

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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FRIDAY, APRIL 13, 2007

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The Commission convened in room 540 at 624
9th Street, N.W., Washington, D.C. at 9:30 a.m.,
GERALD A. REYNOLDS, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairperson
JENNIFER C. BRACERAS, Commissioner (via telephone)
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner
ASHLEY L. TAYLOR, JR., Commissioner
MICHAEL YAKI, Commissioner
KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

TYRO BEATTY, Director, Human Resources Division
DAVID BLACKWOOD, General Counsel, OGC
MARGARET BUTLER
CHRISTOPHER BYRNES, Attorney Advisor to the Office
of the Staff Director
DEBRA CARR, Associate Deputy Staff Director, OSD
RANITA CARTER
PAMELA A. DUNSTON, Chief, ASCD
BARBARA FONTANA
LATRICE FOSHEE
DEREK HORNE
MAHA JWEIED
SOCK-FOON MacDOUGALL
TINALOUISE MARTIN (via telephone)
EMMA MONROIG, Solicitor/Parliamentarian
BERNARD QUARTERMAN, JR.
EILEEN RUDERT
KIMBERLY TOLHURST
AUDREY WRIGHT
MICHELE YORKMAN RAMEY

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COMMISSIONER ASSISTANTS PRESENT:

LISA NEUDER
RICHARD SCHMECHEL
KIMBERLY SCHULD

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Adjourn	

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

(9:38 a.m.)

CHAIRMAN REYNOLDS: Good morning, everyone. The meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. And this meeting is being held at 624 9th Street, Northwest, room 540, Washington, D.C.

With the exception of Commissioner Braceras, all of the commissioners are physically present. Commissioner Braceras is participating by phone.

This morning we focus our attention on business and administrative issues at the Commission.

I. Approval of Agenda

CHAIRMAN REYNOLDS: The first item on the agenda is the approval of the agenda. I move that we approve the agenda. Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please signify by saying aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

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1 CHAIRMAN REYNOLDS: Any abstentions?

2 (No response.)

3 CHAIRMAN REYNOLDS: The motion passes
4 unanimately.

5 **II. Approval of Minutes of March 9 Meeting**

6 CHAIRMAN REYNOLDS: The second item is the
7 approval of the minutes of March 9th of 2007. I move
8 that we approve those minutes. Is there a second?

9 COMMISSIONER KIRSANOW: Second.

10 CHAIRMAN REYNOLDS: Discussion?

11 (No response.)

12 CHAIRMAN REYNOLDS: All in favor please
13 say aye.

14 (Whereupon, there was a chorus of "Ayes.")

15 CHAIRMAN REYNOLDS: Any objections?

16 (No response.)

17 CHAIRMAN REYNOLDS: Any abstentions?

18 (No response.)

19 CHAIRMAN REYNOLDS: The motion passes
20 unanimately. Excuse me. I am in the process of
21 coming down with a cold. I may lose my voice before
22 it's all over.

23 **III. Announcements**

24 CHAIRMAN REYNOLDS: The announcements,
25 April 15th is the 60-year anniversary of Jackie

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1 Robinson's breaking Major League Baseball's color
2 barrier. He became the first black American Major
3 League Baseball player of the modern era in 1947.

4 He was a member of six World Series teams,
5 earned six consecutive all-star game nominations and
6 won several awards during his career. And he was
7 inducted into the baseball Hall of Fame in 1962.

8 In recognition of his accomplishments,
9 both on and off the field, Robinson posthumously
10 received a Congressional Gold Medal and the
11 Presidential Medal of Freedom.

12 On March 29th, the Tuskegee Airmen, a
13 group of black American pilots who flew with
14 distinction during World War II as the 332nd fighter
15 group of the U.S. Army Air Corps received --

16 COMMISSIONER MELENDEZ: The Red Tails.

17 CHAIRMAN REYNOLDS: -- received the
18 nation's highest civilian award, the Congressional
19 Gold Medal, for fighting to defend their country while
20 facing bigotry at home.

21 Although they were not allowed to practice
22 or fight with their white counterparts, the Tuskegee
23 Airmen distinguished themselves by escorting bomber
24 aircraft with unusual fuel losses during World War II.

25 Prior to the Tuskegee Airmen, no U.S. military pilots

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1 had ever been black Americans.

2 At this point we will hear from the Staff
3 Director. We will hear his report.

4 STAFF DIRECTOR MARCUS: I thank you, Mr.
5 Chairman, Madam Vice Chair, commissioners.

6 **IV. Staff Director**

7 STAFF DIRECTOR MARCUS: We do have a few
8 issues for this morning. First, on March 29th, 2007,
9 I testified before the U.S. House of Representatives
10 Committee on Appropriations Subcommittee on Commerce,
11 Justice, Science, and Related Agencies in support of
12 the agency's request for fiscal year 2008
13 congressional appropriations.

14 Chairman Mollohan, Ranking Member
15 Frelinghuysen and Member Ruppertsberger were present
16 during my testimony. The agency's budget request was
17 generally well-received. And both Chairman Mollohan
18 and Ranking Member Frelinghuysen praised Commission
19 leadership for the success of certain of its reforms.

20 There were a number of concerns or
21 questions that were expressed from the committee,
22 including, for instance, concerns that members had
23 about our process for external review of commission
24 reports, the timeliness of state advisory committee
25 rechartering, and Commissioner Melendez's criticisms

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1 regarding the briefing procedures or lack of briefing
2 procedures.

3 However, in general, I think the tone of
4 the congressmen's remarks were positive. They were
5 particularly impressed with our ability to get a clean
6 audit for last year. And they were also impressed
7 with the seriousness with which we have taken the most
8 recent GAO audit.

9 Just this week, the Commission entered
10 into an agreement with GSA to provide expanded
11 services to the Commission regarding budget and
12 finance. I've mentioned in the past that we were
13 working with GSA to execute this MOU. Under this
14 agreement, GSA will be providing a substantial number
15 of the services that were previously provided by our
16 Budget and Finance Division chief.

17 There are some tasks that we will still
18 need to do in-house that they cannot do, including,
19 for instance, doing reconciliation of some of their
20 work and doing some coordination that can only be done
21 on the premises here. But this will involve a
22 substantial undertaking by GSA to do the work
23 previously done by the Budget and Finance Division.
24 And I think it is an excellent way of ensuring that we
25 get high-quality work in budget and finance.

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1 Within the last week, the staff posted on
2 FedBizOps the statement of work for the audit. We are
3 getting ready once again to ensure a timely audit for
4 this fiscal year.

5 The statement of work is largely similar
6 to the one that we did last year with the exception
7 that the Commission is now able to indicate to
8 potential auditors that we did receive unqualified
9 opinions on all of our financial statements last year
10 and also that we now have an accounting system that is
11 finally fully compliant with the joint financial
12 management improvement plan based on our work with
13 GSA.

14 So we are hopeful that this will signal to
15 potential auditors that we are not only a fully
16 auditable agency but that the audit work can be
17 undertaken at a reasonable time and expense level.

18 This week, as directed by the Commission,
19 we held a roll-out of the campus anti-semitism public
20 education campaign. The launch of the Website is
21 scheduled for today, but we held a meeting with
22 interested groups from the higher education community
23 as well as from the Jewish community and civil rights
24 community about the work that we were doing to
25 communicate to college students about what their

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1 rights are and what remedies they have in the event
2 that they face anti-semitism.

3 We do have an example of the poster that
4 is being disseminated. The content had previously
5 been approved by the Commission with some changes.
6 The changes have now been approved. And it was I
7 think very successfully executed by GPO.

8 GPO was here for the roll-out, including
9 members of their creative team. In addition, we are
10 disseminating the hard copy card, which has
11 essentially the same image that you can see on the
12 easel and the same message. And the Web site will
13 roll out.

14 One of the creative features of the Web
15 site is the way in which it participates in our viral
16 campaign. As the commissioners may recall, a goal of
17 the Website is to inform students of what their rights
18 are but also to make sure that students around the
19 country know about our complaint line, what they can
20 do. So we use the poster, the flyer, and the
21 electronic card as a means of letting people know the
22 URL address of our new Website and also the phone
23 number and e-mail address for our complaint line.

24 An interesting feature of the Website is
25 that the electronic version of this card can now be

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1 e-mailed directly from the site. We had a number of
2 staff members who did a lot of great work, too many to
3 thank by name.

4 I would say Sock Foon MacDougall
5 coordinated the entire project, that Michele Yorkman
6 was able to do the Website in-house, juggling it with
7 all of our other work so that we did not incur
8 additional expenses for the electronic side. Margaret
9 Butler and Maha Jweied and others provided other sorts
10 of support. And we had a substantial team of other
11 people.

12 So this was I think successful. One
13 organization sent us a letter describing as momentous
14 our campaign.

15 VICE CHAIRPERSON THERNSTROM: Have there
16 been any hits so far on the Website? Do you know?

17 STAFF DIRECTOR MARCUS: The Website is
18 scheduled to be launched this morning --

19 VICE CHAIRPERSON THERNSTROM: Oh, this
20 morning? Okay.

21 STAFF DIRECTOR MARCUS: -- as part of this
22 meeting.

23 VICE CHAIRPERSON THERNSTROM: Right.

24 STAFF DIRECTOR MARCUS: We have completed
25 a proposed state advisory committee for the State of

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1 Michigan and the Commonwealth of Virginia, which has
2 been distributed to members. And I am pleased that
3 the potential members who have been identified have
4 both a very wide range of experience and a wide range
5 of expertise and community involvement.

6 I would like, if I may, to say a few more
7 words about it, particularly in light of
8 correspondence that we have just received from the
9 Hill. And I think that commissioners should have
10 received not directly the correspondence from Chairman
11 Conyers and Chairman Nadler.

12 The recommendation for the Michigan
13 advisory committee includes a former chairman of the
14 U.S. Commission on Civil Rights, president of the
15 Michigan Asian Pacific American Bar Association, and
16 the American Indian affairs specialist for the
17 Michigan Department of Civil Rights, chairperson of
18 the Michigan Civil Rights Initiative, regional
19 director of the American Hour of Discrimination
20 Committee, the executive director of the American
21 Civil Liberties Union of Michigan, the pastor of the
22 Ypsilanti Bible Church, and the deputy director and
23 director of community affairs for Chairman Conyers.
24 So we have, just to name a few of them, some very
25 distinguished people among the recommended members.

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1 Similarly, the proposed members for the
2 Virginia state advisory committee include a former
3 staff director of the U.S. Commission on Civil Rights,
4 the former chief of staff of the Employment Division
5 --

6 COMMISSIONER YAKI: I am sorry. Excuse
7 me. But why are we going through this now if it's not
8 a discussion item yet? I think it's appropriate to
9 note the letter, but I don't think we need to go into
10 a debate about the merits of the different people
11 unless you want to start it right now.

12 VICE CHAIRPERSON THERNSTROM: Well, wait a
13 minute. We're not into a debate. We're simply
14 hearing what the list is.

15 COMMISSIONER YAKI: That list is already
16 an agenda item. So why are we doing it now?

17 VICE CHAIRPERSON THERNSTROM: I would like
18 to hear from the Staff Director. Usually when it is
19 an agenda item -- what is the down side of hearing the
20 list from the Staff Director as part of his report?

21 COMMISSIONER YAKI: Because it is already
22 on the agenda. And the list is part of the agenda.
23 So, therefore, we discuss it during that part of the
24 agenda. He is simply noting the fact that we got a
25 letter late yesterday from Chairman Conyers and

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1 Subcommittee Chairman Nadler. And I think that's
2 appropriate, but to go into a defense of whatever it
3 is is something that is more appropriate for the
4 agenda item. And we're not at that place right now.

5 STAFF DIRECTOR MARCUS: I will be happy to
6 wrap it up. I have discussed this in prior meetings.
7 And when I have done this, I was not aware of any
8 concern.

9 I will simply say that there is a wide
10 variety of

11 COMMISSIONER YAKI: Well now there is a
12 big concern.

13 STAFF DIRECTOR MARCUS: a wide variety of
14 very impressive individuals who have been recommended.

15 COMMISSIONER YAKI: Oh, yes.

16 STAFF DIRECTOR MARCUS: Those are my
17 comments. If there are any questions from the
18 members?

19 COMMISSIONER MELENDEZ: Commissioner
20 Melendez.

21 I just had a question about the
22 appropriation. I know that our budget was a big
23 concern. As you know, we were decreased down to \$8.8
24 million. And we had talked about trying to in some
25 way -- we recognize that the Staff Director cannot --

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1 well, the Staff Director cannot advocate against the
2 word of such an employee for the federal government.

3 But I think that we had talked about
4 trying to some way advocate for more funding for the
5 Commission because we are really under-funded. So we
6 had talked about if there is some way to mention that
7 maybe you cannot advocate for that, but at least
8 individual commissioners had concerns with the amount
9 of money that we are getting to adequately operate
10 here within the Commission.

11 So did we have that opportunity to
12 absolutely ask the people at the hearing that that is
13 a big issue?

14 STAFF DIRECTOR MARCUS: There was talk
15 about individual commissioners who might want to send
16 letters in their individual capacity. I am not aware
17 of any letters that were sent. And they certainly
18 weren't shared with me.

19 COMMISSIONER MELENDEZ: Okay. We can
20 still do that?

21 STAFF DIRECTOR MARCUS: If you are asking
22 whether commissioners legally can do that, I would say
23 that I have distributed the best legal advice that OGC
24 has. And I would simply say that I have nothing to
25 add on the legality of it.

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1 Since the commissioner mentions the need
2 for more money, I suppose I should also add -- and
3 this is very significant -- that both the chairman and
4 the ranking member noted fairly strongly their belief
5 that our agency needs more money than what is
6 requested.

7 They both in very strong terms
8 acknowledged the importance of the mission of the
9 agency. They indicated their belief that we have been
10 under-funded in prior years. And they expressed a
11 concern that we should receive more money than is
12 requested.

13 COMMISSIONER MELENDEZ: Just a couple of
14 updates. Could you also -- I note you did comment on
15 this, but we still have a statutory report for 2007
16 that we still have some deadline dates. What is our
17 status on that?

18 STAFF DIRECTOR MARCUS: We are woefully
19 behind. As the commissioner may recall, we have had a
20 lot of attrition in the Office of General Counsel in
21 the last year or so. And we have just put some people
22 back on. But we still are understaffed there.

23 We are at this point, I would say, more
24 than a month, probably more than six weeks or two
25 months behind on that. But the Office of General

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1 Counsel is working very hard to put a draft together.

2 And I would expect to have a draft in a shape that I
3 can circulate, I'm hoping, between now and the next
4 meeting.

5 Now, because we are trying to get it out
6 much sooner in the year than we have done in the past,
7 it will not look as polished, I don't think, or as
8 complete as prior drafts. There are still substantial
9 areas where the research is not yet completed.

10 This is, as the commissioner may recall, a
11 very data-intensive project. The research has been
12 very intensive and is required on a district by
13 district basis checking on court records and checking
14 on the status of proceedings where no one seems to
15 have checked on them for quite some time.

16 So we are behind. The draft will not be
17 polished or completed on time, but we will provide the
18 best that is available at some time over the course of
19 the next month.

20 VICE CHAIRPERSON THERNSTROM: Is there any
21 further discussion? I have obviously taken over.
22 Gerry had to step out. The Chairman had to step out.

23 Is there further discussion of the Staff Director's
24 report at this point?

25 COMMISSIONER MELENDEZ: Just one other

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1 question. What is the status of our hiring here in
2 the office? You know, you had mentioned that. Could
3 you give us an update of who has been hired in the
4 last six weeks or something like that?

5 STAFF DIRECTOR MARCUS: I'm sorry? The
6 people hired in the last six week?

7 COMMISSIONER MELENDEZ: Yes. Is there new
8 staff?

9 STAFF DIRECTOR MARCUS: Maybe someone
10 could remind me. I don't believe we have new staff
11 who have actually come on board in the last six weeks.

12 I do anticipate new staff will come on
13 board between now and the next meeting, whom I hope to
14 be able to introduce at that time. And they would
15 include a new attorney adviser in the Office of the
16 Staff Director to take over the work that Derek Horne
17 had been doing since he is moving into the regional
18 structure as well as a special assistant for the
19 Chairman has been previously approved.

20 We are working to identify a person who
21 can help on the procurement side, but that person will
22 not be an employee but, rather, would be part of a
23 contracting operation.

24 COMMISSIONER YAKI: Do we have a head of
25 OCRE yet?

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1 STAFF DIRECTOR MARCUS: We do not have a
2 new head of OCRE, but we are fairly far along in the
3 process. I don't know whether we will have someone
4 who is on board by the next meeting, but I certainly
5 hope to have one within the next few meetings.

6 It's a Senior Executive position. So the
7 procedures are a little bit more intensive.

8 COMMISSIONER MELENDEZ: Just a final
9 question. How is the staff morale here within the
10 Commission? I understand we have done some surveys to
11 try to get some feedback as to how everything is going
12 within the operations here.

13 STAFF DIRECTOR MARCUS: As with any
14 agency, that is a complicated question. And there are
15 at any given time people with higher and people with
16 lower.

17 I would say that over the last few years,
18 the morale at this agency has been lower than it
19 should be and lower than at other federal agencies.
20 And I don't believe that in the last two years we have
21 been able to significantly improve that. I think we
22 have improved it in some areas. And in other areas it
23 may actually have declined. And that is a concern.

24 Just over the last few years our budget in
25 relative terms has continued to decline. The number

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1 of staff has significantly declined while the amount
2 of work has not. So I think that the workload has
3 been increasing. We have had less money than other
4 agencies for bonuses, for training, and for travel.

5 So I would say in general our staff has
6 faced a lot of challenges over the last couple of
7 years and that that is an issue. At the same time, I
8 would say I have been impressed by a number of signs
9 of great commitment and passion by individual staff
10 members and some extraordinary work in certain areas
11 that has been done that shows unflagging enthusiasm by
12 at least some staff members in some area that I think
13 can be a source of pride.

14 COMMISSIONER MELENDEZ: Thank you. You
15 know, my point is that the budget even affects morale
16 to some extent because people do a lot more than they
17 normally would. So I just wanted to point that out.
18 So thank you.

19 STAFF DIRECTOR MARCUS: Thank you, sir.

20 VICE CHAIRPERSON THERNSTROM: Are there
21 any other questions or comments with respect to the
22 Staff Director's report?

23 COMMISSIONER YAKI: Yes. I have a
24 question. Do we have any idea of anticipated
25 personnel changes in the regions?

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1 STAFF DIRECTOR MARCUS: Yes. We are
2 anticipating that we will have continued attrition.
3 And there are three retirement-eligible officials we
4 anticipate will retire within the course of the next
5 month or so.

6 COMMISSIONER YAKI: And what rank are
7 these people?

8 STAFF DIRECTOR MARCUS: They are senior
9 people that include the regional director of our
10 Chicago office, the regional director of our Denver
11 office, and our analyst in Los Angeles.

12 COMMISSIONER YAKI: And there is no
13 regional director in L.A. right now as is, correct?

14 STAFF DIRECTOR MARCUS: That's correct.

15 COMMISSIONER YAKI: So with the retirement
16 of the analyst, that pretty much leaves no one in the
17 Western region?

18 STAFF DIRECTOR MARCUS: We will need to
19 backfill for the analyst to replace him. That's
20 correct.

21 COMMISSIONER MELENDEZ: Just a comment.
22 Can you give us a revised time line for the statutory
23 report --

24 STAFF DIRECTOR MARCUS: I would happy to
25 provide it as soon as we can and certainly between now

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1 and the next meeting.

2 COMMISSIONER MELENDEZ: Okay. And if
3 there are any surveys you want to send us on morale,
4 that would be fine, too, if you could. I would like
5 to see those.

6 STAFF DIRECTOR MARCUS: Yes. There is a
7 survey. If I had not communicated it to the
8 commissioners, I certainly will.

9 COMMISSIONER MELENDEZ: Okay. Thank you.

10 VICE CHAIRPERSON THERNSTROM: Any other
11 comments on the staff director's report?

12 (No response.)

13 **V. Management and Operations**

14 **-2007 Calendar**

15 VICE CHAIRPERSON THERNSTROM: Otherwise
16 let us move on to the 2007 calendar. We need to
17 approve this calendar of meetings and briefings. Some
18 commissioners have requested that we amend it to --
19 I'm sorry, sir? Do you want to stop me in my tracks
20 here or no?

21 STAFF DIRECTOR MARCUS: Maybe if you could
22 give us just a moment?

23 VICE CHAIRPERSON THERNSTROM: Okay.

24 (Pause.)

25 VICE CHAIRPERSON THERNSTROM: Is there a

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1 problem on discussing the calendar?

2 STAFF DIRECTOR MARCUS: No. I'm sorry.

3 VICE CHAIRPERSON THERNSTROM: Oh, okay.
4 Anyway, do we have the calendar, the proposed
5 calendar, here? I do not have this.

6 COMMISSIONER YAKI: I didn't see it in my
7 packet either.

8 VICE CHAIRPERSON THERNSTROM: Yes. I do
9 not have it. I'm happy to continue, though the Chair
10 has just arrived back. Mr. Chairman, we're in the
11 middle of discussing this, beginning to discuss the
12 calendar.

13 Some commissioners have requested that we
14 amend the calendar to ensure that we have enough time
15 to handle pending issues at business meetings. And
16 the suggestion is that meetings would consist of
17 either business or briefings but not both unless we
18 have an unusual or pressing need to conduct business
19 during a month dedicated to a briefing.

20 And so I would like a motion to revise the
21 2007 business meeting briefing calendar in order to
22 cancel the business meeting previously scheduled for
23 the months of June, October, and November, move the
24 briefing scheduled for July to August.

25 Revising the calendar will enable us to

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1 focus on the briefings scheduled for those months
2 under the revised calendar. The June briefing will
3 remain, "School Choice: The Blaine Amendments and
4 Anti-Catholicism."

5 There will now be an August briefing,
6 previously scheduled for July, which will be "Minority
7 Children in State Foster Care and Adoption."

8 The October briefing will remain
9 "Discrimination Against Native Americans in Border" --

10 CHAIRMAN REYNOLDS: Is there something
11 about being chair today that ruins your voice?

12 VICE CHAIRPERSON THERNSTROM: Yes. Well,
13 this Chair has got not a new disease but just a
14 lingering cough from an old sickness. So I'm not
15 lethal in any way.

16 PARTICIPANT: In that regard.

17 VICE CHAIRPERSON THERNSTROM: In that
18 regard. Yes. I hope I'm lethal in other regards.

19 And the November briefing will remain
20 "Minorities in Special Education." So we need a
21 motion on this to change it. And do people actually
22 need the list, which I do not have? Do people need to
23 stare at this calendar?

24 CHAIRMAN REYNOLDS: Does anyone need this
25 calendar?

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1 VICE CHAIRPERSON THERNSTROM: None of us
2 have it.

3 STAFF DIRECTOR MARCUS: I sent a staff
4 member to try to make copies.

5 VICE CHAIRPERSON THERNSTROM: Yes. It
6 would be helpful to have it right in front of us.

7 COMMISSIONER KIRSANOW: Maybe we should
8 move on to the next agenda item while we are waiting
9 for the --

10 COMMISSIONER YAKI: And while we are
11 waiting for the cough drops to take effect.

12 CHAIRMAN REYNOLDS: I will resume my
13 duties.

14 VICE CHAIRPERSON THERNSTROM: Yes. Please
15 do.

16 CHAIRMAN REYNOLDS: Okay. So we are going
17 to table this issue until we get copies of the
18 calendar. The next item up is -- yes, Commissioner
19 Braceras?

20 COMMISSIONER BRACERAS: Like the others, I
21 have the motion but not the calendar. Could someone
22 e-mail it to me?

23 VICE CHAIRPERSON THERNSTROM: Could
24 somebody e-mail it to you?

25 STAFF DIRECTOR MARCUS: Perhaps we will

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1 have someone fax it to you. Is that equally
2 acceptable?

3 COMMISSIONER BRACERAS: Unfortunately, no.

4 STAFF DIRECTOR MARCUS: I think Ms. Schuld
5 is taking care of that.

6 COMMISSIONER YAKI: Clarification. So
7 under the proposed calendar, July and September would
8 now be business meetings?

9 VICE CHAIRPERSON THERNSTROM: We are
10 holding this until we get a calendar in front of us so
11 we can all intelligently discuss this.

12 **-Website Updates**

13 CHAIRMAN REYNOLDS: The next item up is
14 the Website updates. I move to authorize the Staff
15 Director to post the following documents on the
16 Commission's public Website.

17 The first item is the letter to Major
18 League Baseball commending it for hosting its first
19 ever civil rights game. The letter was signed by all
20 commissioners except Commissioner Melendez.

21 The second item to be posted would be the
22 letter sent to Major League Baseball signed by
23 Commissioners Yaki and Melendez expressing concern
24 over the participation of a team in the civil rights
25 game with a mascot representing Native Americans.

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1 Three, the third item is the Staff
2 Director's March 29th testimony before the House
3 Appropriations Subcommittee for Commerce, Justice,
4 Science, and Related Agencies.

5 And the fourth item is the Commission's
6 January 31st, 2007 letter to the House Appropriations
7 Committee on Commission reforms.

8 Is there a second?

9 VICE CHAIRPERSON THERNSTROM: I second it.

10 CHAIRMAN REYNOLDS: Discussion?

11 (No response.)

12 CHAIRMAN REYNOLDS: All in favor, please
13 signify by saying aye.

14 (Whereupon, there was a chorus of "Ayes.")

15 CHAIRMAN REYNOLDS: Any objections?

16 (No response.)

17 CHAIRMAN REYNOLDS: Any abstentions?

18 (No response.)

19 CHAIRMAN REYNOLDS: The motion passes
20 unanimously.

21 **-2007 Calendar (Continued)**

22 CHAIRMAN REYNOLDS: I guess we can jump
23 back now. Do we all have calendars in front of us
24 now?

25 VICE CHAIRPERSON THERNSTROM: Jennifer,

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1 have you got a calendar?

2 COMMISSIONER BRACERAS: I am looking. No.

3 VICE CHAIRPERSON THERNSTROM: Well, I
4 don't think you are in disagreement with the basic
5 thrust of this.

6 COMMISSIONER BRACERAS: No, of course not.

7 VICE CHAIRPERSON THERNSTROM: I think the
8 first question is, is anybody in disagreement with
9 separating briefings and business, if possible?

10 CHAIRMAN REYNOLDS: I assume that everyone
11 is in support of separating business meetings from
12 briefings, but I could be wrong. Does anyone have any
13 thoughts?

14 COMMISSIONER HERIOT: I guess for the
15 record, I am willing to do it, you know, to have a
16 full day's agenda. That's not a problem for me. I am
17 a worker today.

18 CHAIRMAN REYNOLDS: You are in the
19 minority.

20 (Laughter.)

21 VICE CHAIRPERSON THERNSTROM: Well, Gerry,
22 let's talk about this for a second. She's in the
23 minority, I believe, because of concerns on the part
24 of the West Coast participants. Is that not correct?

25 CHAIRMAN REYNOLDS: Yes.

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1 COMMISSIONER BRACERAS: Not exactly. I
2 mean, they are concerns of the West Coast
3 participants. They are also concerns by, I believe,
4 Ashley and myself because of the need to get back to
5 our families.

6 CHAIRMAN REYNOLDS: Well, what we have to
7 do, though, is to balance our workload with our
8 personal lives. And sometimes we have to make
9 sacrifices on the personal side, as we all do.

10 COMMISSIONER BRACERAS: Gerry, I
11 understand that, but the reality is that both Ashley
12 and I have to leave by a certain time on Fridays. And
13 if the meetings go beyond that certain time, we will
14 rarely, if ever, be in attendance. That's the way it
15 is.

16 VICE CHAIRPERSON THERNSTROM: Jennifer,
17 what time do you have to leave on Fridays?

18 COMMISSIONER BRACERAS: Well, historically
19 I have always been on the 3:45 flight, preferably the
20 2:45, but I can make the 3:45 and make it work. Now,
21 you know, I'm only --

22 COMMISSIONER TAYLOR: I have that same
23 schedule. I take the train.

24 COMMISSIONER BRACERAS: So that's what we
25 have always done. And my proposal with briefings and

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1 meetings was initially made because what we were
2 finding is that we were never getting the work of the
3 Commission done because we had briefings and then
4 people like myself and folks on the West Coast
5 couldn't get out. So we were not getting the work
6 done. So we could go ahead and be here all day.

7 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

8 COMMISSIONER KIRSANOW: I am in favor of
9 whatever the majority would like to do. I could stay
10 here as long as necessary or truncate the meetings,
11 but there was I think a second consideration. And
12 that is that if we had day-long meetings, that might
13 necessitate those who are on the West Coast to stay
14 over a night, which impacts our budget.

15 COMMISSIONER BRACERAS: That's right.

16 COMMISSIONER YAKI: Now, to add, the other
17 reason why this was a serendipitous change is that we
18 were informed that it made more budgetary sense to not
19 be running and logistical sense not to be running 9 to
20 ten briefings a year as is.

21 So, if I recall, how originally the
22 genesis of this came about was a mutually beneficial
23 convergence of the fact that briefings at 1:00 o'clock
24 meant that Commissioner Melendez and I were leaving
25 after about an hour and a half of testimony at the

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1 most.

2 And at the same time budget constraints
3 and the reality of time and personnel and the backlog
4 in our briefing reports date meant that we were
5 cutting back from a full schedule to about eight.

6 COMMISSIONER BRACERAS: That is right.
7 And I think there was a giant feeling that it was
8 important to produce quality reports, even if that
9 meant fewer reports, that we were going to exercise
10 quality over quantity.

11 CHAIRMAN REYNOLDS: I think that there are
12 good reasons to do this. I just want to say that
13 there will be some issue, some emerging issue, that
14 will come up that we will have to handle.

15 So there may be occasions where we deviate
16 from this. And I would assume that it would only be
17 under circumstances that are significant where we
18 would deviate.

19 COMMISSIONER KIRSANOW: I agree.

20 VICE CHAIRPERSON THERNSTROM: I have a
21 question. Oh, Pete, you do, too?

22 COMMISSIONER KIRSANOW: No.

23 VICE CHAIRPERSON THERNSTROM: If we look
24 back at the record of meetings, let's say, over the
25 last year, have there been months in which we could

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1 have skipped the business section of the meeting
2 without any cost to the functioning of the agency?
3 We're going to have quite a few months here in which
4 we do not have a discussion of business.

5 COMMISSIONER BRACERAS: My concern is not
6 that we are limiting the business portion of the
7 meetings to the months that we would be briefing so
8 much as it is that we make sure we satisfy ones like
9 this one, where we only do that and that when we have
10 to conduct business in the other months, those
11 discussions are much shorter and streamlined.

12 I never anticipated that we would have
13 months where we would probably never have to do any
14 business. The notion of having a separate business
15 meeting was to take off the items on our agenda
16 without having to worry that speakers were being made
17 to wait until we could have the full airing and not
18 let our business meeting be taken over by the
19 briefing.

20 COMMISSIONER YAKI: And to underscore
21 Commissioner Braceras' point, I think I can point to
22 more than several meetings at which due to the length
23 of the briefing or attendance or other matters that
24 intervened, we basically had to try and reschedule the
25 business portion of the meeting to a teleconference,

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1 which is always problematic at best with all of our
2 very divergent schedules. And those I always find to
3 be a poor substitute for the robust discussion that we
4 have in person at the Commission.

5 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

6 VICE CHAIRPERSON THERNSTROM: But,
7 Commissioner Yaki, that simply reinforces a concern of
8 mine, which is that if we simply eliminate -- and I
9 understand what Commissioner Braceras has said. Look,
10 this will not necessitate eliminating business
11 discussions. But I don't want to structure it such
12 that we are having months in which we do not discuss
13 business that is important and we end up on these
14 teleconferences.

15 COMMISSIONER BRACERAS: We'll make sure we
16 deal with it, but we have months where we have months
17 where we have no briefings. For all the reasons that
18 --

19 VICE CHAIRPERSON THERNSTROM: Right. And
20 that is a slightly different point, it seems to me,
21 than the one that comes through on this calendar. The
22 one that comes through on this calendar, I mean, the
23 calendar suggests no business at the meetings at which
24 we are holding briefings. So I think it's important
25 not to --

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1 COMMISSIONER BRACERAS: We did offer that
2 with the knowledge that we will try to do business to
3 a minimum on --

4 CHAIRMAN REYNOLDS: Commissioner Melendez?

5 COMMISSIONER MELENDEZ: Yes. It always
6 seemed to me that the business meeting was scheduled
7 in the morning. I guess the question would be if you
8 scheduled all briefings in the morning -- and I always
9 wondered whether or not we were planning to
10 accommodate the people that were coming in to
11 participate in presentations at the briefing.

12 And it always seemed to me I always
13 wondered why we didn't have a business meeting at 1:00
14 and then go as much into it so people could get out of
15 here at 3:00 and if you didn't accomplish what was on
16 the agenda, then you would just table it to the next
17 business meeting. At least you would get two hours of
18 business meeting after lunch and take care of
19 briefings in the morning if you were going to -- that
20 would be the only scenario that I could see if you
21 were going to combine both of them. I would hate to
22 see a business meeting in the morning than to try to
23 go through afternoon briefing.

24 I just think that the briefing was more
25 important than the business meeting. So I don't know

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1 if we ever thought about that scenario.

2 CHAIRMAN REYNOLDS: If we are going to do
3 a briefing and also handle some business, we can pick
4 some topics that are not controversial, that is not
5 going to soak up a lot of time. So that's a way where
6 we could get some business done while at the same
7 time, at least on the same day, have a briefing.

8 VICE CHAIRPERSON THERNSTROM: Provided we
9 can, in fact, postpone the controversial issues that
10 come up like the one that has come up today with the
11 letter.

12 STAFF DIRECTOR MARCUS: If I may just
13 briefly respond to Commissioner Melendez's question,
14 we did consider flipping it and having the briefings
15 in the morning and the business meetings in the
16 afternoon. And, in fact, we tried that for a few
17 times.

18 The concern that was expressed by some
19 commissioners is that they felt it wasn't working
20 because we would lose the quorum during the business
21 meeting, the business meeting would fail; whereas, the
22 briefing would not by our guidelines require a quorum.

23 So that was the reason we switched it around last
24 time.

25 COMMISSIONER MELENDEZ: So did we break

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1 for lunch? Does that have a big impact into trying to
2 come back after 1:00 or something like that? If you
3 just went straight through, would it --

4 STAFF DIRECTOR MARCUS: Well, we have had
5 times where we have broken for lunch. I'm not sure if
6 we have had times where we didn't break for lunch.

7 COMMISSIONER YAKI: There have been more
8 times than not that we haven't.

9 STAFF DIRECTOR MARCUS: There have been
10 more times where we haven't?

11 COMMISSIONER YAKI: Yes. I would say
12 break for lunch is the exception, rather than the
13 rule. But just I don't think we need to beat this
14 horse anymore. I would say this is an imperfect
15 compromise amongst the many items that we have.

16 I think that the Chairman's point about we
17 can schedule nominal type business that we have to get
18 out that we need to get housekeeping reports,
19 whatever, out not controversial reports, but staff
20 director reports, whatever, during the days that we
21 have briefings.

22 But I do not want to see briefings
23 starting at 1:00 o'clock in the afternoon. It just
24 does not work for me. I need to get on the 5:30
25 flight. Everything else is usually all booked up.

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1 And as we accrete more toward the spring
2 and summer months, if you go to Dulles at 3:00 o'clock
3 in the afternoon, you're in for a nightmare of epic
4 proportions going through security. And I don't want
5 to leave early from these briefings because I find
6 them enjoyable and very thought-provoking and part of
7 why I enjoy being a commissioner, because it allows us
8 to take heed of the important issues of the day.

9 And to say, "Well, you know, we're going
10 to put them in the afternoon because we can lose
11 quorum because we might have to leave" I think is a
12 disservice to the folks on the West Coast.

13 VICE CHAIRPERSON THERNSTROM: Let me just
14 ask a question. So what we are talking about here is
15 both May and June being briefings? And we don't have
16 the next business, real business, discussion until
17 July 13th. Is that correct?

18 STAFF DIRECTOR MARCUS: That is correct.
19 And it is an anomaly. The basic rule seems to be that
20 we would alternate from month to month between
21 business meetings and briefings.

22 VICE CHAIRPERSON THERNSTROM: Well, it is
23 not true. September is business and then not until
24 December 3rd again.

25 STAFF DIRECTOR MARCUS: The reason for the

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1 first anomaly that you mentioned is that --

2 COMMISSIONER KIRSANOW: We voted on it.

3 STAFF DIRECTOR MARCUS: -- it was a vote
4 last month to flip this month's meeting and next.

5 COMMISSIONER BRACERAS: Right. This month
6 was supposed to be the briefing.

7 STAFF DIRECTOR MARCUS: Right. So that
8 does create the unfortunate situation that there would
9 not be another business meeting until July.

10 VICE CHAIRPERSON THERNSTROM: Well, but we
11 have got the same thing between September and
12 December. Pete, I just don't see how we can go that
13 long without --

14 COMMISSIONER BRACERAS: Well, again, you
15 know, my suggestion is to do the briefings first.

16 VICE CHAIRPERSON THERNSTROM: We can't
17 afford to lose our quorum, however, for business
18 meetings.

19 CHAIRMAN REYNOLDS: Ken, for those months
20 where we have back-to-back briefings, I mean, looking
21 at what's in your "In" basket now, is it possible for
22 you to determine if we could take care of housekeeping
23 matters during those two months?

24 STAFF DIRECTOR MARCUS: It is difficult to
25 assess because we seldom have a month where it doesn't

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1 appear to me that there is a lot going on that it
2 would be useful to get commissioner input.

3 VICE CHAIRPERSON THERNSTROM: Yes,
4 exactly.

5 STAFF DIRECTOR MARCUS: If the question
6 is, if push comes to shove, can we do without
7 commissioner input for an extra 60 days, formal input,
8 I think we can try to do it. I don't see any of our
9 obligations that we would be disregarding if we did it
10 that way.

11 There would be state advisory committees
12 that staff would be ready to recharter but where the
13 charter would be delayed for 30 or 60 or 90 days
14 because we don't have a meeting. And there might be
15 occasional issues where input would be useful and we
16 can only get it informally.

17 COMMISSIONER BRACERAS: Why don't you just
18 do November and December?

19 STAFF DIRECTOR MARCUS: I don't see any
20 reason why. It might have been inadvertent that we
21 had them in this order. The "Minorities and Special
22 Education" had been voted for November 9, but there is
23 no reason that I can think of why they wouldn't be
24 switched.

25 COMMISSIONER BRACERAS: Well, just flip

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1 them and then for the understanding that there may be

2 --

3 CHAIRMAN REYNOLDS: Commissioner Heriot?

4 COMMISSIONER HERIOT: I am new here, but I
5 am a bit confused. I am feeling somewhat
6 uncomfortable with all of this. Civil rights issues
7 haven't gotten any less important, and we aren't being
8 paid any less money.

9 It seems to me that why don't we just
10 schedule telephone conferences, but why don't we then
11 start, you know, an hour earlier? We started at 9:30
12 today. If we started at 8:30, we could get more done.

13 Again, I am willing to be here as often as
14 is necessary to get the job done. And I'm not feeling
15 very comfortable with a notion of cutting back on any
16 kind of project.

17 CHAIRMAN REYNOLDS: Commissioner Heriot's
18 suggestions, some of them, have been considered; for
19 example, starting earlier. Some of us are willing to
20 do that. Some of us are not.

21 COMMISSIONER BRACERAS: Well, also on
22 cutting back, we are not trying to do. We are putting
23 quality over quantity. I know it is expensive, but
24 they were what we had before. And they were not based
25 on personal convenience but, rather, the reality that

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1 we can only afford to do a certain number of things.

2 CHAIRMAN REYNOLDS: Well, I think that a
3 significant driver in this conversation has to do with
4 schedules, people feeling that they need to be home,
5 people who believe that they need to be at the airport
6 by a certain time. And that is having its effect on
7 how we do business.

8 Vice Chair Thernstrom? Then Commissioner
9 Kirsanow.

10 VICE CHAIRPERSON THERNSTROM: Look, I take
11 very seriously what the Staff Director just said, that
12 a month rarely goes by in which there are not
13 important issues having to do with the functioning of
14 this agency that need to be discussed.

15 And I don't think that these telephone
16 conference calls from our experience with them in the
17 past are a substitute. They are an exercise in
18 frustration.

19 CHAIRMAN REYNOLDS: Well, they are less
20 effective.

21 VICE CHAIRPERSON THERNSTROM: They are
22 really less effective.

23 CHAIRMAN REYNOLDS: They are less
24 effective, but we still manage to get things done.
25 It's not the --

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1 VICE CHAIRPERSON THERNSTROM: We do, but I
2 don't think that they answer the problem that we're
3 creating here.

4 COMMISSIONER BRACERAS: If I may, I mean,
5 why do they not answer the problem?

6 VICE CHAIRPERSON THERNSTROM: Because
7 there is a world of difference between the conference
8 calls and meeting in --

9 COMMISSIONER BRACERAS: No, that is not my
10 question. Let me finish my question.

11 VICE CHAIRPERSON THERNSTROM: I'm sorry.

12 COMMISSIONER BRACERAS: Why does it not
13 answer the problem? Pass a motion where some months
14 there are business meetings and some months there are
15 briefings first, business meetings second.

16 VICE CHAIRPERSON THERNSTROM: If we can
17 keep the quorum for the business meetings. That was
18 the issue. I raised that question only because the
19 Staff Director raised that question of concern about
20 keeping a quorum for the business meeting when the
21 business meeting is not first thing.

22 COMMISSIONER BRACERAS: Well, right. And
23 that is going to happen sometimes. There is really no
24 other way.

25 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

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1 Then Commissioner Melendez.

2 COMMISSIONER KIRSANOW: I am not sure that
3 the views being expressed are necessarily in conflict.
4 I think they are reconcilable.

5 I agree with Commissioner Heriot that, you
6 know, we need to get these things done. And I'm not
7 sure why we are focused on the tail end of the day.
8 Why not start at 8:00? Why not start at 7:30? Get
9 the business meetings done when we've got --

10 COMMISSIONER BRACERAS: The Vice Chair
11 doesn't want to.

12 COMMISSIONER KIRSANOW: Well, we have got
13 --

14 VICE CHAIRPERSON THERNSTROM: 7:30, no, I
15 don't.

16 COMMISSIONER KIRSANOW: -- to go when we
17 know we have a quorum and then start the briefing. I
18 don't want to rush the briefings so that we have
19 sufficient time to get to a business meeting.

20 I think the briefings are the guts of what
21 we do. And, frankly, I mean, it has worked to some
22 degree in the past, not perfectly, but my
23 understanding was before I got to the Commission, I
24 think, before anyone else here got onto the
25 Commission, the Commission had traditionally had

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1 day-long meetings. And I have got to believe, with
2 all due respect to everybody here, -- and I am
3 sensitive to everyone's schedule. I'm not making any
4 comments with respect to anybody's schedule, but I
5 have got to believe that those commissioners had
6 schedules that they tried to accommodate also.

7 So I am in favor of having this schedule
8 where we have got business meetings or days that are
9 devoted solely to business, but I don't think that we
10 can go more than a month without addressing some
11 business.

12 And I don't see why we can't front load
13 those situations. Everyone gets in on Thursday night
14 anyway or most often people get in on Thursday night,
15 maybe not all the time. And there may be occasions
16 when we have one or two commissioners who aren't
17 present. That's happened in the past. But we still
18 have a quorum. We can conduct the business.

19 I think we should endeavor to get as much
20 done as we can while we are here face to face.
21 Conference calls are a poor substitute.

22 COMMISSIONER YAKI: I agree.

23 CHAIRMAN REYNOLDS: Commissioner Yaki?

24 COMMISSIONER YAKI: Well, since we are now
25 in the realm of throwing everything out on the table,

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1 I have always said on more than one occasion that I
2 did not see why if we had to have a situation where we
3 needed to transact business and we had a rather
4 lengthy briefing, briefing schedule, with adequate
5 notice, we could break it up and have the business
6 portion Thursday afternoon.

7 COMMISSIONER BRACERAS: We did that
8 before. I thought that went very well.

9 COMMISSIONER YAKI: I mean, we are flying
10 out. We have to fly out Wednesday, rather than
11 Thursday, but I would rather do that than have to be
12 flying out on Saturday.

13 CHAIRMAN REYNOLDS: Okay. What does that
14 do to our budget.

15 VICE CHAIRPERSON THERNSTROM: Jennifer,
16 can you do that?

17 STAFF DIRECTOR MARCUS: It does cost money
18 to have people in for an extra night, but it's not
19 going to bust the budget.

20 CHAIRMAN REYNOLDS: All right. Any other
21 thoughts? Commissioner Heriot?

22 COMMISSIONER HERIOT: I teach a class
23 Wednesday night. I will in the future. I actually
24 teach it Thursday nights these days, but I took the
25 Red Eye this morning. But as long as it's late enough

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1 in the afternoon, I can do that.

2 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

3 VICE CHAIRPERSON THERNSTROM: Well, the
4 one other thought in terms of this break for lunch, I
5 mean, if everybody leaves the building and goes to a
6 restaurant, it becomes a real break. If we brought in
7 food and had a continuous meeting, we would get a lot
8 more done.

9 COMMISSIONER YAKI: Was there a catering
10 budget request in the appropriations?

11 (Laughter.)

12 VICE CHAIRPERSON THERNSTROM: We can all
13 make this a brown bag affair. We can all chip in,
14 whatever, but I think if we're going to --

15 COMMISSIONER YAKI: The no-doughnut rule?

16 VICE CHAIRPERSON THERNSTROM: We need to
17 have a --

18 COMMISSIONER YAKI: We need some lobbyist
19 to hang around here.

20 VICE CHAIRPERSON THERNSTROM: There are
21 ways of getting more work done when we are here.

22 COMMISSIONER MELENDEZ: I guess the
23 question would be, how early can we start the briefing
24 that is acceptable to all of us? I mean, on Capitol
25 Hill, they have 8:00 o'clock maybe they're having

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1 briefings because of their schedule.

2 So I don't see why we can't start at 8:00,
3 run through lunch. I mean, if we had to pay for our
4 own sandwiches right after the briefing and have a
5 working meeting while we have somebody run down to the
6 deli, that might work also.

7 I think we are looking at a time frame
8 from something like 8:30 to 2:30 and trying to squeeze
9 both the briefing meeting and just a meeting into all
10 of that. I think it can all be done, but we have to
11 all agree to 8:30 to 2:30 and then work right through
12 lunch because I also have a commitment on Wednesday
13 nights that's very hard for me to -- that's why I
14 travel out here on Thursday. I have many meetings on
15 Wednesday evenings. That's difficult for me.

16 CHAIRMAN REYNOLDS: Okay. It sounds like
17 we have at least two competing ideas. One would be to
18 start on Thursday afternoon. The other would be to
19 start early, 8:30 to 2:30. Now, of those two options
20 --

21 COMMISSIONER TAYLOR: Mr. Chair? As to
22 that second option, let me add these two thoughts.
23 The first is that I don't think as a body we have
24 focused in the past on being as efficient as possible
25 with the use of our time. That just hasn't been one

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1 of our goals. I think it should be. And that has
2 caused part of the problem. And I think as a --

3 COMMISSIONER YAKI: This is government
4 mystery. I don't know what you are talking about.

5 COMMISSIONER TAYLOR: I was going to say
6 it's a governmental body. Unfortunately, if you just
7 create more time and don't focus on efficiency, you
8 tend to just fill in the time, rather than focusing on
9 efficiency.

10 COMMISSIONER YAKI: Private sector folks.

11 COMMISSIONER TAYLOR: And so for that
12 reason, I would --

13 VICE CHAIRPERSON THERNSTROM: This is a
14 shocking statement.

15 COMMISSIONER TAYLOR: I would be in
16 support of the second proposal, focusing on
17 Commissioner Melendez's suggestion that we start the
18 briefings early. We have business meetings one month.
19 We have a briefing the next month. We start the
20 briefing early in the morning. We are all prepared to
21 work through lunch for two and a half, three hours
22 after the briefings.

23 And I suspect if we do all of those things
24 and focus on being efficient and using our time
25 wisely, we will have plenty of time to accomplish our

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1 work.

2 CHAIRMAN REYNOLDS: I think that that
3 approach is sound in theory. The one thing, though,
4 that I want to point out in practice, I mean, when we
5 deal with controversial issues, it takes up a lot of
6 time. When we deal with noncontroversial issues, like
7 the calendar, it takes up a lot of time.

8 And we have not demonstrated much
9 restraint. We will discuss important issues to death.

10 And we will discuss issues that are not very
11 important. We can spend a lot of time on them.

12 So, in theory, I think we should try it, I
13 think, but okay. Well, she beat you.

14 COMMISSIONER HERIOT: I have just one
15 sentence to say, and that is that with issues as
16 controversial as some of those that we discussed, it
17 is important to be collegial and let everyone have
18 their say. And that interferes sometimes with
19 efficiency, but I would go with collegiality over
20 efficiency.

21 CHAIRMAN REYNOLDS: And to add to that,
22 because of -- well, when I started here, there was a
23 lot of -- well, in the past, there had been a lot of
24 bad blood. And so one of the things that we have done
25 is to ensure that everyone gets an opportunity to have

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1 their say. We bend over backwards to ensure that
2 people have an opportunity to have their say. And one
3 of the costs is meetings that tend to drag on.

4 Commissioner Yaki?

5 COMMISSIONER YAKI: I would just like to
6 end this conversation by saying there are good ideas,
7 let's just get this thing done with, give discretion
8 to you and the Staff Director as we go along to figure
9 out what the business is like for a particular month
10 and whether we need to do X or Y, communicate that
11 early enough to the commissioners, and move on.

12 CHAIRMAN REYNOLDS: Is everyone
13 comfortable with that approach?

14 VICE CHAIRPERSON THERNSTROM: Yes.

15 COMMISSIONER TAYLOR: Yes.

16 COMMISSIONER HERIOT: So we are reserving
17 the possibility of having Thursday meetings?

18 COMMISSIONER YAKI: Yes.

19 COMMISSIONER HERIOT: And early meetings?

20 CHAIRMAN REYNOLDS: Or early, or early,
21 and/or early.

22 VICE CHAIRPERSON THERNSTROM: Wait a
23 minute. How late on a Thursday so that Gail Heriot
24 can get here? How late on a Thursday could we start a
25 meeting? I don't want to start a meeting without

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1 Gail.

2 COMMISSIONER HERIOT: If worse comes to
3 worst, I could take the Red Eye on Wednesday.

4 VICE CHAIRPERSON THERNSTROM: No.

5 COMMISSIONER YAKI: I would say a 5:00 to
6 7:00 meeting is probably doable given that the
7 earliest flights from the East to the West Coast start
8 about 6:30-7:00 o'clock in the morning. They get in
9 about 3:00.

10 COMMISSIONER HERIOT: From San Diego, they
11 get in about like from 3:30.

12 COMMISSIONER YAKI: Yes. And then you
13 have to --

14 VICE CHAIRPERSON THERNSTROM: It's not
15 that late.

16 COMMISSIONER YAKI: -- rush hour. By the
17 time you get here, 5:00 o'clock would be --

18 COMMISSIONER TAYLOR: 5:00 o'clock?

19 COMMISSIONER YAKI: Yes.

20 COMMISSIONER HERIOT: I can meet at 5:00
21 o'clock. And, again, I can take the Red Eye. I think
22 that would be --

23 STAFF DIRECTOR MARCUS: The one point I
24 would add is that if the meetings go late, there is
25 some point at which there are additional fees that we

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1 incur, both for overtime court reporting and also for
2 those employees who are required to be paid overtime
3 at a certain hour. So that's just one thing we have
4 to balance in.

5 COMMISSIONER YAKI: Just keep that in
6 mind.

7 CHAIRMAN REYNOLDS: Yes. We will keep
8 that in mind when we make our decisions.

9 COMMISSIONER MELENDEZ: I just don't see
10 how I can get here any earlier. I mean, I took the
11 6:20 through San Francisco on United. I got here to
12 Dulles, I think it was -- I got to the hotel at 6:00
13 o'clock. So I'm just saying that's the earliest I --

14 COMMISSIONER YAKI: The one down side
15 about trying to do the Thursday is if there is any
16 weather delay on the West Coast or East Coast.

17 VICE CHAIRPERSON THERNSTROM: Yes. I
18 think that Thursday is --

19 COMMISSIONER YAKI: One time I was
20 supposed to do a conference call with you guys at
21 4:00, thinking my plane landed at 3:15. My plane
22 landed at 5:00 p.m.

23 VICE CHAIRPERSON THERNSTROM: Yes. I
24 think that Thursday is unrealistic. I really do. It
25 took me six and a half hours to get here yesterday

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1 from Boston because --

2 COMMISSIONER YAKI: That is because you
3 were bicycling.

4 (Laughter.)

5 VICE CHAIRPERSON THERNSTROM: Yes, I know.
6 The plane was bicycling.

7 CHAIRMAN REYNOLDS: Okay. We will go with
8 Commissioner Yaki's recommendation essentially. The
9 motion that is on the table right now is to vote for
10 the -- I am going to regret this. Did we resolve the
11 issue of whether we want to flip the November and
12 December?

13 VICE CHAIRPERSON THERNSTROM: No, we
14 didn't, but we should do that.

15 CHAIRMAN REYNOLDS: Okay. So is everybody
16 comfortable switching the order so that on the
17 November 9th --

18 COMMISSIONER YAKI: Remember, December 3
19 is a Monday.

20 CHAIRMAN REYNOLDS: I'm sorry?

21 COMMISSIONER YAKI: December 3 is a
22 Monday. Remember, we did that because Jennifer's and
23 Peter's term may expire at the end of that week. And
24 we wanted to do it before then so we could all do Auld
25 Lang Syne or Welcome Back or do a roast or just heave

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1 them out the door.

2 CHAIRMAN REYNOLDS: Okay.

3 COMMISSIONER YAKI: Okay. So I don't know
4 if that has a consequence for how we schedule --

5 CHAIRMAN REYNOLDS: We can still throw
6 them out the door if the briefing is moved to the 3rd.

7 COMMISSIONER YAKI: Yes. I have no
8 objection.

9 CHAIRMAN REYNOLDS: Okay. So we are going
10 to vote.

11 COMMISSIONER MELENDEZ: Mr. Chairman?

12 CHAIRMAN REYNOLDS: Mr. Melendez?

13 COMMISSIONER MELENDEZ: For August, do we
14 have a date yet or is that something we decide after?

15 CHAIRMAN REYNOLDS: No, we don't.

16 COMMISSIONER YAKI: Yes. How come we
17 don't have a date?

18 STAFF DIRECTOR MARCUS: We have not
19 previously had an agreement to have this briefing in
20 August.

21 COMMISSIONER YAKI: Usually we don't do
22 August.

23 STAFF DIRECTOR MARCUS: Usually we don't
24 do August. The idea of having an August briefing
25 would be a way of ensuring that we don't have

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1 briefings --

2 COMMISSIONER YAKI: It's so hot here in
3 August.

4 VICE CHAIRPERSON THERNSTROM: Oh, you
5 know, violins are playing over here.

6 CHAIRMAN REYNOLDS: We have air
7 conditioning. I think that we can handle it. Folks,
8 we need to bring this --

9 COMMISSIONER YAKI: The Bay area, man.
10 We've got --

11 CHAIRMAN REYNOLDS: We need to bring this
12 to a close. So let's vote on the --

13 COMMISSIONER YAKI: I move that we adopt
14 the proposed calendar as amended with the flip of the
15 November and December meetings with instructions to
16 the Chairman and the Staff Director as appropriate to
17 determine whether we need early starts on any of the
18 days that we have briefings.

19 CHAIRMAN REYNOLDS: Is there a second?

20 COMMISSIONER HERIOT: I am still confused.
21 How does this calendar differ from the calendar that
22 existed before?

23 CHAIRMAN REYNOLDS: Does anyone have the
24 original?

25 COMMISSIONER YAKI: Yes. The original --

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1 STAFF DIRECTOR MARCUS: The second page of
2 this document shows the existing briefing schedule.

3 COMMISSIONER HERIOT: Okay.

4 CHAIRMAN REYNOLDS: So we are changing
5 August --

6 COMMISSIONER HERIOT: I get it. Never
7 mind.

8 CHAIRMAN REYNOLDS: Okay. Let's take a
9 look at our calendars for August. Pick a date.

10 COMMISSIONER MELENDEZ: How about the
11 10th?

12 CHAIRMAN REYNOLDS: Okay. The 10th is on
13 the table. Does everyone have a calendar?

14 VICE CHAIRPERSON THERNSTROM: I'm looking
15 for mine. Hold on.

16 COMMISSIONER HERIOT: I'm okay. I can
17 remember my calendar for August.

18 VICE CHAIRPERSON THERNSTROM: She's lying
19 on a beach.

20 COMMISSIONER BRACERAS: I can only come
21 for the 24th in August or the 31st.

22 COMMISSIONER YAKI: The 31st?

23 COMMISSIONER BRACERAS: Oh, you're right.

24 CHAIRMAN REYNOLDS: So the 10th doesn't --

25 VICE CHAIRPERSON THERNSTROM: What dates

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1 are we talking about?

2 CHAIRMAN REYNOLDS: What about the 17th?

3 COMMISSIONER KIRSANOW: Twenty-fourth.

4 COMMISSIONER YAKI: Jennifer said she
5 can't do the 17th.

6 COMMISSIONER BRACERAS: I've got stuff
7 going on that day.

8 CHAIRMAN REYNOLDS: Okay. The 24th?

9 COMMISSIONER KIRSANOW: I can do the 24th.

10 COMMISSIONER HERIOT: Is the 10th out?

11 CHAIRMAN REYNOLDS: Yes.

12 COMMISSIONER YAKI: Is the 3rd out?

13 COMMISSIONER HERIOT: Then I can do any
14 date.

15 COMMISSIONER YAKI: Is the 3rd out?

16 COMMISSIONER KIRSANOW: No.

17 CHAIRMAN REYNOLDS: We didn't consider the
18 3rd.

19 COMMISSIONER YAKI: Why didn't we consider

20 --

21 COMMISSIONER BRACERAS: The 25th --

22 COMMISSIONER HERIOT: The 3rd is out for
23 me.

24 COMMISSIONER YAKI: Wait, wait, wait.

25 COMMISSIONER BRACERAS: I am basically

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1 booked.

2 VICE CHAIRPERSON THERNSTROM: Say that
3 again, Jennifer. I'm sorry.

4 COMMISSIONER YAKI: Jennifer just
5 basically said, "I'm irrelevant in this discussion."

6 CHAIRMAN REYNOLDS: Okay, folks. We need
7 to end this.

8 COMMISSIONER MELENDEZ: September is the
9 21st for a meeting in September. So it would be about
10 a month.

11 COMMISSIONER KIRSANOW: Twenty-fourth.

12 COMMISSIONER MELENDEZ: Twenty-fourth?
13 That would work.

14 CHAIRMAN REYNOLDS: Okay. Twenty-fourth,
15 going once. Going twice. Gone. It's the 24th of
16 August. Please let's make that change.

17 VICE CHAIRPERSON THERNSTROM: There is
18 this horrible groaning over there.

19 CHAIRMAN REYNOLDS: Okay. So Commissioner
20 Yaki has made the motion. I second it. We have had
21 the discussion, I hope.

22 STAFF DIRECTOR MARCUS: May I just ask by
23 way of clarification whether Commissioner Yaki's
24 motion to give a certain amount of discretion to the
25 Chairman and the Staff Director would enable us to

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1 schedule a business meeting on one of the days
2 currently scheduled only for a briefing if it were
3 necessary to deal with --

4 COMMISSIONER YAKI: Yes, yes.

5 STAFF DIRECTOR MARCUS: Thank you.

6 CHAIRMAN REYNOLDS: Okay. All in favor
7 please signify by saying aye.

8 (Whereupon, there was a chorus of "Ayes.")

9 CHAIRMAN REYNOLDS: Any opposition?

10 (No response.)

11 CHAIRMAN REYNOLDS: Any abstentions?

12 (No response.)

13 CHAIRMAN REYNOLDS: The motion carries
14 unanimously.

15 Vice Chair Thernstrom, I did not know
16 where you left off. So where are we?

17 VICE CHAIRPERSON THERNSTROM: We are --

18 COMMISSIONER YAKI: Pretty much nowhere.

19 VICE CHAIRPERSON THERNSTROM: No. That's
20 not true. Hold on a second.

21 COMMISSIONER YAKI: We did the Website
22 updates.

23 VICE CHAIRPERSON THERNSTROM: Yes. We
24 have done the Website updates.

25 COMMISSIONER YAKI: We have not done the

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1 launch of the Website.

2 VICE CHAIRPERSON THERNSTROM: Procedures
3 for briefing reports.

4 CHAIRMAN REYNOLDS: Okay.

5 COMMISSIONER YAKI: Wouldn't we rather
6 launch the Website before we get into that.

7 CHAIRMAN REYNOLDS: Okay. So we did not
8 -- okay.

9 **-Anti-Semitism Public Education Campaign Web Pages**

10 CHAIRMAN REYNOLDS: On January 20th, 2006,
11 the Commission voted to have the Staff Director
12 produce public education campaign materials to
13 communicate with college students to educate them
14 about their rights and about the available remedies in
15 the event they face anti-semitic discrimination on
16 campus.

17 Staff worked with the GPO to develop a
18 poster and flyer, which the Commission unanimously
19 approved on July 28th, 2006. More importantly, staff
20 also developed a campus anti-semitism Website, which
21 will be situated within the Commission's general
22 Website at www.usccr.gov. The Commission approved the
23 new Website on March 9th, 2007, agreeing that the
24 Website should be launched during this meeting.

25 This campaign has already received a great

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1 deal of favorable attention as well as support from
2 countless organizations within both the higher
3 education community and the Jewish community.
4 Yesterday, for example, one national higher education
5 association praised this campaign as momentous.

6 We are pleased to launch the Website this
7 morning. The particulars, Michele, please press the
8 button launching this. Drum roll, please. Very good.

9 STAFF DIRECTOR MARCUS: And we are live.

10 (Applause.)

11 CHAIRMAN REYNOLDS: Once again I would
12 like to thank the staff for its excellent work in
13 putting together the materials and the Website.

14 VICE CHAIRPERSON THERNSTROM: We all thank
15 the staff.

16 CHAIRMAN REYNOLDS: Okay.

17 CHAIRMAN REYNOLDS: If I am correct, we
18 are up to procedures for briefing reports.

19 VICE CHAIRPERSON THERNSTROM: Yes.

20 **-Procedures for Briefing Reports**

21 CHAIRMAN REYNOLDS: I would like to move
22 -- well, the working group spent quite a bit of time
23 coming up with various proposals. We did not reach a
24 consensus in terms of what the procedure should be.

25 I am going to move to amend our policies

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1 on national projects to provide these procedures for
2 all briefings. All briefings will be subject to the
3 requirement of a concept paper, a defame and degrade
4 review, commissioner review of the initial draft of
5 the report, external review of the report, and final
6 revision of the report.

7 Editorial review and legal sufficiency
8 will be provided when they are appropriate and on a
9 case-by-case basis at the discretion of the Staff
10 Director. Affected agency review will be used when
11 there is another agency that is affected by our report
12 to the same extent as other national office reports.

13 Also under this motion, once a briefing
14 report with findings and recommendations is submitted
15 for a vote, the vote would be conducted in a
16 bifurcated fashion. Commissioners would first vote to
17 approve part A of the report, what Commissioner
18 Braceras has called the clearinghouse portion of the
19 report, containing the executive summary, a
20 description of the topic and summary of the
21 proceedings as well as Commission's questions.

22 Commissioners would then vote on part B of
23 the report. This vote would consist of an
24 item-by-item vote on each finding and each
25 recommendation. Those votes receiving a majority vote

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1 would be included in the report with a vote tally and
2 a sentence explaining any opposition vote for that
3 item.

4 The ability of commissioners to provide
5 concurring or dissenting statements would not be
6 affected by this policy.

7 Is there a second?

8 COMMISSIONER YAKI: Point of order.

9 CHAIRMAN REYNOLDS: Yes?

10 COMMISSIONER YAKI: I don't have a copy of
11 that motion in my binder. Was that sent later?

12 CHAIRMAN REYNOLDS: This is on the fly.
13 This is something that after looking at all of the
14 motions that came down, I am putting this one on the
15 table since we didn't have a consensus.

16 COMMISSIONER YAKI: Can we get copies of
17 that so I could read it more carefully --

18 CHAIRMAN REYNOLDS: Sure, sure.

19 COMMISSIONER YAKI: -- before offering
20 even comment on it?

21 STAFF DIRECTOR MARCUS: It will take a few
22 minutes to get copies made.

23 CHAIRMAN REYNOLDS: Okay.

24 COMMISSIONER YAKI: I would just ask as a
25 point of courtesy that whenever we have new motions on

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1 items, that they be distributed prior to the meeting,
2 if possible, at the day of, or anything that basically
3 is sent Thursday on, I would appreciate it if it were
4 available in hard copy at each commissioner's place,
5 desk on Friday mornings because it is very difficult
6 to get to a printer when you're in a hotel.

7 CHAIRMAN REYNOLDS: No. I think that that
8 is a -- well, as a rule, we generally distribute
9 motions ahead of time, but yesterday sitting down and
10 looking at what we had, I decided to put this on the
11 table to jump-start the conversation.

12 But you are right. It would be best if we
13 and to the extent possible provide hard copies to all
14 the commissioners.

15 VICE CHAIRPERSON THERNSTROM: Yes. I
16 mean, this is very difficult to deal with as simply in
17 oral form here.

18 CHAIRMAN REYNOLDS: Yes. We are going to
19 table this and move to strategic planning.

20 **-Strategic Planning**

21 CHAIRMAN REYNOLDS: The draft strategic
22 plan was approved by the commissioners and was sent to
23 the Office of Management and Budget. The comments
24 made by OMB are included in the draft and appear in
25 the gray boxes to the right of the text of the report.

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1 The most important change was to
2 strengthen and clarify the measures to hold the agency
3 accountable for results before submitting the
4 strategic plan to the appropriate congressional
5 committees.

6 The additional changes by OMB, comments,
7 must be approved by the commissioners. At our last
8 meeting, the commissioners agreed to table the motion
9 until today.

10 I would like to move that the Commission
11 adopt the proposed preliminary draft strategic plan
12 distributed to the commissioners on March 1st of 2007
13 subject to one change. Instead of requiring a
14 50-state SAC report by 2010, we will require a
15 multi-SAC report based on as many SACs as we have been
16 able to charter by that time.

17 Please note that approval of this motion
18 does not constitute approval of the final strategic
19 plan as the draft strategic plan remains preliminary
20 and must be further vetted by OMB and Congress.

21 Is there a second?

22 COMMISSIONER KIRSANOW: Second.

23 CHAIRMAN REYNOLDS: Discussion?

24 COMMISSIONER MELENDEZ: Mr. Chairman,
25 Commissioner Melendez.

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1 I had asked a number of questions to the
2 Staff Director on the strategic plan. And he did
3 answer me on many of those questions, but basically
4 some of the questions I asked were whether or not some
5 of the I don't know whether you call them goals within
6 the strategic plan were actually realistic, you know.

7 And I think his answer to many of the
8 questions I asked was that they're ambitious. So
9 whether that means the same thing, you know, but I'm
10 just saying that as it stands now, I don't really
11 support. I think that it still needs some work on
12 this plan.

13 That's just my opinion. So I just wanted
14 to say that.

15 CHAIRMAN REYNOLDS: Your opinion is
16 important. And I guess I would respond, in part, by
17 saying that this is still preliminary. And there
18 still will be opportunities to improve it.

19 COMMISSIONER MELENDEZ: Right. Just
20 another comment because we have a new commissioner.
21 Also, I don't know if she has had an opportunity to
22 actually go through the plan herself because I
23 remember when I came on this Commission, there were
24 some issues that I had just come on as a new
25 commissioner. And I asked for some like table of the

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1 month so that I had an opportunity to kind of go
2 through it. And they gave me two weeks on -- I forgot
3 what that issue was but the same situation as facing
4 us here with a new commissioner.

5 So I think everybody should have an
6 opportunity. I know everybody is busy, but I am not
7 sure if everybody has totally gone through my
8 questions that I had with the Staff Director on this
9 plan and also maybe have some yourself. I'm just
10 laying that out there.

11 So I just want you to consider that in
12 this motion because this is really a step forward
13 where we're going here with the Commission and has to
14 do with budgeting issues that make it either realistic
15 to attain whatever is in this plan.

16 And I just see our budget going kind of
17 the opposite direction as to what our ambitious vision
18 is here. So I just think that all of the
19 commissioners have to kind of take that into account
20 as they vote on this.

21 And if you do need more time, I would
22 suggest you consider that in your motion. Thank you.

23 CHAIRMAN REYNOLDS: Other comments?

24 (No response.)

25 CHAIRMAN REYNOLDS: Okay. Did we have a

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1 second?

2 COMMISSIONER KIRSANOW: Yes.

3 CHAIRMAN REYNOLDS: Okay. Are we ready to
4 vote? All in favor please signify by saying aye.

5 (Whereupon, there was a chorus of "Ayes.")

6 CHAIRMAN REYNOLDS: Any opposition?

7 COMMISSIONER MELENDEZ: Opposed.

8 CHAIRMAN REYNOLDS: Any abstentions?

9 (Whereupon, there was a show of hands.)

10 CHAIRMAN REYNOLDS: Okay. Please let the
11 record reflect that Commissioner Yaki abstained from
12 the vote, Commissioner Melendez voted against the
13 motion, and the remaining commissioners voted in favor
14 of it. So the motion carries.

15 COMMISSIONER YAKI: Do you want to break?

16 VICE CHAIRPERSON THERNSTROM: He says
17 hopefully.

18 CHAIRMAN REYNOLDS: Yes. Let's take a
19 five-minute break.

20 (Whereupon, the foregoing matter went off
21 the record at 10:54 a.m. and went back on the record
22 at 11:07 a.m.)

23 CHAIRMAN REYNOLDS: On the record. Okay.
24 Everyone should have in front of them a copy of the
25 motion. Jennifer, are you there?

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1 COMMISSIONER BRACERAS: I'm here.

2 CHAIRMAN REYNOLDS: Very good and,
3 Jennifer, did you receive the email?

4 COMMISSIONER BRACERAS: No, I guess not.

5 CHAIRMAN REYNOLDS: Okay. You guess not.

6 COMMISSIONER BRACERAS: I received the
7 calendar --

8 CHAIRMAN REYNOLDS: Okay. The motion,
9 well, we're at the discussion point. Comments?
10 Concerns? Commissioner Heriot.

11 COMMISSIONER HERIOT: I just have a
12 question in that I'm not familiar some of the jargon
13 here. When you refer to an external review of the
14 report, who is the external reviewer?

15 CHAIRMAN REYNOLDS: Staff Director. Well,
16 that's not the answer. Please respond to Commissioner
17 Heriot.

18 STAFF DIRECTOR MARCUS: The Commission
19 adopted a procedure within the last few months under
20 which we have new objectivity criteria for Commission
21 reports including briefing reports as well as other
22 reports. Under those procedures, the Staff Director
23 is required to make certain certifications about
24 objectivity procedural issues such as the balance of
25 speakers. After the Staff Director makes those

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1 certifications, the certification is then reviewed by
2 an outside reviewer who may be either a member of the
3 State Advisory Committee or an outside paid consultant
4 selected by the Staff Director.

5 COMMISSIONER HERIOT: Okay. So this is at
6 the Staff Director's discretion.

7 STAFF DIRECTOR MARCUS: That's correct.

8 COMMISSIONER: And it's not substantive.

9 STAFF DIRECTOR MARCUS: People have -- I
10 find difficult sometimes the distinction between what
11 is called "substantive" and what's called
12 "procedural." It does not deal with whether the
13 content of the report is good or bad or problematic.
14 It goes to whether the determinations of whether
15 certain procedures have been applied to ensure the
16 objectivity of the report.

17 COMMISSIONER HERIOT: Such as?

18 STAFF DIRECTOR MARCUS: Such as a
19 numerical balance of varying and opposing points of
20 view.

21 CHAIRMAN REYNOLDS: Okay. Commissioner
22 Kirsanow, did you have a comment or a question?

23 COMMISSIONER KIRSANOW: What would be the
24 effective date of this if it passed?

25 CHAIRMAN REYNOLDS: I would assume it

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1 would be today since we have --

2 COMMISSIONER KIRSANOW: Let me be more
3 specific. Any briefing reports that are in the
4 pipeline, would it apply to this or would it only
5 apply prospectively to briefing that occur hence
6 forth.

7 STAFF DIRECTOR MARCUS: This is a very
8 good and difficult question and probably one that we
9 should try in a more formalized way to bring. It has
10 been my understanding that all of the recent prior
11 decisions on procedure both in the iterations of AI 1-
12 6 and the motions apply to those activities that take
13 place after the date of the approval. Now that's a
14 little bit more complicated than it sounds in that
15 some of the procedures relate to what happens at the
16 briefing itself. So it applies to all of the
17 briefings that take place afterwards. Some of them
18 apply to the national planning for the briefing which
19 takes place two years in advance.

20 COMMISSIONER KIRSANOW: I'm sorry for
21 interrupting, Mr. Staff Director. The one thing that
22 I see has not been done or may not have been done,
23 I'm not sure, for some of them, it may have been, in
24 terms of this motion for any ending briefings, that is
25 briefings we've already had and that are waiting the

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1 production of a report, is the motion of the concept
2 paper. I don't recall getting concept papers on
3 briefings that we've had already. Maybe I -- I know
4 we've gotten one from statutory report. I think we
5 got something, an explanation, of what we're doing
6 with respect to, for example, No Child Left Behind.
7 But I'm not sure the notion of concept paper -- that
8 the notion of a concept paper was applied to any of
9 the other briefings we've done.

10 STAFF DIRECTOR MARCUS: I believe external
11 review has not yet occurred because it is a procedure
12 that was developed I believe in January. So it
13 applies to reports of briefings that took place since
14 January. We've not yet had a vote on the report of
15 any briefing that took place since January. Concept
16 papers though have been done so far as I recall for
17 all or substantially all of the briefings we've had so
18 far. Some of them were developed in connection with
19 the annual planning. So it would be for the planning
20 meeting.

21 COMMISSIONER KIRSANOW: Okay.

22 CHAIRMAN REYNOLDS: Vice Chairperson
23 Thernstrom.

24 VICE CHAIRPERSON THERNSTROM: I'm back to
25 the extent of the questions. So the Staff Director

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1 said he had a line between -- Sorry about that.
2 (Microphone.) I'm back to the question of the general
3 review of the report. The Staff Director said the
4 line between procedural and substantive review is a
5 little blurred now and then he talked about making
6 sure that the report met the standard of objectivity.
7 Well, does that apply to the findings and
8 recommendations?

9 STAFF DIRECTOR MARCUS: The external
10 reviewer would not address the findings and
11 recommendations per se. He would only address whether
12 certain procedural requirements have been met. I
13 should say that this motion as the Chairman read it
14 would not affect in any way the use of external review
15 for briefing reports because the Commission has
16 already voted a couple of months ago to use external
17 review for all national products including briefing
18 reports. So this is one of the few things where we've
19 already clearly said we're going to be doing it.

20 VICE CHAIRPERSON THERNSTROM: Right. But
21 I understand it that external review, if we agree to
22 have findings and recommendations on briefing reports,
23 that external review does not apply to the findings
24 and recommendations and I just want to make sure that,
25 I just want this to be on the record, we're not going

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1 to cut some kind of objectivity test for findings and
2 recommendations.

3 CHAIRMAN REYNOLDS: Commissioner Melendez
4 and the Commissioner Taylor.

5 COMMISSIONER MELENDEZ: My concern, at
6 least in that part of the whole process, is it almost
7 sounded to me like an external reviewer would actually
8 have some checkout box. He would look to see if
9 certain components were actually done. So it almost
10 sounded to me like he may not even read some standard
11 portion of the report. He may just look at a list and
12 say, "That's in here. This is in here. That's in
13 there." So to me that kind of seemed like that's our
14 external review and if it's different, then you need
15 to tell me that it's something more than some checkoff
16 box that just goes down and checks that certain things
17 are in there as opposed to maybe given some opinion as
18 to whether or not the whole report means something
19 other than just a checkoff box.

20 STAFF DIRECTOR MARCUS: Again, this motion
21 does not affect in any the external review. That's
22 something that was already decided by vote at least a
23 couple of months ago and it's memorialized in AI 1-6
24 in the associated appendix and it does essentially
25 involve completing a checkoff box. It does not entail

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1 the reviewer developing a separate opinion about
2 findings and recommendations or anything else.

3 CHAIRMAN REYNOLDS: Commissioner Heriot.

4 COMMISSIONER HERIOT: I'm just seeking
5 further clarification on this external review.
6 Suppose an external reviewer has that checklist and
7 decides that the procedures were not followed but the
8 Commission disagrees. What happens then?

9 CHAIRMAN REYNOLDS: We have not had to
10 wrestle with that.

11 COMMISSIONER HERIOT: Don't we want to
12 know what happens?

13 COMMISSIONER THERNSTROM: Yes, we do want
14 to know.

15 STAFF DIRECTOR MARCUS: The checkoff box
16 has to be completed before the materials can be
17 forwarded to the Commission. But I'm not aware of
18 anything that constrains the Commission from making
19 its own ultimate determinations.

20 COMMISSIONER HERIOT: So we never see the
21 report until the external reviewer has.

22 STAFF DIRECTOR MARCUS: You will have seen
23 at least one draft previously.

24 COMMISSIONER HERIOT: What would be the
25 procedure if you received an external review that said

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1 this was not complied with and the Staff Director
2 disagrees preliminarily and believes that it has been
3 complied with. Let's start with that possibility.
4 Then what happens next?

5 STAFF DIRECTOR MARCUS: I think we would
6 have to -- I would have to take this back and report
7 to you either at the next meeting or in the interim.

8 CHAIRMAN REYNOLDS: Right.

9 COMMISSIONER HERIOT: That's important in
10 terms of what the procedure is here because one day
11 that's going to happen. It's best not for it to be an
12 explosive situation when it happens. It's best if we
13 know what the procedure is right off the bat
14 especially if we've already gotten this in our AI 1-6.
15 We need to know what it means. So we need a policy
16 on that.

17 CHAIRMAN REYNOLDS: Okay. Commissioner
18 Kirsanow and then Commissioner Melendez.

19 COMMISSIONER KIRSANOW: Yes. First, I
20 concur with Commissioner Heriot on that. It strikes
21 me though that simply in terms of raw delegation of
22 powers we would be the ultimate arbiter of that.

23 CHAIRMAN REYNOLDS: Right.

24 COMMISSIONER KIRSANOW: And we would
25 probably have to vote on it.

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1 CHAIRMAN REYNOLDS: Yes.

2 COMMISSIONER KIRSANOW: And determine
3 whether or not we're going to go forward. But it's a
4 good thing to memorialize that so that we're acting
5 consistent with what we've already designated as our
6 procedure. The question I have is in going through
7 this, unless I'm missing something, how does this
8 fundamentally differ from the procedure used in our
9 statutory report. Other than in paragraph two, I
10 really don't know that there are many differences
11 between the way we handle briefing reports and
12 statutory reports and not that that's a good or bad
13 thing. I just want to know how it does differ.

14 STAFF DIRECTOR MARCUS: The statutory
15 report also has at least one or two other
16 requirements, for instance, the requirement of the
17 discovery plan and I believe there's also a discovery
18 of the outline that also has to be done and an
19 opportunity for the Commissioners to see it. The
20 statutory plan has -- Let me see.

21 COMMISSIONER KIRSANOW: That's correct.
22 My recollection is it comes back to the Commissioners
23 for our input also.

24 STAFF DIRECTOR MARCUS: That's right.

25 COMMISSIONER KIRSANOW: Yes, because we

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1 don't have that stuff in here.

2 STAFF DIRECTOR MARCUS: That's right and
3 I'm not sure where you're calling the second
4 paragraph, but with the statutory report, the
5 editorial review, legal (Background noise) review, are
6 part of the process. It's not --

7 COMMISSIONER KIRSANOW: Right. It's
8 discretionary.

9 STAFF DIRECTOR MARCUS: That's right.

10 CHAIRMAN REYNOLDS: Commissioner Melendez.

11 COMMISSIONER MELENDEZ: Yes. Just I think
12 this whole process really has to do with having a
13 quality report that comes out of this whole process
14 where I looked at this here where it says "Editorial"
15 about the seventh line down, "Editorial review and
16 legal sufficiency review will be provided when they
17 are appropriate on a case-by-case basis at the
18 discretion of the Staff Director." And really I have
19 a problem with that because in my opinion an AI 1-6
20 has been changed in February. So the question would
21 be what were we operating on before February 6 and
22 what was the reason we changed it to that point and
23 have we been operating on what was changed in February
24 when we changed AI 1-2. So AI 1-6 seems to be kind of
25 like shooting from your hip where you change it. But

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1 we really have to understand the reasons for it
2 because even what we're talking about here would
3 change AI 1-6 again.

4 So it sounds to me like AI 1-6 is a
5 discretion of us in some way putting some policies in
6 place. In my opinion, I think what you want to do is
7 take out discretion from a Staff Director to make
8 those calls. I think the process have to be something
9 where we're following some process with limited
10 discretion.

11 Otherwise, we're always going to
12 questioning the Staff Director as the authority that
13 we give him to make the discretion of himself. So I
14 think just a statement in here is what I'm trying to
15 make to ensure that we have a policy that takes a lot
16 of discretion out. That's just my opinion as to
17 what's written here if we're trying to come up with a
18 policy that's pretty much set in stone, not totally.
19 Nothing's really set in stone, but I'm just saying
20 that maybe we need to go back to the reasons of the
21 change of AI 1-6 back in February and what did we
22 accomplish with that and if this is something that
23 will constantly be changing AI 1-6 as we change it
24 again in October. I don't know. So that's my
25 question on this whole process.

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1 CHAIRMAN REYNOLDS: Mr. Staff Director,
2 why is it that some of these items are mandatory while
3 others are discretionary?

4 STAFF DIRECTOR MARCUS: I think that the
5 distinction between editorial review and legal
6 sufficiency on the one hand and some of the others is
7 that editorial review can take a substantial amount of
8 resources and the balance of whether it's justified to
9 a report will depend on a lot of factors like the
10 availability of resources and the complexity of the
11 document, perhaps whether there are findings and
12 recommendations, whether there's a substantial amount
13 of staff work or analysis or whether there isn't a
14 substantial amount of analysis.

15 The way we've been doing editorial review
16 boards requires three staff members to take usually a
17 significant amount of time, at least a few days, and
18 put aside all of their work to focus on this. So the
19 question is to what extent do we want staff members to
20 be working on new projects or to be spending
21 additional time on review of old ones.

22 Legal sufficiency review is important for
23 some documents. For instance, it's important for
24 documents that have either legal citations or legal
25 claims or there might be some sort of legal problem.

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1 But there are other sorts of documents where it's easy
2 to say that there aren't either legal citations or
3 legal issues, but that sending it to OGC might take
4 awhile for them to go through and putting aside other
5 work that they're working on.

6 COMMISSIONER MELENDEZ: Okay. Just
7 another comment. You know, an editorial review, it
8 almost sounded to me like we were doing nothing more
9 than a spell check on it, whatever that means. So I
10 think every one of these that has editorial review
11 really has to tell the Commission exactly what does
12 that mean and are we actually following that so that
13 it's more in-depth than spell check. I don't fully
14 understand what that components means as far as these
15 other things, the legal sufficiency, and I've always
16 been not real clear as to exactly what we were saying
17 as far as those various things I mentioned because
18 we're talking about quality here and I think they are
19 all components of quality.

20 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

21 VICE CHAIRPERSON THERNSTROM: I think what
22 Commissioner Melendez is saying and it really does
23 open the door to another debate here is what he would
24 like to see in the way of editorial review is a review
25 of the substance of the points in the briefing so that

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1 he would define editorial in a very board way and
2 please correct me if I'm wrong on this.

3 I mean as it is we're having a lot of
4 trouble getting these briefing reports out. We have a
5 balanced panel of experts who come and we honestly
6 report what they have to say and then go on. In my
7 view, it's essential to go on for findings and
8 recommendations. I do not think that an editorial
9 review in any sense that encompasses substance is
10 appropriate here.

11 COMMISSIONER MELENDEZ: Right. My point
12 was that we had talked about when people come and give
13 their testimony we basically when we were talking
14 about whether or not we should approve without
15 findings and recommendations we would just say what
16 they said. Let Congress or the President make up his
17 mind as to what was said by all these people who had
18 testified. Then we got into the issue of if you go
19 beyond that and even our staff here under the Staff
20 Director started to insert their own opinions on what
21 those people have said. The question is who do you
22 actually believe when we're inserting our own opinions
23 because many times it's who is whose side and who is
24 actually believing who when we have two people
25 advocating for a certain position, two people against

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1 and then we have our staff basically inserting their
2 opinions. They might line up with somebody I don't
3 agree with. So at some point --

4 VICE CHAIRPERSON THERNSTROM: Wait a
5 minute. At what point are they inserting their
6 opinions?

7 COMMISSIONER MELENDEZ: I thought we were
8 --

9 VICE CHAIRPERSON THERNSTROM: Before the
10 findings and recommendations?

11 COMMISSIONER MELENDEZ: Well, I think that
12 was actually happening in my opinion.

13 STAFF DIRECTOR MARCUS: I'm not aware of
14 it.

15 VICE CHAIRPERSON THERNSTROM: I mean when
16 and what part of the briefing is it happening? Not in
17 this --

18 COMMISSIONER MELENDEZ: For example, when
19 we did the Native Hawaiians that's the reason that the
20 whole thing got thrown out without findings and
21 recommendations because the people that testified in
22 my opinion, there was a lot of insertion if you want
23 in those findings and recommendations.

24 VICE CHAIRPERSON THERNSTROM: Okay. So
25 you're concerned about the findings and

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1 recommendations. This is not a comment on anything
2 that comes prior to the findings and recommendations.

3 COMMISSIONER MELENDEZ: I still am not
4 clear as to this whole process as we're talking about
5 it and we're almost ready to make a motion to approve
6 this paper here which I still have tremendous
7 questions on and I think, our working group, part of
8 the problem is we never could connect to actually
9 fully meet adequacy. I think we cancelled about three
10 or four calls because people couldn't make the call
11 and a lot of this, like you said, was done on
12 conference calls where a couple of us were there. A
13 couple of us were not. So I'm saying we adequately
14 have actually gotten to the bottom of all these many
15 issues I've talked about. That's my opinion and here
16 we're ready to vote on this.

17 VICE CHAIRPERSON THERNSTROM: Wait a
18 minute. This has -- There are two separate issues
19 here. One is the question of findings and
20 recommendations in these briefing reports and the
21 other is the report prior to the list of findings and
22 recommendations. Are you concerned about the
23 editorial review and its meaning with respect to any
24 part of these reports other than the findings and
25 recommendations?

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1 COMMISSIONER MELENDEZ: Again, I'm not
2 sure exactly like I said whether or not editorial
3 review actually met some checkoff list that actually
4 didn't even work. A person hadn't even read the
5 report. So the only point I'm making, I'm not real
6 comfortable with this whole -- the many issues that
7 are on this paper here.

8 So I could raise a number of questions on
9 this. I'm sure others will also. But I'm just saying
10 if we're ready to vote on this, I'm not real
11 comfortable with it.

12 CHAIRMAN REYNOLDS: Commissioner Yaki and
13 then Commissioner Kirsanow.

14 COMMISSIONER YAKI: Just to pick on
15 Commissioner Melendez's point and in response to
16 Commissioner Thernstrom, I think that quite frankly it
17 goes to both. I have chosen because it gets to be, I
18 think, ticky-tacky at some point, but other points
19 I've been rather disturbed to see what was cobbled out
20 of my questions and answers to panelists in some of
21 these reports. Whether something is in quotations or
22 not or something is characterized a certain way, to me
23 in the end I'm willing not to get too much into it
24 because it then starts getting into a wholesale
25 relearning. But to the extent that there's editorial

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1 review of that, I think that would be very useful.

2 I also think that editorial review goes to
3 the question of whether or not, and I think this goes
4 to Commissioner Melendez's second point, there is
5 substantial evidence in the record before us to
6 substantiate some of the findings at the very least in
7 these reports and I think that Native Hawaiian is a
8 good example of that. But I also think that there are
9 other examples as well including in the report that
10 we're going to be discussing today where I find it
11 very difficult to accept the notion that anyone who
12 was doing editorial review and all of us write. All
13 of us do writings and we all know that we get
14 questioned by our editors whether or not a statement
15 that we make that is sweeping as the need to be
16 substantiated by a bibliography or other sorts of
17 things rather than simply our own take of what we
18 believe the state of literature to be and I believe an
19 editorial review can and should go toward that. But
20 there are bigger issues involved here and we're just
21 doing this in chunks. So I'm going to reserve the
22 rest of my remarks for later.

23 VICE CHAIRPERSON THERNSTROM: I would just
24 like him to clarify something he said before he goes
25 on.

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1 COMMISSIONER YAKI: I'm sorry.

2 CHAIRMAN REYNOLDS: Vice Chairperson
3 Thernstrom would like you to clarify a statement you
4 made.

5 VICE CHAIRPERSON THERNSTROM: Yes. Has
6 there been an occasion, I'm speaking again not to the
7 question of finding some recommendations, but you
8 complained about, for instance, on occasion, the
9 summary of your own remarks, your own questions posed.

10 I don't remember an occasion on which, but maybe you
11 do, I haven't had the opportunity to correct the
12 characterization of what I said at the briefing.

13 COMMISSIONER YAKI: It kind of gets to be
14 completely honest, Commissioner Thernstrom, it gets to
15 the point where if I know that I'm going to basically
16 be trashing on the report anyway, what's the point of
17 adding in three or four more lines to make a point
18 that I thought I was making clear a little more clear
19 or a little bit less editorialized.

20 VICE CHAIRPERSON THERNSTROM: Wait a
21 minute. That's your choice not to have your voice
22 properly represented in the body of the briefing
23 report. It seems to me that this is for the record as
24 it were for the ages and it seems to me that it's in
25 your interest to have your voice properly reflected

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1 and I don't see what that has to do with applying some
2 recommendations and questions. It's completely
3 separate question and our procedures do allow you to
4 collect your own voice.

5 COMMISSIONER YAKI: That may be. On the
6 other hand, if we want to start going down this road,
7 to me paragraph two of this motion does nothing more
8 than ratify the status quo that many of us were
9 attempting to change. By providing a case-by-case
10 discretion for all briefing reports, the Staff
11 Director is basically, I believe, the status quo as it
12 sits right now.

13 CHAIRMAN REYNOLDS: But that's not what it
14 says. Certain issues in certain areas the Staff
15 Director has discretion. In other areas, the Staff
16 Director does not.

17 COMMISSIONER YAKI: It says, "Editorial
18 review and legal sufficiency will be provided when
19 they are appropriate on a case-by-case basis at the
20 discretion of the Staff Director." What about that
21 sentence am I not understanding?

22 CHAIRMAN REYNOLDS: Prior to that, we also
23 talk about a concept paper, defame and degrade, and
24 the fact that the Commissioners will receive an
25 initial draft. There will be an external review of

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1 the report and a final revision of the report. None
2 of those items are discretionary.

3 COMMISSIONER YAKI: With all due respect,
4 Mr. Chair, it's like putting spackle on a leaking hole
5 as far as I'm concerned. Fine. We have been doing
6 concept papers as the Staff Director pointed out.
7 Defame and Degrade, I think we have been doing as the
8 Staff Director has pointed out on a number of
9 occasions especially with regard to a report where we
10 had something corrected, even though if we had done
11 defame and degrade. We do have initial review of the
12 initial draft and we do review the final revision, of
13 course.

14 What I am talking about is that it goes to
15 what I call the unknown data that comes into these
16 reports and that is the stuff that appears in the
17 findings and recommendations which is why I think
18 editorial review is necessary there as well. It's not
19 just about objectivity. It's also about the academic
20 scholarship involved in those findings. So they're
21 not just simply taken out of thin air based upon
22 extraneous research or points and information that was
23 not before us in the record of these briefings and
24 which is why quite frankly I have had the most trouble
25 with briefing reports to begin with.

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1 When we have four people testify, two on
2 one side, two on another, it stands to reason to me
3 that you are not going to be getting everything that
4 you would need to move onto the next level which is
5 now we're going to take a position. That to me is
6 something that I might have done at the Board of
7 Supervisors in San Francisco. But let me tell you.
8 That is not what I would want to see done at the
9 United States Commission on Civil Rights which is far
10 greater mandate, far greater responsibility, far
11 greater impact, than whether or not we approve zoning
12 for someone's backyard expansion. This is not that
13 kind of a thing.

14 When we have again just two people on
15 either side talking about that, talking about an
16 issue, I don't understand how we can possibly find
17 that there is clear and preponderant evidence or
18 testimony on one side or the other. The reason we're
19 talking about this is because there are going to -- I
20 admit.

21 There are going to be occasions when if we
22 did an issue on campus racism which I think actually
23 we should expand now this to campus racism in general
24 given what's going on in the world today and I don't
25 think that any of us here would have a panel in which

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1 there would be two white supremacists and any of us
2 would agree with their point of view. But those
3 exceptions, I think, proving the rule when you have a
4 situation like we did in the report that we'll be
5 talking about later today. I think that this kind of
6 editorial and legal editorial review is not just --
7 should be at the discretion of the Staff Director. I
8 believe that at some point the Commission should be
9 able to direct that it be mandatory.

10 VICE CHAIRPERSON THERNSTROM: But I was
11 trying to separate the findings and recommendations
12 question from the rest of it because I think we need
13 to talk about that separately. You are merging the
14 two.

15 CHAIRMAN REYNOLDS: Vice Chairperson
16 Thernstrom, Commissioner Kirsanow is next up in the
17 queue.

18 VICE CHAIRPERSON THERNSTROM: I'm sorry.

19 COMMISSIONER KIRSANOW: Many of the issues
20 raised by Commissioners Melendez and Yaki are
21 obviously important issues, but I think that this
22 procedure contemplates those issues. We do have a
23 mechanism to address these matters such as the ability
24 to file a dissent, the ability to review these things,
25 and also these is the first time we will have a vote

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1 on each discrete item which that vote (Microphone
2 noise) further someone who is a third party can look
3 at it and decided for himself whether or not this is
4 the position, the unanimous position, or if it's a
5 mixed position, divided up positions.

6 In terms of editorial review, my
7 understanding of editorial review would be simply
8 that. It's a rote process that doesn't get into the
9 substance of the findings and recommendations. I
10 think that's what our charge is and I think there's
11 nothing in this that detracts from that.

12 In fact, when we had briefings in the
13 past, this is an improvement insofar as even to the
14 extent there are no changes in certain aspects of the
15 procedure, at least it's in writing. So we can make
16 reference to it and we have a check on ourselves,
17 whereas in the past, we haven't had that and in the
18 past, you would have reports that were wildly
19 untethered to the testimony that was received or any
20 of the documents we received.

21 Commissioner Yaki was making the point
22 when we have a balanced panel, there's really a great
23 difficulty entailed in coming up with findings and
24 recommendations. But simply because the panel is
25 balanced doesn't mean that the evidence adduced is

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1 balanced. A good example would be K through 12
2 education that we had in July of last year when we had
3 a balanced panel, but all of the evidence with the
4 exception of maybe one or two discrete reports to
5 which they referred seemed to suggest proposition A as
6 opposed to proposition B.

7 And I think that to the extent that
8 there's an disagreement that that's what all the
9 evidence suggests, there is an ability to file a
10 dissent. There's an ability for us to have a review
11 as Commissioners and talk about it. We, I think, have
12 been collegial in that respect. Again, I hate
13 referring to the past, but the fact is that's our
14 starting point and in the past there was no ability
15 for commissioners to have any input. We would simply
16 get this thing. It would be a complete product and
17 then we would vote on it. Whereas here we could look
18 at it and say, "Wait a minute. This doesn't have any
19 connection to what was adduced at the hearing and may
20 be amended as a result." But I think there are some
21 safeguards. Is it a perfect procedure? I'm agnostic
22 about it, but I think this is something that I could
23 lend my support to.

24 CHAIRMAN REYNOLDS: Commissioner Heriot.

25 COMMISSIONER HERIOT: I just want to

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1 clarify here. I assumed that it would be in order for
2 a commissioner to make a motion to amend a report.

3 CHAIRMAN REYNOLDS: That is correct.

4 COMMISSIONER HERIOT: Even at the final
5 stages.

6 CHAIRMAN REYNOLDS: That is correct.

7 VICE CHAIRPERSON THERNSTROM: Yes.

8 COMMISSIONER HERIOT: And that it would be
9 in order for the Commission to vote to require the
10 Staff Director to conduct a legal sufficiency review.

11 CHAIRMAN REYNOLDS: That is correct.

12 COMMISSIONER HERIOT: If they think it's
13 appropriate. Okay.

14 CHAIRMAN REYNOLDS: Commissioner Melendez.

15 COMMISSIONER MELENDEZ: Again, I want to
16 understand the process because I would ask the Staff
17 Director to give us an example of what we call an
18 editorial review process and in the process we'd
19 determine how the reviewer is chosen. That would seem
20 to me if we're would saying the A-1 process is
21 important we could read that or is it something where
22 he would say, "Chris Burns, I want you to read this."
23 So I'm talking about what process is it that tells
24 certain people are the reviewers and all those
25 different things and then how are their concerns

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1 reported into this document. So I'm not sure exactly
2 what this process is.

3 Maybe the Staff Director can tell us how
4 does the review process actually work, how does he
5 choose the so-called panel and are they the same
6 people or different people? Are we shooting from the
7 hip or is it something that's really laid out that
8 certain people are on this panel? I don't totally
9 understand how that works right now.

10 STAFF DIRECTOR MARCUS: I would be happy
11 to. I construe the term "editorial review" as being
12 harmonized with editorial review board as the term is
13 used in AI 1-6 and elsewhere in the AIs. So we do
14 spell out at least some aspects of what's done in
15 editorial review.

16 It is a process for a panel of usually
17 three members of the staff to review a document
18 usually with the focus on a few things in mind such as
19 the balance of the document, the support for
20 propositions in the document as well as what would
21 normally think of as editorial issues more narrowly
22 construed which is to say the quality of the writing
23 as well as the quality of the analysis.

24 I typically like to have both continuity
25 and change on the panels. I like to have a rotation

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1 of members of the panels. I do like to have one
2 person see as many of these as possible so that I can
3 get an assessment of how does this stack up especially
4 if we're talking about regional products as well. How
5 did this stack up with comments on the one we got last
6 month or the one we got the month before? But I also
7 like to have people from different offices and people
8 who were not involved in the preparation of the
9 underlying document. Typically, I try to have at
10 least one person who is from a headquarters office
11 other than the Office of the Staff Director and when
12 possible, I will get one person from the regional
13 office and I'll try to vary it up depending upon the
14 work load of different offices and the needs that we
15 have and I like to try and get different skill sets
16 involved. I might like to have an attorney on it but
17 not necessarily three attorneys. If possible, I like
18 to have at least one other social scientist or analyst
19 and I try to get different office perspectives on the
20 document. And that's true whether it's the editorial
21 review board for a regional document or an editorial
22 review board for a national document.

23 COMMISSIONER MELENDEZ: Okay. Just one
24 other question. How does the editorial review and all
25 the staff that you have working on that play into the

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1 findings? Is that the basis for the findings that
2 have come out say in the affirmative action in law
3 schools which we'll be talking about later today? Is
4 that the basis where all that comes from?

5 STAFF DIRECTOR MARCUS: You know, to the
6 best of my knowledge, I have not made changes in the
7 editorial review board process as opposed to what
8 we've done before, although I haven't spoken with the
9 prior staff director about it. The custom and
10 practice has been not to include findings and
11 recommendations in the editorial review process.

12 Typically, they were not included there
13 because the notion was that that's not editorial.
14 That's more of a policy issue. They have been
15 included more recently in a couple of editorial review
16 boards, but it's not required and it wasn't usually
17 the way it was done in the past.

18 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

19 VICE CHAIRPERSON THERNSTROM: Commissioner
20 Yaki, I have to say that, I can't resist saying that,
21 when you said if we have a balanced panel who, let's
22 say, it's an issue that lends itself to this kind of
23 polarization, two on one side, two on the other side
24 and then you look at the findings and recommendations
25 and you said, "Gee. It was a balanced panel, but the

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1 findings and recommendations, particularly the
2 recommendations, probably don't seem to reflect that
3 two and two balance." My reaction is fine. Let's
4 have more imbalanced panels and then there will be
5 findings and recommendations which will flow clearly
6 from what has been before us, presented to us, and I
7 don't think that that's what you want. Look, we have
8 balanced panels and, you know, we start to think
9 ourselves. That seems to me our job.

10 COMMISSIONER YAKI: And there's a
11 difference between thinking for ourselves and -- Well,
12 let me put it as kindly as I can. My concern about
13 the briefing reports and where we were headed, the
14 direction that we were headed in in conversations with
15 Commissioner Braceras and Taylor and Melendez on
16 briefing reports is my concern that we deviated from
17 the original concept of what briefings were supposed
18 to be. They were supposed to be briefings. They were
19 not supposed to become briefing reports. It was
20 supposed to be a way of hearing an issue, listening to
21 what's going on and then in terms of thinking for
22 ourselves, Commissioner Thernstrom, I thought that it
23 would be appropriate for us to ask further questions,
24 to develop that four people in two hours could not
25 possibly begin to develop with us. It would be

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1 explore additional lines of inquiry, of research, of
2 whatever that would lend itself to a more credible
3 product in the end.

4 What we are doing here and what you call
5 thinking for ourselves to me does nothing more than
6 create a procedural fig leaf for the imposition of
7 certain views as a result of these reports. If that's
8 where they are going, I mean, I certainly don't have
9 the votes on this commission to deal with that. But
10 I'm just telling you that in the spirit of compromise
11 and seeking to broker some harmony on this issue, a
12 topic that has not been addressed but one that was
13 addressed seriously by Commissioners Braceras, Taylor,
14 Melendez and myself came up in the context of two
15 things, one that there was this discord on the
16 Commission over the fact that at least two of us here
17 believe that it was not the original intent of
18 briefing reports to then proceed off on policy at full
19 speed based on two hours of testimony, No. 1.

20 But No. 2 and more importantly, was the
21 fact that in so doing, we created a fairly substantial
22 backlog of work for our own staff for our own product
23 to the point where it was starting to become stale.
24 Omaha is becoming stale. In terms of the developments
25 going on in Omaha today, it was a great hearing

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1 envisioned by the Chair to go there and to send and
2 offer our view point and our and our moral authority
3 there. It helped galvanize a lot of people into
4 coming forth and putting out points of view. And then
5 every month I get an email from someone saying is the
6 report ready, is the report ready, is the report
7 ready, and life is just moving on there.

8 So the compromise that we started talking
9 about was to have something along the lines of two or
10 three full-blown briefing reports. That would be my
11 concession to go ahead, put out what you want to put
12 out. I can't stop it. But at the same time, let's
13 also not forget the fact that there are some issues
14 where a briefing is just a briefing and we can talk
15 about it and we can ask about more questions. We can
16 look for certain lines of inquiry and move on and that
17 has the added impact of reducing the backlog on the
18 staff from attempting to justify and defend what goes
19 on in these findings and recommendations that we're
20 going to fighting about for two hours later on today.

21 That's where we were going and I was quite willing to
22 make that kind of compromise. I don't see that here
23 today and so you can understand my dissatisfaction
24 with the result and why -- I'll just stop talking
25 about it and why don't we just vote it through since

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1 I'm not going to prevail on it.

2 COMMISSIONER BRACERAS: Can I be heard?

3 CHAIRMAN REYNOLDS: Yes. Commissioner
4 Braceras.

5 COMMISSIONER BRACERAS: (Speaking from
6 unmiked location.)

7 CHAIRMAN REYNOLDS: Commissioner BRACERAS,
8 Jennifer, can you go closer to the microphone on your
9 phone?

10 COMMISSIONER BRACERAS: Yes. Can you hear
11 me now?

12 CHAIRMAN REYNOLDS: Yes.

13 COMMISSIONER BRACERAS: Hello?

14 CHAIRMAN REYNOLDS: That's better.

15 COMMISSIONER BRACERAS: All right. The
16 first is as I said from the beginning that there are
17 two sets of issues here. One involves front end
18 procedures and has to do what happens at the staff
19 level. The other has to do with back end procedures
20 and how we as commissioners procedurally handle these
21 reports.

22 So one possibility is to go on to aspects.

23 The other part is that although we have something
24 today that doesn't end for today on this and I think
25 that the working group can continue to tinker with

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1 these policies and fine-tune them. I think if I'm not
2 mistaken the rationale for bringing these policies and
3 procedures forward for a vote today is so that we can
4 move forward with the reports that are becoming stale,
5 obviously a work in progress for dealing with them
6 until such time that we can come up with something
7 better.

8 We should always strive for something
9 better and I'm willing to continue to do that. But I
10 do think it's critical that we get some procedures in
11 place today so that we can review the reports better
12 on the table and that will be coming to the table in
13 the next two months. That I guess goes to, I think,
14 it was Commissioner Kirsanow said, as to whether what
15 we're approving is prospective or retrospective. I
16 would argue that with at least with respect to the
17 back-end procedures and how Commissioners vote on and
18 profit from anything we vote on today will be tied to
19 any subsequent vote we take under 4 CFR before, today
20 or in the future until we come up with something
21 different. That's all I have to say about that.

22 CHAIRMAN REYNOLDS: Okay. Are there other
23 questions? Commissioner Taylor.

24 COMMISSIONER TAYLOR: Very quick comments.
25 First is that this is not, I think, the final word on

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1 this. I think we should continue to work even after
2 this vote today. I think it's important though to
3 vote on this today to move the reports in the pipeline
4 at some point. The ones in the pipeline really worry
5 me and we're holding ourselves back.

6 But the larger issue to Commissioner
7 Yaki's point of the issue of briefings evolving is
8 that when the briefings were first raised the thought
9 was that frankly there would be a lot of briefings
10 every year. And I want to point out to everyone if we
11 look at our calendar we've adopted, we have four
12 listed and I think we've had two more that are not
13 listed. We have actually reduced the number of
14 briefings that we intend to hold throughout the year
15 and I think that in large measure addresses the point
16 raised by Commissioner Yaki and even his suggested
17 compromise of two to three is not a far cry from the
18 six briefings we're going to end up with in reality.

19 I think we've had two lines that have been
20 getting closer and closer and I think they are very
21 close now and I think that marginal difference is not
22 a reason to hold back the reports in the pipeline
23 today. But I think even that marginal difference can
24 be reconciled over the next two months with a little
25 bit of work. So we should do both, I think,

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1 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

2 VICE CHAIRPERSON THERNSTROM: I agree we
3 should bring this to a vote and I also agree that this
4 is not the final word. I would say however that there
5 remain on the table very important disagreements that
6 I don't think are going to get papered over with
7 further discussion.

8 CHAIRMAN REYNOLDS: Commissioner Melendez.

9 COMMISSIONER MELENDEZ: Just going back to
10 where we started discussing this whole process, I
11 don't know when it was, the issue actually was whether
12 or not it sounded to me like AI 1-6 applied to all
13 reports, statutory, all the different reports we had.

14 At the time, we were going to ask a question as far
15 as formal hearings, you know, that would be where we
16 can subpoena witnesses basically and maybe there's
17 more process and procedures on recommendations and
18 findings in hearings. So I wasn't even sure whether
19 or not this Commission was supposed to doing briefings
20 that led up to hearings, maybe we're the eyes and
21 ears, and when important issues in this country come
22 in the form of a briefing, we sure knew it wasn't
23 coming from the SACs. I mean I never really heard
24 what was going on there that really trickled into the
25 Commission here. So it seemed to me with all the

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1 different briefings that we were holding some of those
2 would actually be so important that they'd actually
3 end up being a hearing. I'm not sure whether that's
4 part of the process or not.

5 But at the very beginning, the question
6 was should AI 1-6 be for all reports. It sounded
7 logical to me. But then at some point, we started to
8 change. At some point in February and all these
9 different reasons, it sounds like we wanted to become
10 more discretionary in not having this legal
11 sufficiency and editorial review and all that stuff.
12 We wanted to kind of give them more discretion. To
13 me, it sounded like we should just maintain that all
14 reports coming out of the Commission are quality, that
15 we should applied the same AI 1-6 standards to
16 everything. I think that's where we kind of went off
17 on some watered-down process with discretion in it
18 within the Staff Director doing some of this.

19 That's my issue here and not only that.
20 In the GAO Report of 2006, it sounded like he was
21 actually looking at those very things that we're
22 talking about today. So in my opinion, if we make
23 this motion here today, we haven't really increased
24 quality. Actually, we've decreased the quality of the
25 reports that are going to come out of this Commission.

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1 So that's the reason I would oppose this. I just
2 think that there's a lot more work we have to do to
3 come to some agreement. Thank you.

4 CHAIRMAN REYNOLDS: The work will continue
5 and ask for AI 1-6 applied to whole briefing. At
6 least one Commissioner has taken the position that
7 that rule applies to all reports, but other
8 Commissioners have taken a different position. For
9 example, I don't believe, that AI 1-6 when that rule
10 was put into place, I don't believe that there was an
11 intent to have it apply to briefing reports. There
12 was no discussion at that time. Well, at the time
13 that it was put into place, the discussion centered
14 around our national reports. It was some months later
15 when we decided to do briefings. Well, the briefings,
16 the decision to do briefings came after the decision
17 to apply the standards that are in AI 1-6. So I just
18 want to be clear that there is a disagreement as to
19 whether we intended AI 1-6 to apply to both briefings
20 and national reports.

21 COMMISSIONER BRACERAS: Can we call the
22 question?

23 VICE CHAIRPERSON THERNSTROM: Yes.

24 CHAIRMAN REYNOLDS: All in favor please
25 signify by saying aye.

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1 (Chorus of ayes.)

2 CHAIRMAN REYNOLDS: In all in opposition.

3 (Two opposed.)

4 COMMISSIONER YAKI: No.

5 COMMISSIONER MELENDEZ: Opposed.

6 CHAIRMAN REYNOLDS: Please let the record
7 reflect that Commissioners Yaki and Melendez opposed
8 the motion. The remaining Commissioners support it.
9 The motion carries.

10 **VI. PROGRAM PLANNING - AFFIRMATIVE ACTION IN LAW**

11 **SCHOOLS BRIEFING REPORT**

12 CHAIRMAN REYNOLDS: The next item on the
13 agenda is the Affirmative Action in Law School
14 Briefing Report. Consideration of this report was
15 postponed until the new procedures for briefing
16 reports were approved. That this has now been
17 resolved, may I have a motion that the Commission
18 approve for publication along with any concurring and
19 dissenting statements submitted by any Commissioner by
20 March 23 -- I'm sorry. Hold on. How much time do
21 folks -- How much time will folks need to review?
22 Will two weeks suffice?

23 VICE CHAIRPERSON THERNSTROM: No.

24 CHAIRMAN REYNOLDS: Okay. A month?

25 COMMISSIONER BRACERAS: To review what?

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1 CHAIRMAN REYNOLDS: To review the report.

2 COMMISSIONER BRACERAS: Which report are
3 you talking about?

4 CHAIRMAN REYNOLDS: The Affirmative Action
5 in Law Schools Briefing Report.

6 COMMISSIONER BRACERAS: Haven't we
7 reviewed that for a month?

8 STAFF DIRECTOR MARCUS: I think the
9 question is if anyone wants to write a concurring or
10 dissenting opinion that hasn't yet been completed, how
11 much additional time they will need.

12 CHAIRMAN REYNOLDS: That's right.

13 COMMISSIONER BRACERAS: Okay. Thank you.

14 CHAIRMAN REYNOLDS: Will 30 days do?

15 VICE CHAIRPERSON THERNSTROM: Yes.

16 COMMISSIONER YAKI: No.

17 VICE CHAIRPERSON THERNSTROM: Wait a
18 minute. How much time do you -- Do you want a year?

19 COMMISSIONER BRACERAS: -- probably three
20 or four.

21 COMMISSIONER YAKI: I'm sorry. Perhaps
22 the fact that as a partner in a law firm, I have other
23 responsibilities as well.

24 VICE CHAIRPERSON THERNSTROM: I'm sorry.

25 COMMISSIONER YAKI: This is a very heavy

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1 month for me.

2 VICE CHAIRPERSON THERNSTROM: Yes. I'm
3 sorry. I apologize, Commissioner Yaki.

4 COMMISSIONER YAKI: I have patients that
5 are going berserk right now. I've been basically -- I
6 email back and forth to my office and I'm on travel
7 half this month devoted toward these case.

8 VICE CHAIRPERSON THERNSTROM: I'm sorry.
9 I apologize for that. I do. It was uncalled for.

10 CHAIRMAN REYNOLDS: Okay. Commissioner
11 Yaki.

12 COMMISSIONER YAKI: I would like 45 days.

13 CHAIRMAN REYNOLDS: Any objections to 45
14 days?

15 (No response.)

16 CHAIRMAN REYNOLDS: Okay. All right. So
17 the dissents and conferring statements will be
18 submitted 30 days from today.

19 COMMISSIONER YAKI: Forty-five.

20 CHAIRMAN REYNOLDS: I'm sorry. Forty-five
21 days from today. Part A of the Affirmative Action in
22 Law Schools Briefing -- I'm sorry. This draft
23 reflects Commissioner and panelists' input on the
24 briefing the Commission held on June 16, 2006 on
25 Affirmative Action in American Law Schools.

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1 Part A as distributed in draft form to
2 Commissions on April 5, 2007 contains an executive
3 summary with a brief overview of the issue and an
4 explanation of why the Commission chose to conduct
5 this briefing. A summary of the proceedings
6 consisting of synopses of the panelists' oral
7 statements during the briefing and a synopsis of the
8 question and answer sessions and finally copies of the
9 panelists' written statements.

10 Under this motion if a majority of the
11 Commissions votes to adopt Part A of the briefing
12 report the Commission will then open discussion on
13 Part B. Is there a second?

14 VICE CHAIRPERSON THERNSTROM: Second.

15 CHAIRMAN REYNOLDS: Discussion.

16 COMMISSIONER YAKI: Point of order. In
17 terms of the new procedures that we adopted today, I'd
18 like to know whether or not what effected agency
19 review was conducted with regard to this report.

20 CHAIRMAN REYNOLDS: May I amend your --
21 Offer a friendly amendment and ask whether this report
22 conforms to the procedures that we just adopted.

23 COMMISSIONER YAKI: That can be it, but I
24 was just asking about effected agency reviews since
25 our findings and recommendations make mention of

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1 various agencies.

2 STAFF DIRECTOR MARCUS: I know that
3 Commissioner Melendez previously asked that question
4 and I responded to all of the Commissioners and my
5 recollection is that the answer on this one is that
6 there was no agency that was deemed to require a review.
7 So it did not go to any agency for that.

8 COMMISSIONER YAKI: What determines -- I
9 don't mean to beat a dead horse, but what determines
10 whether or not an agency is entitled to review or not
11 because it says there's another agency affected by the
12 report. Here we're talking about the National
13 Academy. We're talking about Congress. I just wanted
14 to know whether or not -- And by implication through
15 this, the Department of Education, I'm just wondering
16 if they had been consulted as part of this as well.

17 STAFF DIRECTOR MARCUS: In general the
18 question is whether the work of other agencies is
19 assessed or described or analyzed or criticized in any
20 way with which they would need to comment on or
21 correct and that was considered not to be the case for
22 this document.

23 COMMISSIONER YAKI: It wasn't?

24 STAFF DIRECTOR MARCUS: That's correct.

25 COMMISSIONER YAKI: Not withstanding the

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1 fact that these standards dealt with the Department of
2 Education in terms of Standard 211 and -- I'm just
3 curious. The answer is no?

4 STAFF DIRECTOR MARCUS: The answer is no.

5 COMMISSIONER YAKI: Okay.

6 CHAIRMAN REYNOLDS: Other questions?
7 Comments?

8 VICE CHAIRPERSON THERNSTROM: Call the
9 question.

10 COMMISSIONER YAKI: No, we're going to go
11 on the findings recommendations that we're going to
12 vote on each one one at a time, right?

13 CHAIRMAN REYNOLDS: No, first we have to
14 vote on Part A before we get to Part B.

15 COMMISSIONER KIRSANOW: Okay.

16 CHAIRMAN REYNOLDS: All in favor, please
17 signify by saying aye.

18 (Chorus of ayes.)

19 CHAIRMAN REYNOLDS: Objections? Opposed?

20 COMMISSIONER YAKI: Opposed?

21 CHAIRMAN REYNOLDS: Abstentions?

22 COMMISSIONER MELENDEZ: I abstain.

23 CHAIRMAN REYNOLDS: Please let the record
24 reflect that Commissioner Yaki opposes the motion.
25 Commissioner Melendez abstains and the remaining

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1 Commissioners voted in the affirmative.

2 COMMISSIONER YAKI: I'll change my vote to
3 abstain.

4 CHAIRMAN REYNOLDS: Okay. Please let the
5 record reflect that both Commissioners Melendez and
6 Yaki abstain from the vote. The remaining
7 Commissioners vote in favor. The motion carries.

8 Okay. Since the Commission has adopted
9 Part A of the briefing report, we will address Part B.
10 Part B as distributed in draft form to Commissioners
11 on April 5, 2007 contains the Commission's findings
12 and recommendations. Under this motion, the
13 Commission will vote individually on each finding and
14 recommendation.

15 The first finding reads as follows:
16 "Richard Sander, November 2004, Article, Systematic
17 Analysis of Affirmative Action in American Law Schools
18 in the *Stanford Law Review*, attributed disparities
19 between white and African American law students in
20 grades, graduation and bar passage rate to an academic
21 mismatch. Specifically, Professor Sander concluded
22 that large racial preferences employed by law schools
23 in admissions had demonstratively counterproductive
24 effects on their intended beneficiaries, that is, many
25 African American law school applicants are admitted to

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1 law schools for which they are not academically
2 qualified." Is there a second?

3 VICE CHAIRPERSON THERNSTROM: Second.

4 CHAIRMAN REYNOLDS: Discussion.

5 (No response.)

6 CHAIRMAN REYNOLDS: Okay. I'll call the
7 question. All in favor?

8 (Chorus of ayes.)

9 CHAIRMAN REYNOLDS: All in opposition?

10 COMMISSIONER MELENDEZ: Aye.

11 COMMISSIONER YAKI: Aye.

12 CHAIRMAN REYNOLDS: Let the record reflect
13 that Commissioners Melendez and Yaki oppose the
14 motion. The remaining Commissioners vote in favor.
15 The motion carries.

16 COMMISSIONER BRACERAS: Just a point of
17 information. Is that going to be specifically
18 indicated under finding, how many votes for and how
19 many against?

20 CHAIRMAN REYNOLDS: Yes. I believe that
21 our new rule requires that.

22 VICE CHAIRPERSON THERNSTROM: Yes, with
23 the identification of.

24 COMMISSIONER BRACERAS: Yes.

25 CHAIRMAN REYNOLDS: Of the Commissioners

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1 who --

2 VICE CHAIRPERSON THERNSTROM: Yes.

3 CHAIRMAN REYNOLDS: Okay. I move -- The
4 second finding is "both Sander's supporters and
5 critics have agreed that there are significant
6 disparities between white and African American law
7 students in terms of grades, graduation and bar
8 passage rates. However, others disagree with Sander's
9 assertion that academic mismatch is the culprit. Data
10 that would enable researchers to further evaluate the
11 strength of the academic mismatch theory is not widely
12 available." Discussion. Commissioner Yaki.

13 COMMISSIONER YAKI: Yes, I move to amend
14 this one to state that "both Sander's supporters and
15 critics have agreed that there are strikingly
16 significant disparities between white and African
17 American law students in terms of grades, graduation
18 and bar passage rates. The vast majority of the
19 literature disputes Sander's statistical and
20 scientific conclusions and do not agree with Sander's
21 assertion that academic mismatch is the culprit."
22 That's how I would amend it.

23 CHAIRMAN REYNOLDS: Okay. Vice Chair
24 Thernstrom.

25 VICE CHAIRPERSON THERNSTROM: I can't go

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1 along with that. First place --

2 COMMISSIONER YAKI: Of course, you can't.

3 VICE CHAIRPERSON THERNSTROM: Yes. First
4 place, if there aren't significant disparities, then
5 why is this even an issue?

6 COMMISSIONER YAKI: Exactly.

7 VICE CHAIRPERSON THERNSTROM: I mean if
8 there are trivial disparities we shouldn't even be
9 talking about the question. And, no, I can't possibly
10 sign on to the notion that to some suggestion that
11 Sander's work lacks --

12 COMMISSIONER HERIOT: We don't have a
13 second yet. So there's no --

14 COMMISSIONER KIRSANOW: Yes, we need a
15 second to amend it.

16 VICE CHAIRPERSON THERNSTROM: I'm sorry.

17 CHAIRMAN REYNOLDS: Okay. Is there a
18 second?

19 COMMISSIONER BRACERAS: Yes, second.

20 CHAIRMAN REYNOLDS: All right. Vice Chair
21 Thernstrom, have you completed your thought?

22 VICE CHAIRPERSON THERNSTROM: The second
23 thought was simply that the second part of
24 Commissioner Yaki's amendment suggests that Sander's
25 work lacks integrity and that there is some kind of at

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1 least widespread consensus on that. I can't sign onto
2 that either.

3 CHAIRMAN REYNOLDS: Additional comments?
4 Commissioners Yaki.

5 COMMISSIONER YAKI: Let me just defend my
6 characterization. At the hearing, we heard Professor
7 Sander discuss his methodology and then discuss his
8 reformulated methodology. He did not really indicate
9 that there were others who had taken the same
10 methodology and reached the same conclusion.

11 To the contrary, we heard a number of
12 different reports, not just from Professor Lempert,
13 but Professor Ayres and Professor Brooks, and other
14 professors at UCLA, as I said, in the *Stanford Law*
15 *Review* article. There were too many responses that
16 they could even publish to the original Sander
17 finding. There are still problems, quantitatively and
18 with the Sander second revised proposal. And that to
19 me was pretty clear and continues to be pretty clear
20 that Dr. Sander, Professor Sander, pretty much stands
21 alone.

22 Whether he's right or not you may choose
23 to believe he's right, Commissioner Thernstrom. But
24 certainly from an objective point of view, the vast
25 amount of research out there today refutes what Sander

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1 is saying and I don't see why it should not be put in
2 there. Certainly the idea that the supporters and
3 critics are evenly matched is quite absent -- The
4 inference is completely wrong and I think that that
5 should be highlighted in there.

6 CHAIRMAN REYNOLDS: Commissioner Yaki, it
7 seems to me that there is a dispute over the
8 methodological approach. But the issue that's on the
9 table here is whether there are significant
10 disparities in terms of grades, graduation and bar
11 passage.

12 COMMISSIONER YAKI: But part of --

13 CHAIRMAN REYNOLDS: Hear me out.

14 COMMISSIONER YAKI: Okay.

15 CHAIRMAN REYNOLDS: And these facts I
16 don't believe are in dispute.

17 COMMISSIONER YAKI: I would say that if
18 you read the testimony of Professor Lember, he indeed
19 takes issue with the fact that the disparities are as
20 great as Sander says. They attack the control group
21 and when you have a control group that is wrong,
22 you're going to get results that are wrong and whether
23 you agree or disagree with that, the fact is that
24 there is disagreement on whether or not the
25 disparities are significant or not especially with

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1 regard to some of the factors that are put forth in
2 this. I'm just trying to be factual and correct in
3 this particular characterization of Sander's research
4 and the criticisms of it and I think that you will
5 find people who will say that you will get different
6 disparities depending on the different datasets you
7 get. Some may be significant. Some may not be and
8 Lempert had charts that show that the disparity in
9 some instances was not as great as Sander would assert
10 it to be.

11 COMMISSIONER BRACERAS: Excuse me. I'm
12 sorry. I just wanted to tell you all that I'm going
13 to step away from the phone for a moment or two. I
14 will be back. But I'll just tell you now it's going
15 to be the questions that I'm not participating in from
16 now until the time I get back. But I need to --

17 VICE CHAIRPERSON THERNSTROM: And you
18 don't have any immediate comment on this.

19 COMMISSIONER BRACERAS: I have no
20 immediate comment. I just wanted the record to
21 reflect that I'm stepping away and I'll let you know
22 when I'm back.

23 CHAIRMAN REYNOLDS: Okay. Thank you.
24 Commissioner Kirsanow.

25 COMMISSIONER KIRSANOW: I don't want to

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1 belabor the point. I think that there was
2 considerable evidence adduced at the hearing with
3 respect to the characterization of the three sentences
4 that are contained in this Finding No. 2.

5 I think if memory serves correctly,
6 Professor Lembert was talking in terms of certain
7 grades, not even grades because some of these
8 institutions don't even have grades by which you can
9 measure. But to the extent there are grades, there
10 are disparities in those grades and they're
11 significant. There is the testimony that we deduced
12 and I think Lembert even agreed with this is that on a
13 1,000 point scale there's about 135 point difference
14 between blacks and whites in terms of their academic
15 performance.

16 There is significance difference in terms
17 of -- and this was not disputed either that
18 approximately 50 percent of all black students in law
19 schools cluster in the bottom 10 percent of the law
20 school classes which would actually make the bottom 10
21 percent virtually all black. I consider that to be a
22 significant disparity, maybe a deplorable disparity,
23 maybe a -- I don't know what other adjective we can
24 use.

25 And bar passage rates, I don't think there

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1 was any dispute there, although he did -- maybe it
2 would be cabined in terms of bar passage rates in
3 terms of certain states. California, we didn't have a
4 bar passage rate for, but for the states that we have
5 bar passage rates, blacks were six times as likely to
6 fail. That's astonishing. That's not just
7 significant. That's astonishing. Six times as likely
8 to fail and I think all the other witnesses concurred
9 with that including Professor Bernstein from George
10 Mason. So I would agree with the first one --

11 COMMISSIONER YAKI: He is on your side
12 though.

13 COMMISSIONER KIRSANOW: And that's why you
14 disagree with him. We are talking about the testimony
15 that was adduced.

16 And in terms of the second sentence,
17 "others disagree with Sander's assertions" suggests
18 that there are multiple people that disagree with one
19 person. It's not as if we're trying to suggest that
20 the proposition is evenly matched. Others disagree
21 with him, but we had Sander in front of us and he's
22 the one in front of us that had conducted a full-scale
23 study. Professor Lembert did not. And they both
24 agreed that we need more research on this. I think
25 everybody concludes that this is preliminary research

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1 and I know Professor Sander is seeking to conduct more
2 comprehensive research including bar passage rates
3 from the State of California.

4 CHAIRMAN REYNOLDS: Commissioner Taylor.

5 COMMISSIONER TAYLOR: As to the first
6 sentence, I think from my recollection of the evidence
7 at least and the material from my perspective
8 indicated that the disparities were significant and
9 indeed -- As to the second sentence, others disagree
10 could be read to imply a balance of views and I think
11 at this point, I think it's accurate to say that a
12 vast majority of literatures is again saying this on
13 the mismatch issue. And the third point, that is that
14 everyone agrees you need more research on the mismatch
15 issues specifically is a valid statement. So that
16 reason I think we should keep "significant." I don't
17 mind changing the second sentence to indicate that at
18 this point Sander is not in the majority and indeed
19 there is not a balanced argument in that regard and
20 that they both agree that you need more evidence to
21 determine who's right. That was my recollection of
22 the evidence.

23 CHAIRMAN REYNOLDS: Okay. Let's call the
24 question.

25 VICE CHAIRPERSON THERNSTROM: Can I --

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1 CHAIRMAN REYNOLDS: Commissioner
2 Thernstrom.

3 VICE CHAIRPERSON THERNSTROM: Yes.

4 CHAIRMAN REYNOLDS: That's quite nice.

5 VICE CHAIRPERSON THERNSTROM: Thank you,
6 dear. I'm scribbling here. I'm drawing. I actually
7 have a problem with the last sentence stated that
8 there will be researchers to further evaluate the
9 strength of the academic mismatch there is not widely
10 available -- I don't know what "widely" means, but I
11 mean it is available and Professor Sander continues to
12 work on it, not as well as other people though. There
13 are a lot of people working on it.

14 COMMISSIONER KIRSANOW: It may not be
15 readily available because he's having significant
16 difficulty.

17 VICE CHAIRPERSON THERNSTROM: All right.
18 Readily-available. That he is not --

19 COMMISSIONER KIRSANOW: -- drawing that
20 information out because --

21 VICE CHAIRPERSON THERNSTROM: But nobody
22 is at the end of the road in terms of exploring this
23 issue.

24 COMMISSIONER KIRSANOW: I don't disagree
25 with you. He's saying that he's having a difficult

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1 time and others have had a difficult time teasing out
2 the information because it's being kept more closely
3 than the secrets to the Manhattan Project.

4 VICE CHAIRPERSON THERNSTROM: And I really
5 don't care in the Academy which I have no respect for
6 in general what the balance of agreement is on
7 Sander's assertions, but that seems to me simply
8 saying others disagree. Okay. That is accurate.
9 Others disagree. I don't care what the numbers are.

10 CHAIRMAN REYNOLDS: Okay.

11 VICE CHAIRPERSON THERNSTROM: I would like
12 it to remain as is. In other words, I would like us
13 to vote on this as the motion was.

14 COMMISSIONER KIRSANOW: There is been an
15 amendment we had to vote on, Commissioner Yaki's
16 amendment first and then we will vote on this one.

17 CHAIRMAN REYNOLDS: Okay. All in favor of
18 Commissioner Yaki's amendment, please signify by
19 saying aye.

20 COMMISSIONER YAKI: Aye.

21 COMMISSIONER MELENDEZ: Aye.

22 CHAIRMAN REYNOLDS: All in opposition?

23 (Chorus of nays.)

24 CHAIRMAN REYNOLDS: Okay. Please let the
25 record reflect that Commissioners Melendez and Yaki

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1 voted in the affirmative. The remaining Commissioners
2 voted against. The motion does not carry.

3 Next up we're going to vote on the
4 original motion. All in favor please signify by
5 saying aye.

6 (Chorus of ayes.)

7 CHAIRMAN REYNOLDS: All in opposition?

8 COMMISSIONER YAKI: No.

9 COMMISSIONER MELENDEZ: No.

10 CHAIRMAN REYNOLDS: Okay. Please let the
11 record reflect that Commissioners Yaki and Melendez
12 voted in the negative. The remaining Commissioners
13 voted in the affirmative. The motion carries.

14 Okay. I move that we adopt the Finding
15 No. 3 which reads: "Minority lost students may better
16 gauge their likelihood of academic success at a given
17 law school and future career prospects if law schools
18 and the entities responsible for granting admission to
19 the bar publicly disclose the extent to which they use
20 race and admissions data on academic performance, bar
21 passage rates, graduation rates, student loan default
22 rate and grade point averages disaggregated by rates.
23 Is there a second?

24 COMMISSIONER KIRSANOW: Second.

25 CHAIRMAN REYNOLDS: Discussion.

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1 Commissioner Yaki.

2 COMMISSIONER YAKI: Why don't we just put
3 on every law school sign, every law school, a warning
4 for minority students "Don't come here. You're likely
5 to fail." This is an amazing endorsement, a stereo-
6 type threat and I can't endorse it.

7 CHAIRMAN REYNOLDS: Okay. I -- Jump right
8 in, Commissioner Heriot.

9 COMMISSIONER HERIOT: I'm thinking about
10 maybe a motion to amend this. Is it really the data
11 that we want desegregated by race or desegregated by
12 academic credentials? A student of any particular
13 race shouldn't want to know how the people of my race
14 do. They should want to know how do people of my
15 academic credentials do because that's what matters
16 and the notion that we should look at this by race I
17 think is a big mistake. This is an issue of academic
18 credentials.

19 COMMISSIONER KIRSANOW: I would agree with
20 that and I'd also strike the first word in this,
21 minority. I think all students may better gauge how
22 they would perform and the problem is I think
23 Professor Bernstein read maybe an apocryphal email
24 from the student from Colorado Law School who happened
25 to be a minority student self-identified and thought

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1 that this was a bait and switch where she was
2 encouraged and lured to go to this place with the
3 promise that she was going to graduate and everything
4 and have a fine academic career and fine legal career
5 and found out that in fact had she known what
6 individuals with her grade point average and LSAT
7 scores, how they fare in law school, she would have
8 found some other place to go to rather than spend all
9 the money going to Colorado State or Colorado Law
10 School. But I would suggest, I would amend the
11 friendly amendment to strike "Minority law students"
12 and just put "law students."

13 COMMISSIONER HERIOT: Yes.

14 VICE CHAIRPERSON THERNSTROM: Commissioner
15 Heriot, do you also want to strike then "the extent to
16 which racial preferences are used"?

17 COMMISSIONER HERIOT: I don't know about
18 that.

19 COMMISSIONER KIRSANOW: I happen to think
20 personally since I'm an amendment to the friendly
21 amendment I would keep that in.

22 VICE CHAIRPERSON THERNSTROM: Yes.

23 COMMISSIONER KIRSANOW: Or possibly
24 segregate to the subcategory 3(a). But nonetheless
25 that is pertinent.

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1 VICE CHAIRPERSON THERNSTROM: Right.

2 COMMISSIONER KIRSANOW: What we did have
3 was testimony that referenced a study and I believe it
4 was by the Center for Equal Opportunity.

5 VICE CHAIRPERSON THERNSTROM: It was.

6 COMMISSIONER KIRSANOW: It showed the
7 greater the preference the greater the likelihood of -
8 - I'm sorry. Maybe we shouldn't have quoted somebody
9 else, but the fact of the matter is if somebody else
10 has another study let him put it forth and that
11 studied showed the greater the preference the more
12 likely the student is to flunk out and I think it is
13 the job of this Commissioner to alert minorities to
14 these kinds of difficulties. This is not a good thing
15 for minorities that are being sold the Santa Claus
16 version of what it's like to go to college and law
17 school and then they flunk out or do poorly and that
18 just breeds resentment.

19 But more importantly is those individuals
20 who celebrate the number of people who are in school
21 have failed to graduate I would suggest are not acting
22 necessarily in the best interest of minorities. I
23 would rather think that it's more likely to yield a
24 better society where we're celebrating the number of
25 those who graduate and become productive members of

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1 society. Garbage input, garbage output.

2 CHAIRMAN REYNOLDS: Commissioner Yaki, you
3 have a question.

4 COMMISSIONER YAKI: No. Just a heavy
5 sigh.

6 COMMISSIONER HERIOT: Let's make this more
7 of an official motion.

8 VICE CHAIRPERSON THERNSTROM: Yes.

9 COMMISSIONER HERIOT: I move that this be
10 amended to read No. 3 "Law students may better gauge
11 their likelihood of academic success at a given law
12 school and future career prospects if law schools and
13 the entities responsible for granting admission to the
14 bar publicly disclose the extent to which they use
15 race and admission and data on academic performance,
16 bar passage rates, graduation rates, student loan
17 default rates and grade point averages disaggregated
18 by academic credentials."

19 COMMISSIONER KIRSANOW: Second.

20 VICE CHAIRPERSON THERNSTROM: Good. Like
21 it.

22 CHAIRMAN REYNOLDS: Commissioner Melendez.

23 COMMISSIONER MELENDEZ: I don't know that
24 distributing this kind of information could result in
25 misuse that actually harms minorities. I'm just

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1 saying that you'd better sure that that's not going to
2 happen and I think that even the Staff Director may,
3 this question may have been raised by your staff
4 people as far as it gets to be a legal thing and I'm
5 not sure what you're feeling on this component here.
6 I just feel uncomfortable with distributing
7 information like that that has a potential to harm
8 minority students and I think you have to really think
9 that out as to could that be possible.

10 COMMISSIONER KIRSANOW: I'm just -- Just
11 as a question to --

12 COMMISSIONER BRACERAS: I'm back.

13 COMMISSIONER KIRSANOW: How does this harm
14 the minority students?

15 COMMISSIONER MELENDEZ: I'm not sure.

16 COMMISSIONER KIRSANOW: Are you referring
17 to personally identifying?

18 COMMISSIONER MELENDEZ: And who we give
19 that information to, I guess, would be the question.

20 VICE CHAIRPERSON THERNSTROM: It seems to
21 me the thrust here is to help minority students and
22 other students, not only minority. That was why this
23 was amended who are entering law school with
24 credentials that are way below average. Those are the
25 average student.

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1 CHAIRMAN REYNOLDS: So in effect this is a
2 form of consumer protection. Potential law students
3 would have additional information on which to base
4 their decision.

5 COMMISSIONER YAKI: Then why have the
6 criteria and if they use race and admissions then?

7 CHAIRMAN REYNOLDS: That would shed some
8 light and provide some transparency as to what schools
9 are actually doing. I think it would be helpful for
10 researchers. I think that as a public policy matter
11 if you're going to do it well and you think that
12 there's value to it then there should be no reason to
13 hide the extent to which racial preferences are used
14 in the omissions process.

15 COMMISSIONER YAKI: I think you're just
16 making them ensure that they're targets for Ward
17 Connolly and I object to that.

18 CHAIRMAN REYNOLDS: This is not going to
19 prevent Ward Connolly -- This does not provide Ward
20 Connolly with any additional abilities to move forward
21 with an initiative. He's doing it in the absence of
22 this data.

23 COMMISSIONER KIRSANOW: Mr. Chairman.
24 There is a technical reason to provide this kind of
25 information going beyond a policy reason. One is that

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1 there are a number of individuals who are apply to a
2 law school with sterling credentials thinking that
3 with these credentials they're going to get admitted,
4 at least, based on the objective criteria set forth in
5 the various publications that say what the admissions
6 rates are. However, they then come to find out that
7 they've been rejected and don't know the reasons
8 therefore.

9 A little bit further data reveals that
10 sometimes they are rejected because someone with less
11 sterling credentials gets admitted because there is a
12 racial preference in place. Those individuals have
13 spent time and energy and money applying to those
14 places when they probably could have devoted their
15 attention to applying to another school that doesn't
16 have this regime in place.

17 COMMISSIONER YAKI: So you just want to
18 make sure that their resentment is based on fact. Is
19 that what you're trying to do?

20 COMMISSIONER KIRSANOW: No, it's consumer
21 protection.

22 COMMISSIONER YAKI: That's just
23 ridiculous.

24 COMMISSIONER KIRSANOW: Right now -- It's
25 curious. It's very curious that law schools as I say

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1 protect like the secrets to the Manhattan Project what
2 the degree of preference is. The reason --

3 COMMISSIONER YAKI: That's because there
4 are people out there like others not in this room who
5 are going to sue them and that's in a half second.

6 COMMISSIONER KIRSANOW: There are people
7 who are concerned about their protection. There are
8 people who are concerned about black and Hispanic law
9 students who are being sold a pig in a poke saying,
10 "Come on in here. Spend your money here and whether
11 you graduate..."

12 COMMISSIONER YAKI: That's not the data
13 that C- about African Americans in Michigan.

14 COMMISSIONER KIRSANOW: And whether or not
15 you graduate is a wholly different proposition.

16 CHAIRMAN REYNOLDS: Gentlemen. Let's --

17 COMMISSIONER KIRSANOW: It's very similar
18 to the schools that invite black athletes in and say
19 "Come on here. Play for us" and then don't graduate
20 them. "We love your presence here as mascots and
21 everybody else, but whether or not you graduate,
22 that's your problem, not ours."

23 CHAIRMAN REYNOLDS: Commissioner Heriot.

24 COMMISSIONER HERIOT: I may be able to put
25 Commissioner Yaki's mind at rest a bit. Ward

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1 Connolly's initiatives, of course, only apply to
2 public universities. As a result, he has access to
3 this information through FOIA requests anyway. The
4 reason for this finding is not for Ward Connolly or
5 anyone else who might wish to pursue a public
6 initiative but rather for individual applicants.

7 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

8 VICE CHAIRPERSON THERNSTROM: I mean I
9 hate to play social scientist here and intellectual
10 and scholar, but, you know --

11 CHAIRMAN REYNOLDS: But you can't help
12 myself.

13 VICE CHAIRPERSON THERNSTROM: I can't help
14 myself and the more information that a reliable source
15 that I have to think about very hard problems and
16 these are tough problems, the better off we all are so
17 that we're not just trading accusations and
18 suppositions and frankly junk that is ideologically
19 driven. So I just -- More information is better than
20 less information.

21 COMMISSIONER KIRSANOW: If racial
22 preferences are such a good thing, why don't college
23 comp it? Why don't they say we give you a ten percent
24 preference? We give you a 50 percent preference? Why
25 are they hiding it?

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1 VICE CHAIRPERSON THERNSTROM: Absolutely.
2 And we're -- because we believe in it. Absolutely.
3 There's an argument for them.

4 CHAIRMAN REYNOLDS: Okay. Let's vote.
5 All in favor, please say aye.

6 (Chorus of ayes.)

7 CHAIRMAN REYNOLDS: As amended.

8 COMMISSIONER BRACERAS: Aye. I'm back.

9 COMMISSIONER KIRSANOW: Did she hear the
10 amendment by the way?

11 CHAIRMAN REYNOLDS: Commissioner Braceras,
12 the motion was amended.

13 COMMISSIONER BRACERAS: Could you read it
14 to me please?

15 CHAIRMAN REYNOLDS: Commissioner Heriot,
16 would you mind?

17 COMMISSIONER HERIOT: Okay. Commissioner
18 Braceras, this is for No. 3. Under the motion, it
19 would read, "Law students may better gauge their
20 likelihood of academic success at a given law school
21 and future career prospects if law schools and the
22 entities responsible for granting admission to the bar
23 publicly disclosed the extent to which they use race
24 and admissions and data on academic performance, bar
25 passage rates, graduation rates, student loan default

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1 rates and grade point averages disaggregated by
2 academic credentials."

3 COMMISSIONER BRACERAS: Okay. Great. I
4 still vote aye. Thank you very much.

5 CHAIRMAN REYNOLDS: Okay. All in
6 opposition?

7 COMMISSIONER YAKI: Absolutely.

8 COMMISSIONER MELENDEZ: Aye.

9 CHAIRMAN REYNOLDS: Please let the record
10 reflect that Commissioners Yaki and Melendez voted
11 against the finding and the remaining Commissioners
12 voted against the finding as amended by Commissioner
13 Heriot. Okay. One of those days. The remaining
14 Commissioners voted to support the motion. So the
15 motion carries.

16 COMMISSIONER HERIOT: Clarification. Was
17 that -- It was my motion, I know. But are we treating
18 that though as a vote on the actual finding or is that
19 just a motion to substitute and now do we have to vote
20 again on the finding?

21 COMMISSIONER YAKI: No, it's a supremacy
22 motion. So it carries as is. And the underlying
23 motion, there's no need for a vote.

24 COMMISSIONER HERIOT: Okay.

25 CHAIRMAN REYNOLDS: Okay. I move that the

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1 following finding be adopted. It reads as follows:
2 "The impact of racial preferences in law school
3 admissions is an important matter of public policy and
4 particularly the public would benefit from further
5 social science research on such preference's impact on
6 African American and other minority law students.
7 Admitting students into law school for which they
8 might not academically be prepared could harm their
9 academic performance and hinder their ability to
10 obtain and secure gainful employment in the legal
11 profession. Law school entails significant
12 investments of time and financial resource and law
13 students often take out extensive Federal and private
14 loans to finance their education. Racial preferences
15 that contribute to any academic mismatch might
16 therefore also contribute to income and wealth
17 disparities between whites and African Americans." Is
18 there a second?

19 VICE CHAIRPERSON THERNSTROM: I second it.

20 CHAIRMAN REYNOLDS: Discussion. Yes.
21 Commissioner Yaki.

22 COMMISSIONER YAKI: Yes, I'm just
23 wondering why we don't have as a finding the fact that
24 there are many studies that would indicate that the
25 number of African American lawyers would decrease

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1 under the Sander's model utilizing his mismatch theory
2 and correction model.

3 CHAIRMAN REYNOLDS: Well -- I'm sorry.
4 I'm just --

5 COMMISSIONER YAKI: You have Katherine
6 Barnes. You have Ayres and Brooks and you have Lempert
7 all stating that the elimination of these items would
8 actually result in a decrease in the number of African
9 Americans who would be entering the bar.

10 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

11 VICE CHAIRPERSON THERNSTROM: I believe
12 that what the research finds is a cascading effect
13 such that students who are preferentially admitted
14 today to schools where they are mismatched with the
15 average law student at those schools are going to go
16 to a school that say one tier lower that the only
17 students who will be out of the profession entirely
18 are those at the very bottom who cannot drop down
19 another tier. But those students are not passing the
20 bar exam.

21 CHAIRMAN REYNOLDS: Chairman Heriot, do
22 you have a question?

23 COMMISSIONER YAKI: But we're not making
24 those distinctions. We're not talking about the
25 subtleties of these studies. We're not talking about

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1 the fact that there's contrary evidence that would say
2 that students at the top tier law schools do well and
3 do have good bar passage rates. We're not talking
4 about that and instead we're simply creating this
5 incredible stereotype threat of guess what. You're
6 not going to make it in law school and you're not
7 going to make it in life and I just can't subscribe to
8 that.

9 VICE CHAIRPERSON THERNSTROM: Actually,
10 they don't do well at the top law schools, but in any
11 case, I'm sorry.

12 COMMISSIONER HERIOT: All finding of Fact
13 No. 4 says is this might be so.

14 COMMISSIONER KIRSANOW: That's right.

15 COMMISSIONER HERIOT: And so it's not
16 really --

17 COMMISSIONER YAKI: But it doesn't give
18 the contrary point of view.

19 COMMISSIONER KIRSANOW: But it says who
20 would benefit from further social science research.

21 COMMISSIONER YAKI: But there is already
22 an existing contrary point of view. Rather than
23 simply saying would benefit from further research,
24 there is already an existing contrary point of view.

25 COMMISSIONER HERIOT: But that's already

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1 in No. 2.

2 COMMISSIONER YAKI: Professor Lempert
3 talked about it.

4 COMMISSIONER HERIOT: That's in No. 2.

5 COMMISSIONER YAKI: No. It simply says
6 there's disagreement, not that in the actual
7 conclusions of 4 that there is actual disagreement on
8 what those conclusions actually are. Two is just
9 blather. Four is specific and four has specific
10 reputations by Lempert, Brooks, Ayres, Barnes, etc.

11 COMMISSIONER KIRSANOW: But these aren't
12 conclusions in four. No. 2 is --

13 COMMISSIONER YAKI: They are findings.

14 COMMISSIONER HERIOT: They are finding
15 that it's possible.

16 COMMISSIONER KIRSANOW: Right.

17 COMMISSIONER YAKI: But we're not talking
18 about the other side at all.

19 COMMISSIONER KIRSANOW: No. 2 acknowledges
20 a disagreement --

21 COMMISSIONER YAKI: No. 2 acknowledges
22 nothing.

23 COMMISSIONER KIRSANOW: No. 2 acknowledges
24 --

25 COMMISSIONER YAKI: No. 2 just

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1 acknowledges that maybe there's a --

2 (Both speaking at once.)

3 COMMISSIONER KIRSANOW: But it says right
4 here others disagree.

5 COMMISSIONER YAKI: -- maybe there are
6 people who disagree.

7 COMMISSIONER KIRSANOW: It says others
8 disagree.

9 COMMISSIONER KIRSANOW: Commissioner --

10 COMMISSIONER YAKI: It doesn't say
11 anything about what the disagreement is.

12 COMMISSIONER KIRSANOW: -- further
13 research on the disagreement.

14 CHAIRMAN REYNOLDS: Gentlemen. Keep it
15 civil.

16 COMMISSIONER YAKI: We're civil. We're
17 just talking loud. Four does not state what the
18 disagreement is with regard to these particular
19 findings and the contrary conclusions driven by other
20 researchers who have taken Sander's data.

21 CHAIRMAN REYNOLDS: Are you suggesting
22 that we don't have the ability to make distinctions
23 and judge the -- to essentially choose amongst
24 competing arguments?

25 VICE CHAIRPERSON THERNSTROM: And put it

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1 all in terms of "might contribute."

2 COMMISSIONER KIRSANOW: But you have a
3 predicate in No. 2 that says we have a disagreement.
4 No. 4 says we need further research to tease that out
5 and find out who's right and who's wrong.

6 COMMISSIONER HERIOT: And that's an
7 important issue. If it might be true, it's important
8 enough to study.

9 COMMISSIONER YAKI: But it posits that
10 there is this thing to study and if you read Lempert
11 and Ayres and Brooks, they're not entirely as
12 conclusive on what their definition of academic
13 mismatch is as what Sander defines academic mismatch.

14 So because of that, you're essentially putting the
15 cart before the horse. That's why -- Forget it. Just
16 vote on it. I'm going to lose on it anyway. What the
17 hell do I care.

18 COMMISSIONER KIRSANOW: Mr. Chair, I do
19 have a question on -- Just to throw out. Not that I
20 would necessarily disagree with this, but something
21 for consideration. The last sentence "Racial
22 preferences that contribute to any academic mismatch
23 might therefore also contribute to income and wealth
24 disparities between whites and African Americans." It
25 may make some logical sense, but that seems to be a

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1 little bit of a leap from where the rest of where No.
2 4 is. I'm just throwing that out. I don't
3 necessarily disagree with it, but it does give me a
4 little pause.

5 CHAIRMAN REYNOLDS: Okay.

6 VICE CHAIRPERSON THERNSTROM: I don't have
7 a problem with it.

8 COMMISSIONER YAKI: Okay. Of course not.

9 CHAIRMAN REYNOLDS: All right. Let's call
10 the vote unless there are other questions or comments.
11 All in favor please say aye.

12 (Chorus of ayes.)

13 CHAIRMAN REYNOLDS: All in opposition?

14 COMMISSIONER YAKI: No.

15 COMMISSIONER MELENDEZ: No.

16 COMMISSIONER BRACERAS: I'm sorry. I'm
17 back.

18 COMMISSIONER YAKI: Is there a seven
19 second delay after Peter and my latest exchange,
20 Jennifer?

21 CHAIRMAN REYNOLDS: Let the record reflect
22 that Commissioners Melendez and Yaki voted against the
23 motion and the remaining Commissioners voted to
24 support the motion. The motion carries.

25 I move that Finding No. 5 be adopted.

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1 Finding No. 5 reads as follows: "Despite research
2 questioning the impact and extent of racial
3 preferences in law school admissions, the American Bar
4 Association adopted Standard 211 in August of 2006.
5 Under Standard 211, law schools seeking accreditation
6 from the American Bar Association must demonstrate by
7 concrete action a commitment to having a student body
8 that is diverse with respect to race among other
9 aspects of diversity." Is there a second?

10 VICE CHAIRPERSON THERNSTROM: Second.

11 CHAIRMAN REYNOLDS: Discussion.

12 COMMISSIONER YAKI: Why do we have the
13 first sentence in there?

14 VICE CHAIRPERSON THERNSTROM: I don't know
15 why we don't start with simply "The American Bar
16 Association adopted Standard 211..."

17 COMMISSIONER KIRSANOW: I agree. I would
18 excise the first clause.

19 VICE CHAIRPERSON THERNSTROM: Yes.

20 CHAIRMAN REYNOLDS: The first sentence?

21 VICE CHAIRPERSON THERNSTROM: No, in the
22 first sentence.

23 COMMISSIONER KIRSANOW: Beginning with --
24 It would start "The American Bar Association adopted
25 Standard 211 in August 2006."

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1 VICE CHAIRPERSON THERNSTROM: Right.

2 COMMISSIONER KIRSANOW: And then go on
3 from there.

4 CHAIRMAN REYNOLDS: Commissioner Taylor.

5 COMMISSIONER TAYLOR: I would agree with
6 that. Just a question. I just don't recall the
7 evidence on this point. Did the American Bar
8 Association discuss the issues of bar passage rates,
9 graduation rates, student loan default rates, grade
10 point averages, disaggregated by academic credentials
11 with regard to race?

12 VICE CHAIRPERSON THERNSTROM: No.

13 CHAIRMAN REYNOLDS: I don't believe so.

14 COMMISSIONER TAYLOR: So they passed this
15 new standard without answering those questions or at
16 least knowing --

17 VICE CHAIRPERSON THERNSTROM: Correct.

18 COMMISSIONER TAYLOR: Then I think we
19 should -- I thought the point of the first phrase in
20 that clause was to demonstrate that they were doing
21 something in the face of all of these questions. So
22 in my mind, an appropriate addition would be the ABA
23 passed this in the absence of knowing X. That's the
24 important point.

25 COMMISSIONER KIRSANOW: That's right and I

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1 think we specifically asked Professor Smith who was
2 the ABA representative maybe not everything that
3 you're asking. But I know I asked at least one
4 question related to that and he answered back as I
5 recall, you might want to look at the record, was they
6 hadn't looked at that.

7 VICE CHAIRPERSON THERNSTROM: The first
8 clause does not --

9 COMMISSIONER TAYLOR: Right. It doesn't
10 do that.

11 VICE CHAIRPERSON THERNSTROM: It doesn't
12 do that.

13 COMMISSIONER TAYLOR: Right.

14 VICE CHAIRPERSON THERNSTROM: So would you
15 like to formulate --

16 COMMISSIONER TAYLOR: I won't. I tell you
17 what. Let's just strike the first clause and keep it.
18 I'm going to write something on my own I think. I
19 can't come up with it right now.

20 VICE CHAIRPERSON THERNSTROM: Fine.

21 COMMISSIONER TAYLOR: But on that point,
22 I'll just write something.

23 VICE CHAIRPERSON THERNSTROM: I would like
24 to call the question.

25 CHAIRMAN REYNOLDS: All right. All in

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1 favor signify by saying aye.

2 VICE CHAIRPERSON THERNSTROM: Of the
3 amended. As amended.

4 CHAIRMAN REYNOLDS: Yes.

5 VICE CHAIRPERSON THERNSTROM: Yes.

6 (Chorus of ayes.)

7 CHAIRMAN REYNOLDS: Any objections?

8 (No response.)

9 CHAIRMAN REYNOLDS: Any abstentions?

10 COMMISSIONER YAKI: Aye.

11 CHAIRMAN REYNOLDS: Let the record reflect
12 that Commissioners Yaki and Melendez abstain. The
13 remaining Commissioners voted to support the motion as
14 amended.

15 COMMISSIONER MELENDEZ: I vote no.

16 CHAIRMAN REYNOLDS: I'm sorry. Okay. Let
17 the record reflect that Commissioner Yaki abstained.
18 Commission Melendez voted against the motion. The
19 remaining Commissioners voted in support of the motion
20 as amended. The amended motion is approved.

21 Okay. I move that Finding 6 be adopted
22 and Finding 6 reads as follows: "The American Bar
23 Association also enacted official interpretations to
24 help guide law schools in these demonstrations of
25 concrete action. Interpretation 211-2 permits law

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1 schools `consistent with the U.S. Supreme Court's
2 decision in Grutter v Bollinger' to use race and
3 ethnicity in their admissions process to promote equal
4 opportunity and diversity. Interpretation 211-3
5 states that `the determination of the law school
6 satisfaction of these obligations is based on the
7 totality of the law schools actions and the results
8 achieved.' Given these interpretations, it's
9 difficult to see who law schools could satisfy their
10 obligations under Standard 211 without the use of
11 racial preferences. To this extent some have argued
12 that the standard strongly although implicitly
13 encourages the use of racial preferences in
14 admissions." Is there a second?

15 VICE CHAIRPERSON THERNSTROM: Second.

16 CHAIRMAN REYNOLDS: Any discussion?

17 Commissioner Heriot.

18 COMMISSIONER HERIOT: I actually have a
19 minor point that applies not just to six but
20 unfortunately to five which we've already done here.
21 The American Bar Association itself is not the
22 accrediting agency. It's the American Bar
23 Association's Council on Legal Education and Admission
24 to the Bar or something like that and what happened in
25 August of 2006 was that the ABA House of Delegates

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1 didn't ratify rather than adopt the standard.

2 COMMISSIONER YAKI: It's the Council on
3 Section of Legal Education Admissions to the Bar.

4 COMMISSIONER HERIOT: We might want to
5 amend five and six to refer to the Council and leave
6 out the date because I think it's the Council that
7 does the adopting and the House of Delegates that
8 simply ratified. Because what happens is if the House
9 of Delegates fails to ratify, the Council then doesn't
10 have to accept that. They can then repromulgate it
11 and the second time it takes even without the ABA's
12 intervention and that has to do with any trust law
13 settlement that goes back a couple of years with the
14 Department of Justice. If we want to get it right, we
15 might as well get it right.

16 VICE CHAIRPERSON THERNSTROM: Yes. Let's
17 have a motion to amend both of those.

18 COMMISSIONER HERIOT: Yes. I move that
19 both five and six be changed to substitute the words
20 "American Bar Association's Council..."

21 COMMISSIONER YAKI: "On Legal Education
22 and Admission to the Bar."

23 COMMISSIONER HERIOT: "Adopted Standard
24 211" and leave out the date "in August of 2006." Just
25 put "in 2006." Strike the word "August."

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1 COMMISSIONER KIRSANOW: Second.

2 COMMISSIONER YAKI: Actually, that should
3 be called the Section. They don't call it the
4 Council.

5 COMMISSIONER HERIOT: Section. And same
6 for No. 6.

7 COMMISSIONER KIRSANOW: Second.

8 CHAIRMAN REYNOLDS: Okay. All in favor
9 of --

10 COMMISSIONER HERIOT: And the same for No.
11 7.

12 COMMISSIONER KIRSANOW: Second.

13 CHAIRMAN REYNOLDS: Okay. Why don't we
14 take some time and --

15 VICE CHAIRPERSON THERNSTROM: We don't
16 need time.

17 COMMISSIONER HERIOT: That's just
18 separate. We can split on this. It's a separate
19 issue. It's noncontroversial.

20 VICE CHAIRPERSON THERNSTROM: Yes.

21 CHAIRMAN REYNOLDS: All right. All in
22 favor of the motion to -- Is that --

23 COMMISSIONER YAKI: Jennifer's baby is
24 kind of going through these changes right now.

25 (Off the record comments.)

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1 CHAIRMAN REYNOLDS: Okay. All in favor
2 to adopt the motion as articulated by Commissioner
3 Heriot please signify by saying aye.

4 (Chorus of ayes.)

5 CHAIRMAN REYNOLDS: Any objections?

6 (No response.)

7 CHAIRMAN REYNOLDS: And abstentions?

8 (No response.)

9 CHAIRMAN REYNOLDS: The motion carries
10 unanimously.

11 VICE CHAIRPERSON THERNSTROM: And it
12 affects five, six and seven.

13 CHAIRMAN REYNOLDS: So that gets us back
14 to six. We've had the discussion. Is that right?

15 COMMISSIONER YAKI: No.

16 CHAIRMAN REYNOLDS: Okay. The floor is
17 open. Any questions?

18 COMMISSIONER YAKI: No. I'm not even
19 going to go there.

20 COMMISSIONER KIRSANOW: Call the question.

21 CHAIRMAN REYNOLDS: You have a question?

22 COMMISSIONER KIRSANOW: No. I call the
23 question.

24 VICE CHAIRPERSON THERNSTROM: Call the
25 question, yes.

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1 CHAIRMAN REYNOLDS: All in favor please
2 signify by saying aye.

3 (Chorus of ayes.)

4 CHAIRMAN REYNOLDS: All in opposition?

5 COMMISSIONER YAKI: No.

6 CHAIRMAN REYNOLDS: Let the record reflect
7 that Commissioners Yaki and Melendez voted against the
8 motion. The remaining Commissioners voted in favor of
9 the motion. The motion carries.

10 Finding No. 7. I move that we adopt
11 Finding No. 7 and Finding No. 7 reads as follows:
12 "The American Bar Association..." The amendment that
13 we made before would that be applicable here?

14 COMMISSIONER HERIOT: Yes, we applied it
15 here.

16 CHAIRMAN REYNOLDS: Okay. Please give me
17 the name of this. "The American Bar Association..."

18 COMMISSIONER YAKI: Section on Legal
19 Education and Admissions to the Bar.

20 COMMISSIONER HERIOT: It's Council of the
21 Section on Legal Education and Admissions to the Bar.

22 COMMISSIONER YAKI: Pardon? Yes, the
23 Council of the Section.

24 COMMISSIONER HERIOT: Yes.

25 COMMISSIONER YAKI: It's bizarre.

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1 COMMISSIONER HERIOT: They like lots of
2 words at the ABA.

3 VICE CHAIRPERSON THERNSTROM: The problem
4 with lawyers in general.

5 COMMISSIONER YAKI: I would not begin to
6 debate that.

7 CHAIRMAN REYNOLDS: And that's on Legal
8 Education to the --

9 COMMISSIONER YAKI: On Legal Education and
10 Admissions to the Bar.

11 VICE CHAIRPERSON THERNSTROM: They get
12 paid by the word.

13 COMMISSIONER TAYLOR: Amen.

14 CHAIRMAN REYNOLDS: Finding 7 reads as
15 follows: "The American Bar Association Council of the
16 Section on Legal Education and Admissions to the Bar
17 rounded Standard 211 and the Supreme Court's 2003
18 decision in Grutter v Bollinger, the Supreme Court's
19 deference to the University of Michigan Law School's
20 judgement that racial diversity was essential to its
21 educational mission, was predicated on the 'Expansive
22 Freedom's Speech and Thought associated with the
23 University environment' which give higher
24 institutional institutions "a special niche in our
25 Constitutional tradition." The Court recognized the

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1 traditional judicial deference to the right of
2 colleges and universities to select those students who
3 will contribute the most to the robust exchange of
4 ideas of a means to achieve a goal that is of
5 paramount importance to the fulfillment of its mission
6 and understands the American Bar Association Council
7 of the Section on Legal Education and Admission to the
8 Bar displaces the judgement of individual law schools
9 to decide the importance of diversity and substitutes
10 its own." Is there a second?

11 COMMISSIONER KIRSANOW: Second.

12 CHAIRMAN REYNOLDS: Discussion.

13 COMMISSIONER MELENDEZ: Yes. Is that last
14 sentence that you read where "it displaces the
15 judgement of individual law schools to decide the
16 importance of diversity and to substitute its own" is
17 that actually true? I just want to know.

18 COMMISSIONER KIRSANOW: Professor
19 Bernstein testified to that effect. That would be a
20 legal judgement, one with which I concur. I suspect
21 that Michael doesn't. But to the extent that Standard
22 211 kind of subsumes New Hampshire v Sweaze, it does
23 displace it because Grutter only applied to education
24 institutions of higher learning such as colleges and
25 said we're going to do because we grant great autonomy

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1 to these educational institutions pursuant to New
2 Hampshire v Sweaze.

3 In doing that, taking 211, it takes away
4 the discretion that Grutter presupposes that these
5 institutions are going to exercise it. An institution
6 can decide it's not a part of their educational
7 mission to have diversity. It's not -- whatever that
8 school may be. Another may say it is a part of their
9 educational mission. That's part of the discretion
10 subsumed in New Hampshire v Sweaze. This takes that
11 away and says you must do that.

12 CHAIRMAN REYNOLDS: Commissioner Yaki.

13 COMMISSIONER YAKI: I was just going to
14 sigh heavily continually. But with regard to six and
15 seven, we're distorting what the testimony was by Dean
16 Smith at the hearing. The standard itself has
17 admissions as only one criteria by which the ABA will
18 measure "concrete actions." It is not -- And if you
19 read 211 which I just did and it talks -- Here. The
20 interpretation of 211-3 "The determination of law
21 school satisfaction of such obligations is based on
22 the totality of the law school's actions and the
23 results achieved. The commitment to providing full
24 educational opportunities for members of under-
25 represented groups typically includes a special

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1 concern for determining the potential of these
2 applicants through the admissions process, special
3 recruitment efforts, programs of the system meeting
4 the academic and financial needs of many of these
5 students and that creates a more favorable environment
6 for students from under-represented groups." Dean
7 Smith talked about those in his testimony. This
8 obsessive focus in six and seven on admissions, I
9 think, distorts his testimony and is why I'm going to
10 be voting against them.

11 COMMISSIONER TAYLOR: Question. I
12 actually had the same question as Commissioner
13 Melendez and I was taken halfway home by your
14 explanation but not all the way there, this reason.
15 As I saw the argument being framed, you were right in
16 the sense that it took the discretion out but only
17 with respect to one of many criteria that were
18 required to use so that the law school could not say
19 that is not part of our mission and therefore for
20 purposes of our comprehensive review remove that
21 particular aspect of review. Law schools could no
22 longer do that. So in that respect, it does displace
23 the law school's judgement but not totally because it
24 is one of many factors they consider. That's how I
25 had it framed in my mind.

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1 COMMISSIONER KIRSANOW: Right. It's one
2 of many factors in terms of Grutter but not in terms
3 of meeting the accreditation standard here. In
4 Grutter, the University of Michigan Law School program
5 supposedly, admissions program, met Constitutional
6 muster because race was only one factor among many in
7 a holistic review. It was flexible plus factor not
8 applied in a mechanical way. This applies it in a
9 mechanical way and therefore displaces the discretion
10 that you were just talking about.

11 COMMISSIONER YAKI: How? It's just one of
12 a number of factors. It doesn't say it have to be --

13 COMMISSIONER KIRSANOW: Now if you listen
14 to not just Dean Smith's testimony and he didn't
15 dispute this. The uncontroverted testimony of
16 Professor Bernstein was when he talked to a number of
17 other law school deans is no, this is how we do it
18 because the ABA calls you up and says what's going on
19 here and everyone knows if you don't meet these
20 numbers, out the door you go. So that testimony was
21 uncontroverted.

22 CHAIRMAN REYNOLDS: Additional questions?

23 COMMISSIONER YAKI: That's because no one
24 could question who he had called and he had no
25 evidence of anyone who he had called and told about

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1 it. So how can you dispute that with which comes from
2 there?

3 COMMISSIONER KIRSANOW: He was sitting
4 right next to me.

5 COMMISSIONER YAKI: And that for me is the
6 flaw of these briefings in general and why in a
7 truncated proceeding where I'm looking at my watch
8 because it's getting close to the time I have to get
9 out the door and maybe I could have and should have
10 picked up on it. I don't know or maybe I was just
11 ignoring all the blather coming out of his mouth. I
12 don't know.

13 COMMISSIONER KIRSANOW: You could have
14 controverted him if you had wished.

15 COMMISSIONER YAKI: I will in my dissent.

16 CHAIRMAN REYNOLDS: Okay. Commissioner
17 Heriot.

18 COMMISSIONER HERIOT: The school marm in
19 me insists we correct the lack of a comma after the
20 word "environment" and before the word "which."

21 COMMISSIONER KIRSANOW: And it should come
22 after the quotation marks.

23 VICE CHAIRPERSON THERNSTROM: No. Before
24 the quotation marks.

25 COMMISSIONER YAKI: Before the quotation

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1 marks.

2 COMMISSIONER HERIOT: It's before the
3 quotation marks.

4 COMMISSIONER KIRSANOW: Is it? I'm not a
5 school marm.

6 VICE CHAIRPERSON THERNSTROM: I'm a school
7 marm, too. Before the quotation marks.

8 CHAIRMAN REYNOLDS: Okay. So we will not,
9 I assume, need to vote on this.

10 COMMISSIONER HERIOT: I hope we don't have
11 to vote.

12 CHAIRMAN REYNOLDS: Yes. If there are no
13 other questions, comments or discussion we can vote.
14 All in favor, please signify by saying aye.

15 (Chorus of ayes.)

16 CHAIRMAN REYNOLDS: All opposed?

17 COMMISSIONER KIRSANOW: Jennifer?

18 COMMISSIONER BRACERAS: Aye.

19 CHAIRMAN REYNOLDS: All in opposition?

20 COMMISSIONER MELENDEZ: No.

21 COMMISSIONER YAKI: No.

22 CHAIRMAN REYNOLDS: Let the record reflect
23 that Commissioners Yaki and Melendez voted against the
24 motion. The remaining Commissioners voted in favor of
25 the motion. The motion carries.

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1 VICE CHAIRPERSON THERNSTROM: I have a
2 small stylistic recommendation on these. I guess it's
3 five, six and seven that we don't each time say the
4 American Bar Association Council of the Section on
5 Legal Education and Admissions to the Bar but simply
6 the first --

7 CHAIRMAN REYNOLDS: Just say ABA.

8 VICE CHAIRPERSON THERNSTROM: The first
9 time put in parens, ABA Council or something like that
10 so we don't have this cumbersome language with each
11 one of these.

12 CHAIRMAN REYNOLDS: Okay. So we are up to
13 No. 8.

14 COMMISSIONER HERIOT: Eight?

15 VICE CHAIRPERSON THERNSTROM: Yes.

16 COMMISSIONER HERIOT: There is no eight.

17 COMMISSIONER YAKI: There is no eight.

18 VICE CHAIRPERSON THERNSTROM: Now we're
19 starting on the recommendations.

20 CHAIRMAN REYNOLDS: That's right. Okay.
21 I move that we adopt the following recommendation
22 which reads as follows: "The National Academy of
23 Sciences or another appropriate grant-making entity
24 should fund independent research on the impact of
25 racial preferences on racial disparities in law school

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1 academic performance, bar passage rates, graduation
2 rates, student loan default rates and future income.
3 State bar associations should cooperate with this
4 research." Is there a second?

5 COMMISSIONER KIRSANOW: Second.

6 CHAIRMAN REYNOLDS: Discussion.

7 COMMISSIONER YAKI: I recommend we do not.

8 VICE CHAIRPERSON THERNSTROM: I'm sorry.
9 What are you recommending?

10 COMMISSIONER YAKI: That we do not.

11 COMMISSIONER HERIOT: Call the question.

12 CHAIRMAN REYNOLDS: Okay. That was
13 concise. Thank you. All in favor, please signify by
14 saying aye.

15 (Chorus of ayes.)

16 COMMISSIONER YAKI: Garbage in, garbage
17 out. No.

18 COMMISSIONER HERIOT: Did you take nays on
19 that?

20 CHAIRMAN REYNOLDS: I was deciding whether
21 to have some fun, but no. All in opposition?

22 COMMISSIONER MELENDEZ: No.

23 COMMISSIONER YAKI: No.

24 CHAIRMAN REYNOLDS: And Jennifer?

25 COMMISSIONER BRACERAS: I did aye.

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1 CHAIRMAN REYNOLDS: Let the record reflect
2 that Commissioners Yaki and Melendez voted against the
3 motion. The remaining Commissioners voted in favor of
4 the motion. The motion carries.

5 I move that we adopt Recommendation 2
6 which reads as follows: "Law schools should
7 voluntarily provide disclosure to the public and at
8 the very least to potential applicants on student
9 academic performance, attrition, graduation, bar
10 passage rates, student load default rates and future
11 income disaggregated by race and ethnicity."

12 COMMISSIONER KIRSANOW: Friendly
13 amendment. I would change "race and ethnicity" to
14 "academic credentials."

15 VICE CHAIRPERSON THERNSTROM: Yes, I agree
16 with that.

17 COMMISSIONER HERIOT: Yes. Okay.

18 CHAIRMAN REYNOLDS: All in favor of the
19 amendment please say aye.

20 (Chorus of ayes.)

21 CHAIRMAN REYNOLDS: Any in opposition?

22 (No response.)

23 CHAIRMAN REYNOLDS: Any abstentions?

24 COMMISSIONER YAKI: To the amendment
25 itself?

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1 CHAIRMAN REYNOLDS: Yes.

2 COMMISSIONER YAKI: Or to the main motion?

3 CHAIRMAN REYNOLDS: To the amendment.

4 VICE CHAIRPERSON THERNSTROM: I have a
5 question about it.

6 COMMISSIONER YAKI: Abstain.

7 VICE CHAIRPERSON THERNSTROM: Is it
8 possible in changing it to "academic credentials" that
9 that phrase could open the door to definitional gains
10 as to what academic credentials are?

11 COMMISSIONER HERIOT: But so can race and
12 ethnicity.

13 VICE CHAIRPERSON THERNSTROM: Well, it
14 could mean some kind of holistic blah, blah, blah that
15 has very little to do with LSAT scores, very little to
16 do with college grade point averages, etc.

17 COMMISSIONER YAKI: You just gave the
18 argument against Sander. So there we go.

19 VICE CHAIRPERSON THERNSTROM: No, I have
20 not given the argument against Sander. I've given the
21 argument for typing this up slightly.

22 COMMISSIONER HERIOT: We could have a
23 definition.

24 COMMISSIONER KIRSANOW: Yes.

25 COMMISSIONER HERIOT: Within the meaning

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1 of these findings of facts and recommendations.
2 Academic credentials mean high GPA --

3 VICE CHAIRPERSON THERNSTROM: I think that
4 is necessary.

5 COMMISSIONER HERIOT: -- and LSAT.

6 CHAIRMAN REYNOLDS: Okay. May I have a
7 motion to this effect?

8 COMMISSIONER KIRSANOW: "Academic
9 credentials" as used herein shall be defined as
10 college grade point average, cumulative grade point
11 average and LSAT scores.

12 VICE CHAIRPERSON THERNSTROM: Thank you.

13 COMMISSIONER HERIOT: Where do we want to
14 put that?

15 COMMISSIONER KIRSANOW: Right at the end.

16 VICE CHAIRPERSON THERNSTROM: Right at the
17 end.

18 COMMISSIONER HERIOT: At the very end of
19 the recommendation.

20 COMMISSIONER KIRSANOW: Yes, because I
21 think that may be the only place where it's used.

22 COMMISSIONER YAKI: Don't you want to say
23 the school that they went to as well? Doesn't it have
24 an impact on GPA?

25 VICE CHAIRPERSON THERNSTROM: Pardon me?

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1 COMMISSIONER KIRSANOW: I'm sorry.

2 COMMISSIONER YAKI: Nothing. I'm just
3 trying to help you.

4 COMMISSIONER KIRSANOW: We appreciate your
5 help.

6 VICE CHAIRPERSON THERNSTROM: But I know
7 it was a brilliant suggestion.

8 COMMISSIONER KIRSANOW: What's the
9 suggestion?

10 COMMISSIONER YAKI: Isn't part of the data
11 that they looked at is also the tiered school from
12 which they graduated from in the first place?

13 COMMISSIONER HERIOT: I don't know how to
14 come up with the data for that. You can't generate
15 that as easily.

16 CHAIRMAN REYNOLDS: So the first vote will
17 be on the definition of --

18 VICE CHAIRPERSON THERNSTROM: Adding the
19 definition. One sentence which adds the definition of
20 academic credentials.

21 CHAIRMAN REYNOLDS: Okay.

22 COMMISSIONER TAYLOR: Let me put a word of
23 caution on the table. I hesitate to try to craft the
24 definition as we sit here today. I fear we're going
25 to miss something that could really be important and I

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1 would be inclined not to put a definition in.

2 COMMISSIONER KIRSANOW: At all?

3 COMMISSIONER TAYLOR: Yes, I like just
4 academic credentials. I'm fearful sitting here that
5 we're going to --

6 VICE CHAIRPERSON THERNSTROM: Let me tell
7 you schools go to town with vague phrases like that.

8 COMMISSIONER TAYLOR: Sure. But I would
9 just like to put more thought into a definition.

10 COMMISSIONER HERIOT: These aren't binding
11 anyway and it can be changed if you do define it in
12 that they have to use a band and the band could be
13 larger or smaller.

14 CHAIRMAN REYNOLDS: Okay. where are we
15 folks?

16 VICE CHAIRPERSON THERNSTROM: I would like
17 to vote on the motion as amended with the definition
18 and we can revisit it later.

19 COMMISSIONER TAYLOR: Okay. It seems like
20 when I start putting definitions in on the fly I get
21 nervous.

22 VICE CHAIRPERSON THERNSTROM: This is not
23 really --

24 COMMISSIONER KIRSANOW: You make a good
25 point but I think that we can revisit it.

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1 VICE CHAIRPERSON THERNSTROM: We can
2 revisit it. It's not --

3 COMMISSIONER KIRSANOW: We're not crafting
4 legislation.

5 COMMISSIONER BRACERAS: When are we going
6 to revisit it if it's going --

7 VICE CHAIRPERSON THERNSTROM: This is not
8 a fancy definition. We're simply saying that we
9 regard the word "academic" as referring to cumulative
10 GPAs and LSATs.

11 COMMISSIONER BRACERAS: That's fine with
12 me, but as long as we know --

13 VICE CHAIRPERSON THERNSTROM: And it
14 doesn't refer to the sob story you can give to the law
15 school about why you're really qualified even though
16 your LSAT scores are terrible and --

17 COMMISSIONER BRACERAS: But let's just be
18 clear that the language we vote on is the language
19 that will be public.

20 CHAIRMAN REYNOLDS: Okay folks.

21 COMMISSIONER YAKI: No. I'm sorry.

22 CHAIRMAN REYNOLDS: That was just a
23 reflex.

24 COMMISSIONER YAKI: That's right.

25 (Laughter.)

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1 CHAIRMAN REYNOLDS: Okay. We're voting on
2 Recommendation 2 as amended. All in favor, please
3 signify by saying aye.

4 (Chorus of ayes.)

5 CHAIRMAN REYNOLDS: All in opposition?

6 COMMISSIONER MELENDEZ: No.

7 COMMISSIONER YAKI: No.

8 COMMISSIONER TAYLOR: I'm going to
9 abstain.

10 CHAIRMAN REYNOLDS: Okay. Let the record
11 reflect that Commissioner Taylor abstained, that
12 Commissioners Yaki and Melendez voted against the
13 motion. The remaining Commissioners voted in favor.
14 The motion carries.

15 Okay. I move that we adopt Recommendation
16 3 which reads as follows: "Congress should enact
17 legislation requiring law schools receiving Federal
18 financial assistance..."

19 COMMISSIONER KIRSANOW: I'm not sure we
20 actually voted on the whole notion.

21 COMMISSIONER HERIOT: Did we vote two up
22 or down?

23 COMMISSIONER YAKI: That was the vote. We
24 already did --

25 COMMISSIONER KIRSANOW: I thought we were

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1 voting on the amendment dealing with --

2 COMMISSIONER YAKI: No.

3 CHAIRMAN REYNOLDS: Wait.

4 COMMISSIONER KIRSANOW: -- the amendment
5 dealing with the addition of the definition.

6 COMMISSIONER HERIOT: Yes. We added --

7 CHAIRMAN REYNOLDS: Okay. I thought what
8 I read into the record that -- I did mush it all
9 together.

10 COMMISSIONER KIRSANOW: You did?

11 COMMISSIONER YAKI: I thought he did.

12 COMMISSIONER HERIOT: I thought it was two
13 separate because I haven't written down anything that
14 suggests that we've voted on two yet.

15 CHAIRMAN REYNOLDS: Okay. If that's the
16 case.

17 COMMISSIONER HERIOT: At worse, it would
18 be just duplicating. Better that than skipping.

19 CHAIRMAN REYNOLDS: Okay. Here is the
20 recommendation that we're voting on. It reads as
21 follows: "Law schools should voluntarily provide
22 disclosure" --

23 (Off the record discussion.)

24 CHAIRMAN REYNOLDS: "Law schools should
25 voluntarily provide disclosure to the public and at

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1 the very least to potential applicants on student
2 academic performance, attrition, graduation rates, bar
3 passage rates, student loan default rates and future
4 income disaggregated by academic credentials which is
5 defined as cumulative GPA and LSAT scores."

6 COMMISSIONER HERIOT: I thought we defined
7 it in nine because if you define it only in two, then
8 you have to go back to three of the findings and
9 define it there as well. I thought we added the
10 definition of academic credentials as nine.

11 CHAIRMAN REYNOLDS: Okay.

12 COMMISSIONER YAKI: What?

13 CHAIRMAN REYNOLDS: What do you mean by --
14 You mean have it as a separate sentence?

15 COMMISSIONER HERIOT: Yes. You need it to
16 be separate from two because we want it to be
17 applicable to three on findings as well.

18 COMMISSIONER YAKI: What?

19 CHAIRMAN REYNOLDS: So if I understand
20 you, this should be a standalone. The definition
21 should standalone so that it applies to all --

22 COMMISSIONER KIRSANOW: Right.

23 COMMISSIONER YAKI: Why don't you just put
24 it in three instead and not worry about another No. 9
25 and then it will refer by inference back to No. 3?

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1 COMMISSIONER HERIOT: I thought we just
2 did it that way and since that --

3 COMMISSIONER YAKI: No. Three in the
4 first one, not three in the second. You talk about
5 academic credentials in two.

6 COMMISSIONER HERIOT: Three and two.

7 COMMISSIONER YAKI: Whatever. I'm just
8 trying to make it simpler.

9 CHAIRMAN REYNOLDS: Okay folks.

10 COMMISSIONER YAKI: If you put it up in
11 the findings thing, then it will refer downward rather
12 than to having put it in the back and refer upwards.

13 VICE CHAIRPERSON THERNSTROM: I agree with
14 that. A point of agreement. Let everybody note.

15 COMMISSIONER YAKI: I'm not going to vote
16 for it though.

17 CHAIRMAN REYNOLDS: But we do appreciate
18 your note. Okay. Where is the first time that phrase
19 is used?

20 COMMISSIONER HERIOT: I think it's
21 Findings 3.

22 CHAIRMAN REYNOLDS: Three, Findings,
23 disaggregate. Okay. So we're going to go back and
24 vote again.

25 COMMISSIONER KIRSANOW: I move to amend

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1 Finding No. 3 to add at the very end "academic
2 credentials" as used in these findings and
3 recommendations "as defined as cumulative college
4 grade point average and LSAT scores."

5 CHAIRMAN REYNOLDS: Is there a second?

6 VICE CHAIRPERSON THERNSTROM: Second.

7 CHAIRMAN REYNOLDS: Discussion.

8 (No response.)

9 CHAIRMAN REYNOLDS: All in favor, please
10 signify by saying aye.

11 (Chorus of ayes.)

12 CHAIRMAN REYNOLDS: Any in opposition?

13 COMMISSIONER MELENDEZ: No.

14 COMMISSIONER YAKI: No.

15 CHAIRMAN REYNOLDS: Jennifer?

16 COMMISSIONER BRACERAS: I said aye.

17 CHAIRMAN REYNOLDS: Okay. The motion
18 passes unanimously. So now we're back to --

19 COMMISSIONER KIRSANOW: Three.

20 CHAIRMAN REYNOLDS: We have finished with
21 Recommendation 2. Is that correct?

22 COMMISSIONER KIRSANOW: Yes.

23 CHAIRMAN REYNOLDS: Okay.

24 VICE CHAIRPERSON THERNSTROM: Yes. We're
25 on Recommendation 3.

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1 CHAIRMAN REYNOLDS: Okay. I move that we
2 approve Recommendation 3 and Recommendation 3 reads as
3 follows: "Congress should enact legislation requiring
4 law schools receiving Federal financial assistance to
5 disclose to the public detailed data on the extent to
6 which they take race into account in making admissions
7 decisions. These details should include: (1) whether
8 they take race, color or national origin into account;
9 (2) the race, color and national origin groups for
10 which membership is considered a plus or a minus
11 factor; (3) a description of how group membership is
12 considered including the weight accorded to such
13 membership; (4) whether targets, goals or quotas are
14 used; (5) a statement explaining a group membership is
15 given particular weight and its relationship to the
16 diversity rationale; (6) a description of the
17 consideration given to using race neutral alternatives
18 to achieve those goals; (7) how frequently the need to
19 give weight to group membership is reassessed; (8)
20 what nonracial factors are considered in the
21 admissions process; and (9) an analysis of any
22 correlation between membership in a favored group to
23 placement in remediation program, graduation rates and
24 student loan default rates." Is there a second?

25 COMMISSIONER KIRSANOW: I would move to

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1 amend Subpart 9 to say "an analysis of any correlation
2 between academic credentials to placement in
3 remediation program, graduation rates and student loan
4 default rates."

5 COMMISSIONER HERIOT: Second.

6 VICE CHAIRPERSON THERNSTROM: Yes.

7 CHAIRMAN REYNOLDS: Commissioner Yaki.

8 COMMISSIONER YAKI: Are we in discussion?
9 Are we in the discussion phase now?

10 CHAIRMAN REYNOLDS: Yes.

11 COMMISSIONER YAKI: Two points, one a
12 point of procedure. This is, I believe, taken almost
13 verbatim from legislation by Representative Peter King
14 of New York, a legislation which --

15 COMMISSIONER KIRSANOW: Steven King of
16 Iowa.

17 COMMISSIONER YAKI: Or whatever. One of
18 those guys.

19 (Laughter.)

20 COMMISSIONER YAKI: Whichever it is, they
21 lost 337 to 77 in Congress, No. 1. No. 2, aside from
22 a very brief oblique mention of it in the Sander
23 testimony, again this is something that comes from
24 outside sources, that given the fact that it's already
25 been, had hearings and such, it would have been

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1 instructive to have known what the hearings about this
2 legislation said rather than simply repeating it as if
3 it had never existed before when in fact it has. And
4 finally, I would just say that the chances of this
5 happening in this Congress are slim to none and slim
6 is leaving town.

7 CHAIRMAN REYNOLDS: Other comments?
8 Questions?

9 COMMISSIONER YAKI: This is a garbage
10 recommendation.

11 VICE CHAIRPERSON THERNSTROM: Wait a
12 minute. That has been your mantra, should we call it.

13 COMMISSIONER YAKI: I wonder why.

14 VICE CHAIRPERSON THERNSTROM: Yes.

15 CHAIRMAN REYNOLDS: Okay folks. All in
16 favor of the recommendation as amended, please signify
17 by saying aye.

18 (Chorus of ayes.)

19 CHAIRMAN REYNOLDS: Is anyone opposed to
20 the motion?

21 COMMISSIONER YAKI: Yeah.

22 CHAIRMAN REYNOLDS: And, Jennifer, that
23 was an aye.

24 COMMISSIONER BRACERAS: Yes, it was.

25 CHAIRMAN REYNOLDS: Please let the record

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1 reflect that Commissioners Yaki and Melendez voted
2 against the recommendation and that the remaining
3 Commissioners voted in support, in favor of the
4 recommendation. So the recommendation is adopted.

5 The next recommendation is Recommendation
6 4. I move that it be approved. It reads as follows:

7 "As an interim measure, the American Bar Association
8 should pursuant to its accreditation authority require
9 law schools to disclose the details recommended in
10 Recommendation 2." Is there a second?

11 COMMISSIONER KIRSANOW: Second.

12 CHAIRMAN REYNOLDS: Discussion.

13 (No response.)

14 CHAIRMAN REYNOLDS: All in favor, please
15 signify by saying aye.

16 (Chorus of ayes.)

17 CHAIRMAN REYNOLDS: Does anyone oppose the
18 recommendation?

19 COMMISSIONER YAKI: Yep.

20 COMMISSIONER MELENDEZ: No.

21 CHAIRMAN REYNOLDS: Let the record reflect
22 that Commissioners Melendez and Yaki voted against the
23 recommendation. The remaining Commissioners voted in
24 favor of it. The recommendation is approved.

25 Next up we have Recommendation 5. "Should

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1 states require the authorities responsible for
2 granting admission to the bar and their jurisdiction
3 to disclose bar passage rates disaggregated by
4 academic credentials." Is there a second?

5 COMMISSIONER KIRSANOW: Second.

6 CHAIRMAN REYNOLDS: Discussion.

7 (No response.)

8 CHAIRMAN REYNOLDS: All in favor, please
9 signify by saying aye.

10 (Chorus of ayes.)

11 CHAIRMAN REYNOLDS: Commissioner Yaki, do
12 you oppose or abstain from this vote?

13 COMMISSIONER YAKI: Do I have a choice?

14 CHAIRMAN REYNOLDS: Sure you have choices.

15 COMMISSIONER YAKI: The answer is I
16 oppose.

17 CHAIRMAN REYNOLDS: Okay. Let the record
18 reflect that Commissioner Melendez did not vote. He
19 stepped out of the room. Commissioner Yaki voted
20 against the recommendation.

21 COMMISSIONER YAKI: I move to keep the
22 roll open until Commissioner Melendez returns.

23 CHAIRMAN REYNOLDS: Okay.

24 COMMISSIONER KIRSANOW: Second.

25 CHAIRMAN REYNOLDS: I assume that there

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1 will be no objectives.

2 VICE CHAIRPERSON THERNSTROM: No
3 objections to that. Is there going to be a surprise?

4 COMMISSIONER YAKI: No, I wanted to do it
5 on the record.

6 VICE CHAIRPERSON THERNSTROM: I know but I
7 suspect we could put it on the record right now.

8 COMMISSIONER YAKI: No, you can't vote for
9 somebody else. That just can't be done.

10 VICE CHAIRPERSON THERNSTROM: I'm not
11 serious, Michael.

12 COMMISSIONER KIRSANOW: Do you have his
13 proxy?

14 VICE CHAIRPERSON THERNSTROM: He gave me
15 his proxy. Right. All right. Let's go onto
16 Recommendation --

17 COMMISSIONER YAKI: Maybe we should go
18 back to Florida and have another hearing.

19 CHAIRMAN REYNOLDS: Okay. So --

20 COMMISSIONER YAKI: Obviously, No. 6 needs
21 a big correction because we're not dealing with the
22 Americans with Disabilities Act provision but Section
23 211. Section 212 is the Americans with Disabilities
24 Act provision of the state bar standard.

25 CHAIRMAN REYNOLDS: Good catch.

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1 COMMISSIONER YAKI: And that should be
2 changed for seven and eight as well.

3 COMMISSIONER KIRSANOW: Yes.

4 COMMISSIONER YAKI: So I will move that
5 Section 212 be amended to read Section 211 in
6 Recommendations 6, 7 and 8.

7 CHAIRMAN REYNOLDS: Is there a second?

8 VICE CHAIRPERSON THERNSTROM: Second.

9 COMMISSIONER KIRSANOW: That's not
10 noncontroversial. I think we can do that.

11 COMMISSIONER YAKI: I know he's so
12 uncomfortable seconding my motion.

13 CHAIRMAN REYNOLDS: Okay. We will fix it.

14 (Commissioner Melendez enters.)

15 COMMISSIONER YAKI: We kept the roll open
16 for you on No. 5.

17 CHAIRMAN REYNOLDS: Commissioner Melendez,
18 we assumed you would support it.

19 COMMISSIONER MELENDEZ: No.

20 CHAIRMAN REYNOLDS: Okay. Let the record
21 reflect that Commissioner Melendez along with
22 Commissioner Yaki voted against it. The remaining
23 Commissioners voted for it. The recommendation is
24 approved.

25 Onto Recommendation 6, I move that we

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1 adopt it. It reads as follows: "The ABA should
2 revise the recently adopted Standard 211 to delete any
3 requirement that law schools seeking accreditation
4 demonstrate a commitment to diversity. The standard
5 should instead be revised to permit law schools the
6 freedom to determine whether diversity is essential to
7 their academic mission consistent with Grutter v
8 Bollinger. Accordingly, the ABA should appeal
9 Interpretation 211-2 so as to most clearly preserve
10 law schools academic freedom in the accreditation
11 process." Is there a second?

12 COMMISSIONER KIRSANOW: I would move a
13 small amendment, stylistic more than anything, to
14 delete "any" in the first sentence. It says, "The ABA
15 should revise the recently adopted Standard 211 to
16 delete any..." I would change that to "the
17 requirement." There is only one requirement in that
18 standard.

19 VICE CHAIRPERSON THERNSTROM: Yes, I agree
20 with that and also "The standard should be revised to
21 permit law schools, consistent with Grutter v
22 Bollinger, the freedom to determine whether..." It's
23 a little bit confusing to have that consistent with
24 Grutter v Bollinger at the very end.

25 COMMISSIONER KIRSANOW: I agree.

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1 CHAIRMAN REYNOLDS: Any other comments?

2 COMMISSIONER MELENDEZ: I would just
3 comment that this side deletes requirements that
4 schools demonstrate a commitment to diversity then
5 basically.

6 CHAIRMAN REYNOLDS: That's correct and
7 that it be left up to the schools whether they --

8 COMMISSIONER YAKI: Can discriminate or
9 not.

10 COMMISSIONER KIRSANOW: Well, they're all
11 discriminating right now.

12 COMMISSIONER YAKI: I'm sure they are.

13 CHAIRMAN REYNOLDS: Okay folks. All in
14 favor of the recommendation as amended, signify by
15 saying aye.

16 (Chorus of ayes.)

17 CHAIRMAN REYNOLDS: All in opposition?

18 COMMISSIONER MELENDEZ: No.

19 COMMISSIONER YAKI: No.

20 CHAIRMAN REYNOLDS: Any abstentions?

21 (No response.)

22 CHAIRMAN REYNOLDS: Let the record reflect
23 that Commissioners Yaki and Melendez voted against the
24 recommendation. The remaining Commissioners voted to
25 adopt it. Recommendation 6 is adopted.

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1 Okay. I move that we adopt Recommendation
2 No. 7 which reads as follows: "The ABA should revise
3 Interpretation 211-3 to make it clear that the
4 organization will not judge a law school's commitment
5 to diversity by the results achieved." Is there a
6 second? Pretty please.

7 COMMISSIONER HERIOT: Second.

8 CHAIRMAN REYNOLDS: Thank you.
9 Discussion.

10 COMMISSIONER YAKI: Yes. I just wanted to
11 say for six, seven and eight it's a very sad, sad day
12 when diversity is a four letter word at this
13 Commission.

14 COMMISSIONER KIRSANOW: It's a sad day
15 when discrimination seems to supplant equal protection
16 at this Commission.

17 COMMISSIONER YAKI: Then maybe you should
18 -- Never mind.

19 COMMISSIONER HERIOT: But I would like to
20 point out that seven does not do that anyway.

21 COMMISSIONER KIRSANOW: That's right.

22 CHAIRMAN REYNOLDS: Okay folks. Let's
23 withdraw the six shooters and we'll continue to work
24 through these.

25 (Off the record comments.)

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1 CHAIRMAN REYNOLDS: Commissioner Melendez.

2 COMMISSIONER MELENDEZ: I just think that
3 the ABA's recommendation already is good enough.

4 CHAIRMAN REYNOLDS: Okay. Other comments?
5 Questions?

6 COMMISSIONER KIRSANOW: The other comment
7 I have is that I understand this recommendation based
8 on the manner in which 211 is drafted. But 211 in and
9 of itself is somewhat vague and I think this
10 replicates the vagueness.

11 VICE CHAIRPERSON THERNSTROM: I agree with
12 this.

13 COMMISSIONER BRACERAS: I see your point.

14 COMMISSIONER KIRSANOW: I don't know that
15 I would vote for this and I'm not sure how this
16 actually much lends to our recommendations.

17 VICE CHAIRPERSON THERNSTROM: I agree with
18 this. We don't need this.

19 COMMISSIONER TAYLOR: In fact, both 7 and
20 8.

21 CHAIRMAN REYNOLDS: Any other comments?

22 VICE CHAIRPERSON THERNSTROM: All right.
23 I'm going to vote against it. I agree with this and
24 people looking at this just aren't going to know what
25 it means.

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1 CHAIRMAN REYNOLDS: Let's finish the
2 discussion before we start voting.

3 COMMISSIONER HERIOT: Yes. Maybe we need
4 to clarify a little bit for me here. I don't quite
5 understand that.

6 COMMISSIONER KIRSANOW: The way for me,
7 the way this reads can be susceptible of a number of
8 interpretations with which I may or may not agree and
9 I have a little bit of a background as we all do
10 having heard the testimony. I'm not so sure how this
11 would be interpreted by the broader public or by any
12 our stakeholders.

13 For example, it says that "it should be
14 revised to make it clear that the organization will
15 not judge a law school's commitment to diversity by
16 the results achieved." I'm not so sure what "results
17 achieved" means. Standing along, I understand based
18 on the evidence that we receive what it means, but I'm
19 not sure without more elaboration what this actually
20 means. So I'm a little hesitant to vote for it.

21 VICE CHAIRPERSON THERNSTROM: We need to
22 beef it up if we're going to --

23 COMMISSIONER KIRSANOW: I don't know that
24 this adds that much to our report.

25 VICE CHAIRPERSON THERNSTROM: Right. I

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1 agree.

2 COMMISSIONER YAKI: Just strike it.

3 COMMISSIONER KIRSANOW: That's what I
4 would do.

5 CHAIRMAN REYNOLDS: Other comments?

6 (No response.)

7 COMMISSIONER HERIOT: Is that a motion to
8 strike then?

9 COMMISSIONER KIRSANOW: Yes, I would move
10 to strike.

11 COMMISSIONER YAKI: I'll vote for that.

12 CHAIRMAN REYNOLDS: I mean we just vote
13 and if it doesn't get the majority, then it's done.

14 COMMISSIONER YAKI: Yes. That will make a
15 vote for yes.

16 CHAIRMAN REYNOLDS: Okay. All in favor of
17 Recommendation No. 7 please signify by saying aye.

18 (No response.)

19 CHAIRMAN REYNOLDS: All in opposition?

20 (Chorus of nos.)

21 CHAIRMAN REYNOLDS: Any abstentions?

22 (No response.)

23 COMMISSIONER YAKI: You could have made it
24 a motion to strike and I could have gone on the record
25 as voting with you.

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1 COMMISSIONER KIRSANOW: You are voting
2 with me.

3 COMMISSIONER YAKI: It's not the same
4 thing. I mean an affirmative vote versus a no vote.

5 CHAIRMAN REYNOLDS: Commissioner Heriot,
6 was that an abstention?

7 COMMISSIONER HERIOT: I abstain. I still
8 haven't figured this out.

9 COMMISSIONER TAYLOR: Correct.

10 CHAIRMAN REYNOLDS: Okay. Let the record
11 reflect that Commissioners Heriot, Taylor and Reynolds
12 abstain.

13 VICE CHAIRPERSON THERNSTROM: Do you know
14 what? I'm changing mine to an abstention also since I
15 can't that out. The reason is I can't figure that
16 out.

17 COMMISSIONER YAKI: You can't give me one
18 victory, Abigail. Is that it?

19 (Laughter.)

20 VICE CHAIRPERSON THERNSTROM: You got the
21 victory. We've struck it.

22 CHAIRMAN REYNOLDS: Okay. Let the record
23 reflect that Commissioners Heriot, Taylor, Thernstrom
24 and Reynolds abstained. The remaining Commissioners
25 voted against the recommendation. I'm sorry.

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1 Jennifer, am I correct in assuming that you voted
2 against it?

3 COMMISSIONER BRACERAS: I did. I was just
4 thinking about Commissioner Thernstrom's comments.
5 Yes, I'll keep my vote against it.

6 CHAIRMAN REYNOLDS: So this constitutes a
7 victory for Commissioners Yaki and Melendez. That was
8 a joke, folks.

9 (Laughter.)

10 CHAIRMAN REYNOLDS: Okay. Recommendation
11 8.

12 VICE CHAIRPERSON THERNSTROM: Got to work
13 on your sense of humor, Jerry.

14 CHAIRMAN REYNOLDS: I'm not going to quit
15 my day job.

16 Recommendation 8, I move that we approve
17 it. It reads as follows: "The ABA should revise
18 Interpretation 211-1 to make it clear that the
19 Constitutional and statutory provisions at the
20 Federal, state and local levels remain binding, legal
21 obligations for all law schools even if they conflict
22 or appear to conflict with Standard 211 and its
23 official interpretations." Is there a second?

24 VICE CHAIRPERSON THERNSTROM: Second.

25 CHAIRMAN REYNOLDS: Discussion.

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1 COMMISSIONER KIRSANOW: I just had a
2 question and maybe staff knows this. My recollection
3 is that subsequent to the, was it the July meeting,
4 I'm sorry, June meeting, that there was an amendment
5 to 211 to make that clear or maybe it was Stephen
6 Smith who testified that there was going to be a
7 clarification. Does anybody know?

8 STAFF DIRECTOR MARCUS: My understanding
9 also is that there was an amendment which deleted
10 language which many said created an explicit conflict.

11 COMMISSIONER KIRSANOW: Right.

12 COMMISSIONER HERIOT: I thought, maybe I'm
13 wrong, but I thought that this second sentence in
14 Interpretation 211-1 was the modification. "A law
15 school that is subject to such Constitutional or
16 statutory provisions would have to demonstrate the
17 commitment required by Standard 211 by means other
18 than those prohibited by the applicable Constitutional
19 or statutory provisions." That was the addition.

20 COMMISSIONER BRACERAS: I think
21 Commissioner Heriot is correct on that one.

22 COMMISSIONER KIRSANOW: So the question is
23 does that clarify it sufficiently.

24 CHAIRMAN REYNOLDS: Folks.

25 COMMISSIONER YAKI: Not my fight.

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1 VICE CHAIRPERSON THERNSTROM: Commissioner
2 Heriot, do you think that we need this at this point?

3 COMMISSIONER BRACERAS: I think we need to
4 do something about it because certainly the ABA did
5 attempt to say initially that law schools broke the
6 law and how they may have changed that under pressure.
7 So I think we nevertheless want to be very clear that
8 legal obligations come before accrediting obligations.
9 So I think it was my suggestion that we maintain a
10 reference to that and it may not be clear and it may
11 be -- but I just want to be clear that it's more
12 important for law schools to comply with the law than
13 it is for them to comply with the ABA.

14 VICE CHAIRPERSON THERNSTROM: Do we lose
15 anything by including this in our list of findings?
16 We don't even if it's duplicative.

17 COMMISSIONER KIRSANOW: I don't have a
18 problem with it as written. I just had a question as
19 to whether or not that clarification had been made.

20 VICE CHAIRPERSON THERNSTROM: Right.

21 COMMISSIONER KIRSANOW: And if this, in
22 fact, if we already have reference to that
23 clarification my only question was does that satisfy
24 us. I'm not sure.

25 VICE CHAIRPERSON THERNSTROM: I know. I'm

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1 just asking since we don't have an answer to that
2 question whether we need it.

3 COMMISSIONER BRACERAS: I have a
4 suggestion. How about taking out the first part that
5 says "ABA should revise" and just simply state "Law
6 schools should be clear that Constitutional and
7 statutory provisions" blah, blah, blah.

8 VICE CHAIRPERSON THERNSTROM: That's fine.

9 COMMISSIONER BRACERAS: We're not asking
10 the ABA to do anything. We're simply reminding the
11 law schools of where their primary obligations lie.

12 VICE CHAIRPERSON THERNSTROM: Right, and
13 then strike "for all law schools." But "Law schools
14 should be clear at the outset." Strike "for all law
15 schools."

16 COMMISSIONER BRACERAS: That's right.

17 CHAIRMAN REYNOLDS: Commissioner Melendez.

18 COMMISSIONER MELENDEZ: No, I didn't have
19 a comment.

20 CHAIRMAN REYNOLDS: All right.

21 VICE CHAIRPERSON THERNSTROM: And then it
22 should read "even if these obligations conflict."

23 COMMISSIONER BRACERAS: Right. "Or
24 appears to," right?

25 VICE CHAIRPERSON THERNSTROM: Right.

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1 COMMISSIONER BRACERAS: -- right now.

2 "Even if they conflict or appear to conflict."

3 VICE CHAIRPERSON THERNSTROM: Right.

4 COMMISSIONER BRACERAS: "Standard 211 and
5 its interpretation." So in other words, "Standard 211
6 and its official interpretation" can say what they
7 want. I don't want any ABA bureaucratic on the sly
8 telling people, "You never really..."-- valid
9 initiative that the people voted for. So whether it
10 appears to them or somebody else tells they're not at
11 the point because they have to comply the law first.

12 VICE CHAIRPERSON THERNSTROM: Right. I'm
13 in agreement with this.

14 CHAIRMAN REYNOLDS: Okay. All in favor of
15 this recommendation as amended, please signify by
16 saying aye.

17 (Chorus of ayes.)

18 COMMISSIONER KIRSANOW: I would move to
19 hold open the record so that Commissioner Yaki can
20 register his vote on this.

21 VICE CHAIRPERSON THERNSTROM: That's fine.

22 In the meantime while we're doing that --

23 CHAIRMAN REYNOLDS: One thing.
24 Commissioner Melendez, do you vote for this or against
25 it or abstain?

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1 COMMISSIONER MELENDEZ: Which number is
2 this?

3 COMMISSIONER KIRSANOW: No. 8

4 COMMISSIONER MELENDEZ: I'm opposed.

5 CHAIRMAN REYNOLDS: Okay.

6 VICE CHAIRPERSON THERNSTROM: I hate to do
7 this but I do want to go back for one minute to
8 Finding 2. I am still very bothered by the last
9 sentence "is not widely available." You know, I still
10 don't know why we have that in there as it don't
11 bother folks to pursue this topic.

12 COMMISSIONER KIRSANOW: "Readily
13 available"?

14 VICE CHAIRPERSON THERNSTROM: Why do we
15 need that sentence?

16 COMMISSIONER YAKI: Are we still talking
17 about this?

18 VICE CHAIRPERSON THERNSTROM: No, I know.

19 COMMISSIONER KIRSANOW: How do you vote on
20 No. 8?

21 CHAIRMAN REYNOLDS: You don't need to
22 know. Just say no.

23 COMMISSIONER YAKI: No. 8? Could you
24 reread that? No.

25 COMMISSIONER HERIOT: You're aware of the

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1 new phrasing of it.

2 COMMISSIONER YAKI: It doesn't matter.

3 COMMISSIONER HERIOT: Okay.

4 COMMISSIONER KIRSANOW: Commissioner Yaki
5 will be given \$1 million bonus.

6 CHAIRMAN REYNOLDS: Okay. The suggestion,
7 are you comfortable?

8 VICE CHAIRPERSON THERNSTROM: I'm
9 suggesting we cut the last sentence on Finding 2. I'm
10 uncomfortable with the notion, with any notion, that
11 further research is less than feasible.

12 COMMISSIONER HERIOT: It just says
13 "further evaluate." So all the data that's out there
14 is out there.

15 CHAIRMAN REYNOLDS: This would be in
16 addition to the body of information that's out --

17 COMMISSIONER HERIOT: It's almost
18 redundant. The data that's not there yet is not there
19 yet.

20 VICE CHAIRPERSON THERNSTROM: Is that the
21 way it's going to be read? The fact is we have a
22 bunch of scholars working on this question. They're
23 trying to get the data. Sander himself is trying to
24 get more data.

25 COMMISSIONER HERIOT: Yes, but in that

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1 respect, the data isn't widely available. But with
2 regard to that research, it's true.

3 VICE CHAIRPERSON THERNSTROM: This seems
4 to suggest we can't answer crucial questions and will
5 not be able to.

6 CHAIRMAN REYNOLDS: My sense is -- Well,
7 the impression that I have is, Vice Chair Thernstrom,
8 I think you're reading a lot into it.

9 VICE CHAIRPERSON THERNSTROM: Okay. All
10 right. Fine. I'll drop it.

11 CHAIRMAN REYNOLDS: Where are we, folks?

12 VICE CHAIRPERSON THERNSTROM: We're at the
13 State Advisory Committee. I have one other remark to
14 make before we go onto this. This is too cumbersome a
15 process. Surely, there is some way of doing this --

16 COMMISSIONER KIRSANOW: Poll votes.

17 VICE CHAIRPERSON THERNSTROM: Whatever.

18 COMMISSIONER BRACERAS: I have to disagree
19 with you. I think this is precisely the type of
20 stuff, the good discussion, that we never had under
21 Mary Frances Berry that is good for us to have in open
22 forum and I think some of the changes that were made
23 today, some of them substantive and some of them nit-
24 picky, all make it much better document and they would
25 not have been made if we hadn't gone through this

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1 exercise and, yes, it's time-consuming and, yes, it's
2 laborious but frankly, I think it's the most important
3 work we can do, much more important than voting on the
4 schedule.

5 VICE CHAIRPERSON THERNSTROM: Jennifer, my
6 point is --

7 COMMISSIONER HERIOT: I have a proposal
8 though. What if we had a rule that says we have to
9 vote on each finding and recommendation upon the
10 request of any individual Commissioner so that if in
11 the future there is some report where nobody really
12 wants to do this, that we can bypass it.

13 VICE CHAIRPERSON THERNSTROM: Jennifer, my
14 point is not that this wasn't valuable. The only
15 point is is there a way to do it in a more expeditious
16 way and the answer may be no.

17 COMMISSIONER BRACERAS: I don't think so
18 because I think the public has the right to hear the
19 debated substantive issues and that is really what we
20 are paid to do, not vote on the scheduling.

21 VICE CHAIRPERSON THERNSTROM: I'm not sure
22 we were debating substantive issues today.

23 COMMISSIONER HERIOT: I think it was a
24 good thing to go through these things one at a time on
25 this report.

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1 COMMISSIONER YAKI: Yes. I know I thought
2 I was.

3 COMMISSIONER BRACERAS: I think the edits
4 that were made were all excellent and it's a much
5 better product because we looked at them one at a
6 time.

7 VICE CHAIRPERSON THERNSTROM: All right.

8 COMMISSIONER BRACERAS: Even the nit-picky
9 things like what you call the Council or what have
10 you. That wouldn't have been made if we hadn't
11 brought it up here.

12 VICE CHAIRPERSON THERNSTROM: All right.
13 I withdraw my comments.

14 **VII. STATE ADVISORY COMMITTEE ISSUES**

15 CHAIRMAN REYNOLDS: All right. Next up is
16 the State Advisory Committee Issues. We are
17 rechartering right now Virginia.

18 COMMISSIONER BRACERAS: I'm sorry, folks.
19 At this time, I need to get off the call because I
20 need to go to the doctor and take one of the kids to
21 the doctor since we're all sick here.

22 CHAIRMAN REYNOLDS: Okay.

23 COMMISSIONER BRACERAS: Which is why I
24 couldn't be there in person. So I'm signing off.
25 Thank you and we'll see you in May.

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1 CHAIRMAN REYNOLDS: Very good.

2 (Commissioner Braceras exits meeting.)

3 CHAIRMAN REYNOLDS: We are rechartering
4 two state advisory committees. May I have a motion to
5 recharter the Virginia State Advisory Committee?
6 Under this motion, the Committee appoints the
7 following individuals to that committee based on the
8 recommendations of the Staff Director, Linda Chavez,
9 Lloyd Cohen, Stanley Cook, Morris Cooper, Tao Du,
10 Rachel Fisher, James Hengley, Curt Levy, Richard Samp,
11 Janeen Sims, Andrew Shannon, Raog Su, Jason Torcinski
12 and Lacey Ward.

13 Furthermore, I also move that the
14 Commission appoint Linda Chavez as Chair of the newly
15 rechartered Virginia State Advisory Committee. These
16 members will serve as uncompensated Government
17 employees and the Commission approves the hard work
18 that they will no doubt contribute to this SAC. Under
19 this motion, the Commission authorizes the Staff
20 Director to execute the appropriate paperwork for the
21 appointment. Is there a second?

22 COMMISSIONER KIRSANOW: Second.

23 COMMISSIONER YAKI: I move to divide the
24 question.

25 CHAIRMAN REYNOLDS: Okay. Someone explain

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1 to me what that means?

2 COMMISSIONER TAYLOR: Membership and
3 chair?

4 COMMISSIONER YAKI: Yes.

5 CHAIRMAN REYNOLDS: I'm sorry.

6 COMMISSIONER TAYLOR: Membership and
7 chair. That's all.

8 COMMISSIONER KIRSANOW: Divided on the
9 membership and chair.

10 CHAIRMAN REYNOLDS: Okay. So --

11 COMMISSIONER TAYLOR: Second.

12 CHAIRMAN REYNOLDS: All right.

13 COMMISSIONER YAKI: Actually, there is no
14 second on a motion to divide the question. It's a
15 privileged motion. Discussion.

16 CHAIRMAN REYNOLDS: And we're talking
17 about the chair, right?

18 COMMISSIONER YAKI: No, the membership.

19 COMMISSIONER MELENDEZ: I wanted to talk
20 about SACs in general because at the beginning of the
21 Staff Director's report we could have talked about but
22 then kind of waited for this time to talk about SACs
23 in general. My understanding is that there will be
24 several retirements in the coming months from the
25 Commission regional office and this plays into it

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1 because we're talking about a process of how
2 recommendations for the names that are submitted to
3 the Commission actually come to us.

4 So my concern is that we're losing a
5 number of regional office people there or the people
6 that head up those offices and I just need to know how
7 do we plan to facilitate that without chairs because I
8 think they play into this whole issue of
9 recommendations coming from the different regions as
10 far as the SAC.

11 I never totally understood what the
12 process is on that because at some point, I thought
13 that maybe they had some hand in recommending or
14 whether or not it was the Staff Director here that
15 recommends or whether or not it was the Commissioners
16 that throw a couple names into the hat. So I think
17 before we start to get in there, I think we should
18 define exactly what is the process because I think the
19 outcome obviously plays into this because we're
20 supposed to have a diverse array of people that end up
21 on these SAC committees and we raised it a number of
22 times that it seems to be not staffed just along party
23 lines, but it doesn't seem to be staffed evenly as far
24 as women on these committees.

25 If we look at the Virginia SAC, we have 21

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1 percent women, 79 percent men. We have two Democrats,
2 seven Republicans, five Independents. We seem to be
3 many times turning out to be Republicans from what
4 I've seen so far. So I'm just saying at some point
5 we're supposed to be somewhere close to balance on
6 this, but we've raised this on a number of other
7 recharter packages. So I just think that we need to
8 talk about, have frank discussion, as to what is this
9 process? Is it working or did the regional director
10 submit names and we're not really listening to them
11 and I'd like to even ask on this one who did the
12 regional staff recommend for that and then have the
13 Staff Director tells us why some of those names were
14 rejected or others inserted in their place and I think
15 that's a fair question that we really need to know
16 those answers before we vote on this, not only this
17 one, but the Michigan SAC also. I'm just raising that
18 question up front.

19 COMMISSIONER YAKI: Point of order. I
20 would request a two minute recess to talk with the
21 Chair.

22 CHAIRMAN REYNOLDS: Sure. Off the record.

23 (Whereupon, the foregoing matter went off
24 the record at 1:39 p.m. and went back on the record at
25 1:58 p.m.)

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1 CHAIRMAN REYNOLDS: On the record. Okay.
2 We were scheduled to vote on the Virginia and
3 Michigan rechartering packages for Virginia and
4 Michigan. We have received a letter from the Chairman
5 of the Committee of the Judiciary, John Conyers. The
6 letter is also signed by Gerald Nadler who is the
7 Chairman of the Subcommittee on the Constitution Civil
8 Rights and Civil Liberties.

9 Rather than -- And in this letter, they
10 have raised questions about our process in terms of
11 selecting members for the SACs. Rather than vote on
12 these rechartering packages, we believe that out of
13 deference and respect for the Chairman that we respond
14 to the letter prior to voting. So I move that we
15 table the vote on the rechartering packages for the
16 states of Virginia and Michigan until next month. Is
17 there a second?

18 COMMISSIONER KIRSANOW: Second.

19 CHAIRMAN REYNOLDS: All in favor?

20 (Chorus of ayes.)

21 CHAIRMAN REYNOLDS: Any in opposition?

22 (No response.)

23 CHAIRMAN REYNOLDS: Any abstentions?

24 (No response.)

25 CHAIRMAN REYNOLDS: The motion passes

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1 unanimously. Folks, we are --

2 COMMISSIONER YAKI: Out of here.

3 CHAIRMAN REYNOLDS: I'm sorry.

4 COMMISSIONER HERIOT: Look at your agenda.

5 Is that --

6 VICE CHAIRPERSON THERNSTROM: That was the
7 whole reason for doing this was to get out.

8 CHAIRMAN REYNOLDS: We are adjourned. Off
9 the record.

10 (Whereupon, at 2:00 p.m., the above-
11 entitled matter was concluded.)

12

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