

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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Thursday, May 4, 2006

The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 3:00 p.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairman
JENNIFER C. BRACERAS, Commissioner
MICHAEL YAKI, Commissioner
PETER N. KIRSANOW, Commissioner
ASHLEY L. TAYLOR, JR., Commissioner
ARLAN D. MELENDEZ, Commissioner

KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

JOHN BLAKLEY
TERESA BROOKS
MARGARET BUTLER
CHRISTOPHER BYRNES
DEBRA CARR, ESQ., Associate Deputy Staff
Director
RANITA CARTER
PAMELA A. DUNSTON, Chief, Administrative
Services and Clearinghouse Division
PATRICIA JACKSON, Chief, Budget and Finance
Division
SOCK-FOON MacDOUGALL
ALEXIS MANKS
TINA LOUISE MARTIN
EMMA MONROIG, Solicitor/Parliamentarian
EILEEN RUDERT
AUDREY WRIGHT

COMMISSIONER ASSISTANT PRESENT:

CHRISTOPHER JENNINGS

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

3:03 P.M.

CHAIRMAN REYNOLDS: The meeting will come to order. It looks like we have quite a few folks from the great State of Hawaii. Welcome.

First order of business, we have a new addition to the Commission staff. Her name is Shoshana, Shoshana Marcus. And Ken is a brand new dad.

(Applause.)

And her middle name is USCCR, right?

(Laughter.)

Okay, this is a meeting of the U.S. Commission on Civil Rights, held on May 4, 2006 at 624 9th Street, N.W., Room 540, Washington, D.C. All of the Commissioners are present. If the meeting is not completed this afternoon, the meeting will be adjourned until tomorrow after the briefing. To avoid this, I suggest that we work until 6 p.m. Any objections to working until 6? Very good.

The first item on the agenda is the approval of the agenda.

I. Approval of Agenda

CHAIRMAN REYNOLDS: May I have a motion to approve the agenda?

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1 VICE CHAIRMAN THERNSTROM: So moved.

2 CHAIRMAN REYNOLDS: Is there a second?

3 COMMISSIONER MELENDEZ: Second.

4 CHAIRMAN REYNOLDS: Would anyone like
5 discussion? Okay, let's vote. All in favor say aye.

6 (Ayes.)

7 CHAIRMAN REYNOLDS: All in opposition?

8 (No response.)

9 CHAIRMAN REYNOLDS: Any in opposition? Any
10 abstentions? Okay, the motion passes unanimously.

11 First, we have a motion to amend today's
12 agenda. I move to amend the agenda to add an item
13 labeled Briefing in Omaha, Nebraska on Creation of
14 Racially Identifiable School Districts. I'd like to
15 place that immediately following the discussion on
16 Program Planning.

17 Is there a second?

18 COMMISSIONER KIRSANOW: Second.

19 CHAIRMAN REYNOLDS: Discussion? All in
20 favor, say aye.

21 (Ayes.)

22 CHAIRMAN REYNOLDS: Any in opposition,
23 please say no.

24 (No response.)

25 CHAIRMAN REYNOLDS: Any abstentions? The

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1 motion passes unanimously.

2 The second is approval of the minutes for
3 the March 10, April 3rd and April 7th, 2006 meetings.

4 **II. Approval of Minutes of March 10, April 3, and**
5 **April 7, 2006 Meetings**

6 CHAIRMAN REYNOLDS: May I have a motion
7 for the approval of these minutes?

8 COMMISSIONER KIRSANOW: So moved.

9 CHAIRMAN REYNOLDS: Is there a second?

10 VICE CHAIRMAN THERNSTROM: Second.

11 CHAIRMAN REYNOLDS: Discussion? All in
12 favor say aye.

13 (Ayes.)

14 CHAIRMAN REYNOLDS: Any folks in
15 opposition, please say no.

16 (No response.)

17 CHAIRMAN REYNOLDS: Any abstentions? The
18 motion passes unanimously.

19 Next up, we have the Announcements.

20 **III. Announcements**

21 CHAIRMAN REYNOLDS: This month is Asian
22 Pacific Heritage Month. I am pleased to announce that
23 May is Asian Pacific Heritage Month. This year's
24 theme is "Freedom for All, a Nation We Call Our Own."
25 I would encourage all Americans to celebrate the

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1 extraordinary contributions and accomplishments of the
2 Asian Pacific Americans with community festivals and
3 educational activities.

4 At this point I will turn it over to the
5 Staff Director for his report.

6 **IV. Staff Director's Report**

7 STAFF DIRECTOR MARCUS: Thank you, Mr.
8 Chairman, Madam Vice Chair, Commissioners, just a few
9 brief remarks to supplement my written report.

10 First, I would like to explain that
11 nowadays the first cheerful face you're likely to see
12 as you enter the Office of the Staff Director is Ms.
13 Teresa Brooks who joins us in the Office of the Staff
14 Director on a detail. She has been with the Civil
15 Rights Commission for nearly five years, but has just
16 recently joined us as an Assistant to the Office of
17 the Staff Director.

18 Also, joining us temporarily in the Office
19 of the Staff Director is Margaret Butler who has been
20 a civil rights analyst in the Office of Civil Rights
21 Evaluation for eight years and she joins us on a stint
22 as Acting Special Assistant to the Staff Director.
23 You recall Margaret Butler's excellent work in the
24 recent Funding Report. She replaces Mr. Aonghas St.
25 Hilaire who departed the Commission on April 28 to

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1 accept a position at the U.S. Census Bureau.

2 Additionally, I'd like to acknowledge the
3 extraordinary work being done by Dr. Sock-Foon
4 MacDougall. You will appreciate tomorrow her work in
5 putting together the briefing on Historically Black
6 Colleges and Universities. In addition to that work
7 as a civil rights analyst, she is also temporarily
8 acting as the Acting Deputy Assistant Staff Director
9 for Civil Rights Evaluation in light of the departure
10 of Terri Dickerson.

11 I'd also like to say that we're very
12 pleased that we have gotten acceptances from excellent
13 speakers for our June briefing on Affirmative Action
14 and Law Schools. We will, at that point, hear from
15 Professor Richard Sander at the University of
16 California at Los Angeles Law School, as well as
17 Professor Richard O. Lempert, currently on leave from
18 the University of Michigan Law School while serving as
19 Division Director for the Social and Economic Sciences
20 at the National Science Foundation. Professor Lempert
21 is one of the co-authors of "The Real Impact of
22 Eliminating Affirmative Action in American Law
23 Schools, an Empirical Critique of Richard Sander's
24 Study", which was published in Stanford Law Review.

25 In addition, we will hear in June from Mr.

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1 Steve Smith, Chair of the American Bar Association's
2 Council on the Section of Legal Education and
3 Admissions to the Bar, who will address the Council's
4 proposed changes and the standards by which law
5 schools are accredited by the ABA. In addition,
6 Professor David Bernstein, currently Visiting
7 Professor at the University of Michigan Law School,
8 will address that same topic.

9 Those are my comments for today, unless
10 there are any questions from the Commission.

11 VICE CHAIRMAN THERNSTROM: I have -- go
12 ahead, Commissioner Kirsanow.

13 COMMISSIONER KIRSANOW: Mr. Staff
14 Director, do we have a location for the June briefing
15 yet?

16 STAFF DIRECTOR MARCUS: The June briefing
17 will be here at Headquarters.

18 COMMISSIONER KIRSANOW: Is David
19 Bernstein, the same David Bernstein from George Mason?

20 STAFF DIRECTOR MARCUS: Yes, Commissioner.
21 He is at George Mason, but visiting Michigan.

22 VICE CHAIRMAN THERNSTROM: I want to
23 welcome myself the number of people interested,
24 obviously, in our Native Hawaiian Government Report
25 and I wondered whether, what kind of response you have

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1 gotten, Mr. Staff Director. In general, what kind of
2 feedback you have gotten to our work? There are a
3 number of people in the audience. It's controversial,
4 probably.

5 STAFF DIRECTOR MARCUS: Certainly, Madam
6 Vice Chair. The Commissioners are, of course, aware
7 of the feedback received during the formal public
8 comment period which is summarized in our draft
9 report. That feedback included both comments in
10 support of the so-called Akaka Bill, as well as
11 comments in opposition. The supporters included
12 various elected officials and organizations including
13 the American Bar Association.

14 The opponents of the legislation were a
15 large number of individuals and a few organizations.
16 In general, the opposition correspondence far
17 outweighed the correspondence in support of the Akaka
18 Bill.

19 There's also been extensive media coverage
20 of what is described as a leaked version of the draft
21 report that has come out and in that media coverage,
22 various people, including Members of Congress are
23 quoted as being upset about or opposed to the draft
24 report.

25 Since the media articles have come out,

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1 I've received a substantial number of emails from
2 people with Hawaii addresses, all of the messages that
3 I have received have been from people who are
4 supportive of the Commission's work and wanted to say
5 thank you for what they understand the draft report to
6 contain.

7 CHAIRMAN REYNOLDS: Any other questions?
8 Next we'll deal with the National Report on Voting
9 Rights Act.

10 **V. Program Planning: Voting Rights Act Statutory**
11 **Report**

12 This report is the Commission's statutory
13 report on the enforcement of civil rights by the
14 Federal Government that has to be done annually. This
15 year, it has been done on the Voting Rights Act in
16 order to provide Congress with a basis on whether to
17 extend the temporary sections of the Voting Rights
18 Act. This report was distributed in draft form to
19 Commissioners on March 2, 2006 for the Commission's
20 March 10, 2006 meeting, and again, with minor changes
21 indicated in strike through on March 30, 2006.

22 There was a motion at the March meeting to
23 postpone consideration and voting of this project in
24 order to provide the Commissioners with additional
25 time to review the draft report and the concurring and

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1 dissenting opinions. There are now various proposed
2 amendments to the Voting Rights Statutory Report.
3 Before the same is approved, I would ask that the Vice
4 Chair read the motion into the record.

5 VICE CHAIRMAN THERNSTROM: And the Vice
6 Chair is trying to find the material. And also -- I
7 was also trying to find, I know that Commissioner Yaki
8 has written a dissent. I have written concurrence, as
9 it were, and I wonder -- I haven't been able to find
10 those in this material here, both of them.

11 Mine is a response to Commissioner Yaki's
12 dissent.

13 CHAIRMAN REYNOLDS: What I'm missing is
14 the dissent.

15 VICE CHAIRMAN THERNSTROM: We're still
16 missing the dissent.

17 STAFF DIRECTOR MARCUS: Madam Vice Chair,
18 your concurrence is being distributed right now. I
19 believe that Commissioner Yaki's concurrence or rather
20 dissent was distributed electronically.

21 VICE CHAIRMAN THERNSTROM: I did receive
22 it electronically. I want to make sure everybody had
23 a copy, has a copy.

24 Anyway --

25 CHAIRMAN REYNOLDS: Commissioner Yaki?

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1 COMMISSIONER YAKI: I just have a
2 procedural question. This is not to be taken the
3 wrong way, other than as I recall, when we gave the
4 dates for the deadline for dissenting, concurring
5 opinions to be brought, it was supposed to be done by
6 a time certain. That date came, I believe, the day
7 that our -- in April, the last day that we had a
8 meeting, was the date upon which the dissenting and
9 concurring opinions were due.

10 And I have no problem with the fact that
11 this may have been extended. If someone has written a
12 concurrence in response to my dissent, which was sent
13 that afternoon of April, I would like the opportunity
14 to respond to the response to my dissent. I was
15 unaware that we were going to be able to read each
16 other's concurrences or dissents -- or whatever
17 -- because in fact, the deadline was that day and I
18 submitted mine pretty much at the end of the day on
19 that particular day.

20 STAFF DIRECTOR MARCUS: Mr. Chairman, if I
21 may address the first factual portion of that?

22 CHAIRMAN REYNOLDS: Yes, sure.

23 STAFF DIRECTOR MARCUS: The other part may
24 be a motion or may be a policy matter for discussion.

25 For the April meeting, there were motions

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1 that involved due dates for responses to, I believe,
2 three different reports. Some of them had due dates
3 on the day of the meeting and some were for two weeks
4 following. It had been my understanding that the
5 motion essentially extended by one month both the due
6 dates for the concurrences and dissents, as well as
7 the suggestions for when things would be published.
8 That had been my understanding of the motion, but that
9 was my interpretation.

10 CHAIRMAN REYNOLDS: Okay.

11 COMMISSIONER YAKI: Just as a point of
12 parliamentary inquiry then, having been one of the
13 four Members at the meeting, you were otherwise
14 engaged in a much more lofty goal of and duty to your
15 family, and being present at the birth of your
16 daughter, it was pretty clear that the -- I did not
17 hear the motion that way. I had simply heard that we
18 were going to defer the consideration of it until
19 then.

20 I did not hear in the motion that we were
21 also going to be specifically extending the deadline
22 of concurrences and dissents until -- for a month
23 later. And quite frankly, I'm a little miffed,
24 because I worked my tail off to meet that deadline,
25 knowing that that was the one that had been set by a

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1 motion of the Commission. The holdover, I thought,
2 was simply for consideration of the report, not for
3 everything else in between. If I had known that, I
4 would have requested the opportunity to review what
5 somebody had written about mine, so I could write
6 about theirs.

7 CHAIRMAN REYNOLDS: Commissioner Yaki, is
8 there a way out of this to provide with you an
9 opportunity to revise your dissent, if you decide that
10 that's what you want to do?

11 COMMISSIONER YAKI: Yes, I would.

12 VICE CHAIRMAN THERNSTROM: Let me speak to
13 this. This process can go on forever. Then I can
14 respond to him and you know, I've been through this
15 before in my service on this Commission which the
16 question of back and forth endlessly comes up and the
17 resolution has not been and I've been in your
18 position, the resolution has not been to allow a
19 response and then another response and so forth.

20 I would say to you, Commissioner Yaki,
21 that I think you have written the response to my
22 concurring statement that is, it seems to me, you
23 wrote what you wanted to say and needed to say and it
24 can't be said better. It's excellent.

25 And I can't imagine that there's anything

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1 -- I mean we've got a basic split here in our view of
2 this issue. It's very nicely laid out in these two
3 statements and I'm very reluctant to once again
4 postpone a vote, a final vote, so that we can get a
5 statutory report out.

6 COMMISSIONER YAKI: I'm not suggesting
7 that. I'm not suggesting that --

8 VICE CHAIRMAN THERNSTROM: Well, wait a
9 minute. If we have a final vote today, we can get it
10 out immediately and this is an issue that is
11 currently, this Senate is about -- it's actually
12 started --

13 CHAIRMAN REYNOLDS: What I had in mind is
14 that the briefing report would be issued immediately
15 along with your concurrence and we would issue, we
16 would publish Commissioner Yaki's document as soon as
17 he presented it.

18 VICE CHAIRMAN THERNSTROM: Well, I think
19 it needs to be a package. Am I wrong?

20 CHAIRMAN REYNOLDS: I think that's the
21 best way to do it.

22 VICE CHAIRMAN THERNSTROM: At that point
23 I'm going to be wanting a response to him. I mean it
24 doesn't make any sense.

25 We both said what we have to say about

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1 this report and this statute.

2 COMMISSIONER YAKI: Let me be very honest
3 about this. I had about four thousand other things
4 going on at the time. I knew this deadline was coming
5 up on April whatever it was, April 3rd, 4th, 5th,
6 whatever the eventual date was, because we had -- in
7 fact, in a previous email on another subject, on
8 deadlines, I had spoken with the Staff Director who
9 said that deadlines may only be specifically extended
10 by motion of the body. So just to let you know, this
11 was -- I thank you that you think it's an excellent
12 work. Quite honestly, I don't think it was everything
13 that I wanted it to be simply because I did not feel
14 that I had enough time, but I wanted to respect that
15 deadline and decided to put out what it is that I felt
16 I could put out, given that time deadline that I had.

17 If I had known that the extension was to
18 include -- forget even responding to what you had to
19 say, Madam Vice Chair. But if I had had an additional
20 week or two weeks, or a month in this case, to have
21 actually been able to work on this, I would have
22 produced a much different document than what I did.

23 CHAIRMAN REYNOLDS: I think that we have a
24 solution, but it's not perfect. I think it's
25 extremely important that this document be issued, that

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1 we vote on it and if it passes that we publish it as
2 soon as possible. I am sympathetic, Commissioner
3 Yaki, to your desire to write a document that takes
4 into account all of the criticism that was submitted
5 by other Commissioners and in this particular case,
6 you're saying you didn't have the opportunity because
7 Commissioner -- Vice Chair Thernstrom's response was
8 submitted after the deadline.

9 VICE CHAIRMAN THERNSTROM: Not after the
10 deadline as I understood it.

11 COMMISSIONER YAKI: Well, I would like to
12 see the transcripts of that to see whether or not we
13 specifically included in there the deadlines for
14 dissents or -- that being aside -- I just want to say,
15 if we're going to vote on this today, I want my
16 dissent in there. I do not want it separately
17 packaged. I don't want it in a trailing document. I
18 want it in there.

19 VICE CHAIRMAN THERNSTROM: That's my whole
20 point. We need to get this report out. It's time to
21 get it out. You wrote an excellent dissent. I don't
22 see how it can be any better. We both of us wrote
23 under -- you can't imagine the number of bowls I'm
24 juggling in life. I wrote under enormous pressure
25 too. Could I do a better perfect document? Of

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1 course, I could do a more perfect document, but that's
2 always true of anything I write.

3 The point is both of us have crystal clear
4 statements where we're coming from and I don't see how
5 yours could be better, frankly, and I've read an awful
6 lot of stuff on voting rights.

7 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

8 COMMISSIONER KIRSANOW: I was present at
9 the meeting. I don't recall what the precise motion
10 was. I would prefer to get this document out
11 immediately. However -- and my vote would be to get
12 it out immediately.

13 However, in the interest of comity -- I --
14 T-Y -- if Commissioner Yaki was amenable to having a
15 statement submitted within a week or so that would be
16 a trailing statement, his dissent being published
17 along with everything else concurrently with the
18 majority draft, then I'd be amenable to that. I think
19 there's no meeting of the minds as to what the
20 deadline is supposed to be and frankly, I don't
21 recall. And even if we did have a meeting of the
22 minds, I think there's some dispute as to what had
23 happened and I think that we're a collegial body and
24 we can accommodate that.

25 CHAIRMAN REYNOLDS: Commissioner Braceras?

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1 COMMISSIONER BRACERAS: I don't know the
2 legislative timetable, but what's the downside to
3 granting Commissioner Yaki's request?

4 VICE CHAIRMAN THERNSTROM: The legislative
5 timetable is that the Senate has started hearings. It
6 has had one hearing so far. The rest are coming very
7 rapidly. There will be -- there will be a vote in the
8 Senate and there is some possibility that this report
9 is of some use to some Senators and can play a role
10 including Commissioner Yaki's dissent, which as I
11 said, is excellent. I'd like to see that play a role
12 as well as the rest of --

13 COMMISSIONER BRACERAS: Just to be clear,
14 what exactly is it, Commissioner Yaki, that you're
15 asking for in terms of delay or extension? What is
16 the precise request on the table?

17 COMMISSIONER YAKI: I think there are sort
18 of two things going on here. One is that what I sense
19 is that the Commission doesn't want to delay voting on
20 the report today. If that is the case, then I have no
21 case because I do not want my dissent floating either.

22 COMMISSIONER BRACERAS: What's your best
23 case scenario? What would you --

24 COMMISSIONER YAKI: My best case --

25 COMMISSIONER BRACERAS: I'm asking you

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1 what you would prefer.

2 COMMISSIONER YAKI: My best case scenario
3 is that I'd be allowed time to revise and probably
4 expand my dissent.

5 COMMISSIONER BRACERAS: How much time?

6 COMMISSIONER YAKI: Well, the thing is I
7 could probably -- I think we need -- until the next
8 meeting is too long. I think that would probably be
9 too much to ask. I would say that 10 days and then if
10 we had to have a special just phone call to approve it
11 with concurring and dissenting statements, that would
12 be fine with me.

13 CHAIRMAN REYNOLDS: Well, what about a
14 compromise where we would vote, we would get both,
15 well, all the documents out today and we would -- when
16 your document is ready and after you've amended it, we
17 would just supplement? Actually, just replace the
18 dissent that would go out along with the briefing with
19 your amended document?

20 COMMISSIONER YAKI: I think I'm going to
21 go for simplicity here because simplicity, I think --
22 I'm now going to decide that I wanted to make a point
23 about the deadline. I wanted to make a point about
24 fairness. I wanted to make a point about clarity of
25 these proceedings. The fact is that as I look at

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1 this, it's getting more complicated and it's taking
2 more time than it should. I'm ready to debate the
3 report, get it out one way or the other with what I've
4 got and we'll just go from there.

5 VICE CHAIRMAN THERNSTROM: And I want to
6 repeat again, I really think it's terrific what you
7 already wrote. I wouldn't say it if I didn't think
8 that.

9 CHAIRMAN REYNOLDS: Commissioner Braceras?

10 COMMISSIONER BRACERAS: I mean I am
11 concerned about fairness and Commissioner Yaki's --
12 the issues that he raises. And I guess my personal
13 view is if it wouldn't be too onerous to wait 10 days
14 and have a poll vote via fax on the entire document,
15 obviously we wouldn't be able to discuss it publicly,
16 that's fine with me. I think we all know where we're
17 going to come out on this report.

18 I have no problem with that if the
19 legislative calendar is such that that's doable. That
20 that's still relevant.

21 VICE CHAIRMAN THERNSTROM: It's not
22 doable. Then we're opting out of having anybody who
23 is involved in the legislative process read this
24 report.

25 COMMISSIONER BRACERAS: Ten days makes a

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1 difference?

2 VICE CHAIRMAN THERNSTROM: Ten days
3 absolutely makes a difference.

4 COMMISSIONER BRACERAS: Okay.

5 CHAIRMAN REYNOLDS: There's a risk that
6 there could be a vote within that 10-day period.

7 COMMISSIONER BRACERAS: What about five
8 days?

9 VICE CHAIRMAN THERNSTROM: Jennifer, this
10 is --

11 COMMISSIONER YAKI: Commissioner Braceras,
12 I appreciate what you're saying. I would say at this
13 point I was just surprised that this deadline which I
14 always thought was hard and fast had magically
15 extended and I just knew how much I'd thrown out in my
16 rush to try and get what -- distill down what I could.
17 Maybe that was an editing process that I would have
18 been involved in anyway.

19 I just want to say for the future and for
20 the record, if we're going to do these kinds of
21 extensions, we should make it very clear whether or
22 not that includes the deadlines for dissenting and
23 other kinds of -- and concurring statements because
24 that -- what I got from the April meeting was we were
25 simply going to put over consideration of the final

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1 draft of the report that had included everything else,
2 including the dissenting and concurring statements at
3 the deadline they were submitted, not that that had
4 somehow also put over the deadline for writing it as
5 well.

6 CHAIRMAN REYNOLDS: Well, I think in the
7 future we should be careful. We need to be more
8 precise on these matters.

9 COMMISSIONER YAKI: So I'm going to now
10 withdraw my parliamentary question and why don't we
11 talk about the report?

12 STAFF DIRECTOR MARCUS: Mr. Chairman, if I
13 may, I think there's one point of clarification that's
14 needed for the staff which is to know whether the
15 deadlines for concurring and dissenting statements for
16 the other reports from the April meeting also were --
17 whether they were extended or whether they've also
18 expired.

19 COMMISSIONER YAKI: I think the gloss of
20 interpretation is now that they go along with the
21 extension.

22 STAFF DIRECTOR MARCUS: That had been my
23 prior interpretation, but as Commissioner Yaki
24 indicates --

25 VICE CHAIRMAN THERNSTROM: My

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1 understanding all along has been that those deadlines
2 are tied to the actual votes by the Commission on
3 these reports.

4 COMMISSIONER YAKI: I know, but as a point
5 of information, usually they trail by about two weeks.
6 Because we had already put it off from March, I had
7 agreed, I had specifically agreed that the dissenting
8 statements would be due the same day as consideration
9 of the report. So there was a very special exception
10 tied in there to the VRA report in deference, quite
11 frankly, to concerns raised by members here that we
12 didn't want to have a trailing again and we wanted to
13 get this out as soon as possible. That was the
14 exception I think that perhaps proves the rule, but we
15 should just --

16 VICE CHAIRMAN THERNSTROM: This needs to
17 be, in the future, needs to be --

18 CHAIRMAN REYNOLDS: And in addition, I
19 think it would be -- Ken, when you receive
20 concurrences of dissents, they should be -- if they're
21 in final form, distributed, because I don't believe I
22 received yours.

23 VICE CHAIRMAN THERNSTROM: I have crashed
24 to do mine.

25 CHAIRMAN REYNOLDS: All right, let's --

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1 VICE CHAIRMAN THERNSTROM: Also, like
2 Commissioner Yaki, without the time to do it, really.

3 CHAIRMAN REYNOLDS: Okay, well, we're
4 going to get out of here before six, let's -- do we
5 have a second?

6 VICE CHAIRMAN THERNSTROM: I did not read
7 this motion. You wanted me to read this motion.

8 CHAIRMAN REYNOLDS: Okay.

9 VICE CHAIRMAN THERNSTROM: Now you need me
10 to read the entire thing, rather than have people
11 stare at it, okay, fine.

12 I did one last run through on the
13 statutory report and just picked up a few things I
14 would like to see changed. None of them is make or
15 break. But they were put in the form of a motion. So
16 I move that a motion be approved with the following
17 changes to the Voting Rights Statutory Report.

18 Does everybody have this document?

19 COMMISSIONER BRACERAS: No.

20 CHAIRMAN REYNOLDS: That was emailed the
21 very last day by itself and was a little confusing.

22 COMMISSIONER BRACERAS: I don't have it
23 with me.

24 CHAIRMAN REYNOLDS: Okay, Vice Chair
25 Thernstrom, why don't you just read the portion of the

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1 document that you would like edited and just read in
2 the edits.

3 COMMISSIONER BRACERAS: Thanks. I looked
4 at it. I just don't have it.

5 VICE CHAIRMAN THERNSTROM: Sure. This is
6 picky stuff.

7 Bottom of page one, last paragraph, last
8 sentence, "Commission reported in the late 1950s and
9 early 1960s" -- has everybody got this? Because I
10 want to wait until people have it.

11 Commissioner Yaki, do you have it yet?

12 COMMISSIONER YAKI: The amendments?

13 VICE CHAIRMAN THERNSTROM: No, the report
14 itself, so you can stare at the report.

15 COMMISSIONER YAKI: I'm looking at it.

16 VICE CHAIRMAN THERNSTROM: "The Commission
17 reported in the late 1950s and early 1960s on the
18 pervasive discrimination in voting that then existed
19 throughout most of the South and which led" it reads
20 and I simply want "that led parallel construction."
21 That's all.

22 I'm being nitpicky here. So instead of
23 "which led", "that led."

24 Page 10. I was bothered -- after the
25 first sentence of the second full paragraph, so it

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1 currently reads "Covered jurisdictions may not
2 implement voting changes unless and until they obtain
3 federal preclearance." I wanted a sentence added "The
4 Justice Department has 60 days to respond to a request
5 for a voting change." In other words, it's not an
6 indefinite preclearance process. Put in the
7 information that this is a 60-day process.

8 Page 16. And this is more substantive.
9 After the first sentence of the first full paragraph
10 where it says "In Georgia, the gap between white and
11 black registration rates narrowed steadily" and gives
12 some figures here. I wanted to put in here, but
13 again, none of this is make or break for me, "These
14 are remarkable figures given the educational and
15 economic disparities between the two racial groups and
16 the high correlation between socio-economic status and
17 voter participation."

18 All right, next page, 17. Just before the
19 end of the fifth bullet, page 17. The bullet --

20 CHAIRMAN REYNOLDS: The bullet is on 18,
21 isn't it?

22 VICE CHAIRMAN THERNSTROM: Pardon me, it's
23 got to be 18. I was working with a different
24 document. Hold on, let me just take a clip off here.
25 Okay, the fifth bullet -- I'm sorry, I'm lost on my

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1 own point here.

2 "If Section 5 is extended, should Congress
3 alter the procedure by which covered jurisdictions may
4 seek to bail out from coverage and/or amend the
5 formula for determining geographic coverage." I
6 wanted to add "such as updating the trigger to reflect
7 registration and turnout figures in the 2004
8 election." That just spells out the point about --
9 the question here about amending the formula. The
10 real issue here is whether the trigger should be
11 updated. And I don't think it's clear. I don't think
12 anybody is going to know what we're talking about
13 otherwise.

14 Okay, page 20. There's a footnote here,
15 footnote 75, "the one divergent decision since 1982
16 was the Supreme Court's determine that Section 5
17 generally does not cover changes to the powers and
18 duties of elected officials. See, Presley versus Ida
19 County. That's accurate if we're talking about since
20 1982, but it's -- I think it would be more informative
21 to add the following sentence, "However, also note
22 that changes do not need to be precleared that have
23 been ordered by a Federal Court and do not reflect the
24 policy preferences of elected officials." Connor
25 versus Johnson.

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1 COMMISSIONER BRACERAS: Officials
2 shouldn't be capitalized.

3 VICE CHAIRMAN THERNSTROM: Yeah, I didn't
4 capitalize that. Somebody else did. Right.
5 Officials should definitely not be capitalized.

6 Okay, page 21. Well, and this is a
7 substantive disagreement. First full paragraph in 21,
8 there's the sentence: "Decisions by the Supreme
9 Court, however, have narrowed the scope of the Section
10 5 discrimination standard." I would take that
11 sentence out because I would argue they haven't
12 narrowed the scope of the Section 5 nondiscrimination
13 standard since its scope was inflated beyond what
14 anything the Supreme Court ever had signed on to
15 previously. And so it's just brought back in line
16 with the core Supreme Court decisions. I would take
17 the sentence out.

18 COMMISSIONER YAKI: Where is that again?

19 VICE CHAIRMAN THERNSTROM: It is first
20 full paragraph on page 21 at the end, under the
21 heading, Section 5 Preclearance Standard. The end of
22 the paragraph says "Decisions by the Supreme Court,
23 however, have narrowed the scope of the Section 5
24 nondiscrimination standard." I happen to think that
25 that's an inaccurate statement and I would like it

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1 deleted.

2 COMMISSIONER YAKI: That's where I'm going
3 to disagree on that.

4 VICE CHAIRMAN THERNSTROM: Yes.

5 (Laughter.)

6 COMMISSIONER BRACERAS: Surprise,
7 surprise.

8 VICE CHAIRMAN THERNSTROM: Pardon me?

9 COMMISSIONER BRACERAS: Surprise,
10 surprise.

11 VICE CHAIRMAN THERNSTROM: Yeah, well,
12 right. Then page 21, another sentence I would delete.
13 This is the second paragraph, the sentence reads "The
14 scope of the preclearance standard was apparently
15 well-established when Congress last extended Section 5
16 in 1982." I don't know what that sentence says, "was
17 apparently well-established." I don't think it was -
18 - I mean I think the legal standards under Section 5
19 have frankly been a mess and so nothing was well-
20 established.

21 COMMISSIONER BRACERAS: So you would just
22 delete the whole thing?

23 VICE CHAIRMAN THERNSTROM: I would delete
24 that, yes, exactly.

25 Okay. Third paragraph on that same page

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1 21. Oh, this is just stylistic. It says -- the third
2 sentence of the third paragraph -- very bottom of the
3 page. "Presented for preclearance were not based on
4 appropriate application of the Section 5 standards,
5 but instead were based on" -- I just didn't like the
6 two "based on" and I wanted to say "rested on".

7 COMMISSIONER BRACERAS: Which one?

8 VICE CHAIRMAN THERNSTROM: I can't
9 remember which one I wanted. Somebody else typed
10 these up. I sent them in as possible corrections. I
11 don't know which one I wanted, but we can figure it
12 out right now. "But instead rested on a department
13 policy", whatever. Yes, the second one.

14 Okay, page 39.

15 COMMISSIONER YAKI: I can flip a coin
16 right now if you want.

17 VICE CHAIRMAN THERNSTROM: No, we will do
18 the second one. I think it makes more sense on the
19 second one.

20 I know I'm nitpicking. I'm a nitpicker.
21 Jennifer is worse than I am.

22 Okay, page 39. The sentence from -- where
23 are we here -- "from July 1982 through June 2004" -- I
24 don't even see this sentence on 39.

25 STAFF DIRECTOR MARCUS: Is that the very

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1 top of 39, the first line?

2 VICE CHAIRMAN THERNSTROM: I've got a
3 different version here.

4 What I've got is not at the top of 39.

5 (Pause.)

6 It's on the annexation. I can't find it.

7 CHAIRMAN REYNOLDS: Okay, is it
8 substantive?

9 STAFF DIRECTOR MARCUS: Top of page 41,
10 perhaps the second line from the top?

11 CHAIRMAN REYNOLDS: Are we working with
12 the same document?

13 VICE CHAIRMAN THERNSTROM: Well, no,
14 because I've got this red-lined version here.

15 It reads "From July 1982 through June
16 2004, the Justice Department annexation objections
17 prevented the diminution of the effective exercise of
18 the electoral franchise in 2,000 cities." Well, I
19 want to change it from -- same dates obviously -- "the
20 Justice Department's annexation objections prevented
21 the diminution of the" -- I want to delete that and --
22 I want to delete that because I don't think it's
23 accurate and also replace "supported" with "demanded"
24 in the last sentence of the paragraph. I just don't
25 think it's an accurate sentence.

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1 I don't think that's what was going on
2 with the annexation objections. I mean objections
3 occur -- I mean the Supreme Court cases that started
4 the whole train -- the annexation train going down the
5 road was -- what was it, Perkins versus Matthews I
6 think it was, but in any case, it was an annexation
7 that was proposed by a black City Council member. It
8 had nothing to do with effective exercise of the
9 electoral franchise and yet it became a means to force
10 the city to go from at-large voting to Single Member
11 Districts, even though there had been members of the
12 City Council elected under the at-large system. I
13 mean these annexation cases, in my view, are shall we
14 say curious to the core. And I don't think this is an
15 accurate description of what the annexation objections
16 involve.

17 The Justice Department forces cities that
18 have at-large voting to go to Single Member Districts
19 even when not one -- even when you're annexing areas
20 that are -- have no population whatsoever and do not
21 change the racial balance. It's a way of getting
22 around the retrogression standard. I want that
23 sentence out.

24 CHAIRMAN REYNOLDS: Anything else?

25 VICE CHAIRMAN THERNSTROM: Yes, page 41.

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1 I know this is taking longer than it should here.

2 Okay, good. 41. Third sentence of the
3 first paragraph. Where it says "clearly improved the
4 electoral opportunity of minority voters", I want
5 simply "were not retrogressive."

6 CHAIRMAN REYNOLDS: Is that it?

7 VICE CHAIRMAN THERNSTROM: No. One last
8 one, same page. "As a result of the Supreme Court's
9 Bossier Parish decision, the Justice Department no
10 longer objects to changes from at-large to mixed
11 election systems based on discriminatory purpose or
12 Section 2 violation." I want it deleted and I'm not
13 even sure why right now. Just one second.
14 Since I can't remember what was bothering me, where is
15 the Bossier Parish?

16 CHAIRMAN REYNOLDS: I don't know and I
17 wasn't able to find it.

18 VICE CHAIRMAN THERNSTROM: Maybe it's
19 gone.

20 CHAIRMAN REYNOLDS: Here we are.

21 (Pause.)

22 VICE CHAIRMAN THERNSTROM: That's fine.
23 Axe that. I don't know what was bothering me.

24 COMMISSIONER BRACERAS: Can I make a
25 friendly amendment to her motion, a couple more

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1 nitpicky things?

2 CHAIRMAN REYNOLDS: Let's hear it.

3 COMMISSIONER BRACERAS: None of these are
4 substantive. They're just with respect to the
5 Executive Summary.

6 On page 2, the first full paragraph that
7 starts "Faced with mounting unrest" -- just reading
8 this over again on the plane, it seems as if that
9 doesn't belong there because the paragraph before is
10 talking about the Commission's work, and the paragraph
11 after that goes back to talking about the Commission's
12 work. And it almost seems as if something was deleted
13 and this was still left in and it didn't -- it doesn't
14 seem to flow. So I thought that that paragraph should
15 be moved to where -- to the section on the overview of
16 the Voting Rights Act.

17 CHAIRMAN REYNOLDS: Which page is that?

18 COMMISSIONER BRACERAS: It's on page five.
19 So it would be the first paragraph of page five.

20 CHAIRMAN REYNOLDS: Okay.

21 COMMISSIONER BRACERAS: It just seems like
22 a non sequitur there.

23 CHAIRMAN REYNOLDS: You would lift it in
24 its entirety and it would be the first paragraph under
25 the overview section?

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1 COMMISSIONER BRACERAS: Correct.

2 CHAIRMAN REYNOLDS: Any other suggested
3 revisions?

4 COMMISSIONER BRACERAS: Yes, just two
5 small things on the Executive Summary. Going back to
6 page one, the last sentence of the first paragraph:
7 "At the same time, some have questioned the continuing
8 utility of the expiring provisions at this juncture".
9 I would just delete "at this juncture."

10 CHAIRMAN REYNOLDS: That's what I was
11 going to say. Why do we have "at this juncture"?

12 COMMISSIONER BRACERAS: Put a period at
13 the end of "provisions."

14 CHAIRMAN REYNOLDS: Yes.

15 COMMISSIONER BRACERAS: And then one final
16 suggestion. In the last paragraph that carries over
17 to the next page, it begins "The U.S. Commission on
18 Civil Rights" and ends with the clause that says
19 "since its formation in 1957". I would just take that
20 clause and put it up at the beginning so that it says
21 "Since its formation in 1957, the U.S. Commission on
22 Civil Rights" blah, blah, blah, blah, blah. And the
23 sentence would end with a period after the Voting
24 Rights Act, "Federal Voting Rights Act".

25 CHAIRMAN REYNOLDS: I like that better.

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1 COMMISSIONER BRACERAS: I know they are
2 nit picky, but I think the Executive Summary is
3 important because sometimes that's all congressional
4 staffers read. So I think it should flow.

5 CHAIRMAN REYNOLDS: Okay, any other
6 suggested revisions?

7 Okay, at this point I hope everyone -- I
8 hope someone has written done all of the suggested
9 revisions. At this point, I guess it would be useful,
10 well first --

11 VICE CHAIRMAN THERNSTROM: That was a
12 motion.

13 CHAIRMAN REYNOLDS: That's right. We need
14 a second.

15 COMMISSIONER KIRSANOW: Second.

16 VICE CHAIRMAN THERNSTROM: And including a
17 friendly amendment.

18 COMMISSIONER BRACERAS: Do you accept the
19 amendment?

20 VICE CHAIRMAN THERNSTROM: I accept the
21 friendly amendment.

22 CHAIRMAN REYNOLDS: Okay, discussion. I
23 hope that if, I know that Commissioner Yaki, that he's
24 going to object to at least one of --

25 COMMISSIONER YAKI: Two.

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1 CHAIRMAN REYNOLDS: Two?

2 COMMISSIONER YAKI: Possibly three.

3 CHAIRMAN REYNOLDS: Okay. Well, just

4 --

5 COMMISSIONER YAKI: Rather than segregate
6 it all out, just go up or down on the whole package.
7 That would be easier.

8 CHAIRMAN REYNOLDS: Okay, that's fine. Do
9 we need additional discussion? Okay, all in favor of
10 Commissioner Braceras' amendment along with Vice Chair
11 Thernstrom's, please say aye.

12 (Ayes.)

13 All in opposition?

14 COMMISSIONER YAKI: No.

15 COMMISSIONER MELENDEZ: No.

16 CHAIRMAN REYNOLDS: Okay, please let the
17 record show that Commissioners Yaki and Melendez voted
18 against the motions, and the remaining Commissioners
19 voted in favor of the motion.

20 Okay, now we vote on the document. I move
21 that the Commission approve the Voting Rights
22 Statutory Report, as amended, along with any
23 dissenting or concurring statements received from the
24 Commissioners by the close of business today. Is
25 there a second?

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1 VICE CHAIRMAN THERNSTROM: I second it.

2 CHAIRMAN REYNOLDS: Discussion? Okay, all
3 in favor please say I. Sorry.

4 Yes, Commissioner Yaki?

5 COMMISSIONER YAKI: Two things. One, in
6 my dissent, the first sentence it should say named,
7 not names. Secondly, Commissioner Melendez wishes to
8 join my dissent. I'd like to have that reflected in
9 the final version. Third, and I'll just be very brief
10 because my dissent pretty much says it all. And this
11 goes I think with one of the last points I've made is
12 that I think it's unfortunate that the lack of
13 resources at the Commission have constrained us to the
14 point where I think that in comparison to previous
15 reports that the Commission has done on the extension
16 of the Voting Rights Act, that we have a report that I
17 think lacks focus on the two new dynamic and expanding
18 communities in our country, Latino and Asian
19 Americans.

20 I think that that is clearly a resource
21 deficiency rather than that of any deliberate
22 oversight by members of the staff or the Commission.
23 I think it just goes to the point of how we put this
24 report on overdrive at a time when we're in severe
25 budget crisis. But I think that will have an impact

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1 on how this report is received and treated because of
2 its lack of focus on those two communities.

3 I think that finally, just as a very
4 simple statement, yesterday or the day before,
5 yesterday, I think it was on the steps on Capitol
6 Hill, there was a bipartisan, bicameral group of
7 Members of the House and Senate leadership on both the
8 Democratic and Republican sides, all pledging their
9 support for renewal of the temporary extensions of the
10 Voting Rights Act, and I just wish that we could have
11 joined them with this report.

12 CHAIRMAN REYNOLDS: Any other comments?

13 COMMISSIONER MELENDEZ: One of the issues,
14 I know the issue bottom line on this is whether or not
15 the Voting Rights Act should be reauthorized in all
16 those different sections, section 5 and section 203.
17 And I know that many of the Native American
18 reservations, Arizona, Alaska, and certain counties in
19 South Dakota actually come under this preclearance of
20 Section 5. And what I get from at least the grass
21 roots level is that there's a lot of discrimination, a
22 lot of intimidation that's still happening today.

23 I know that there's a lot of people who
24 come to think that everything is kosher, and there's
25 not a lot of discrimination, those things aren't

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1 happening. I think that as Commissioner Yaki pointed
2 out in his dissent, you know some of the things that
3 we measured to say that things are okay, and that we
4 should basically let those provisions expire, I just
5 feel that based on what I see in America today that
6 there's still a lot of intimidation and things that
7 are happening, and that the Commission should support
8 reauthorization of the Voting Rights Act. That's just
9 how I feel.

10 I recognize that everyone has an opinion
11 and we could take no stance on it, but I know that on
12 other areas and some of the other things that we'd be
13 discussing today that the Commission has taken a
14 stance to either fully support or not support
15 different things, or take no stance on it. This is
16 just one where I feel that the way things are
17 happening and discrimination in America that the
18 Commission should support reauthorization. So that's
19 just my opinion. I know we all have a different
20 opinion.

21 CHAIRMAN REYNOLDS: Thank you.
22 Commissioner Braceras.

23 COMMISSIONER BRACERAS: Just to be clear
24 and set the record straight, Commissioner Melendez
25 said we should all support reauthorization of the

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1 Voting Rights Act. I don't think there's a single
2 person in this room who doesn't support the Voting
3 Rights Act. The issue is the specific temporary
4 provisions that were emergency provisions and intended
5 to be temporary, which are up for reauthorization.
6 The entire act is not up for reauthorization;
7 something that may be obvious to everyone in this
8 room, but something that is not obvious to the general
9 public, indeed it's become a bit of an urban legend
10 that the entire act is up for reauthorization, and
11 that certain people want to take away the right to
12 vote in certain communities, which is obviously not
13 the case.

14 So just so the record is clear, we're
15 talking here about the temporary emergency provisions
16 of the Voting Rights Act, and not the act as a whole.

17 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

18 VICE CHAIRMAN THERNSTROM: I think it's
19 important to say, Commissioner Melendez, that this --
20 and Commissioner Yaki, to both of you, this shouldn't
21 be our last word on the Voting Rights Act. You know,
22 I think obviously budgetary and other constraints did
23 force us to narrow the scope of the report perhaps,
24 but this is an ongoing issue. And I hope we will take
25 the occasion in the future to revisit some of the

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1 questions that you raised.

2 CHAIRMAN REYNOLDS: Commissioner Yaki.

3 COMMISSIONER YAKI: Yes, let me just, I
4 just want to say in response to what has been laid on
5 the table, yes, I think that certainly the House and
6 Republican leadership yesterday knew that they were
7 talking about the temporary provisions of the Voting
8 Rights Act. But I think to say that the fact that
9 they were temporary indicates perhaps people foresaw
10 there may not be a need for them anymore, I think is
11 correct, in part. But I think incorrect in that the
12 nature of the wrong sought to be remedied, and that is
13 the ability of local governments to change the way
14 polling places are located, to engage in voter
15 intimidation or harassment in terms of registration or
16 poll checking, in terms of how legislative districts
17 are drawn by government, can't be seen in a vacuum.

18 I think as Commissioner Melendez
19 accurately pointed out, and as I point out in my
20 dissent, there is -- one would wish there is a vacuum
21 called racism in this country. But it is not. It
22 exists, it is prominent, it is prevalent. We saw it
23 with I think in the response to Katrina. We've seen
24 it in the news reports everyday of horrible crimes
25 still being committed in parts of this country based

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1 on what someone looks like or where they think that
2 they come from.

3 And as much as one would like to think
4 that the people in government have none of those
5 traits, the fact is that everyone is human and the
6 continued usage of Section 2 throughout this country
7 to change one of the permanent provisions of the Act.
8 But the mere fact that it is still out there and being
9 used to attack voting systems and schemes, cannot but
10 lead to the conclusion that those types of behaviors
11 is still out there and Section 5 provides an easier
12 remedy, one with the full force of the United States
13 Government behind it, in order to capture, prevent,
14 and discourage these types of schemes.

15 Finally, the one point that I think cannot
16 be stressed enough is the deterrent impact of Section
17 5. Section 5 for whatever good it has done, it has
18 done lots of good over the years, has done one thing I
19 think no one can dispute. That is it is like the
20 proverbial stop sign at the intersection. It has
21 prevented people from going through and crossing the
22 boundaries and I think that its continued presence as
23 a stop sign is something that cannot be underestimated
24 and was not addressed in the report.

25 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

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1 VICE CHAIRMAN THERNSTROM: Well, the
2 special provisions to the Voting Rights Act were not
3 only temporary. They were, as Commissioner Braceras
4 said, they were emergency provisions. They were only
5 upheld by the U.S. Supreme Court as such. Unless you
6 want to argue there's a permanent emergency in this
7 country, I think that they're not so easy to justify
8 more than 40 years later. And there are indeed
9 serious constitutional questions about whether today,
10 again, more than 40 years later, there is an emergency
11 that justifies them.

12 There's serious questions about whether
13 there is congruity and proportionality between wrong
14 and remedy as city of Flores v. Boerne demands and
15 serious questions of whether the extension of these
16 special provisions, of these emergency provisions
17 which will undoubtedly be passed by Congress, will
18 survive constitutional scrutiny. An excellent
19 scholar, Professor at NYU Law School who has been, as
20 it were, on the political left throughout the history
21 of the enforcement of the Voting Rights Act, Samuel
22 Issacharoff, has written a very good article in the
23 Columbia Law Review saying hey folks, this cannot
24 survive constitutional scrutiny.

25 So I think that that is a question that

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1 can't simply be brushed under the table, as it were.

2 Now the number of suits that have been won
3 under Section 2, I don't want to debate this act
4 endlessly, but I mean that says something not about
5 disfranchisement in this country today, it seems to
6 me. It says something about the legal standards under
7 Section 2 which in my view are a total distortion of
8 what that amendment, permanent amendment to the act
9 was supposed to be all about in 1982. And as to the
10 deterrent impact of Section 5, no, I would not
11 describe it as a -- the provision as a stop sign. I
12 would describe it as equivalent to a curfew after a
13 riot. The riot is over, the curfew should end. But I
14 don't think we should endlessly debate this, the
15 substance of this issue, which we do very well in --
16 which you contribute to in an important way in your
17 dissent.

18 CHAIRMAN REYNOLDS: Okay, I'll just make a
19 quick comment. I agree with Commissioner Yaki that
20 racism exists. As far as I'm concerned it will always
21 exist, but that is the not the factual predicate that
22 resulted in the passage of the Voting Rights Act.
23 What was in place was a racial cast system, mostly in
24 the South. The Supreme Court has described the
25 deviation from the historical allocation of power

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1 between the Federal Government and the States, at
2 least in this regard, as extraordinary. The facts
3 that were in place at the time were extraordinary and
4 the question is do we have a sufficient factual
5 predicate in the 21st Century that would justify the
6 continuation of the Federal Government's enhanced
7 role. I believe that the report does a good job of
8 discussing facts and proxies for levels of
9 disenfranchment.

10 Now after having said that, I'll ask any
11 other discussion?

12 Okay. At this point, we have a second, I
13 believe?

14 VICE CHAIRMAN THERNSTROM: Yes, we do.

15 CHAIRMAN REYNOLDS: Okay, good. All in
16 favor say aye.

17 (Ayes.)

18 CHAIRMAN REYNOLDS: All in opposition?
19 Please let the record reflect that Commissioners Yaki
20 and Melendez voted in opposition and that the
21 remaining Commissioners voted in support of the
22 motion.

23 The next matter on the agenda is a motion
24 to approve publication of the Native Hawaiian
25 Government Reorganization Act Briefing Report dealing

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1 with Senate Bill 147.

2 **V. Program Planning: Report from the Briefing on**
3 **the Native Hawaiian Government**

4 According to information we have heard,
5 the Senate is likely to take up the proposed Native
6 Hawaiian Government Reorganization Act no later than
7 the third week of May 2006. As with all civil rights
8 issues, it's important that the voice of the
9 Commission be heard.

10 In addition, unfortunately, a draft of the
11 Commission's Native Hawaiian Report has been leaked to
12 the press and the press is now mischaracterizing what
13 is in the report. For this reason, it is important
14 that the Commission approve the report and issue it as
15 soon as possible.

16 While the Commission would normally wait
17 for concurring and dissenting statements to be
18 prepared, in this instance, because of the regrettable
19 lapse, the whole document should be made immediately
20 available to the public. Also the public can see what
21 it says.

22 Accordingly, I move that the report be
23 immediately released in its present form and to
24 formally print it through the Government Printing
25 Office with any concurring or dissenting opinions

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1 received within two weeks.

2 VICE CHAIRMAN THERNSTROM: I second the
3 motion.

4 CHAIRMAN REYNOLDS: I'm sorry, brain
5 freeze. Commissioner Braceras?

6 COMMISSIONER BRACERAS: I'd like to make a
7 motion to make a few small nitpicky edits.

8 CHAIRMAN REYNOLDS: Okay. Let me catch up
9 to you.

10 COMMISSIONER BRACERAS: And they're
11 basically nonsubstantive, so it shouldn't change the
12 nature of our discussion afterwards.

13 CHAIRMAN REYNOLDS: Okay.

14 COMMISSIONER BRACERAS: On page 12, in the
15 second full paragraph, the one that begins
16 "Commissioner Braceras" -- about midway through that
17 paragraph, there's a sentence that begins "Several
18 Commissioners asked whether self-governance could be
19 extended to Puerto Ricans, lack of familiarity with
20 the Puerto Rican situation prevents solid answers, but
21 the question was raised about whether other groups of
22 people can make similar arguments for obtaining rights
23 through self-governance programs."

24 I would just like to delete the first part
25 of that sentence, primarily because I believe I was

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1 the one who raised the issue.

2 CHAIRMAN REYNOLDS: You were.

3 COMMISSIONER BRACERAS: And it was really
4 just a hypothetical and a sort of a musing and I don't
5 think it is particularly relevant to the report
6 itself.

7 What I would propose is deleting
8 everything through -- well, I would leave "Several
9 Commissioners asked whether" and then I would delete
10 everything from "self-governance" down to the next
11 time it says the word "whether" so that the sentence
12 would now read "Several Commissioners asked whether
13 other groups of people could make similar arguments
14 for obtaining rights through self-governance programs
15 period" without reference to the Puerto Rican
16 situation, particularly because I believe we're going
17 to be having a briefing specific to the Puerto Rican
18 question at another time, so I'd like to delete that.

19 CHAIRMAN REYNOLDS: Okay, so let me see if
20 I got this right, so it would read "Several
21 Commissioners asked whether other groups of people"
22 -- is that where I jump down?

23 VICE CHAIRMAN THERNSTROM: Yes.

24 COMMISSIONER BRACERAS: Correct.

25 CHAIRMAN REYNOLDS: Okay.

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1 COMMISSIONER BRACERAS: And then in the
2 findings section, page 16, finding 2, the last
3 sentence. I'd just like to recommend changing "in
4 violation" to say "to violate" -- "may be found to
5 violate the fifth and fourteenth amendments" instead
6 of "in violation of".

7 CHAIRMAN REYNOLDS: Okay.

8 COMMISSIONER BRACERAS: Finding number 4.
9 "Although the Supreme Court has upheld the equal
10 protection challenges against legislation, I would say
11 "equal protection challenges to legislation." So
12 replace the word "against" with the word "to".

13 And the final edit, also in finding number
14 4, in the sentence that begins "accordingly" -- it
15 currently reads "Accordingly, allotting benefits on
16 the basis of race in the situation where a Native
17 Hawaiian entity had not satisfied" etcetera, etcetera,
18 etcetera. I would delete the three words "in the
19 situation" and I would change "had" to "has" so that
20 it reads: "Accordingly, allotting benefits on the
21 basis of race where a Native Hawaiian entity has not
22 satisfied" -- yadda, yadda, yadda.

23 CHAIRMAN REYNOLDS: Okay.

24 COMMISSIONER BRACERAS: So I move that
25 those changes be incorporated into the text.

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1 VICE CHAIRMAN THERNSTROM: Do you see a
2 second on that?

3 CHAIRMAN REYNOLDS: Is there a second?

4 VICE CHAIRMAN THERNSTROM: Yes.

5 CHAIRMAN REYNOLDS: And let's vote. All
6 in favor of Commission Braceras' amendments, please
7 say aye.

8 (Ayes.)

9 CHAIRMAN REYNOLDS: Those in opposition,
10 please say no.

11 Let the record reflect that Commissioner
12 Melendez objected to the proposed -- to the motion.

13 COMMISSIONER YAKI: And Yaki.

14 COMMISSIONER BRACERAS: And why?

15 COMMISSIONER MELENDEZ: I think it's not
16 to that motion. I think in the general discussion, I
17 would probably object to a lot of --

18 VICE CHAIRMAN THERNSTROM: Wait a minute.
19 There's only -- there's a specific motion with a
20 little bit of nitpicking about language here.

21 COMMISSIONER MELENDEZ: It's not that so
22 much.

23 VICE CHAIRMAN THERNSTROM: But I mean
24 --

25 COMMISSIONER BRACERAS: That's what we're

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1 voting on.

2 VICE CHAIRMAN THERNSTROM: That's what
3 we're voting on.

4 CHAIRMAN REYNOLDS: We're not voting on
5 the substantive motion at this point.

6 VICE CHAIRMAN THERNSTROM: We're just
7 voting on this nitpicking stylistic.

8 COMMISSIONER MELENDEZ: I won't vote
9 against it.

10 CHAIRMAN REYNOLDS: Please let the record
11 reflect that Commissioners Yaki and Melendez abstain
12 and the remaining Commissioners voted to approve
13 Commissioner Braceras' motion.

14 Okay, Commissioner Taylor?

15 COMMISSIONER TAYLOR: A question which
16 could lead to a possible motion. Our recommendation
17 on page 18, I always wonder when we're discussing
18 these issues whether including sort of as a standard
19 phrase "in its current form" after Native Hawaiian
20 Government Reorganization Act of 2005 in its current
21 form, because I know that there are a number of
22 amendments floating around.

23 VICE CHAIRMAN THERNSTROM: Right, yes.

24 COMMISSIONER TAYLOR: And our views could
25 change, depending on the amendments that are

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1 ultimately adopted, so I wonder whether including that
2 phrase would be helpful.

3 CHAIRMAN REYNOLDS: There's a motion, is
4 there a second?

5 COMMISSIONER TAYLOR: Is this a
6 discussion, I say that because this may have been a
7 discussion you all have had in the past.

8 VICE CHAIRMAN THERNSTROM: No, no, no, no.
9 We haven't and I think it's a very good idea and I
10 second it. Make it a motion and I second it.

11 CHAIRMAN REYNOLDS: Okay, all in favor,
12 please say aye.

13 (Ayes.)

14 COMMISSIONER YAKI: Parliamentary
15 question. What do we mean by "current form"?

16 VICE CHAIRMAN THERNSTROM: Just what
17 exists today on the table.

18 COMMISSIONER YAKI: Well, from what I
19 understand there is a version that exists that was
20 passed out of Committee and then there is a substitute
21 amendment that has been introduced, but I don't know
22 the status of that yet.

23 So what is it that we're talking about?

24 COMMISSIONER TAYLOR: My recommendation
25 would then be to be specific. I think that's helpful,

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1 that we include a phrase to indicate that we are
2 talking about the version of the document or the act
3 that was circulated when we had our discussion in
4 briefing.

5 COMMISSIONER BRACERAS: And cites to it by
6 bill number.

7 COMMISSIONER TAYLOR: Yes, so we all know
8 what we are talking about. So when folks pick up this
9 record in 10 years, they know exactly what we meant.

10 CHAIRMAN REYNOLDS: Commissioner Yaki?

11 COMMISSIONER YAKI: Point of information.

12 There were two versions circulated. There was the
13 version that was in our packets and the version that
14 was circulated by the staff person for Senator Akaka.

15 CHAIRMAN REYNOLDS: Okay, well.

16 COMMISSIONER YAKI: And that actually goes
17 to what I believe is one of the fundamental problems
18 with this. I'm going to speak on this as regard to,
19 with regard to this motion. Because I am uncertain as
20 to what version some of these recommendations go to,
21 these findings go to, I think that there are serious
22 issues with the findings themselves in terms of
23 whether they would have any relevance at all to which
24 version or what. There are other deeper problems to
25 discuss, but I just think as to this particular

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1 motion, I'm not sure. I'm still puzzled as to what
2 the staff, which version the staff was looking at when
3 they were preparing their analysis of the legislation
4 contained in the findings of this report.

5 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

6 VICE CHAIRMAN THERNSTROM: Would it be a
7 disaster to simply amend this to read "The Commission
8 recommends against passage of any legislation that
9 would discriminate on the basis of race or national
10 origin". In other words, take out the reference to
11 the actual act itself. Is that, are we losing a lot
12 by doing that? Or gaining something by it? We're
13 obviously gaining something.

14 CHAIRMAN REYNOLDS: But that's the only
15 change. I think it's clear that we're talking about
16 -- I mean, it's clear which piece of legislation that
17 we're talking about, at least in general. And I don't
18 think we lose much by striking it out in this section.

19 Commissioner Braceras.

20 COMMISSIONER BRACERAS: I like the Vice
21 Chair's recommendation, but I think I would strike
22 even more language because obviously we're all against
23 legislation that discriminates on the basis of race or
24 national origin. The question is do we think that
25 this legislation does that? So I might say "The

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1 Commission recommends against any legislation that
2 would subdivide the American people into discrete
3 subgroups, accorded varying degrees of privilege".
4 And maybe there needs to be something else thrown in
5 there to clarify, but --

6 VICE CHAIRMAN THERNSTROM: Wait.
7 Something has to go before subgroups and accorded.
8 Well, okay. It doesn't have to be -- "subgroups that
9 are"?

10 CHAIRMAN REYNOLDS: Commissioner Taylor?

11 COMMISSIONER TAYLOR: I agree with the
12 Vice Chair's motion and the spirit of the motion. I
13 think, however, for purposes of our discussion on the
14 substantive issues, it may be helpful if we identify
15 the legislation we're focusing on for purposes of
16 addressing any concerns raised by Commissioner. We're
17 not going to be able to skirt the issue by identifying
18 the document we're talking about, when we really get
19 down to brass tacks.

20 VICE CHAIRMAN THERNSTROM: All right.
21 What do we do about the fact that Commissioner Yaki
22 has said that there are actually two -- Commissioner
23 Yaki, would you repeat that again? There were two at
24 the time? Two competing bills?

25 CHAIRMAN REYNOLDS: One of the, it's my

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1 understanding that one of the witnesses circulated
2 another version of the legislation.

3 VICE CHAIRMAN THERNSTROM: One of the
4 witnesses.

5 COMMISSIONER YAKI: Yes.

6 VICE CHAIRMAN THERNSTROM: But that does
7 not have the same standing as --

8 CHAIRMAN REYNOLDS: That's correct.

9 VICE CHAIRMAN THERNSTROM: All right. So
10 it seems that we can ignore that.

11 COMMISSIONER YAKI: Yes, we could.

12 VICE CHAIRMAN THERNSTROM: How would you
13 like it to read?

14 COMMISSIONER TAYLOR: Do we have a copy of
15 what we're talking about?

16 CHAIRMAN REYNOLDS: I don't believe so.
17 The bottom line is that the staff director distributed
18 copies of a version of the legislation and we can
19 confirm, we can confirm that that is the document that
20 we worked off of.

21 COMMISSIONER TAYLOR: I'm happy with that
22 as long as identify it.

23 STAFF DIRECTOR MARCUS: If I may. The
24 witness to whom the Vice Chair referred distributed a
25 copy of the substitution amendment. That was the

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1 current version as of the date of the Commission
2 meetings. As far as we know, it's the current one
3 now. This document is based on that version of the
4 bill.

5 However, to the best of my knowledge, what
6 it said about that version also applies to the earlier
7 version. The substance applies to both. So I don't
8 know that there is any difference. I'm not aware of
9 any version of the bill for which the proposed
10 findings and recommendations don't apply.

11 CHAIRMAN REYNOLDS: Commissioner Braceras?

12 COMMISSIONER BRACERAS: So just to be
13 clear, we want to reference the bill that's been
14 passed at a Committee? And that's the bill that we're
15 going to reference here and that's the bill that these
16 findings were made in reference to. So does
17 everything in here actually apply to that particular
18 version?

19 STAFF DIRECTOR MARCUS: Yes it does,
20 Commissioner Braceras.

21 COMMISSIONER BRACERAS: Just want to make
22 sure. Okay.

23 CHAIRMAN REYNOLDS: Any other questions or
24 comments?

25 VICE CHAIRMAN THERNSTROM: I'm lost as to

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1 where we are.

2 CHAIRMAN REYNOLDS: Okay, we had a vote on
3 Commissioner Braceras' motion to amend the edits that
4 we voted on. And at this point, we'll have a -- bear
5 with me. Okay, I move that the report in its present
6 form go to the Government Printing Office with any
7 occurring or dissenting opinions received within two
8 weeks and that --

9 VICE CHAIRMAN THERNSTROM: I'm lost as to
10 the final resolution of our language on the
11 recommendation.

12 CHAIRMAN REYNOLDS: All right. Did we
13 make a decision on this issue?

14 COMMISSIONER KIRSANOW: What's the bill
15 number?

16 COMMISSIONER BRACERAS: We need the bill
17 number.

18 STAFF DIRECTOR MARCUS: I believe S147.

19 COMMISSIONER KIRSANOW: Why don't we just
20 interject that and be done with it?

21 COMMISSIONER BRACERAS: "The Commission
22 recommends against passage of S147 or any other
23 legislation that would further subdivide the American
24 people into discrete subgroups, accorded varying
25 degrees of privilege."

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1 COMMISSIONER YAKI: I've really got to
2 object again on purely point of information grounds.
3 We had two versions of S147 that were circulated.
4 There was the version that came out of committee and
5 there was the version that is in the nature of the
6 substitute that was the product in negotiation between
7 Justice, the White House, and Senator Akaka's office.

8 CHAIRMAN REYNOLDS: And that was the
9 document that was introduced at the briefing. Is that
10 correct?

11 COMMISSIONER YAKI: Right. But we are
12 talking, what you were talking about is the version of
13 S147 as it came out of committee.

14 CHAIRMAN REYNOLDS: I don't believe that's
15 true. I believe that the Staff Director indicated
16 that the document that we worked off, the document --

17 COMMISSIONER YAKI: That's not the
18 document we had in our packets. The document that we
19 had in our packets was the one that came out of
20 committee. If that's the document that this analysis
21 is based upon, I want to identify that specifically
22 because we cannot just be saying, making analysis of
23 legislation that, of which there is version one and
24 version two, and say that we're applying it only to
25 version one. Because if we didn't study version two,

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1 how can we possibly make the conclusions that we
2 intend to stand by?

3 We looked at the version that came out of
4 committee. That is the one that was in our packets.
5 That is the one I heard the Staff Director to say was
6 in our packets. If that is the version, I want -- we
7 should specifically refer to that. Otherwise, we will
8 look like fools in case there is a substitute, or as
9 Commissioner Taylor said, when he was attempting to do
10 this by saying current form, we do not want to be
11 making blanket statements on legislation that could be
12 substantially different from -- but could carry the
13 same bill number.

14 CHAIRMAN REYNOLDS: Commissioner Yaki, are
15 you aware of any substantive differences that would
16 offend, that would impact this report? Differences
17 between the, what came out of committee versus the
18 document that was distributed?

19 COMMISSIONER YAKI: As a matter of fact,
20 there are a number of differences. The differences go
21 towards treatments of sovereign immunity. It goes
22 towards the extension of federal law including civil
23 rights laws to provisions, to the Native Hawaiian
24 Commission that would be set up. Especially with
25 regard to the sovereign immunity issues, which go

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1 directly to the core of some of the criticisms that
2 were made by the report, I think we should be very,
3 very careful.

4 That, in fact, is the basis of much of
5 what I want to talk about, and that is there is a
6 fundamental lack of how should I call it, real
7 targeting of these critiques with regard to what it is
8 what we're really talking about.

9 I certainly am looking more at the Akaka
10 substitute, which was the product of discussions with
11 the White House and with DOJ, with Interior, as
12 something that is going to be probably one of the
13 vehicles that is going to be discussed by the Senate.

14 That legislation has in it different provisions
15 concerning some of the critical issues of sovereign
16 immunity, the nature of the coverage of existing
17 federal law, etcetera, that these findings seem to
18 find shortcomings in.

19 And if it is based on the legislation that
20 existed out there as it came out of the McCain
21 Committee, I think we're talking apples and oranges.

22 COMMISSIONER KIRSANOW: What is the risk
23 of identifying the marker for what we considered in
24 this report? This is not rocket science. Bill number
25 plus when it was discharged from committee, the date

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1 it was discharged from committee. This is not rocket
2 science. We should be able to put six words in here
3 to identify that.

4 CHAIRMAN REYNOLDS: Commissioner Braceras?

5 COMMISSIONER BRACERAS: But I think
6 Commissioner Yaki raises a larger problem because even
7 if we clarify that we're referring to the bill that
8 came out of committee, if that's not what the Congress
9 is focusing on right now then some, not all, but some
10 of our findings are irrelevant. So it may be that we
11 need to revise them.

12 CHAIRMAN REYNOLDS: At this point, I don't
13 think that anyone has pointed out any provisions, any
14 sections in the document and demonstrated, at least to
15 my satisfaction, that we've gotten the facts wrong.

16 COMMISSIONER BRACERAS: Well, for example
17 in finding number 7. Is it number 7? Wait a minute.
18 No, I'm sorry. There is somewhere, and I'd have to
19 look at it more carefully at the portion of this
20 document that refers to the sovereign immunity
21 question and those other questions that may not be
22 actually in the findings. That may be in the
23 testimony.

24 CHAIRMAN REYNOLDS: I mean, one of the
25 core issues is a constitutional issue, whether Native

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1 Hawaiians should be treated in a constitutional sense
2 in the same way that American Indians are treated.
3 That issue isn't impacted in terms of the public
4 policy implications of this document, whether we
5 should have a situation where you would have different
6 classes of citizenship in the State of Hawaii. I
7 don't believe that that issue is affected in any way
8 by the subsequent version.

9 COMMISSIONER BRACERAS: You're correct.
10 My only point is to say that it might be worth giving
11 this another once over with an eye towards making sure
12 that the precise findings we have here are relevant to
13 both versions of the legislation. And maybe it is. I
14 just would like to reconsider that.

15 CHAIRMAN REYNOLDS: Okay, Commissioner
16 Kirsanow?

17 COMMISSIONER KIRSANOW: I think
18 Commissioner Braceras makes a good point, but I would
19 object to it because I don't think that we should be
20 revising the report based on the version of the bill
21 that we did not consider nor adduced evidence on.

22 COMMISSIONER BRACERAS: I don't think.
23 That's not what I'm suggesting, just to be clear. I'm
24 suggesting that we take 10 minutes to re-read the
25 findings and make sure that they are general enough to

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1 be statements of policy and of theory that aren't
2 necessarily specific to a bill that may no longer be
3 the most relevant version. That's all.

4 CHAIRMAN REYNOLDS: Commissioner
5 Thernstrom?

6 VICE CHAIRMAN THERNSTROM: I was about to
7 say something very similar. You've got a fluid
8 legislative picture here and all we have to do here,
9 it seems to me is to make sure that as we have stated
10 these findings, they can apply to whatever is likely
11 to emerge because after all, you're not going to have
12 a huge deviation of what we've looked at.

13 COMMISSIONER BRACERAS: Right.

14 CHAIRMAN REYNOLDS: I agree.

15 COMMISSIONER BRACERAS: I just want to --

16 CHAIRMAN REYNOLDS: I'm sorry,
17 Commissioner Braceras?

18 COMMISSIONER BRACERAS: I just want to
19 take 10 minutes to re-read it, that's all.

20 COMMISSIONER KIRSANOW: Point of
21 parliamentary. Are we considering the amendment or is
22 this the discussion?

23 CHAIRMAN REYNOLDS: Right now, this is the
24 second, if I remember correctly, friendly amendment.
25 Jennifer first and then Ashley proposed a change to

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1 the recommendation on page 18. And we are discussing

2 --

3 VICE CHAIRMAN THERNSTROM: I think I
4 seconded it. I'm not sure. But in any case, that's
5 what's on the table.

6 CHAIRMAN REYNOLDS: So does anyone --
7 would anyone like to put something on the table in
8 terms of the course of action?

9 VICE CHAIRMAN THERNSTROM: Yes, I would
10 like a few minutes to stare at the findings. And are
11 we getting a copy?

12 STAFF DIRECTOR MARCUS: We're getting a
13 copy, yes.

14 VICE CHAIRMAN THERNSTROM: We're getting a
15 copy of the bill.

16 COMMISSIONER TAYLOR: The formal motion
17 would simply be that we identify the version of the
18 bill that was the subject of the hearing and the
19 subject of our discussion and we identified in the
20 recommendation section.

21 VICE CHAIRMAN THERNSTROM: But one would
22 hope that our findings, the bill changes, that our
23 findings are still appropriate.

24 COMMISSIONER TAYLOR: Right.

25 VICE CHAIRMAN THERNSTROM: And that's the

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1 point of this staring for a minute, getting a copy of
2 the bill and staring for a minute at these findings.

3 CHAIRMAN REYNOLDS: Commissioner Kirsanow.

4 COMMISSIONER KIRSANOW: In spite if we
5 take that procedure, I will tell you right off the bat
6 if we utilize that procedure I will vote against the
7 report without any question.

8 VICE CHAIRMAN THERNSTROM: Why?

9 COMMISSIONER KIRSANOW: We have spent and
10 staff has spent and has done a commendable job
11 incorporating all the testimony that accurately
12 reflects the written statements and testimony,
13 incorporated into this thing and then tried to analyze
14 the facts and put into findings and recommendations
15 and then in a minute we're going to take a look at
16 substitute legislation and possibly amend this? I
17 would vote against that in a heartbeat. There's no
18 way that would get my vote.

19 VICE CHAIRMAN THERNSTROM: Nobody is
20 suggesting that.

21 CHAIRMAN REYNOLDS: Well, okay, from my
22 vantage point the core issues that were discussed at
23 the briefing, they're not affected should we do this.
24 Should we have multiple levels of citizenship? Should
25 the Government distribute benefits and burdens on the

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1 basis of race? And does Congress have the authority
2 to create a tribe? The core issues that we discussed
3 are not affected by the subsequent legislation.

4 COMMISSIONER YAKI: Mr. Chairman, forgive
5 me, but I think under current law the answer to all
6 your questions is yes. When you consider what the
7 United States Government has done with regards to
8 Native American tribes and Alaska Natives who are not
9 tribes --

10 CHAIRMAN REYNOLDS: You're debating the
11 merits now. I was making a smaller point. And that
12 point being that the subsequent legislation does not
13 affect this document because the core issues that were
14 discussed, they're not in any way affected by the
15 subsequent legislation.

16 Now we will discuss these issues on the
17 merits eventually, but at this point I propose that we
18 take a 10-minute break.

19 COMMISSIONER TAYLOR: Let me try to
20 clarify something. I was not suggesting that we refer
21 to a document in this recommendation section and then
22 get a different document and review it quickly and
23 look at our findings.

24 I was suggesting quite the opposite, that
25 is, we pick a target --

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1 COMMISSIONER KIRSANOW: I agree with that.

2 COMMISSIONER TAYLOR: Okay.

3 COMMISSIONER YAKI: That's all I'm asking.

4 CHAIRMAN REYNOLDS: Let's take a 10-minute
5 break. We can think about this during the break and
6 so let's reconvene in 10 minutes.

7 (Off the record.)

8 CHAIRMAN REYNOLDS: Okay, let's get
9 started. At this point, I'd like to ask the Staff
10 Director, in those long 10 minutes, was he able to get
11 any information that would add any light to which
12 version of the document was used in putting together
13 the report?

14 STAFF DIRECTOR MARCUS: Yes, Mr. Chairman.
15 The primary basis for the report was the version of
16 the legislation from the Committee on Indian Affairs
17 reported by Senator McCain with an amendment in the
18 nature of a substitute on May 16, 2005.

19 CHAIRMAN REYNOLDS: Okay, Commissioner
20 Yaki, does that answer your question what was the
21 version that was -- what version --

22 COMMISSIONER YAKI: Yes. I'd just like to
23 see that reflected in the finding, in the
24 recommendation.

25 CHAIRMAN REYNOLDS: Okay.

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1 VICE CHAIRMAN THERNSTROM: Well, we can
2 just insert that.

3 CHAIRMAN REYNOLDS: And Commissioner
4 Taylor, you're comfortable with that?

5 COMMISSIONER TAYLOR: That would be the
6 substance of my motion.

7 COMMISSIONER KIRSANOW: Second.

8 CHAIRMAN REYNOLDS: All right, a little
9 progress. Okay, so --

10 VICE CHAIRMAN THERNSTROM: Wait a minute,
11 we've got a motion that's been seconded. Let's get a
12 vote on it. This is changing the language of the
13 recommendation.

14 COMMISSIONER KIRSANOW: I seconded.

15 CHAIRMAN REYNOLDS: That's right. Okay,
16 so how would it read?

17 Let's get the language nailed down.

18 COMMISSIONER YAKI: As reported out of
19 committee on May 16, 2005.

20 CHAIRMAN REYNOLDS: Okay. All right, all
21 in favor?

22 (Ayes.)

23 COMMISSIONER YAKI: I'm abstaining.

24 CHAIRMAN REYNOLDS: Why am I not
25 surprised.

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1 COMMISSIONER YAKI: I can abstain.

2 CHAIRMAN REYNOLDS: I know you can.

3 COMMISSIONER BRACERAS: He doesn't want to
4 lend credibility to the overall report.

5 CHAIRMAN REYNOLDS: Okay, we have one
6 abstention.

7 Commissioner Melendez?

8 Okay, let the record reflect --

9 (Laughter.)

10 Let the record reflect --

11 COMMISSIONER YAKI: In that case I will
12 join and make it unanimous.

13 CHAIRMAN REYNOLDS: Okay, so the motion
14 passes unanimously.

15 VICE CHAIRMAN THERNSTROM: Now you can
16 have a fit about the rest of it.

17 CHAIRMAN REYNOLDS: Absolutely. Now the
18 fun part.

19 Okay, I have read this twice.

20 COMMISSIONER TAYLOR: Are copies
21 circulated?

22 CHAIRMAN REYNOLDS: What are you referring
23 to?

24 COMMISSIONER TAYLOR: The bill as reported
25 out of committee on --

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1 VICE CHAIRMAN THERNSTROM: We don't need
2 the bill any more.

3 COMMISSIONER TAYLOR: Okay, all right.

4 CHAIRMAN REYNOLDS: Okay, I'm going to
5 read the motion into the record once again. I move to
6 issue the Report on Native Hawaiians immediately in
7 its present form and to formally print it through the
8 Government Printing Office with any concurring or
9 dissenting opinions received within two weeks.

10 Is there a second?

11 VICE CHAIRMAN THERNSTROM: I second it.

12 CHAIRMAN REYNOLDS: Discussion. Yes,
13 Commissioner Yaki?

14 COMMISSIONER YAKI: What?

15 (Laughter.)

16 COMMISSIONER YAKI: I haven't raised my
17 hand yet.

18 CHAIRMAN REYNOLDS: I have a feeling,

19 COMMISSIONER YAKI: I'm deferring first to
20 Commissioner Melendez.

21 CHAIRMAN REYNOLDS: Okay.

22 COMMISSIONER MELENDEZ: The motion again,
23 could you just restate that? You're saying we have
24 two weeks and for some reason this gets tabled, two
25 weeks from the new date?

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1 VICE CHAIRMAN THERNSTROM: No.

2 CHAIRMAN REYNOLDS: No, we're now debating
3 the main motion.

4 COMMISSIONER BRACERAS: The merits.

5 CHAIRMAN REYNOLDS: The merits.

6 COMMISSIONER BRACERAS: We're debating the
7 merits.

8 VICE CHAIRMAN THERNSTROM: The merits, but
9 you have two weeks to write a dissent.

10 COMMISSIONER YAKI: I'll go first.

11 CHAIRMAN REYNOLDS: But the report will go
12 out immediately.

13 COMMISSIONER MELENDEZ: I'll go ahead.

14 COMMISSIONER YAKI: Wait, the report would
15 go out without the dissents?

16 CHAIRMAN REYNOLDS: Yes.

17 COMMISSIONER YAKI: No, no, no, no, no,
18 no. Wait, wait, wait -- when have we done that? That
19 is wrong.

20 CHAIRMAN REYNOLDS: What was wrong was the
21 initial leak of the document. The document now, at
22 least one newspaper has it. The document is being
23 discussed in the public. There will be subsequent
24 articles written about our report, based on not the
25 report itself, but on the original news article and I

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1 think that since it's already out the door, we need to
2 get this in the hands of the public so that they can
3 look at the document itself as opposed to relying,
4 just recycling the original article.

5 I concede that this is a deviation from
6 what we normally do. It is my strong preference that
7 packets, that briefing reports go out in total, but in
8 this case, we have a story that is out there and folks
9 are citing to the -- at least the comments, the
10 characterizations of the report that was contained in
11 the original news story that --

12 COMMISSIONER YAKI: Let me just ask a
13 procedural question on this, because this has puzzled
14 -- this is now really starting to puzzle me. If, for
15 example, today we voted on the Voting Rights Act
16 report, in that report substantial portions of that
17 report, well, not substantial, but portions of that
18 report were read aloud and into the record, presumably
19 for the entire public to hear and see. They could
20 tell what the debate was about. One could ascertain
21 from talking with us afterwards what it was about.
22 And yet, the report isn't out. So what is the
23 difference?

24 CHAIRMAN REYNOLDS: The difference is that
25 --

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1 COMMISSIONER YAKI: We're talking about
2 you --

3 CHAIRMAN REYNOLDS: What we say here is
4 that this is for public consumption, a confidential
5 document was released to a newspaper. I think that
6 there is a difference. We presume that anything said
7 at these meetings can be used in the press, as opposed
8 to our confidential reports.

9 COMMISSIONER YAKI: I think we need some
10 clarification of this from the Counsel on this,
11 because I thought that once this report -- for
12 example, when we were discussing a report on whatever,
13 on Adarand or something like that and we're discussing
14 it during that meeting, and what you are telling me is
15 that if a reporter comes up to me that day and says
16 can I see the section of the report that talks of
17 those findings, it is still at that point
18 confidential?

19 CHAIRMAN REYNOLDS: Well, I'm surprised at
20 your question. Our documents that are circulated
21 amongst the Commissioner and staff, those documents
22 are confidential until they are released to the
23 public, until there is a vote. We haven't voted on
24 the document yet. The presumption is that the
25 documents will not be distributed to third parties.

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1 COMMISSIONER YAKI: I just come from a
2 different world in terms of the Public Records Act, I
3 presume, the Public Records Act in California, the
4 Brown Act, the Sunshine Act involved at the local
5 sector. To me --

6 CHAIRMAN REYNOLDS: Even drafts are
7 exempt.

8 COMMISSIONER YAKI: No, I understand
9 drafts are exempt.

10 CHAIRMAN REYNOLDS: That's all we have.

11 COMMISSIONER YAKI: When we vote upon a
12 final, we're voting to make a report final. I guess I
13 would like clarification. If we are voting to make
14 this document final, that means that by the end of
15 that meeting that document has become final with the
16 amended changes. Why is it then still protected from
17 being released the public?

18 CHAIRMAN REYNOLDS: It is not. The
19 problem is that a vote has not occurred and the
20 document has been circulated. I agree with the way
21 you framed the issue. Once we have voted on the
22 document, then the document is no longer a draft. It
23 is a final document. It is subject to the Open
24 Records Act. But that's not where we are now. A few
25 days ago, the document was leaked. The document was

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1 discussed in a news article, and the document that was
2 leaked is a draft.

3 COMMISSIONER YAKI: Well, the question I
4 have still goes to however, whatever, how that
5 document got out, whatever. The question still
6 remains then does the result be that for those of us
7 who have a contrary opinion of what is in this report
8 have to then deal with the fact that this report gets
9 sent out without our dissent simply because we feel
10 we're being stampeded by one day of news when the fact
11 is that with the Voting Rights Act today, which I
12 would suggest has much more import to this
13 Commission's perception amongst policymakers, amongst
14 groups, amongst people on the Hill in that, and tell
15 me if I'm not allowed to say what the recommendation
16 of the report was. Am I?

17 VICE CHAIRMAN THERNSTROM: Yes.

18 COMMISSIONER YAKI: I'm looking at our
19 counsel.

20 STAFF DIRECTOR MARCUS: Yes.

21 COMMISSIONER YAKI: Okay, that it had no
22 recommendation as to whether the temporary extension,
23 the temporary provision should be renewed or not, just
24 simply questions that you go to it or not. That to
25 me, from a policy perspective, is ten times more

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1 important and if it stampedes out the door tomorrow
2 without, and say we had followed the normal course and
3 had dissents following two weeks or whatever later, I
4 mean that's -- we wouldn't be saying well, we got to
5 rush the whole thing out to publication and damn the
6 dissents, would we? Or would we?

7 CHAIRMAN REYNOLDS: Are you saying that if
8 the Voting Rights Act document report was leaked --

9 COMMISSIONER YAKI: No, I'm saying that if
10 the Voting Rights Act, what we did today becomes like
11 big news. I don't know if it will. Maybe no one
12 cares. But if it became big news and you were
13 concerned that people were distorting what it was that
14 we did in the new cycle, today is Thursday, new cycle
15 on Friday, and we were just getting hammered Friday,
16 Saturday, Sunday, Monday. Would you then feel an
17 obligation to put the report out without the dissents?
18 I Just don't think that a day, two days, I don't know
19 when this story came out. I know I got a call from
20 the reporter and that's about it.

21 But all I know in terms of the timing of
22 this, I just find it very odd that one day of news,
23 two days of news, I have no idea how many days of news
24 it is, causes us to completely rip apart the
25 procedures that we had all agreed to early on in the

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1 interest of comity and the interest of working
2 together, and when a similar situation involving say a
3 fire storm on another report that would be following
4 its normal course wouldn't have the same thing happen
5 to it.

6 CHAIRMAN REYNOLDS: I guess one
7 distinction is that in your scenarios, your other
8 scenarios do not involve a leak on a day or two before
9 we were supposed to vote on a document. My concern is
10 that basically reporters read other articles and
11 they're going to read that article and the manner in
12 which the document, the draft, was characterized will
13 be repeated. It will be repeated by other reporters
14 without the benefit of actually seeing what the
15 document says. They won't have an opportunity to
16 review the quoted language in the context in which it
17 occurred. So that's my concern.

18 COMMISSIONER YAKI: Okay, then let me just
19 say this. Maybe we're talking about two different
20 things here, Mr. Chairman. I have no problem with the
21 report as a text file being released for anyone who
22 wants to see it. I have a problem with the report as
23 a bound document of the Commission going out without
24 the dissents and concurring statements. In other
25 words, if a reporter calls up today and says "I'd like

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1 to see it", send it out the door. I don't care.

2 CHAIRMAN REYNOLDS: So you don't have a
3 problem --

4 COMMISSIONER YAKI: No, no. But I have a
5 problem.

6 CHAIRMAN REYNOLDS: Let me make sure I
7 understand you. So you don't have a problem if we
8 have a vote on this and the document is released, but
9 it is not sent to GPO, that we wait until we receive
10 concurrences, dissents.

11 VICE CHAIRMAN THERNSTROM: Put it on the
12 website.

13 COMMISSIONER YAKI: Because I think that's
14 the practical -- but the practical impact of this is
15 that on any major report that we do, if someone wants
16 to find out after we have voted upon it during the
17 day, to find out what it says, I think they have a
18 right, I believe, to do it. I'm just saying I don't
19 think there's any need to sort of panic about rushing
20 this to production when you know, and let's be honest,
21 the universe on this is with all due respect to all
22 our friends from Hawaii here, rather small in terms --

23 CHAIRMAN REYNOLDS: I disagree.

24 COMMISSIONER YAKI: In terms of where this
25 new cycle is headed.

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1 CHAIRMAN REYNOLDS: I think the issue is
2 extremely important. But I think, though, that we
3 have a compromise. I didn't fully understand what
4 your concern was. If I understand you correctly, you
5 don't mind the document being released. What you do
6 mind is the document being bound without concurrences
7 and dissents.

8 COMMISSIONER YAKI: Let's put it this way.
9 I don't mind the document being released with respect
10 to reporters who have an interest in it. If this is
11 going to be sent out to every Member of Congress,
12 Senate, I would have a problem.

13 CHAIRMAN REYNOLDS: Okay. All right. Now
14 after this discussion, I propose --

15 VICE CHAIRMAN THERNSTROM: Wait a moment.
16 You've got Ashley wanting to say something.

17 CHAIRMAN REYNOLDS: Mr. Taylor?

18 VICE CHAIRMAN THERNSTROM: You've just
19 been called up.

20 COMMISSIONER TAYLOR: My only thought is
21 that we may want to defer this to discussion until
22 after we actually discuss the substance and then folks
23 may know whether they want to write a dissent or a
24 concurrence?

25 CHAIRMAN REYNOLDS: Okay, although I have

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1 a sneaking suspicion that Mr. Yaki has already started
2 working on his dissent.

3 COMMISSIONER TAYLOR: Stranger things have
4 happened. You never know.

5 CHAIRMAN REYNOLDS: Okay. Vice Chair
6 Thernstrom.

7 VICE CHAIRMAN THERNSTROM: I think we do
8 have a good compromise on this. I just wanted to say
9 that Commissioner Yaki is right on the procedural
10 point here, that leaks were business is usual under
11 the previous chair and we never released a report
12 prior --

13 CHAIRMAN REYNOLDS: Well, there's a fix to
14 leaks going back to the old way which was ridiculous.
15 Commissioners did not receive drafts until it is
16 published on the website.

17 VICE CHAIRMAN THERNSTROM: Right. But I
18 think he is right that it should not go out in bound,
19 published form until the dissents or concurrences are
20 included. I think it's a good compromise and I'm
21 going to support it. I can't imagine a big discussion
22 of the substance is going to change the basic picture.

23 CHAIRMAN REYNOLDS: Why don't we take
24 Commissioner Taylor up on his suggestion and have a
25 discussion on the merits. I don't remember where we

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1 are. Do we have a second? I read it into the motion
2 actually about five times now. There was a second.
3 Does anyone recall?

4 COMMISSIONER KIRSANOW: I remember I
5 seconded something.

6 CHAIRMAN REYNOLDS: Okay, that's good
7 enough.

8 COMMISSIONER YAKI: That was in 1984
9 though, wasn't it?

10 (Laughter.)

11 CHAIRMAN REYNOLDS: Commissioner Melendez
12 was up.

13 COMMISSIONER MELENDEZ: Thank you, Mr.
14 Chairman. I don't even know where to start. This is
15 such a -- to a certain extent controversial and
16 basically I think it's broader than just the issues of
17 constitutionality and those things. I think you have
18 to go back to a certain extent to the history of --
19 you know, I read a lot of the documents that were
20 sent. This one here "From Mauka to Makai". I'm not
21 sure if I pronounced that right, but I read a lot of
22 the stuff.

23 You know, when I read it I thought these
24 indigenous from Hawaii really went through similar
25 things. I saw similar things to what happened to

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1 Native Americans in the United States, you know. So I
2 know the last time when we did have the testimony, I
3 commented in the words of Grover Cleveland what he
4 said was "a substantial wrong has thus been done which
5 I do regard for our national character as well as the
6 rights of the injured people require we should
7 endeavor to repair."

8 And then I had a document that came from
9 actually the Interior Department, I think it was this
10 one here where they tried to work out some
11 reconciliation to what had happened in 1883 with the
12 overthrow of the Queen there at that time. And then I
13 think the bigger picture is it seemed to me that the
14 Federal Government was somehow trying to reconcile
15 some of the things that had happened at that time and
16 with the apology resolution, I believe in 1993 or so,
17 the apology was under -- a few years back -- that they
18 issued a resolution and that started a process of, I
19 believe, even some of the U.S. Commission on Civil
20 Rights going to Hawaii and taking testimony and other
21 issues, addressing the wrongs that had been done to
22 the indigenous people of the Hawaiian Islands.

23 So I kind of look at this as a bigger
24 picture. I think we're talking about justice here
25 also, even though we are part of the Federal

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1 Government, whether we're on a Committee or whether
2 Congress itself, you know, justice to me doesn't mean
3 justifying a moral wrong committed against an
4 indigenous people. I think the history of this
5 country we have seen that happen. We've seen that
6 happen when Grover Cleveland sent somebody, one of the
7 former Congressman to find out what actually happened,
8 whether or not it was actually legal or an act of war
9 as to how they dethroned the Queen at that time.

10 Basically, what really happened, the
11 report came back from Grover Cleveland's person that
12 he sent there, that yes, a wrong had been committed
13 and at that time he decided to right the wrong. Well,
14 as we know, this country is famous for justifying the
15 wrongs that it's done with the Foreign Affairs
16 Committee at that time, I read that. And basically it
17 sounded to me like the United States basically did
18 their own reasoning through lawyers and attorneys,
19 just like ourselves here with this Committee to
20 justify some manner as to what you did wrongfully to
21 that kingdom.

22 And the Native Americans, even today, we
23 see the same things happening. And the problem is
24 that the time they called it a Bayonet Constitution.
25 And when I thought about it, it's a good thing that

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1 the Pilgrims didn't come here. The first question
2 we'd probably ask them was whether or not you're a
3 provisional government, if that's your intention to
4 set that up. And so I'm just saying when I read the
5 history, I think what Grover Cleveland said about the
6 credibility of the United States is still the question
7 today. And I think I just ask the question, boy, if I
8 was around in those times, I'd sure like to make a
9 right, but here we sit today, basically and
10 particularly in that same position, you know. It's
11 not what would you do back in those times. I think
12 you might be in that same situation today as we look
13 at what do we do. Is it something we're trying to do
14 to right a wrong?

15 Let's just -- the issue in a larger
16 context -- but getting down to the report that
17 actually came out of this Commission, I think that
18 when I look at it, I see a lot of things that were
19 kind of assumptions. And I think -- I just want to
20 make some of those findings. I'm sure other people
21 will talk about that.

22 There are some things in this report, I
23 believe that were not really true statements. And one
24 of the problems we have, a lot of the references have
25 to do with Indian law because for some reason we're

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1 trying to some way look at Indian law as far as ways
2 tribes are recognized and all those different things.
3 And some of our -- and the comments we have made from
4 our basically, our legal people here in the
5 Commission, basically it just seems that maybe there's
6 a lack of understanding of federal law as to how it's
7 applied to Native American Indian tribes, because I
8 look in the statements.

9 Let me give you an example of some of
10 those. In number 2 finding, let's just take that one.
11 The Office of Hawaiian Affairs currently administers a
12 racial preference. I don't know if that's actually a
13 fact or somebody's idea. I'd like to strike racial at
14 least and just say maybe it's a preference system
15 there

16 There's other things that have been said
17 by our people who put this report together that a
18 tribe had to have existed continuously and we know as
19 Native American tribes that that hasn't happened at
20 least for Native American tribes. We've been
21 terminated and came back to life, I guess. The
22 problem is we were always there. We might have been
23 in jail like the Queen, but the issue is you're
24 basically suppressed, so you can't really pull
25 Robert's Rules of Order meetings, if that's what

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1 everybody is looking for to say that you are a
2 continuous government. I guess the question would be
3 are you still alive, would be whether or not you
4 really existed as a tribal government.

5 The other issue, when we look to the final
6 document, I see that the Commission sometimes takes no
7 position and sometimes they decide to support
8 something or not support something. I think this is
9 such a controversial issue and I think maybe my
10 colleague, Michael, might go under some of the other
11 issues as far as nine findings and we'll probably talk
12 a little bit about them.

13 But I think that because this issue is so
14 controversial and people are kind of looking at it and
15 I saw the publication that came from the SAC out in
16 Hawaii, you know. I think our credibility to a
17 certain extent is on the line here. And I would think
18 that just to have -- the people in the United States
19 look at us to be somewhat fair and I would think that
20 at the very least we would take no position and send
21 the report on to Congress, let them determine all
22 these different things. Otherwise, I think that in my
23 opinion, I don't think this report is ready to go out.
24 I think we have to still go through and -- in fact,
25 I'd like to strike Section 5, finding 5 completely.

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1 Because the reason for that --

2 CHAIRMAN REYNOLDS: I'm sorry, which page
3 are you on?

4 COMMISSIONER MELENDEZ: Seventeen. That
5 one basically had -- and the issue isn't even relevant
6 to the briefing as to testimony.

7 And a lot of assumptions are made that
8 whether or not Hawaiians or whether or not that entity
9 would have to come under the process for recognizing
10 tribes, you know. That's not really as it's depicted.
11 I think Congress has the authority -- there's many
12 ways that they can grant federal recognition. They
13 can do it by Executive Order. They can actually do it
14 through a court system. But to assume through many
15 times through these findings that this Hawaiian
16 entity, if it were established, would have to come
17 through the congressional -- I guess the way they're
18 recognized, that it's the only process. I know that
19 one time that only applied to the tribes within the
20 United States, but it's not to say that Congress
21 couldn't basically establish them as a tribe.

22 So the only point I'm making, I see a lot
23 of areas within this at least tied to the federal
24 recognition process that I don't even think maybe it
25 should even be in here at some point.

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1 Throughout the findings, there are
2 statements that are premises upon the proposition that
3 the federal acknowledgement criteria applied to Native
4 Hawaiians and I don't think that's totally true. So I
5 just see a lot of issues.

6 There's a statement in here in Finding 1.
7 It says "In Finding 1, in like manner, the act would
8 give the governing entity the ability to treat non-
9 Native Hawaiians differently than Native Hawaiians is
10 belied by the fact that the provisions of the U.S.
11 Constitution would apply to the Native Hawaiian
12 governing entity, including the Constitution,
13 guarantees that all citizens shall be afforded equal
14 protection." I mean that's the bottom line, but
15 sometimes the report seems to be biased in a way that
16 Native Hawaiians, if they were to come under the same
17 status of Indian tribes that they for some reason
18 wouldn't have the same protections of -- under the --
19 that's under the Constitution, equal protection and
20 civil rights and all those different things.

21 But those type things are in here and a
22 lot of times we're asking well, it just seems like
23 opinionated or biased by whoever is writing this
24 report. That's part of the problem that I have
25 because this report is going to be scrutinized by a

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1 lot of people and I think if we're going to put out a
2 report like this, it better be accurate and we better
3 confer with the people who do know Indian law and we
4 better find out are we saying things that are actually
5 true. So that's kind of what I see. That's all I
6 wanted to say for right now.

7 I'll let Michael talk about it.

8 CHAIRMAN REYNOLDS: Ready?

9 COMMISSIONER YAKI: I think one of the
10 largest deficiencies in this report is what
11 Commissioner Melendez pointed out and that is the
12 absence of any real grounding in and understanding of
13 Indian or aboriginal law and constitutional law in the
14 United States.

15 When you look, for example, at the Alaskan
16 Natives who do not -- many do not follow any sort of
17 set tribal patterns. They don't fit the classic
18 definition of a tribe. Yet, they are completely
19 granted the same protections as Native American tribes
20 on the continental U.S.

21 You understand that Congress has and
22 continues to reserve its plenary authority to
23 determine recognition and sovereignty issues for the
24 indigenous peoples of this -- of what became the
25 United States.

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1 One of the most important things I think
2 to understand about that is I think findings 5 and 6,
3 especially are completely inapplicable to this
4 discussion. The idea that as Commissioner Melendez
5 says that the federal acknowledgement process should
6 be any part in evaluating the claims of Native
7 Hawaiians is, I think, completely (a) misplaced; and
8 (b) why are we relying on federal regs to determine
9 what is essentially a constitutional issue?

10 I can name a dozen tribes. I'll just
11 start with one, two, the Menominee and the Lytton
12 Tribes. The Menominee Tribe was a tribe that had its
13 recognition established, re-established after it had
14 been disbanded in the 1940s. The Lytton Tribe had
15 land given to it and given a historical character to
16 it that did not exist at the time in order for it to
17 evade the regulations within the Department of the
18 Interior.

19 The fact, the idea that DOI and
20 regulations should be at all applicable in the
21 analysis of the Native Hawaiians is completely
22 misplaced and I think lends substantially to a lack of
23 credibility for this report.

24 Now, we can talk about this ad nauseam.
25 The fact that Rice v. Cayetano has some biblical magic

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1 in this is erroneous. It was a fifteenth amendment
2 case dealing with state action. Again, Congress has
3 the ability and in response to one of the first things
4 that the Chairman said, under the theory espoused by
5 the Chairman, we should not be -- Congress should not
6 be in the business of recognizing any additional
7 Native American tribes because we are "deciding to
8 recognize people" in terms of discrete subgroups
9 further subdividing this nation.

10 There are a number of Native American
11 peoples in the continental United States who are still
12 seeking recognition for wrongs done to them one
13 hundred years ago. Maybe we should be adding to the
14 statement oh by the way, we also believe that these
15 regs that DOI have are basically unconstitutional
16 because they lead to the perpetuation of and
17 subdivision of Americans into discrete subgroups.
18 That's certainly not, I don't think, what the Chairman
19 means to say. And I don't understand in all fairness
20 to peoples who may have been the first discoverers of
21 the America -- of the western side of North and South
22 America, depending on the archeological evidence
23 that's out there, when you -- people who had
24 extraordinary navigational abilities, far beyond that
25 of Western Europe at a time when they're sailing

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1 across not just little ponds but two, three thousand
2 miles of open ocean. We settled on these islands,
3 whose islands were basically, for lack of a better
4 word, wrecked by the contact with white civilization
5 and then whose government was essentially stolen by
6 the United States in 1893, an act, by the way, which
7 Congress in its authority, in its role, voted
8 overwhelmingly to support an apology for that action.

9 I mean, excuse me, but we give any
10 credence, with all due respect, to Mr. Burgess and his
11 group of people who are very eloquent at sending
12 emails and sending comments in when they're asked to,
13 when the cold fact is that 84 percent of the Hawaiian
14 people support this kind of legislation. I mean, the
15 idea that we're giving credence and we're elevating
16 people who believe that the, what's the report --
17 begins with an M. The Morgan report, you know, is the
18 actual true story of the overthrow of Liliuokalani and
19 her court, I think makes us look silly.

20 I can understand from a policy
21 perspective, Mr. Chairman, where you come from in
22 terms of the idea that, I mean we disagree on it, but
23 I understand it. I understand where other people on
24 this Commission come from. But I don't think it is
25 wise to apply it in this instance to Native Hawaiians.

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1 And certainly not to the history that Native Hawaiians
2 have endured on their lands and on these islands.

3 Yes, is it a wonderful place? Is there
4 the Aloha spirit? Of course, it is. I mean, it's one
5 of the most beautiful places on God's earth to go
6 visit, and you don't have to pay in Euros. It's a
7 wonderful, beautiful place. But I have been there, I
8 have seen the undercurrents. I have seen the poverty
9 of the Native Hawaiians. I have seen, you know, I
10 have talked to people who still burn with the
11 injustice over a 100 years ago.

12 Are they working in the island? Are they
13 in the government? Are they in the civil service?
14 Yes. But scratch the surface a little bit and you'll
15 find people who still believe to their heart that
16 their paradise was stolen from them over 100 years ago
17 and the fact that through endless circular logic, they
18 are not even given the opportunity, which is what S147
19 would do. The opportunity to take baby steps in
20 determining whether or not there can be some semblance
21 of limited self-determination and self-governance, I
22 think, is an insult to an important constituency of
23 this Commission to a state, to an entire state, in
24 this country.

25 (Phone rings)_

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1 If they're coming to get me, give me five
2 minutes to run out the door.

3 (Laughter.)

4 I just believe that for -- that I know
5 where you are, Mr. Chairman. I know where other
6 members of this Commission are. I respect that
7 position. I may not agree with it. I would just say
8 that extending that doctrine to this particular
9 example is misplaced, and doing it in this way when we
10 have had extremely limited testimony about this. We
11 have not heard, for example, from the Department of
12 the Interior, from the Department of Justice. When we
13 have not -- and to take a stand on a piece of
14 legislation important to one particular state, and one
15 particular people in this country I think is a
16 disservice and I fear as Commissioner Melendez has
17 said is that we could be undermining our credibility
18 with that constituency, undermining our credibility in
19 terms of our ability to opine about Indian law when we
20 are clearly wrong all over the place in this report
21 about Indian law, and why I voted, quite frankly, to
22 support Commissioner Taylor's recommendation of
23 isolating the report to that one document, when in
24 fact three other iterations of this exists, that may
25 solve a lot of the problems that you are talking

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1 about.

2 I just wanted to go on record as saying
3 that we're dealing with an area of law as Professor
4 Heriot said very complex, but one where unlike
5 Professor Heriot who seemed to say that the whole
6 thing should be junked and tossed out, the fact is
7 that as Christopher Bartolomucci said and others have
8 said, in other legal forums, including by the way the
9 hearing before Senator McCain had five witnesses, none
10 of whom were named William Burgess or associated with
11 him, where this is something that has had three
12 reports done by different agencies that are not cited
13 in here at all. To just ignore that history, to
14 ignore the body of Indian law out there, to ignore the
15 experts of Indian law out there, is to tread in very
16 dangerous legal and scholarly waters that I don't
17 think the Commission should do.

18 I think that we had a briefing on it. We
19 heard interesting points of view. I find it, I'll
20 just conclude with this. I find it ironic that for
21 our statutory report, which involved the allocation of
22 as much resources that we could possibly have, to get
23 to issues as critical to this nation as the vote of
24 the extension of the temporary provisions of the
25 Voting Rights Act, that in there ultimately we decided

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1 that we would pose questions for policymakers, pose
2 issues for them to consider as they went through a
3 renewal process that is getting near unanimous support
4 in the bodies of Congress.

5 But on this piece of legislation, on a
6 limited hearing, where I believe that we gave far too
7 much credibility to a small group of people who have
8 problems with this in Hawaii, and again, I just
9 reference the poll, which of course you can't find
10 anywhere in these documents. And yet we manage to
11 come down with a firm and hard recommendation on that.
12 I mean, the disparity to me could not be any greater.
13 And given the complicated issues, given the complex
14 Indian law issues, the complex issues involving an
15 analysis of the history of the Native Hawaiian
16 peoples, of the monarchy, of the Apology Resolution,
17 of the Hawaiian Homes Commission, etcetera, of the Act
18 of Statehood that incorporated all of this, of the 160
19 acts of Congress that have applied directly to Native
20 Hawaiians that have never been thrown out in any
21 Court, I think we're treading on the scholarly and
22 legal equivalent of a land mine.

23 I just say that compared to what we just
24 did with something as important as the Voting Rights
25 Act report, where we gave questions, if this were a

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1 report that said we were the Civil Rights Commission
2 and we want to make sure that whatever this entity
3 does, it protects civil rights of all people in
4 Hawaii. If we want to say that it must protect the
5 civil rights of those people who are formed within
6 that government, if it were to say that we are
7 concerned and we want to make sure that these kinds of
8 things should be looked at, I would have no problem
9 with that.

10 But to say we want to dump this
11 legislation which is overwhelmingly supported by the
12 Hawaiian people as only a tentative first step in
13 this, and doing it on the basis of very faulty
14 analyses of law, of policy, and of regulations, I
15 think is something I don't want this Commission to be
16 associated with.

17 CHAIRMAN REYNOLDS: Okay, Commissioners
18 Melendez and Yaki, I must say that your arguments,
19 many of them, resonate with me. The injustices that
20 occurred in Hawaii, who cannot feel for the folks who
21 had to suffer those injustices? But after saying that
22 though, I think that we should be mindful of our
23 attempts to remedy historic wrongs. We need to be
24 careful that we don't commit wrongs in the attempt to
25 remedy historical wrongs.

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1 I sit here as the father of two children,
2 and my question, and moving away from the
3 constitutional arguments, the public policy arguments,
4 and when I ask myself as the father of two black
5 children, if they would have moved to Hawaii, would
6 they have the same benefits and burdens as Native
7 Hawaiians? And if the answer is no, as a father, I
8 have a problem with that. And quite frankly, I would
9 have a problem with it to the same extent if Hawaiian
10 children were to live in a state where they had, where
11 their privileges weren't the same as the favored
12 group.

13 You know, we have a decision to make. In
14 the 21st century, do we want to continue to expand the
15 use of racial classifications? I think that
16 throughout the country's history, we've always used
17 racial classifications, whether it is slavery, whether
18 it is Jim Crow, whether it is preference policies. We
19 have always used racial classifications. I think that
20 it is odious, as it's been described by the Supreme
21 Court, but we continue to do it.

22 I think that we do it at our own peril.
23 We make arguments why in any particular case it is
24 justified, and many of the arguments resonate with me.
25 But I also see the dangers. There's some folks in

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1 Nebraska who have, to their mind, very good reasons
2 for why they want to carve up the school district
3 based on using racial classifications to create
4 racially identifiable school districts. They have to
5 their mind very good reasons for doing this. I think
6 that as a principal response to these claims of
7 injustice and the folks in Nebraska, the folks who
8 supported the legislation, at least some of them feel
9 that this is necessary to undo wrongs.

10 Yes, I think that we have an obligation
11 and it's good public policy to try to address historic
12 wrongs. But we have to do so in a way that doesn't
13 create new problems. But I think that a principle
14 that we should consider embracing, not just in
15 rhetoric, but in terms of our public policy and our
16 legislation, is that the government's use of racial
17 classifications is not permitted.

18 Now that is not the state of the law
19 today. It is permitted. You passed a strict scrutiny
20 standard. You can do it. But I think that we're
21 playing with fire. This is a diverse nation and we
22 have many people here and we have many people here who
23 have been wronged. I don't think that there is any
24 group that has come to America who haven't been
25 screwed in some way or another when they've first

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1 arrived. That seems to be a part of our tradition at
2 least in the past.

3 The bottom line is I think that it is
4 important that we have some over-arching principles
5 that unite us all as a people, and I think that the
6 notion of distributing benefits and burdens to groups
7 based on different criteria, I think moves us away
8 from that over-arching principle that we're all
9 Americans and that we all have the same political
10 obligations and political burdens and privileges and
11 rights.

12 So while I believe that you made some
13 powerful arguments, I still have concerns about the, I
14 don't know what you want to call it, balkanization the
15 country. I just think that it is dangerous in the
16 long term. The world is not going to end tomorrow,
17 but just extrapolating, this is not going to stop.
18 With every success, there is another group who are
19 going to come back and use the same arguments that
20 have been used by the successful group. And to my
21 mind, that leads to a dangerous place.

22 COMMISSIONER MELENDEZ: Let me ask a
23 question, Mr. Chairman. You asked the question how
24 would they get along if there were special, I guess,
25 recognition in appropriations, or whatever went along

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1 with it. How would people in Hawaii get along with if
2 there was a group like that? The question would be
3 this country, if we were in that situation right now,
4 how would your children right now, where there's 550
5 tribes that are very recognized that get what you
6 might term special appropriations for some reason,
7 were just about the same reason as basically the
8 taking of over I don't know how many millions of lands
9 of Native Americans. Why did they give us a special
10 recognition as a Native American entities? And how
11 are you living alongside of them today?

12 I'll tell you why. Because the
13 reservations that they put us on were probably the
14 worst reservations, the most despicable land you could
15 ever live on, where all of the basically the
16 Caucasians took the nice pieces. It's probably the
17 same situation in Hawaii.

18 If we looked at the amount of 200,000
19 acres, I bet if we went there today, and I have never
20 been there to look at those lands, but I bet they are
21 not the best pieces of the land on the water front. I
22 bet they're probably up on a hill-side or probably
23 some swamp that you can't even probably live on. And
24 I'm just guessing, but you can check into that for
25 yourself.

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1 The reasons why can live alongside of us
2 is because the United States controls probably most of
3 the land. If you look at how much Indian tribes are
4 set on, my tribe has 30 acres. Thirty acres. There
5 are farms in the Midwest, probably President Bush's
6 farm or ranch is probably larger than our whole
7 reservation. So how do you get along? In Hawaii, it
8 would really come down to how much land you have as
9 opposed to what everyone else controls. They probably
10 have that whatever was mentioned in that Homestead
11 Act.

12 CHAIRMAN REYNOLDS: How many acres was
13 that?

14 COMMISSIONER MELENDEZ: Something like --
15 I forget what the amount of acreage is, but that's
16 probably what you're talking about. There's no way
17 that the people that control Hawaii, and if the Queen
18 were alive, and let's give that scenario, and she had
19 on acre upon a mountain top, would we be trying to
20 restore her today or would we be trying to get our
21 legal experts for some way to not give her that right
22 to restore herself on one acre of land.

23 I know there are probably some people who
24 would say yeah, we would be trying to restore. No, we
25 wouldn't. We would be trying to do the same thing

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1 that the history of the country has always been trying
2 to do. We'd try to find some way legally through our
3 lawyers to say, just like they did back there with the
4 people that they threw in there, we'd be doing the
5 same thing today, because this country has never
6 changed in that philosophy. And that's really the
7 truth about it.

8 So the issue is are we going to right our
9 wrong and let them have their minute land when they
10 controlled the whole islands and let them operate like
11 Native Americans, like us, on their 30 acres? You
12 could probably do that and still live alongside them.

13 I don't think it would devastate your children or
14 anything like that. It hasn't devastated you living
15 alongside Native American reservations in this
16 country, so why would it in Hawaii. Unless you think
17 for some reason they're going to expand and some
18 reason that tribe, or whatever you want to call them,
19 the entity that's recognized is going to in some way
20 going to take over the Hawaiian islands, which I don't
21 think anybody would let them do as far as a land base.

22 COMMISSIONER YAKI: And that's another
23 thing, is that if you again, looking at the law, and
24 looking at the actual text of the law that is in
25 question versus the text, the text of the laws on the

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1 books enacted by Congress with regard to Indian
2 tribes, or Native American reservations, etc. I mean,
3 one of the most interesting things and I'm going to
4 put on my Hawaiian hat here, is the fact that you have
5 so many diverse groups of people living in a very
6 small area who for the most part, by and large, all
7 get along really well.

8 I think that's a tribute to the Hawaiian
9 people. It's a tribute to the fact that they're all
10 in a small place and they all got to get along. But I
11 think it also should say something about what kind of
12 fears anyone would have about what this entity could
13 or could not do. And I think it's why the State
14 Advisory Commission is so vehemently opposed to what
15 the Commission's actions could be here today.

16 And that is, and why they were upset about
17 the hearing, and why they send us emails I'm getting
18 all the time and faxes from the Staff Director. I
19 just really beseech you, Mr. Chairman, that I
20 understand what it is that you see and what it is you
21 envision as the correct path for what our Nation
22 should go to. But I sincerely believe that in the
23 case of a Native Hawaiian people, it's seriously
24 misplaced and we should instead look to a different
25 guiding philosophy, and that is if your argument is if

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1 we say yes, who else do we have to say yes to?

2 My question is if we say no to them, how
3 do we explain it to them based on the fact that other
4 peoples, the Native Alaskans, the Native Americans,
5 continue to this day to hear the answer yes.

6 CHAIRMAN REYNOLDS: Well, I don't think
7 that because in the case of Native Americans we have
8 in my view a constitutional distinction. And I know
9 you don't agree with me that this merely applies to
10 Native Americans, but I think that that distinction is
11 important and to move away from that would require a
12 constitutional amendment. The distinctions may with
13 respect to Native Americans, I think that it is
14 constitutional.

15 COMMISSIONER YAKI: But Native Alaskans
16 don't fit that definition, Mr. Chair.

17 CHAIRMAN REYNOLDS: I agree.

18 COMMISSIONER YAKI: And yet there are
19 special acts of Congress that recognize their
20 sovereignty, that recognize tribal governments and
21 government relations.

22 CHAIRMAN REYNOLDS: Okay, that is true.
23 And quite frankly, I do not know if that issue was
24 presented today how it would be treated. But the
25 bottom line is we have an issue in front of us and we

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1 will have to eventually vote on it.

2 Commissioner Braceras?

3 COMMISSIONER BRACERAS: The only thing I
4 want to say is that I think if you look at the
5 recommendation that the Commission proposes, it is a
6 recommendation that is normative and theoretical, as
7 opposed to speaking to the constitutional question.
8 And I think it is embodied very nicely in what the
9 Chair just said in his first set of remarks, about the
10 direction that he would like to see this country go.
11 And that is towards one of unity and away from
12 balkanization.

13 So I don't think that the precise
14 recommendation that we're voting on confronts the
15 constitutional question. Reasonable minds can differ
16 about whether or not Congress is within its rights to
17 propose this legislation, but the question is even if
18 they do have the authority to propose it, whether or
19 not it is a good idea. And I think the Chairman spoke
20 quite eloquently as to why it is not a good idea. So
21 I'm going to support the report and I'd like to call
22 the question.

23 COMMISSIONER MELENDEZ: Can I comment?

24 CHAIRMAN REYNOLDS: Yes.

25 COMMISSIONER MELENDEZ: If we send a

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1 report, I want to hopefully that we answer all of the
2 questions of the authorities on the report. For
3 example, in Finding 1, using ancestry it says as a
4 proxy for race, that Native Hawaiian government
5 Reorganization Act would likewise establish an
6 impermissible racial preference in the establishment
7 and operation of a government entity.

8 The question is what authority for this
9 conclusion, where is the cite to a law or a Court
10 ruling that supports this conclusion, rather than just
11 being opinionated by one of our attorneys?

12 In Finding 2, "The Office of Hawaiian
13 Affairs currently administers a racial preference
14 system and that's one where I said maybe we should
15 take out racial because it's just opinion in the form
16 of a substantial public trust, including cultivated
17 sugarcane, land, water rights and other natural
18 resources as well as any derivative profits." And
19 here again, what is the authority for this conclusion?

20 Where is the cite to a law or a Court ruling that
21 supports this conclusion? Indeed, no Court has never
22 held that the Office of Hawaiian Affairs administers a
23 racial preference system and one might well ask how is
24 the Office of Hawaiian Affairs and the programs it
25 administers under the authority of the Hawaiian State

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1 Constitution relevant to the report on a Senate bill?

2 And Finding 9, "Furthermore, the passage
3 by Congress of 160 statutes addressing the conditions
4 of Native Hawaiians and the continuous efforts by the
5 Federal Government to implement those statutes were
6 not intended to imply a recognition of a distinct
7 political entity." Again, where is the cite that
8 would provide support for the statement of
9 congressional intent? Are the drafters of the report
10 former or current members of Congress?

11 The only point I'm making is that a lot of
12 this is just opinion of maybe some of our attorneys
13 and I think that they aren't -- I don't think they
14 know Indian law based to make these type of assertions
15 in this report.

16 COMMISSIONER BRACERAS: The question has
17 been called.

18 COMMISSIONER YAKI: The question has been
19 called, but it requires a two-thirds vote and I'm not
20 going to vote for it to keep the debate open.

21 CHAIRMAN REYNOLDS: I'm sorry, you want to
22 keep debate open, okay.

23 VICE CHAIRMAN THERNSTROM: Wait a minute,
24 wait a minute. I want a parliamentary here. The
25 question has been called. What's the next step?

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1 STAFF DIRECTOR MARCUS: Madam
2 Parliamentarian, can you answer the question?

3 MS. MONROIG: I believe you said you
4 wanted to call the question? You want to end debate
5 on this?

6 VICE CHAIRMAN THERNSTROM: Jennifer said
7 "I called the question."

8 COMMISSIONER BRACERAS: The Vice Chair
9 just asked what the next step is after that, that was
10 the question.

11 VICE CHAIRMAN THERNSTROM: I mean somehow
12 that was ignored. She had called the question.

13 CHAIRMAN REYNOLDS: It wasn't ignored.
14 Maybe I shouldn't have done this, but I --

15 VICE CHAIRMAN THERNSTROM: I really do
16 think you need to stick to Robert's Rules of Order.

17 STAFF DIRECTOR MARCUS: Madam
18 Parliamentarian, is it the case that when the question
19 is called, if it is seconded, the Chair determines
20 whether there is a two-thirds vote in favor?

21 MS. MONROIG: Yes.

22 VICE CHAIRMAN THERNSTROM: And I'm
23 seconding it.

24 CHAIRMAN REYNOLDS: Okay, well, we will
25 have a vote on Jennifer's motion.

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1 All in favor say aye.

2 (Ayes.)

3 All in opposition.

4 (Nos.)

5 Any abstentions?

6 If my math is right --

7 VICE CHAIRMAN THERNSTROM: The question
8 has been called.

9 CHAIRMAN REYNOLDS: Yes.

10 VICE CHAIRMAN THERNSTROM: There cannot be
11 any more discussion on this.

12 CHAIRMAN REYNOLDS: Okay, so let the
13 record reflect that Commissioners Yaki and Melendez
14 voted against the motion and the remaining
15 Commissioners voted in favor. The motion passes.

16 COMMISSIONER YAKI: I have a point of
17 information?

18 CHAIRMAN REYNOLDS: Yes.

19 COMMISSIONER YAKI: Which is pertinent to
20 the motion under Robert's Rules.

21 CHAIRMAN REYNOLDS: God help me.

22 VICE CHAIRMAN THERNSTROM: We have a
23 parliamentary here.

24 COMMISSIONER YAKI: I just have a question
25 as to who drafted Findings 2, 5, 6 and 7?

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1 CHAIRMAN REYNOLDS: I have no idea.

2 COMMISSIONER YAKI: I just want you to
3 know they're factually wrong.

4 CHAIRMAN REYNOLDS: I think it's in the
5 record that both Commissioner Melendez and you believe
6 that there are factual inaccuracies in the document.

7 And as for the identity, I don't know and

8 --

9 STAFF DIRECTOR MARCUS: They were prepared
10 by staff and as Staff Director, I certainly take
11 responsibility for anything contained in the
12 documents. We have a career staff and the document
13 was prepared by members of the career staff.

14 CHAIRMAN REYNOLDS: Okay, at this point,
15 let's vote.

16 All in favor of the document, please say
17 aye.

18 (Ayes.)

19 All in opposition?

20 (Nos.)

21 Abstentions?

22 (Abstention.)

23 COMMISSIONER KIRSANOW: Abstained, and for
24 the record, my abstention has nothing to do with the
25 work done by staff which I think was excellent in

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1 terms of compiling accurately what was adduced at the
2 hearing and all subsequent information received by the
3 Commission related to this particular issue. And
4 substantively, I would adhere to the comments made by
5 the Chairman in response to Commissioner Yaki, which I
6 think was one of the most succinct exigencies on the
7 unity principle, but I think the Commission needs to
8 keep in mind when addressing its primary functions
9 related to providing counsel recommendation fact-
10 finding with respect to issues pertaining to civil
11 rights and voting rights to the Executive Branch and
12 Legislative Branch.

13 So while I concur with the report as
14 drafted in terms of what was presented at the hearing,
15 I would nonetheless abstain.

16 CHAIRMAN REYNOLDS: Okay, I vote for it.
17 But I just want to put on the record that I do -- many
18 of the arguments made by Commissioners Melendez and
19 Yaki, I found powerful, but -- and as for the document
20 itself, I -- while I don't agree with everything
21 that's in the document and I can say that about all
22 the documents, at the end of the day I support it. So
23 please let the record reflect that Commissioners Yaki
24 and Melendez voted against the motion and that
25 Commissioner Kirsanow abstained and the remaining

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1 Commissioners voted in favor. So the motion passes.

2 VICE CHAIRMAN THERNSTROM: Let me say one
3 final thing since you said something explanatory with
4 respect to your vote, Mr. Chairman. The core issue
5 for me here was the Government's use of racial
6 classifications and I thought that we had here a
7 split, basically over that issue and that is the issue
8 that will continue to divide in various forms this
9 Commission, because I thought it was the core issue.
10 I went with voting for the report although, of course,
11 Commissioners Yaki and Melendez add much that was
12 useful and informative.

13 COMMISSIONER YAKI: Like I said, I would
14 just say this and I appreciate everyone listening to
15 both Commissioner Melendez and myself, but I just want
16 to tell you that notwithstanding the viewpoints and
17 the policy perspectives of the Chairman, Vice
18 Chairman, Commissioner Kirsanow and Commissioner
19 Braceras, which we can respectfully agree --

20 VICE CHAIRMAN THERNSTROM: What happened
21 to Commissioner Taylor?

22 COMMISSIONER YAKI: And Commissioner
23 Taylor who we can respectfully disagree with and we'll
24 probably continue to in a tone of niceness throughout
25 our terms, one concern I do have about this report

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1 going out is that there are serious factual errors in
2 the findings.

3 It is one thing to say that we believe
4 that this is what it's going to do. It's nothing to
5 go into a long explanation of the Hawaiian monarchy
6 which is wrong, which is about the federal regs which
7 are wrong, about Finding 6 which is wrong. I mean I
8 just think that it's one thing to put out a thought
9 document which says all the things that you talk about
10 that voices your concerns and says that we hope these
11 are addressed or because of this we have serious
12 reservations about it. It's another thing to have
13 findings that are so easily attacked because they're
14 just factually incorrect that it undermines what it is
15 you're trying to do.

16 VICE CHAIRMAN THERNSTROM: Well,
17 Commissioner Yaki, I think all of us are going to look
18 forward to your dissent.

19 COMMISSIONER YAKI: It's just going to be
20 facts and law. Facts and law.

21 VICE CHAIRMAN THERNSTROM: And it will
22 obviously enrich the document to have it.

23 CHAIRMAN REYNOLDS: Okay, at this point I
24 move that we adjourn this meeting. We will deal with
25 the remaining issues that are on the agenda tomorrow

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1 after the briefing.

2 Thank you.

3 (Off the record.)

4 CHAIRMAN REYNOLDS: Commissioner Yaki,
5 just so we are clear, the document will not be bound.
6 We will put it on the website, but the document won't
7 be bound.

8 VICE CHAIRMAN THERNSTROM: I think it is
9 important to say on the website explicitly that we are
10 expecting dissents from Commissioners Melendez and
11 Yaki.

12 CHAIRMAN REYNOLDS: Okay, all right, see
13 everyone tomorrow.

14 (Off the record.)

15 CHAIRMAN REYNOLDS: Okay, there is a
16 motion that Commissioner Taylor wants to make and so
17 Commissioner Taylor?

18 COMMISSIONER YAKI: He's referring to me.

19 CHAIRMAN REYNOLDS: First motion to
20 reconvene.

21 COMMISSIONER TAYLOR: I need to make that
22 motion. Having voted on the prevailing side, I'd like
23 to move that we reconsider our vote.

24 COMMISSIONER TAYLOR: Is there a second?

25 COMMISSIONER KIRSANOW: Second.

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1 CHAIRMAN REYNOLDS: Okay, all in favor?

2 (Ayes.)

3 Any in opposition?

4 Any abstentions?

5 Motion passes.

6 COMMISSIONER KIRSANOW: I'd like to make a
7 very brief point. Those are pages 16 through 18 in
8 terms of page numbers in the briefing report. And I
9 would just like to adopt similar comments made by
10 Commissioner Yaki with respect to the findings and
11 recommendations.

12 As I said, I think the report itself
13 summarizing what occurred at the hearing was
14 excellent, but I think there was a disconnect between
15 what was adduced at the hearing and some of the
16 findings and recommendations which didn't necessarily
17 reflect what had occurred at the hearing.

18 And having said that, I'll just shut up.

19 (Laughter.)

20 CHAIRMAN REYNOLDS: Thank you. I need you
21 sitting next to me.

22 Okay --

23 VICE CHAIRMAN THERNSTROM: We've got a
24 motion.

25 CHAIRMAN REYNOLDS: Commissioner Yaki.

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1 VICE CHAIRMAN THERNSTROM: Wait a minute.
2 The motion has not been made yet.

3 COMMISSIONER YAKI: To reconsider, yes.

4 VICE CHAIRMAN THERNSTROM: Okay.

5 COMMISSIONER YAKI: Thank you very much,
6 Mr. Chairman. On the main item, I would move that we
7 strike the findings from the document, Findings 1
8 through 11 and simply have as the conclusion the
9 amended -- the recommendation as amended earlier
10 today.

11 CHAIRMAN REYNOLDS: Is there a second?

12 VICE CHAIRMAN THERNSTROM: Second.

13 CHAIRMAN REYNOLDS: Discussion? All in
14 favor.

15 (Ayes.)

16 Any in opposition? Any abstentions?

17 Motion passes unanimously.

18 I move that we adjourn.

19 VICE CHAIRMAN THERNSTROM: I second that.

20 (Whereupon, at 6:08 p.m., the meeting was
21 concluded.)

22

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