result, if you have any  
3        outstanding travel vouchers or any outstanding  
4        timesheets, I would appreciate it if everyone can  
5        get those to us by the end of this month.  
6        Obviously, in September it will have to come due  
7        when it is due.

8                    But we are trying to reconcile our  
9        accounts and then to see what, if any, money we have  
10       available in the different sections. So the faster  
11       that you can get that in for us, that would be  
12       phenomenal.

13                   I also wanted to advise everyone that  
14       based on the removal of the two SACs from our agenda  
15       today, we now have 20 SACs that have expired and  
16       that still require appointments. And we also have  
17       five other SACs that are coming up for reappointment  
18       before the end of 2013.

19                   So I would like for the commissioners to  
20       keep that in mind to please look at the SAC status  
21       appointment status report and take a look at what  
22       states are outstanding. If you have any questions,  
23       concerns, or recommendations, please get those to me  
24       as soon as possible so that we can try to address  
25       any concerns that may take place prior to any

1 meeting that we have scheduled for acceptance of any  
2 SAC appointment package.

3 That would be all.

4 CHAIRMAN CASTRO: Okay, any questions  
5 for the Staff Director?

6 Hearing none, then we will move on to  
7 the consideration of the SACs that do remain on the  
8 agenda.

9 IV. APPROVAL OF STATE ADVISORY COMMITTEE

10 APPOINTMENT SLATES

11 MAINE

12 CHAIRMAN CASTRO: So the first one is  
13 let's see here -- I am going to make a motion that  
14 the Commission appoint the following individuals to  
15 the Maine Committee, based upon the recommendation  
16 of our Staff Director. Rachel Talbot-Ross, William  
17 D. Baker, Daniel -- I'm sorry -- Diane A. Khiel,  
18 Donna M. Loring, Phillipe J. Nadeau, Jennifer A.  
19 Bailey, Edith F. Flores, Maurice R. Gilbert, Akiva  
20 A. Herzfeld, Judith D. Jones, Stephen J. Meardon,  
21 Eric M. Mehnert, Michael R. Montgomery, Joseph R.  
22 Reisert, Paul S. Robinson, Carl M. Toney, and  
23 William Wettlaufer.

24 Pursuant to this motion, the Commission  
25 appoints Rachel Talbot-Ross as Chair of the Maine

1 State Advisory Committee. These members will serve  
2 as uncompensated government employees. Under this  
3 motion, the Commission authorizes the Staff Director  
4 to execute the appropriate paperwork for the  
5 appointments. Is there a second?

6 Do I have a second?

7 COMMISSIONER KLADNEY: Second.

8 CHAIRMAN CASTRO: Okay. Madam Vice  
9 Chair, how do you vote? I'm assuming there is no  
10 discussion on this.

11 Madam Vice Chair, how do you vote?

12 VICE CHAIR THERNSTROM: Yes.

13 CHAIRMAN CASTRO: Commissioner Kirsanow,  
14 how do you vote?

15 COMMISSIONER KIRSANOW: Yes.

16 CHAIRMAN CASTRO: Commissioner Heriot,  
17 how do you vote?

18 COMMISSIONER HERIOT: Yes.

19 CHAIRMAN CASTRO: Commissioner Gaziano,  
20 how do you vote?

21 COMMISSIONER GAZIANO: No.

22 CHAIRMAN CASTRO: Commissioner  
23 Achtenberg, how do you vote?

24 COMMISSIONER ACHTENBERG: Yes.

25 CHAIRMAN CASTRO: Commissioner Yaki, how

1 do you vote?

2 COMMISSIONER YAKI: Aye.

3 CHAIRMAN CASTRO: Commissioner Kladney,  
4 how do you vote?

5 COMMISSIONER KLADNEY: Yes.

6 CHAIRMAN CASTRO: And I vote yes. It  
7 passes seven to one.

8 RHODE ISLAND

9 I am now going to make a motion that the  
10 Commission appoint the following individuals to the  
11 Rhode Island State Advisory Committee, based upon  
12 the recommendation of our Staff Director. Norman G.  
13 Orondenker, Ann A. Clanton, Jodi L. Glass, Patrick  
14 A. Guida, Ann C. Keefe, Jonathan D. Orent, Donald C.  
15 Anderson, Farid Ansari, Julio C. Aragon, Charles A.  
16 Berkley, Junior, Langdon D. Clough, Bob Cooper, Mark  
17 C. DeBinder, Nicanor Figueroa, Ernest A. Greco, and  
18 Gertrude F. Jones.

19 Pursuant to this motion, the Commission  
20 appoints Norman G. Orondenker as chair of Rhode  
21 Island State Advisory Committee. These members will  
22 serve as uncompensated government employees. Upon  
23 this motion, the Commission authorizes the Staff  
24 Director to execute the appropriate paperwork for  
25 the appointments.

1 Do I have a second?

2 COMMISSIONER KLADNEY: Second.

3 CHAIRMAN CASTRO: Second, Commissioner  
4 Kladney.

5 Madam Vice Chair, how do you vote? Is  
6 she here?

7 MS. SALLO: She's gone.

8 CHAIRMAN CASTRO: Okay. Commissioner  
9 Kirsanow, how do you vote?

10 COMMISSIONER KIRSANOW: Yes.

11 CHAIRMAN CASTRO: Commissioner Heriot,  
12 how do you vote?

13 COMMISSIONER HERIOT: Yes.

14 CHAIRMAN CASTRO: Commissioner Gaziano,  
15 how do you vote?

16 COMMISSIONER GAZIANO: No.

17 CHAIRMAN CASTRO: Commissioner  
18 Achtenberg, how do you vote?

19 COMMISSIONER ACHTENBERG: Yes.

20 CHAIRMAN CASTRO: Commissioner Yaki, how  
21 do you vote?

22 COMMISSIONER YAKI: Aye.

23 CHAIRMAN CASTRO: Commissioner Kladney,  
24 how do you vote?

25 COMMISSIONER KLADNEY: Yes.

1 CHAIRMAN CASTRO: And I vote yes. The  
2 motion passes six yeses and a no, and there was one  
3 absent.

4 TENNESSEE

5 CHAIRMAN CASTRO: Okay, I am now moving  
6 on to make a motion that the Commission appoint the  
7 following individuals to the Tennessee State  
8 Advisory Committee, based upon the recommendation of  
9 our Staff Director. Diane Di Ianni, Tiffany Baker  
10 Cox, Brian T. Fitzpatrick, Joseph Gregory Grisham,  
11 John Harris, Mary Jean Howard-Hill, Nika Jackson,  
12 Jason A. Johnson, Bernie Miller, Christopher K.  
13 Sanders, Gail S. Seavey, and Eliud Gonzalez Trevino.

14 Pursuant to this motion, the Commission  
15 appoints Diane Di Ianni as chair of Tennessee State  
16 Advisory Committee. These members will serve as  
17 uncompensated government employees. Under this  
18 motion, the Commission authorizes the Staff Director  
19 to execute the appropriate paperwork for the  
20 appointments.

21 Is there a second?

22 COMMISSIONER KLADNEY: Second.

23 CHAIRMAN CASTRO: Okay, Madam Vice  
24 Chair is not here yet?

25 MS. SALLO: No, she's gone.

1 CHAIRMAN CASTRO: She's gone from the  
2 meeting? All right.

3 Commissioner Kirsanow, how do you vote?

4 COMMISSIONER KIRSANOW: Yes.

5 CHAIRMAN CASTRO: Commissioner Heriot,  
6 how do you vote?

7 COMMISSIONER HERIOT: Yes.

8 CHAIRMAN CASTRO: Commissioner Gaziano,  
9 how do you vote?

10 COMMISSIONER GAZIANO: No.

11 CHAIRMAN CASTRO: Commissioner  
12 Achtenberg, how do you vote?

13 COMMISSIONER ACHTENBERG: Yes.

14 CHAIRMAN CASTRO: Commissioner Yaki, how  
15 do you vote?

16 COMMISSIONER YAKI: Aye.

17 CHAIRMAN CASTRO: Commissioner Kladney,  
18 how do you vote?

19 COMMISSIONER KLADNEY: Yes.

20 CHAIRMAN CASTRO: And I vote yes. So  
21 the motion passes with six yeses, one no, and an  
22 absent.

23 WEST VIRGINIA

24 CHAIRMAN CASTRO: Okay, I am now going  
25 to make a motion that the Commission appoint the

1 following individuals to the West Virginia State  
2 Advisory Committee, based upon the recommendation of  
3 our Staff Director. Debra J. Hart, Patty V.  
4 Tompkins, Sheli Bernstein-Goff, Phyllis H. Carter,  
5 Richard L. James, Luke A. Lafferre, Janet L. Lilly-  
6 Stewart, Tara N. Martinez, Larry K. Matheney,  
7 Pauline M. Mejia, James F. Shaffer, Charles E.  
8 Smith, Ethel M. Smith, and Lisa K. Younis.

9 Pursuant to this motion, the Commission  
10 appoints Phyllis H. Carter as chair of West  
11 Virginia State Advisory Committee. These members  
12 will serve as uncompensated government employees.  
13 Under this motion, the Commission authorizes the  
14 Staff Director to execute the appropriate paperwork  
15 for the appointments.

16 Do I have a second?

17 COMMISSIONER KLADNEY: Second.

18 CHAIRMAN CASTRO: Thank you.

19 Madam Vice Chair is absent.

20 Commissioner Kirsanow, how do you vote?

21 COMMISSIONER KIRSANOW: Yes.

22 CHAIRMAN CASTRO: Commissioner Heriot,  
23 how do you vote?

24 COMMISSIONER HERIOT: Yes.

25 CHAIRMAN CASTRO: Commissioner Gaziano,

1       how do you vote?

2                   COMMISSIONER GAZIANO:   No.

3                   CHAIRMAN        CASTRO:               Commissioner  
4   Achtenberg, how do you vote?

5                   COMMISSIONER ACHTENBERG:   Yes.

6                   CHAIRMAN CASTRO:   Commissioner Yaki, how  
7   do you vote?

8                   COMMISSIONER YAKI:   Aye.

9                   CHAIRMAN CASTRO:   Commissioner Kladney,  
10   how do you vote?

11                   COMMISSIONER KLADNEY:   Yes.

12                   CHAIRMAN CASTRO:   I vote yes.   So the  
13   motion passes with six yeses, one no, and an absent.

14                                   V. ADJOURN MEETING

15                   CHAIRMAN CASTRO:   My final and most  
16   important motion for the day is a motion to adjourn.

17       Do I have a second?

18                   COMMISSIONER KLADNEY:   Second.

19                   CHAIRMAN CASTRO:   All those in favor,  
20   aye.

21                                   (Chorus of aye.)

22                   CHAIRMAN CASTRO:   Any opposed?   Any  
23   abstentions?   All right.   The meeting is now  
24   adjourned at 11:46 Eastern Time.   Thank you.

25   (Whereupon, at 11:46 a.m., the above-entitled matter

