

## U.S. COMMISSION ON CIVIL RIGHTS

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TELEPHONIC  
COMMISSION MEETING

+ + + + +

TUESDAY  
SEPTEMBER 30, 2008

+ + + + +

The meeting convened telephonically at 11:00 a.m., Abigail Thernstrom, Vice Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, CHAIRMAN  
ABIGAIL THERNSTROM, VICE CHAIRMAN  
TODD F. GAZIANO, COMMISSIONER  
GAIL L. HERIOT, COMMISSIONER  
PETER N. KIRSANOW, COMMISSIONER  
ASHLEY L. TAYLOR, JR., COMMISSIONER  
MICHAEL YAKI, COMMISSIONER

MARTIN DANNENFELSER, Staff director

STAFF PRESENT;

DAVID BLACKWOOD, General Counsel  
IVY DAVIS  
DEMITRIA DEAS  
PAMELA A. DUNSTON, Chief, ASCD  
MAHA JWEIED  
TINALOUISE MARTIN, Director, Office of  
Management  
EMMA MONROIG, Solicitor and Parliamentarian  
LENORE OSTROVSKY. Attorney/Advisor, OSD  
EILEEN RUDERT  
KIMBERLY TOLHURST  
AUDREY WRIGHT  
MILITSA SAMARDZIJA, Consultant

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COMMISSIONER ASSISTANTS PRESENT:

TIM FAY  
JACK KAMMEN  
DOMINIQUE LUDVIGSON  
KIMBERLY SCHULD  
HANS VON SPAKOVSKY

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

Time: 11:05 a.m.

VICE CHAIR THERNSTROM: Thank you very much.

This -- Have we got, by the way, the reporter with us here? Mrs. Staff Director, do you know that we have got a reporter?

STAFF DIRECTOR DANNENFELSER: The reporter is on.

VICE CHAIR THERNSTROM: This is Vice Chair Thernstrom. It is 11:10 a.m. Eastern Daylight Time on September 30, 2008. We are having a telephonic meeting with all Commissioners participating, all Commissioners who are able to participate coming from different locations.

I will call the name of each Commissioner in order to determine if there is a quorum to hold a meeting. Commissioner Gaziano?

COMMISSIONER GAZIANO: Here.

VICE CHAIR THERNSTROM: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Here.

VICE CHAIR THERNSTROM: Commissioner Heriot?

COMMISSIONER HERIOT: Here.

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1 VICE CHAIR THERNSTROM: Commissioner  
2 Melendez? Commissioner Malendez?

3 STAFF DIRECTOR DANNENFELSER: He won't be  
4 here today.

5 VICE CHAIR THERNSTROM: He will not be  
6 here? Okay. Commissioner Yaki, I know, will not be  
7 here.

8 Commissioner Taylor?

9 STAFF DIRECTOR DANNENFELSER: Yaki is  
10 there.

11 VICE CHAIR THERNSTROM: Yaki is here? Oh,  
12 I'm delighted to hear that. So, Commissioner Yaki,  
13 you are on with us?

14 COMMISSIONER YAKI: Yes.

15 VICE CHAIR THERNSTROM: Yes. Okay, that  
16 was a very low yes. I hope you will speak up as we  
17 proceed.

18 Commissioner Taylor?

19 COMMISSIONER TAYLOR: Present.

20 VICE CHAIR THERNSTROM: Thanks. And is  
21 the Staff Director present?

22 STAFF DIRECTOR DANNENFELSER: Present.

23 VICE CHAIR THERNSTROM: And I understand  
24 the Court Reporter is on the line.

25 The meeting will come to order. If a

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1 Commissioner wants to make a statement, please  
2 identify yourself first. Whenever it is necessary to  
3 take a vote, the following procedure will be followed.

4 I will call out the name of each  
5 Commissioner. The Commissioner should then answer  
6 yes, no, or abstain. After the vote is concluded, I  
7 will read out how each of you has voted to ensure that  
8 the tally is correct.

9 COMMISSIONER YAKI: Point of order.

10 VICE CHAIR THERNSTROM: Yes.

11 COMMISSIONER YAKI: This is Commissioner  
12 Yaki. Since I may have to jump off any moment, where  
13 are we on quorum? Do we have enough?

14 VICE CHAIR THERNSTROM: We seem to have  
15 enough: Gaziano, Kirsanow, Heriot.

16 STAFF DIRECTOR DANNENFELSER: Six, I  
17 believe, at the moment counting Commissioner Yaki.

18 VICE CHAIR THERNSTROM: Yaki, Taylor and  
19 myself.

20 COMMISSIONER YAKI: I couldn't tell is  
21 Kirsanow was on or not.

22 COMMISSIONER KIRSANOW: Yes, I am on.

23 COMMISSIONER YAKI: Okay. I didn't want  
24 to leave you below quorum. So I just wanted to make  
25 sure. Okay.

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1 STAFF DIRECTOR DANNENFELSER: Madam Vice  
2 Chair.

3 VICE CHAIR THERNSTROM: Yes.

4 STAFF DIRECTOR DANNENFELSER: Could you  
5 just have the Court Reporter confirm that they are on  
6 the line?

7 VICE CHAIR THERNSTROM: Will the Court  
8 Reporter please identify that he or she is on the  
9 line?

10 COURT REPORTER: I am on the line. Can  
11 you hear me?

12 VICE CHAIR THERNSTROM: Yes, I can. So as  
13 I understand it, we have Commissioners Gaziano,  
14 Kirsanow, Heriot, Yaki, Taylor. That is the total  
15 list at the moment. Correct?

16 **I. APPROVAL OF AGENDA**

17 VICE CHAIR THERNSTROM: Okay. We need a  
18 motion to approve the agenda. Can I have somebody  
19 make a motion?

20 COMMISSIONER GAZIANO: Gaziano. So move.

21 COMMISSIONER HERIOT: Second.

22 VICE CHAIR THERNSTROM: Okay.

23 COMMISSIONER HERIOT: That was Gail  
24 Heriot.

25 VICE CHAIR THERNSTROM: Gail Heriot

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1 seconded. Any discussion? And we will have a vote,  
2 and again I guess I have to go through the roll call  
3 on every vote. Is that correct, Mr. Staff Director?  
4 Is that what I understand?

5 STAFF DIRECTOR DANNENFELSER: Yes.

6 VICE CHAIR THERNSTROM: Okay.

7 COMMISSIONER HERIOT: You can't do  
8 "Hearing no objection"?

9 VICE CHAIR THERNSTROM: Can I do "Hearing  
10 no objection"?

11 STAFF DIRECTOR DANNENFELSER: Yes, we can  
12 do "Hearing no objection."

13 VICE CHAIR THERNSTROM: Okay. Hearing no  
14 objection, do I have approval for the agenda?

15 COMMISSIONER HERIOT: Yes.

16 VICE CHAIR THERNSTROM: That is unanimous  
17 consent on approving the agenda, as I understand it,  
18 having heard no objection.

19 I'm sorry. I'm just getting my bearings  
20 here. Okay.

21 **II. PROGRAM PLANNING**

22 **FY 2008 STATUTORY REPORT**

23 **ENFORCING RELIGIOUS FREEDOM IN PRISON**

24 VICE CHAIR THERNSTROM: We are moving on  
25 to the statutory report that is Enforcing Religious

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1 Freedom in Prison, September 22, 2008. The draft of  
2 the FY 2008 statutory report on Enforcing Religious  
3 Freedom in Prison was sent to you.

4 I now move that the Commission approve for  
5 publication, along with any concurring and dissenting  
6 statements submitted by any Commissioner by October  
7 14, 2008. I'm sorry, I still have a cough after all  
8 these weeks.

9 COMMISSIONER HERIOT: Before you move  
10 that, wouldn't it be -- Before anybody seconds that,  
11 wouldn't it be quicker to move it with the corrections  
12 that I have suggested, so that we could just use that  
13 as our starting point and not have to amend the  
14 motion?

15 VICE CHAIR THERNSTROM: Well, no, I think  
16 not, because we have got -- It is not only your  
17 corrections. I think it would be better to --

18 COMMISSIONER HERIOT: But we certainly  
19 don't want to do these one at a time.

20 VICE CHAIR THERNSTROM: Well, for you to  
21 introduce friendly amendments, to put them in. I have  
22 amendments, and I don't know whether Commissioner  
23 Gaziano does as well, but I would prefer to just  
24 approve this motion, and then in the discussion you  
25 make a motion, a friendly motion.

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1 COMMISSIONER HERIOT: That is going to be  
2 one more motion, no matter what.

3 VICE CHAIR THERNSTROM: It is. I think,  
4 since I also have some changes, Commissioner Gaziano  
5 may have some changes, there may be other people who  
6 want to weigh in.

7 COMMISSIONER HERIOT: Again, not just me.  
8 You know, we could save one more motion, but we are  
9 wasting it on this discussion.

10 VICE CHAIR THERNSTROM: So let's just move  
11 on here.

12 So I now move that, as I said, we approve  
13 for publication, along with any concurring and  
14 dissenting statements submitted by any Commissioner by  
15 October 14, 2008, Part A of the statutory report.

16 Part A as distributed contains a summary  
17 of the report, four chapters dealing with the  
18 following matters: Chapter 1, introduction and  
19 overview; chapter 2, prisoners' free exercise claims;  
20 3, the Department of Justice enforcement of prisoner's  
21 free exercise rights; and lastly, Chapter 4, judicial  
22 response, analysis of cases alleging religious  
23 discrimination in prison.

24 Under this motion, if a majority of the  
25 Commission votes to adopt Part A of this statutory

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1 report, the Commission will then open discussion on  
2 Part B. If Part A fails to obtain a majority of  
3 votes, discussion of Part B, obviously, becomes moot.  
4 This bifurcated vote is taken pursuant to the policy  
5 adopted by Commissioners at the April 13, 2007,  
6 business meeting.

7 So can I have a motion to adopt Part A?

8 COMMISSIONER HERIOT: You just made it,  
9 didn't you?

10 VICE CHAIR THERNSTROM: Did I just make  
11 it?

12 COMMISSIONER HERIOT: Yes.

13 VICE CHAIR THERNSTROM: I made it. Okay.  
14 I need a second.

15 COMMISSIONER KIRSANOW: Kirsanow. Second.

16 VICE CHAIR THERNSTROM: Okay.

17 COMMISSIONER HERIOT: I then move to amend  
18 the motion to include the list of changes that I  
19 suggested in the e-mail message that was distributed  
20 yesterday.

21 VICE CHAIR THERNSTROM: Okay. This comes  
22 under changes, discussion, questions. The first point  
23 here by Commissioner Heriot is to -- a motion to  
24 amend. So Commissioner Heriot has a list of proposed  
25 changes to Part A, and --

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1 COMMISSIONER HERIOT: I don't have a  
2 second yet, though.

3 COMMISSIONER KIRSANOW: Kirsanow. Second.

4 VICE CHAIR THERNSTROM: Yes. Kirsanow has  
5 seconded that. Do we need any discussion?

6 COMMISSIONER HERIOT: We just have to now  
7 vote on whether or not to amend your motion to include  
8 my changes as well, and then we can discuss.

9 COMMISSIONER GAZIANO: I do have a few  
10 other amendments. So whatever the --

11 COMMISSIONER HERIOT: We are going to do  
12 this one at a time. So we are going to have to vote  
13 on it one at a time.

14 COMMISSIONER GAZIANO: Oh, no, I don't  
15 want to vote on yours, since you have been so helpful.  
16 I don't want to vote on yours one at a time, since you  
17 have been so helpful.

18 COMMISSIONER HERIOT: No. My motion, not  
19 his, and then you can make motions as well. But if we  
20 vote in my motion, then we are discussing the report  
21 as my amendments go, and then we can add other  
22 people's amendments.

23 COMMISSIONER GAZIANO: That's fine by me.  
24 I just wanted to understand, when we are voting, we  
25 are not voting finally.

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1 COMMISSIONER HERIOT: No, just changing  
2 the motion at this point.

3 VICE CHAIR THERNSTROM: Right.  
4 Commissioner Heriot, what I was planning to do, but  
5 you -- Okay, fine.

6 COMMISSIONER HERIOT: I can't vote for the  
7 motion the way it is now. I need my changes in before  
8 I can vote yes.

9 VICE CHAIR THERNSTROM: I understand that.  
10 I was planning to -- All right. I do not think we  
11 needed a separate vote on the question of whether you  
12 can offer a friendly amendment. I was going to simply  
13 offer -- I was going to simply have a vote on Part A  
14 as amended by the friendly amendment. But whatever,  
15 we can have a vote. If you say procedurally we need  
16 to, we can have a vote on your motion to have a  
17 friendly amendment.

18 COMMISSIONER HERIOT: If it is friendly,  
19 you can say "Hearing no objection."

20 VICE CHAIR THERNSTROM: Any objection to  
21 Commissioner Heriot's motion to amend the motion to  
22 approve Part A? Hearing no objection, Commissioner  
23 Heriot, you've got the floor here.

24 COMMISSIONER HERIOT: I don't need the  
25 floor except to say that the suggestions that I put in

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1 the list, I think, improve the report and allow me to  
2 vote for it.

3 VICE CHAIR THERNSTROM: Okay. So nobody  
4 on the phone needs to -- Is there any discussion  
5 whatsoever?

6 COMMISSIONER YAKI: Commissioner Yaki has  
7 discussion.

8 VICE CHAIR THERNSTROM: Okay.  
9 Commissioner Yaki.

10 COMMISSIONER YAKI: Before I vote on this,  
11 I wanted to ask some procedural questions that go to  
12 the AIs regarding our statutory report obligation.

13 VICE CHAIR THERNSTROM: Right.

14 COMMISSIONER YAKI: Do we have the  
15 Statutory report checklist for this report?

16 VICE CHAIR THERNSTROM: I have it  
17 someplace right here. I just have to find it on my  
18 desk. Yes, go on?

19 COMMISSIONER YAKI: When was it sent?

20 STAFF DIRECTOR DANNENFELSER: When was it  
21 sent to Commissioners?

22 COMMISSIONER YAKI: Yes.

23 STAFF DIRECTOR DANNENFELSER: It was sent  
24 with the package that was mailed to commissioners on  
25 the 23rd.

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1 COMMISSIONER YAKI: Okay. I don't have  
2 that.

3 STAFF DIRECTOR DANNENFELSER: With the  
4 hard copy of the statutory report, the checklist was  
5 in that Federal Express package.

6 COMMISSIONER YAKI: Okay, I will look at  
7 that.

8 VICE CHAIR THERNSTROM: I am staring at it  
9 right now.

10 COMMISSIONER YAKI: Was it in the e-mail  
11 that you sent or was it only --

12 VICE CHAIR THERNSTROM: No. it came as  
13 hard copy to me with the statutory report.

14 COMMISSIONER GAZIANO: This is Gaziano. I  
15 received a hard copy of it as well, and I have it in  
16 front of me.

17 COMMISSIONER YAKI: Did any of the -- I'd  
18 like to know if there is any information about who --  
19 Other than staff, direct staff, were there any special  
20 assistants or consultants who worked on rewriting the  
21 report after the comment period provided to the  
22 Commissioners?

23 VICE CHAIR THERNSTROM: Mr. Staff  
24 Director, do you want to answer that?

25 STAFF DIRECTOR DANNENFELSER: Well, we had

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1 -- As we noted earlier, we had asked former Staff  
2 Director Ken Marcus to provide us with some feedback,  
3 particularly on the legal aspects of the report, and I  
4 distributed his comments.

5 He had a proposed revision that combined  
6 Chapters 1 and 2 into Chapter 1, and then he had a  
7 number of other suggestions throughout the report that  
8 were considered.

9 COMMISSIONER GAZIANO: This is Gaziano.  
10 Just a point of clarification to Commissioner Yaki.  
11 Who are you concerned about working on it? I  
12 certainly sent in typos and things at various times.  
13 I certainly hope that the staff looked at those and  
14 corrected some of those typos.

15 What is the focus of your question?

16 COMMISSIONER YAKI: I was simply asking  
17 who other than direct staff, excluding special  
18 assistants, from that notion, worked on the report  
19 after the comment period provided to the  
20 Commissioners.

21 STAFF DIRECTOR DANNENFELSER: I believe  
22 some of the Commissioners have consultants that they  
23 presumably consulted with during the course of --

24 COMMISSIONER YAKI: No, I am talking about  
25 after the comment period.

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1 COMMISSIONER HERIOT: When was the comment  
2 period?

3 COMMISSIONER YAKI: It was due -- When was  
4 the comment period closed? I think it was like -- It  
5 was like -- It was about a month ago. It was before  
6 the last meeting.

7 COMMISSIONER HERIOT: Really, I didn't  
8 know there was a close to the comment period. I've  
9 been working on this thing the whole time.

10 COMMISSIONER GAZIANO: Well, again my  
11 temporary special assistant that you so graciously  
12 approved has provided me with a lot of information,  
13 but I think that is excluded from your question, isn't  
14 it?

15 COMMISSIONER YAKI: Yes. It is not  
16 whether they provided you with information. It is  
17 whether any of them worked directly with staff after  
18 the comment period. Simple question.

19 VICE CHAIR THERNSTROM: Well, again I  
20 don't know the answer. So, Mr. Staff Director, you  
21 need to answer that.

22 STAFF DIRECTOR DANNENFELSER: I believe  
23 the comments we received from Ken Marcus, for  
24 instance, were received during that period, and he was  
25 --

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1 VICE CHAIR THERNSTROM: During the comment  
2 period? Is that what you are saying?

3 STAFF DIRECTOR DANNENFELSER: Yes. I  
4 believe that was up until, I believe it was August  
5 22nd. So we had comments from him prior to that, and  
6 I am not aware of other information.

7 COMMISSIONER YAKI: There were no comments  
8 by Mr. Marcus after that period or assistants or  
9 rewriting by Mr. Marcus after that period?

10 STAFF DIRECTOR DANNENFELSER: I don't  
11 believe so, no. He sent in his comments at the end of  
12 that period, and then we considered them and  
13 incorporated them.

14 COMMISSIONER YAKI: So nor were there any  
15 comments or assistance given by special assistants.

16 COMMISSIONER GAZIANO: Again, I am trying  
17 to clarify your question. Whether I conveyed  
18 information or my special assistant, my temporary  
19 consultant acting as special assistant conveyed them,  
20 why is that an issue?

21 COMMISSIONER HERIOT: Yes, I don't  
22 understand this notion that there is like a closed  
23 period where we are not supposed to give comments  
24 anymore. I had no knowledge of that.

25 COMMISSIONER YAKI: That has always been

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1 the case.

2 COMMISSIONER HERIOT: Well, if so, I am  
3 very happy to amend that rule right now.

4 COMMISSIONER YAKI: We should, but I  
5 understood --

6 COMMISSIONER HERIOT: I would move to --  
7 If you are taking that position, I would be happy to  
8 change that rule during this meeting.

9 COMMISSIONER YAKI: We cannot change a  
10 rule retroactively.

11 VICE CHAIR THERNSTROM: Hold on a minute,  
12 Michael. Michael, hold on. I have a question for the  
13 Court Reporter. Are you okay that people are not  
14 giving their names? Can you now identify voices? The  
15 question for the Court Reporter.

16 COURT REPORTER: I am doing pretty well.  
17 I will interrupt if I have any problems, if you need  
18 me, it will take a few seconds to get on the line.

19 VICE CHAIR THERNSTROM: Fine. I just  
20 wanted to know if you were okay, because people are  
21 dropping the identification. Commissioner Yaki, you  
22 were talking. Go ahead.

23 COMMISSIONER YAKI: Commissioner Yaki was  
24 simply stating that this has been a rule that I have  
25 followed and been dealing with for the past three

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1 years on the Commission.

2 My understanding was that it was a rule  
3 designed to end the volleying back and forth and move  
4 to produce a final report that the Commissioners who  
5 thought that they had had up to the comment period  
6 would not be blindsided by huge chunks of revisions by  
7 other Commissioners after the fact.

8 So if what I am hearing is that the Staff  
9 Director accepted changes and revisions and comments  
10 from Commissioners outside the August 22nd deadline,  
11 that is indeed news to me.

12 I mean, what Commissioner Heriot proposed  
13 in her amendment is perfectly proper, and that is  
14 received publicly and were able to look at it and  
15 understand what the changes were at that time, but  
16 this document was not meant to be a moving target for  
17 an indefinite period of time; and if that is not the  
18 case, I would like the Staff Director to please  
19 explain or relate to us those who did abide by the  
20 August 22nd deadline, what came in and what changes  
21 were made based on comments from Commissioners after  
22 that period of time.

23 COMMISSIONER GAZIANO: Commissioner Yaki,  
24 this is Commissioner Gaziano. I just wanted to sort  
25 of clarify again what I hope you are not concerned

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1 about, and that is it certainly makes sense to me that  
2 we are urged by staff to get the bulk of our comments  
3 in by a particular time. Otherwise, I don't see -- It  
4 is very difficult for them to create an orderly  
5 process; and I assume that that was when the bulk of  
6 comments were received. But I continued, certainly,  
7 to study it.

8 As you know from the record we recreated,  
9 my consultant acting as special assistant, I don't  
10 think, was even hired until after that time. He has  
11 mostly been reporting to me, but I think at times I  
12 suggested that he share some thoughts with other  
13 special assistants.

14 Those other special assistants may have  
15 shared them with Commissioners. I don't know whether  
16 other Commissioners then shared them with staff. Some  
17 of these were in the nature of typos.

18 I certainly hope you don't think that  
19 further input is outside the productive use of our  
20 time and expertise.

21 COMMISSIONER YAKI: Typos are typos,  
22 Commissioner, I have no issue with.

23 COMMISSIONER HERIOT: This is silly.  
24 There is no rule that says you can't continue to give  
25 comments. There's just the convenience of the staff.

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1 COMMISSIONER YAKI: No, there is a rule.

2 COMMISSIONER HERIOT: And the convenience  
3 of the staff has to do with whether or not we get the  
4 draft out on time.

5 COMMISSIONER YAKI: Commissioner Heriot,  
6 there is a rule.

7 COMMISSIONER HERIOT: The draft is out on  
8 time.

9 COMMISSIONER YAKI: There is a rule.

10 COMMISSIONER HERIOT: This is all very  
11 moot, and let's go on.

12 COMMISSIONER YAKI: There is a rule.

13 COMMISSIONER HERIOT: We are trying to  
14 turn out a decent report.

15 COMMISSIONER YAKI: We adopt these rules  
16 for a specific reason.

17 COMMISSIONER HERIOT: Not for the reason  
18 that you are specifying.

19 COMMISSIONER YAKI: This was adopted by a  
20 majority --

21 COMMISSIONER HERIOT: We are adopting  
22 these rules for the convenience of the staff, so that  
23 the staff may turn out a report on time, so that we  
24 can then get our second report out on time, as  
25 required by the law.

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1 COMMISSIONER YAKI: You are a majority.  
2 You are a majority.

3 VICE CHAIR THERNSTROM: Look, there is no  
4 possibility that that conversation was properly  
5 recorded by the Court Reporter, because you were both  
6 talking at once.

7 COMMISSIONER YAKI: Exactly, and that is  
8 why I did it.

9 VICE CHAIR THERNSTROM: And none of us  
10 could follow it, and this telephonic meeting cannot be  
11 conducted that way. It is impossible for us to have  
12 an orderly meeting with that kind of back and forth.

13 COMMISSIONER YAKI: Well, Commissioner --

14 VICE CHAIR THERNSTROM: Hold on a minute.  
15 Mr. Staff Director, there is -- I think we need a  
16 clarification here on what is permitted and what is  
17 not permitted after that deadline expires, because a  
18 number of us have continued to stare at this document.

19 I will at this meeting -- Obviously, I  
20 have not circulated before hand. I will have some  
21 suggestions for tiny little revision. There is  
22 nothing substantive.

23 COMMISSIONER GAZIANO: Madam Vice Chair,  
24 this is Gaziano. I just respectfully request that the  
25 Staff Director could say what he understood the rules

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1 to be or may understand, if he has an opinion, but we  
2 are the ultimate interpreter of our own rules.

3 VICE CHAIR THERNSTROM: I understand.

4 COMMISSIONER GAZIANO: I don't know that  
5 it is up at this point to go through that, but I will  
6 be clear with Commissioner Yaki, that some of the  
7 matters that I communicated were not significant in  
8 any way, and I suppose other -- but they were not just  
9 typos. I said that many of them were typos, and that  
10 is certainly the type of thing I hope we all were  
11 communicating.

12 If we noted a substantive error but not a  
13 big one -- a chart didn't add up to 100 percent -- I  
14 certainly hope people would have continued to  
15 communicate those kind of concerns.

16 COMMISSIONER YAKI: Commissioner -- Madam  
17 Chair, this is Commissioner Yaki. Before the Staff  
18 Director answers, perhaps you would help out with this  
19 response, and that was what I was trying to convey to  
20 Commissioner Heriot before she attempted to shout me  
21 down.

22 It had to do with the fact that these were  
23 rules promulgated by the majority when I first came on  
24 the Commission three years ago to protect against  
25 abuses in the statutory report process that they

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1 perceived were -- they were the victims of during  
2 prior iterations of the Commission.

3 It was designed to ensure that at some  
4 point the ball stopped rolling, stopped work on it,  
5 and that there were no sort of complete rewrites done  
6 by Commissioners in the majority of the time, so that  
7 the minority had no idea that additional information  
8 was being circulated and written into a report at that  
9 time.

10 These were rules that Commissioner  
11 Braceras and the Braceras Subcommittee and I, which I  
12 think Commissioner Kirsanow and Commissioner Reynolds  
13 are very familiar with, promulgated to basically  
14 create some order for the process, rather than have a  
15 rolling draft that some Commissioners were unaware of.

16 Now there is nothing that prevents someone  
17 from, at a meeting, introducing new sections or  
18 revisions in a public, transparent manner that allows  
19 full and robust discussion about it, but the point of  
20 having the deadline was not silly at all.

21 It was to, in effect, put a brake on what  
22 was perceived as an abuse by a prior Commission of the  
23 statutory report process and the rights of the  
24 minority at that time; and ironically, the rights of  
25 the minority at that time were expressed by the then

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1 majority that was extant at the time that I assumed my  
2 Commissionership in February of 2005, and these rules,  
3 I think, came into effect later in the spring of that  
4 year, led by Commissioner Braceras.

5 So I want to make sure that that  
6 background is given, because these were not silly, and  
7 these were not whatever. Typos, I have very little  
8 problem with. Substantive issues, I do. I think  
9 substantive issues should be brought up separately at  
10 the time that the report is debated and discussed by  
11 the Commission, that there is complete transparency  
12 for the project, rather than having the minority have  
13 to go through and try and pick out what else changed  
14 other than what they knew of in the course of the  
15 draft.

16 COMMISSIONER GAZIANO: Gaziano again. If  
17 I could just maybe try to ask a different question,  
18 that might help.

19 VICE CHAIR THERNSTROM: I would like to  
20 respond.

21 COMMISSIONER GAZIANO: Let me just make my  
22 little point. I certainly hope they also made other  
23 substantive changes that were in the order of mistakes  
24 that aren't just typos, but if your concern is did  
25 other commissioners see drafts that you didn't see,

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1 why don't you just ask that question. So I will. I  
2 don't think so.

3 Did the Staff director circulate  
4 subsequent drafts to some Commissioners that weren't  
5 shared with all Commissioners?

6 COMMISSIONER HERIOT: Not to me.

7 COMMISSIONER GAZIANO: I don't think so.

8 VICE CHAIR THERNSTROM: Commissioner  
9 Gaziano, I would like to respond to Commissioner Yaki  
10 here, and then the Staff director can weigh in as  
11 well.

12 Look, I don't think deadlines are silly.  
13 I am totally in agreement with you. I remember well  
14 having joined this Commission in January of 2001. I  
15 remember the history of abuse of this process.

16 I am a process person in general. So I am  
17 very sympathetic to what you are saying. We've got  
18 rules. They were adopted. I want them followed.

19 If we have had a rolling draft here, that  
20 is one -- That is a question that we need an answer  
21 from. The question is, do we have -- Have we had a  
22 rolling draft, and I would like to hear from the Staff  
23 Director on that. Is that an accurate description?

24 STAFF DIRECTOR DANNENFELSER: I don't  
25 think so. This is the Staff Director. It took longer

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1 for the staff to incorporate the many changes  
2 requested by the Commissioners. So that is why it was  
3 ultimately sent out on September 23rd, this final  
4 version that is before the Commission today.

5 So the Commissioners were all given an  
6 opportunity to make sure that every Commissioner had  
7 an opportunity to submit comments by August 22nd, and  
8 I believe that other things that came in in the  
9 meantime were in the nature of technical changes, but  
10 staff certainly continued to consult with other staff  
11 in trying to find ways to improve the report.

12 There were various concerns that were  
13 expressed by the Commissioners, and some wanted some  
14 very substantive changes to the report. Commissioner  
15 Gaziano's point during the comment period, of course,  
16 that we do some outreach and a legal expert on  
17 religious liberty to make sure that we are citing  
18 these cases properly, and then we decided that Ken  
19 Marcus would be a good person, both because he is a  
20 religious liberty expert, and he is also familiar with  
21 the procedures of the Commission.

22 So that was one of the types of outreach  
23 that we did, and of course, that was very much above-  
24 board, and his comments in their entirety were shared  
25 with all of the Commissioners.

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1 VICE CHAIR THERNSTROM: So, Commissioner  
2 Yaki, what I am hearing here is, number one, I am in  
3 total agreement with your point, but number two, the  
4 rules that we set in place have not been violated.

5 Does that -- Can we close the matter there  
6 and move on or is there some problem that you think  
7 needs further discussion here, because I will  
8 absolutely stick with you if I think rules have been  
9 violated. I do not hear any information that would  
10 lead me to conclude that that is the case.

11 COMMISSIONER YAKI: Fine. Move on.

12 VICE CHAIR THERNSTROM: Okay. So let us  
13 move on.

14 COMMISSIONER YAKI: But I thought the  
15 question needed to be asked.

16 VICE CHAIR THERNSTROM: Oh, that's fine.  
17 It's fine.

18 COMMISSIONER YAKI: I don't think that  
19 these rules are silly.

20 VICE CHAIR THERNSTROM: No, I don't think  
21 they are silly in the slightest. We worked long and  
22 hard on fashioning them. The Braceras group was very  
23 responsible in doing so, and they responded to a real  
24 defect in the processes by which the Commission  
25 fashioned these statutory reports.

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1                   So I am totally sympathetic with what you  
2 are saying.

3 I just don't hear any violation of those rules. But I  
4 thank you for raising the question. I think it was an  
5 important one to raise.

6                   All right. Where are we here?

7                   STAFF DIRECTOR DANNENFELSER: I guess the  
8 Commission has adopted Commissioner Heriot's motion  
9 with the package of amendments, and there are other  
10 Commissioners who apparently had amendments that they  
11 would like to have considered to Part A.

12                  VICE CHAIR THERNSTROM: Right.  
13 Commissioner Gaziano, and I have myself some proposed  
14 amendments. Commissioner Gaziano, do you have some  
15 proposed amendments that you would like to bring up at  
16 this time?

17                  COMMISSIONER GAZIANO: Do we want to vote  
18 first on Gail's, or have we?

19                  COMMISSIONER HERIOT: I think there were  
20 no objections.

21                  VICE CHAIR THERNSTROM: There were no  
22 objections.

23                  COMMISSIONER GAZIANO: Okay. Well, then  
24 to Part A I have several more on findings and  
25 recommendations, but --

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1 VICE CHAIR THERNSTROM: Findings and  
2 recommendations are Part B.

3 COMMISSIONER GAZIANO: Right. I  
4 understand. I am just warning that is where I will be  
5 heavily involved, but on page 25, the last sentence on  
6 that page, the lack of grievances filed under this  
7 category seems odd. I don't know that we have a basis  
8 for saying that, and I would like that to be struck.

9 VICE CHAIR THERNSTROM: I haven't gotten  
10 to that page yet.

11 STAFF DIRECTOR DANNENFELSER: Madam Vice  
12 Chair, there is some concern among the staff whether  
13 we went through the procedures to make sure that we  
14 adopted Commissioner Heriot's friendly amendment. So  
15 if we could have a second to her motion.

16 VICE CHAIR THERNSTROM: I had seconded,  
17 and I believe somebody else had.

18 COMMISSIONER HERIOT: I thought Pete did.

19 VICE CHAIR THERNSTROM: Commissioner  
20 Kirsanow did.

21 STAFF DIRECTOR DANNENFELSER: That's  
22 right. Commissioner Kirsanow. Okay. All right.  
23 Thank you then.

24 VICE CHAIR THERNSTROM: Yes. Okay, page  
25 25. Look, the pagination of mine is slightly off, I

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1 discovered, in going through it this morning with Tim  
2 Fay. What paragraph are you talking about?

3 COMMISSIONER GAZIANO: I have two  
4 different -- I'm sorry, I have two different versions,  
5 and it is Chapter 25 in mine.

6 VICE CHAIR THERNSTROM: You mean page 25?

7 COMMISSIONER GAZIANO: I'm sorry, yes,  
8 page 25. Let me see.

9 COMMISSIONER YAKI: While Commissioner  
10 Gaziano is doing this -- Commissioner Yaki -- as a  
11 point of order, Staff Director, is the hardbound  
12 version different than the e-mail version?

13 STAFF DIRECTOR DANNENFELSER: No, I don't  
14 believe so. Unless there is some hardware  
15 installation that people have that would cause it to  
16 shift, but not a lot.

17 COMMISSIONER YAKI: Because on my e-mail  
18 one, which I am working off right now, several parts  
19 of the report were highlighted or had some gaps in  
20 there, and I didn't know if those had been changed or  
21 not.

22 STAFF DIRECTOR DANNENFELSER: There were a  
23 few instances, I believe, with footnotes where there  
24 were some things highlighted, and staff was working to  
25 correct those.

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1 COMMISSIONER YAKI: Okay.

2 COMMISSIONER GAZIANO: Mine is right after  
3 the -- Page 25 in mine is the page after Table 2.4.

4 VICE CHAIR THERNSTROM: Yes. Okay, I've  
5 got that, and what paragraph?

6 COMMISSIONER GAZIANO: It is the last  
7 paragraph on my page 25. It begins "General:  
8 Grievances defined by BOP."

9 VICE CHAIR THERNSTROM: Yes.

10 COMMISSIONER GAZIANO: Then "The lack of  
11 grievances filed" -- See, it seems odd to some author.  
12 I'm not sure that -- and I don't really care that much  
13 about this one. There is another one that I feel  
14 stronger, but I don't know that it needs our  
15 commentary in this respect.

16 VICE CHAIR THERNSTROM: I agree with that.  
17 I would like to strike that sentence. Anybody got any  
18 problem with striking that sentence?

19 STAFF DIRECTOR DANNENFELSER: Commissioner  
20 Gaziano, could you just repeat the sentence that you  
21 are moving to strike?

22 COMMISSIONER GAZIANO: They are talking  
23 about -- The previous sentences are talking about the  
24 level of claims for religious rituals, and then the  
25 sentence I want to strike says, quote, "The lack of

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1 grievances filed under this category seems odd."

2 STAFF DIRECTOR DANNENFELSER: That is the  
3 very last sentence on page 25.

4 VICE CHAIR THERNSTROM: Yes. So do you  
5 have a second for your motion?

6 COMMISSIONER HERIOT: Second.

7 STAFF DIRECTOR DANNENFELSER: Commissioner  
8 Heriot, second. Vice Chair, I am sorry I interrupted  
9 you. Let me turn it back to you.

10 VICE CHAIR THERNSTROM: I was just saying  
11 I had already seconded by, in effect, saying I want  
12 that sentence struck as well.

13 Okay. Commissioner Gaziano, you got more  
14 suggestions?

15 COMMISSIONER GAZIANO: Yes.

16 STAFF DIRECTOR DANNENFELSER: Vice Chair,  
17 should we do those -- Should we vote on that  
18 particular strike?

19 COMMISSIONER HERIOT: Hearing no  
20 objection.

21 VICE CHAIR THERNSTROM: Hearing no  
22 objection, we are striking that sentence. Anybody  
23 object? No.

24 COMMISSIONER HERIOT: We are amending the  
25 main motion to include striking that sentence.

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1 VICE CHAIR THERNSTROM: Well, okay. We  
2 are amending the main motion. I was going to just go  
3 through the Gaziano ones and have a motion to accept  
4 them, but that's fine.

5 COMMISSIONER HERIOT: Yes, but then each  
6 one of them just amends the main motion.

7 VICE CHAIR THERNSTROM: Yes. Okay, we are  
8 amending the motion to strike that sentence.  
9 Commissioner Gaziano?

10 COMMISSIONER GAZIANO: It was page 97 of  
11 the printed version. It is page 99 of another one,  
12 but the bound version, 97, conclusion to Chapter 4.  
13 So it is the very last part of this before findings  
14 and recommendations, the second to last bullet.

15 I would strike that bullet. It makes  
16 sense to me that --

17 VICE CHAIR THERNSTROM: Please read it out  
18 loud for the Court Reporter.

19 COMMISSIONER GAZIANO: I would strike the  
20 second to last bullet, and it says, "The Department of  
21 Justice has not evidenced a high level of activity on  
22 behalf of plaintiff claims other than to defend the  
23 Constitutionality of the statute."

24 That could be, I think, misread. I think  
25 I know what the drafters intended. It certainly makes

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1 sense to me, if prisoners find lawyers, volunteer  
2 lawyers to defend them, that the Justice Department  
3 wouldn't feel the need.

4 The Justice Department is a rather unique  
5 and almost exclusive authority to defend the  
6 Constitutionality of the statute. It may make it look  
7 to someone like they are putting disproportionate  
8 resources in that kind of defense, but it will be read  
9 by some, I think, in an inappropriate way.

10 COMMISSIONER HERIOT: Yes, I agree with  
11 that. We wouldn't expect the Department of Justice to  
12 be intervening in these cases. They are really not --  
13 You know, that is not what they do. These cases are  
14 individual prisoner versus state prison or state  
15 prison workers.

16 VICE CHAIR THERNSTROM: And your motion is  
17 to simply, Commissioner Gaziano, to simply strike that  
18 bullet point entirely?

19 COMMISSIONER GAZIANO: That is correct.  
20 The chart speaks for itself. It provides us  
21 sufficient information.

22 COMMISSIONER HERIOT: Second.

23 VICE CHAIR THERNSTROM: I was going to  
24 say, Commissioner Heriot, are you seconding it?

25 COMMISSIONER HERIOT: Yes.

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1 VICE CHAIR THERNSTROM: Okay. Any  
2 objection to doing that, to striking that bullet  
3 point?

4 COMMISSIONER GAZIANO: And I will move  
5 later to strike the corresponding part of the findings  
6 in this regard.

7 VICE CHAIR THERNSTROM: Well, that is  
8 fine.

9 COMMISSIONER HERIOT: Wait.

10 VICE CHAIR THERNSTROM: We are holding  
11 that. Okay, Commissioner Gaziano. Well, hearing no  
12 objection, we are striking that bullet point.

13 COMMISSIONER HERIOT: Amending the main  
14 motion.

15 VICE CHAIR THERNSTROM: Amending the main  
16 motion.

17 COMMISSIONER YAKI: Hang on. I object. I  
18 object.

19 VICE CHAIR THERNSTROM: Okay. We have got  
20 one objection here, and Commissioners Gaziano,  
21 Kirsanow, Heriot, Taylor and myself agree to strike  
22 that bullet point.

23 COMMISSIONER HERIOT: Well, we have to do  
24 it by name. You have to do a roll call. That's your  
25 rule.

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1 VICE CHAIR THERNSTROM: Right. Okay,  
2 thanks.

3 Commissioner Gaziano?

4 COMMISSIONER GAZIANO: Aye.

5 VICE CHAIR THERNSTROM: Kirsanow?

6 COMMISSIONER KIRSANOW: Yes.

7 VICE CHAIR THERNSTROM: Heriot?

8 COMMISSIONER HERIOT: Aye.

9 VICE CHAIR THERNSTROM: Yaki?

10 COMMISSIONER YAKI: No.

11 VICE CHAIR THERNSTROM: Taylor?

12 COMMISSIONER TAYLOR: Yes.

13 VICE CHAIR THERNSTROM: And I vote yes as  
14 well. So we have five Ayes, one Nay. The motion  
15 passes. Okay, Commissioner Gaziano.

16 COMMISSIONER GAZIANO: No further to offer  
17 at this time.

18 COMMISSIONER HERIOT: Call the question on  
19 the main motion.

20 VICE CHAIR THERNSTROM: Pardon me?

21 COMMISSIONER HERIOT: Call the question on  
22 the main motion.

23 VICE CHAIR THERNSTROM: No, because I have  
24 some suggestions.

25 COMMISSIONER HERIOT: Oh, I'm sorry. I'm

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1 sorry.

2 VICE CHAIR THERNSTROM: Okay, on the very  
3 first page of Chapter 1, Introduction and Overview, I  
4 think this is simply a reader friendly suggestion for  
5 change and, obviously, it is a motion on my part.

6 On the third paragraph of the first page -  
7 - that is the paragraph right above Methodology --  
8 where there is a list, it says, "The Commission  
9 studies the processes through which prisoners seek  
10 redress for religious discrimination at four levels."

11 I want bullet points before each one of  
12 those levels. It will just be a friendlier reading,  
13 easier reading for people.

14 And with the same point with the first  
15 paragraph under Methodology. I would like to have  
16 this list in the form of bullet points, and in  
17 addition, I don't like the word time frames,  
18 qualitative and quantitative data of various types and  
19 time frames. We don't need time frames.

20 So that is my first motion, and does  
21 anybody want to second that?

22 COMMISSIONER HERIOT: Second.

23 VICE CHAIR THERNSTROM: Anybody object to  
24 creating some bullet points there just simply for  
25 easier reading? Hearing no objection --

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1                   STAFF DIRECTOR DANNENFELSER: Madam Vice  
2 Chair, you are striking the words "and time frames" as  
3 well?

4                   VICE CHAIR THERNSTROM: Yes. Just put  
5 "qualitative and quantitative data of various types  
6 and at various times," I guess it goes. I don't like  
7 -- I happen not to like this word time frames.

8                   COMMISSIONER GAZIANO: I struck the same  
9 myself, Madam Chairman. Thank you for offering.

10                  VICE CHAIR THERNSTROM: Okay, so we need  
11 to vote on those bullet points. It has been seconded,  
12 the motion. Then is there any objection to turning  
13 those two paragraphs into bullet points? Hearing  
14 none, that motion passes.

15                  The second page, and I'm not going to have  
16 a lot of these, I promise. The second page, the first  
17 -- no, second sentence after "Incidents of alleged  
18 religious discrimination", "The Commission requested  
19 data on religious grievances from several prisons  
20 including a few each of" -- no, this is too awkward,  
21 "including federal, state and privately managed  
22 institutions and two jails". We don't need "a few  
23 each of". I just want to strike that --

24                  COMMISSIONER GAZIANO: Gaziano, second,  
25 you're reading my mind.

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1 VICE CHAIR THERNSTROM: Okay, so that is a  
2 stylistic change of striking "a few each of". Anybody  
3 got an objection to that, any discussion necessary?  
4 Hearing none the motion passes unanimously.

5 Okay, going onto page 29 --

6 COMMISSIONER YAKI: I abstained from the  
7 last vote.

8 VICE CHAIR THERNSTROM: I'm sorry. Court  
9 Reporter, we have an abstention from the last vote on  
10 striking those two words.

11 COMMISSIONER YAKI: I keep flipping back  
12 and forth between mute and I sometimes flip the wrong  
13 switch.

14 VICE CHAIR THERNSTROM: All right, does  
15 that mean I now have to have a roll call?

16 COMMISSIONER HERIOT: No, it's still not  
17 an objection.

18 COMMISSIONER YAKI: You can just note  
19 that.

20 VICE CHAIR THERNSTROM: Okay.  
21 Commissioner Yaki has abstained. Okay, this is just  
22 typos. You've got a list, starting on page 28 of  
23 examples of grievances and a list of allegations. The  
24 end of the list on page 29 after eight -- no, just  
25 before eight, there's an and after -- no, I'm sorry,

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1 just before nine there's an and after the semicolon.  
2 That and should be struck and there should be an and  
3 instead before the numeral 10. This is on the top of  
4 page 29. This is just grammatical and then at the end  
5 of religious programs, there should be a period.

6 COMMISSIONER GAZIANO: Madam Chair, I  
7 certainly agree. This is Gaziano, I certainly agree  
8 with the change but I was going to try to offer or  
9 suggest that someone offer a motion. There are many  
10 other little ones I noticed, but that we would  
11 authorize the staff to make such grammatical and typo  
12 corrections. Style changes may be debatable but would  
13 that move things along?

14 VICE CHAIR THERNSTROM: No, Commissioner  
15 Yaki, I've got almost nothing more. Why don't we just  
16 go through them.

17 COMMISSIONER GAZIANO: Okay, but then I  
18 would like to offer that motion anyway so that we know  
19 that --

20 COMMISSIONER HERIOT: I've got one written  
21 down for this, so we can get to it after we adopt  
22 Section A. It's most important that we get to the  
23 Section A question before one of us croaks.

24 COMMISSIONER GAZIANO: Okay, go ahead,  
25 sorry.

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1 VICE CHAIR THERNSTROM: I'm sorry.

2 COMMISSIONER GAZIANO: I'll offer the  
3 motion later.

4 VICE CHAIR THERNSTROM: Okay. Where were  
5 we? Did we have a vote on that change?

6 COMMISSIONER HERIOT: One of the ones that  
7 you just mentioned is this one at the top of page 29,  
8 I got that but I didn't get it quite right. I forgot  
9 to strike the and before 9, but I did get the fact  
10 that it ends in a semicolon, and there's no and before  
11 10.

12 VICE CHAIR THERNSTROM: I thought you had,  
13 yeah.

14 COMMISSIONER HERIOT: So we just need to  
15 strike the and.

16 VICE CHAIR THERNSTROM: Strike the and.  
17 Any objection to striking the and before 9 and putting  
18 in and before --

19 COMMISSIONER HERIOT: I got that part.  
20 All you need to do is strike the and.

21 VICE CHAIR THERNSTROM: Okay, very good.  
22 Any objection? If I hear none, the motion passes.

23 COMMISSIONER YAKI: I'm just -- record me  
24 as an abstention.

25 VICE CHAIR THERNSTROM: Okay, Commissioner

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1 Yaki would, once again, like to be recorded as  
2 abstaining on that motion.

3 Page 40, the summary of Chapter 2 is  
4 confusing to start that summary by saying "Chapter 2  
5 examined". It's like wait a minute, was Chapter 2  
6 something other than I just read? Is there a  
7 reference back to a former chapter which is -- it  
8 should be "This chapter", so nobody gets confused.  
9 It's a tiny stylistic change.

10 COMMISSIONER HERIOT: I second.

11 VICE CHAIR THERNSTROM: Pardon me?

12 COMMISSIONER HERIOT: I second that.

13 VICE CHAIR THERNSTROM: I second that.

14 Any discussion on that? Instead of "Chapter 2  
15 examined", we just have "This chapter examined". And  
16 here is my last one, on page 44, "The Department of  
17 Justice's" --

18 STAFF DIRECTOR DANNENFELSER: Madam Vice  
19 Chair, did you ask if there were no objections?

20 VICE CHAIR THERNSTROM: I'm sorry. Are  
21 there any objections or abstentions?

22 COMMISSIONER YAKI: I'll abstain.  
23 Commissioner Yaki abstains.

24 VICE CHAIR THERNSTROM: Commissioner Yaki  
25 abstains once again. Mr. Court Reporter, we have one

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1 abstention here, Commissioner Yaki. I'm sorry. I  
2 apologize.

3 And on page 40 and this is my last one,  
4 it's summary -- no, I'm sorry, page 44, "The  
5 Department of Justice's Civil Rights Division", I just  
6 wondered whether we -- "since the OJ Civil Rights  
7 Division CRD was established in 1957, I'd like to add  
8 or make note or some way -- it was part of the 1957  
9 Civil Rights Act.

10 COMMISSIONER HERIOT: That's in the  
11 footnote.

12 VICE CHAIR THERNSTROM: Okay, is that good  
13 enough for you?

14 COMMISSIONER HERIOT: Yeah, it's good  
15 enough for me.

16 VICE CHAIR THERNSTROM: All right.

17 COMMISSIONER HERIOT: That has to be aside  
18 anyway.

19 VICE CHAIR THERNSTROM: All right, that's  
20 the --

21 COMMISSIONER HERIOT: I changed, however,  
22 in -- and my motion changes the footnote to say it was  
23 established by the Civil Rights Act rather than after  
24 because it sounds like it sort of sprung up separate,  
25 which is wrong.

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1 VICE CHAIR THERNSTROM: Yeah, and it is  
2 wrong. It should read, "It was established by".

3 COMMISSIONER HERIOT: Yeah, it's in my  
4 motion, so it's okay.

5 VICE CHAIR THERNSTROM: Okay, all right,  
6 fine. Those are the end of my motions to slightly  
7 append this document and I think they have all been  
8 approved with some abstentions. So I think we can  
9 move on now to the Motion as -- to vote on the motion  
10 as amended to approve Part A. Any further discussion?

11 (No response.)

12 VICE CHAIR THERNSTROM: Hearing none, let  
13 me have a vote.

14 STAFF DIRECTOR DANNENFELSER: Madam Vice  
15 Chair, I think Tim Fay would like to speak for a  
16 moment.

17 VICE CHAIR THERNSTROM: Sure.

18 MR. FAY: Pardon me, Madam Vice Chair.  
19 This is Tim Fay. Did you have some concern about the  
20 religious classifications and the limitations on that  
21 data?

22 VICE CHAIR THERNSTROM: Thank you very  
23 much. I did send that around to people and then  
24 promptly forgot about it. I do have -- I did have a  
25 problem with the religious classifications and I hope

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1 people got my suggestion with respect to that. I --  
2 in other words, I was proposing a disclaimer and here  
3 I'm introducing it as part of the discussion of  
4 approving Part A in its entirety.

5 I circulated a proposed disclaimer  
6 regarding the religious classifications and I would  
7 like to see it at the beginning of the report noting  
8 that there are several important limitations regarding  
9 the religious affiliations categories, traditions,  
10 practices, of prisoners which are used in this report.  
11 Did everybody get my e-mail on that because otherwise  
12 I will read the three points I make.

13 COMMISSIONER HERIOT: I see it. I got it.

14 VICE CHAIR THERNSTROM: Is there anybody  
15 who did not get it and --

16 COMMISSIONER YAKI: I didn't get it.

17 VICE CHAIR THERNSTROM: I'm sorry, who is  
18 this, Commissioner Yaki?

19 COMMISSIONER YAKI: Yes.

20 VICE CHAIR THERNSTROM: Okay, well, let me  
21 just then run quickly through the points. Three  
22 points, first, "Prisoners' religious affiliations are  
23 self-reported and as such, are not easily subjected to  
24 verification against any external objective standard.  
25 Indeed there is no universally accepted objective

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1 definition of religious affiliation tradition or  
2 practice".

3 Two, "Various federal, state and local  
4 authorities as well as individual prisons and jails  
5 use different methods of classifying the religious  
6 affiliation of inmates."

7 Third, "The breadth and scope of  
8 prisoners' religious affiliations and traditions  
9 presented in this report has in some cases,  
10 necessitated grouping similar", quote unquote "similar  
11 religions together for the purpose of data analysis.  
12 This is an imperfect solution and various authorities  
13 disagree on which traditions can be combined into a  
14 meaningfully", quote unquote, "similar categories".

15 As an alternative we could say we've  
16 addressed some of these concerns by recommending that  
17 prisoners -- that prisons and the various prison  
18 authorities A, "Standardize the categories of  
19 religious traditions and practices and, B, improve the  
20 collection of these data".

21 COMMISSIONER HERIOT: We can't vote on  
22 that until we've voted on the rest of these.

23 VICE CHAIR THERNSTROM: No, we can't but  
24 you know, we can --

25 COMMISSIONER HERIOT: But we can

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1 incorporate the first part now.

2 VICE CHAIR THERNSTROM: Right, and so any  
3 discussion of this motion of mine that we have a  
4 disclaimer at the beginning of the report?

5 COMMISSIONER HERIOT: Second.

6 VICE CHAIR THERNSTROM: You second it.  
7 Any discussion?

8 COMMISSIONER YAKI: This is Commissioner  
9 Yaki. It seems to me that we're wading directly into  
10 the heart of the free exercise clause and I'm a little  
11 worried about how we characterize what other people's  
12 actions may be that in fact, may violate that clause.

13 So I'm going to vote no.

14 VICE CHAIR THERNSTROM: Now, wait a  
15 minute. Explain that a bit further to me. I'm sorry  
16 to take people's time but I'd like to understand the  
17 point. That is all -- in my view all I was suggesting  
18 is, look, there are -- there are potential objections  
19 to this report saying well, wait a minute, there are  
20 different methods of classifying religious -- the  
21 religious affiliation of inmates. The data is limited  
22 because there are -- because the religious  
23 affiliations are self-reported and so forth.

24 Tell me again what a problem with saying  
25 look, we understand it's a pre-emptive move on our

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1 part. We understand the potential for some objections  
2 here and we recognize that this is imperfect  
3 information.

4 COMMISSIONER HERIOT: I think the comment  
5 goes more to the optional conclusion than it goes to  
6 the first part.

7 VICE CHAIR THERNSTROM: All right, well,  
8 we're not going to discuss the optional conclusion at  
9 the moment. How about just cross that out. How about  
10 simply the three points in which we say -- in which we  
11 inject a little modesty into the report in terms of  
12 you know, what we know and what we don't know?

13 COMMISSIONER YAKI: Well, I don't see that  
14 as a -- as a little point of limitation. I see that  
15 as an important -- an important disclosure in the main  
16 body that talks about, you know, that there -- that by  
17 the fact that we are relying upon definitions or  
18 categories created by these authorities.

19 COMMISSIONER HERIOT: We're actually  
20 giving this real prominence, though, aren't we? We're  
21 giving this -- we're putting this disclaimer up front  
22 so you should be especially happy with it.

23 COMMISSIONER YAKI: Well, it depends where  
24 -- I mean, there's up front and then there's -- I  
25 don't think this is a three-point thing. I think this

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1 is much -- requires much more prominence than --

2 COMMISSIONER HERIOT: It's going to be at  
3 the beginning of the report. That's as prominent as  
4 something can be.

5 VICE CHAIR THERNSTROM: I just want some  
6 academic integrity here, Commissioner Yaki.

7 COMMISSIONER YAKI: No, I know and I want  
8 some academic integrity as well, but I just think that  
9 just because you put something at the front, doesn't  
10 necessarily mean how you put it in the front is going  
11 to do it. And I think it demands a longer discussion  
12 about the problematic data that we are forced to rely  
13 upon based upon authority whose ability to interpret  
14 the First Amendment is suspect at best.

15 VICE CHAIR THERNSTROM: Well --

16 COMMISSIONER HERIOT: You should be all  
17 the more for this then.

18 VICE CHAIR THERNSTROM: Just a minute,  
19 because getting into an argument with Commissioner  
20 Yaki about whether he should or should not be for it  
21 doesn't, it seems to me, advance the discussion here.

22 Commissioner Yaki, is there -- and then I  
23 have a question for the staff director on -- a  
24 procedural question. Would you feel -- I mean, is  
25 there a form in which you could put this that makes

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1 this point that you would be more comfortable with,  
2 and I realize you're going to say, "I can't do it on  
3 the spot, this minute". And so then my -- the  
4 question goes to the staff director, is there a way of  
5 kind of holding this -- the exact formulation of this  
6 disclaimer.

7 COMMISSIONER YAKI: I mean, I will  
8 probably do it in my defense. I don't want to waste  
9 any more time. I just wanted to raise it as an issue  
10 that I have as concern about. The way that you choose  
11 to deal with it is how -- the majority chooses to deal  
12 with it, is how you're going to choose to deal with  
13 it. I think that if I went off on writing -- writing  
14 a gambit that that would delay the report and I don't  
15 want to be associated with that.

16 So I just want to raise my objections, the  
17 reason for it, and move on.

18 VICE CHAIR THERNSTROM: All right, then we  
19 will move on. I was just trying to arrive --

20 COMMISSIONER YAKI: No, I appreciate,  
21 Commissioner Thernstrom, your attempt to incorporate  
22 this in the process, but I think that ultimately it  
23 would run into buzz saws from other Commissioners and  
24 we'd be debating this and nauseam in which case, they  
25 go back to your original anyway, so why bother?

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1 VICE CHAIR THERNSTROM: All right. So I  
2 need now -- and it has been seconded by Commissioner  
3 Heriot. I need a vote on putting this disclaimer at  
4 the front of the report. Commissioner Yaki, you are  
5 voting nay.

6 COMMISSIONER YAKI: No, I'm going to  
7 abstain.

8 VICE CHAIR THERNSTROM: You're abstaining.  
9 Have I got yea votes from all of the Commissioners?

10 COMMISSIONER GAZIANO: Yea.

11 VICE CHAIR THERNSTROM: Okay, Court  
12 Reporter, we have here five yeas and an abstention  
13 from Commissioner Yaki on putting this disclaimer, the  
14 three points, at the front of the report. So, onto --  
15 I think -- onto I believe what we need to do now is to  
16 approve the motion to accept Part A as amended.

17 COMMISSIONER GAZIANO: Point of order.

18 VICE CHAIR THERNSTROM: Yes.

19 COMMISSIONER GAZIANO: I just want to make  
20 sure that my subsequent motion to authorize typo  
21 corrections would not be out of order if we vote at  
22 this time.

23 COMMISSIONER HERIOT: I think that's  
24 right, isn't it?

25 VICE CHAIR THERNSTROM: Absolutely.

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1 COMMISSIONER GAZIANO: Okay, then I'm  
2 willing to proceed.

3 VICE CHAIR THERNSTROM: If anybody finds  
4 typos, obviously, we don't want to end up with typos  
5 in the final report. Okay, vote on Part A. Why don't  
6 I start with you, Commissioner Yaki?

7 STAFF DIRECTOR DANNENFELSER: Madam Vice  
8 Chair.

9 VICE CHAIR THERNSTROM: Yeah.

10 STAFF DIRECTOR DANNENFELSER: This is the  
11 staff director. I just wanted to point out the  
12 Executive Summary would come in Part A but the concern  
13 there is that that should really be finalized after  
14 the report is finalized and we know what the -- it  
15 would incorporate the findings and recommendations.  
16 So I believe we might want to have an understanding  
17 that the Executive Summary will be incorporated as the  
18 Commission completes its work on this report today.

19 VICE CHAIR THERNSTROM: Okay, that  
20 understanding should then be part of the package of  
21 approval of Part A. We are expecting down the road,  
22 an Executive Summary.

23 COMMISSIONER HERIOT: Are we going to get  
24 an opportunity to approve or not approve of that  
25 Executive Summary?

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1 VICE CHAIR THERNSTROM: I would hope so.  
2 Is that correct, Mr. Staff Director?

3 STAFF DIRECTOR DANNENFELSER: I think we  
4 could do that by notational voting.

5 VICE CHAIR THERNSTROM: Yeah, I mean, I  
6 really want to see what the Executive Summary looks  
7 like. I'm sure other people do, too.

8 Any objection to that proposal, that we --  
9 no, I put it as part of the motion to approve Part A  
10 with the understanding that we will have a chance to  
11 review that Executive Summary. So let us have a vote  
12 on this approving Part A.

13 Commissioner Gaziano?

14 COMMISSIONER GAZIANO: Yes.

15 VICE CHAIR THERNSTROM: Kirsanow?

16 COMMISSIONER KIRSANOW: Yes.

17 VICE CHAIR THERNSTROM: Heriot?

18 COMMISSIONER HERIOT: Yes.

19 VICE CHAIR THERNSTROM: Yaki?

20 COMMISSIONER YAKI: No.

21 VICE CHAIR THERNSTROM: Taylor?

22 COMMISSIONER TAYLOR: Yes.

23 VICE CHAIR THERNSTROM: And I'm voting  
24 yes, so we have once again five yea votes and this  
25 time not an abstention but a nay vote from

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1 Commissioner Yaki.

2 COMMISSIONER GAZIANO: This is Gaziano. I  
3 move at this time to authorize the staff to correct  
4 not only typographical -- obvious typographical  
5 errors, but also clear and obvious grammatical errors  
6 that any of us might point out to the staff or that  
7 the staff may notice on their own and obviously,  
8 misspellings and similar non-substantive corrections.

9 COMMISSIONER HERIOT: Don't say non-  
10 substantive because that includes stylistic things  
11 that we might not approve of. It should be  
12 misspellings, typographical errors, punctuation errors  
13 and simple and clear grammatical errors that can be  
14 fixed without seriously changing the sentence.

15 VICE CHAIR THERNSTROM: I agree with that  
16 because --

17 COMMISSIONER GAZIANO: That is a  
18 clarification of my motion.

19 COMMISSIONER HERIOT: And one more, and  
20 Blue Book errors.

21 COMMISSIONER GAZIANO: Certainly. Be glad  
22 to include that.

23 VICE CHAIR THERNSTROM: Yeah, I agree  
24 because something can be read as a substantive change  
25 that is masquerading as a technical or other --

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1 COMMISSIONER HERIOT: So as that motion  
2 was contributed to by us, I would second that.

3 VICE CHAIR THERNSTROM: Okay, all right.  
4 So wait a minute. Wasn't it your own motion?

5 COMMISSIONER GAZIANO: It was my motion.

6 VICE CHAIR THERNSTROM: Oh, it's your  
7 motion, yes, okay. Okay, and you're accepting the  
8 rewriting of that motion.

9 COMMISSIONER GAZIANO: Yes.

10 **DISCUSSION OF PART B**

11 VICE CHAIR THERNSTROM: Okay. We need to  
12 vote on that. Any objections to that? Hearing none,  
13 it has been approved. So Part A is approved, let us  
14 go on to Part B, which as distributed in draft form to  
15 the Commission on September 24<sup>th</sup>, 2008, contains the  
16 Commission's findings and recommendations. Under this  
17 motion the Commission will vote individually on each  
18 finding and recommendation. Those findings and  
19 recommendations receiving a majority vote will be  
20 included in the report with the vote tally and a  
21 sentence explaining any opposition to the item that  
22 has been voted on.

23 So Finding 1, can we have a motion that  
24 the Commission approve Finding 1 which reads as  
25 follows: "Conflicts over the exercise of religious

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1 liberty in prisons are inherently difficult even  
2 intractable at times. While incarcerated persons  
3 maintain the right to exercise their religion, their  
4 ability to do so is tempered by the unique health,  
5 safety and administrative concerns of state and  
6 federal correctional institutions.

7 The First Amendment, State Religious  
8 Freedom Restoration Acts, Civil Rights of  
9 Institutional Persons Act and the Religious Land Use  
10 and Institutional Persons Act or the Religious Freedom  
11 Restoration Act where federal prisoners are concerned,  
12 together address the religious rights of prisoners and  
13 the interests of the American people in maintaining  
14 order and ensuring safety".

15 And by the way, I forgot to point this  
16 out, but the first time that I think it was RLUIPA in  
17 the draft we got was mentioned. RLUIPA was not -- the  
18 full name of the act was not spelled out and needs to  
19 be. And it needs to be identified. Anyway, so --

20 COMMISSIONER HERIOT: I had a potential  
21 amendment to this one.

22 VICE CHAIR THERNSTROM: Yes, okay.

23 COMMISSIONER GAZIANO: And I do, in turn.

24 VICE CHAIR THERNSTROM: Okay, so first I  
25 move that we accept it. Is there discussion and then

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1 we'll have -- is there a second and then we'll move  
2 onto the -- can I hear a second on it?

3 COMMISSIONER GAZIANO: Second and then I  
4 suppose we can move to amend.

5 VICE CHAIR THERNSTROM: Yeah, absolutely.  
6 Any changes, discussion or questions regarding this  
7 motion. So, Commissioner Heriot?

8 COMMISSIONER HERIOT: I wanted to add the  
9 Prisoner Litigation Reform Act, (PLRA), in parenthesis  
10 to the list of statutes and I would also like to add  
11 the words, and remedies after religious rights, so  
12 that it would read "religious rights and remedies for  
13 prisoners", because I think part of the point that  
14 we're making in this report is that the two go  
15 together.

16 VICE CHAIR THERNSTROM: Yes, so you're  
17 talking about the last sentence where the last part of  
18 the last sentence together address the religious  
19 rights and remedies.

20 COMMISSIONER HERIOT: Yeah, and in the  
21 litany of statutes include the Prisoner Litigation  
22 Reform Act (PLRA).

23 VICE CHAIR THERNSTROM: Right, right. Do  
24 we have a second for that motion? I'll second it.  
25 Any discussion of that motion? Is there unanimous

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1 approval or have we got some dissents or --

2 COMMISSIONER YAKI: Commissioner Yaki will  
3 abstain.

4 VICE CHAIR THERNSTROM: Commissioner Yaki  
5 abstains and we have five yeas on that. Okay, any  
6 other discussion of this first finding?

7 COMMISSIONER GAZIANO: I move to amend it  
8 further in two minor respects. I'd rather substitute  
9 in the second sentence "the right to practice their  
10 religion", since I think that --

11 VICE CHAIR THERNSTROM: Rather than --

12 COMMISSIONER GAZIANO: -- the lay reader,  
13 particularly the lay readers will pay attention to  
14 this. Certainly, no one is trying to tell prisoners  
15 what they can, you know, say in their prison cells.  
16 It's really the -- or think. It's really the  
17 practices that's at issue. My, I think, other  
18 suggestion is in the last sentence after "the rights",  
19 and we've now added "and remedies of prisoners and the  
20 interests of", I would like to add "prison officials  
21 and the American people".

22 A lot of the safety concerns at issue are  
23 primarily for the protection of prison officials and  
24 secondarily to the American people.

25 COMMISSIONER HERIOT: Question. Haven't

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1 we used the word "practice" in a more narrow sense?

2 VICE CHAIR THERNSTROM: I was going to say  
3 the same thing.

4 COMMISSIONER HERIOT: In other parts of  
5 the --

6 VICE CHAIR THERNSTROM: Yes.

7 COMMISSIONER GAZIANO: Pardon?

8 COMMISSIONER HERIOT: Haven't we used the  
9 word "Practice" in other parts in this report in a  
10 more narrow sense than you mean, so that we'll have a  
11 confusing conflict between what practice means?

12 COMMISSIONER GAZIANO: I will yield if you  
13 all feel strongly. I think that in the -- this  
14 particular sentence you're talking about the second  
15 clause is their ability to do so. It's the practices  
16 that are mostly limited by health, safety and  
17 administrative --

18 COMMISSIONER HERIOT: But we've used the  
19 word "practice" in other parts of the report in a very  
20 narrow sense that didn't include lots of the RLUIPA  
21 objections. I mean, that's one of our sub-categories  
22 somewhere, I think.

23 COMMISSIONER GAZIANO: I thought that was  
24 confusing all along but I didn't fight it there, so I  
25 won't fight it here. Strike my first suggestion then,

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1 if you all suggest otherwise. But I would ask your  
2 consideration for the second.

3 COMMISSIONER HERIOT: Fine, for the  
4 record, I agree with you that that word "practice" was  
5 used in a weird way in the body of the report, but I  
6 let it go and I don't think it would be a good idea to  
7 now go back and --

8 VICE CHAIR THERNSTROM: We are not going  
9 back to it.

10 COMMISSIONER GAZIANO: Okay.

11 VICE CHAIR THERNSTROM: We have a motion  
12 on the floor.

13 COMMISSIONER GAZIANO: I'll withdraw that  
14 one.

15 VICE CHAIR THERNSTROM: We have a motion  
16 on the floor simply to add "interests of" -- how did  
17 you put it -- "prison officials"?

18 COMMISSIONER GAZIANO: "Prison officials  
19 and the American people".

20 VICE CHAIR THERNSTROM: "And the American  
21 people" in the last --

22 COMMISSIONER HERIOT: I second that one.

23 VICE CHAIR THERNSTROM: Any discussion,  
24 any further discussion? Any abstentions or nays?

25 COMMISSIONER YAKI: Yes.

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1 VICE CHAIR THERNSTROM: Commissioner Yaki,  
2 you are what, which one?

3 COMMISSIONER YAKI: Abstaining.

4 VICE CHAIR THERNSTROM: You are  
5 abstaining. So one abstention, Commissioner Yaki,  
6 five yeas and the motion passes.

7 Okay, Finding 2; can I have a motion --

8 COMMISSIONER GAZIANO: Do we now vote on  
9 the finding as amended?

10 VICE CHAIR THERNSTROM: I'm sorry, we do.  
11 Can we have a vote on the finding as amended? All  
12 approve?

13 COMMISSIONER GAZIANO: Aye.

14 VICE CHAIR THERNSTROM: We've got -- let's  
15 just put it the other way. Once again, any nays or  
16 abstentions? Commissioner Yaki, you obviously have  
17 either an abstention or a nay.

18 COMMISSIONER YAKI: I'm abstaining.

19 VICE CHAIR THERNSTROM: You're abstaining  
20 so Commissioner Yaki abstains and five yeas, am I  
21 correct on that? Is anybody else abstaining? Okay,  
22 moving on to Finding 2. Obviously, the motion passes.

23 Finding 2, can I have a motion that the  
24 Commission approve Finding 2 which reads as follows:  
25 "Some two million persons are incarcerated in the

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1 United States with 93 percent of those located in  
2 state and local correction facilities. The percentage  
3 of prisoners professing non-Christian faith tend to be  
4 larger than their proportion within the non-  
5 incarcerated adult population in the United States  
6 aged 18 and older. Federal and state prisons have  
7 encountered difficulty in recruiting chaplains for  
8 these faiths, particularly Islam. Therefore, prisons  
9 rely heavily on religious contractors, volunteers and  
10 faith based organizations to meet inmates' religious  
11 needs. State prisons draw even more heavily on the  
12 service of religious contractors and volunteers, than  
13 do federal prisons but have less uniform vetting  
14 procedures for them. The shortage of chaplains and  
15 the resulting practice of prisons relying on  
16 contractors and volunteers have" -- Grammatik, no,  
17 have is right -- "have ramifications for both inmates'  
18 religious accommodation and national security".

19 So can I have a motion to approve that and  
20 there will be amendments in the discussion period.  
21 Can I have a motion --

22 COMMISSIONER GAZIANO: So moved.

23 VICE CHAIR THERNSTROM: And a second, I'll  
24 second it myself. Any discussion? Well, let me start  
25 out the discussion. Just a couple of grammatical

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1 things here. I don't like the sentence, "Federal and  
2 State prisons have encountered difficulty in  
3 recruiting chaplains for these faiths particularly  
4 Islam". I would prefer a dash, "Particularly for the  
5 adherents of the Islamic faith or", and then period.  
6 "Therefore, prisons rely heavily on religious  
7 contractors," et cetera.

8 Then at the bottom last sentence, "The  
9 shortage of chaplains and the resulting practice of  
10 prisons relying", I would prefer, "at the reliance on  
11 contractors", instead of "relying", just in my view  
12 reads more smoothly and yeah, it's just smoothing out  
13 of the language.

14 So I am moving that those two small  
15 changes be made. They are just minor changes in  
16 wording. They obviously have no substantive import.

17 COMMISSIONER HERIOT: Okay.

18 VICE CHAIR THERNSTROM: Is there -- are  
19 there any objections or abstentions? Hearing none, it  
20 is approved unanimously. Any other discussion of this  
21 finding? Okay, can we have a motion to -- well, we  
22 already had a motion to -- do we need another motion  
23 now to approve it? We had a motion to -- I guess we  
24 do as amended. Is that correct? Somebody --

25 COMMISSIONER HERIOT: We're still on 2?

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1 COMMISSIONER GAZIANO: Yeah, that's  
2 correct.

3 COMMISSIONER HERIOT: Yeah.

4 VICE CHAIR THERNSTROM: Yeah, okay, so we  
5 need a motion to approve as amended Finding 2. I so  
6 move. Is there a second?

7 COMMISSIONER HERIOT: Second, although I  
8 think that's the pending main motion anyway but --

9 VICE CHAIR THERNSTROM: Pardon me?

10 COMMISSIONER HERIOT: I think that might  
11 be the pending main motion anyway. Whatever, let's  
12 just vote on it.

13 VICE CHAIR THERNSTROM: Let's just vote on  
14 it. Any abstentions or objections to approving  
15 Finding 2 as amended?

16 COMMISSIONER YAKI: I abstain.

17 VICE CHAIR THERNSTROM: Okay, Yaki  
18 abstains and five Commissioners approve.

19 Finding 3, can I have a motion that the  
20 Commission approve Finding 3, which reads as follows:  
21 "Religious grievances make up a very small proportion  
22 of all grievances filed in prisons regardless of  
23 jurisdiction, federal, state or local. They make up a  
24 similarly small proportion of complaints from or on  
25 behalf of inmates to the US Commission on Civil

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1 Rights. The types of religious grievances reported in  
2 federal and state prisons are similar.

3 The Federal Bureau of Prisons, the BOP  
4 does not collect information on grievances in federal  
5 prisons related to religious items/literature and  
6 religious grooming/head cover. These two categories  
7 are among the most common bases for all RLUIPA  
8 litigation by state prisoners".

9 So --

10 COMMISSIONER GAZIANO: So moved.

11 VICE CHAIR THERNSTROM: So moved. Second?  
12 I will second it. Let's have any discussion.

13 COMMISSIONER GAZIANO: This is Gaziano. I  
14 would like to amend the recommendation in two respects  
15 and possibly a third if I hear any support for the  
16 third. The phrase "from, or on behalf of, inmates  
17 to", I would substitute "filed with" so the sentence  
18 would essentially read --

19 VICE CHAIR THERNSTROM: Yes, I understand.

20 COMMISSIONER GAZIANO: "Similarly a small  
21 proportion of complaints filed with the U.S.  
22 Commission on Civil Rights".

23 COMMISSIONER HERIOT: I'm sorry, I missed  
24 that, Todd. What did you say?

25 VICE CHAIR THERNSTROM: He's just

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1 simplifying it. He's saying --

2 COMMISSIONER GAZIANO: The sentence would  
3 read, "They make up a similarly small proportion of  
4 complaints filed with the U.S. Commission on Civil  
5 Rights".

6 VICE CHAIR THERNSTROM: We'd get rid of  
7 all that fancy --

8 COMMISSIONER GAZIANO: And the second  
9 change I would suggest in the next sentence, "The  
10 types of religious grievances reported" it should be  
11 "by federal and state prisons".

12 VICE CHAIR THERNSTROM: Yes, of course.  
13 Yes.

14 COMMISSIONER GAZIANO: Okay, there are  
15 either grievances in or grievances reported by.

16 VICE CHAIR THERNSTROM: Yeah.

17 COMMISSIONER GAZIANO: And if there's  
18 support from others, I think the last two sentences  
19 are kind of optional observations. I'm not sure I  
20 support the recommendation when we come to it, but I  
21 wonder if there's any support for, strong support for  
22 those last two sentences.

23 COMMISSIONER HERIOT: Can we -- when we  
24 get to the recommendation, if it fails to pass, then  
25 we'll include in that motion, going back and striking

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1 the two sentences there.

2 COMMISSIONER GAZIANO: That's fine with  
3 me.

4 COMMISSIONER HERIOT: Because otherwise we  
5 wanted it here so we really can't decide at this  
6 point.

7 COMMISSIONER GAZIANO: That's fine.

8 VICE CHAIR THERNSTROM: All right, so you  
9 -- at the moment you have two motions. Is that  
10 correct, Commissioner --

11 COMMISSIONER GAZIANO: Correct.

12 COMMISSIONER HERIOT: Two corrections.

13 COMMISSIONER GAZIANO: Two corrections  
14 which is a motion.

15 VICE CHAIR THERNSTROM: Yeah, which is a  
16 motion. Let's have a vote on those two corrections  
17 which are obviously, stylistic. Anybody abstaining or  
18 opposed to those stylistic changes?

19 COMMISSIONER YAKI: I'm abstaining.

20 VICE CHAIR THERNSTROM: Commissioner Yaki  
21 abstains and five Commissioners approve. So we need a  
22 vote on Finding 3 then as amended with the stylistic  
23 changes. I move we approve Finding 3. Have I got a  
24 second there?

25 COMMISSIONER HERIOT: Second.

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1 VICE CHAIR THERNSTROM: Any abstentions or  
2 dissents from the approval of Finding 3?

3 COMMISSIONER YAKI: I abstain.

4 VICE CHAIR THERNSTROM: You abstain.  
5 Commissioner Yaki abstains and five Commissioners  
6 approve of Finding 3 with the stylistic changes we  
7 have already voted on.

8 Okay, Finding 4, can I have a motion that  
9 the Commission approve Finding 4, which reads as  
10 follows: "Inmates professing non-Christian faiths are  
11 more likely than other inmates to make claims about  
12 free exercise limitations in both federal and state  
13 prisons. Muslim, Jewish and Native American male  
14 inmates acting" -- I'm not a lawyer, "initiated the  
15 largest number of RLUIPA cases studied by the  
16 Commission". Okay, have I got a motion to approve  
17 that finding?

18 COMMISSIONER GAZIANO: So moved.

19 VICE CHAIR THERNSTROM: I will second it.  
20 Any discussion of that finding?

21 COMMISSIONER HERIOT: I just wanted to say  
22 for the record here that I think it was a mistake for  
23 the report generally to refer to Native American  
24 religions as Native Americans because a lot of people  
25 are going to be confused into believing that is a

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1 racial rather than a religious category but it's all  
2 through the report and I didn't move to correct it  
3 elsewhere, so I'm not moving it here.

4 COMMISSIONER GAZIANO: I might support  
5 such a move just because we didn't elsewhere, the  
6 people are going to pay particular attention to the  
7 recommendation.

8 COMMISSIONER HERIOT: Okay, if you can  
9 come up with language, I'll support it, Muslim, Jewish  
10 and --

11 COMMISSIONER GAZIANO: Native American  
12 religions.

13 VICE CHAIR THERNSTROM: It doesn't make  
14 any sense.

15 COMMISSIONER HERIOT: Yeah, it doesn't.

16 COMMISSIONER GAZIANO: Oh, I see, and  
17 inmates who practice Native American faiths.

18 COMMISSIONER HERIOT: Male inmates,  
19 there's too many words here.

20 COMMISSIONER GAZIANO: Well, do we need  
21 the male? I moved inmates before. Muslim, Jewish, I  
22 don't know. Inmates -- well, okay, "Inmates", sorry  
23 to do this on the fly, "Inmates who practice Muslim,  
24 Jewish, and Native American faiths".

25 COMMISSIONER HERIOT: Fine, I'll vote for

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1 that.

2 COMMISSIONER GAZIANO: All right.

3 STAFF DIRECTOR DANNENFELSER: Do you want  
4 to keep male inmates or just --

5 VICE CHAIR THERNSTROM: Well, if that's  
6 accurate.

7 STAFF DIRECTOR DANNENFELSER: Yes, it is.

8 COMMISSIONER GAZIANO: Okay, I'll keep --

9 VICE CHAIR THERNSTROM: It has to be to in  
10 there then.

11 COMMISSIONER HERIOT: Yeah, although one  
12 of the things that the original draft of the report  
13 failed to do was point out, of course, that  
14 overwhelmingly inmates are male.

15 VICE CHAIR THERNSTROM: Right, we've only  
16 got the data for males. That should be included.

17 COMMISSIONER GAZIANO: I suppose except  
18 does it imply that female inmates of these --

19 VICE CHAIR THERNSTROM: No, it just  
20 implies in my view at least, simply that that is a  
21 generalization we can make on the basis of the data we  
22 have which solely concerns male inmates.

23 COMMISSIONER GAZIANO: I don't feel  
24 strongly unless a few others do. I have one other  
25 slight suggestion to ask you about. Instead of "make

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1 claims", I mean, that's rather vague. Aren't we  
2 talking about file complaints or registered  
3 complaints?

4 VICE CHAIR THERNSTROM: Yes, we are.

5 COMMISSIONER GAZIANO: Thank you. I would  
6 include those two changes.

7 VICE CHAIR THERNSTROM: Okay, so  
8 Commissioner Gaziano has moved that we make two  
9 changes. Instead of make claims, you've got -- tell  
10 me again the exact words.

11 COMMISSIONER GAZIANO: I believe file  
12 complaints.

13 VICE CHAIR THERNSTROM: File complaints  
14 and then give me again the exact wording the second  
15 change.

16 COMMISSIONER GAZIANO: If we want to  
17 include males, it would be, "Male inmates practicing  
18 Muslim, Jewish and Native American faiths, acting pro  
19 se, initiated the largest number of RLUIPA cases  
20 studied by the Commission".

21 VICE CHAIR THERNSTROM: Right, okay, can  
22 we have a -- any further discussion of this and if  
23 not, can we have a vote on those suggested changes?  
24 Okay, hearing no further discussion, have we got any  
25 abstentions or nay votes on this.

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1 COMMISSIONER YAKI: Abstained.

2 VICE CHAIR THERNSTROM: Commissioner Yaki  
3 abstains and five commissioners approve unless I hear  
4 differently from any of the other commissioners. The  
5 finding is approved.

6 Okay.

7 COMMISSIONER HERIOT: We approved both the  
8 amendment and Number 4? Is that what we did?

9 VICE CHAIR THERNSTROM: Yes, I believe so.  
10 I believe that that's what we just did. Anybody think  
11 we didn't just do that? I think that's the way I  
12 worded it.

13 COMMISSIONER HERIOT: Okay.

14 VICE CHAIR THERNSTROM: Finding 5, I move  
15 that the Commission approve Finding 5 which reads as  
16 follows: "Both state and federal correctional  
17 institutions identified prison inmates' security and  
18 lack of resources as the key reasons for any burdens  
19 they may have to impose" -- I'm sorry -- "they may  
20 impose on inmates' free exercise. While federal  
21 prisons acknowledge that national security  
22 considerations have been relevant in how they regulate  
23 the religious activities of inmates post-9/11. The  
24 prisoner advocacy groups unanimously agree state  
25 correctional institutions almost uniformly deny

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1 restricting prisoners' religious activities based on  
2 national security concerns". That sentence to me is a  
3 little garbled, but we'll go on.

4 COMMISSIONER GAZIANO: I will move to  
5 strike it when you're finished.

6 VICE CHAIR THERNSTROM: Okay. "Federal  
7 prisons admit to increasing supervision of inmate led  
8 programs and vetting of religious volunteers and  
9 materials entering the prison. Where resource  
10 limitations prevent supervision, regularly scheduled  
11 services have been reduced. The federal prisons  
12 surveyed appeared to have spread the burden of  
13 reduction in religious programming across all faith  
14 groups". So I move that this be approved. Is there a  
15 second and we will obviously go on to discussion.

16 COMMISSIONER GAZIANO: Second.

17 VICE CHAIR THERNSTROM: Okay, any changes,  
18 discussion, questions?

19 COMMISSIONER GAZIANO: I would like to  
20 strike the second sentence. I'm going to make a  
21 similar recommendation in the first recommendation.  
22 And I would change the third to make the  
23 recommendation make some sense at the end of the  
24 sentence to say, "After 9/11".

25 VICE CHAIR THERNSTROM: All right.

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1                   STAFF DIRECTOR DANNENFELSER:    So are you  
2                   changing post to after?  Is that the change?

3                   COMMISSIONER GAZIANO:        I'm just taking  
4                   that one phrase, "after 9/11", adding it to the end of  
5                   the current third sentence and striking the second  
6                   sentence.

7                   VICE CHAIR THERNSTROM:        Right.  I would  
8                   think with the post 9/11 up further in the sentence --  
9                   no, that's fine, that's fine.

10                  COMMISSIONER GAZIANO:        If you want to make  
11                  it at the front of the sentence, fine.

12                  VICE CHAIR THERNSTROM:        Instead of post  
13                  9/11 can we have "subsequent to 9/11"?

14                  COMMISSIONER GAZIANO:        "Subsequent to  
15                  9/11" is fine, but I just want that second sentence --

16                  VICE CHAIR THERNSTROM:        Right, okay.  I  
17                  agree with actually striking that second, quite  
18                  garbled sentence.  Any discussion of Commissioner  
19                  Gaziano's two changes here?  Hearing none, let's have  
20                  a vote.  Any nay votes?

21                  COMMISSIONER GAZIANO:        Let the record  
22                  reflect, I just thought the way that that second  
23                  sentence was -- it implied that they're doing  
24                  something duplicitous.  That they're being dishonest  
25                  and I don't think the record supports that at all.

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1 VICE CHAIR THERNSTROM: Right, I didn't  
2 like that sentence either. Let's just have a vote on  
3 your two suggested changes, the striking of that  
4 second sentence and the third sentence ends now,  
5 "subsequent to 9/11"? Any abstentions or nay votes on  
6 this?

7 COMMISSIONER YAKI: I abstain.

8 VICE CHAIR THERNSTROM: Commissioner Yaki  
9 abstains. There are, I assume then, five votes  
10 supporting those changes. We now need to vote on --  
11 to approve Finding 5 as amended. I will move the  
12 approval. Is there a second?

13 COMMISSIONER HERIOT: Second.

14 VICE CHAIR THERNSTROM: Okay, again, any  
15 abstentions or nay votes?

16 COMMISSIONER YAKI: I abstain.

17 VICE CHAIR THERNSTROM: Commissioner Yaki  
18 abstains and five Commissioners approve. The motion  
19 obviously passes.

20 Finding 6, can I have a motion that the  
21 Commission approve Finding 6, which reads as follows:  
22 "There has been a dramatic increase in the number of  
23 religious discrimination complaints received by the  
24 Justice Department Special Litigation Section since  
25 RLUIPA's passage. In 2001 SPL received only 23

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1 complaints. By 2006 that number had increased to 417  
2 complaints. SPL investigated a very small percentage  
3 of the complaints during this period, half of one  
4 percent".

5 Can I have a motion to approve Finding 6  
6 and again, we will go on to the question of any  
7 amendments in the discussion period, but --

8 COMMISSIONER TAYLOR: So moved.

9 VICE CHAIR THERNSTROM: And I will second  
10 it. All in favor?

11 COMMISSIONER YAKI: I abstain.

12 VICE CHAIR THERNSTROM: You abstain, okay.  
13 So the --

14 COMMISSIONER GAZIANO: I'm sorry, I had  
15 mute on. This is Gaziano. Can I amend first?

16 VICE CHAIR THERNSTROM: Well, I thought we  
17 were going on. I'm sorry.

18 COMMISSIONER GAZIANO: Can we amend 6?

19 VICE CHAIR THERNSTROM: I'm sorry, we need  
20 a discussion at this point. I'm terribly sorry. I  
21 got distracted here. Discussion, questions.

22 COMMISSIONER GAZIANO: Gaziano here. I  
23 would like to amend the last sentence. As it's  
24 currently written, it strongly implies that there is  
25 no vetting process at the Justice Department and the

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1 following sentence, I think, would clarify the point.  
2 "SPL" I would add the following words so it would just  
3 be -- "determined that only a very small percentage of  
4 complaints merited investigation during this period,  
5 half of one percent".

6 VICE CHAIR THERNSTROM: And --

7 COMMISSIONER GAZIANO: It's my  
8 understanding that they do, in fact, look at them and  
9 make a first blush, so it's helpful to say that they  
10 think --

11 COMMISSIONER HERIOT: Yeah, I agree.

12 COMMISSIONER GAZIANO: -- only one percent  
13 merited investigation but it's not because they're  
14 lazy and don't do anything.

15 VICE CHAIR THERNSTROM: Yeah, but do we  
16 have that in the body? I can't remember now at this  
17 point. Do we have that in the body of the report  
18 that, in fact, that is the case, that they look at all  
19 of them and make merit judgements?

20 COMMISSIONER GAZIANO: I don't know from  
21 their interrogatory responses, but I know that that is  
22 their practice, so I would object to the sentence as  
23 is. So either I'm going to move to strike the  
24 sentence, which I don't want to do or the --

25 VICE CHAIR THERNSTROM: Well, we can't

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1 have a finding that's not based on anything in the  
2 report.

3 COMMISSIONER GAZIANO: We can base our  
4 knowledge on how the Department of Justice works. We  
5 have expertise in that regard. Does anyone have any  
6 reason to doubt my understanding of how the Department  
7 works?

8 VICE CHAIR THERNSTROM: Well, could the  
9 Staff Director come in on this? I mean, it is my  
10 understanding that these findings have to be based on  
11 what is in the report. I don't want to have a finding  
12 that reads in a way that adds information that we have  
13 -- that is simply based on the understanding of  
14 Commissioners of how the Justice Department works but  
15 which is based on nothing in the report or in the --  
16 well, is based on nothing in the report. Mr. Staff  
17 Director.

18 STAFF DIRECTOR DANNENFELSER: One moment.  
19 It's been suggested that the staff could read the  
20 interrogatory to see if there's anything in there that  
21 would enable them to say that.

22 VICE CHAIR THERNSTROM: Yeah, I mean, I  
23 don't care what the reality as you know it,  
24 Commissioner Gaziano or Commissioner Gaziano and  
25 Heriot is. I am concerned that we stick with our

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1 rules that nothing in the findings --

2 COMMISSIONER HERIOT: I agree with you  
3 too, Abby, but I also agree with Todd that the way it  
4 reads it sounds like an accusation. So if it turns  
5 out there is nothing in the report, we might just want  
6 to strike it. We don't have to have a finding on an  
7 issue, especially if Todd has information that they do  
8 conduct some sort of preliminary investigation which  
9 they almost certainly do. I mean, sort of by  
10 definition. They're not randomly picking these cases  
11 to investigate.

12 COMMISSIONER GAZIANO: Yeah, that would be  
13 my position. I'd prefer we could amend it. I suspect  
14 the interrogatories would support that.

15 VICE CHAIR THERNSTROM: Why don't you make  
16 a motion that the staff look at the substance of the  
17 interrogatories to see whether it -- the -- your  
18 proposed amendment is justified?

19 COMMISSIONER GAZIANO: Okay, that would be  
20 fine but what I would move is --

21 COMMISSIONER HERIOT: But if we want  
22 closure, we could just strike it.

23 COMMISSIONER GAZIANO: Yeah, I would move  
24 that we either strike it or if there's support in the  
25 record, that we amend it as I suggest, because I think

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1 it's helpful if there is the support in the record  
2 that I think there is. If e-mails or communications  
3 or other -- DOJ, you know, filed some substantial  
4 responses. I bet that would, you know, be the  
5 implication of what they sent us.

6 VICE CHAIR THERNSTROM: What would you  
7 like to do at this point? We can --

8 COMMISSIONER GAZIANO: I can move to  
9 either strike the sentence or if there is support in  
10 the Department of Justice's communications to us, to  
11 amend the sentence to read as follows, "SPL determined  
12 that only a very small percentage of the complaints  
13 merited investigation during this period, half of one  
14 percent". I would suggest that we delegate to the  
15 staff which of those two, if they're supporting the --

16 COMMISSIONER HERIOT: I mean, the sentence  
17 may be true regardless of what's in the record. I  
18 mean, nobody claims that they are randomly picking  
19 which ones to do. We may -- we don't have to endorse  
20 how good a job they did in determining which ones to  
21 investigate to acknowledge that of course, they do and  
22 they have some procedure to do that.

23 COMMISSIONER GAZIANO: Unless someone  
24 believes that the one percent that they left, the one  
25 percent they got to was just the first one off the

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1 pile and that's the only one they did. That makes  
2 perfect sense.

3 STAFF DIRECTOR DANNENFELSER: I think you  
4 could make a case that it's a -- that it's a semantic  
5 change, that Commissioner Gaziano is pushing, is  
6 promoting here. Although, you know, there is that one  
7 other possibility that you said, that someone might  
8 say the only alternative is they just randomly, you  
9 know, like you go through the first 500 names in the  
10 Manhattan Phone Book type of argument.

11 COMMISSIONER GAZIANO: I just --

12 STAFF DIRECTOR DANNENFELSER: I don't  
13 think anyone thinks that's the case here. So given  
14 that, I think we could assume that this is essentially  
15 a semantic change unless staff finds something --

16 COMMISSIONER GAZIANO: Well, how about  
17 this as an argument, the Justice Department is  
18 required by law to look at these and we must presume  
19 unless the staff has contrary evidence, that they did  
20 follow the law, but that's also the logical inference  
21 of what we've written as well.

22 VICE CHAIR THERNSTROM: Where are we on  
23 this? Do you want to put a motion, do you want to  
24 frame your motion, leaving this in the hands of the  
25 staff?

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1 COMMISSIONER HERIOT: I would much prefer  
2 closure on this.

3 COMMISSIONER GAZIANO: Okay, if my motion,  
4 my first motion to amend fails, then I'll move to  
5 strike but I hope, Commissioners have enough  
6 experience with how DOJ operates that a majority will  
7 feel comfortable amending the sentences I have -- as  
8 I've done.

9 COMMISSIONER HERIOT: I have an  
10 alternative that I think fudges it a little better.  
11 It's less of an accusation but less of a statement.  
12 If we just were to say "SPL selects a very small  
13 percentage of the complaints for investigation, half  
14 of one percent".

15 VICE CHAIR THERNSTROM: That, it seems to  
16 me solves the problem.

17 COMMISSIONER GAZIANO: Does that imply  
18 that the selection is random. That they have --

19 COMMISSIONER GAZIANO: No, it leaves open  
20 the possibility that it's random but I don't think it  
21 implies it at all.

22 VICE CHAIR THERNSTROM: No, I don't think  
23 it implies it. It seems to me that solves the problem  
24 here.

25 COMMISSIONER GAZIANO: Okay.

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1 COMMISSIONER YAKI: But from the way I  
2 view the way the Justice Department has worked for the  
3 past eight years, I do believe that there's a fair  
4 amount of selectivity and other activities that I  
5 would not be pleased about. So however way you word  
6 this, I'm voting against it.

7 VICE CHAIR THERNSTROM: Well, what if we  
8 strike the sentence, Commissioner Yaki, the last  
9 sentence? Can you go along with this finding then?

10 COMMISSIONER YAKI: No.

11 VICE CHAIR THERNSTROM: I'm happy to  
12 strike that last sentence.

13 COMMISSIONER YAKI: No, because I think  
14 that -- I think that anything the Justice Department  
15 has done in the past eight years is something that  
16 needs scrutiny anyway. So, no.

17 VICE CHAIR THERNSTROM: Well, but wait a  
18 minute. Then the finding would be reduced to simply  
19 to the numbers, the number of complaints increased to  
20 417, period, end of finding. Could you support it  
21 then? All we're doing is reporting the numbers, the  
22 number of complaints.

23 COMMISSIONER YAKI: I will abstain but I  
24 won't vote no.

25 STAFF DIRECTOR DANNENFELSER: Does

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1 Commissioner Gaziano wish to strike that last sentence  
2 or would he prefer to amend it?

3 COMMISSIONER GAZIANO: I'd prefer to amend  
4 it as Commissioner Heriot has suggested.

5 COMMISSIONER HERIOT: "SPL selects a very  
6 small percentage of the complaints".

7 STAFF DIRECTOR DANNENFELSER: It should be  
8 selected, right?

9 COMMISSIONER HERIOT: Selected, "selected  
10 a very small percentage".

11 VICE CHAIR THERNSTROM: Right, yeah, that,  
12 Commissioner Yaki, does not exclude the possibility  
13 that they've selected that percentage, small  
14 percentage, of complaints for investigation on grounds  
15 that -- on objectionable grounds. It doesn't exclude  
16 that possibility.

17 STAFF DIRECTOR DANNENFELSER: Is it clear  
18 what it did? Now it says now that they've selected  
19 them, what does that --

20 COMMISSIONER HERIOT: Selected them for  
21 investigation.

22 COMMISSIONER GAZIANO: During this period,  
23 half of one percent.

24 VICE CHAIR THERNSTROM: Selected for  
25 investigation, a very small percentage, that does not

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1 say --

2 COMMISSIONER HERIOT: Yeah, it doesn't  
3 accuse but it doesn't exclude the possibility that we  
4 wouldn't approve.

5 STFF DIRECTOR DANNENFELSER: Okay, so,  
6 "SPL selected for investigation a very small  
7 percentage of the complaints during this period, half  
8 of one percent".

9 VICE CHAIR THERNSTROM: Right, now that  
10 does not exclude the possibility that Yaki believes to  
11 be the case that their process of selection was  
12 corrupt. It simply states what they have done.

13 COMMISSIONER GAZIANO: Okay.

14 VICE CHAIR THERNSTROM: Okay, so we need  
15 to vote on that amendment which simply revises that  
16 last sentence that Commissioner Gaziano suggested  
17 wording, "selects for investigation" and that last  
18 sentence.

19 STAFF DIRECTOR DANNENFELSER: "Selected  
20 for investigation" because you're talking about a  
21 particular period that --

22 VICE CHAIR THERNSTROM: Yes, okay. I'm  
23 sorry, wait a minute. "By 2006, that number has  
24 increased to 417 complaints." Then how do you want  
25 the last sentence to read?

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1 STAFF DIRECTOR DANNENFELSER: Okay, I'm  
2 sorry Commissioner Heriot?

3 COMMISSIONER HERIOT: Yes, "SPL selected  
4 for investigation a very small percentage of the  
5 complaints during this period".

6 VICE CHAIR THERNSTROM: Of course, yes,  
7 I'm sorry. I missed what the Staff Director was  
8 saying there. Okay, let's have a vote on that motion  
9 of Commissioner Gaziano's. Let's start with  
10 abstentions and nay votes. Commissioner Yaki?  
11 Commissioner Yaki?

12 COMMISSIONER YAKI: Abstain.

13 VICE CHAIR THERNSTROM: You are  
14 abstaining. Commissioner Yaki abstains. Hearing no  
15 other abstentions, five votes yea. Commissioner Yaki  
16 abstains. The motion is approved.

17 Finding 7. I have a motion that the  
18 Commission approve Finding 7 which reads as follows:  
19 "The number of RLUIPA cases has grown annually,  
20 increasing from only four cases in 2001 to 27 cases in  
21 2004 and 135 cases in 2006. The total number of  
22 RLUIPA cases when compared to the total number of  
23 prisoners in state prisons is small, 0.2 percent. The  
24 Prison Litigation Reform Act, PLRA, has been a key  
25 factor in maintaining manageable levels of prisoner

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1 free exercise litigation. The Department of Justice  
2 has not evidenced the high level of activity on behalf  
3 of plaintiffs' claims in RLUIPA cases other than to  
4 defend the constitutionality of the statute".

5 I will move to approve it. Can I have a  
6 second? Second, people? Hey, wake up, I need a  
7 second.

8 COMMISSIONER GAZIANO: Second.

9 COMMISSIONER HERIOT: Second, but this one  
10 is going to have a lot of amendments, I think.

11 VICE CHAIR THERNSTROM: I understand,  
12 okay. We can go on now to changes, discussions,  
13 questions, regarding the motion.

14 COMMISSIONER HERIOT: Could I go?

15 VICE CHAIR THERNSTROM: Yeah.

16 COMMISSIONER HERIOT: Okay, first, I would  
17 move to add the word "reported" in front of the word  
18 "RLUIPA" in the first line. Second, in the second  
19 sentence, you know, I think that the evidence that we  
20 have of there not being, you know, a lot of litigation  
21 doesn't really come from Chapter 4 and our Lexus  
22 study. It comes from the fact that the witnesses  
23 didn't report that they had an unmanageable level of  
24 litigation. So I would add after the first sentence,  
25 "Nevertheless, judging from the witness testimony as

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1 well as our inventory of reported cases, the overall  
2 volume of litigation is not unmanageable at this time,  
3 period".

4 VICE CHAIR THERNSTROM: All right,  
5 "Nevertheless, judging from", go on.

6 COMMISSIONER HERIOT: "The witness  
7 testimony as well as our inventory of reported cases,  
8 the overall volume of litigation is not unmanageable  
9 at this time". Then in the third sentence, I would --  
10 what will be the third sentence, but is currently the  
11 second sentence, I would again add the word "reported"  
12 I front of RLUIPA. And then when we get to that  
13 number, first of all, it's a typo. It should be 0.02  
14 and second, it's not really the right figure in the  
15 first place because unless I'm mistaken, RLUIPA  
16 applied to county jails as well, and therefore, the  
17 denominator ought to include the number of prisoners  
18 in county jails as well, which is going to be much  
19 higher and we're going to drive that number into  
20 something even smaller.

21 COMMISSIONER GAZIANO: I'm sorry, on that  
22 point, could we just say "smaller", "somewhat smaller  
23 than", rather than eliminating the figure all  
24 together?

25 COMMISSIONER HERIOT: I'd rather recompute

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1 it because, you know, I'd like to show that the number  
2 is very small. Actually 0.2 percent wouldn't be all  
3 that small.

4 COMMISSIONER GAZIANO: I could live with  
5 that. I'd like to include a number if our staff can  
6 do that.

7 COMMISSIONER HERIOT: I propose that we  
8 use the same number that we used earlier. In Finding  
9 Number 1 we said that there are two million people,  
10 roughly two million people incarcerated and 93 percent  
11 of them are in state and local correctional  
12 facilities. So take 93 percent of two million and  
13 have that be our denominator and add approximately  
14 because it will be only approximate at that point.

15 COMMISSIONER GAZIANO: That sounds good.

16 COMMISSIONER HERIOT: So that's something  
17 staff can do without further intervention from us.

18 VICE CHAIR THERNSTROM: So what you're  
19 saying is substitute whatever number the staff comes  
20 up with and put an approximately before it.

21 COMMISSIONER HERIOT: Right.

22 STAFF DIRECTOR DANNENFELSER: I'm told  
23 that the staff did not find any county RLUIPA cases.

24 COMMISSIONER HERIOT: Yeah, but it doesn't  
25 matter whether there were any. What matters is there

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1 could have been and there weren't. So that's just --  
2 it doesn't matter. When we're talking about whether  
3 the litigation is out of control, what matters is they  
4 could have filed a case and they didn't so they go in  
5 the denominator, just like Joe Schmoo a particular  
6 prisoner at a state prison could have filed one but  
7 didn't and he went into the denominator.

8 COMMISSIONER YAKI: Point of information,  
9 this is Commissioner Yaki for the Staff Director.  
10 When we start talking about the denominator and what's  
11 in a denominator, this is a discussion that -- point  
12 that I raised early on I think the first time we  
13 debated this thing. Commissioner Thernstrom and I  
14 both voiced some reservations about this in our  
15 statutory report. To what extent does this data  
16 include prisoners who are in for-profit private  
17 correctional institutions?

18 STAFF DIRECTOR DANNENFELSER: I'm going to  
19 ask the General Counsel to respond to that since he  
20 did much of the research in this area.

21 MR. BLACKWOOD: This is David Blackwood.  
22 The answer to your question, Commissioner Yaki, it  
23 depends on what section of the court you're looking  
24 at. Finding Number 7 basically, comes out of Chapter  
25 4, which is the survey of electric database that OGC

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1 conducted. As a matter of results, we simply didn't  
2 find, as the Staff Director mentioned, any jails in  
3 that.

4 You asked about for profit, I don't  
5 believe we broke it down.

6 COMMISSIONER YAKI: No, what I mean is the  
7 private correctional centers that are operated by you  
8 know, Correctional Corporation of America, Wackenhut,  
9 those things that are not owned by the state. They're  
10 not operated by the state. They are operated by  
11 private entities.

12 COMMISSIONER HERIOT: But they're still  
13 subject to the statute, aren't they?

14 COMMISSIONER YAKI: Well, there's an  
15 interesting question on a lot of that stuff because --  
16 but I just want to know whether or not that section of  
17 the population was included in the statistics for the  
18 study.

19 VICE CHAIR THERNSTROM: I can't hear  
20 whoever is talking.

21 STAFF DIRECTOR DANNENFELSER: I believe we  
22 are just taking what was reported by the states, so if  
23 the states would have reported those numbers, they  
24 would have been included, but --

25 COMMISSIONER YAKI: But we don't know.

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1 Arizona, for example --

2 STAFF DIRECTOR DANNENFELSER: I'm not sure  
3 that we know with certainty whether the states  
4 included them in the numbers they reported.

5 COMMISSIONER HERIOT: I believe when you  
6 say the two million figure that they do include that  
7 sort of thing.

8 VICE CHAIR THERNSTROM: I want a footnote  
9 to this.

10 MR. BLACKWOOD: They're working on behalf  
11 of the states though.

12 VICE CHAIR THERNSTROM: I --

13 COMMISSIONER YAKI: But there are some  
14 facilities that are mixed federal and state. There  
15 are facilities that hold ICE detainees. There are  
16 facilities that hold federal detainees, and there are  
17 facilities -- and that same facility can also hold  
18 state prisoners as well. I mean, I've visited many of  
19 them and there are some significant ones in Arizona,  
20 in Texas, what have you, and I don't know if  
21 necessarily, they are included within the state counts  
22 of anything.

23 Some states export their prisoners to  
24 other states as well. So you know, when a state says,  
25 "I have X number of people," are they talking about

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1 just within their state or are they including the  
2 number that are residing in Oklahoma or in Texas? I  
3 just think we need some clarity on that. And this is  
4 a point I raised at the very, very beginning.

5 VICE CHAIR THERNSTROM: It is. I remember  
6 this very well. I'm very sympathetic to this point as  
7 Commissioner Yaki has said.

8 MR. BLACKWOOD: This is David Blackwood  
9 again. Commissioner Yaki, you know at some point  
10 there is a footnote where we identify the population  
11 prisoners and it's over a million something. I'll try  
12 to look into that footnote and if I can, I'll try to  
13 determine what it included in that figure.

14 COMMISSIONER YAKI: Okay.

15 VICE CHAIR THERNSTROM: Right, and if  
16 there isn't a footnote, there should be.

17 MR. BLACKWOOD: I'm fairly certain that  
18 it's in there as we identify the population of prisons  
19 in state -- I'm sorry, prisoners in state prisons.

20 COMMISSIONER YAKI: Well, these are not  
21 state prisons. They are privately operated prisons.  
22 They contract with states to place state prisoners but  
23 they are not state prisons. And frequently many of  
24 these contract with multiple states for the same  
25 institution.

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1 MR. BLACKWOOD: Actually, I can identify  
2 for you what I was referring to in Chapter 4, Footnote  
3 8, we have the following language and, "The Commission  
4 found that 250 RLUIPA cases handed down in September  
5 30, 2006, the adult male population in state prisons  
6 was 1,114,506. The American Correctional Association  
7 in their 2007 directory: the Adult and Juvenile  
8 Correction Department, institutions, agencies and  
9 probation and parole authorities" --

10 THE REPORTER: Your current discussion is  
11 not getting on the record. I'm not getting these  
12 people recorded clear.

13 MR. BLACKWOOD: This is David Blackwood.

14 VICE CHAIR THERNSTROM: Yeah, David, you  
15 need to do something. I had to stop listening myself  
16 because somebody was at my front door, so I missed a  
17 little bit of this.

18 COMMISSIONER GAZIANO: Can you borrow a  
19 mike, David.

20 VICE CHAIR THERNSTROM: But you need to  
21 repeat this in any case for the Court Reporter.  
22 You're coming in, in general very weakly.

23 STAFF DIRECTOR DANNENFELSER: Can you  
24 borrow a mike, David?

25 MR. BLACKWOOD: I thought mine was working

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1 but I'll find another one. This is David Blackwood  
2 again. There is a figure that we use in Chapter 4,  
3 the footnote says --

4 COMMISSIONER YAKI: That's not any better.  
5 Borrow Marty's microphone.

6 STAFF DIRECTOR DANNENFELSER: He's going  
7 to borrow my mike.

8 MR. BLACKWOOD: The reference I made, this  
9 is David Blackwood again, in Chapter 4, Footnote 6 is  
10 we do use a figure of 1,114,506 as --

11 COMMISSIONER HERIOT: What page is that  
12 on?

13 MR. BLACKWOOD: It's on page 80,  
14 representing that adult male population in state  
15 prisons. Then we give a cite to the American  
16 Correctional Association, 2007 directory. I do not  
17 know whether that figure, although we can find out  
18 whether that would include private prisoners.

19 COMMISSIONER HERIOT: Again, it doesn't  
20 include state jails, county jails, which is a problem.  
21 And we turn around and in our finding we say there is  
22 about two million prisons, 93 percent of whom are  
23 located in state and local corrections facilities.  
24 That I think is the figure that we're looking for to  
25 use here, or we should be looking for because that

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1 would be the population of people who are subject to  
2 RLUIPA.

3 COMMISSIONER KIRSANOW: Kirsanow here.  
4 I've got to jump off for a moment, I'll be back a  
5 little bit later.

6 VICE CHAIR THERNSTROM: Okay.

7 COMMISSIONER YAKI: When are you going to  
8 jump back on, Peter, because I've got to leave in  
9 about 30 minutes?

10 COMMISSIONER KIRSANOW: I'll be back  
11 before then.

12 COMMISSIONER YAKI: Okay.

13 VICE CHAIR THERNSTROM: All right, anybody  
14 got any further discussion on this and what would  
15 people like to do? Somebody make a proposal.

16 COMMISSIONER HERIOT: I'm lost.

17 COMMISSIONER YAKI: Madam Chair, while  
18 they're doing whatever they are with their  
19 microphones, you know, I just want to point out that  
20 this is where I begin to have severe issues with the  
21 report. There was reliance on the Prison Litigation  
22 Reform Act. I received a fair amount of  
23 correspondence from religious organizations, faith-  
24 based organizations, that are just really seeking to  
25 amend PLRA because of the high threshold and abuses of

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1 interpretation in enforcement that are ongoing, that  
2 the idea that the physical injury requirement is an  
3 extremely high bar for people to bring claims.

4 The exhaustion of administrative remedies  
5 often means that they have to go through a complaint  
6 system that goes before the very guards and folks who  
7 are denying them their rights in the first place.  
8 There are onerous restrictions on attorney's fees so  
9 many attorneys won't take the cases and you'll find  
10 and you'll find in my defense people from the National  
11 Association of Evangelicals to Sojourners, the  
12 Presbyterian Church, the United Methodist Church all  
13 have serious concerns about the fact that we can make  
14 -- we can make conclusions that say that there's now a  
15 manageable level of litigation because of PLRA, but  
16 the cost is at the -- the cost is at the -- is the  
17 constitutional rights of the people that we seek to  
18 protect and starting with 7, where we make the  
19 statement that a key factor in maintaining manageable  
20 levels through the remainder of the findings that talk  
21 about standards of litigation and why there are so few  
22 laws, et cetera, I think that PLRA is the -- is one of  
23 the major culprits behind it and deserved a more  
24 thorough investigation and discussion in the report  
25 than it currently does.

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1           And I say this now because I will have to  
2 be leaving pretty soon and one, if not the major  
3 concern I have about this report is not examining in  
4 more detail the impact that PLRA has had on the issue  
5 of religious exercise and religious rights of  
6 prisoners in this country.

7           VICE CHAIR THERNSTROM:     Well, I think  
8 that's an extremely interesting comment because you  
9 say -- we say in maintaining manageable -- hello,  
10 hello. Am I back? I was -- I had a ringing. Am I  
11 on?

12           COMMISSIONER HERIOT:     So did we, I hear  
13 you.

14           VICE CHAIR THERNSTROM:     Okay, because we  
15 say in maintaining manageable levels of prisoner free  
16 exercise to litigation. Now, of course, you know,  
17 whatever you're talking about, if you're talking  
18 about, let's say crime, if you arrest people in  
19 violation of their constitutional rights, you can get  
20 the arrest level down to that which is manageable. I  
21 mean, it is a loaded word, in other words, and I think  
22 that Commissioner Yaki's comment is extremely  
23 interesting and I don't know what to do in response to  
24 it. I wouldn't know what to do in response to it  
25 because it's a comment that goes, as he would

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1 acknowledge --

2 COMMISSIONER HERIOT: Is it a loaded term  
3 or just the opposite? I mean, by manageable, we're  
4 not making a value judgment of whether or not this is  
5 good. It's simply manageable.

6 VICE CHAIR THERNSTROM: Well, yeah, I --

7 COMMISSIONER GAZIANO: Can we think of a  
8 synonym? I don't object to it. I think it's helpful  
9 but if you can think of a synonym that pleases us  
10 better, I like the sentence.

11 COMMISSIONER HERIOT: Yeah, I think  
12 manageable or unmanageable, those are the least loaded  
13 terms you can come up with. Otherwise, it sounds like  
14 you really are endorsing or not endorsing and I think  
15 the nice thing about manageable is it doesn't say  
16 anything about it except for it's administrative  
17 feasibility.

18 VICE CHAIR THERNSTROM: Well, no it says  
19 that --

20 COMMISSIONER YAKI: But I guess the  
21 question I would -- this is Commissioner Yaki. The  
22 question I would pose back is since when does redress  
23 for constitutional rights rest on a manageability  
24 standard?

25 COMMISSIONER HERIOT: Nobody is saying

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1 that it does here. They're just saying it's  
2 manageable.

3 COMMISSIONER YAKI: Who's saying it's  
4 manageable?

5 VICE CHAIR THERNSTROM: It is a loaded  
6 term because exactly for the reason Commissioner Yaki  
7 just pointed out. I mean, we're accepting as a  
8 constitutional standard that you want is a good thing,  
9 that you want but --

10 COMMISSIONER GAZIANO: Well, it's a  
11 positive factor. It can cut the other way. You do  
12 want a system that allows people to raise claims to be  
13 manageable, so the courts actually pay attention to  
14 meritorious claims. It is a factor. It's not the be  
15 all and end all but it's a positive factor. If you  
16 say it's unmanageable then the courts can't sift  
17 because the dross and the crap and they may dismiss  
18 them all.

19 VICE CHAIR THERNSTROM: Yes, but if you  
20 are making -- if you are reducing the load, a load of  
21 whatever to manageable levels, and compromising rights  
22 in the process of doing so, then you know, manageable  
23 is not a good thing. I do agree that it has  
24 connotations here that are slightly troubling. I  
25 don't know what to do about it, however, because

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1 you're really talking about something, Commissioner  
2 Yaki, you're really talking about something very  
3 fundamental for the whole report.

4 COMMISSIONER YAKI: Right, which is why  
5 I'm --

6 COMMISSIONER GAZIANO: Maybe what we could  
7 do then is break up different amendments to it. I was  
8 going to try to strike the last sentence when it was  
9 my turn and maybe we can just see which commissioners  
10 on the call and we may have to wait till hopefully  
11 Pete comes back before Michael has to go off and we  
12 can just see which parts of things -- by the way, the  
13 math that my consultant acting as special assistant  
14 has e-mailed to me is 256 RLUIPA plaintiffs out of 93  
15 percent of two million is 0.0 --

16 COMMISSIONER HERIOT: 250, not 256, isn't  
17 it?

18 COMMISSIONER GAZIANO: Pardon?

19 COMMISSIONER HERIOT: Where does 256 come  
20 from? I thought it was 250?

21 COMMISSIONER GAZIANO: Well, I can try to  
22 redo the math, but it comes to less than either -- so  
23 less than 0.014, so we could say less than 0.014 and  
24 be accurate.

25 COMMISSIONER HERIOT: So that's working

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1 with 93 percent of two million as the denominator.

2 COMMISSIONER GAZIANO: Correct.

3 COMMISSIONER HERIOT: Okay.

4 VICE CHAIR THERNSTROM: You know, you  
5 could change the -- getting rid of manageable, you  
6 could substitute "has been a key factor in creating  
7 the level of free exercise litigation that we find".

8 COMMISSIONER HERIOT: That would be fine.  
9 You could leave in, then, my sentence where it says  
10 it's not unmanageable. You know, that doesn't cut  
11 against Yaki's point at all. You know, it just says,  
12 you know, we haven't reached unmanageable levels. And  
13 you know, therefore -- that cuts in his direction and  
14 then change the "maintaining manageable" as you've  
15 said. That works for me.

16 VICE CHAIR THERNSTROM: Commissioner Yaki,  
17 have you got that?

18 COMMISSIONER YAKI: No.

19 VICE CHAIR THERNSTROM: No? Okay, what  
20 I'm suggesting here is changing that sentence, "The  
21 Prison Litigation Reform Act has been a key factor in  
22 maintaining manageable levels", I'm suggesting  
23 changing it to, "The Prison Litigation Reform Act has  
24 been a key factor in creating the level of free  
25 exercise litigation that we find". So it's not -- it

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1 gets rid of the manageable.

2 COMMISSIONER HERIOT: Oh, by the way, I  
3 had intended to add a probably to that sentence, just  
4 to say --

5 VICE CHAIR THERNSTROM: All right, well,  
6 probably or may have been a key factor, whatever. So  
7 it's simply saying, yeah, I like that "has been a  
8 likely factor," get away from "key", "has been a  
9 likely factor in creating the level of free exercise  
10 litigation", we find it's less -- you can read less  
11 into that.

12 COMMISSIONER YAKI: Well, I know you can  
13 read less into it but to me, the fact that this is --  
14 imbues so much of the report and the findings, I mean,  
15 even -- you put lipstick on it and it still isn't  
16 going to make it any more attractive.

17 COMMISSIONER GAZIANO: Well, at some  
18 point, that's -- we -- the record is not clear but we  
19 should still vote on these various changes. I don't  
20 want to introduce my last one about that last sentence  
21 if we're not done with these, but let's -- can we vote  
22 on some of these individually?

23 VICE CHAIR THERNSTROM: Yeah, let's vote  
24 on them individually. I've got them here. The first  
25 sentence, "The number of reported RLUIPA cases",

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1 putting in "reported" before RLUIPA. Can I have a  
2 vote on that? Any abstentions, objections to that?  
3 Okay, that has been unanimously accepted.

4 Then the second sentence that was proposed  
5 by, I don't know who by this time, "Nevertheless,  
6 judging from the witness testimony as well as our  
7 inventory of reported cases", the total number --

8 COMMISSIONER HERIOT: "The overall volume  
9 of litigation".

10 VICE CHAIR THERNSTROM: "The overall  
11 volume of litigation", thank you.

12 COMMISSIONER HERIOT: "Is not unmanageable  
13 at this time".

14 VICE CHAIR THERNSTROM: No, no, no, no,  
15 we've got -- we're into the sentence which is --

16 COMMISSIONER HERIOT: No, putting it this  
17 way is actually a pro Yaki way to put it.

18 VICE CHAIR THERNSTROM: I know but we're  
19 in the sentence before that.

20 COMMISSIONER HERIOT: No, no.

21 COMMISSIONER GAZIANO: I think she's  
22 proposing a different way of doing it.

23 VICE CHAIR THERNSTROM: All right, so --  
24 okay, after the date of 2006, you're proposing what,  
25 Gail?

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1 COMMISSIONER HERIOT: "Nevertheless," --

2 VICE CHAIR THERNSTROM: Yeah, "Judging  
3 from the" --

4 COMMISSIONER HERIOT: -- "judging from the  
5 witness testimony, as well as our inventory of  
6 reported cases, the overall volume of litigation is  
7 not unmanageable at this time".

8 VICE CHAIR THERNSTROM: Now wait a minute.  
9 So you've got -- so you're now bringing the  
10 unmanageable. I thought we were --

11 COMMISSIONER HERIOT: This is manageable.  
12 What I'm saying is it's not a problem now. So  
13 somebody who thinks that's not important --

14 VICE CHAIR THERNSTROM: Now wait a minute.

15 COMMISSIONER HERIOT: -- should be happy.  
16 Their opposition is conceding that it's not a problem  
17 at this point.

18 VICE CHAIR THERNSTROM: I thought the rest  
19 of that sentence would now read, "The total number of  
20 cases when compared to the total number of prisoners  
21 in state prisons is small, approximate X percent".

22 COMMISSIONER HERIOT: No, we don't know  
23 that, remember? We don't know how many cases.

24 VICE CHAIR THERNSTROM: We get an adjusted  
25 number.

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1 COMMISSIONER HERIOT: Pardon? We have no  
2 idea what the total number is.

3 COMMISSIONER GAZIANO: Are we going to add  
4 another sentence talking about the number of claims  
5 compared to the total prison population? We do have  
6 that figure but maybe that's a third sentence.

7 COMMISSIONER HERIOT: We don't know  
8 reported claims.

9 COMMISSIONER GAZIANO: Pardon?

10 COMMISSIONER HERIOT: We don't have any  
11 idea how many cases there are. We only know how many  
12 reported cases.

13 COMMISSIONER GAZIANO: I understand. With  
14 that change, with that change are we going to not  
15 point out the --

16 COMMISSIONER HERIOT: Oh, I think we still  
17 can. We could just put reported, it's small and have  
18 the number.

19 COMMISSIONER GAZIANO: Sure, okay.

20 COMMISSIONER HERIOT: It's not very  
21 important but there is it, you know, somebody went to  
22 the trouble of writing Chapter 4.

23 VICE CHAIR THERNSTROM: But then Gail, as  
24 I understand it, you're suggesting, "Nevertheless,  
25 judging from the witness testimony as well as our

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1 inventory of reported cases, the total number of cases  
2 when compared to the total number of prisons and state  
3 prisons is small," period.

4 COMMISSIONER HERIOT: I don't know that.  
5 All I know is it's not unmanageable. They didn't say  
6 it was small. They said they didn't complain about it  
7 being unmanageable and they would have. I'm not  
8 relying on Chapter 4 which I don't think gives us any  
9 valuable information given that it's confined to  
10 reported cases. Although it's helpful in the sense  
11 that it supports the fact that these guys would have  
12 and were basically asked to complain about this, and  
13 they didn't really complain all that much. That's  
14 what I'm judging from. I am not judging from --

15 VICE CHAIR THERNSTROM: Well, we're back  
16 to -- when I tried to get rid of it in the next  
17 sentence, we're back to the word "manageable".

18 COMMISSIONER HERIOT: Yeah, but here we're  
19 saying it in a way that shouldn't bother somebody who  
20 is concerned that that not be the standard because  
21 basically we're saying, whether that's the standard or  
22 not, that's not a problem here, so we can forget about  
23 it at this time.

24 VICE CHAIR THERNSTROM: Commissioner Yaki?

25 COMMISSIONER YAKI: Yes?

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1 VICE CHAIR THERNSTROM: You got any  
2 further input on this?

3 COMMISSIONER YAKI: Not really. I mean, I  
4 appreciate what you're trying to do. My point goes to  
5 the fact that this underlying statute, to me,  
6 completely infects the data on this since its  
7 enactment, and to me the data itself is tainted by  
8 virtue of the way that the statute has been  
9 interpreted and enforced. And that's why --

10 VICE CHAIR THERNSTROM: Yes, I understand.

11 COMMISSIONER YAKI: Okay, so I don't want  
12 to belabor that point.

13 COMMISSIONER GAZIANO: Yes. With respect,  
14 I think that the finding by setting forth the two  
15 allows you to -- anyone to argue that point, and you  
16 have effectively argued that point on our record.  
17 People can interpret it in a different way.

18 COMMISSIONER HERIOT: Yes. I really think  
19 this is a finding -- putting it this way allows people  
20 to take that as a starting point for arguments in both  
21 directions.

22 VICE CHAIR THERNSTROM: Okay. So I now --  
23 hold on, let me just write this down. I have now got  
24 on that sentence, "Nevertheless, judging from the  
25 witness testimony, as well as our inventory of

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1 reported cases, the total number of" -- we don't need  
2 to have reported once again, "of RLUIPA of cases when  
3 compared to the total number of" --

4 COMMISSIONER HERIOT: Wait, wait, wait,  
5 wait, wait. What happened to the sentence? Are you  
6 proposing an alternative to mine that gets rid of that  
7 part?

8 VICE CHAIR THERNSTROM: No. I thought I  
9 was with your's.

10 COMMISSIONER HERIOT: No. No, mine, again  
11 is, "Nevertheless" --

12 VICE CHAIR THERNSTROM: "Nevertheless,  
13 judging from the" --

14 COMMISSIONER HERIOT: -- "judging from the  
15 witness testimony, as well as our inventory of  
16 reported cases, the overall volume of litigation is  
17 not unmanageable at this time."

18 VICE CHAIR THERNSTROM: Okay.

19 COMMISSIONER GAZIANO: I'm going to  
20 suggest another sentence in a minute, but that's fine  
21 to stop there.

22 COMMISSIONER HERIOT: And then we go on to  
23 the sentence about the total number of, again,  
24 reported RLUIPA cases. We really want to be very  
25 careful never to suggest that that number applies to

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1 all RLUIPA cases. We do not need that word "reported"  
2 there, because the middle sentence, the one I  
3 suggested is not talking about just reported cases,  
4 it's talking about the overall volume of litigation.

5 COMMISSIONER GAZIANO: Well, I --

6 VICE CHAIR THERNSTROM: But wait a minute.

7 COMMISSIONER GAZIANO: We're just  
8 reporting -- we're reporting slightly different facts  
9 there, both of which are helpful.

10 COMMISSIONER HERIOT: Yes.

11 VICE CHAIR THERNSTROM: Gail, wait a  
12 minute.

13 COMMISSIONER HERIOT: Sentence number one  
14 deals with reported RLUIPA cases.

15 VICE CHAIR THERNSTROM: Okay.

16 COMMISSIONER HERIOT: And my added  
17 sentence deals with overall litigation, so that's very  
18 different.

19 VICE CHAIR THERNSTROM: Yes. And then  
20 sentence number two has the word "reported" in it, as  
21 you read it. "Nevertheless, judging from the witness  
22 testimony, as well as our inventory of reported  
23 cases".

24 COMMISSIONER HERIOT: Right. That's  
25 right. I'm saying the reason I am judging overall

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1 litigation is that, number one, the witnesses who are  
2 in a position to claim that they were being  
3 overwhelmed, they wrote that they were basically  
4 asked, are you being overwhelmed, and they weren't  
5 being overwhelmed. And, also, as evidence, but only  
6 as evidence of the overall litigation, we have the  
7 reported litigation.

8 VICE CHAIR THERNSTROM: Okay. The  
9 sentence as I understand it reads, "Nevertheless,  
10 judging from the witness testimony, as well as our  
11 inventory of reported cases, the overall volume of  
12 litigation is not unmanageable at this time."

13 COMMISSIONER HERIOT: Right. And then the  
14 next sentence would again have to focus in on reported  
15 RLUIPA cases, so we have to add "reported."

16 VICE CHAIR THERNSTROM: I've got that.  
17 And the next sentence goes, "The total number of  
18 reported RLUIPA cases" -- hold on, let me just correct  
19 my text here - "when compared to the total number of  
20 prisoners", you want to finish that? We don't want to  
21 say -- you want to say not unmanageable again?

22 COMMISSIONER GAZIANO: No, no.

23 COMMISSIONER HERIOT: I want to say total  
24 number of prisoners in state correctional facilities  
25 instead of prison, so that we include jails.

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1 VICE CHAIR THERNSTROM: Correctional  
2 facilities --

3 COMMISSIONER HERIOT: Is --

4 COMMISSIONER GAZIANO: Very small, quite  
5 small, and then the figure is dash, dash less than  
6 014. It's actually .0134, but that gives a false  
7 sense of accuracy, since we're using 93 percent of 2  
8 million.

9 COMMISSIONER HERIOT: Right. It's  
10 probably also worth pointing out we're not talking  
11 about per year, we're talking about over the period of  
12 what, seven years that this covers?

13 COMMISSIONER GAZIANO: Yes, if you want to  
14 begin the sentence that way.

15 COMMISSIONER HERIOT: We could put it next  
16 to the number, 0.014 percent over the course of how  
17 many ever years it is.

18 COMMISSIONER GAZIANO: I would put that at  
19 the beginning of the sentence, "Over the course of" --

20 VICE CHAIR THERNSTROM: No, I think it  
21 belongs at the end of it.

22 COMMISSIONER GAZIANO: Okay. Fine.

23 VICE CHAIR THERNSTROM: We can get rid of  
24 a comma that way. How many years is it?

25 COMMISSIONER HERIOT: I don't know.

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1 VICE CHAIR THERNSTROM: All right. The  
2 sentence now reads, "The total number of reported  
3 RLUIPA cases when compared to the total number of  
4 prisoners in state correctional facilities is very  
5 small -- less than 0.014 over the course of X years."

6 COMMISSIONER GAZIANO: It looks like four  
7 -- isn't it 2004, 2005, 2006? Can David Blackwood or  
8 someone clarify?

9 COMMISSIONER HERIOT: So 2001 it starts.

10 COMMISSIONER GAZIANO: What?

11 COMMISSIONER HERIOT: It's 2001, and it  
12 goes up -- I don't know whether it goes into 2007 at  
13 all, or whether it just cuts off at the end of 2006.

14 COMMISSIONER GAZIANO: What chart are we  
15 referring to? I'm sorry.

16 VICE CHAIR THERNSTROM: If we take the  
17 number of years out, which is going to be complicated  
18 because it's not going to be --

19 STAFF DIRECTOR DANNENFELSER: It only goes  
20 up to 2006. This is the Staff Director. It goes from  
21 2001 through 2006.

22 COMMISSIONER HERIOT: So it's six years.

23 STAFF DIRECTOR DANNENFELSER: Yes.

24 COMMISSIONER GAZIANO: Okay. Let's just  
25 make it six.

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1 COMMISSIONER HERIOT: Each of those six  
2 years, yes.

3 VICE CHAIR THERNSTROM: Okay. Got it.  
4 All right. Anything more on this finding?

5 COMMISSIONER GAZIANO: Yes, but do you  
6 want to vote on that sentence?

7 VICE CHAIR THERNSTROM: Yes.  
8 "Nevertheless, judging from the witness testimony, as  
9 well as our inventory of reported cases, the overall  
10 volume of litigation is not unmanageable at this time.  
11 The total number of reported RLUIPA cases, when  
12 compared to the total number of prisoners in state  
13 correctional facilities is very small -- less than  
14 0.014 over the course of six years."

15 COMMISSIONER HERIOT: Percent.

16 VICE CHAIR THERNSTROM: Pardon me?

17 COMMISSIONER HERIOT: Percent.

18 VICE CHAIR THERNSTROM: I'm sorry,  
19 percent.

20 COMMISSIONER HERIOT: "Over the course of  
21 six years."

22 VICE CHAIR THERNSTROM: Yes. All right.  
23 Can we have a vote on that sentence?

24 COMMISSIONER GAZIANO: I move to strike  
25 everything after that sentence, too. Do you want to

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1 do that separately?

2 VICE CHAIR THERNSTROM: No.

3 COMMISSIONER HERIOT: No. We haven't  
4 voted on these yet.

5 COMMISSIONER GAZIANO: Okay.

6 VICE CHAIR THERNSTROM: Yes, let's vote on  
7 that sentence. All opposed or abstaining?

8 COMMISSIONER YAKI: I abstain; oppose, I  
9 mean.

10 VICE CHAIR THERNSTROM: Commissioner Yaki  
11 is opposed. Got anybody else abstaining?

12 COMMISSIONER HERIOT: Does that mean we  
13 have to do a roll call?

14 VICE CHAIR THERNSTROM: No.

15 COMMISSIONER YAKI: No, I opposed. I  
16 didn't abstain.

17 COMMISSIONER GAZIANO: Okay. Go ahead.  
18 Roll call.

19 VICE CHAIR THERNSTROM: All right.  
20 Commissioner Gaziano.

21 COMMISSIONER GAZIANO: Aye.

22 VICE CHAIR THERNSTROM: Kirsanow? Not  
23 here. Heriot.

24 COMMISSIONER HERIOT: Aye.

25 VICE CHAIR THERNSTROM: Yaki is opposed,

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1 and Taylor?

2 COMMISSIONER TAYLOR: Present. Here. I  
3 vote aye.

4 VICE CHAIR THERNSTROM: Aye.

5 COMMISSIONER TAYLOR: Yes.

6 VICE CHAIR THERNSTROM: Okay. So we have  
7 got one, two, three, four ayes, and one nay.

8 COMMISSIONER HERIOT: By that you mean  
9 you're an aye, as well?

10 VICE CHAIR THERNSTROM: I'm an aye, as  
11 well. Yes, but we don't have Kirsanow, so it's four.

12 COMMISSIONER HERIOT: Okay.

13 COMMISSIONER GAZIANO: Okay. Unless I'm  
14 stepping on anyone's toes, I think we've incorporated  
15 what was the second to last sentence now into a  
16 previous sentence. I think the last sentence I'd also  
17 like to strike for the reasons that I struck --

18 COMMISSIONER HERIOT: We haven't done the  
19 Prison Litigation Reform Act sentence.

20 COMMISSIONER GAZIANO: Oh, I'm sorry. I  
21 thought you incorporated that earlier in your earlier  
22 sentence. Go ahead with that.

23 COMMISSIONER HERIOT: I wanted to add the  
24 word "probably", and I thought that Abby had some --

25 VICE CHAIR THERNSTROM: I had "likely",

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1 but it doesn't matter. "It's been a likely factor in  
2 creating the level" -- I propose "creating the level  
3 of free exercise litigation that we find." I got rid  
4 of unmanageable.

5 COMMISSIONER HERIOT: That's fine with me.

6 COMMISSIONER GAZIANO: Fine with me.

7 VICE CHAIR THERNSTROM: Okay. So that  
8 sentence now reads, "The Prison Litigation Reform Act  
9 (PLRA) has been a likely factor in creating the level  
10 of free exercise litigation that we find."

11 STAFF DIRECTOR DANNENFELSER: The level  
12 of, should say "prisoner free exercise litigation".  
13 Right?

14 VICE CHAIR THERNSTROM: Yes. Good. Thank  
15 you. All right. Let's have a vote on that, that  
16 sentence. Any nays or abstentions on that?

17 COMMISSIONER YAKI: I vote no.

18 VICE CHAIR THERNSTROM: Okay. Roll call.  
19 Commissioner Gaziano.

20 COMMISSIONER GAZIANO: Aye.

21 VICE CHAIR THERNSTROM: Kirsanow is still  
22 not here. Heriot?

23 COMMISSIONER HERIOT: Aye.

24 COMMISSIONER KIRSANOW: Kirsanow here, but  
25 I just got back, so I'm not prepared to vote on

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1 whatever it is we're voting on.

2 VICE CHAIR THERNSTROM: Okay.

3 Commissioner Taylor?

4 COMMISSIONER TAYLOR: I vote aye.

5 VICE CHAIR THERNSTROM: And I vote aye, so  
6 it's four ayes, one nay.

7 COMMISSIONER TAYLOR: This is Ashley. I  
8 need to drop off now.

9 VICE CHAIR THERNSTROM: We're going to  
10 lose our quorum.

11 COMMISSIONER HERIOT: No, we're not, are  
12 we?

13 COMMISSIONER KIRSANOW: Pete's back.

14 VICE CHAIR THERNSTROM: Pete's back, but  
15 Commissioner Yaki is going to be leaving very soon.  
16 Isn't that correct?

17 COMMISSIONER YAKI: Yes.

18 VICE CHAIR THERNSTROM: Yes, so at that  
19 point we're going to lose our quorum.

20 COMMISSIONER HERIOT: Where's Jerry?

21 VICE CHAIR THERNSTROM: He can't make it.  
22 There's no way of making --

23 COMMISSIONER HERIOT: Okay. Let's do  
24 eight. No, we've got to finish seven. I'm sorry.

25 COMMISSIONER GAZIANO: Jerry can't be

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1 located under the circumstances for a half --

2 VICE CHAIR THERNSTROM: No, he cannot. I  
3 talked to him at length this morning. He cannot.

4 COMMISSIONER GAZIANO: Okay. Well, I move  
5 --

6 COMMISSIONER YAKI: How much longer can  
7 Ashley stay on, or Ashley's gone?

8 VICE CHAIR THERNSTROM: Yes.

9 COMMISSIONER YAKI: Because it's 10:30,  
10 and I've got to jump on this other thing. I mean, I  
11 pushed it back as far as I could.

12 VICE CHAIR THERNSTROM: Yes. No, I  
13 understand. I was delighted you were able to make it  
14 today. I didn't expect you to be able to make it.

15 COMMISSIONER YAKI: This is why I worry  
16 about these teleconferences, because of the quorum  
17 issue.

18 VICE CHAIR THERNSTROM: I hate these  
19 teleconference meetings. I hate them. I think --

20 COMMISSIONER HERIOT: Well, can we get  
21 Ashley on the phone and see if there's some chance of  
22 getting him back after a break?

23 VICE CHAIR THERNSTROM: It didn't sound  
24 it.

25 COMMISSIONER HERIOT: But we need to

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1 verify that. It's too important, given that the law  
2 requires us to get this report out, it's too important  
3 to just assume that he can't do it.

4 VICE CHAIR THERNSTROM: You do realize the  
5 report is not going out today.

6 COMMISSIONER HERIOT: I don't realize  
7 that, no, but --

8 VICE CHAIR THERNSTROM: It's not going  
9 out.

10 COMMISSIONER HERIOT: Yes, but  
11 nevertheless, it is much better to have a report today  
12 rather than later. So if there's any chance of  
13 getting Ashley back on the phone, even for just enough  
14 time to get these recommendations passed, then we need  
15 to --

16 COMMISSIONER YAKI: It will be a lot  
17 easier when I get off the phone, because then I won't  
18 be interrupting you all the time. You can just simply  
19 say let's adopt it all, cheerio, go.

20 VICE CHAIR THERNSTROM: Michael?

21 COMMISSIONER YAKI: Yes?

22 VICE CHAIR THERNSTROM: I thought you were  
23 a process person, too.

24 COMMISSIONER YAKI: I am a process person,  
25 but I'm just trying to explain a better process for

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1 you as soon as I jump off, which is going to be in  
2 about --

3 COMMISSIONER GAZIANO: Do we have a  
4 volunteer on the --

5 COMMISSIONER HERIOT: Yes, let's finish.

6 VICE CHAIR THERNSTROM: That process is  
7 not acceptable to me.

8 COMMISSIONER GAZIANO: Can we have a  
9 volunteer on the Commission Staff for special  
10 assistance to try to reach Ashley?

11 CHAIRMAN REYNOLDS: This is Chairman  
12 Reynolds. I'm on the line.

13 COMMISSIONER GAZIANO: Oh.

14 COMMISSIONER HERIOT: Okay.

15 VICE CHAIR THERNSTROM: Oh, fantastic.

16 COMMISSIONER KIRSANOW: All right. We're  
17 okay then.

18 VICE CHAIR THERNSTROM: Okay. Let's keep  
19 going.

20 COMMISSIONER GAZIANO: I move to strike  
21 the last sentence. The reason that I move to strike  
22 it in the --

23 VICE CHAIR THERNSTROM: Where are you now?

24 COMMISSIONER GAZIANO: Finding Seven, the  
25 last sentence. We struck "the factual predicate for

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1 this" earlier in Part A. I don't think it's  
2 necessary. If someone could try to convince me  
3 otherwise, but it implies somehow that the Department  
4 of Justice is derelict --

5 VICE CHAIR THERNSTROM: I want to --

6 COMMISSIONER GAZIANO: -- intervening.

7 VICE CHAIR THERNSTROM: I want to strike  
8 it, too. I second that.

9 COMMISSIONER GAZIANO: Okay.

10 VICE CHAIR THERNSTROM: Any discussion?  
11 Hearing none, let's have a vote on striking that last  
12 sentence. Do I need to read it again? "The  
13 Department of Justice (DOJ) has not evidenced a high  
14 level of activity on behalf of plaintiff's claims in  
15 RLUIPA cases other than to defend the constitution" --  
16 we are striking that sentence entirely. Can I have a  
17 vote on that? Commissioner Yaki, are you still here?

18 COMMISSIONER YAKI: Yes. After you finish,  
19 I'd just like to ask one question, make one statement  
20 before I take off.

21 VICE CHAIR THERNSTROM: Okay. Well, let's  
22 just vote on this. How are you voting on the striking  
23 of this sentence?

24 COMMISSIONER YAKI: I abstain.

25 VICE CHAIR THERNSTROM: You abstain.

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1 Anybody else abstaining or voting nay? Hearing no nay  
2 votes on this, it's Yaki abstaining, Gaziano,  
3 Kirsanow, Heriot, Taylor and myself -- oh, no, Taylor  
4 is gone. I'm sorry. Gaziano, Kirsanow, Heriot, and  
5 myself voting --

6 COMMISSIONER GAZIANO: And Reynolds.

7 VICE CHAIR THERNSTROM: Well, Jerry, can  
8 you vote on that? Okay. Fine.

9 CHAIRMAN REYNOLDS: Yes.

10 VICE CHAIR THERNSTROM: Okay. And  
11 Reynolds voting aye on this.

12 COMMISSIONER YAKI: May I have a point of  
13 personal privilege here?

14 VICE CHAIR THERNSTROM: Yes, sure.

15 COMMISSIONER YAKI: Now the Chair is back,  
16 Mr. Chair.

17 VICE CHAIR THERNSTROM: Yes, Jerry, you  
18 want to take this over entirely?

19 COMMISSIONER GAZIANO: No, Abby will hold  
20 onto the gavel. She'll finish.

21 VICE CHAIR THERNSTROM: Okay. Go on.

22 COMMISSIONER YAKI: Two questions. One, I  
23 just wanted to get a firm date on when these things  
24 are due. Is it going to be the 14<sup>th</sup>, is that what is  
25 being contemplated?

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1 VICE CHAIR THERNSTROM: Staff Director,  
2 you need to answer this.

3 STAFF DIRECTOR DANNENFELSER: Yes, October  
4 14<sup>th</sup>.

5 COMMISSIONER YAKI: Okay. Number one.  
6 And number two, I just wanted to state just another  
7 general concern, in the Finding section, the  
8 Recommendation section that I won't be around for. I  
9 have some deep concerns about the word, the term, the  
10 usage, and the implications of the radicalization with  
11 regard to religion, and specifically, I think it goes  
12 without saying that that standard is being applied to  
13 followers of the practice of Islam. I think we should  
14 be very careful about what we say with regard to that,  
15 that we should not take at face value some of these  
16 national security issues. We should be concerned  
17 about the fact that where you have -- in two countries  
18 where they have different takes on how you deal with  
19 the practice of Islam in prisons, that the country  
20 that has a much more hard line national security  
21 radicalization, anti-radicalization standard friend  
22 has much more problem with radicalization inside their  
23 prisons than does a country with a much more lenient  
24 free exercise approach, such as Great Britain. That,  
25 coupled with, as I said before, the problems with the

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1 PRLA that I will enunciate in my dissent is why, if I  
2 were here for the entire portion, I would be voting  
3 against the final report.

4 So thank you very much, and I'll talk to  
5 you guys -- I'll see you folks in a few weeks.

6 VICE CHAIR THERNSTROM: Thank you very  
7 much for making the time to come, Michael.

8 COMMISSIONER YAKI: Thank you.

9 VICE CHAIR THERNSTROM: Okay. We have  
10 voted on -- we need to vote on Finding Seven as a  
11 whole, as amended. Can I have a motion to do so?

12 COMMISSIONER HERIOT: So moved.

13 VICE CHAIR THERNSTROM: I'll second it.  
14 All in favor, or have we got a unanimous vote at this  
15 point with Commissioner Yaki having gone. If I don't  
16 hear any nay votes or any abstentions, that motion has  
17 been approved.

18 So we go on to Finding Eight. Can I have  
19 a motion that the Commission approve Finding Eight,  
20 which reads as follows: "Prisoners prevailed in a very  
21 small percentage of the 250 RLUIPA cases studied by  
22 the Commission, indicating that religious  
23 discrimination against prisoners as defined by RLUIPA  
24 is not a serious or substantial problem, and that the  
25 majority of complaints are considered to be either

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1 without merit by the courts, or that state prison  
2 authorities have a compelling interest in not  
3 accommodating a particular religious request.  
4 Plaintiffs may not be well served by representing  
5 themselves in the majority of cases, rather than  
6 seeking legal assistance from experienced  
7 professionals. The court decisions also show that no  
8 one's religion is more or less successful in pursuing  
9 RLUIPA litigation."

10 Can I have a motion to approve that?

11 CHAIRMAN REYNOLDS: So moved.

12 VICE CHAIR THERNSTROM: And I'll second  
13 it, so let's go on to discussion.

14 COMMISSIONER HERIOT: Yes, I've got deep  
15 problems with this one.

16 COMMISSIONER GAZIANO: So do I.

17 COMMISSIONER HERIOT: Yes. I think that  
18 first sentence, "Prisoners prevailed in only a small  
19 percentage of the 250 RLUIPA cases studied by the  
20 Commission", that's literally true. But as I've put  
21 in the footnote to the report, there's a huge bias in  
22 that database. You would expect to find an extremely  
23 large number of cases in which the defendant prevails,  
24 and very few where the plaintiff prevails. And it has  
25 absolutely no implications for the population of cases

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1 generally. So although the statement is literally  
2 true, I think it has -- it's very misleading, and I  
3 would strike it entirely.

4 The second sentence I think is also,  
5 "Plaintiffs may not be well served by" blah, blah,  
6 blah, blah, blah. The causation may go entirely the  
7 other way around. Attorneys are willing to represent  
8 prisoners when they have valid claims, and when a  
9 prisoner is pro se, it's because no attorney working  
10 for a faith-based organization or a prisoner's rights  
11 organization was willing to undertake the case on  
12 their behalf. So that may be why the pro se cases  
13 seldom succeed, although I don't know for a fact that  
14 they do seldom succeed, because, again, we don't know  
15 based on the database that we have in front of us.

16 VICE CHAIR THERNSTROM: Commissioner  
17 Heriot, if we put your two objections together, I  
18 think there's a very clear conclusion here, strike  
19 Finding Eight.

20 COMMISSIONER HERIOT: Except for that last  
21 sentence, which I wanted to make a separate finding,  
22 since it's very different, if we had anything on  
23 Eight. But that last sentence, if we put, "The  
24 reported court decisions seem to indicate that no one  
25 religion is more or less successful in pursuing RLUIPA

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1 litigation". I have -- you know, there's no  
2 systematic bias in the database on that issue, so that  
3 may well be something that we could generalize about,  
4 as long as we are careful not to say that it's  
5 certainly true. And the way it's written now, it only  
6 says it seems to indicate.

7 COMMISSIONER GAZIANO: Commissioner  
8 Heriot, see if you would accept a friendly amendment.  
9 I agree with all that, but I sort of studied your  
10 thoughts on the bias. I certainly know that bias  
11 exists, but if we had more time, I'd try to persuade  
12 you that maybe it doesn't go quite as far in one  
13 direction as you think, that the biases may go the  
14 other way.

15 I wouldn't object too much if we just have  
16 the last sentence, and your improvement in it is  
17 certainly something I would have suggested. But is it  
18 all right if we just -- whether it's a separate  
19 finding, or the same finding, just have something  
20 rather plain, that says, "Prisoners prevailed in only  
21 a small percentage of the 250 RLUIPA cases studied in  
22 the Lexis database", and then add some qualifier,  
23 acknowledging that that database may not be  
24 representative of all cases.

25 COMMISSIONER HERIOT: Well, it's not just

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1 that it may not be. I don't believe that it is.

2 VICE CHAIR THERNSTROM: It isn't. Yes.  
3 You know, Gail --

4 COMMISSIONER GAZIANO: Again, I don't want  
5 to -- okay. Then with that -- there's nothing like  
6 that that you all are comfortable -- I'd be  
7 comfortable with striking it all before the last  
8 sentence, as you have amended it.

9 VICE CHAIR THERNSTROM: Commissioner  
10 Heriot, this brings up a point I should have raised  
11 earlier when we were discussing Part A. You've got  
12 the question of data bias, you've got that point in a  
13 footnote. It really belongs in the text of Part A.  
14 It is an extremely important point.

15 COMMISSIONER GAZIANO: Well, anyone who, I  
16 think, wants to cite it, ought to be careful enough to  
17 read the footnote, so at this point, I'd slightly  
18 prefer we not reopen Part A.

19 VICE CHAIR THERNSTROM: All right. Okay.  
20 I am sorry not to have it in the text, and I should  
21 have raised that question. I didn't have it. I had  
22 it in my notes, but not -- but I'm staring at the  
23 script instead.

24 Okay. So then the suggestion here is that  
25 Finding Eight gets reduced to one sentence? Is that

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1 one sentence worth an entire separate finding?

2 COMMISSIONER GAZIANO: I think it's  
3 helpful, but I would just elaborate maybe if we're  
4 striking the first sentence, which I thought  
5 completely, say something, "The court decisions  
6 studied by the Commission, or the RLUIPA -- the  
7 reported RLUIPA cases studied by the Commission seem  
8 to indicate that no one religion is more or less  
9 successful in pursuing RLUIPA litigation."

10 COMMISSIONER HERIOT: Fine with me.

11 VICE CHAIR THERNSTROM: Okay. So Finding  
12 Eight gets reduced to one sentence, "The reported  
13 RLUIPA cases studied by the Commission seem to show  
14 that no one religion is more or less successful in  
15 pursuing", well, you don't want again RLUIPA. So take  
16 out the first one. "The reported cases studied by the  
17 Commission seem to show that no one religion is more  
18 or less successful in pursuing RLUIPA litigation."

19 COMMISSIONER HERIOT: Why not just get rid  
20 of "in pursuing". Successful, it's a --

21 VICE CHAIR THERNSTROM: Tell me again what  
22 you're proposing.

23 COMMISSIONER HERIOT: It seems odd to say  
24 that a court decision seems to -- that in pursuing  
25 RLUIPA litigation, that seems to self-referential

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1 there.

2 VICE CHAIR THERNSTROM: Right. Okay.

3 COMMISSIONER GAZIANO: But RLUIPA back in  
4 the first part, and end the sentence at "successful".

5 COMMISSIONER HERIOT: Yes. "The reported"  
6 -- I don't know. I give up.

7 COMMISSIONER GAZIANO: "The RLUIPA  
8 decisions -- the reported RLUIPA decisions studied by  
9 the Commission seem to indicate that no one religion  
10 is more or less successful."

11 VICE CHAIR THERNSTROM: No, you need  
12 something more.

13 COMMISSIONER HERIOT: No, we do need  
14 something. We just don't --

15 STAFF DIRECTOR DANNENFELSER: In RLUIPA,  
16 just take out "pursuing". "In RLUIPA litigation."  
17 Does that work?

18 VICE CHAIR THERNSTROM: Yes.

19 COMMISSIONER GAZIANO: That's fine.

20 VICE CHAIR THERNSTROM: That's fine. I  
21 don't want RLUIPA twice.

22 COMMISSIONER GAZIANO: Okay.

23 COMMISSIONER HERIOT: What --

24 VICE CHAIR THERNSTROM: I'm sorry. People  
25 are talking at once. Somebody -- whoever was talking

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1 just now, one of you say -- Gail, what did you just  
2 say?

3 COMMISSIONER HERIOT: I don't have an  
4 opinion at this point.

5 VICE CHAIR THERNSTROM: I don't understand  
6 why -- what's wrong with "pursuing", and get rid of  
7 the second RLUIPA.

8 COMMISSIONER HERIOT: That's fine with me.  
9 That's fine.

10 VICE CHAIR THERNSTROM: So it now reads --  
11 we're down to one sentence as Finding Eight. "The  
12 reported RLUIPA cases studied by the Commission seem  
13 to show that no one religion is more or less  
14 successful in pursuing litigation." That's the entire  
15 Finding Eight now.

16 Can we vote on that? Let's have a vote,  
17 the amended Finding Eight. Anybody voting --  
18 abstaining or voting nay on that? Hearing none,  
19 Finding Eight is approved, as amended, which reduces  
20 the entire finding down to one sentence. I don't  
21 think we need a separate vote, we've just had a vote  
22 on that.

23 Okay. We're on to the recommendations.  
24 Can I have a motion that the Commission approve  
25 Recommendation One, which reads as follows: "Given

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1 that the vast majority of incarcerated persons in the  
2 United States reside in state prisons, radicalization  
3 poses a greater potential threat in such prisons than  
4 in federal ones. State prison authorities should take  
5 national security considerations into account,  
6 carefully, even-handedly, and without relying on  
7 ethnic or religious stereotypes in reviewing all  
8 requests for religious accommodations. They should  
9 also factor these considerations into their vetting of  
10 religious contractors and volunteers, in general.  
11 Both prison security and national security interests  
12 would be better served if states were to adopt uniform  
13 vetting procedures for their religious contractors and  
14 volunteers. To the extent that prisons, either state  
15 or federal, experience severe shortages in chaplains  
16 of specific religions, e.g., Islam, prison officials  
17 should engage in vigorous efforts to try to alleviate  
18 such shortfalls without diminishing qualification  
19 requirements."

20 I will make a motion to adopt that.  
21 Anybody second it?

22 COMMISSIONER GAZIANO: Second.

23 VICE CHAIR THERNSTROM: Okay. Let's go on  
24 to discussion. Let me raise the first question here.  
25 On this last sentence, "Prison officials should engage

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1 in vigorous efforts", are we suggesting that they  
2 don't? "Prison officials should engage in vigorous  
3 efforts to try to alleviate such shortfalls."

4 COMMISSIONER GAZIANO: I think that's a  
5 fair point. And probably if it would be read that  
6 way, that should be amended.

7 VICE CHAIR THERNSTROM: I think it seems  
8 gratuitously insulting.

9 COMMISSIONER GAZIANO: May I begin with a  
10 modification that may partially serve Commissioner  
11 Yaki's concerns before he got off the call?

12 VICE CHAIR THERNSTROM: Yes.

13 COMMISSIONER GAZIANO: I think I'd like to  
14 substitute for the first sentence a few slight  
15 changes, one of which is that radicalization isn't  
16 defined. But, more importantly, it doesn't -- that  
17 first sentence doesn't logically follow. Just because  
18 the vast majority of prisoners are in state prisons  
19 doesn't mean that radicalization is more of a threat  
20 in those kind of prisons than in federal prisons.

21 VICE CHAIR THERNSTROM: Yes. That's  
22 right.

23 COMMISSIONER GAZIANO: In number, but  
24 moreover, radicalization may pose more or less of a  
25 threat in state or federal prisons depending on the

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1 type of crimes, and prison populations, and any number  
2 of factors. So this is my substitution, and then a few  
3 other changes will follow.

4 "Radicalization of prisoners in both state  
5 and federal prisons poses a serious concern", rather  
6 than threat, "poses a serious concern to fellow  
7 prisoners, prison officials, and others in the general  
8 population." So that would be my first sentence.

9 VICE CHAIR THERNSTROM: I'm sorry. Let me  
10 go over this again. "Radicalization of prisoners in  
11 both state and federal prisons", you want prisoners  
12 and prisons?

13 COMMISSIONER GAZIANO: Okay.  
14 "Radicalization of inmates", we'll say, if you prefer.

15 VICE CHAIR THERNSTROM: Yes.

16 COMMISSIONER GAZIANO: I was doing this on  
17 the fly while we were working on the last finding.

18 VICE CHAIR THERNSTROM: Okay. "Both state  
19 and federal prisons poses", go on. I've got the rest  
20 written down.

21 COMMISSIONER GAZIANO: "A serious concern  
22 to fellow prisoners, prison officials, and others in  
23 the general population." And I would assume that in  
24 both England and France, it at least poses concerns.

25 And then in the next sentence I would

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1 strike "state" since we've made it applicable to both  
2 state and federal prisons. "Prison authorities" --

3 VICE CHAIR THERNSTROM: Wait a minute.  
4 You've got -- I'm sorry. Hold on a second. Okay.  
5 "Prison authorities."

6 COMMISSIONER GAZIANO: Okay. That's all  
7 the change I'd make on that one. Two sentences later,  
8 "In general, both prison security and national  
9 security interests would be better served if prisons  
10 were to adopt uniform vetting procedures." I mean, to  
11 the extent that this finding is worth making, I think  
12 it's worth making as to both --

13 VICE CHAIR THERNSTROM: I'm sorry,  
14 Commissioner Gaziano. We've got the sentence here  
15 now. "Prison authorities should take national  
16 security considerations into account carefully" --  
17 blah, blah, blah -- "in reviewing all requests for  
18 religious accommodations." Then the sentence after  
19 that you are saying --

20 COMMISSIONER GAZIANO: I'm saying, the  
21 next sentence after that, that begins, "In general".

22 VICE CHAIR THERNSTROM: Yes. Okay.

23 COMMISSIONER GAZIANO: I just want to  
24 apply it to all prisons, rather than just the state.  
25 And then I would --

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1 VICE CHAIR THERNSTROM: Wait a minute. It  
2 is all prisons here. It's, "In general, both prison  
3 security and national security interests will be  
4 better served."

5 COMMISSIONER GAZIANO: I don't know -- I'm  
6 going to talk about whether others feel that we really  
7 need uniform standards.

8 VICE CHAIR THERNSTROM: But --

9 COMMISSIONER HERIOT: Let's wait for that.  
10 Let's go through your's, because I've got that on my  
11 list.

12 COMMISSIONER GAZIANO: All right.

13 VICE CHAIR THERNSTROM: Yes, but I'm  
14 sorry, I'm missing your change to the sentence, "In  
15 general, both prison" --

16 COMMISSIONER GAZIANO: Do you see it says  
17 somewhere in the middle, it says, "states".

18 COMMISSIONER HERIOT: Instead of "states",  
19 mid-sentence.

20 VICE CHAIR THERNSTROM: "Would be better  
21 served if states were to adopt uniform vetting" --

22 COMMISSIONER HERIOT: That would have to  
23 include the feds, as well, so prison authorities were  
24 to adopt.

25 COMMISSIONER GAZIANO: Yes. Cross out

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1 "states", and make it "prison authorities."

2 VICE CHAIR THERNSTROM: Okay. "Will adopt  
3 uniform vetting procedures for their religious  
4 contractors and volunteers."

5 Commissioner Heriot, you had something  
6 about that sentence.

7 COMMISSIONER HERIOT: You want to go to  
8 mine now? I just --

9 VICE CHAIR THERNSTROM: Only if it's on  
10 that sentence.

11 COMMISSIONER HERIOT: We can't -- mine is  
12 inconsistent with Todd's, so I think we should go  
13 through Todd's.

14 VICE CHAIR THERNSTROM: All right. Let's  
15 just go on through this with Todd.

16 COMMISSIONER GAZIANO: Well, that's all I  
17 wanted to raise, except I think I support your's,  
18 Madam Vice Chair, but I might yield to a friendly  
19 amendment from Gail. Maybe I missed --

20 VICE CHAIR THERNSTROM: No, I want to  
21 simply delete the last sentence. As I said, I think  
22 it's gratuitously insulting. Of course, if they've  
23 got severe shortages, we have to assume that they're  
24 engaging in efforts to alleviate those shortages.

25 STAFF DIRECTOR DANNENFELSER: This is the

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1 Staff Director, if I could just point something out,  
2 why there was a distinction between federal and state  
3 in that recommendation. The report on pages 36 and 37  
4 made a distinction that the Bureau of Prisons has  
5 taken several significant steps to limit the threat of  
6 radicalization, including increasing supervision  
7 within the federal system. And then it says on page  
8 37, "By contrast, all the state prisons surveyed  
9 responded that national security conditions had not  
10 been a factor in, or had no known impact on how they  
11 regulate the religious activities of inmates." So  
12 there was a distinction, in general, about how the  
13 federal prisons were dealing with national security  
14 considerations and the state prisons.

15 COMMISSIONER GAZIANO: I understand that,  
16 and the report is a little more precise in that. I'm  
17 fine to leave that as it is, but the finding, as  
18 written -- first of all, the first sentence is just  
19 illogical as written, but I think it's best for us in  
20 these recommendations that people are going to be  
21 paying attention to, regardless of whether one has  
22 done a better job or the other, saying they both ought  
23 to take this into account, and they ought to do so  
24 even-handedly, yadda ya.

25 COMMISSIONER HERIOT: Yes, I agree with

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1 that. There's no reason that we have to put in our  
2 recommendations the difference in their response --

3 COMMISSIONER GAZIANO: Also, we know  
4 there's some evidence in this. I don't know in a  
5 recommendation I'm prepared to say that everything the  
6 federal government has done is peachy, and that our  
7 information collecting on the states has been so  
8 severe, or so authoritative that we know no state has  
9 done that. I'd rather -- if we have some hunch of  
10 that, and we have it in the body of the report, fine.  
11 But maybe some state has done so. There's some --  
12 actually, there was something in the findings that  
13 suggests that states sort of take it into account, but  
14 they -- so the evidence is a little bit mixed on this.  
15 This is just a little bit more neutral.

16 COMMISSIONER HERIOT: Yes. Can I suggest  
17 that we adopt or not adopt Todd's recommendations to  
18 modify number one, and then go on to mine, because  
19 mine -- I would support Todd's if mine isn't adopted,  
20 and so we sort of need to do these one at a time.

21 VICE CHAIR THERNSTROM: That's fine. Let  
22 me read it now, then. Recommendation One would read,  
23 "Radicalization of the inmates in both state and  
24 federal prisons poses a serious concern to fellow  
25 prisoners, prison officials, and others in the general

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1 population. Prison authorities should take national  
2 security considerations into account carefully, even-  
3 handedly, and without relying on ethnic or religious  
4 stereotypes in reviewing all requests for religious  
5 accommodations. They should also factor these  
6 considerations into their vetting of religious  
7 contractors and volunteers. In general, both prison  
8 security and national security interests would be  
9 better served if prison authorities were to adopt  
10 uniform vetting procedures for their religious  
11 contractors and volunteers."

12 And, Commissioner Gaziano, I suggest that  
13 we end there, cut the last sentence. If you will  
14 accept that --

15 COMMISSIONER GAZIANO: I accept. I  
16 accept.

17 VICE CHAIR THERNSTROM: Okay. So then I  
18 have just read the Recommendation One, as amended, as  
19 Commission Gaziano proposes to amend. Let's have a  
20 vote on that, and then we will go on to Commissioner  
21 Heriot's further thoughts.

22 Can I have a motion to accept Commissioner  
23 Gaziano's proposed amendments?

24 COMMISSIONER GAZIANO: So moved.

25 VICE CHAIR THERNSTROM: And I will second

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1 it. So let's have a vote on that. Any abstentions,  
2 any opposition? Hearing none, those proposed  
3 amendments were unanimously accepted.

4 Now, Commissioner Heriot, you have a  
5 separate one.

6 COMMISSIONER HERIOT: Yes. I have one  
7 that I'm not really certain how I feel about this, but  
8 I get really uncomfortable with all the  
9 recommendations that Commissions all over the country,  
10 in every little corner of the country, about adopting  
11 uniform standards. I don't really have any belief  
12 that there ought to be uniform standards, as opposed  
13 to non-uniform standards, so I really don't endorse  
14 that part of it.

15 COMMISSIONER GAZIANO: Would Commissioner  
16 Heriot mind just dropping the word "uniform"? I kind  
17 of agree with that. That was sort of odd, but how  
18 about we just urge them to adopt vetting procedures?

19 COMMISSIONER HERIOT: That's fine. That  
20 would work fine. Let's just drop the word "uniform".  
21 That's my motion.

22 VICE CHAIR THERNSTROM: Second? No, wait  
23 a minute. Go back with me. Where are you --

24 COMMISSIONER HERIOT: I don't know how the  
25 sentence reads now, but that word "uniform" appears in

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1 there.

2 COMMISSIONER GAZIANO: This would be now  
3 the last sentence after we've dropped --

4 VICE CHAIR THERNSTROM: Yes. "In general,  
5 both prison security and national security interests  
6 would be better served if prison authorities were to  
7 adopt vetting procedures for their religious  
8 contractors and volunteers." If you take "uniform"  
9 out of it, it doesn't mean anything. I'm sure they  
10 have vetting procedures.

11 COMMISSIONER GAZIANO: Are you sure? I'm  
12 not. Why don't you say "vetting procedures to address  
13 these issues."

14 VICE CHAIR THERNSTROM: I'm sure they have  
15 vetting procedures.

16 COMMISSIONER GAZIANO: I'm not sure.

17 VICE CHAIR THERNSTROM: I can't believe  
18 they don't have vetting procedures. What do you  
19 think, they do it randomly?

20 COMMISSIONER GAZIANO: They may not vet  
21 for these issues.

22 COMMISSIONER HERIOT: It might not  
23 specifically include --

24 COMMISSIONER GAZIANO: Or whether they are  
25 certified Odinists, but they may not vet for whether

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1 the certified Odinists are enemies, radical enemies of  
2 the United States.

3 VICE CHAIR THERNSTROM: They have no  
4 procedures for -- no standards when they look at  
5 religious contractors and --

6 COMMISSIONER GAZIANO: On their checklist  
7 they may not be checking for whether these people are  
8 radicalizers. And we're just suggesting they ought to  
9 take their -- put that on their checklist. Maybe the  
10 Odinists, by the way, aren't the violent types, but it  
11 seemed to me in history the Norse, the historic Norse  
12 were, and so there's an Odinist guy, instead of just  
13 building long ships to row to Valhalla, they preach  
14 something else, I want to know.

15 VICE CHAIR THERNSTROM: I'm sorry. The  
16 point makes no sense to me.

17 COMMISSIONER HERIOT: I agree with that  
18 beyond this, this is not working. If we are going to  
19 suggest that they adopt standards, then we have to at  
20 least have some deferential language, just in case  
21 they haven't, then they should.

22 VICE CHAIR THERNSTROM: But, of course,  
23 they have, they've got some standards for deciding  
24 what contractors and volunteers are acceptable, and  
25 which ones are not.

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1 COMMISSIONER GAZIANO: You know, I  
2 wouldn't cry too much if we struck the sentence, but I  
3 think that it's helpful to just say that this ought to  
4 be one of the factors. I'm not confident that they're  
5 not just making sure that someone is a certified  
6 Odinist.

7 VICE CHAIR THERNSTROM: I want to strike  
8 the sentence, if we don't have "uniform" in there. So  
9 it was simply, "And they should also factor these  
10 considerations into their vetting of religious  
11 contractors and volunteers." End of recommendation.

12 COMMISSIONER GAZIANO: I would say -- if  
13 we're going to vote on it, I'm sorry. Are you moving  
14 to strike, or are we voting on your --

15 VICE CHAIR THERNSTROM: I'm moving to  
16 strike that sentence now. Otherwise, I don't see the  
17 point of the sentence.

18 COMMISSIONER GAZIANO: Okay. Fine. I  
19 agree.

20 VICE CHAIR THERNSTROM: All right. So I  
21 move that we strike that sentence. Somebody got --

22 COMMISSIONER HERIOT: Second.

23 VICE CHAIR THERNSTROM: You've seconded,  
24 in effect. Can we have a vote on it? Anybody opposed  
25 or abstaining? I don't hear any opposition or

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1 abstention, and, therefore, the recommendation now  
2 ends with the sentence, "They should also factor these  
3 considerations into their vetting or religious  
4 contractors and volunteers." And do I need a motion  
5 to now -- do we need to move to accept Recommendation  
6 One, as amended? I guess so.

7 COMMISSIONER HERIOT: So moved.

8 VICE CHAIR THERNSTROM: And I second it.  
9 All in favor?

10 COMMISSIONER HERIOT: Aye.

11 VICE CHAIR THERNSTROM: I'll do it the  
12 other way. I think there's a -- any abstentions or  
13 nay votes here? Hearing none, it is adopted. I'm  
14 sorry. I'm just staring at where we're going here.  
15 It is adopted, as amended.

16 Okay. Recommendation Two. Can I have a  
17 motion that the Commission approve Recommendation Two,  
18 which reads as follows: "Data regarding prisoners'  
19 claims of non-accommodation of their religious belief  
20 should be collected and categorized by DOJ in a more  
21 detailed and consistent manner. For example, although  
22 religious grievances will likely remain small in  
23 comparison to the total number of grievances filed in  
24 federal facilities, BOP should collect grievance data  
25 related to denials of religious items/literature and

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1 religious rulings/head-cover to provide a more  
2 thorough and accurate picture of the nature of the  
3 grievances filed in prisons."

4 By the way, I didn't object earlier  
5 because I thought I have to come up with some other  
6 language if I object, but I hate these slashes. I  
7 mean, it's bad writing, in my view.

8 Anyway, can I have a motion to -- well, I  
9 move that we accept Recommendation Two. Can I have a  
10 second? Second, anybody?

11 COMMISSIONER HERIOT: I'm against it.

12 VICE CHAIR THERNSTROM: You're against it.  
13 Does anybody --

14 COMMISSIONER GAZIANO: Okay. I'll second  
15 it. Let's discuss it.

16 COMMISSIONER HERIOT: Okay.

17 VICE CHAIR THERNSTROM: Okay. Let's have  
18 a discussion.

19 COMMISSIONER HERIOT: I just feel like we  
20 make recommendations like this as if collecting data  
21 is free, and it's not. It's a lot of effort to  
22 collect data. And I think one of our -- the basic  
23 feeling I get from this whole report is that we've  
24 covered this area, not perfectly, but we've discovered  
25 that things don't seem to be massively amiss, so I'm

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1 not certain that this is an area that I would want DOJ  
2 to assign somebody to work on. It's a lot of work to  
3 be in charge of that.

4 VICE CHAIR THERNSTROM: Anybody got a  
5 response to that? Don't all speak up at once. Are  
6 you moving that we simply strike Recommendation Two,  
7 Commissioner Heriot?

8 COMMISSIONER HERIOT: We could just go  
9 with a motion now and defeat it.

10 VICE CHAIR THERNSTROM: We could. Any  
11 further discussion? We'll take a vote on it.

12 COMMISSIONER HERIOT: Oh, by the way, if  
13 this doesn't get defeated, I will change my vote to  
14 abstain.

15 VICE CHAIR THERNSTROM: Well, I'm going to  
16 abstain on this.

17 COMMISSIONER HERIOT: Well, let's see what  
18 happens if people vote their conscience here, and then  
19 we can change votes.

20 VICE CHAIR THERNSTROM: You know, I don't  
21 -- I mean, I like data collected, categorized.

22 COMMISSIONER HERIOT: But you know that  
23 it's not free.

24 VICE CHAIR THERNSTROM: It's not free, but  
25 they collect a lot of data. They can collect some

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1 more. I think this is probably useful data.

2 COMMISSIONER HERIOT: Vote your conscience  
3 and let's see how it comes out. It's not like this is  
4 a --

5 VICE CHAIR THERNSTROM: All right. Okay.  
6 We have a motion on the table to accept Recommendation  
7 Two. All in favor?

8 COMMISSIONER HERIOT: You need to do a  
9 roll call.

10 VICE CHAIR THERNSTROM: I'll do a roll  
11 call, I was going to say. Commissioner Gaziano.

12 COMMISSIONER GAZIANO: Abstain.

13 VICE CHAIR THERNSTROM: You're abstaining.  
14 Okay. Commissioner Kirsanow, are you back?

15 COMMISSIONER GAZIANO: My first  
16 abstention, I think.

17 VICE CHAIR THERNSTROM: Pardon me?

18 COMMISSIONER GAZIANO: Maybe my first  
19 abstention on the Commission.

20 VICE CHAIR THERNSTROM: Yes. Okay. I  
21 can't remember. Commissioner Kirsanow, are you back  
22 or gone?

23 COMMISSIONER KIRSANOW: I'm back. Aye.

24 VICE CHAIR THERNSTROM: You're an aye.  
25 Commissioner Heriot?

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1 COMMISSIONER HERIOT: No.

2 VICE CHAIR THERNSTROM: Nay. Commissioner  
3 Yaki is gone. Commissioner Reynolds?

4 CHAIRMAN REYNOLDS: No.

5 VICE CHAIR THERNSTROM: Nay. And I'm a  
6 nay, too. No, wait a minute. Wait a minute here.

7 COMMISSIONER HERIOT: Or are you an aye?

8 VICE CHAIR THERNSTROM: I'm an aye. I'm  
9 sorry. Not thinking. I'm an aye.

10 COMMISSIONER HERIOT: We tied.

11 COMMISSIONER GAZIANO: Okay. What's the  
12 result of a tie?

13 COMMISSIONER HERIOT: Todd, would you like  
14 to weigh in, because you can control this vote.

15 COMMISSIONER GAZIANO: I don't want to.  
16 That's the point. I suppose I'll vote against the  
17 recommendation. I might vote for it if I knew what  
18 the cost was, but I -- in the absence of not knowing  
19 why that isn't collected, and not knowing the cost, I  
20 think I'd rather not make the recommendation. We can  
21 still argue it. Anyone can argue it based on a report  
22 that says DOJ doesn't collect this.

23 COMMISSIONER HERIOT: See, the things is,  
24 with a tie, it doesn't pass, so that means that the  
25 nos win. But you could swing it Todd, if you want to

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1 swing it.

2 COMMISSIONER GAZIANO: Well, what I say, I  
3 want to strike this. I forget what the posture of the  
4 motion is.

5 VICE CHAIR THERNSTROM: The motion is to  
6 accept it.

7 COMMISSIONER GAZIANO: Okay. Well, then I  
8 want to strike it, because I don't know enough to be  
9 recommending. I think that anyone else who cares  
10 about this can note in our Part A that DOJ doesn't  
11 collect this. I just --

12 COMMISSIONER HERIOT: Yes, but there's no  
13 motion to strike. You have to vote yes, or no, or  
14 abstain.

15 VICE CHAIR THERNSTROM: Yes. And we're --

16 COMMISSIONER HERIOT: And they're the  
17 same, whether it's a motion to strike or a motion to  
18 accept, but the motion is to accept it. So if you  
19 want to strike it --

20 COMMISSIONER GAZIANO: Then I vote no.

21 CHAIRMAN REYNOLDS: So that's 3-2 against  
22 the motion.

23 COMMISSIONER HERIOT: It's gone.

24 VICE CHAIR THERNSTROM: Right. So, in  
25 effect, we have eliminated -- not in effect. We have

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1 -- Recommendation Two is gone.

2 COMMISSIONER HERIOT: Yes.

3 VICE CHAIR THERNSTROM: Now, Commissioner  
4 Gaziano, if you were suggesting that what you want is  
5 this -- a discussion of this point in Part A, that's  
6 not going to happen.

7 COMMISSIONER GAZIANO: It is in Part A  
8 already.

9 VICE CHAIR THERNSTROM: All right.

10 COMMISSIONER GAZIANO: What is in Part A,  
11 and this is what tipped my mind after listening to the  
12 debate, it lists in Part A that DOJ doesn't collect  
13 this. Now, based on that, anyone else can then hammer  
14 away at DOJ, and say why not? And they might say  
15 well, that would cost \$6 billion and the financial  
16 crisis would occur that we're all trying to avert. I  
17 just don't think we need to recommend they do --

18 VICE CHAIR THERNSTROM: That's going to  
19 tip the balance.

20 COMMISSIONER HERIOT: Okay. Then we've  
21 taken care of it.

22 VICE CHAIR THERNSTROM: We had a vote.  
23 We're going on.

24 Recommendation Three. Can I have a motion  
25 that the Commission approve Recommendation --

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1 (Off the record.)

2 COURT REPORTER: Hello, this is the court  
3 reporter.

4 VICE CHAIR THERNSTROM: Yes?

5 COURT REPORTER: I need to interrupt. I  
6 got disconnected when the beginning of Recommendation  
7 Three started at 2:11:40, which I've got as exactly  
8 two minutes ago.

9 VICE CHAIR THERNSTROM: Okay. We are  
10 voting now on a amendment by Commissioner Gaziano that  
11 substitutes the last two hyphenated words, "even-  
12 handedly", substitutes for those words "in a fair and  
13 reasonable manner, so such burden should be spread  
14 across all faith groups in a fair and reasonable  
15 manner." And that is what we are -- that is the  
16 amendment we are now voting on. Any nay votes, any  
17 abstentions on that? Hearing none, that amendment is  
18 accepted.

19 Now, Commissioner Heriot?

20 COMMISSIONER HERIOT: My motion would be  
21 to make this the first recommendation rather than the  
22 second, because it's more representative of the  
23 general report, which really didn't have that much to  
24 do with national security, and so I think it looks  
25 better to have what is currently listed as number

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1 three as number one, and then have what is currently  
2 number one become number two, and then four becomes  
3 three, and so on.

4 VICE CHAIR THERNSTROM: Okay. I second  
5 that. Any discussion? Changing the order of the  
6 recommendations, so this becomes Recommendation One.

7 COMMISSIONER GAZIANO: I suggest unanimous  
8 consent for that.

9 VICE CHAIR THERNSTROM: Unanimous consent  
10 on this, if I hear no objections. All right. That is  
11 adopted. Any further discussion of Recommendation  
12 Three? Hearing none, we have to -- we need a motion  
13 to adopt Recommendation Three, as amended. I so move.

14 COMMISSIONER HERIOT: Second.

15 VICE CHAIR THERNSTROM: Unanimous consent  
16 on that. Anybody abstaining or objecting to that? We  
17 have unanimous on adopting what is now Recommendation  
18 One. I'm sorry.

19 Okay. Recommendation Three, can I have a  
20 motion that the Commission approve Recommendation  
21 Three, which reads as follows: "State prisons would  
22 benefit from looking at the measures federal prisons  
23 have enacted in trying to balance national security  
24 concerns with prisoners' free exercise rights. To  
25 that end, better communication and knowledge sharing

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1 between state, federal, and local correctional  
2 institutions would enhance such jurisdiction's  
3 efforts."

4 I move the adoption. Have I got a second?

5 COMMISSIONER GAZIANO: Second.

6 VICE CHAIR THERNSTROM: Okay. Discussion?

7 COMMISSIONER HERIOT: I think the  
8 "measures federal prisons have enacted", prisons don't  
9 enact. We're talking about policies federal prisons  
10 have adopted, I believe.

11 VICE CHAIR THERNSTROM: All right. Yes,  
12 we are, indeed.

13 COMMISSIONER HERIOT: I'm a little worried  
14 that I don't know exactly what those policies are.

15 VICE CHAIR THERNSTROM: Yes, I'm bothered  
16 by that, too.

17 COMMISSIONER HERIOT: Yes, I'm a lot  
18 worried about it. I don't know what they are.

19 COMMISSIONER GAZIANO: Sorry. We had  
20 testimony on it, but I found -- and I think there's  
21 some support in Part A, that -- I'm sorry. Which -- I  
22 had a momentary -- are you talking about the first  
23 sentence, or the second sentence?

24 VICE CHAIR THERNSTROM: We're now on the  
25 first sentence for recommendation, what's become

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1 Recommendation Three.

2 COMMISSIONER GAZIANO: Yes. Right. In  
3 the first sentence, I think there was some testimony  
4 that the federal officials have spent a lot of time,  
5 in part looking at how DOD -- first studying how DOD  
6 has done it in the kind of Iraqi War situation, how  
7 they've applied that. And there was some evidence  
8 that suggests they haven't done it.

9 I didn't want in another recommendation to  
10 be too heavy-handed in it, but I'm not sure that it  
11 hurts to say that they would benefit in looking at the  
12 measures.

13 COMMISSIONER HERIOT: Yes, I agree with  
14 that. Maybe I'm going overboard. I wasn't really  
15 focusing on the fact that it doesn't say adopt them,  
16 it just says look at them.

17 COMMISSIONER GAZIANO: Yes. I think --

18 COMMISSIONER HERIOT: Gail Heriot would  
19 benefit from looking at them, too, but I haven't.

20 COMMISSIONER GAZIANO: Yes. And I think  
21 there's some evidence that the federal government has  
22 just put a lot more effort into that, and I may be  
23 wrong, but some evidence --

24 COMMISSIONER HERIOT: There's definitely  
25 testimony on that.

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1 COMMISSIONER GAZIANO: The state is a  
2 little worried they hadn't.

3 VICE CHAIR THERNSTROM: Okay. So the  
4 Recommendation Three would now read, "State prisons  
5 would benefit from looking at policies federal prisons  
6 have adopted in trying to balance national security  
7 concerns with prisoners' free exercise rights", and  
8 nothing else would change.

9 COMMISSIONER GAZIANO: Except taking out  
10 the space there between rights and the period.

11 VICE CHAIR THERNSTROM: Yes. Okay.  
12 They're going to catch that kind of thing.

13 COMMISSIONER GAZIANO: I'm trying to be  
14 humorous at this point.

15 VICE CHAIR THERNSTROM: Pardon me?

16 COMMISSIONER GAZIANO: Nothing. Sorry.

17 VICE CHAIR THERNSTROM: Look, we're  
18 relying on the staff to --

19 COMMISSIONER GAZIANO: I know, I was  
20 joking, joking.

21 VICE CHAIR THERNSTROM: Okay.

22 COMMISSIONER GAZIANO: Move on.

23 VICE CHAIR THERNSTROM: Okay. Can I have  
24 -- we've got a motion to amend it. I don't even know  
25 whose amendment that is. Oh, it's Heriot's.

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1 COMMISSIONER HERIOT: That was mine, yes.

2 VICE CHAIR THERNSTROM: Yes. To amend it,  
3 so that it reads as I just read. Can we have  
4 unanimous consent on that, or have I got any  
5 objections, or any abstentions? Hearing none, we have  
6 unanimous consent. And do I need a separate motion to  
7 now approve Recommendation Three? I don't think so.  
8 We just had unanimous consent in adopting these  
9 changes. I'm moving on.

10 Recommendation Five. Can I have a motion  
11 that the Commission approve, it's now Recommendation  
12 Four, I'm sorry, Four, which reads as follows: "Though  
13 the number of meritorious cases will likely remain  
14 small, DOJ should assess whether more of its resources  
15 can be allocated to investigating the religious  
16 discrimination complaints it receives for possible  
17 RLUIPA violations, particularly in light of its  
18 vigorous enforcement of the statutes for land use  
19 provisions."

20 COMMISSIONER HERIOT: That's not what I  
21 have in front of me. I didn't hear the part about  
22 small. I thought that was taken out. If not, I'm in  
23 favor of taking it out. I'm basically against this  
24 one.

25 VICE CHAIR THERNSTROM: Wait a minute. We

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1 have got to have a vote. I move that we adopt this. I  
2 need a second on it. We'll get to discussion in a  
3 minute. Have I got a second on adopting this  
4 recommendation?

5 COMMISSIONER GAZIANO: Second, so that I  
6 can vote against in the end.

7 VICE CHAIR THERNSTROM: Four. Okay. Now,  
8 discussion. Commissioner Heriot?

9 COMMISSIONER HERIOT: What you -- I have a  
10 version that like is day later than that, that doesn't  
11 have anything --

12 VICE CHAIR THERNSTROM: I'm reading the  
13 script sent to me this morning.

14 COMMISSIONER HERIOT: Oh, okay. Well, at  
15 any rate, anything that says that there are a small  
16 number of cases has to come out, because that is not  
17 proven. What I think we can only say is that it's not  
18 an overwhelming number of cases, as I said before, not  
19 an unmanageable number, so that stuff should come out.  
20 But, moreover --

21 VICE CHAIR THERNSTROM: Why do we need  
22 that first phrase all together? Why can't we simply  
23 start with, "DOJ should assess whether" --

24 COMMISSIONER HERIOT: Yes, that's the  
25 version that I have in front of me, starts with, "DOJ

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1 should assess."

2 VICE CHAIR THERNSTROM: Fine.

3 COMMISSIONER HERIOT: And I'm not for it,  
4 because I don't think there's any real evidence that  
5 DOJ has not allocated its resources appropriately  
6 already. We probably should have inquired more  
7 closely into what they're doing for the land use  
8 cases, and why, in order to be able to come to an  
9 assessment as to whether or not they're overdoing the  
10 land use cases relative to the religion cases. But  
11 since the -- relative to the prison cases. But since  
12 the prison cases don't -- there doesn't seem to be  
13 anything gravely wrong here, I don't see why we should  
14 be recommending any reassessment on their part at all.  
15 It just seems like --

16 COMMISSIONER GAZIANO: That was my  
17 assessment. I don't think the connection logically  
18 fits, and there may be some evidence that some member  
19 of our staff thought existed for this, but we have to  
20 vote on it. And I don't remember it in the report  
21 itself, and that's what's going to be delivered to  
22 Congress. So I just think without more, I'm not  
23 comfortable joining this recommendation.

24 VICE CHAIR THERNSTROM: Well, not only  
25 that, we just eliminated the whole recommendation on

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1 the collection of data on prisoners' claims. If  
2 you're going to collect data, it's the more important  
3 one. Sorry.

4 Commissioner Heriot, make a --

5 COMMISSIONER HERIOT: We could defeat the  
6 motion. Let's just defeat the motion.

7 VICE CHAIR THERNSTROM: Let's just defeat  
8 the motion. Any other discussion on this motion for  
9 Recommendation Four? Okay. All in favor of  
10 approving, that is how the motion reads, all in favor  
11 of approving Recommendation Four?

12 COMMISSIONER HERIOT: Roll call.

13 VICE CHAIR THERNSTROM: Doing a roll call.  
14 Yes. Gaziano.

15 COMMISSIONER GAZIANO: No.

16 VICE CHAIR THERNSTROM: Kirsanow, you  
17 came. All right. You still here? You're here.

18 COMMISSIONER KIRSANOW: Abstain.

19 VICE CHAIR THERNSTROM: You're abstaining.  
20 Heriot is a no.

21 COMMISSIONER HERIOT: Wait. I'm allowed  
22 to vote. No.

23 VICE CHAIR THERNSTROM: Reynolds?

24 CHAIRMAN REYNOLDS: No.

25 VICE CHAIR THERNSTROM: No. And I'm a no.

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1 It is four nos, and one abstention, Kirsanow has an  
2 abstention. The Recommendation Five fails. If  
3 somebody is speaking and I'm supposed to hear, I can't  
4 hear. Okay. Did I just say Five? It's Four now,  
5 Recommendation Four fails.

6 So now we've just gotten rid of two  
7 recommendations, and Recommendation Six becomes Four.  
8 Can I have a motion that the Commission approve  
9 Recommendation Four, which reads as follows: "The PLRA  
10 helps maintain a balance between prisoners' rights and  
11 the interest of prison officials, and the courts, and  
12 minimize the number of frivolous lawsuits. Its  
13 provisions relating to exhaustion, the limitation on  
14 monetary awards absent physical injury and attorney  
15 fees" -- there should be a comma there, anyway --  
16 "should be preserved in their original form."

17 I move to accept this. I need a second,  
18 and then we'll have a discussion. Second?

19 COMMISSIONER HERIOT: Second.

20 VICE CHAIR THERNSTROM: Okay. Discussion.

21 COMMISSIONER HERIOT: I would add the word  
22 "probably" in the first sentence, just because I hate  
23 making assertions that don't have fudge words like  
24 that. You can't be absolutely sure, but I think --

25 VICE CHAIR THERNSTROM: That probably

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1 helped.

2 COMMISSIONER HERIOT: Yes. Now, I would  
3 have figured that -- well, I don't want to suggest  
4 amendments for you, Abby, but I would think that you'd  
5 be kind of concerned about this one, too, for the same  
6 reasons as before, as we were doing the unmanageable  
7 issue.

8 VICE CHAIR THERNSTROM: Yes.

9 COMMISSIONER HERIOT: "PRLA has probably  
10 helped maintain the level of litigation we see today."  
11 Isn't that what you did in the previous?

12 VICE CHAIR THERNSTROM: Yes. That is what  
13 I did in the previous one.

14 COMMISSIONER GAZIANO: But we can  
15 certainly vote for it, unless someone wants to -- vote  
16 for or against. I think I'm inclined to vote for it.

17 COMMISSIONER HERIOT: For it the way it  
18 is?

19 COMMISSIONER GAZIANO: Yes, unless someone  
20 wants to suggest an amendment that will get more folks  
21 on board. I'm -- we did have testimony on this, and I  
22 considered it both ways, and the arguments to change  
23 weren't persuasive to me. This is --

24 VICE CHAIR THERNSTROM: Commissioner  
25 Heriot, if you would put that -- just vote it up or

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1 down, but put that, instead of my having to make a  
2 separate motion, put that as part of your motion, will  
3 you be comfortable doing that? "The PLRA probably  
4 helps maintain the level of litigation we see today."

5 COMMISSIONER HERIOT: Yes, I'd be happy to  
6 leave it the way it is. I'm more concerned about  
7 making -- in the second sentence, instead of wording  
8 the way it is, just pointing out that there's no  
9 reason to provide religious liberty claims with a  
10 special exemption from the provisions of the Prison  
11 Litigation Reform Act.

12 COMMISSIONER GAZIANO: Why don't you  
13 scrawl out a sentence and read it to us, so that we  
14 can incorporate it.

15 COMMISSIONER HERIOT: For sentence one, or  
16 sentence two?

17 COMMISSIONER GAZIANO: Two.

18 COMMISSIONER HERIOT: "We see no reason to  
19 provide religious liberty claims with a special  
20 exception from its provisions relating to exhausting  
21 the limitation of monetary awards, absent a physical  
22 injury and attorneys fees."

23 VICE CHAIR THERNSTROM: All right. I'll  
24 have to write this out. "We see no reason" --

25 COMMISSIONER HERIOT: This is in my email

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1 message.

2 VICE CHAIR THERNSTROM: I don't have it in  
3 front of me.

4 COMMISSIONER HERIOT: Okay. Here it  
5 comes. "We see no reason to provide religious liberty  
6 claims with a special exemption from its provisions  
7 relating to exhaustion the limitation on monetary  
8 awards absent a physical injury and attorneys fees."

9 VICE CHAIR THERNSTROM: I'm just writing  
10 here.

11 COMMISSIONER HERIOT: Those would be my  
12 two proposals, add the word "probably", and change the  
13 second sentence. I won't propose the other thing. We  
14 can do that in a separate motion, if we want to, but I  
15 think I prefer it the way it is.

16 VICE CHAIR THERNSTROM: I'm sorry. So  
17 your second sentence goes, "We see no reason to  
18 provide religious liberty claims with a special  
19 exemption from" - and where do you go from there?

20 COMMISSIONER HERIOT: "Its", its refers  
21 back to the Prison Litigation Reform Act. "Its  
22 provision relating to exhaustion, the limitation on  
23 monetary award, absent" --

24 VICE CHAIR THERNSTROM: The rest is  
25 unchanged.

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1 COMMISSIONER HERIOT: Yes, that's right,  
2 except for the part, "or should be preserved in their  
3 present form". That's unneeded.

4 VICE CHAIR THERNSTROM: Right.

5 COMMISSIONER HERIOT: It just cuts off at  
6 the word "fees".

7 VICE CHAIR THERNSTROM: Right. Yes.  
8 Correct.

9 STAFF DIRECTOR DANNENFELSER: You have an  
10 apostrophe after attorneys, I believe.

11 COMMISSIONER HERIOT: Right. So it's  
12 plural possessive.

13 VICE CHAIR THERNSTROM: Right. Okay. So,  
14 Commissioner Heriot, I'm willing to give up -- to keep  
15 the beginning as written.

16 COMMISSIONER HERIOT: So we just add the  
17 word "probably" to the first sentence, plus you keep  
18 my second sentence.

19 VICE CHAIR THERNSTROM: Yes, yes, yes,  
20 yes. Well, "a balance". How about "the balance we  
21 see today"? Does anybody have a problem with that?  
22 Because you're suggesting here that there's some kind  
23 of correct balance.

24 COMMISSIONER HERIOT: I don't have any  
25 objection to that.

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1 VICE CHAIR THERNSTROM: Can you make it  
2 part of your motion then?

3 COMMISSIONER HERIOT: Yes. My point is  
4 simply that there's no reason to -- I'm not making --  
5 I don't have an opinion on the Prison Litigation  
6 Reform Act, specifically, but there's no reason to  
7 treat this area of the law differently from other  
8 areas of prison litigation.

9 VICE CHAIR THERNSTROM: I should take the  
10 --

11 COMMISSIONER HERIOT: So, "the balance we  
12 see today", is that what we're asking for?

13 VICE CHAIR THERNSTROM: Yes. "The PLRA  
14 has probably helped maintain the balance we see  
15 today between prisoners' rights and the interest of  
16 prison officials, and the courts in minimizing  
17 frivolous lawsuits." So we're not implying the  
18 balance is right or wrong, but it's --

19 COMMISSIONER HERIOT: But it's not special  
20 to this kind of case.

21 VICE CHAIR THERNSTROM: Yes, I know.  
22 Nevertheless, the former -- previous formulation  
23 suggests the balance -- we like the balance. I'm  
24 trying to make it more neutral.

25 COMMISSIONER HERIOT: That's fine.

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1 VICE CHAIR THERNSTROM: Then it goes on to  
2 say, "We see no reason to provide religious liberty  
3 claims with a special exemption from its provisions  
4 relating to exhaustion, a limitation on monetary  
5 awards absent physical injury, and attorneys fees."  
6 And I think we need a comma before absent, am I wrong  
7 there? Anybody got an opinion?

8 COMMISSIONER HERIOT: No, you are wrong.  
9 "Limitation on monetary awards absent physical  
10 injury."

11 VICE CHAIR THERNSTROM: You're right.  
12 You're right.

13 COMMISSIONER HERIOT: That's a concept by  
14 itself. We could put a comma after "injury", so that  
15 we make a list there.

16 VICE CHAIR THERNSTROM: Right. Yes.

17 COMMISSIONER HERIOT: Actually, no, it's a  
18 limitation --

19 VICE CHAIR THERNSTROM: No, you can't.

20 COMMISSIONER HERIOT: No, you can't.

21 VICE CHAIR THERNSTROM: You can't.

22 COMMISSIONER HERIOT: You can't. No comma  
23 there. It's right the way it is.

24 VICE CHAIR THERNSTROM: Okay. It's right  
25 the way it is. Okay. Are we prepared --

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1 COMMISSIONER HERIOT: Wait. No, let's go  
2 back, because then we need -- it should be "provisions  
3 relating to exhaustion and the limitations on monetary  
4 awards".

5 VICE CHAIR THERNSTROM: Yes, of course it  
6 should. Yes.

7 COMMISSIONER HERIOT: Okay. So delete  
8 that comma after exhaustion.

9 VICE CHAIR THERNSTROM: Yes, I just did.

10 COMMISSIONER HERIOT: Insert "and".

11 VICE CHAIR THERNSTROM: Yes.

12 COMMISSIONER HERIOT: And then make  
13 "limitations" plural.

14 VICE CHAIR THERNSTROM: Yes. Yes, I just  
15 did. I'm going to go back and read the whole thing  
16 once again. "The PLRA has probably helped maintain  
17 the balance we see today between prisoners' rights and  
18 the interest of prison officials, and the courts in  
19 minimizing the number of frivolous lawsuits. We see  
20 no reason to provide religious liberty to claims with  
21 special exemption from its provisions relating to  
22 exhaustion and the limitations on monetary awards  
23 absent physical injury and attorneys fees."

24 Any further discussion on this  
25 recommendation, which is now Recommendation Four?

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1 Hearing none, do we have unanimous consent, or are  
2 there any nays or abstentions on this? Hearing none,  
3 we have unanimous consent, and we don't need a  
4 separate motion, it seems to me once again. Accepting  
5 Recommendation Four, we just had one.

6 Recommendation Seven. Could I have a  
7 motion that the Commission approves Recommendation  
8 Seven, which reads as follows: "Prisoners' Rights  
9 Advocacy Organizations should undertake efforts to  
10 enhance the availability of professional legal  
11 representation perhaps through facilitating pro bono  
12 arrangements with attorneys at local firms for  
13 prisoners who believe their religious rights have been  
14 inappropriately infringed."

15 I move that we accept that. Have I got a  
16 second?

17 COMMISSIONER GAZIANO: Second.

18 VICE CHAIR THERNSTROM: Okay. So,  
19 discussion?

20 COMMISSIONER GAZIANO: Vote.

21 COMMISSIONER HERIOT: I'd like to add --

22 COMMISSIONER GAZIANO: Sorry.

23 COMMISSIONER HERIOT: Yes, I'd like to add  
24 at the very beginning, "Prison ministry and prisoners'  
25 rights advocacy organizations." Then if there are a

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1 lot of prison ministry organizations that would be  
2 happy to find a lawyer, they might not have lawyers on  
3 staff.

4 VICE CHAIR THERNSTROM: Yes, but aren't  
5 they, in effect, prisoners --

6 COMMISSIONER HERIOT: I don't think they  
7 would call themselves that, no.

8 VICE CHAIR THERNSTROM: Anybody else got  
9 any thought about that? I don't --

10 COMMISSIONER GAZIANO: Well, I actually do  
11 like the distinction, and I think that it certainly  
12 doesn't detract.

13 VICE CHAIR THERNSTROM: Okay. So we're  
14 now, I'm sorry. "Prison ministry" -- how did you word  
15 it?

16 COMMISSIONER HERIOT: I just have, "Prison  
17 ministry and prisoners' rights advocacy organizations  
18 should undertake", blah, blah, blah, blah, blah.

19 VICE CHAIR THERNSTROM: Yes. Yes. Okay.  
20 Commissioner Heriot has got the following amendment,  
21 the start of Recommendation Five becomes, "Prison  
22 ministry and prisoners" -- well, it's mouthful here  
23 now, Gail.

24 COMMISSIONER HERIOT: Yes, it's not  
25 pretty.

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1 VICE CHAIR THERNSTROM: Yes, it's not  
2 pretty. "And prisoners' rights advocacy organizations  
3 should undertake efforts to enhance the availability  
4 of professional legal representation, perhaps through  
5 facilitating pro bono arrangements with attorneys at  
6 local firms for prisoners who believe their religious  
7 rights have been inappropriately infringed."

8 Can we have a vote on --

9 COMMISSIONER HERIOT: Can we strike  
10 "inappropriately"? If it's infringed, it's  
11 inappropriate.

12 VICE CHAIR THERNSTROM: You are perfectly  
13 right. So in addition to the -- Commissioner Heriot's  
14 amendment is striking the word "inappropriately". So,  
15 "who believe their religious rights have been  
16 infringed." Can we have a vote on Commissioner  
17 Heriot's amended version of Recommendation Five? Any  
18 abstentions, any nay votes? We have unanimous  
19 consent, and by implication we have unanimous consent  
20 in adopting Recommendation Five.

21 Recommendation Six. Can I have a motion  
22 the Commission approve Recommendation Six, which reads  
23 as follows -- this is obviously renumbered as Six.  
24 "DOJ and State Departments of Correction should seek  
25 to develop more uniform categories for describing the

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1 religious affiliation of prisoners and should collect  
2 this data", it's got to be "these data more  
3 consistently across institutions. This will allow for  
4 more accurate review of efforts to accommodate the  
5 religious rights of prisoners. Additionally,  
6 collecting data on the entering and exiting" -- I'm  
7 sorry. This is also badly written. "Collecting data  
8 on the entering and exiting for professed faiths of  
9 inmates in both federal and state prisons will assist  
10 experts in assessing trends that have been -- that may  
11 have national security implications."

12           Whoever wants to amend this in any way,  
13 please include the change of "this data" to "these  
14 data". So, in any case, I move the adoption. Have I  
15 got a second?

16           COMMISSIONER KIRSANOW: Second.

17           VICE CHAIR THERNSTROM: And a vote.

18           COMMISSIONER HERIOT: Are we going to have  
19 a discussion?

20           VICE CHAIR THERNSTROM: Yes, right away.  
21 Have unanimous consent on that motion, and now we move  
22 on to discussion.

23           COMMISSIONER HERIOT: No, it's not  
24 unanimous consent. I'm against it.

25           VICE CHAIR THERNSTROM: You're against.

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1 COMMISSIONER HERIOT: I would vote no, but  
2 we haven't voted on it really. We just made the  
3 motion and seconded it. And now I want to argue --

4 VICE CHAIR THERNSTROM: No, we -- this is  
5 a question of simply -- I mean, our practice so far,  
6 Commissioner Heriot, has been to vote for it and then  
7 have a discussion.

8 COMMISSIONER HERIOT: No, that hasn't been  
9 our practice, and that wouldn't be --

10 VICE CHAIR THERNSTROM: All right. All  
11 right.

12 COMMISSIONER HERIOT: -- permitted.

13 VICE CHAIR THERNSTROM: Okay. All right.

14 COMMISSIONER HERIOT: All you've got is a  
15 motion to adopt this. I want to argue against it.  
16 It's hard for me as a full employment theology grad  
17 student, how is anybody ever going to really go about  
18 this task of categorizing religions? That's really  
19 tricky stuff. And I think the better part of valor  
20 here is to like not do it.

21 VICE CHAIR THERNSTROM: Well, it goes to  
22 my disclaimer at the very beginning of the report that  
23 has been adopted.

24 COMMISSIONER HERIOT: Yes, but this is --  
25 I don't think this can be done, so I don't think that

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1 anybody should try it. Imagine being the poor sot  
2 who's given the assignment of categorizing religion.

3 VICE CHAIR THERNSTROM: I'm in agreement  
4 with that. I'm going to vote no against the adoption.  
5 Further discussion on this? Are we ready to vote on  
6 whether to --

7 COMMISSIONER KIRSANOW: Yes.

8 VICE CHAIR THERNSTROM: Yes. Okay. So the  
9 motion is to approve Recommendation Six. Let me do a  
10 roll call. Gaziano.

11 COMMISSIONER GAZIANO: No.

12 VICE CHAIR THERNSTROM: Kirsanow.

13 COMMISSIONER GAZIANO: Not on the -- oh,  
14 I'm sorry. I thought he got off.

15 VICE CHAIR THERNSTROM: Are you there?  
16 Seems to be not. Heriot?

17 COMMISSIONER HERIOT: No.

18 VICE CHAIR THERNSTROM: No. Reynolds?

19 CHAIRMAN REYNOLDS: No.

20 VICE CHAIR THERNSTROM: No. And I'm a no  
21 on this, too. With unanimous, in a unanimous voice  
22 this has been defeated. So Recommendation Eight is  
23 defeated.

24 COMMISSIONER GAZIANO: I move that we  
25 adopt all the Findings and Recommendations, if that is

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1 still necessary, as the previous vote corrected, and  
2 we do all the things we need to do to move this to the  
3 next stage.

4 VICE CHAIR THERNSTROM: Let's have a  
5 motion whether or not it's necessary.

6 STAFF DIRECTOR DANNENFELSER: Is  
7 Commissioner Kirsanow on the phone there?

8 VICE CHAIR THERNSTROM: No.

9 COMMISSIONER KIRSANOW: I'm back. I just  
10 was on another line.

11 VICE CHAIR THERNSTROM: Oh, okay.

12 COMMISSIONER HERIOT: Let's have him vote  
13 on this, because otherwise we don't have a quorum.

14 VICE CHAIR THERNSTROM: Everybody has  
15 voted no in accepting --

16 COMMISSIONER KIRSANOW: I vote no on Six.

17 STAFF DIRECTOR DANNENFELSER: Okay.  
18 Unanimous.

19 COMMISSIONER HERIOT: Swell.

20 VICE CHAIR THERNSTROM: Unanimous.

21 COMMISSIONER GAZIANO: Other motions,  
22 unanimous consent motion, so that the absence of an  
23 objection will prevail in case someone has to get off  
24 momentarily.

25 VICE CHAIR THERNSTROM: Okay. Anyway,

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1 somebody make a motion on adopting the package as it  
2 exists.

3 COMMISSIONER GAZIANO: I move that we  
4 adopt the package, Part A and B, as amended, and that  
5 we do all those nice things that are necessary to move  
6 it to the next stage.

7 COMMISSIONER HERIOT: Second.

8 VICE CHAIR THERNSTROM: Any discussion?  
9 All right. I'll do a roll call once again. Gaziano.

10 COMMISSIONER GAZIANO: Aye.

11 VICE CHAIR THERNSTROM: Kirsanow?

12 COMMISSIONER KIRSANOW: Aye.

13 VICE CHAIR THERNSTROM: Heriot?

14 COMMISSIONER HERIOT: Aye.

15 VICE CHAIR THERNSTROM: Reynolds?

16 CHAIRMAN REYNOLDS: Aye.

17 VICE CHAIR THERNSTROM: And I vote aye, so  
18 we have unanimous consent.

19 COMMISSIONER HERIOT: Can I ask a  
20 question?

21 VICE CHAIR THERNSTROM: Yes.

22 COMMISSIONER HERIOT: Is there any way  
23 that we can have this conveyed even in this form today  
24 to Congress and the White House, so that we will have  
25 fulfilled our obligations under the law? Something

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1 that says the Commissioner statements are to follow.

2 COMMISSIONER GAZIANO: Commissioner  
3 Kirsanow's email that quoted the statute suggested to  
4 me that -- I don't read that as necessary. It's that  
5 we have to adopt, it doesn't say we have to transmit  
6 it by year end.

7 COMMISSIONER HERIOT: Is that right? When  
8 did that message come in? Can I --

9 COMMISSIONER GAZIANO: Pete just -- do you  
10 have that handy, what our staff --

11 VICE CHAIR THERNSTROM: Well, wait a  
12 minute. Let's just get -- the Staff Director has to  
13 have something to say on this. We don't need to start  
14 searching for emails here.

15 COMMISSIONER GAZIANO: Well, if we could  
16 just read the statute, we could interpret it  
17 ourselves.

18 VICE CHAIR THERNSTROM: Well --

19 COMMISSIONER HERIOT: Yes, I would prefer  
20 it.

21 VICE CHAIR THERNSTROM: Commissioners?

22 STAFF DIRECTOR DANNENFLESER: The statute  
23 says, "Annual report, the Commission shall submit to  
24 the President and Congress at least one report  
25 annually that monitors federal civil rights

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1 enforcement efforts in the United States."

2 COMMISSIONER HERIOT: Okay. The word is  
3 "submit".

4 STAFF DIRECTOR DANNENFELSER: Oh, I --

5 COMMISSIONER HERIOT: And the word  
6 "annually." What counts as annually?

7 COMMISSIONER GAZIANO: Right. I was going  
8 to say, does it say from fiscal year to fiscal year?

9 COMMISSIONER KIRSANOW: No, it does not  
10 say that, neither does the CFR.

11 COMMISSIONER HERIOT: Okay. Then we're  
12 fine.

13 COMMISSIONER KIRSANOW: But it has been  
14 taken in the past to mean the fiscal year. That's  
15 been the practice.

16 COMMISSIONER GAZIANO: Exactly. And  
17 that's a great practice, and we will substantially  
18 comply with that practice.

19 COMMISSIONER HERIOT: Yes. We're fine.  
20 We're fine. I withdraw my question.

21 VICE CHAIR THERNSTROM: Okay. We are  
22 going on to the 2009 briefing --

23 COMMISSIONER GAZIANO: Could I just get  
24 clarification, since I tuned out an earlier unpleasant  
25 discussion. When -- two things. First of all, when

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1 is our ability to provide a defense and concurrences.

2 VICE CHAIR THERNSTROM: The report --

3 COMMISSIONER GAZIANO: And I move at this  
4 point that we be given an opportunity to view other  
5 Commissioners' dissents and concurrences, and be given  
6 an opportunity --

7 COMMISSIONER HERIOT: And to respond.

8 COMMISSIONER GAZIANO: -- to disagree,  
9 very briefly though it may be.

10 COMMISSIONER HERIOT: Yes, I think that's  
11 really crucial to the fairness of this procedure. We  
12 have to be able to respond to each other.

13 VICE CHAIR THERNSTROM: That is a -- if  
14 the Staff Director would come in on this, I would  
15 appreciate it.

16 COMMISSIONER GAZIANO: We have a  
17 Commissioner who has told us he's going to file a  
18 dissent.

19 VICE CHAIR THERNSTROM: I understand that.  
20 Commissioner --

21 COMMISSIONER GAZIANO: Just keeping the  
22 Chairman up-to-date.

23 VICE CHAIR THERNSTROM: Yes. Chairman  
24 Reynolds, will you come on this? It seems to me this  
25 requires -- this would be a change in our procedures,

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1 that it would have to be a motion that requires  
2 discussion.

3 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
4 I just walked into the room. Could you briefly --

5 COMMISSIONER GAZIANO: I moved, just to  
6 bring up -- there's one -- Commissioner Yaki promised  
7 us he would file a dissent. I move that all  
8 Commissioners have an opportunity to look at each  
9 other's Commissions in defense, and have a brief  
10 period of maybe five days to comment on -- to either  
11 try to persuade the Commissioners to change their  
12 concurrences or dissents, or comment themselves on it.

13 COMMISSIONER HERIOT: Seven days. You've  
14 got to have a weekend in there. These are part-time  
15 jobs.

16 COMMISSIONER GAZIANO: That's fine. Seven  
17 days then. And if that requires us to amend the AI  
18 later to reflect our vote, so be it, but I want to  
19 vote on my motion today.

20 COMMISSIONER HERIOT: I second that. I  
21 think fundamental fairness requires that we have to  
22 have --

23 VICE CHAIR THERNSTROM: Let's have a  
24 discussion of this. The first place, I don't want a  
25 retroactive AI. I mean, this is not --

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1 COMMISSIONER HERIOT: It's not  
2 retroactive. It's for this one.

3 VICE CHAIR THERNSTROM: Well, wait a  
4 minute. This is a substantial change in existing --

5 COMMISSIONER HERIOT: No, nobody is going  
6 to be able to make a fairness argument saying that I  
7 deserve the opportunity to make accusations that are  
8 not responded to.

9 VICE CHAIR THERNSTROM: We have never --

10 COMMISSIONER HERIOT: You know, that's  
11 absurd.

12 VICE CHAIR THERNSTROM: -- had a process  
13 in place whereby people saw dissents or concurrences,  
14 and had an opportunity to respond to them.

15 COMMISSIONER HERIOT: Every other  
16 organization of our type does.

17 VICE CHAIR THERNSTROM: I don't care what  
18 every other organization --

19 COMMISSIONER HERIOT: Because it's unfair  
20 not to.

21 VICE CHAIR THERNSTROM: I want the Chair  
22 to come in on this.

23 CHAIRMAN REYNOLDS: This appears to be a  
24 deviation from what we've done in the past.

25 VICE CHAIR THERNSTROM: Yes.

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1 CHAIRMAN REYNOLDS: I know that at least  
2 one Commissioner, probably more than one Commissioner,  
3 has suggested that we need to amend the process so  
4 that --

5 COMMISSIONER HERIOT: Actually, it's not a  
6 deviation from what we did in the law school class,  
7 Jerry.

8 CHAIRMAN REYNOLDS: The law school class?

9 COMMISSIONER HERIOT: The law school  
10 affirmative action report. This is what we did with  
11 that. Remember, he was libeling Ken Marcus. And on  
12 an ad hoc basis we allowed a period for reply.

13 COMMISSIONER GAZIANO: He also raised some  
14 other very strange questions about our process, and I  
15 just want an opportunity, so that he -- that every  
16 Commissioner knows that other Commissioners will have  
17 an opportunity to respond. That may restrain certain  
18 Commissioners from trying to sandbag other said  
19 Commissioners, or gives us a chance to respond. But  
20 this is -- whatever the position of the Commission  
21 before, if it deviates from what I'm asking, I think  
22 we should change that.

23 VICE CHAIR THERNSTROM: Look, that is a  
24 discussion about altering our AIs. There is nothing  
25 unique about this report that requires --

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1                   COMMISSIONER GAZIANO: Right now I'm  
2 saying I want it for this statutory report. If that  
3 is a modification of AI, it's only a modification for  
4 this report. I will then re-urge that we have that  
5 discussion further. I just want to clarify that I  
6 think that this is appropriate, whether or not it is a  
7 modification of an AI, or not.

8                   CHAIRMAN REYNOLDS: And I think that's the  
9 heart of a disagreement. In terms of past practice, I  
10 think that Abby is right.

11                   COMMISSIONER HERIOT: I guarantee you, I  
12 responded.

13                   VICE CHAIR THERNSTROM: I'm sorry. We  
14 have had in the past a vote on this.

15                   CHAIRMAN REYNOLDS: Gail, assuming that  
16 you're right, I still believe that past practice,  
17 looking at how we've operated in the past, taking into  
18 account the exception that you just put on the table,  
19 I think that we have not allowed folks to respond to  
20 dissent. And it's not -- I don't think that the issue  
21 has never -- I don't believe the issue has ever been  
22 squarely joined.

23                   COMMISSIONER HERIOT: I think it violates  
24 fundamental fairness, particularly to, in the case of  
25 Commissioners who make quite outrageous accusations.

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1 CHAIRMAN REYNOLDS: I agree with you,  
2 Gail. However, we do have some procedural issues to  
3 deal with. Right now, Yaki and Melendez are not on  
4 the line, and it seems to me that if we're going to do  
5 something like this, procedural fairness would require  
6 a full discussion of all the Commissioners.

7 VICE CHAIR THERNSTROM: Absolutely. I  
8 really feel very strongly about that.

9 COMMISSIONER GAZIANO: Well --

10 COMMISSIONER HERIOT: I feel very strongly  
11 in the other direction.

12 COMMISSIONER GAZIANO: That's right. And  
13 I'm just wondering if we can hold the permanent  
14 changeover for another time, but it is not -- we  
15 didn't keep Commissioner Melendez from joining the  
16 call. And I don't see on what grounds --

17 VICE CHAIR THERNSTROM: It's irrelevant.  
18 It's irrelevant. The fact is that if we do that, then  
19 Yaki is going to come back, number one.

20 COMMISSIONER HERIOT: And say nobody  
21 should be allowed to respond to me? I mean, that's  
22 just silly.

23 VICE CHAIR THERNSTROM: Wait a minute.  
24 Hold a minute. Commissioner Yaki is, one, going to  
25 complain about procedure. But, two, he's going to say

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1 fine, I want to respond to their response. This is a  
2 major procedural change that we need to discuss as a  
3 change in our AIs, and we need to discuss it with the  
4 two Democratic appointees with us.

5 COMMISSIONER HERIOT: Well, we're not  
6 talking about changing the AIs at this point, just  
7 this particular one.

8 VICE CHAIR THERNSTROM: You can't make  
9 exceptions.

10 COMMISSIONER HERIOT: We did already.

11 VICE CHAIR THERNSTROM: Gail, I'm not sure  
12 you're correct in your description of that. But, in  
13 any case, as the Chair just said -- I mean, there's  
14 nothing special about this report that suddenly when  
15 we know Yaki is going to write a dissent, as he has  
16 done with past reports, we should suddenly say all  
17 right, if you're going to write a dissent, we have to  
18 have a chance to respond.

19 COMMISSIONER GAZIANO: I will quote my  
20 hero, "Trust, but verify." We ought to amend for this  
21 report. We can discuss it later.

22 VICE CHAIR THERNSTROM: You can't just  
23 amend it. It is a procedural travesty.

24 CHAIRMAN REYNOLDS: The issue was not  
25 placed on the agenda, no one had notice that we were

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1 going down this road, at least not officially. And  
2 the issue doesn't turn on whether Yaki and Melendez  
3 are present, it seems in the final analysis it turns  
4 on whether we notice this issue up properly.

5 COMMISSIONER GAZIANO: I don't -- Mr.  
6 Chairman, I think it's certainly subsumed in approving  
7 the report. If you really don't want to vote for it,  
8 I understand, for the reasons you stated, but I think  
9 it is not fair to us to say that it's not subsumed in  
10 approving a report of this type.

11 VICE CHAIR THERNSTROM: But it has never  
12 been a part of the approval process. I mean, we have  
13 no Democrat on the phone, and it does -- it is a  
14 substantial change in our very longstanding procedure.  
15 And, as a matter of fact, this whole issue was  
16 discussed when I was on the Commission in the early  
17 years, and it was decided by the Commission we could  
18 not have an endless going around and around --

19 COMMISSIONER HERIOT: That's not the --

20 COMMISSIONER GAZIANO: But I don't really  
21 want to delay this, but can we keep things open until  
22 our next meeting?

23 COMMISSIONER HERIOT: Yes. In that case,  
24 I would ask that the --

25 VICE CHAIR THERNSTROM: No, we can't.

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1 This report has to go in.

2 CHAIRMAN REYNOLDS: We have to vote on the  
3 report.

4 VICE CHAIR THERNSTROM: We have to vote on  
5 the report.

6 COMMISSIONER GAZIANO: We voted on the  
7 report.

8 COMMISSIONER HERIOT: We did vote.

9 COMMISSIONER GAZIANO: Can we keep open at  
10 this time, we are voting to keep open the period of  
11 time to file dissents and concurrences, or the - we're  
12 keeping open the opportunity to respond to each  
13 other's concurrences or dissents until after our next  
14 meeting.

15 VICE CHAIR THERNSTROM: By the way, I will  
16 not be at the next meeting. No, we can't do that.  
17 This report has got to be out the door. Hold on.

18 COMMISSIONER HERIOT: Well, then I would  
19 call the question on the motion.

20 VICE CHAIR THERNSTROM: I'm going to call  
21 the question on this.

22 COMMISSIONER HERIOT: This is not the end  
23 of this issue.

24 COMMISSIONER GAZIANO: Just one question,  
25 again, why -- Mr. Chairman, why can't we at least keep

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1 this response to -- what is the date that concurrences  
2 and dissents are going to be allowed?

3 VICE CHAIR THERNSTROM: Until the 14<sup>th</sup> of  
4 October.

5 COMMISSIONER GAZIANO: Okay. Can we keep  
6 open until October 17 whether we can respond to each  
7 other's? We might then pass on whether we really need  
8 to respond, but at least note in our record today that  
9 we're keeping that open as a possibility.

10 VICE CHAIR THERNSTROM: All right.  
11 Commissioner Gaziano, we know there is going to be a  
12 dissent coming in.

13 COMMISSIONER GAZIANO: Exactly. We're  
14 leaving open the possibility we might be able to  
15 respond to it.

16 CHAIRMAN REYNOLDS: So, essentially, this  
17 vote that we're about to take, you want to postpone.

18 COMMISSIONER GAZIANO: No. I want there  
19 to be a -- if you will agree, I will pose a different  
20 motion. The motion is, if you will agree, that we  
21 leave open the possibility, no one can say laches to  
22 me, we leave open the possibility that we might be  
23 able to respond to each other's concurrences and  
24 dissents until after we debate this issue at our next  
25 meeting.

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1 CHAIRMAN REYNOLDS: Okay. And depending  
2 on the --

3 COMMISSIONER GAZIANO: Depending on the  
4 dissents and concurrences, it may be moot.

5 VICE CHAIR THERNSTROM: Well, wait. If we  
6 are holding this report --

7 CHAIRMAN REYNOLDS: And you would ask that  
8 the new rule, assuming that it passes, be applied  
9 retroactively.

10 COMMISSIONER GAZIANO: I'm saying that it  
11 won't be retroactive, because we have held this issue  
12 open with regard to this report.

13 COMMISSIONER HERIOT: I note there is no  
14 rule that says we don't do this. The rule just  
15 doesn't address it.

16 VICE CHAIR THERNSTROM: I'm sorry. There  
17 was, before you got on the Commission, a vote on this  
18 matter. There was a decision not to allow responses  
19 to dissents --

20 COMMISSIONER GAZIANO: It's unclear to me  
21 whether that was just a discussion and a vote, but if  
22 it's not in our AI, we ought to --

23 CHAIRMAN REYNOLDS: Hold on. How about  
24 this? We have a dispute over the fact, let's take the  
25 time between now and the next time we meet to -- our

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1 next business meeting to nail down the facts, what  
2 does the AI say, what have we voted on in the past?

3 COMMISSIONER HERIOT: Okay.

4 CHAIRMAN REYNOLDS: Just hold the issue in  
5 abeyance until then.

6 COMMISSIONER HERIOT: Yes. Todd could  
7 withdraw his motion until then.

8 COMMISSIONER GAZIANO: But will it --  
9 we're going to hold open the concurrences and  
10 dissents -- by the way, even if the AIs are clear that  
11 this is now verboten, I still want to move that we be  
12 able to comment on each other's dissents and  
13 concurrences for this report.

14 VICE CHAIR THERNSTROM: I don't understand  
15 why we had a teleconference meeting today, which  
16 nobody wants to come to these teleconference meetings.  
17 We want to discuss in person these reports, why we did  
18 this, except for the fact that we needed to get this  
19 report out the door. Now you're suggesting this  
20 report is not going to go out the door until after the  
21 next Commission meeting. And, by the way, this is an  
22 issue I care about a lot, and I will not be at the  
23 next Commission meeting. That aside, you're now  
24 holding the report --

25 CHAIRMAN REYNOLDS: Abby, the report can't

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1 be circulated until we get the dissents and  
2 concurrences.

3 VICE CHAIR THERNSTROM: Well, that's  
4 October 14<sup>th</sup>.

5 CHAIRMAN REYNOLDS: Right. The only thing  
6 that we intended to do was to vote on the report today  
7 with the understanding that the document wouldn't be  
8 circulated until after we receive dissents and  
9 concurrences.

10 COMMISSIONER GAZIANO: Actually, that's  
11 slowing things up by maybe three days, but only three  
12 days. And three days for, I think, an important  
13 reason. If you really want to rush things along, then  
14 I hope you would support my motion to allow seven days  
15 to look at each other's concurrences and dissents.

16 VICE CHAIR THERNSTROM: It's not three  
17 days, because at the point at which they come in,  
18 which is supposed to be the 14<sup>th</sup>, then people need time  
19 to read them, and write responses, if indeed responses  
20 are going to be allowed.

21 CHAIRMAN REYNOLDS: Okay, folks, I'm going  
22 to have to get off the phone.

23 COMMISSIONER HERIOT: We need a quorum,  
24 Jerry. We need to vote in --

25 CHAIRMAN REYNOLDS: I understand.

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1 COMMISSIONER HERIOT: We need the other  
2 motion on the agenda. Let's just go to that really  
3 quickly, to adopt the concept paper.

4 CHAIRMAN REYNOLDS: Okay.

5 VICE CHAIR THERNSTROM: I have a proposal  
6 on the concept, on the topic. I have a preference.

7 STAFF DIRECTOR DANNENFELSER: Have we  
8 completed the Statutory Report, the final vote on it?

9 VICE CHAIR THERNSTROM: Yes, we've  
10 completed it.

11 COMMISSIONER HERIOT: Yes, we're going on  
12 to English Language.

13 VICE CHAIR THERNSTROM: We're going on to  
14 English Language.

## 15 II. PROGRAM PLANNING

### 16 FY 2009 BRIEFING TOPIC; EMPLOYERS' RIGHTS TO 17 SPECIFY ENGLISH AS THE LANGUAGE OF THE WORKPLACE

18 VICE CHAIR THERNSTROM: We could avoid a  
19 whole debate on the English language concept paper if  
20 we -- if anybody else was interested in doing what I  
21 would like to do, which is given the financial crisis  
22 we're living in, to substitute the Community  
23 Reinvestment Act as the topic instead for the next  
24 briefing.

25 COMMISSIONER GAZIANO: With respect, I've

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1 been sort of leading part of the research on that, and  
2 I don't think we're quite there yet to vote on it. I  
3 don't know if other people -- that wasn't on the  
4 agenda either, and I don't think other people have  
5 even looked at the draft concept paper. But the  
6 draft, as amended by Staff, actually took out some  
7 things that I wanted to propose to the rest of you, so  
8 there are two problems, I would suggest, with that.

9 COMMISSIONER HERIOT: I haven't even seen  
10 that.

11 VICE CHAIR THERNSTROM: No, I'm just  
12 suggesting in principle that we postpone the English  
13 as the language of the workplace topic, and try  
14 instead to go for the Community Reinvestment Act as  
15 the next topic.

16 COMMISSIONER HERIOT: That was the issue  
17 we decided last month, to go ahead with the briefing  
18 topic. The issue now is just whether to adopt the  
19 concept paper. I move we adopt the concept paper.

20 COMMISSIONER KIRSANOW: I second it.

21 VICE CHAIR THERNSTROM: Is the Chair still  
22 with us?

23 CHAIRMAN REYNOLDS: Yes.

24 VICE CHAIR THERNSTROM: Yes. Okay. Do  
25 you want to come in in any way on this?

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1 CHAIRMAN REYNOLDS: Well, you're  
2 suggesting that we take the concept paper -- you're  
3 suggesting that we replace English in the workplace  
4 with --

5 COMMISSIONER HERIOT: No, the motion is to  
6 adopt the concept paper.

7 COMMISSIONER GAZIANO: We have a motion on  
8 the table to adopt the English-only concept paper.

9 COMMISSIONER HERIOT: There's no motion  
10 about anything else.

11 COMMISSIONER GAZIANO: So that's the  
12 discussion.

13 CHAIRMAN REYNOLDS: Okay. Abby proposed  
14 something else.

15 VICE CHAIR THERNSTROM: Yes. No, what I'm  
16 saying is we could avoid the whole discussion of this  
17 briefing topic, if there was enthusiasm for  
18 substituting the Community Reinvestment Act. We would  
19 get a huge CSPAN audience on that, given the financial  
20 crisis at the moment, which is not going to disappear  
21 tomorrow.

22 COMMISSIONER HERIOT: My guess is we can't  
23 put together something like that in November or  
24 December, and we would be upstaged by a thousand other  
25 events.

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1 COMMISSIONER GAZIANO: Yes, and it's more  
2 important when we have to get it right. We might have  
3 a very important contribution to make.

4 VICE CHAIR THERNSTROM: All right. Okay.  
5 I will drop that suggestion, and we are on to the  
6 question of approving the briefing topic as -- the  
7 concept paper as circulated, Employers' Rights to  
8 Specify English as the Language of the Workplace. Can  
9 I have a motion --

10 COMMISSIONER HERIOT: Already did.

11 COMMISSIONER KIRSANOW: We had a motion  
12 and a second.

13 VICE CHAIR THERNSTROM: We already did.

14 COMMISSIONER HERIOT: Call the question.

15 VICE CHAIR THERNSTROM: Call the question.  
16 Okay. Any nays, any abstentions? Hearing none, we  
17 have unanimous consent here to adopt it.

18 CHAIRMAN REYNOLDS: I've got to get off  
19 the phone, folks.

20 VICE CHAIR THERNSTROM: Okay. And the  
21 next item is Future Agenda Items.

### 22 **III. FUTURE AGENDA ITEMS**

23 VICE CHAIR THERNSTROM: Does anybody --

24 CHAIRMAN REYNOLDS: Well, we've lost the  
25 quorum.

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1 VICE CHAIR THERNSTROM: We've lost the  
2 quorum. Okay. We haven't lost the quorum to adjourn.

3 **IV. ADJOURN**

4 VICE CHAIR THERNSTROM: We're adjourned.

5 COMMISSIONER KIRSANOW: Okay.

6 COMMISSIONER HERIOT: Okay. Bye-bye.

7 COMMISSIONER GAZIANO: Bye now.

8 (Whereupon, the proceedings went off the  
9 record at 3:03:59 p.m.)

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