

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION MEETING

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FRIDAY, DECEMBER 4, 2009

The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 9:30 a.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman (via telephone)  
ABIGAIL THERNSTROM, Vice Chairman (via telephone)  
TODD F. GAZIANO, Commissioner  
GAIL L. HERIOT, Commissioner (via telephone)  
PETER N. KIRSANOW, Commissioner (via telephone)  
ARLAN D. MELENDEZ, Commissioner  
ASHLEY L. TAYLOR, JR., Commissioner (via telephone)  
MICHAEL YAKI, Commissioner  
MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC  
CHRISTOPHER BYRNES  
PAMELA A. DUNSTON, Chief, ASCD  
ROBERT LERNER, Asst. Deputy Staff Director  
TINALOUISE MARTIN, Director, OM  
EMMA MONROIG, Solicitor  
MICHELE RAMEY-YORKMAN  
LENORE OSTROWSKY  
KIMBERLY TOLHURST  
AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

ALEC DEULL  
TIM FAY  
DOMINIQUE LUDVIGSON  
JOHN MARTIN  
ALISON SCHMAUCH  
KIMBERLY SCHULD

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

(9:32 a.m.)

CHAIRMAN REYNOLDS: All right, we're going to start. Ashley will join us later.

Good morning, this is Chairman Gerald Reynolds. This meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. It's 9:32 Eastern Standard Time on December 4, 2009.

Commissioners Melendez, Yaki, and Gaziano are present at 624 9th Street, N.W., Room 540, Washington, D.C., where the meeting is being held. All other Commissioners with the exception of Commissioner Taylor, who I believe will be joining us later, are participating by phone.

To assist the Court Reporter, I'd like to remind everyone participating by phone that if they wish to make a statement, they should state their name first. Whenever it is necessary to take a vote, the following proceeding will be followed: I will call out the name of each Commissioner. The Commissioner should answer yes, no, or abstain. After the voting is concluded I will read out how each of you has voted in order to ensure that the tally is correct.

## Approval of Agenda

CHAIRMAN REYNOLDS: The first item on the

1 agenda is the approval of the agenda. I move that we  
2 approve the agenda. Actually, I move that we amend  
3 the agenda by adding the third healthcare letter to  
4 program planning.

5 Is there a second?

6 COMMISSIONER KIRSANOW: Kirsanow seconds.

7 CHAIRMAN REYNOLDS: Discussion?

8 COMMISSIONER YAKI: I'd like to make  
9 another -- this is Commissioner Yaki. I'd like to  
10 make another amendment.

11 CHAIRMAN REYNOLDS: Related to this one?

12 COMMISSIONER YAKI: Related to the agenda.

13 COMMISSIONER HERIOT: You've got to go  
14 through this amendment first.

15 CHAIRMAN REYNOLDS: So this is on a  
16 friendly amendment?

17 COMMISSIONER YAKI: No.

18 CHAIRMAN REYNOLDS: Okay. Commissioner  
19 Kirsanow?

20 COMMISSIONER KIRSANOW: Yes.

21 CHAIRMAN REYNOLDS: You'd like to discuss  
22 this motion?

23 COMMISSIONER KIRSANOW: I'd simply like to  
24 amend the agenda. I second amending the agenda to  
25 place this consideration of the letter pertaining to

1 the Senate's healthcare bill on the first item of  
2 program planning.

3 CHAIRMAN REYNOLDS: Okay.

4 COMMISSIONER GAZIANO: Is there any  
5 discussion or can we vote?

6 VICE CHAIR THERNSTROM: Mr. Chairman, I  
7 have a question to raise about this. And by the way  
8 when you stated who was at the Commission itself as  
9 opposed to phoning in, you didn't mention yourself,  
10 where are you?

11 CHAIRMAN REYNOLDS: Oh, very good. I'm in  
12 Kansas City.

13 VICE CHAIR THERNSTROM: Okay. I'm  
14 bothered as I have been so often by the facts that  
15 this letter came last night, I believe it was. I  
16 thought we had an agreement of a seven-day notice. I  
17 at least would have liked the time to really go over  
18 this and go over the actual legislative language and  
19 so forth. It just comes too late to do a responsible  
20 job. This is an old story. There's numerous  
21 instances of it. It really bothers me.

22 As I say, I think it's a matter of  
23 responsibility on the part of Commissioners to have  
24 the time to review the material properly.

25 CHAIRMAN REYNOLDS: I think your concern

1 is a legitimate one. Would anyone like to respond or  
2 add to it?

3 COMMISSIONER GAZIANO: I think when we get  
4 in the discussion that that's more relevant to the  
5 discussion of whether we should approve it, extend  
6 time to work with language, but I am certainly  
7 comfortable with putting it on the agenda. And I  
8 think we should put it on the agenda.

9 COMMISSIONER YAKI: This is Commissioner  
10 Yaki. I think that the point that Commissioner  
11 Thernstrom raises is a good one in that --

12 VICE CHAIR THERNSTROM: I can't hear  
13 people. You're going to have to speak up in some way.

14 COMMISSIONER YAKI: Commissioner  
15 Thernstrom, can you hear me now?

16 VICE CHAIR THERNSTROM: I can hear you  
17 now, but I couldn't hear anything you said before  
18 that.

19 COMMISSIONER YAKI: What I was saying is  
20 that I would like to agree with the statement that you  
21 made, Commissioner Thernstrom. I believe that to put  
22 it on the agenda in and of itself states that we are  
23 ready to discuss it and I think that the point that  
24 you made is that we are not yet in that position. The  
25 draft should have been circulated well in advance of

1 this meeting in order to qualify for the agenda. And  
2 therefore, I will support you in voting against having  
3 this being put on the agenda.

4 VICE CHAIR THERNSTROM: This is  
5 Commissioner Thernstrom again. I'm just not ready to  
6 discuss this letter at all. So putting it on the  
7 agenda, I agree, put it on the agenda as soon as we're  
8 ready to discuss it. I'm frankly just not ready. I  
9 don't think I could have been ready.

10 COMMISSIONER GAZIANO: Well, since it's  
11 very similar to the letter we previously approved --

12 VICE CHAIR THERNSTROM: It doesn't matter  
13 on the similarity. I mean I would have to look at the  
14 similarity and the differences and figure out, you  
15 know, I am not ready to discuss things on a dime on  
16 this Commission. These things require a courtesy of  
17 giving us time, but also I just don't want to do  
18 things in a sloppy way.

19 COMMISSIONER KIRSANOW: Mr. Chairman, this  
20 is Kirsanow. Since this is my motion, and my letter  
21 or at least generated by me, I think that those points  
22 are well taken. I do think these are not that  
23 complex. It is very similar to the previous letters  
24 Commissioner Gaziano just indicated. Nevertheless, I  
25 think the point is well taken that Commissioners

1 should have an appreciable period of time to at least  
2 consider this letter and I would be open to, if not  
3 discussing this right now, although I think we could  
4 have a discussion, I think there is some timeliness  
5 issue pertaining to this. I know that the healthcare  
6 debate is currently under way. I don't know when it  
7 will conclude. I think that it is important for us to  
8 weigh in otherwise it becomes moot.

9 So with that in consideration, I would be  
10 open to, for example, conducting may be a poll vote or  
11 a teleconference saying within a week or so from now,  
12 as opposed to having a vote today to give  
13 Commissioners sufficient time to take a look at the  
14 letter.

15 COMMISSIONER GAZIANO: I'm not sure how we  
16 could notice that, Commissioner Kirsanow. I thought  
17 that if we advanced it on our agenda we could discuss  
18 those kind of options when we actually discuss the  
19 letter.

20 COMMISSIONER HERIOT: This is Gail Heriot.  
21 From what I understand our plan is not to approve the  
22 letter, but rather to approve the contents of the  
23 letter today and then to have a few more days to  
24 negotiate the language and given the pressing nature  
25 of this issue, I would think we need to proceed.

1                   CHAIRMAN REYNOLDS: We have two issues at  
2 play here. I think that Vice Chair Thernstrom is  
3 right on several levels and it is a matter of common  
4 courtesy and also if she believed that she needs a  
5 reasonable amount of time to review the letter and any  
6 related materials, I think that that is legitimate.

7                   COMMISSIONER HERIOT: Well, sure it is.

8                   CHAIRMAN REYNOLDS: But we have to balance  
9 that against the timeliness issue. I think that  
10 Commissioner Kirsanow offered up a way to balance the  
11 two issues.

12                   COMMISSIONER HERIOT: But we'd have to  
13 notice that, wouldn't we? So that would be a 14-day  
14 delay. Is that going to be too much?

15                   CHAIRMAN REYNOLDS: It would be 14 days?  
16 Is the General Counsel there?

17                   STAFF DIRECTOR DANNENFELSER: Mr.  
18 Chairman, we have a telephonic meeting scheduled on  
19 December 16th, which is 12 days from now.

20                   CHAIRMAN REYNOLDS: Okay, very good.

21                   COMMISSIONER HERIOT: Is that going to be  
22 on time given the Senate debate process that's already  
23 underway there?

24                   CHAIRMAN REYNOLDS: Okay, I'm sorry, let  
25 me jump in for a moment with a different issue.

1                   Is Commissioner Taylor on the phone?  
2                   Okay. I have a message from him that he's on hold, so  
3                   could someone contact the operator and see if they can  
4                   get him in the right queue.

5                   COMMISSIONER YAKI: Mr. Chair, we did hear  
6                   a beep coming in. Did someone else other than a  
7                   Commissioner join the line?

8                   VICE CHAIR THERNSTROM: Right. I heard  
9                   the beep as well.

10                  CHAIRMAN REYNOLDS: Okay, who is the last  
11                  person to join us?

12                  VICE CHAIR THERNSTROM: I am, I think.

13                  COMMISSIONER YAKI: But that was  
14                  subsequent to your joining.

15                  VICE CHAIR THERNSTROM: Right, but after  
16                  that there was a beep.

17                  CHAIRMAN REYNOLDS: Okay.

18                  COMMISSIONER GAZIANO: It could be someone  
19                  leaving the line, too.

20                  CHAIRMAN REYNOLDS: Do you think that's  
21                  sufficient time? Do you think that would be too late  
22                  if we wait until the scheduled teleconference to vote  
23                  on this issue?

24                  COMMISSIONER GAZIANO: This is  
25                  Commissioner Gaziano. I think it might be too late

1 from what I hear, although if you want to have the  
2 whole discussion in the motion to put it on the  
3 agenda, I can explain why, but I just wonder why we  
4 can't discuss this once it's put on the agenda.

5 COMMISSIONER KIRSANOW: Mr. Chairman, this  
6 is Kirsanow. Two things: one is this is the motion to  
7 place it on the agenda. And then I think we could  
8 have a discussion as to whether or not it's too late,  
9 too early or whether we should defer this to December  
10 16th, if in fact, the letter is place on the agenda at  
11 the time that we would consider that discrete item.

12 COMMISSIONER YAKI: This is Commissioner  
13 Yaki. I just wanted to state that the point that  
14 Commissioner Thernstrom was making is that she's not  
15 prepared to discuss it at all, which is why she  
16 objected to it going on the agenda.

17 CHAIRMAN REYNOLDS: No, she discussed  
18 discussing the merits.

19 VICE CHAIR THERNSTROM: This is  
20 Commissioner Thernstrom. There's no point to putting  
21 it on the agenda if we can't discuss it. I can't  
22 discuss it at this point.

23 CHAIRMAN REYNOLDS: Well, if we put it on  
24 the agenda, we can continue this conversation in an  
25 attempt to find a reasonable compromise. At least my

1 position is that we won't vote on this today.

2 COMMISSIONER KIRSANOW: I have a question.

3 CHAIRMAN REYNOLDS: I'm sorry?

4 COMMISSIONER KIRSANOW: I call the  
5 question.

6 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
7 how do you vote?

8 VICE CHAIR THERNSTROM: I'm going to vote  
9 no.

10 CHAIRMAN REYNOLDS: Commissioner Gaziano?

11 COMMISSIONER GAZIANO: Yes.

12 CHAIRMAN REYNOLDS: Commissioner Heriot?

13 COMMISSIONER HERIOT: Yes.

14 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

15 COMMISSIONER KIRSANOW: Yes.

16 CHAIRMAN REYNOLDS: Commissioner Melendez?

17 COMMISSIONER MELENDEZ: No.

18 CHAIRMAN REYNOLDS: Commissioner Yaki?

19 COMMISSIONER YAKI: No.

20 CHAIRMAN REYNOLDS: Commissioner Taylor,  
21 are you on the phone?

22 COMMISSIONER TAYLOR: I am, yes.

23 CHAIRMAN REYNOLDS: Have you been  
24 listening to this?

25 COMMISSIONER TAYLOR: No, I thought my

1 secretary was trying to get through. I apologize.

2 CHAIRMAN REYNOLDS: Okay, well, I vote in  
3 the affirmative. So Commissioners Thernstrom,  
4 Melendez and Yaki voted no. Commissioners Gaziano,  
5 Heriot, Kirsanow, and the chairman voted yes.  
6 Commissioner Taylor says he didn't hear the exchange,  
7 did not vote. The motion passes.

8 The next thing up is -- I have an  
9 additional change. Just to fix a typo under Roman  
10 numeral four, the section in the minutes. We are  
11 reviewing minutes for the October 16th, not the  
12 October 15th minutes, so I'd like to fix that typo.  
13 Do I have a second?

14 COMMISSIONER GAZIANO: Second.

15 CHAIRMAN REYNOLDS: Do we need discussion?  
16 Okay.

17 COMMISSIONER YAKI: I have an amendment to  
18 the agenda.

19 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
20 how do you vote?

21 VICE CHAIR THERNSTROM: Yes.

22 CHAIRMAN REYNOLDS: Commissioner Gaziano?

23 COMMISSIONER GAZIANO: Yes.

24 CHAIRMAN REYNOLDS: Commissioner Heriot?

25 COMMISSIONER HERIOT: Yes.

1 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

2 COMMISSIONER KIRSANOW: Yes.

3 CHAIRMAN REYNOLDS: Commissioner Melendez?

4 COMMISSIONER MELENDEZ: Yes.

5 CHAIRMAN REYNOLDS: Commissioner Yaki?

6 COMMISSIONER YAKI: Yes.

7 CHAIRMAN REYNOLDS: I'm sorry, what was  
8 that?

9 COMMISSIONER YAKI: Yes.

10 CHAIRMAN REYNOLDS: Commissioner Taylor?

11 COMMISSIONER TAYLOR: Yes.

12 CHAIRMAN REYNOLDS: Okay, and I vote for  
13 it also, so it is unanimous.

14 VICE CHAIR THERNSTROM: You can probably  
15 do things like that without objection.

16 CHAIRMAN REYNOLDS: Well, at one point I  
17 thought that too, but sometimes I'm wrong.

18 (Laughter.)

19 CHAIRMAN REYNOLDS: Okay, yesterday,  
20 Commissioner Kirsanow circulated a draft --

21 COMMISSIONER YAKI: Commissioner Yaki has  
22 another amendment.

23 CHAIRMAN REYNOLDS: Yes, thank you.  
24 Commissioner Yaki.

25 COMMISSIONER YAKI: Nor have we approved

1 the agenda, as amended, either.

2 I just wanted to ask that given the fact  
3 that briefing reports have kind of been shoved in lots  
4 of different binders that go back and forth across the  
5 country for me, I do not have my marked up copy of the  
6 briefing report on covert wiretapping with me and ask  
7 that it be pushed back to the next meeting in  
8 Washington, D.C. for review and approval.

9 CHAIRMAN REYNOLDS: I second that.  
10 Discussion?

11 (No response.)

12 Okay, again, discussion, comments?

13 (No response.)

14 Okay, let's vote. Vice Chair Thernstrom,  
15 how do you vote?

16 VICE CHAIR THERNSTROM: Yes.

17 CHAIRMAN REYNOLDS: Commissioner Gaziano?

18 COMMISSIONER GAZIANO: Pass.

19 CHAIRMAN REYNOLDS: Commissioner Heriot?

20 COMMISSIONER HERIOT: Yes.

21 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

22 COMMISSIONER KIRSANOW: Abstain.

23 CHAIRMAN REYNOLDS: Commissioner Melendez?

24 COMMISSIONER MELENDEZ: Yes.

25 CHAIRMAN REYNOLDS: Commissioner Yaki?

1 COMMISSIONER YAKI: Yes.

2 CHAIRMAN REYNOLDS: Commissioner Taylor?

3 COMMISSIONER TAYLOR: Yes.

4 CHAIRMAN REYNOLDS: I vote in favor of it  
5 also.

6 COMMISSIONER GAZIANO: And if no one else  
7 objects, I will not object.

8 CHAIRMAN REYNOLDS: Is that a yes?

9 COMMISSIONER GAZIANO: Yes, that's a yes.  
10 If no one is upset by the delay, I will go along.

11 CHAIRMAN REYNOLDS: Okay, all  
12 Commissioners, with the exception of Commissioner  
13 Kirsanow, voted in favor of the motion. Commissioner  
14 Kirsanow abstained. The motion passes.

15 I move that we accept the agenda as  
16 amended. Is there a second?

17 COMMISSIONER HERIOT: Second.

18 CHAIRMAN REYNOLDS: Discussion?

19 Vice Chair Thernstrom, how do you vote?

20 VICE CHAIR THERNSTROM: Yes.

21 CHAIRMAN REYNOLDS: Commissioner Gaziano?

22 COMMISSIONER GAZIANO: Yes.

23 CHAIRMAN REYNOLDS: Commissioner Heriot?

24 COMMISSIONER HERIOT: Yes.

25 Commissioner Kirsanow?

1 COMMISSIONER KIRSANOW: Yes.

2 CHAIRMAN REYNOLDS: Commissioner Melendez?

3 COMMISSIONER MELENDEZ: Abstain.

4 CHAIRMAN REYNOLDS: Commissioner Yaki?

5 COMMISSIONER YAKI: Abstain.

6 CHAIRMAN REYNOLDS: Commissioner Taylor?

7 COMMISSIONER TAYLOR: Yes.

8 CHAIRMAN REYNOLDS: And I vote in favor of  
9 it also. So we have abstentions from Commissioners  
10 Melendez and Yaki. The remaining Commissioners voted  
11 in favor. So the motion passes.

12 Yesterday, Commission Kirsanow circulated  
13 the draft letter to the Senate regarding racial  
14 preference provisions in H.R. 3590 for Commission  
15 approval. The email contained the draft letter. Our  
16 October 9, 2009 letter regarding a House version of a  
17 healthcare bill, along with the section of the bill  
18 referenced in the draft letter for Commission review.

19 Commissioner Kirsanow, I open up the  
20 floor.

21 COMMISSIONER KIRSANOW: I think I am going  
22 to address the issue that was raised by both  
23 Commissioners Yaki and Thernstrom which I think are  
24 important issues with respect to the timing of this.  
25 I concur with that. We need to give Commissioners

1 sufficient time to consider matters that are going to  
2 be voted on and especially letters that are going to  
3 go out to the public.

4 In fact, this was a pet peeve of both Vice  
5 Chair Thernstrom and mine years ago when we would be  
6 presented with a fait accompli, I am particularly  
7 sensitive to that issue.

8 This is something that has computer issues  
9 here though. The problem we were facing in terms of  
10 the timing of this is as follows: we have, although I  
11 haven't counted the pages, it's widely represented  
12 that it's a 2000-page Senate healthcare bill and I  
13 understand that all would like to read it despite the  
14 fact that many, I think are not going to.

15 What was presented to us just a short time  
16 ago and we considered it for purposes of doing our  
17 statutory duty in terms of the impact it may have on  
18 civil rights issues. I apologize for getting the  
19 letter out the day before a Commission meeting.  
20 Unfortunately, considerable time and effort went into  
21 the deliberation, drafting, reading the bill to ensure  
22 we found the appropriate provisions that we hit on and  
23 were placed in a different posture.

24 If we don't vote on this thing within the  
25 next few days, if we defer to December 16th, our

1 letter will become moot because the reports that we  
2 have are that the Senate would like to have passed  
3 this thing yesterday.

4 There's no indication to when it will  
5 pass. I understand a number of amendments would have  
6 been offered, but all of the reports that I see  
7 regarding the consideration of the Senate healthcare  
8 bill is this thing must pass immediately and I think  
9 some of the reasoning indicated that it will be done  
10 before Christmas.

11 So for that reason for us to have any kind  
12 of an impact other than simply engaging in scholarly  
13 pursuit that will have no bearing whatsoever and  
14 simply be relegated to a dustbin, I think we have to  
15 get this out with some degree of veracity and I don't  
16 know if we can wait until December 16th to do so.

17 This is an unusual circumstance.  
18 Normally, we're not placed in a position where we get  
19 a voluminous piece of -- a voluminous document that  
20 we've got to consider and then we only have a short  
21 period of time in which to weigh in on it, but in the  
22 Commission meeting the subject of the particular  
23 Commission meeting will be worked on or completed or  
24 voted on by the appropriate body.

25 So although I am perfectly willing to

1 defer voting on it today, although I'm prepared to do  
2 so, I think that this is something that can't wait  
3 until December 16th and I'd be open to suggestions as  
4 to whether or not we can conduct a quorum vote at some  
5 later point or if we can get a sense of how people  
6 stand now.

7 The way the motion is currently drafted is  
8 that we vote today with -- and if it passed, then  
9 amendments could be made where it would be tweaked or  
10 tempered just as we have in the past. I know that may  
11 not be acceptable to some, but unfortunately we are in  
12 the position where waiting until December 16th, the  
13 vote may have already been conducted on the entire  
14 bill on December 15th.

15 COMMISSIONER GAZIANO: Mr. Chairman?

16 CHAIRMAN REYNOLDS: Yes.

17 COMMISSIONER GAZIANO: Let me just ask our  
18 General Counsel or our Staff Director a question about  
19 a notational vote, whether that needs the same type of  
20 Federal Register notice and the same time period, if  
21 that is an option for us, because I will explain after  
22 that what I hear about the timing of the Senate bill.

23 MR. BLACKWOOD: This is David Blackwood.  
24 Unfortunately, I don't have my files relating to that  
25 topic. We do have an AI directly related. And I have

1 just sent one of the attorney advisors to go upstairs  
2 to try to locate the information.

3 My recollection though is we can have what  
4 is called an emergency notational vote. I believe  
5 it's five days, but we need unanimity among the  
6 Commission to agree to that. All this, by the way, is  
7 subject to my actually pulling down the AI and  
8 bringing it here.

9 We can also schedule a non-emergency  
10 notational vote, but I can't recall how long that  
11 takes. It's going to be close to the 16th though.

12 COMMISSIONER GAZIANO: Okay. Based on --  
13 if before the end of our meeting we can revisit this  
14 issue, there's some way that we can agree unanimously  
15 to a notational vote on a date certain, you know, six  
16 days away, then I think that might work. Other than  
17 that, I would like to go with the motion as  
18 Commissioner Kirsanow has described it which is  
19 similar to what we've done with some other letters.

20 And I'll explain why and that is that we  
21 agree to circulate our revisions to the draft letter,  
22 that Commissioner Kirsanow then submits to all of us a  
23 revised version that attempts to incorporate all of  
24 our amendments, those of us who are inclined to join  
25 the letter, and that we vote today, failing some other

1 provision that if that letter secures a majority of  
2 Commissioners, that it be sent as soon as possible to  
3 the relevant addressees.

4 From what I hear, Senator -- news reports  
5 are that Senator Reed is looking for 60 votes on any  
6 substantive provision. He only had that bare minimum  
7 on a motion to proceed, but as soon as his  
8 negotiations secure that, he will file cloture and  
9 that will ripen within two or three days and the  
10 Senate will adopt it. It could come before December  
11 16th. It's anybody's guess and given that the  
12 provisions in the Senate bill are very similar to the  
13 House bill, that the letter that Commissioner Kirsanow  
14 has circulated is very similar, makes the same points  
15 as the previous letter, I think that we, within four  
16 or five days, a notice say Monday or Tuesday can get  
17 our comments back to Commissioner Kirsanow for  
18 inclusion in the letter and we can vote on that  
19 process today.

20 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
21 how do you view this suggestion that we have a  
22 notational vote in four or five days?

23 VICE CHAIR THERNSTROM: I can go with  
24 that. I missed most of that conversation because a  
25 phone call came in that I had to get, I had to pick it

1 up. But I'll go along with that.

2 CHAIRMAN REYNOLDS: Okay, if that's the  
3 case then I think that we need to determine right now  
4 whether we have unanimity because it's not an option  
5 if we don't. General Counsel indicated that he is  
6 sure that would require unanimity. He speculates  
7 that's the case, but may be we should hold off until  
8 we're certain and see what he provides.

9 COMMISSIONER GAZIANO: Yes, perhaps we can  
10 postpone this to another portion of the agenda.

11 Program Planning

12 CHAIRMAN REYNOLDS: Okay, we'll do just  
13 that. If that's the case then we're going to move on  
14 to the update on the 2010 Enforcement Report. During  
15 the November 20th meeting Commissioners approved the  
16 discovery plan and project outlined for the 2010  
17 Enforcement Report prepared by the General Counsel  
18 with some minor amendments by Commissioner Gaziano.  
19 The Commission has also approved a motion by  
20 Commissioner Gaziano governing the depositions in the  
21 enforcement investigation related to the New Black  
22 Panther Party. On November 25th, the General Counsel  
23 circulated a letter received from the Department of  
24 Justice pertaining to subpoenas issued to DOJ  
25 personnel.

1                   Mr. Blackwood, please provide us with an  
2                   update.

3                   MR. BLACKWOOD:   This David Blackwood.   Per  
4                   our rules, I won't mention any specific names of  
5                   individuals, but I will fill you in with regard to  
6                   where things stand.

7                   The Department of Justice --

8                   COMMISSIONER YAKI:   Point of information,  
9                   since Washington Times and other articles seem to be  
10                  throwing people's names about, how does that relate to  
11                  our rules?

12                  VICE CHAIR THERNSTROM:   I'm having trouble  
13                  hearing Commissioner Yaki.

14                  COMMISSIONER YAKI:   I will put on my  
15                  Commissioner Thernstrom voice.   I was asking,  
16                  Commissioner Thernstrom, given the fact that the  
17                  Washington Times and other organizations seem to be  
18                  bandying about names rather freely how that impacts  
19                  our ability to say or not say anything during these  
20                  discussions.

21                  MR. BLACKWOOD:   This is David Blackwood  
22                  again.   My view is our rules are our rules.  
23                  Obviously, people have leaked specific names and for  
24                  whatever reason have made that public.   I don't  
25                  believe anybody here has.   If the Commission wishes to

1 use the names, I don't object.

2 COMMISSIONER GAZIANO: I appreciate the  
3 question, Commissioner Yaki, because I had the same  
4 sort of question. As I understand it from one  
5 reporter who called me and asked for a confirmation  
6 and I refused under our rules, we acknowledged that  
7 those deposed are free to speak to the press, or their  
8 attorneys are free to speak to the press, but that if  
9 we -- as I thought about it, if we make it a practice  
10 of confirming or not confirming, that creates a larger  
11 problem. Newspapers could then print stories  
12 speculating that we have subpoenaed X, Y, and Z and  
13 then they could call us for confirmation. And once we  
14 go down the road of confirming some, I'm not sure how  
15 we confirm some and deny others.

16 But those who we subpoena want to go  
17 public, then we shouldn't try to stop that.

18 MR. BLACKWOOD: The alternative would be  
19 that we go into executive to discuss the specific  
20 individuals. We could do that as well.

21 CHAIRMAN REYNOLDS: My preference is that  
22 we don't, but if someone has strong feelings, I'll  
23 defer.

24 (No response.)

25 Why don't we proceed and see where the

1 discussions take us. Just be mindful that once we get  
2 close to the line, then we have to revisit the issue  
3 of going into closed session.

4 MR. BLACKWOOD: With regard to, as per our  
5 rules, allowing discussion with regard to  
6 institutional entities, we are preparing discovery  
7 requests directed to the Department of Justice which  
8 per the prior vote will be accompanied by a subpoena  
9 and also a letter addressing some of the issues raised  
10 by the Department of Justice in other correspondence.

11 We will then -- the purpose of that  
12 letter, frankly, is to ask the Department of Justice  
13 to meet to discuss the discovery requests and review  
14 them so we can determine those items as to which there  
15 is no dispute.

16 Per the plan, those discovery requests are  
17 not limited to the specific incident of the New Black  
18 Panther Party, but also include past cases of voter  
19 intimidation and how those have been treated by the  
20 Department of Justice.

21 CHAIRMAN REYNOLDS: Mr. Blackwood, is that  
22 all?

23 MR. BLACKWOOD: That is all I have, yes.

24 CHAIRMAN REYNOLDS: Okay, does anyone have  
25 any questions or comments?

1                   COMMISSIONER YAKI: Yes, I have some  
2 questions. In terms of the discovery that we may be  
3 propounding to the Department of Justice, I wonder  
4 what the procedure is for adding in certain incidents  
5 that I think did go to Justice and were not  
6 investigated and will be part of the discussion of the  
7 use or not use of this Act or other forms of judicial  
8 injunctive or declaratory relief on these issues.

9                   MR. BLACKWOOD: I can only say the  
10 discovery requests include virtually anything that was  
11 reported to the Department of Justice, anything they  
12 investigated, anything they then decided to pursue  
13 relating to the statute that we were examining.

14                   COMMISSIONER YAKI: True, but how about  
15 specific instances of, for example, in 2006, during  
16 the November 7th general election, attorneys witnessed  
17 individuals aggressively intimidating Latino voters at  
18 a polling place in Tucson, Arizona. One of these  
19 individuals wore dark clothing, had a badge-like  
20 emblem on his jacket and carried a handgun. In  
21 addition, they attempted to intervene to ask anyone  
22 who they deemed to be of Latino descent questions  
23 including writing down personal information and  
24 videotaping them and the license plates of their cars  
25 as they went to vote. This was brought to the

1 attention of the Department of Justice and I'd like to  
2 know whether they considered this a kind of  
3 intimidation worthy of investigation and whether the  
4 statute was considered.

5 In addition, in Louisiana in 2006, in a  
6 mayoral election which race was a significant issue, a  
7 cross burning incident occurred on public property and  
8 there were those who believe that this was a tool to  
9 intimidate primarily African-American voters on that  
10 election.

11 And finally, in the time period leading up  
12 to the November 7, 2006 elections, a major party  
13 congressional candidate in Orange County, California  
14 mailed a letter to 14,000 registered Latino voters or  
15 Hispanic-surname voters written in Spanish, stating  
16 that immigrants may not vote, even though of course,  
17 naturalized citizens who are immigrants may vote, that  
18 -- who have registered to vote -- and that the letter  
19 also stated there's no benefit to voting in U.S.  
20 elections. This was again given to the Department of  
21 Justice to investigate as an issue of voter  
22 intimidation. And I'd like to know whether or not DOJ  
23 at that time considered this case and whether or not  
24 they considered the use of that statute for the  
25 purposes of creating enforcement or an injunction

1 against such actions occurring in the future.

2 MR. BLACKWOOD: Those questions can  
3 certainly be added. We have no limitation on the  
4 number of questions. I do think those would be  
5 covered by what is already drafted, but we can  
6 certainly identify specific incidents and ask for  
7 their reaction.

8 COMMISSIONER YAKI: What is your deadline  
9 for sending these over?

10 MR. BLACKWOOD: We were planning to send  
11 them out actually today, but that said, we have no  
12 limitation and can add as we go along. I did not  
13 anticipate that frankly the initial discovery requests  
14 were going to be the end of the line.

15 COMMISSIONER YAKI: Well, I'd like this  
16 sent in the first packet if possible. If not, then  
17 immediately the following day and I will get this over  
18 to you for inclusion.

19 MR. BLACKWOOD: Okay.

20 CHAIRMAN REYNOLDS: Any other questions?

21 COMMISSIONER YAKI: I have another  
22 questions.

23 CHAIRMAN REYNOLDS: Yes, Commissioner  
24 Yaki.

25 COMMISSIONER YAKI: Where are we in terms

1 of identifying additional witnesses who reside in the  
2 voter jurisdiction or precinct at issue as well as the  
3 registrar of voters or superintendent of elections or  
4 whatever it is they call it in Pennsylvania,  
5 equivalent in terms of the possibility of having a  
6 hearing in Pennsylvania?

7 I again reiterate the fact that I believe  
8 that if we're going to have hearings on this issue, at  
9 least one of them should occur in Philadelphia  
10 approximate to the polling place at issue. I think it  
11 is a way in order to ensure that a broad cross section  
12 of individuals who may or may not have experienced the  
13 -- what has been alleged in the complaint and what has  
14 been alleged in this investigation will give them the  
15 ability to come forward, make their views known, as  
16 well as to use our subpoena power by having a hearing  
17 in that area to ensure that the appropriate election  
18 officials are invited as well.

19 MR. BLACKWOOD: This is David Blackwood  
20 again. We have, and I'm not going to identify any  
21 specific individuals, by reaching out to both  
22 political party organizations, we have identified  
23 additional poll watchers who were on the site. We've  
24 had difficulty actually talking with them, however.  
25 One of them does not have a phone, but we have sent

1 several letters and recently have confirmed by use of  
2 certified mail that they do reside there.

3 Our next step, and I do believe I will be  
4 visiting Philadelphia again is to try to talk to those  
5 individuals. In addition, we have identified  
6 Democratic poll watchers as well, but that was just  
7 recently and we need to confirm the address and phone  
8 number that we received.

9 COMMISSIONER YAKI: And what is the  
10 restriction on -- when you say you're visiting  
11 Philadelphia are you interviewing potential witnesses?

12 Is that essentially what you're doing? And what are  
13 the restrictions on Commissioners attending those  
14 kinds of witness interviews?

15 MR. BLACKWOOD: At this time it would  
16 depend on the initial contact that we have. I don't  
17 see going to Philadelphia when I have not contacted  
18 somebody to say I will be there on such and such a  
19 date.

20 COMMISSIONER YAKI: Right.

21 MR. BLACKWOOD: If was going to be just in  
22 the nature of an interview, I have no problem  
23 identifying when the time and place is and making it  
24 so someone can accompany me or whatever alternative.  
25 But certainly the depositions as we discussed, the

1 Commissioners have an absolute right and we have taken  
2 steps to set up telephonically that those are  
3 available to you or access is available.

4 COMMISSIONER YAKI: I would just request  
5 as a courtesy that if you do identify individuals who  
6 you wish to go to Philadelphia to interview, that you  
7 inform the Commission or at least me in a timely  
8 manner because I would be probably interested in  
9 attending.

10 CHAIRMAN REYNOLDS: I'm sorry,  
11 Commissioner Yaki, please speak up.

12 COMMISSIONER GAZIANO: Use your Darth  
13 Vader voice.

14 COMMISSIONER YAKI: Chairman Reynolds,  
15 what I was asking, Mr. Chair, and this is very odd  
16 because the mic is about half a millimeter away from  
17 where I'm talking, what I was asking is that given the  
18 fact I would hope that the General Counsel, if he has  
19 identified individuals in the Philadelphia area and  
20 Philadelphia precinct that he is going to go and  
21 interview, that he provide the Commission or at least  
22 me with sufficient notice because I would be  
23 interested in attending any witness interviews at that  
24 point.

25 CHAIRMAN REYNOLDS: Okay, now is your

1 intent to participate in the questions or to observe?

2 COMMISSIONER YAKI: Well, I would say, I  
3 would simply hark back to another moment in our  
4 nation's history and just simply say I don't think I  
5 would be there as a potted plant.

6 (Laughter.)

7 CHAIRMAN REYNOLDS: But maybe you need to  
8 be there as a potted plant. I don't have any concerns  
9 with your attending it, but I can see a scenario where  
10 a Commissioner participating in this type of  
11 information gathering sessions could disrupt the  
12 process.

13 COMMISSIONER YAKI: How so?

14 CHAIRMAN REYNOLDS: By asking questions in  
15 a way with the intent of leading a witness in a  
16 particular direction.

17 VICE CHAIR THERNSTROM: Mr. Chairman, with  
18 all due respect, and I'm not an attorney, this is  
19 Commissioner Thernstrom, questions can be seen as  
20 leading witnesses. Any questions can be seen  
21 as leading witnesses, depending on your perspective.  
22 You've got the picture of making mischief here, but  
23 mischief is not a well defined term in this context.

24 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
25 you've been witness to what has taken place at the

1 Commission for an extended period of time I think that  
2 we all can recognize mischief when it shows up. In  
3 fact, one of the issues that we're wrestling with now  
4 is certain behavior amongst Commissioners that impedes  
5 our ability to proceed in an efficient manner. So I  
6 don't think that this is an issue that is so vague  
7 that we need not be concerned about it.

8 COMMISSIONER YAKI: Commissioner Reynolds,  
9 this is Commissioner Yaki. Let me just state that  
10 one, I think that what you're saying is out of bounds  
11 in many respect.

12 CHAIRMAN REYNOLDS: How so?

13 COMMISSIONER YAKI: If you would --  
14 perhaps if you'd like to go back and if you will, I  
15 will go through every single hearing that we've ever  
16 conducted and go through my line of questioning of  
17 each witness that's ever been conducted. And if you  
18 can then point out to me how -- in fact, I'll do it  
19 for every single person who has ever been on the  
20 Commission and we can figure out exactly what your  
21 definition of mischief is.

22 This is a witness interview. It is a  
23 serious and sober --

24 CHAIRMAN REYNOLDS: Commissioner Yaki -

25 COMMISSIONER YAKI: -- Commissioner

1 Reynolds, your obsession with this other issue and how  
2 it's bleeding over into things that have nothing  
3 whatsoever to do with it is just I think a little sad  
4 and attempts to impugn certain people's integrity when  
5 it comes to the very serious issue of how one goes  
6 about looking at witnesses, what our fact-finding  
7 mission is as chartered by the United States Congress.

8 If it is your idea that we are not fact finders, we  
9 are simply recipients of fact finding by others, then  
10 I suggest we go back to the statute and take a very  
11 close look at -- and the history of this Commission to  
12 understand what it is that we have done, have or have  
13 not done in the past.

14 The idea that one would in a discovery  
15 process attempt to act frivolously is, of course, a  
16 sanctionable item under the canons of most  
17 professional conduct. So the idea that you think that  
18 any Commissioner may use that opportunity in order to  
19 make mischief, I think is extremely insulting and one  
20 that shows that your lack of boundaries when it comes  
21 to other issues at the Commission that have nothing  
22 whatsoever to do with it, are quite frankly a little  
23 troubling.

24 COMMISSIONER GAZIANO: Mr. Chairman.

25 CHAIRMAN REYNOLDS: Hold on, Commissioner

1       Gaziano.     My concern is fueled not so much by  
2       speculation, but by Commissioner Yaki's conduct in  
3       Hawaii.

4                    COMMISSIONER YAKI:    Would you like to  
5       review the tapes in Hawaii, Mr. Chair?  Mr. Chair,  
6       seriously.  Before you make an insane accusation like  
7       that, I would suggest that you review --

8                    CHAIRMAN REYNOLDS:   Commissioner Yaki --

9                    COMMISSIONER YAKI:   -- you review the  
10      tapes in Hawaii very carefully, very carefully.

11                   CHAIRMAN REYNOLDS:    I've patiently  
12      listened to you.

13                   COMMISSIONER YAKI:   I'm not going to sit  
14      here and listen to some stupid accusation that you  
15      make based on hearsay from people who didn't even know  
16      what was going on.

17                   CHAIRMAN REYNOLDS:   Do you want to know  
18      what my concerns are?  They're related to my lack of  
19      boundaries.  I'd like to respond.

20                   COMMISSIONER YAKI:   You do have a serious  
21      lack of boundary.  That's very clear.  I think you've  
22      absolutely lost control of this Commission.

23                   CHAIRMAN REYNOLDS:   Commissioner Yaki, let  
24      me finish my conversation.

25                   I received written complaints about how

1 you conducted yourself. The accusations were that --

2 COMMISSIONER YAKI: Have you shown them to  
3 me? Have I seen any single one of them? Did you  
4 bother to show any of them to me?

5 CHAIRMAN REYNOLDS: No, I did not.

6 COMMISSIONER YAKI: Well, you should have.

7 CHAIRMAN REYNOLDS: Commissioner Yaki,  
8 that is the background for my concern.

9 COMMISSIONER YAKI: If you had bothered to  
10 watch the videotape which I believe it was videotaped  
11 or read the transcript which I don't believe you have,  
12 you would find a far different answer than simply the  
13 people who were there who had a distinct objection to  
14 the fact that I was even present at that hearing. And  
15 if you were to ask the staff who was there, you might  
16 also get a different answer.

17 So the question is, Mr. Reynolds, are you  
18 just going to listen to written complaints that you  
19 did not investigate, that you did not ask me about,  
20 that you did not confirm with any staff members who  
21 were there, or perhaps a court reporter --

22 CHAIRMAN REYNOLDS: How do you know I  
23 didn't?

24 COMMISSIONER YAKI: Because I'm pretty  
25 sure you didn't.

1                   CHAIRMAN REYNOLDS:  You're pretty sure  
2                   that I didn't?

3                   COMMISSIONER YAKI:  Yes.  Would you like  
4                   to bring the staff person up right now and ask?  Let's  
5                   do it, let's do it, Mr. Chair.

6                   CHAIRMAN REYNOLDS:  Commissioner Yaki --

7                   COMMISSIONER YAKI:  I am not going to be  
8                   insulted in this manner and have innuendo about  
9                   written complaints that is --

10                  CHAIRMAN REYNOLDS:  I'm not suggesting  
11                  anything --

12                  COMMISSIONER YAKI:  -- not placed before  
13                  me.

14                  CHAIRMAN REYNOLDS:  I am telling you that  
15                  there were accusations --

16                  COMMISSIONER YAKI:  So the idea --

17                  CHAIRMAN REYNOLDS:  -- of misconduct.

18                  COMMISSIONER YAKI:  -- that in a legal  
19                  proceeding where we are interviewing witnesses, it's  
20                  just ridiculous Mr. Chairman.  I take it as a very  
21                  personal insult.  And again it shows to me how your  
22                  lack of personal boundaries on this issue has clouded  
23                  your judgment in the running of this Commission.  And  
24                  I would simply say that it is a sad state for this  
25                  Commission that in our fact finding mode as

1 Commissioners, which by the way we were not in in  
2 Hawaii, and that's irrelevant to this point, that you  
3 would make such scurrilous and unfounded statement as  
4 to what I may or may not do.

5 If you wish to accompany me, Mr. Chair, as  
6 a chaperon, you may do so. If you have an objection  
7 to what I would ask, you may do so. If you wish, I  
8 will whisper questions to Mr. Blackwood so as to not  
9 to quote unquote disrupt or what have you, but the  
10 mere fact that you would bring this up I think is  
11 extremely childish. I think it totally shows a lack  
12 of personal boundaries on this issue. And if you wish  
13 to discuss this further, I suggest you give me a phone  
14 call which as I said in the last meeting you  
15 consistently refuse to do from us.

16 CHAIRMAN REYNOLDS: Commissioner Yaki,  
17 when I have something to say to you, I have no  
18 reservations, I have no concerns about picking up the  
19 phone.

20 COMMISSIONER YAKI: And if you have  
21 nothing to say to me because you haven't called me up,  
22 then don't bring up issues three years in the past  
23 that you've never confronted me on or anything other  
24 than what you state.

25 CHAIRMAN REYNOLDS: Commissioner Yaki, you

1 invited this conversation.

2 COMMISSIONER GAZIANO: Mr. Chairman, I've  
3 been waiting to be recognized.

4 COMMISSIONER YAKI: How did I invite this  
5 conversation?

6 COMMISSIONER GAZIANO: Mr. Chair?

7 COMMISSIONER YAKI: I asked about  
8 attending an interview witness and then you went off  
9 on a little toot about whether or not anyone would  
10 make mischief. I chose, of course, not to identify  
11 anyone by name until you did, so please explain to me  
12 how I invited this, Mr. Chair. You were the one who  
13 made it personal. You're the one who has lost any  
14 sense of personal boundaries.

15 COMMISSIONER GAZIANO: Mr. Chair, if I  
16 could address the general question? I think there is  
17 a serious issue in your inquiry about this matter and  
18 I take issue with the idea that any time our General  
19 Counsel talks to a potential witness that that is a  
20 legal proceeding. I certainly think that when we have  
21 formal hearings, depositions, Commissioners of course  
22 should be able to attend and of course be able to ask  
23 questions. But we had, I think, an extreme and silly  
24 rule that staff members could not talk to  
25 Commissioners and Commissioners could not talk to

1 staff members. I think that was an extreme rule, but  
2 the theory behind it was somehow that Commissioners  
3 shouldn't be standing over the desks of our  
4 professional staff members directing their every move  
5 when they're going about their normal business.

6 I think there is a reasonable line to be  
7 drawn there. My concern with Commissioners  
8 necessarily wanting to be included in every single  
9 conversation or every single step that the General  
10 Counsel or someone in his office may take is just that  
11 it ties things up and it does perhaps begin to  
12 approach some line when we're talking about informal  
13 efforts that the General Counsel and his staff makes.

14 Of course, we should review in a general  
15 way anything that we want to be briefed on. But if  
16 we're going down this road, we need to start drawing  
17 lines as to when Commissioners can stand over the  
18 shoulders of our professional staff and simultaneous  
19 with their work potentially interfere with the  
20 efficient operation of their work.

21 CHAIRMAN REYNOLDS: Commissioner Gaziano?

22 COMMISSIONER GAZIANO: Yes.

23 VICE CHAIR THERNSTROM: Something happened  
24 there.

25 Mr. Chairman, I'd like to say a few

1 things. I don't know what happened to the end of  
2 Commissioner Gaziano's statement there, but if he's  
3 finished I have a couple of thoughts I'd be glad to  
4 express, if that would be all right?

5 COMMISSIONER GAZIANO: Sure.

6 VICE CHAIR THERNSTROM: I would hope we  
7 could agree as a Commission that our primary concern  
8 here should be that we do not compromise our fact  
9 finding process and I don't think it is correct to say  
10 that what Commissioner Yaki is suggesting here is that  
11 anyone direct the General Counsel's every move, that  
12 we stand over his shoulder or -- I think all we're  
13 talking about here is a process that best gets at this  
14 full factual record. I am concerned that we're  
15 compromising or that there's been language here so far  
16 in the discussion that suggests a willingness to  
17 compromise that fact finding process.

18 And you used the word intimidation with  
19 respect -- I did not -- I never looked at that  
20 transcript. I don't know what happened in Hawaii, but  
21 intimidation is in the eye of the beholder. So I'd  
22 like to be a little careful about even using that word  
23 in an accusatory way. Again, not having any sense of  
24 the record of what went on in Hawaii, but if we err,  
25 in my view, in the direction of inclusion of

1 Commissioners, their input, a richer fact finding  
2 process possibly as a consequence, then we should err  
3 in that direction.

4 CHAIRMAN REYNOLDS: Okay, I don't know how  
5 to -- well, I am comfortable with Commissioners being  
6 there observing the process. My comfort is low with  
7 respect to Commissioners participating, but I would  
8 also like to hear from Mr. Blackwood.

9 MR. BLACKWOOD: This is Mr. Blackwood. To  
10 be honest, as I pondered all of this, the set up, the  
11 only type of situation other than the depositions we  
12 already have rules for, would be in the nature and as  
13 I understood what Commissioner Yaki was referring to  
14 was a formal interview that we would be using in lieu  
15 of a deposition. There are -- and I have no problem,  
16 frankly, with any of you all appearing for something  
17 of that kind because it would be in the nature of  
18 something scheduled and it would be in my mind  
19 completed as if it was the deposition or in compliance  
20 with our deposition rules, that is to say I ask all  
21 the questions I have and then however many  
22 Commissioners are there going around round robin and  
23 asking their questions.

24 It is not practical though to say that  
25 every Commissioner would be available for every single

1 conversation with every witness. The initial phone  
2 calls, tracking people down, sending letters,  
3 etcetera, I have already had several conversations  
4 with several witnesses, not multiple conversations  
5 with any one witness. But telephone conversations  
6 with individuals to say what did you say and in a  
7 general way are you a relevant witness. It was not  
8 for the purpose of taking their statement. It was  
9 just to identify whether they would be useful down the  
10 road, identifying who saw the most, things like that.

11 There is no practical way, frankly, any Commissioner  
12 could participate to that degree.

13 That said, the issue of staying or being  
14 present for a formal statement or something that we  
15 have scheduled for formal statement, I do not see a  
16 problem with people attending.

17 CHAIRMAN REYNOLDS: Okay, attending and  
18 participating and asking questions?

19 MR. BLACKWOOD: That's correct, as along  
20 as we follow, in essence, the deposition rules of let  
21 me finish my questions with the witness. If someone  
22 wants to ask additional questions, I don't see that as  
23 a problem.

24 CHAIRMAN REYNOLDS: Okay. All right, all  
25 right. I will defer to Mr. Blackwood.

1 VICE CHAIR THERNSTROM: Mr. Chairman, I  
2 have a question for Mr. Blackwood.

3 Where exactly are we in getting any  
4 witnesses at all at this point?

5 MR. BLACKWOOD: Well, I'd have to get into  
6 more detail than I would prefer to avoid executive  
7 session. Yes, we've identified many witnesses.

8 VICE CHAIR THERNSTROM: I don't mean  
9 identifying, I mean actually witnesses who we expect  
10 to come forward and testify.

11 MR. BLACKWOOD: Well, when you say --  
12 identify is the proper way to --

13 VICE CHAIR THERNSTROM: All right, all  
14 right.

15 MR. BLACKWOOD: -- identify them. We have  
16 numerous witnesses that are available, have indicated  
17 that they would be available. Of course, we have some  
18 that have made it clear that they aren't available.  
19 And as to those, the Commission has authorized the use  
20 of subpoenas and we are using them.

21 CHAIRMAN REYNOLDS: Any other comments or  
22 questions?

23 COMMISSIONER GAZIANO: The clarification  
24 that the General Counsel gave for formal witness  
25 interviews sort of satisfy some of my concerns, so

1 with that understanding I think that that's not  
2 unreasonable.

3 CHAIRMAN REYNOLDS: Okay, Mr. Blackwood,  
4 are we in a position to discuss the rules around a  
5 notational vote?

6 MR. BLACKWOOD: No, I haven't had a chance  
7 to step out of the room and check out the rules. If  
8 we're through this topic, I will go out and review  
9 that and come back and let you know what I found.

10 CHAIRMAN REYNOLDS: Okay, all right.  
11 Next, the Assistant Staff Director for Civil Rights  
12 Evaluation will provide with an update on our 2010  
13 project on sex discrimination in higher education  
14 admission.

15 Dr. Lerner, please provide an update.

16 DR. LERNER: Thank you, Mr. Chairman.

17 VICE CHAIR THERNSTROM: Mr. Chairman, has  
18 gotten off or come on? There's been another one of  
19 these beeps.

20 CHAIRMAN REYNOLDS: Okay. Mr. Taylor?

21 COMMISSIONER TAYLOR: Yes.

22 CHAIRMAN REYNOLDS: Commissioner Heriot?

23 COMMISSIONER HERIOT: I'm here.

24 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

25 (No response.)

1                   CHAIRMAN REYNOLDS: I believe Commissioner  
2 Kirsanow has -- is off of the call.

3                   COMMISSIONER GAZIANO: At least  
4 momentarily. I have some indication Pete will be back  
5 on.

6                   CHAIRMAN REYNOLDS: Dr. Lerner?

7                   DR. LERNER: Yes, sir. I'm here. Thank  
8 you. Excuse me, Mr. Chairman, one of the issues that  
9 we can consider after last meeting was to what extent  
10 the Paperwork Reduction Act applies to our situation.  
11 And we consulted with the General Counsel and we  
12 believe --

13                  CHAIRMAN REYNOLDS: I'm sorry, Dr. Lerner.  
14 You've cut out completely.

15                  DR. LERNER: My apologies, Mr. Chairman.  
16 I'm having a little trouble with manipulating the  
17 microphone.

18                  Essentially, we have selected a tentative  
19 sample of institutions to be subpoenaed --

20                  COMMISSIONER HERIOT: Can you speak up?

21                  DR. LERNER: Yes, I'll try to get this  
22 right. Sorry about that, Commissioners. I'll try to  
23 do a better job here.

24                  We have selected a tentative sample of 19  
25 institutions and the issue then is since that's larger

1 than 9, to what extent does the Paperwork Reduction  
2 Act apply and if it does apply, what should we do?

3 We have consulted extensively with the  
4 Office of General Counsel and we believe, in fact,  
5 that we can give the situation in any case, regardless  
6 of whether it applies or not, and we would do that on  
7 the assumption that it did apply by amending our  
8 request for information to take into account the  
9 different types of institutions we had sampled and  
10 asked somewhat different questions. And as it turns  
11 out that's actually a useful and convenient thing to  
12 do and that's what we're proposing to do. So that's  
13 where it stands at this point.

14 We are completing our tentative requests  
15 for information which we hope to send to the General  
16 Counsel next week and then we can prepare the four  
17 official documents which I hope will be ready for the  
18 Commissioners to vote. That's basically where it  
19 stands.

20 CHAIRMAN REYNOLDS: Okay, questions,  
21 comments?

22 COMMISSIONER HERIOT: So this means we  
23 don't need to take any action today, we're taking it  
24 on the telephone conference?

25 DR. LERNER: As far as I'm concerned, that

1 would be fine. It might be useful, for example, for  
2 me to send the Commissioners a list of the  
3 institutions that were tentatively selected so they  
4 could see them in advance and contemplate it and  
5 perhaps also for me to send the list -- we had sent  
6 these lists around previously, of course, but it might  
7 be a useful thing for me to send it around again. I  
8 would be glad to do that if the Commissioners so  
9 desire.

10 COMMISSIONER HERIOT: Since we've had it  
11 before we could just move today to do it.

12 DR. LERNER: I have no opinion. I thought  
13 that would be fine. But it's strictly the  
14 Commission's judgment, not mine.

15 CHAIRMAN REYNOLDS: Does anyone have any  
16 concern about voting on this today?

17 VICE CHAIR THERNSTROM: Have we voted on -  
18 - tell me again, voting on the list?

19 COMMISSIONER HERIOT: Yes, I've seen the  
20 list a couple of times.

21 COMMISSIONER GAZIANO: I have a slight  
22 preference to take care of this today if all parties  
23 concerned are ready.

24 VICE CHAIR THERNSTROM: Mr. Lerner, is  
25 there any additional information that would be coming

1 to us with respect to this list that might be useful  
2 in the vote?

3 DR. LERNER: No. This is essentially the  
4 list that we had submitted several -- a meeting or two  
5 ago. There was one change we made actually. I do  
6 wish to report that. One of the institutions that we  
7 had originally sampled and selected, and I've already  
8 said this in previous meetings.

9 VICE CHAIR THERNSTROM: You said that at  
10 the last meeting.

11 DR. LERNER: Right, I did indeed. I just  
12 wanted to go over it. But other than that, as of the  
13 last meeting, it has not changed and we don't expect  
14 it to change, subject to Commissioner approval, of  
15 course.

16 COMMISSIONER HERIOT: I move that we  
17 approve the list so that Dr. Lerner can proceed with  
18 all of this without further vote from the Commission.

19 CHAIRMAN REYNOLDS: Is there a second?

20 COMMISSIONER MELENDEZ: I have a question.  
21 This is Commissioner Melendez. I don't see it on the  
22 agenda of this action item. I see some updates that I  
23 have. I didn't even receive actually any information  
24 or a binder. Someone told me well, we're going to  
25 just use the 20th meeting and then the agenda came out

1 kind of late. So here we sit just expecting and  
2 update and here we are voting on something that I have  
3 information that -

4 COMMISSIONER HERIOT: You got it like two  
5 months ago.

6 COMMISSIONER MELENDEZ: Usually, if we  
7 have something agendized, we usually receive it, even  
8 if they give it to us again for the packet. This  
9 meeting -- I don't have anything but the agenda and  
10 here we are voting on things that I would hope that we  
11 could delay this and at least send me something and --  
12 or least a synopsis that was in writing saying okay,  
13 here is what we're voting on. This is the issue, and  
14 now I'm a little bit confused and asked to vote right  
15 now.

16 COMMISSIONER GAZIANO: What we're voting  
17 on is just the list, as I understand it. We've  
18 already approved sending the data request. It's just  
19 the list of institutions which has been sent to us  
20 before. We can read the list of institutions today.  
21 Would you want further study on the list of  
22 institutions, Commissioner Melendez?

23 COMMISSIONER MELENDEZ: My point is we're  
24 really lax in how we're conducting these meetings as  
25 far as having something in writing before us to make a

1 decision. It's kind of like don't you remember, we  
2 gave it to you two months ago and I'm going to go  
3 okay, sounds good, but I don't -- that's just the  
4 problem I'm having with how we're conducting meetings  
5 and making motions. So I would prefer that we table  
6 this, send me something in an email. If you want to  
7 vote on it in a conference call fine. I'm just not  
8 ready to vote on anything right now.

9 VICE CHAIR THERNSTROM: I'm sorry, but I  
10 wasn't at the last meeting. What is the reason there  
11 wasn't a vote then, but there's now a vote? What new  
12 information have we got?

13 COMMISSIONER HERIOT: I think it was a  
14 mistake not to vote on it before. I think there were  
15 questions.

16 CHAIRMAN REYNOLDS: Well, I think that  
17 unlike the letter to the Senate, we don't have a hard  
18 deadline in front of us, although I do have a  
19 preference in giving Dr. Lerner the green light so  
20 that he can move forward. But I think Commissioner  
21 Melendez makes a good point if this information had  
22 been distributed. But the argument that it would have  
23 been acceptable that commissioners have an opportunity  
24 to review the information and refresh their memory,  
25 it's a fine one. Commissioner Melendez' argument is

1 similar to the one that Vice Chair Thernstrom made  
2 this morning.

3 So --

4 COMMISSIONER HERIOT: Well, then can I ask  
5 that this be put on the telephone conference agenda  
6 for two weeks from now? Because honestly, my original  
7 thought was all this stuff would be sent out in  
8 September. I did not realize that the Commission had  
9 to vote on this at all. And I'm still not convinced  
10 that we do, but there were a couple of statements last  
11 time to suggest that the Commission should approve the  
12 list. And so we really need to get moving on this. I  
13 would say that we are at this point three months  
14 behind in this project. And we need to get it on the  
15 road.

16 CHAIRMAN REYNOLDS: Mr. Staff Director,  
17 please make sure that it's on the agenda.

18 STAFF DIRECTOR DANNENFELSER: I'll put it  
19 on, Mr. Chairman.

20 VICE CHAIR THERNSTROM: And I have a  
21 question here for Dr. Lerner. I assume that you are  
22 not stopped in your tracks by a delay in this -- a bit  
23 of a delay in the vote, that is, you've got work to do  
24 on this project, I assume, still, so we're not holding  
25 this project up in any significant way?

1 DR. LERNER: We do have work to do,  
2 Commissioner Thernstrom. But on the other hand I  
3 would only say that the critical step, as far as I  
4 see, if collecting information, of course, to get the  
5 subpoenas --

6 VICE CHAIR THERNSTROM: Do it on the  
7 teleconference though. That's fine.

8 COMMISSIONER HERIOT: That's fine with me,  
9 but we've got to remember that these institutions are  
10 going to need some time to collect this data. Our  
11 part in organizing this is actually quite small  
12 compared to their getting the data to us.

13 CHAIRMAN REYNOLDS: Okay, if there are no  
14 more questions or comments. Next up is the discussion  
15 and with any luck, a vote on the MEPA briefing report.

16 I move that the Commission approve for publication,  
17 along with the concurring and dissenting statements  
18 submitted by any Commissioner by January 13, 2010 and  
19 any rebuttal submitted by any Commissioner by February  
20 14, 2010. Part A of the report produced by staff and  
21 reflecting Commissioner and panelists input on the  
22 briefing on the Commission, on the briefing the  
23 Commission held on September 21, 2007 on the Multi-  
24 Ethnic Placement Act on minority foster care and  
25 adoption, Part A, as distributed in draft form to

1 Commissioners. It contains a briefing -- a brief  
2 overview and summary of the issue and one of the  
3 Commissioners chose to conduct this briefing. A  
4 summary of the proceedings consisting of some synopses  
5 of the panelists' oral statements during the briefings  
6 and a synopsis of the question and answer session.  
7 And finally copies of the panelists' written  
8 statements. On this motion, if a majority of the  
9 Commissioners on the Commission vote to adopt Part A  
10 of the briefing report, the Commission will then open  
11 discussion on Part B. If Part A fails to obtain  
12 majority vote, discussion of Part B becomes moot.

13 Is there a second?

14 COMMISSIONER GAZIANO: Second.

15 CHAIRMAN REYNOLDS: Okay, discussion.

16 Okay.

17 COMMISSIONER MELENDEZ: Mr. Chairman, are  
18 we voting on Part A right then now? Is that what  
19 you're suggesting?

20 CHAIRMAN REYNOLDS: Right now, we're in  
21 the discussion phase.

22 COMMISSIONER GAZIANO: I thought the motion  
23 was for Part A and --

24 CHAIRMAN REYNOLDS: Yes, that's right.

25 COMMISSIONER GAZIANO: And you set forward

1 the procedure that would follow.

2 CHAIRMAN REYNOLDS: We would vote on Part  
3 A.

4 Mr. Melendez, do you have a question or  
5 comment?

6 COMMISSIONER MELENDEZ: No, that's fine.

7 CHAIRMAN REYNOLDS: Anything else?

8 Vice Chair Thernstrom, how do you vote?

9 VICE CHAIR THERNSTROM: Yes.

10 CHAIRMAN REYNOLDS: Commissioner Gaziano?

11 COMMISSIONER GAZIANO: Yes.

12 CHAIRMAN REYNOLDS: Commissioner Heriot?

13 COMMISSIONER HERIOT: Abstain.

14 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

15 (No response.)

16 CHAIRMAN REYNOLDS: Commissioner Melendez?

17 COMMISSIONER MELENDEZ: Yes, on Part A.

18 CHAIRMAN REYNOLDS: Commissioner Yaki?

19 COMMISSIONER YAKI: Abstain.

20 CHAIRMAN REYNOLDS: Commissioner Taylor?

21 COMMISSIONER TAYLOR: Yes.

22 CHAIRMAN REYNOLDS: And I vote for it as  
23 well. The record should reflect the fact that  
24 Commissioner Kirsanow did not vote and that we have  
25 two abstentions, one from Commissioner Heriot and the

1 other from Commissioner Yaki. The other Commissioners  
2 voted in favor. The motion passes.

3 Okay, Part B as distributed in draft form  
4 to Commissioners contains the Commission's findings  
5 and recommendations. Under this motion, the  
6 Commission will vote individually on each finding and  
7 recommendation. Those findings and recommendations  
8 receiving a majority vote will be included in the  
9 report with a vote tally and a sentence explaining any  
10 opposition vote for the item.

11 I understand that we'll have some motions  
12 regarding the findings and recommendations, but we'll  
13 wait --

14 COMMISSIONER GAZIANO: May I ask unanimous  
15 consent though that unless there are such motions that  
16 we go through them and approve them as if read, but  
17 don't go through the necessity of reading them into  
18 the record?

19 VICE CHAIR THERNSTROM: I think they  
20 should be read into the record.

21 CHAIRMAN REYNOLDS: All right, here we go.

22 Okay, I move that the Commission approve  
23 finding number one which reads as follows: The Multi-  
24 Ethnic Placement Act was broadly intended to remove  
25 and eliminate discrimination in child welfare, both

1 for the benefit of children who needed permanent  
2 homes, and for the benefit of prospective parents who  
3 wished to provide permanent homes. Additionally, the  
4 passage of MEPA rendered child welfare policies and  
5 law consistent with the principle of non-  
6 discrimination by race.

7 Is there a second?

8 COMMISSIONER GAZIANO: Second.

9 CHAIRMAN REYNOLDS: Discussion.

10 Any discussion?

11 COMMISSIONER MELENDEZ: Yes, Mr. Chairman,  
12 this is Commissioner Melendez. Is this just basically  
13 this first finding --

14 CHAIRMAN REYNOLDS: I'm sorry,  
15 Commissioner Melendez, please speak up.

16 COMMISSIONER MELENDEZ: Is this first  
17 finding basically just interpreting of what MEPA  
18 actually does?

19 CHAIRMAN REYNOLDS: That's my  
20 interpretation.

21 COMMISSIONER MELENDEZ: Does it actually  
22 need it?

23 CHAIRMAN REYNOLDS: I'm sorry?

24 COMMISSIONER MELENDEZ: Is that finding  
25 actually needed if it's just interpreting what the Act

1 actually does?

2 CHAIRMAN REYNOLDS: Well, this is  
3 consistent -- we've done this in the past, describing  
4 the main purpose of the statute. Is there any aspect  
5 of it that you're uncomfortable with? Do you think  
6 that it misinterpreted the statute?

7 COMMISSIONER MELENDEZ: No, I'm just  
8 saying that I didn't know if it was actually needed.

9 CHAIRMAN REYNOLDS: Okay. Vice Chair  
10 Thernstrom, how do you vote?

11 VICE CHAIR THERNSTROM: Wait a minute, I  
12 thought we already voted on finding one?

13 COMMISSIONER HERIOT: You did, but I don't  
14 think anybody else did.

15 VICE CHAIR THERNSTROM: I already said yes  
16 on finding one.

17 CHAIRMAN REYNOLDS: Okay, Commissioner  
18 Gaziano?

19 COMMISSIONER GAZIANO: Yes.

20 CHAIRMAN REYNOLDS: Commissioner Heriot?

21 COMMISSIONER HERIOT: Abstain.

22 CHAIRMAN REYNOLDS: Commissioner Kirsanow,  
23 have you returned?

24 (No response.)

25 CHAIRMAN REYNOLDS: Mr. Melendez?

1 COMMISSIONER MELENDEZ: Abstain.

2 CHAIRMAN REYNOLDS: Commissioner Yaki?

3 COMMISSIONER YAKI: Abstain.

4 CHAIRMAN REYNOLDS: Commissioner Taylor?

5 COMMISSIONER TAYLOR: Yes.

6 CHAIRMAN REYNOLDS: And I vote for it.

7 Okay, Commissioners Yaki, Melendez, and Heriot  
8 abstained. Commissioner Kirsanow did not vote.  
9 Commissioners Thernstrom, Gaziano, Taylor and Reynolds  
10 voted in favor of the motion. The motion passes.

11 Okay, finding number two. I move that the  
12 Commission approve the following finding: By passing  
13 MEPA, Congress intended to remove barriers to trans-  
14 racial adoptions so as to reduce racial disparities.  
15 It was also intended to reduce the number of children  
16 remaining in non-permanent home care for long periods.

17 Is there a second? Is there a second?

18 COMMISSIONER GAZIANO: Second.

19 CHAIRMAN REYNOLDS: Discussion?

20 VICE CHAIR THERNSTROM: Mr. Chairman, the  
21 wording could be better. By passing MEPA by enacting  
22 MEPA, I don't know. Anyway, instead of simply the  
23 cryptic racial disparity, something like to reduce the  
24 disproportionate number of minority children awaiting  
25 placement. So I would suggest some rewording of that

1 finding number two.

2 CHAIRMAN REYNOLDS: Okay, I'm trying to  
3 write down what you just said.

4 COMMISSIONER GAZIANO: I think I was just  
5 handed a version of what Vice Chair Thernstrom read.  
6 Vice Chair Thernstrom, if you don't mind me trying to  
7 read it back --

8 CHAIRMAN REYNOLDS: That's fine.

9 COMMISSIONER GAZIANO: By enacting MEPA,  
10 enacting is the change in that first clause, Congress  
11 intended to remove barriers to transracial adoptions  
12 so as to reduce -- and the new phrase is the  
13 disproportionate number of minority children awaiting  
14 placement.

15 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
16 is that an accurate -- did he accurately reflect your  
17 intent?

18 CHAIRMAN REYNOLDS: I think those are my  
19 exact words. I believe so, though maybe I can't -- I  
20 think that's what I said.

21 CHAIRMAN REYNOLDS: Okay, I'll take that  
22 as a friendly amendment.

23 Are we ready to vote? Okay, Vice Chair  
24 Thernstrom?

25 VICE CHAIR THERNSTROM: Yes.

1 CHAIRMAN REYNOLDS: Okay, Commissioner  
2 Gaziano?

3 COMMISSIONER GAZIANO: Yes.

4 CHAIRMAN REYNOLDS: Commissioner Heriot?

5 COMMISSIONER HERIOT: Abstain.

6 CHAIRMAN REYNOLDS: Commissioner Kirsanow,  
7 have you returned?

8 (No response.)

9 CHAIRMAN REYNOLDS: Mr. Melendez?

10 COMMISSIONER MELENDEZ: Abstain.

11 CHAIRMAN REYNOLDS: Commissioner Yaki?

12 COMMISSIONER YAKI: Which finding are we  
13 talking about?

14 CHAIRMAN REYNOLDS: Finding number two.

15 VICE CHAIR THERNSTROM: As amended.

16 COMMISSIONER YAKI: I have a comment as  
17 I'm voting. I'm voting to abstain simply because I  
18 find it odd that we cite a briefing transcript rather  
19 than the actual statute or in this case the language  
20 of the IEP itself in some -- in many of these  
21 findings. I understand it's nice shorthand to refer  
22 to what someone else says, but I always think it's  
23 part of our fact-finding mission being able to cite to  
24 the actual source document would be much more  
25 scholarly.

1                   And I vote to abstain.

2                   CHAIRMAN REYNOLDS: Commissioner Taylor?

3                   COMMISSIONER TAYLOR: I'm going to abstain  
4 on this finding.

5                   COMMISSIONER GAZIANO: I just want to  
6 respond to Commissioner Yaki, I certainly agree with  
7 your points. I think the references are just to us so  
8 that we can find who said it, but I certainly would  
9 second your thought that our staff should always try  
10 to show us the actual text of the statute, even if an  
11 expert supposedly testified to it, but that that won't  
12 go in the -- as I understand it, the references won't  
13 go into the final report. Is that correct?

14                  STAFF DIRECTOR DANNENFELSER: That's  
15 correct.

16                  VICE CHAIR THERNSTROM: It is a very good  
17 point and in the future I want the statutory record or  
18 I'm going to abstain as well. It's an excellent  
19 point.

20                  CHAIRMAN REYNOLDS: Any other comments? I  
21 vote in favor of it. So we have one, two, three, four  
22 abstentions, three votes in the affirmative.  
23 Commissioner Kirsanow didn't vote. The motion passes.

24                  COMMISSIONER GAZIANO: May I move to  
25 reopen finding number one in lieu that -- I'm very

1       sorry to do that, but it was just drawn to my  
2       attention. I'd like to add after the Multi-Ethnic  
3       Placement Act, MEPA, and this is the addition, as  
4       amended by the removal of barriers to inter-ethnic  
5       adoption provisions (IEP). I move to reopen finding  
6       number one and amend it with that addition.

7                   CHAIRMAN REYNOLDS:     I second it.  
8       Discussion?

9                   Vice Chair Thernstrom, how do you vote?

10                   VICE CHAIR THERNSTROM:   Yes.

11                   CHAIRMAN REYNOLDS:   Okay, Commissioner  
12       Gaziano?

13                   COMMISSIONER GAZIANO:   Yes.

14                   CHAIRMAN REYNOLDS:   Commissioner Heriot?

15                   COMMISSIONER HERIOT:   Abstain.

16                   CHAIRMAN REYNOLDS:   Commissioner Melendez?

17                   COMMISSIONER MELENDEZ:   Abstain.

18                   CHAIRMAN REYNOLDS:   Commissioner Yaki?

19                   COMMISSIONER YAKI:   Abstain.

20                   CHAIRMAN REYNOLDS:   Commissioner Taylor?

21                   COMMISSIONER TAYLOR:   Yes.

22                   CHAIRMAN REYNOLDS:   And I vote in the  
23       affirmative, so we have three abstentions, four in the  
24       affirmative. The motion passes.

25                   Okay, right now we're up to finding number

1 three. I move the Commission approve the following  
2 finding: The number of children in foster care has  
3 grown over the last generation. A disproportionate  
4 number of foster children are black. On average,  
5 black children remain in foster care longer than  
6 children of other racial and ethnic backgrounds. Some  
7 experts believe the causes of these disparities  
8 include, but are not limited to, historic  
9 discrimination, poverty, and the prevalence of single-  
10 parent families.

11 Is there a second?

12 COMMISSIONER GAZIANO: Second and I'd like  
13 to offer a friendly amendment that instead of the  
14 words "historic discrimination" that we substitute  
15 racial bias which is in some sense a broader term. I  
16 am uncomfortable even crediting experts as saying that  
17 historic discrimination at some time in the past is  
18 necessarily the reason why minority children were in  
19 foster care longer, but racial bias could potentially  
20 include that include other reasons.

21 CHAIRMAN REYNOLDS: Okay, I'll treat it as  
22 a friendly amendment. Comments, questions?

23 Vice Chair Thernstrom, how do you vote?

24 VICE CHAIR THERNSTROM: I am going to  
25 abstain for precisely the reason that Commissioner

1 Yaki just brought up. I don't remember this briefing.

2 I haven't gone back to the transcript and that's it.

3 CHAIRMAN REYNOLDS: Commissioner Gaziano?

4 COMMISSIONER GAZIANO: Yes.

5 CHAIRMAN REYNOLDS: Commissioner Heriot?

6 COMMISSIONER HERIOT: Abstain.

7 CHAIRMAN REYNOLDS: Pete, have you  
8 returned?

9 COMMISSIONER GAZIANO: I have an email  
10 that he will return shortly and wants to be on the  
11 line when we discuss the notational vote issue. It  
12 may be another five minutes before he returns.

13 CHAIRMAN REYNOLDS: Commissioner Melendez?

14 COMMISSIONER MELENDEZ: Abstain.

15 CHAIRMAN REYNOLDS: Commissioner Yaki?

16 COMMISSIONER YAKI: Abstain.

17 CHAIRMAN REYNOLDS: Commissioner Taylor?

18 COMMISSIONER TAYLOR: Yes.

19 CHAIRMAN REYNOLDS: And I vote yes also.  
20 The motion passes.

21 Okay, finding number four.

22 COMMISSIONER GAZIANO: Mr. Chairman?

23 CHAIRMAN REYNOLDS: I move that it be  
24 adopted>

25 COMMISSIONER GAZIANO: Mr. Chairman?

1                   CHAIRMAN REYNOLDS: The finding reads as  
2 follows: Since the amended MEPA became law in 1996,  
3 the adoption of black children by white couples has  
4 increased. From 2000 to 2004, the time black children  
5 spent in foster care had decreased by four months on  
6 average. Multiracial adoption has increased, as has  
7 adoption out of foster care.

8                   Is there a second?

9                   COMMISSIONER GAZIANO: Second.

10                  CHAIRMAN REYNOLDS: Discussion?

11                  COMMISSIONER YAKI: I have a question.  
12 I'm going to abstain --

13                  CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

14                  COMMISSIONER YAKI: Hello. What is the  
15 background noise?

16                  COMMISSIONER YAKI: Commissioner Yaki  
17 wants to be recognized.

18                  CHAIRMAN REYNOLDS: Commissioner Yaki.

19                  COMMISSIONER YAKI: Yes, one, does someone  
20 need to put their phone on mute because we're getting  
21 a lot of wind on the phone in the room.

22                  CHAIRMAN REYNOLDS: I apologize. A big  
23 piece of earth moving piece of equipment just went by.

24                  COMMISSIONER YAKI: So it's finally made  
25 it there.

1 (Laughter.)

2 COMMISSIONER YAKI: The question I had had  
3 to do with these particular statistics. One, the  
4 issue of adoption of black children by white couples  
5 has increased. I just wonder in terms of the  
6 intention of the IEP amendments to MEPA whether the  
7 number is significant in terms of whether it's white  
8 couples, white individuals, interracial couples,  
9 etcetera. And because we don't have any of that in  
10 this to sort of bolster or what have you, some of  
11 these conclusions I'm going to abstain.

12 CHAIRMAN REYNOLDS: Okay, Commissioner  
13 Gaziano?

14 COMMISSIONER GAZIANO: Yes.

15 CHAIRMAN REYNOLDS: Commissioner Heriot?

16 COMMISSIONER HERIOT: Abstain.

17 CHAIRMAN REYNOLDS: Commissioner Melendez?

18 COMMISSIONER MELENDEZ: Abstain.

19 CHAIRMAN REYNOLDS: Commissioner Taylor?

20 COMMISSIONER TAYLOR: Yes.

21 CHAIRMAN REYNOLDS: I vote yes as well.  
22 We have one, two, three, four abstentions and three  
23 votes in the affirmative. The motion passes.

24 Finding number five. I move that the  
25 Commission approve finding number five which reads:

1 Children are considered better off in permanent family  
2 settings than in foster care.

3 Is there a second?

4 COMMISSIONER GAZIANO: Yes, with an  
5 amendment and a discussion. This just reads very odd  
6 to me. Children are considered. It's just sort of  
7 out there. Better off. Either we should find and I'm  
8 not sure we're comfortable finding children --  
9 children are better off in permanent family or we  
10 should ascribe this consideration or belief to  
11 someone. An alternative might be experts generally  
12 believe that children are better off in permanent  
13 family settings than in foster care.

14 I think we had some testimony to that  
15 effect. Or I'd be up for striking this. But I'm just  
16 a little uncomfortable with the way it's worded. If  
17 it's so well known, we don't necessarily need to have  
18 it as one of our findings.

19 Commissioner Taylor, you are one of the  
20 sponsors of this hearing, I understand, or this  
21 briefing. I was not on the Commission then. Do you  
22 have an opinion on that?

23 CHAIRMAN REYNOLDS: Commissioner Taylor?

24 COMMISSIONER TAYLOR: Yes.

25 CHAIRMAN REYNOLDS: Do you have an opinion

1 on the comments made by Commissioner Gaziano?

2 COMMISSIONER TAYLOR: I don't think an  
3 amendment is necessary to the finding. I like the  
4 finding the way it is.

5 CHAIRMAN REYNOLDS: Okay. Commissioner  
6 Kirsanow, did you join us?

7 COMMISSIONER KIRSANOW: I did.

8 CHAIRMAN REYNOLDS: Very good.

9 COMMISSIONER GAZIANO: Commissioner Taylor,  
10 would you mind if we amend it to say experts generally  
11 believe that children are better off or would you  
12 prefer that we simply find children are better off?

13 COMMISSIONER TAYLOR: I like the express,  
14 undiluted finding that children are better in stable  
15 families.

16 CHAIRMAN REYNOLDS: Okay.

17 COMMISSIONER TAYLOR: And I don't like us  
18 hiding behind experts.

19 COMMISSIONER GAZIANO: Good. Well, then  
20 could we strike -- I don't care which way we go, but  
21 could we strike considered then?

22 CHAIRMAN REYNOLDS: Yes, I'll consider  
23 that a friendly amendment. Any other comments?

24 Vice Chair Thernstrom, how do you vote?

25 VICE CHAIR THERNSTROM: I'm abstaining.

1 CHAIRMAN REYNOLDS: Commissioner Gaziano?

2 COMMISSIONER GAZIANO: Yes.

3 CHAIRMAN REYNOLDS: Commissioner Heriot?

4 COMMISSIONER HERIOT: I think I have to

5 vote for this one, yes.

6 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

7 COMMISSIONER KIRSANOW: I wasn't part of

8 the discussion, so I'll have to abstain.

9 CHAIRMAN REYNOLDS: Commissioner Melendez?

10 COMMISSIONER MELENDEZ: Abstain.

11 CHAIRMAN REYNOLDS: Commissioner Yaki?

12 COMMISSIONER YAKI: Abstain.

13 CHAIRMAN REYNOLDS: Commissioner Taylor?

14 COMMISSIONER TAYLOR: Yes.

15 CHAIRMAN REYNOLDS: And I vote yes as  
16 well. Four abstentions and four affirmative votes.

17 The motion passes.

18 We're up to finding number six. I move  
19 that the Commission approve this finding which reads:  
20 Extensive research has shown that transracial  
21 adoption does not produce psychological or other  
22 social problems in adopted children, especially if  
23 parents are properly selected and prepared for raising  
24 children of a different race. Also, according to  
25 experts, transracial adoption does not seem to affect

1 children's racial or ethnic identity.

2 May I have a second?

3 COMMISSIONER GAZIANO: Second.

4 CHAIRMAN REYNOLDS: Discussion?

5 COMMISSIONER GAZIANO: Commissioner  
6 Taylor, you want to strike some of those experts or in  
7 this one are you comfortable with the experts being  
8 there?

9 COMMISSIONER TAYLOR: Yes, I don't think  
10 it's elusive in this one.

11 COMMISSIONER GAZIANO: Okay.

12 CHAIRMAN REYNOLDS: Any other comments?  
13 Vice Chair Thernstrom?

14 VICE CHAIR THERNSTROM: I still have the  
15 same problem which led me to vote abstaining. I mean,  
16 I don't have any doubts it's true. I will vote yes.  
17 I'm being harassed here I realize, I'm voting yes.

18 CHAIRMAN REYNOLDS: Commissioner Gaziano?

19 COMMISSIONER GAZIANO: Yes.

20 CHAIRMAN REYNOLDS: Commissioner Heriot?

21 COMMISSIONER HERIOT: I will abstain on  
22 this one.

23 CHAIRMAN REYNOLDS: Do you believe you're  
24 right?

25 COMMISSIONER HERIOT: Others will have to

1 decide that.

2 (Laughter.)

3 CHAIRMAN REYNOLDS: No, Commissioner

4 Heriot -

5 COMMISSIONER HERIOT: It's a statement  
6 about what experts say and the other one was not, so  
7 that would make a declaration in that one and this one  
8 does not.

9 CHAIRMAN REYNOLDS: Okay, Commissioner  
10 Kirsanow?

11 COMMISSIONER KIRSANOW: Yes.

12 CHAIRMAN REYNOLDS: Commissioner Melendez?

13 COMMISSIONER MELENDEZ: Abstain.

14 CHAIRMAN REYNOLDS: Commissioner Yaki?

15 COMMISSIONER YAKI: Abstain.

16 CHAIRMAN REYNOLDS: Commissioner Taylor?

17 COMMISSIONER TAYLOR: Yes.

18 CHAIRMAN REYNOLDS: I vote yes as well.

19 We have three abstentions and five affirmative votes.

20 It passes. We're up to finding number seven which I  
21 move that the Commission approve the following: MEPA  
22 encourages state and local entities to recruit foster  
23 and adoptive parents who reflect the racial and ethnic  
24 diversity of the children. It does not discourage  
25 transracial placement, nor does it require a

1 preference for same-race placement. The fact that  
2 black parents are adopting at the same rate as white  
3 parents suggests that successful recruitment of black  
4 parents is taking place.

5 Is there a second?

6 COMMISSIONER GAZIANO: Second.

7 CHAIRMAN REYNOLDS: Hello?

8 COMMISSIONER GAZIANO: Second.

9 CHAIRMAN REYNOLDS: Discussion?

10 Vice Chair Thernstrom?

11 VICE CHAIR THERNSTROM: I'm thinking. Get  
12 back to me.

13 CHAIRMAN REYNOLDS: Commissioner Gaziano?

14 COMMISSIONER GAZIANO: Yes.

15 CHAIRMAN REYNOLDS: Commissioner Heriot?

16 COMMISSIONER HERIOT: Abstain.

17 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

18 COMMISSIONER KIRSANOW: Abstain.

19 CHAIRMAN REYNOLDS: Commissioner Melendez?

20 COMMISSIONER MELENDEZ: Abstain.

21 CHAIRMAN REYNOLDS: Commissioner Yaki?

22 COMMISSIONER YAKI: Abstain.

23 CHAIRMAN REYNOLDS: Commissioner Taylor?

24 COMMISSIONER TAYLOR: Yes.

25 CHAIRMAN REYNOLDS: And I vote for it

1 also. We have --

2 COMMISSIONER YAKI: Commissioner  
3 Thernstrom still needs to vote.

4 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

5 VICE CHAIR THERNSTROM: I'm going to vote  
6 yes.

7 CHAIRMAN REYNOLDS: Four abstentions and  
8 four affirmative votes. It passes.

9 We're up to finding number eight. I move  
10 that the Commission approve the following language:  
11 MEPA's prohibition of racial discrimination in child  
12 placement does not prevent agencies from discussing  
13 with respect to adoptive and foster parents their  
14 feelings, capacities and preferences with respect to  
15 caring for a child of a particular race or ethnicity,  
16 nor does it prevent sensitizing parents to the  
17 problems that children might face after adoption by  
18 families of a different race or ethnicity than theirs.

19 Is there a second?

20 COMMISSIONER GAZIANO: Second.

21 CHAIRMAN REYNOLDS: Discussion?

22 Vice Chair Thernstrom?

23 VICE CHAIR THERNSTROM: I'm going to  
24 abstain on that.

25 CHAIRMAN REYNOLDS: Commissioner Gaziano?

1 COMMISSIONER GAZIANO: Yes.

2 CHAIRMAN REYNOLDS: Commissioner Heriot?

3 COMMISSIONER HERIOT: Abstain.

4 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

5 COMMISSIONER KIRSANOW: Abstain.

6 CHAIRMAN REYNOLDS: Commissioner Melendez?

7 COMMISSIONER MELENDEZ: Abstain.

8 CHAIRMAN REYNOLDS: Commissioner Yaki?

9 COMMISSIONER YAKI: Abstain.

10 CHAIRMAN REYNOLDS: Mr. Taylor?

11 COMMISSIONER TAYLOR: Am I going to be the  
12 only person to vote for this thing?

13 (Laughter.)

14 COMMISSIONER GAZIANO: I did, Commissioner  
15 Taylor.

16 COMMISSIONER TAYLOR: Everybody is  
17 abstaining. I'm voting for it.

18 CHAIRMAN REYNOLDS: So am I good.

19 COMMISSIONER TAYLOR: Good.

20 CHAIRMAN REYNOLDS: So we have three votes  
21 for it, the rest abstain.

22 Okay, finding number nine. I move that  
23 the following language be approved: Some agencies and  
24 personnel seek to circumvent MEPA's provision to give  
25 consideration of race and placement by engaging

1 consultants who the agencies and personnel expect to  
2 render an expert opinion that same-race parents are in  
3 the best interest of a child. MEPA makes it clear  
4 that requiring same-race placement should be the  
5 exception rather than the rule and that such cases are  
6 subject to strict scrutiny and must represent age and  
7 telling interest.

8 May I have a second?

9 COMMISSIONER GAZIANO: Second, with an  
10 amendment. I think the last sentence either confuses  
11 or is misleading, misstates possibly the strict  
12 scrutiny rule as if the exception rather than the rule  
13 is the equivalent of the strict scrutiny, so I would  
14 amend the last sentence to read "MEPA is in line with  
15 current equal protection law, which holds that  
16 governmental actions undertaken on the basis of race  
17 are subject to strict scrutiny and must -- let's see,  
18 I'm struggling with the last word -- "and must be  
19 justified by compelling government interest to  
20 withstand fourteenth amendment analysis."

21 VICE CHAIR THERNSTROM: I need you to read  
22 to that me again, I'm sorry.

23 COMMISSIONER GAZIANO: Sure. How about  
24 this slightly different version that one of our  
25 brilliant counsel just handed me that I adopt. Give

1 me just a minute to look it over.

2 (Pause.)

3 How about this: "MEPA permits exceptions  
4 to the general prohibition against race discrimination  
5 only in quote" -- forget the quote. "MEPA presents  
6 exceptions to the general prohibition against race  
7 discrimination only in circumstances where the child  
8 has a specific and demonstrable need for a same-race  
9 placement." New sentence. "Even in those exceptional  
10 cases, however, same-race placement would be subject  
11 to constitutional strict scrutiny and must be  
12 justified by compelling interest to withstand  
13 fourteenth amendment analysis."

14 COMMISSIONER YAKI: That's more  
15 complicated than the other one.

16 COMMISSIONER GAZIANO: It is.

17 CHAIRMAN REYNOLDS: Okay, I'll take that  
18 as a friendly amendment.

19 Vice Chair Thernstrom?

20 VICE CHAIR THERNSTROM: I'm sorry. I know  
21 I was involved in writing this. But I cannot remember  
22 at this point what the legitimate exceptions would be  
23 such that they would be justifiable under however it  
24 was stated strict scrutiny. In any cases, what would  
25 an exception look like? A child who what would need a

1 same race placement?

2 COMMISSIONER GAZIANO: I was trying to  
3 characterize the laws. I don't think -- I think  
4 strict scrutiny in this case, hopefully, would be  
5 fatal in fact. It's a very tough test. And I can't  
6 imagine a situation where it would be satisfied.

7 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
8 I think that that type of determination would be made  
9 on a case-by-case basis. It will depend on the  
10 particular facts there at play. While I share  
11 Commissioner Gaziano's view, that is not to say there  
12 is a set of circumstances that can't meet the  
13 standard.

14 COMMISSIONER HERIOT: What about when the  
15 child desires a particular race? I would think that  
16 would be routinely granted.

17 CHAIRMAN REYNOLDS: Well, Judge Heriot,  
18 you'd have to get a majority vote.

19 VICE CHAIR THERNSTROM: It does, Mr.  
20 Chairman, kind of lead, it seems to me, unless  
21 Commissioner Gaziano is right that scrutiny would be  
22 fatal. It does leaves a loophole for arguments that  
23 have brought implications about or implicitly making  
24 judgments about where children belong, about color  
25 coding children and adoptive parents. It does seem to

1 me there's a hole there that potentially you can drive  
2 a truck through.

3 CHAIRMAN REYNOLDS: Well, if you're right  
4 that hole then resides in the Constitution. The  
5 strict scrutiny standard --

6 VICE CHAIR THERNSTROM: It's always  
7 strictly applied, as you know. What's called strict  
8 scrutiny is often not strict.

9 CHAIRMAN REYNOLDS: Well, I think that in  
10 certain categories of cases I would agree with you.

11 COMMISSIONER GAZIANO: Well, I may be  
12 wrong about whether judges, certain judges can't find  
13 a situation that satisfies strict scrutiny, but I  
14 wanted to be -- but I thought we should be clear that  
15 the strict scrutiny standard applies or if someone  
16 else will offer a different amendment for that last  
17 sentence, but that last sentence seems awkward to me  
18 and to be misleading.

19 CHAIRMAN REYNOLDS: Well, no. I think  
20 introducing the concept of ruling on the exception  
21 that that does muddy the waters a bit.

22 VICE CHAIR THERNSTROM: I agree with that.  
23 I agree with that. I'm just a little concerned about  
24 how it now reads as well.

25 COMMISSIONER GAZIANO: I could go back to

1 my earlier version if that's a little clearer.

2 CHAIRMAN REYNOLDS: If I understand what  
3 is your concern, I'm not sure the concern is directed  
4 at the wording as opposed to the leading concept.

5 COMMISSIONER HERIOT: Excuse me, strict  
6 scrutiny, that's not in the statute, is it?

7 COMMISSIONER GAZIANO: No, it is not.

8 COMMISSIONER HERIOT: I don't think we  
9 should be opining on that then. I'm going to be  
10 abstaining so maybe my view doesn't count.

11 COMMISSIONER GAZIANO: Can you help us out  
12 even if you are going to abstain? MEPA does come up  
13 with a standard that I'm not sure I'm prepared to  
14 articulate. It doesn't supplant strict scrutiny, but  
15 it comes up with a pretty strong standard itself that  
16 there --

17 VICE CHAIR THERNSTROM: Does anybody know  
18 what the MEPA language is that makes it clear that  
19 same race placement should be the exception rather  
20 than the rule? What is the MEPA language there.

21 COMMISSIONER HERIOT: The language I have  
22 in front of me says "prohibited conduct. A person or  
23 government that is involved in adoption or foster care  
24 placement may not (a) deny to any individual the  
25 opportunity to become an adoptive or a foster parent

1 on the basis of race, color, or national origin of the  
2 individual or of the child involved; or (b) delay or  
3 deny the placement of a child for adoption or into  
4 foster on the basis of race, color, or national origin  
5 of the adoptive or foster parent or the child  
6 involved."

7 VICE CHAIR THERNSTROM: Where is the  
8 exception in that language?

9 That language does not suggest that there  
10 can be exceptions.

11 COMMISSIONER HERIOT: The previous  
12 version, the Howard-Metzenbaum version has exceptions  
13 with much looser language. But I don't know of any.

14 VICE CHAIR THERNSTROM: I don't want to  
15 say MEPA makes it clear that blah, blah, blah and  
16 refer to exceptions when MEPA doesn't, from the  
17 language we just read --

18 COMMISSIONER GAZIANO: That's why I was  
19 trying to say -- let me go back to my original  
20 amendment. There are some regulations issued under  
21 this that suggest the -- by the way the text that  
22 Commissioner Heriot read says that -- maybe you could  
23 read it again, but is it clear that absolutely no  
24 consideration can be given? It essentially says that  
25 can be read by various people in still mischievous

1 ways. So maybe one way I suppose I'd prefer to do  
2 this is to just make it clear that strict scrutiny  
3 still applies.

4 MEPA is in line with current equal  
5 protection law which holds that governmental actions  
6 undertaken on the basis of race are subject to strict  
7 scrutiny and must be justified by a compelling  
8 government interest.

9 CHAIRMAN REYNOLDS: Well, Todd, if I  
10 understood the language you just read, the statutory  
11 provision is stricter than the constitutional rule.

12 VICE CHAIR THERNSTROM: Exactly, and the  
13 statutory language does not refer to, as I understand  
14 it from what Commissioner Heriot just read, does not  
15 refer to permissible exceptions.

16 CHAIRMAN REYNOLDS: So while the  
17 Constitution may have room or provide room for a state  
18 to consider race under certain circumstances, the  
19 statute does not?

20 COMMISSIONER GAZIANO: If someone could  
21 read me the language or the statute again. It's a  
22 little unclear to me. The statute is a little unclear  
23 and HHS has interpreted it to allow it in certain  
24 circumstances so I thought we might want to -- if  
25 someone else can formulate a different last sentence

1 that would be fine. Maybe we can come back to it  
2 while someone is working on it.

3 STAFF DIRECTOR DANNENFELSER: Should we  
4 say MEPA's regulations make it clear?

5 COMMISSIONER HERIOT: Have we even looked  
6 at the regulations?

7 VICE CHAIR THERNSTROM: I would need to  
8 look at the regulations. I'm unhappy. I don't know  
9 what I'm doing here because let's go on the basis of  
10 what Commissioner Heriot read to us. There are no  
11 exceptions in this statute itself.

12 COMMISSIONER HERIOT: I would reserve  
13 judgment on whether or not exceptions should be read  
14 into that.

15 VICE CHAIR THERNSTROM: Whatever, but I'm  
16 in the dark here.

17 CHAIRMAN REYNOLDS: Okay, folks, do we  
18 vote? Is there consensus on how we should handle it  
19 or should we just have a vote?

20 COMMISSIONER GAZIANO: Is it possible that  
21 we could take up this particular finding at another  
22 meeting?

23 CHAIRMAN REYNOLDS: It's the equivalent of  
24 tabling it, because staff wouldn't be -- well, I guess  
25 the answer is yes. But we wouldn't be able to publish

1 the document until this issue is resolved.

2 STAFF DIRECTOR DANNENFELSER: We still  
3 would need Commissioners to have their comment period,  
4 so we're going to have some time for that to take  
5 place.

6 COMMISSIONER REYNOLDS: Okay, does anyone  
7 have any objection to tabling finding number nine?

8 COMMISSIONER HERIOT: Well, the comment  
9 period may require some comment on what number nine  
10 eventually becomes.

11 VICE CHAIR THERNSTROM: I need to see the  
12 regs and the MEPA stats.

13 COMMISSIONER HERIOT: Can I comment? The  
14 reason I have been abstaining is that it did seem to  
15 me that the report did not focus enough on the  
16 language of the statute and the legislative history of  
17 the statute. I don't think that we should simply  
18 accept what we're told about a statute. The statute  
19 should be in the report and this is not focused enough  
20 on the language of the statute. It seems to me that  
21 one of the witnesses suggested that we should take a  
22 hard look at what the Department has issued as  
23 regulations and given an opinion on whether or not  
24 that's the appropriate interpretation of the statute.  
25 I would have rather done a report on that.

1                   VICE CHAIR THERNSTROM: I am in agreement  
2 with that, fortunately. I wish you had stated that up  
3 front.

4                   CHAIRMAN REYNOLDS: Okay, we're going to  
5 table finding nine. Next up is finding number ten. I  
6 move that the Commission approve the following  
7 language: In a study of state adoption policies, the  
8 Government Accountability Office found that states  
9 consider provision of federal subsidies to parents who  
10 adopt a child with special needs to be helpful in  
11 reducing racial disparities in adoption. As used in  
12 adoption special needs is a term states use for  
13 children who have categories they believe make  
14 adoption more difficult, for example, being an only  
15 child having a disability or being a member of a  
16 minority group.

17                   Is there a second?

18                   COMMISSIONER GAZIANO: Second with one  
19 justification.

20                   COMMISSIONER TAYLOR: I'm sorry, would you  
21 read that again, Gerry, I lost you there for a second.

22                   COMMISSIONER GAZIANO: In a study of state  
23 adoption policies, the Government Accountability  
24 Office found that states consider provision of federal  
25 subsidies to parents who adopt a child with special

1 needs to be helpful in reducing racial disparities in  
2 adoption. As used in adoption special needs is a term  
3 states use for children who have characteristics they  
4 believe make adoption more difficult, for example,  
5 being an only child having a disability or being a  
6 member of a minority group.

7 COMMISSIONER TAYLOR: Thank you.

8 CHAIRMAN REYNOLDS: Is there a second?

9 COMMISSIONER GAZIANO: Second, but I have  
10 a question as well. Being a member of a minority  
11 group, it may be true, so it may fit this finding that  
12 states include that as a factor or as an example of a  
13 child with a special need, but then I think we have to  
14 use that term special needs very carefully and may  
15 need some amendments in the recommendation. But  
16 before we proceed to that, I just want to make sure  
17 those who drafted the report are comfortable. I think  
18 I'll have to abstain on this one seconding it for  
19 purposes of discussion only, that states really do  
20 identify children of minority -- minority children as  
21 those needing special needs or fitting the special  
22 needs category.

23 CHAIRMAN REYNOLDS: Other comments?

24 Vice Chair Thernstrom, how do you vote?

25 VICE CHAIR THERNSTROM: I'm abstaining.

1 CHAIRMAN REYNOLDS: Commissioner Gaziano?

2 COMMISSIONER GAZIANO: Abstain.

3 CHAIRMAN REYNOLDS: Commissioner Heriot?

4 COMMISSIONER HERIOT: Abstain.

5 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

6 COMMISSIONER KIRSANOW: Abstain.

7 CHAIRMAN REYNOLDS: Commissioner Melendez?

8 COMMISSIONER MELENDEZ: Abstain.

9 CHAIRMAN REYNOLDS: Commissioner Yaki?

10 COMMISSIONER YAKI: Abstain.

11 CHAIRMAN REYNOLDS: Commissioner Yaki?

12 COMMISSIONER YAKI: Abstain.

13 CHAIRMAN REYNOLDS: Commissioner Taylor?

14 COMMISSIONER TAYLOR: Aye.

15 CHAIRMAN REYNOLDS: Give me a moment. I'm  
16 trying to figure out -- and Commissioner Yaki, this is  
17 an opportunity for you. I'm trying to figure out  
18 whether I'm being irrational now. I too have concerns  
19 about this label of special needs being applied to  
20 certain minority groups and -- I understand what they  
21 mean. They're basically saying that certain children,  
22 that the probability of certain children being adopted  
23 within a certain time frame is reduced because of  
24 certain characteristics. I get that.

25 All right --

1                   COMMISSIONER TAYLOR: Mr. Chairman, can I  
2 make a comment?

3                   CHAIRMAN REYNOLDS: Well, I made up my  
4 mind and I'm voting for it --

5                   COMMISSIONER TAYLOR: Let me still make a  
6 comment. I think we need not shy away from the facts  
7 and reality. We may not like the label that people  
8 put on it, but in this context, in terms of a finding  
9 where we are recognizing the reality, but really helps  
10 place children, I don't think we should shy away from  
11 it. We don't have to embrace the label to acknowledge  
12 the facts and that's why I'm voting for it.

13                  CHAIRMAN REYNOLDS: I had to do some  
14 thinking out loud, but I arrived at the same  
15 conclusion.

16                  COMMISSIONER TAYLOR: And also in the  
17 interest of full disclosure, this also comes out of my  
18 experience of adopting my oldest son where this was a  
19 real issue since he is half Persian and half African  
20 American and it became a real issue in terms of a  
21 private adoption and it's something that we struggled  
22 with and so this is something that again I don't shy  
23 away from even though the label may not be something  
24 we all like.

25                  CHAIRMAN REYNOLDS: Okay, now we're up to

1 recommendations.

2 STAFF DIRECTOR DANNENFELSER: Mr.  
3 Chairman?

4 CHAIRMAN REYNOLDS: Yes.

5 STAFF DIRECTOR DANNENFELSER: Just a  
6 clarification. Someone pointed out that they thought  
7 when you read the finding that you might have said  
8 reducing racial disparities whereas the test may have  
9 said disproportionality and I'm just wondering if you  
10 meant to say disparities or disproportionality in that  
11 instance?

12 CHAIRMAN REYNOLDS: I am aware that a  
13 different term was used and I purposely changed it.  
14 Now is there a distinction, am I losing something with  
15 the revision I made?

16 STAFF DIRECTOR DANNENFELSER: Well, we  
17 just want to be clear on what language to put in the  
18 --

19 CHAIRMAN REYNOLDS: Oh, I see.

20 STAFF DIRECTOR DANNENFELSER: -- put in  
21 the printed report.

22 CHAIRMAN REYNOLDS: This is a finding.  
23 Yes. Okay, let's flip it back to what it originally  
24 was -- what was the term, disproportionality?

25 STAFF DIRECTOR DANNENFELSER:

1 Disproportionality.

2 CHAIRMAN REYNOLDS: Okay. And I did it  
3 one other place. I hope it's not in the findings or  
4 recommendations, but it very well may be. So please  
5 bring it to my attention if that turns out to be the  
6 case.

7 STAFF DIRECTOR DANNENFELSER: Okay.

8 CHAIRMAN REYNOLDS: Okay, I move that we  
9 approve recommendation one which reads as follows: It  
10 is in the best interest of a child to be placed in a  
11 safe and stable home.

12 Vice Chair Thernstrom?

13 VICE CHAIR THERNSTROM: Yes.

14 CHAIRMAN REYNOLDS: Commissioner Gaziano?

15 COMMISSIONER GAZIANO: Yes.

16 CHAIRMAN REYNOLDS: Commissioner Heriot?

17 COMMISSIONER HERIOT: Could you read that  
18 again?

19 CHAIRMAN REYNOLDS: It is in the best  
20 interest of a child to be placed in a safe and stable  
21 home?

22 COMMISSIONER HERIOT: Yes.

23 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

24 COMMISSIONER KIRSANOW: I don't know.

25 That sounds pretty controversial to me.

1 (Laughter.)

2 COMMISSIONER KIRSANOW: I'll have to go  
3 with yes.

4 CHAIRMAN REYNOLDS: Commissioner Melendez?

5 COMMISSIONER MELENDEZ: Abstain.

6 CHAIRMAN REYNOLDS: Commissioner Yaki?

7 COMMISSIONER YAKI: Abstain.

8 CHAIRMAN REYNOLDS: Commissioner Taylor?

9 (No response.)

10 CHAIRMAN REYNOLDS: Can anyone hear me?

11 COMMISSIONER HERIOT: I can.

12 COMMISSIONER KIRSANOW: Yes.

13 CHAIRMAN REYNOLDS: Did Commissioner  
14 Taylor respond?

15 COMMISSIONER HERIOT: No.

16 CHAIRMAN REYNOLDS: Okay, let's assume  
17 that he's off the line. I vote in the affirmative.  
18 So we have two abstentions. Commissioner Taylor did  
19 not vote and the remaining Commissioners voted in the  
20 affirmative. One down.

21 COMMISSIONER YAKI: I'll change my vote to  
22 a yes, Commissioner Yaki.

23 CHAIRMAN REYNOLDS: Let the record reflect  
24 that Commissioner Yaki voted in the affirmative.

25 COMMISSIONER YAKI: But my statement on

1 this is going to be on the definition of what a stable  
2 home is.

3 CHAIRMAN REYNOLDS: Okay. I move that the  
4 Commission approve recommendation number two which  
5 reads as follows: The U.S. Department of Health and  
6 Human Services should continue with its vigorous  
7 enforcement of MEPA's anti-discrimination prohibition.

8 Is there a second?

9 COMMISSIONER GAZIANO: Second.

10 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

11 VICE CHAIR THERNSTROM: Well, is there  
12 some question that HHS needs to be told to continue  
13 with -- to enforce such an important statute? I'm  
14 just trying to understand why we've got this here.

15 CHAIRMAN REYNOLDS: To demonstrate that we  
16 have a firm grasp of the obvious.

17 COMMISSIONER GAZIANO: Well, I think the  
18 word vigorous adds something. We think that they  
19 ought to be vigorously enforcing this. You --

20 VICE CHAIR THERNSTROM: No, we say  
21 continue --

22 COMMISSIONER GAZIANO: Right, we don't --  
23 assuming that's been their posture, we don't want them  
24 to slack off on this one.

25 COMMISSIONER HERIOT: I don't think this

1 is an obvious statement at all. I think some of the  
2 enforcement actions by the Department of HHS has been  
3 somewhat controversial.

4 CHAIRMAN REYNOLDS: So Vice Chair  
5 Thernstrom?

6 VICE CHAIR THERNSTROM: All right, yes.

7 CHAIRMAN REYNOLDS: Commissioner Gaziano?

8 COMMISSIONER GAZIANO: Yes.

9 CHAIRMAN REYNOLDS: Commissioner Heriot?

10 COMMISSIONER HERIOT: Abstain.

11 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

12 COMMISSIONER KIRSANOW: Yes.

13 CHAIRMAN REYNOLDS: Commissioner Melendez?

14 COMMISSIONER MELENDEZ: Abstain.

15 CHAIRMAN REYNOLDS: Commissioner Yaki?

16 COMMISSIONER YAKI: Yes.

17 CHAIRMAN REYNOLDS: Commissioner Taylor,  
18 have you returned?

19 COMMISSIONER TAYLOR: I have returned,  
20 yes.

21 CHAIRMAN REYNOLDS: And I vote for it  
22 also, we have two abstentions and the remaining  
23 Commissioners voted in favor of it. The motion  
24 passes.

25 Okay, rolling right along. Recommendation

1 number three. I move that the Commission approve it.

2 The language reads: HHS should investigate  
3 individuals, agencies and groups who seek to sidestep  
4 MEPA's strong restrictions on the use of race in  
5 placements when they use consultants whom the agencies  
6 expect to render an expert opinion that same-race  
7 placement is in the best interest of the child. HHS  
8 should impose sanctions as appropriate.

9 Is there a second?

10 COMMISSIONER YAKI: This is Commissioner  
11 Yaki. Doesn't this suffer from the same defect as  
12 finding number nine that we deferred since it's based  
13 on finding number nine?

14 CHAIRMAN REYNOLDS: Finding number nine.  
15 Commissioner Yaki, could you please --

16 COMMISSIONER YAKI: That was the whole  
17 long rewrite of the strict scrutiny standard that we  
18 did.

19 CHAIRMAN REYNOLDS: Well, this one does  
20 not, I don't believe this implicates the Constitution.

21 COMMISSIONER YAKI: Sure it does, because  
22 nine is based on --

23 COMMISSIONER GAZIANO: I agree they may be  
24 related. If we're going to postpone nine, maybe we  
25 should postpone three as well. Maybe there's a way to

1 improve it. I had a separate question about it myself  
2 and was going to abstain.

3 CHAIRMAN REYNOLDS: Okay, so --

4 COMMISSIONER GAZIANO: I don't know about  
5 HHS' sanction authority and the extent to which this  
6 is -- I'm just not familiar enough with this  
7 recommendation to vote for it. But I defer to others  
8 if they want to.

9 CHAIRMAN REYNOLDS: Okay, let's vote.

10 Vice Chair Thernstrom?

11 VICE CHAIR THERNSTROM: I don't  
12 understand. I thought there was some motion here that  
13 if we're postponing nine, we're postponing this too.

14 COMMISSIONER YAKI: I so move.  
15 Commissioner Yaki.

16 CHAIRMAN REYNOLDS: Okay, no vote  
17 necessary.

18 Recommendation number four. The language  
19 reads as follows: HHS should increase its efforts to  
20 assist federal and state agencies in recruiting  
21 adoptive families for all children available for  
22 placement regardless of race or ethnicity with a goal  
23 to produce a broad spectrum of prospective families.

24 Is there a second? Is there a second?

25 COMMISSIONER GAZIANO: Second for purposes

1 of discussion.

2 CHAIRMAN REYNOLDS: Thank you,  
3 Commissioner Gaziano.

4 Discussion.

5 COMMISSIONER GAZIANO: The reason for my  
6 hesitancy on this one is "should increase its  
7 efforts." I'm just not having participated in the  
8 briefing, I'm a little unclear whether its efforts are  
9 good, bad, indifferent and this relates to another  
10 concern I had with another recommendation. Whenever  
11 we're telling agencies to spend more efforts, we're  
12 also telling them to potentially spend more money. So  
13 that just gives me a little bit of pause.

14 CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
15 how do you vote?

16 VICE CHAIR THERNSTROM: I have exactly the  
17 same problem. Abstain.

18 CHAIRMAN REYNOLDS: Commissioner Gaziano?

19 COMMISSIONER GAZIANO: Abstain.

20 CHAIRMAN REYNOLDS: Commissioner Heriot?

21 COMMISSIONER HERIOT: Abstain.

22 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

23 COMMISSIONER KIRSANOW: Abstain.

24 CHAIRMAN REYNOLDS: Commissioner Melendez?

25 COMMISSIONER MELENDEZ: Abstain.

1 CHAIRMAN REYNOLDS: Commissioner Yaki?

2 COMMISSIONER YAKI: Abstain.

3 CHAIRMAN REYNOLDS: Commissioner Taylor?

4 COMMISSIONER TAYLOR: No.

5 CHAIRMAN REYNOLDS: So you're voting  
6 against the motion?

7 COMMISSIONER TAYLOR: Correct.

8 CHAIRMAN REYNOLDS: I'm curious. What's  
9 your rationale?

10 COMMISSIONER TAYLOR: Because I agree with  
11 the comment. That leads me to a no.

12 CHAIRMAN REYNOLDS: Okay. I'm going to  
13 abstain. Okay, the motion fails.

14 Recommendation number five. It reads:  
15 HHS should develop and support adoption policies and  
16 practices that will allow adoption agencies to have  
17 conversations with parents about the challenges of  
18 raising children whose race differs from their own  
19 without engaging in illegal racial discrimination.

20 Is there a second?

21 COMMISSIONER GAZIANO: Second.

22 CHAIRMAN REYNOLDS: Okay, I think it's  
23 somewhat redundant. I would like to offer a friendly  
24 amendment to strike the word "illegal." Someone was  
25 growling?

1 (Laughter.)

2 Do I take that as concern or opposition?

3 COMMISSIONER GAZIANO: I think it was  
4 something irrelevant. I think we can move on.

5 COMMISSIONER YAKI: Or it was someone's  
6 breakfast, one of the two.

7 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

8 VICE CHAIR THERNSTROM: I don't know what  
9 these conversations -- it's too vague for me. There  
10 are conversations I would not like that bureaucrats  
11 could engage in or develop guidelines for. I will  
12 abstain from that. It's too open ended for me.

13 CHAIRMAN REYNOLDS: Commissioner Gaziano?

14 COMMISSIONER GAZIANO: Yes.

15 CHAIRMAN REYNOLDS: Commissioner Heriot?

16 COMMISSIONER HERIOT: Abstain.

17 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

18 COMMISSIONER KIRSANOW: Abstain.

19 CHAIRMAN REYNOLDS: Commissioner Melendez?

20 COMMISSIONER MELENDEZ: Abstain.

21 CHAIRMAN REYNOLDS: Commissioner Yaki?

22 COMMISSIONER YAKI: Abstain.

23 CHAIRMAN REYNOLDS: Commissioner Taylor?

24 COMMISSIONER TAYLOR: Yes.

25 CHAIRMAN REYNOLDS: Was that a nyet or a

1       yes?

2                   COMMISSIONER TAYLOR:  No.  I mean I agree  
3       with Andy's comments.  This is one of those things I  
4       think it's one, vague.  I think two, it's unnecessary.  
5       And I'm generally cautious about encouraging  
6       bureaucrats to have certain conversations.

7                   CHAIRMAN REYNOLDS:  Okay, I am going to  
8       vote for it.  And --

9                   VICE CHAIR THERNSTROM:  I'm going to  
10      change my vote to a no.  It goes against my  
11      convictions here.  I don't like this.

12                  CHAIRMAN REYNOLDS:  Okay.  We have two  
13      nos.  We have two affirmative votes.  It fails.

14                  Recommendation number six:  Federal  
15      subsidies to parents who adopt a child with special  
16      needs are helpful in moving minority race children  
17      from foster care to adoption and, therefore, should be  
18      maintained.

19                  Is there a second?

20                  COMMISSIONER KIRSANOW:  One more time,  
21      Gerry?

22                  CHAIRMAN REYNOLDS:  Federal subsidies to  
23      parents who adopt a child with special needs are  
24      helpful in moving minority race children from foster  
25      care to adoption and, therefore, should be maintained.

1 COMMISSIONER KIRSANOW: Second.

2 CHAIRMAN REYNOLDS: Thank you.

3 Discussion?

4 Vice Chair Thernstrom, how do you vote?

5 VICE CHAIR THERNSTROM: I'm abstaining.

6 CHAIRMAN REYNOLDS: Commissioner Gaziano?

7 COMMISSIONER GAZIANO: Abstain. I think  
8 the wording, the inclusion of special needs gives me  
9 some pause and the encouragement of federal monies.  
10 I'm just unclear how that works, whether there's a pot  
11 of money that's going to go to waste or something. So  
12 I'm just going to abstain.

13 CHAIRMAN REYNOLDS: Commissioner Heriot?

14 COMMISSIONER HERIOT: Abstain.

15 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

16 COMMISSIONER KIRSANOW: Abstain.

17 CHAIRMAN REYNOLDS: Commissioner Melendez?

18 COMMISSIONER MELENDEZ: Abstain.

19 CHAIRMAN REYNOLDS: Commissioner Yaki?

20 COMMISSIONER YAKI: Yes.

21 CHAIRMAN REYNOLDS: Commissioner Taylor?

22 COMMISSIONER TAYLOR: Yes.

23 CHAIRMAN REYNOLDS: And I vote for it  
24 also. We have three votes in favor. The rest are  
25 abstentions. It passes.

1 Recommendation number seven reads as  
2 follows: In order to increase the number of homes  
3 available for the permanent placement of African  
4 American and other special needs children, Congress  
5 should allow reimbursement for legal guardianship  
6 similar to that currently provided for adoption.  
7 Previously recommended by GAO.

8 Is there a second?

9 COMMISSIONER YAKI: Second.

10 CHAIRMAN REYNOLDS: Discussion?

11 Vice Chair Thernstrom, how do you vote?

12 VICE CHAIR THERNSTROM: Well, wait a  
13 minute. I have a question here. What does legal  
14 guardianship mean here? I'm sorry.

15 CHAIRMAN REYNOLDS: Well, an individual  
16 could assume the responsibility for a child without  
17 the adoption of that child.

18 VICE CHAIR THERNSTROM: I'm sorry,  
19 somebody is at my door.

20 COMMISSIONER YAKI: Is that the milk man,  
21 Commissioner Thernstrom?

22 CHAIRMAN REYNOLDS: Commissioner Gaziano?

23 COMMISSIONER GAZIANO: Abstain.

24 CHAIRMAN REYNOLDS: Commissioner Heriot?

25 COMMISSIONER HERIOT: Abstain.

1 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

2 COMMISSIONER KIRSANOW: Abstain.

3 CHAIRMAN REYNOLDS: Commissioner Melendez?

4 COMMISSIONER MELENDEZ: Abstain.

5 COMMISSIONER YAKI: Commissioner Yaki  
6 votes yes.

7 CHAIRMAN REYNOLDS: How did Commissioner  
8 Melendez vote?

9 COMMISSIONER YAKI: He abstained.

10 CHAIRMAN REYNOLDS: Commissioner Taylor?

11 COMMISSIONER TAYLOR: Yes.

12 VICE CHAIR THERNSTROM: I'm back. I'm  
13 sorry.

14 COMMISSIONER YAKI: Did they get the order  
15 right, Abby, did you get your large pepperoni?

16 (Laughter.)

17 VICE CHAIR THERNSTROM: The leaves are all  
18 over my lawn and the guy who takes care of it told us  
19 to come again and the property is a mess.

20 CHAIRMAN REYNOLDS: Okay.

21 VICE CHAIR THERNSTROM: We should have a  
22 vote on that. Spend some money to get the leaves off  
23 my lawn. Go on.

24 CHAIRMAN REYNOLDS: The motion passes.

25 Recommendation number eight. I move that the

1 Commission approve the following language: The  
2 practice of actively recruiting same-race foster and  
3 adoptive parents must not result in discouraging  
4 trans-racial adoptions and placements and it must not  
5 result in diminished efforts to find qualified  
6 adoptive parents regardless of their race.

7 Do I hear a second?

8 COMMISSIONER GAZIANO: Second.

9 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

10 VICE CHAIR THERNSTROM: I don't know that  
11 this was -- I wasn't involved in drafting this. I  
12 don't even understand it any more. The process is  
13 actively recruiting so and so such race for adopted  
14 parents.

15 Wait a minute. We've established that it  
16 shouldn't be taking place. We haven't established  
17 that it does take place and somebody else must  
18 understand this recommendation better than I do at  
19 this point.

20 COMMISSIONER GAZIANO: Why don't we say  
21 this? I think maybe this will help. Why don't we  
22 strike the "same race" modifier, so that eight would  
23 then read: "The practice of actively recruiting  
24 foster and adoptive parents must not result" yadda,  
25 yadda, yadda.

1                   VICE CHAIR THERNSTROM: Haven't we already  
2 said that in effect?

3                   COMMISSIONER GAZIANO: One of our special  
4 assistants says that the statute actually encourages  
5 finding same race parents. I yield to others then.  
6 We don't want to put it in a recommendation.

7                   VICE CHAIR THERNSTROM: If we are tabling  
8 two others I'd like to table this because I want to  
9 see statutory language.

10                  CHAIRMAN REYNOLDS: Okay. All right.  
11 Bear with me. I'm looking at my notes.

12                                 Management and Operations

13                  CHAIRMAN REYNOLDS: Okay, next up,  
14 Management and Operations. During the November 20th  
15 meeting, Commissioners asked the Director of  
16 Management to create a job description for Special  
17 Assistant that would set the ceiling for the position  
18 at the GS-14 level that accurately reflects the time,  
19 level of responsibility and work involved with the  
20 position. They further instructed that all necessary  
21 action be taken to effectuate that change.  
22 Commissioners also asked the Staff Director to conduct  
23 a review of critical staff positions to assess whether  
24 similar actions have been taken or could have been  
25 taken by OSD with respect to those positions.

1           The Staff Director is prepared to report  
2 back to the Commission on both points.

3           Mr. Staff Director, please provide us with  
4 an update on these two personnel related topics.

5           STAFF DIRECTOR DANNENFELSER: Thank you,  
6 Mr. Chairman. A few days ago, I sent Commissioners a  
7 proposed position description at the GS-14 level that  
8 would apply to Commissioners' special assistants and  
9 the Director of Management is prepared to submit that  
10 to OPM for their approval unless Commissioners have  
11 some strong feelings about wanting to change it. So I  
12 would encourage feedback in the next few days from  
13 Commissioners on that, if they do have -- if they find  
14 any of the language in that position description  
15 troublesome or they feel that it should be enhanced in  
16 some way. But otherwise, I know that Commissioners  
17 were interested in trying to move this process forward  
18 as expeditiously as possible, so if we are prepared to  
19 do that, like I say, unless there is some feeling on  
20 the part of Commissioners that they'd like to see that  
21 proposal amended in some fashion.

22           I also sent a memo that I received from  
23 the Director of Management addressing the issue of the  
24 grade levels for the career staff and noted that over  
25 time certain changes have been made to the grade

1 levels and some of them fairly recently. I noted  
2 that, in particular, there were a few positions for  
3 which the grade levels had been changed fairly  
4 recently and she mentioned some examples of where they  
5 had been changed several years ago. Then explained  
6 what the rationale was for the grade levels and a  
7 number of other cases. So again, I did encourage  
8 Commissioners at that time if they had any further  
9 questions about that memo to either contact me or to  
10 contact the Director of Management and we would be  
11 able to provide some further explanation.

12 CHAIRMAN REYNOLDS: Questions, comments?

13 VICE CHAIR THERNSTROM: Yes, I've got  
14 questions. Hold on. My phone is about to die here.  
15 I'm looking for my cell phone so I can call back. The  
16 first question is budgetary. I'm sure all of us think  
17 our special assistants qualify for a higher pay,  
18 Commissioners have other needs. I'd like to hear the  
19 Staff Director address that question.

20 STAFF DIRECTOR DANNENFELSER: Well, there  
21 is money available within the Fiscal Year 2010 budget  
22 that could accommodate this change. The question is  
23 really beyond that is a policy question on the part of  
24 the Commissioners as to whether they feel this is a  
25 good use of those resources or would they rather see

1 those use of resources used in another area. But in  
2 terms of a budget we have prepared --

3 VICE CHAIR THERNSTROM: I'm going to get  
4 on this so you know, we're going to think in the next  
5 fiscal year that was the best use of our resources as  
6 well. Or you're going to have other priorities.

7 STAFF DIRECTOR DANNENFELSER: That is an  
8 issue that Commissioners have to consider. We do have  
9 some more uncertainty about the Fiscal Year 2011  
10 budget. There was proposal that that either should be  
11 at the flat line level or perhaps reduced by up to  
12 five percent, so that is something that would require  
13 more belt tightening if we wind up with a lower level.

14 But again, within -- certainly within Fiscal Year  
15 2010, we could accommodate this change, based on the  
16 budgetary proposals that have been adopted so far.

17 COMMISSIONER GAZIANO: Mr. Chairman, I  
18 just want to say that this -- that issue, the  
19 budgetary issue certainly is similar, if not in some  
20 ways the same as when any of our permanent staff are  
21 given promotions within the GS level that are  
22 appropriate. That normally is not brought to the  
23 Commission's vote. Just on first blush, I don't think  
24 it necessarily should be brought to our attention on a  
25 regular basis. And I think the vote we've taken now

1 or I don't know that a vote -- another vote is needed,  
2 but the step we're taking now is just saying that for  
3 retention purposes and to properly reflect our special  
4 assistants who -- that we should have that grade level  
5 also available for those who fit the requirements. So  
6 I don't see how the budget issue is really much  
7 different. It's one of fairness and properly  
8 reflecting the work that the job of our counsel and  
9 special assistants have become. I think some of their  
10 duties have expanded in the past year and that we  
11 should -- our compensation system should reflect that.

12 COMMISSIONER YAKI: Commissioner Yaki  
13 here.

14 CHAIRMAN REYNOLDS: Yes.

15 COMMISSIONER YAKI: Well, first of all, I  
16 just want to correct the previous speaker. They're  
17 not counsel. They're special assistants. There's a  
18 very distinct difference.

19 Number two, I don't believe that we are  
20 voting on any individuals. I assume, however, that  
21 the Staff Director has some estimate on the number of  
22 people who might qualify for the bump up and what the  
23 budgetary impact of that would be. And as  
24 Commissioner Thernstrom said, I don't think it can  
25 necessarily be seen as insignificant, given the fact

1 that there have been some clear signals being given  
2 that FY 2011 and perhaps even FY 2010, 2010 may have a  
3 recision. 2011 the signal has been level funding or a  
4 5 to 15 percent cut, depending on the agencies in  
5 question.

6 So I just think that we have to proceed  
7 with caution. I am pleased, however, to find here  
8 that this will be submitted to OMB. My understanding  
9 is that not only must the position be submitted to  
10 OMB, but that since these essentially qualify as a  
11 promotion within the Schedule C grade that that also  
12 has to go to OMB for approval on an individual basis  
13 as well. At least that's my understanding.

14 Anyway, I just wanted to state that I  
15 think that the budgetary impacts are not  
16 insignificant, but I do want to commend Ms. Martin for  
17 her speed in which she put this together for the  
18 special assistants. As much as many of them are  
19 lawyers, they are special assistants. They are not  
20 counsel.

21 STAFF DIRECTOR DANNENFELSER: Just a  
22 clarification, the Agency that this would go to would  
23 be OPM, the Office of Personnel Management.

24 COMMISSIONER YAKI: I stand corrected.

25 COMMISSIONER GAZIANO: Commissioner Yaki

1 attempted to correct me. I don't take correction on  
2 any of those points. My special assistant is both a  
3 counsel and special assistant, but regardless of that,  
4 I do not think the legal authority is clear at all,  
5 that we are required to get permission from OPM on  
6 that. I'm willing to be convinced. I don't -- it may  
7 not make a big difference to inform them of the  
8 change, but we can discuss that off line and we should  
9 try to avoid accepting a view of what is legally  
10 required if we don't have to accept the view that it  
11 is legally required. But if we can work out something  
12 with OPM without admitting some legal requirement,  
13 then let's try to work that out.

14 CHAIRMAN REYNOLDS: Mr. Staff Director,  
15 any other comments?

16 VICE CHAIR THERNSTROM: I have more  
17 comments.

18 CHAIRMAN REYNOLDS: Yes, Vice Chair  
19 Thernstrom.

20 VICE CHAIR THERNSTROM: I mean I find the  
21 language here -- I'm not a lawyer. I'm not a federal  
22 bureaucrat so bear with me, I'm finding the language a  
23 little bit impenetrable. But would the promotion of  
24 special assistants from GS-13 to GS-14, would that be  
25 automatic if this job description is approved? Will

1 all qualified special assistants get promoted to GS-14  
2 automatically?

3 STAFF DIRECTOR DANNENFELSER: Each  
4 Commissioner would have to make a request on behalf of  
5 their special assistant.

6 VICE CHAIR THERNSTROM: Every Commissioner  
7 is going to make a request.

8 COMMISSIONER GAZIANO: Vice Chair  
9 Thernstrom, I know you weren't present for the  
10 discussion, but some special assistants and counsels  
11 are not even at the 13 level right now. So no.

12 VICE CHAIR THERNSTROM: I'm talking about  
13 those who are at the 13 level.

14 COMMISSIONER GAZIANO: But that fact  
15 reflects the idea that our counsel and special  
16 assistants must necessarily fit reasonable criteria,  
17 that there are reasonable criteria that this  
18 Commission will consider. And that we need to be  
19 consistent with the principles that apply to our  
20 professional staff as well as the principles that  
21 apply to the Federal Government generally. And those  
22 will not automatically render all special assistants  
23 14. Some just don't have the experience level or  
24 other qualifications to be currently even at the 13  
25 level or immediately promoted to the 14 level.

1                   VICE CHAIR THERNSTROM: I would also  
2 rather have -- did you say it was the Office of  
3 Personnel -  
4                   - Presidential.

5                   STAFF DIRECTOR DANNENFELSER: Office of  
6 Personnel Management.

7                   VICE CHAIR THERNSTROM: Personnel  
8 Management. Okay, I would also rather have an outside  
9 agency looking at the judgments that we're making with  
10 respect to the qualifications to move up as well.

11                  CHAIRMAN REYNOLDS: Well, I would have to  
12 hear more about that, but we make our decisions. I  
13 don't seem to have -- I don't understand why you don't  
14 think that that's not something that's appropriately -  
15 - a matter that's appropriately handled at the  
16 Commission.

17                  VICE CHAIR THERNSTROM: I just think  
18 there's a lot of subjectivity and politics that can go  
19 into these decisions. I would prefer that they be  
20 reviewed by somebody not within the Agency.

21                  CHAIRMAN REYNOLDS: Other comments?

22                  COMMISSIONER MELENDEZ: Yes, Commissioner  
23 Melendez here. That's a good point as far as who  
24 would make the decision, for example, if I have a  
25 special assistant that I'm trying to fill since  
Richard Schmechel left, the question would be at what

1 level would this other person come in. If I looked at  
2 it and I said well, it looks like he should come in  
3 under the 14 and then all of a sudden the staff would  
4 say well, we think he ought to come in at a 12, and  
5 then on the other side, somebody would say well, I  
6 think my person ought to be a 14 and how is the  
7 fairness of -- because I can hear it already coming  
8 that some of us might be denied based on the politics  
9 and all those things. So how are we guaranteed that  
10 somebody rightly looks at the qualification and  
11 there's not politics, say on the Democrat side, we  
12 make that recommendation and all of a sudden it's put  
13 down because of whatever reason, so I think what  
14 Abigail is saying is how do we guarantee that somebody  
15 takes an honest look at it and that person really gets  
16 the merit of their qualifications that determine their  
17 pay scale and there really isn't any politics or  
18 anybody denies that person being a 14 if that's where  
19 we're going to go.

20 VICE CHAIR THERNSTROM: Mr. Chairman, it's  
21 politics, it's unstated agendas, it's whatever.

22 CHAIRMAN REYNOLDS: Isn't that possibility  
23 -- that's been in place from the beginning. And we've  
24 been making this type of determination since the  
25 beginning of the Agency. Whenever someone comes on

1 board there has to be a determination as to what grade  
2 an individual will get.

3 Our staff people -- our staff people have  
4 been making these determinations and if there's been  
5 an agenda or politics, it has not come to my  
6 attention.

7 COMMISSIONER GAZIANO: Right now we have -  
8 -

9 CHAIRMAN REYNOLDS: -- a determination is  
10 made by staff, but nothing has come to my attention  
11 that anything that smacks of politics has gone on.

12 COMMISSIONER GAZIANO: Right now, the  
13 options for special assistants/counsels are 11, 12 --

14 COMMISSIONER YAKI: Why do you keep on  
15 calling the special assistants slash counsel when the  
16 clear designation is special assistant? If you're  
17 going to call - -if you're going to do that, then we  
18 created a bifurcation in the designation of our  
19 special assistants for those who may not be lawyers.  
20 And I don't see why we're doing that. It is a special  
21 assistant period. Not special assistant/counsel.  
22 It's not counsel/special assistant. It is special  
23 assistant. That is the Schedule C OPM designation.

24 I mean if you feel a need for whatever  
25 reason to have a counsel next to you, that's fine, but

1 that is not the classification we're talking about.  
2 We're talking about a special assistant and they can  
3 only represent themselves as special assistants out  
4 into the world, unless of course, you want me to start  
5 having my special assistant because called chief  
6 counsel for the minority staff, blah, blah, blah,  
7 blah. We can make up all sorts of stuff. But it's  
8 not right.

9 COMMISSIONER GAZIANO: Commissioner Yaki,  
10 I didn't interrupt you and I really don't like how you  
11 scream and yell --

12 COMMISSIONER YAKI: I'm not screaming and  
13 yelling.

14 COMMISSIONER GAZIANO: I was still  
15 talking. You are so easily upset.

16 COMMISSIONER YAKI: I'm not easily upset.

17 COMMISSIONER GAZIANO: You must learn to  
18 restrain yourself.

19 (Laughter.)

20 COMMISSIONER GAZIANO: As I was saying  
21 before I was rudely interrupted, we currently have  
22 designations 11, 12, and 13 for our counsel and  
23 special assistants and all the motion we're -- we've  
24 already adopted the motion. The step I think we're  
25 taking is to include a fourth possible level which

1 reflects the kind of activities and job duties that  
2 some of our counsel and special assistants are  
3 performing for us and so I don't see how the fairness  
4 issue has changed much at all.

5 COMMISSIONER MELENDEZ: Commissioner  
6 Melendez here. Again, going back to the budget, I do  
7 have a concern as usual. If for some reason we have  
8 an idea and it almost sounds to me like because we  
9 have oversight over the budget that there's a certain  
10 amount, when we talk about promotions, that's kind of  
11 a -- I guess you must build in some type of 10 percent  
12 or something for promotions that happened every year.

13 I'm not sure how it's done because we don't really,  
14 as a Commission, really approve promotions or whatever  
15 you call it, because there are some I saw that had  
16 been done that never came in front of the  
17 Commissioners. But if that's so, if you're saying  
18 that this move to a 14 would only affect a couple of  
19 people, then is that what you expect or are we saying  
20 that -- because it's a budget line item and affects a  
21 couple people, that would be one thing. If it  
22 affected four or five, you may end up with \$50,000 or  
23 something like that. I'm guessing, because I have no  
24 idea what going from 13 to a 14 actually means when  
25 we're talking about money, as opposed to how many

1 people. So I would think that at some point I'd like  
2 to hear some ballpark figure as to what we think on a  
3 budget, if you're saying it's in the 10 percent that's  
4 kind of discretionary that you give promotions for  
5 people in general, fine, but if you think it's a big  
6 hit, then I'd like to know about that, if you think  
7 that's going to be a substantial increase or \$50,000  
8 or something like that for people that we expect to  
9 raise --

10 STAFF DIRECTOR DANNENFELSER: We do  
11 generally build in to the budget bonuses and  
12 promotions, so there is generally a line item in the  
13 budget for that that we anticipate certain and we also  
14 have the grade level increases, the within-grade  
15 increases that people are eligible for, either on an  
16 annual, semi-annual or once every three years,  
17 depending on where they are in the step within their  
18 grade. So we do build those things into the budget.

19 I believe there would be potentially, if  
20 we factor in your hiring of another person potentially  
21 six people that would be eligible for this increase.

22 VICE CHAIR THERNSTROM: Mr. Staff  
23 Director, there will be numerous special assistants  
24 coming on with new Commissioners 11 months from now.  
25 They will affect, depending on what level they come

1 in, they will affect the budget as well.

2 Look, on the point of -- Mr. Chairman, on  
3 the point of well, we have always trusted the staff to  
4 do this in a professional way. Yes, that's true. I  
5 have, maybe naively, I have trusted the staff to  
6 determine what level people come in at in a very  
7 professional ways, but this whole proposal is, you  
8 know, it's driven by -- we've taken this out of  
9 recommendations by professional staff. Obviously,  
10 behind this proposal are various agendas, politics,  
11 personalities, etcetera.

12 CHAIRMAN REYNOLDS: Could you be more  
13 specific? It seems like there's something on your  
14 mind.

15 VICE CHAIR THERNSTROM: What's on my mind  
16 is that I think -- I can't be more specific without  
17 going back to the -- which I wasn't to add, I only  
18 have the transcript by going back to the executive  
19 session last time. But there are concerns about  
20 specific special assistants and whether they're  
21 getting proper pay and so forth. This is not simply a  
22 question of turning over to Tina Louise Martin a  
23 judgment as to where people belong and the whole thing  
24 just -- I don't have a good comfort level with it.

25 CHAIRMAN REYNOLDS: Okay, we had a

1 conversation about the fairness of placing a limit on  
2 the GS level that the majority of us thought was  
3 artificially low. And we had a conversation about the  
4 need to have the GS level reflect the skill set and  
5 the value that special assistants bring to the table.

6 We also said that promotions would not  
7 happen automatically, that everything that we do is  
8 raise the level from a GS-13 and make it possible for  
9 -- make it possible for people to be eligible for a  
10 GS-14. Whether or not someone is eligible or not, the  
11 system that has been in place will not be altered in  
12 any way. The only thing that's going to change is  
13 that the limit will be raised from a 13 to a 14.  
14 Anything else, everything else related to the  
15 promotional process remains the same.

16 COMMISSIONER GAZIANO: Mr. Chair, just in  
17 case we're unclear if a vote is needed, I move that  
18 the Staff Director be directed to move promptly to  
19 seek approval for this change in possible grade levels  
20 to include a GS-14 and that Commissioners are  
21 encouraged to get any additions, corrections, or  
22 suggestions to the proposed job description to the  
23 Staff Director as soon as possible.

24 VICE CHAIR THERNSTROM: Let me say, Mr.  
25 Chairman --

1                   COMMISSIONER HERIOT: Is there a second to  
2 that motion?

3                   COMMISSIONER KIRSANOW: Kirsanow seconds.

4                   COMMISSIONER HERIOT: Okay.

5                   VICE CHAIR THERNSTROM: As I read the  
6 transcript of the Executive Session, there was one  
7 remark saying well, if one of the special assistants  
8 would leave, if these promotions weren't done well --  
9 that's what I mean by saying look, there's more to  
10 this than simply bureaucratic judgment here.

11                   COMMISSIONER GAZIANO: If someone decides  
12 to leave, that's their prerogative.

13                   MR. BLACKWOOD: This is David Blackwood.  
14 Before anyone goes any further, if we're going to talk  
15 about individuals, we will need to go into executive  
16 session. We do not need to as long as we talk about  
17 it in a general way.

18                   COMMISSIONER GAZIANO: Yes, and as I  
19 recall, I think it was a hypothetical, but there were  
20 a couple of statements, but one was by me. I was just  
21 saying that I think that we should not put any of our  
22 special assistants in a position that's significantly  
23 different than their counterparts on professional  
24 staff and in other agencies where several of them have  
25 come from where they get to a level of experience with

1 us, where they have hit an artificial ceiling that  
2 doesn't reflect their needs and they may  
3 hypothetically be encouraged to go to another agency.

4 That was my point or if it wasn't, that's my  
5 clarification now.

6 STAFF DIRECTOR DANNENFELSER: Just on this  
7 point, there are objective criteria for how the grade  
8 levels are determined and the Director of Management  
9 has been, as our Chief Personnel Officer, has been the  
10 main person who has made those evaluations. So it was  
11 also noted earlier that there are some distinctions  
12 between the existing special assistants in terms of  
13 grade levels and those are based on those type of  
14 objective criteria such as work experience, salary,  
15 history, and so on.

16 COMMISSIONER MELENDEZ: Commissioner  
17 Melendez. I'm still concerned about the budget impact  
18 and I know you're not talking about this in this  
19 motion unless we come up with another motion after  
20 this. And what I'm talking about is it's one thing to  
21 change a job description for say one person, like a HR  
22 person or it could be a finance person, so you expect  
23 an increase to that one person. If we do something  
24 across the board that you're talking six people or  
25 something like that, then I want to see what that --

1 if it goes up and above and it comes out of some  
2 discretionary money that wasn't actual budgeted for  
3 your normal promotions, you either have to tell us  
4 there's enough money in the normal promotions or  
5 because you're talking about six people it goes above  
6 that and we end up tapping money out of discretionary  
7 and that's where it comes in as what Ms. Thernstrom  
8 said about priorities, because then -- I've been one  
9 to always say that we don't even have a director in  
10 the Western Region. And so the question would be  
11 well, is this competing against those priorities also,  
12 if it's at a magnitude where it's not just one  
13 position, where you're giving another step and it's a  
14 minor hit, fine. If you're talking about six and  
15 we're talking about a substantial amount of money, I  
16 still would like to see that, either in another motion  
17 or something so I'm knowing that we're not going  
18 beyond priorities here. It's a minor hit to what  
19 you're talking about discretionary raises and those  
20 type things. If it's not, then I sure want to know  
21 we're going into discretionary funding that could be  
22 used somewhere else and I'm not sure what you're  
23 saying because nobody has really told me what the  
24 dollar amount is going to be as to what we anticipate  
25 and I think that's our responsibility as the budget in

1 a normal setting, but this appears to be going above  
2 the normal minor raises here and there that you  
3 anticipated in your budget. Sounds like this is going  
4 to be some expansion to what you had predicted.

5 VICE CHAIR THERNSTROM: And I want to  
6 reiterate, we have no idea -- it could be two new  
7 special assistants and we've got two new Commissioners  
8 who would be eligible for GS-14s.

9 COMMISSIONER REYNOLDS: And I think that  
10 would be fine.

11 VICE CHAIR THERNSTROM: It may or may not  
12 be depending on our budgetary priorities.

13 COMMISSIONER HERIOT: This is a really  
14 good use of money to get good special assistants and I  
15 think it's crucial to the future of the Commission.

16 CHAIRMAN REYNOLDS: Okay, any more  
17 discussion? Okay, we're --

18 COMMISSIONER GAZIANO: Can we vote on the  
19 motion?

20 CHAIRMAN REYNOLDS: The approval of the --

21 COMMISSIONER HERIOT: Aren't we going to  
22 vote on the motion?

23 CHAIRMAN REYNOLDS: Oh, that's right.  
24 Discussion?

25 Vice Chair Thernstrom?

1                   COMMISSIONER MELENDEZ: Can you restate  
2 the motion, please?

3                   COMMISSIONER GAZIANO: I'll try. I move  
4 that we direct the Staff Director to move promptly to  
5 whatever steps are necessary to get the grade level 14  
6 added to the grade levels that our special assistants,  
7 can achieve, and that Commissioners are encouraged to  
8 provide any additions, suggested corrections to the  
9 proposed job description to the Staff Director who  
10 will pick a day, say a week from today.

11                   Anything else, Mr. Staff Director, you  
12 want included in that motion?

13                   STAFF DIRECTOR DANNENFELSER: Just a  
14 particular date would be helpful. As you just stated,  
15 a week from today would be find if that's something  
16 that the Commission feels is a reasonable time period.

17                   VICE CHAIR THERNSTROM: I'd like to get  
18 off this for a minute. You're talking about comments  
19 on this from Commissioners coming in?

20                   COMMISSIONER GAZIANO: Yes.

21                   VICE CHAIR THERNSTROM: And then will it  
22 come back to the Commission, the comments that have  
23 been received and --

24                   COMMISSIONER GAZIANO: No. My motion --

25                   VICE CHAIR THERNSTROM: Will it come back

1 to the Commission for another vote?

2 COMMISSIONER GAZIANO: No, my motion is  
3 that he proceed expeditiously while he's awaiting our  
4 comments, but that our comments are just on the job  
5 description and that those are due in a week.

6 VICE CHAIR THERNSTROM: I would think we  
7 would need to see the final version and to vote on it  
8 once again.

9 COMMISSIONER HERIOT: We don't vote on  
10 everything. I think it's odd that we're voting --

11 CHAIRMAN REYNOLDS: Okay, but the special  
12 period has run and Vice Chair Thernstrom asked for a  
13 clarification which was provided. Vice Chair  
14 Thernstrom, how do you vote?

15 VICE CHAIR THERNSTROM: No.

16 CHAIRMAN REYNOLDS: Commissioner Gaziano?

17 COMMISSIONER GAZIANO: Yes.

18 CHAIRMAN REYNOLDS: Commissioner Heriot?

19 COMMISSIONER HERIOT: Yes.

20 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

21 COMMISSIONER KIRSANOW: Yes.

22 CHAIRMAN REYNOLDS: Commissioner Melendez?

23 COMMISSIONER MELENDEZ: Abstain.

24 CHAIRMAN REYNOLDS: Commissioner Yaki?

25 COMMISSIONER YAKI: No.

1 CHAIRMAN REYNOLDS: I'm sorry?

2 COMMISSIONER YAKI: No.

3 CHAIRMAN REYNOLDS: Commissioner Taylor?

4 COMMISSIONER TAYLOR: Yes.

5 CHAIRMAN REYNOLDS: And I vote yes also.

6 Next up, approval of the minutes. I move  
7 to approve --

8 COMMISSIONER GAZIANO: Mr. Chair, would  
9 you mind -- we've postponed the healthcare letter,  
10 could we -- would you mind returning that to now. I  
11 think the General Counsel is ready to discuss that.

12 CHAIRMAN REYNOLDS: Okay, Mr. Blackwood?

13 MR. BLACKWOOD: Sir, this is David  
14 Blackwood. The applicable provision is AI 1-7. I  
15 don't know whether you all have received copies. I  
16 asked that my secretary PDF it and then email it to  
17 you.

18 But the short of it is here are the  
19 conditions of notational voting. One, it is strictly  
20 a vote. It's not a discussion. You all will be sent  
21 around a piece of paper and it will say yes or no. So  
22 I just wanted to emphasize it doesn't involve  
23 discussion. Two, it has to be a unanimous decision by  
24 the Commission to have a notational vote. If any one  
25 of you doesn't want to have a notational vote, it does

1 not occur. Three, as to the timing, the normal rule  
2 under AI 1-7 is four days. That said, if it's  
3 unanimous vote again, you all can shrink that. You  
4 can do it -- decide today to do it in three days, five  
5 days, whatever you choose. But if we do it under four  
6 days, the chair has to say it's extremely urgent and  
7 again, all Commissioners must agree.

8 COMMISSIONER GAZIANO: Mr. Chair, I don't  
9 think that we need to reduce it under four days.

10 MR. BLACKWOOD: Four business days.

11 COMMISSIONER GAZIANO: Okay, even  
12 necessarily under four business days. I would -- if  
13 Commissioners are unanimous, then maybe we could get  
14 comments to Commissioner Kirsanow by close of business  
15 Tuesday, and we can agree to vote by notational vote  
16 on Thursday. Would that satisfy the rule?

17 MR. BLACKWOOD: Yes.

18 COMMISSIONER GAZIANO: Failing that, I  
19 would move to -- failing unanimous consent on that, I  
20 would move that we adopt the procedure we have for  
21 some other letters which is to vote on a draft that is  
22 circulated under those similar circumstances where a  
23 draft is circulated on Tuesday and if it secures a  
24 majority vote by Commissioners that it be sent to the  
25 Senate forthwith.

1 CHAIRMAN REYNOLDS: Okay, so do we have  
2 unanimous consent to have a notational vote?

3 Vice Chair Thernstrom?'

4 (No response.)

5 Hello? Can anyone else out there hear me?

6 COMMISSIONER HERIOT: I can hear you.

7 COMMISSIONER TAYLOR: I can hear you.

8 COMMISSIONER HERIOT: Just go on to the  
9 next person.

10 CHAIRMAN REYNOLDS: Commissioner Gaziano?

11 COMMISSIONER GAZIANO: I could consent to  
12 either.

13 CHAIRMAN REYNOLDS: Commissioner Heriot?

14 COMMISSIONER HERIOT: I would consent.

15 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

16 COMMISSIONER KIRSANOW: Yes.

17 CHAIRMAN REYNOLDS: Commissioner Melendez?

18 COMMISSIONER MELENDEZ: What are the two  
19 options again? One is a notational --

20 COMMISSIONER GAZIANO: One is that the  
21 draft would be -- we would -- Commissioner Kirsanow  
22 has -- I suppose if you're willing to take the lead,  
23 would we get comments by -- to Commissioner Kirsanow  
24 by close of business Tuesday. He would circulate a  
25 draft by Wednesday and we would take a notational vote

1 Thursday afternoon. And the other option is that we  
2 vote now whether to approve any letter that --

3 VICE CHAIR THERNSTROM: I'm back. I had  
4 to get off the phone a minute. I don't know what's  
5 happened, but I'm back.

6 CHAIRMAN REYNOLDS: Welcome back.

7 COMMISSIONER GAZIANO: That we vote to  
8 approve any letter that secures a majority vote of the  
9 Commission.

10 VICE CHAIR THERNSTROM: I'm sorry, explain  
11 the issue to me?

12 CHAIRMAN REYNOLDS: Well, Commissioner  
13 Melendez asked for a point to be clarified. I believe  
14 he asked for the two options to be described. One is  
15 a notational vote. If that doesn't happen, then we  
16 will proceed. I believe -- correct me if I'm wrong,  
17 Todd -- we would proceed with the vote.

18 COMMISSIONER HERIOT: We would vote on  
19 Wednesday, yes.

20 COMMISSIONER GAZIANO: That's correct.  
21 And is the process that I described -- by the way, we  
22 can always amend our AIs, but is the process that I  
23 described consistent with any applicable regulation or  
24 statute as you understand it?

25 MR. BLACKWOOD: This is David Blackwood

1 again. As long as no Commissioner objects, yes.

2 COMMISSIONER GAZIANO: As long as no  
3 Commissioner objects, it is okay if we circulate the  
4 final draft on Wednesday for a notational vote that we  
5 set today for Thursday.

6 COMMISSIONER GAZIANO: Yes.

7 COMMISSIONER MELENDEZ: I'll vote yes to  
8 receive the draft and look it over and vote on  
9 Thursday.

10 CHAIRMAN REYNOLDS: Commissioner Yaki?

11 COMMISSIONER HERIOT: Was that a yes to  
12 the notational vote?

13 COMMISSIONER MELENDEZ: Yes.

14 CHAIRMAN REYNOLDS: Commissioner Yaki, was  
15 that a yes?

16 COMMISSIONER YAKI: No, that was a yes.

17 CHAIRMAN REYNOLDS: Commissioner Taylor?

18 COMMISSIONER TAYLOR: That is a yes.

19 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

20 VICE CHAIR THERNSTROM: Yes.

21 CHAIRMAN REYNOLDS: We have unanimity.

22 Moving on. The approval of the minutes. I move that  
23 --

24 COMMISSIONER HERIOT: I just want one more  
25 clarification. David said that we would vote on

1 paper. I assume that means by email?

2 CHAIRMAN REYNOLDS: Yes, that's how we've  
3 done it in the past.

4 COMMISSIONER HERIOT: Okay.

5

6 Approval of Agendaa

7 CHAIRMAN REYNOLDS: I move to approve the  
8 minutes of the September 24, 2009 meeting. Is there a  
9 second?

10 COMMISSIONER GAZIANO: I'm sorry, just a  
11 clarification. Our parliamentarian said that our rule  
12 provides for either fax or email.

13 COMMISSIONER HERIOT: Okay.

14 COMMISSIONER GAZIANO: Are both required?

15 MR. BLACKWOOD: I can read directly from  
16 the AI. Commissioners must vote personally. Proxies  
17 are not permitted. Commissioners shall vote on the  
18 ballot and then send the ballot to the Staff Director  
19 during the required time limit.

20 COMMISSIONER HERIOT: Does that come in  
21 email form?

22 MR. BLACKWOOD: I don't think it matters  
23 whether it's in the format of an email or a fax.

24 COMMISSIONER HERIOT: I was curious when  
25 you said paper.

1                   CHAIRMAN REYNOLDS:   Okay, I move that we  
2   approve the minutes of the September 24, 2009 meeting.  
3   Is there a second?

4                   COMMISSIONER GAZIANO:   Second.

5                   CHAIRMAN REYNOLDS:   Okay, I have a change  
6   to the minutes.  As to the first sentence in the  
7   section on approval of the agenda, I propose that we  
8   insert the following language:  "Commissioner Yaki's  
9   line was open, but he did not respond."

10                   In the paragraph under the approval of the  
11   agenda, strike everything after the word "program  
12   planning section" and replace with the following:  
13   "During a vote to approve the amended agenda, Vice  
14   Chair Thernstrom did not respond to the Chairman's  
15   call for her vote.  The Staff Director indicated that  
16   she was on another call and her special assistant  
17   stated that she had a family medical emergency, but  
18   would be rejoining the teleconference shortly.  She  
19   did not rejoin the call.  In the absence of a quorum,  
20   the agenda could not be approved.  The proceeding went  
21   off record at 11:46 a.m. in an attempt to get another  
22   Commissioner to participate for a quorum.  The  
23   proceedings went back on the record at 12:28 p.m. with  
24   Commissioner Kirsanow on the line.  Commissioner Yaki  
25   dialed back into the teleconference.  At that point,

1 Commissioner Taylor was no longer on the phone.  
2 Commissioner Yaki left the line and the meeting could  
3 not continue due to a lack of a quorum."

4 Discussion?

5 VICE CHAIR THERNSTROM: It is unnecessary  
6 to have on the public record she had a family  
7 emergency. I had to get off the line.

8 CHAIRMAN REYNOLDS: I don't recall this  
9 agreement.

10 VICE CHAIR THERNSTROM: Mr. Staff  
11 Director, am I wrong in recalling that you were going  
12 to take the initiative and simply alter that language?

13 STAFF DIRECTOR DANNENFELSER: You did send  
14 in some recommended change to the language which I  
15 incorporated into what was sent out to the  
16 Commissioners, but this is a proposed change to that  
17 amended language.

18 VICE CHAIR THERNSTROM: What was the  
19 amended language that you sent in?

20 STAFF DIRECTOR DANNENFELSER: Essentially  
21 what you had requested when you proposed the change to  
22 the earlier version.

23 VICE CHAIR THERNSTROM: Do you remember  
24 exactly how I worded it?

25 STAFF DIRECTOR DANNENFELSER: I don't have

1 your language in front of me.

2 VICE CHAIR THERNSTROM: Maybe my special  
3 assistant remembers. I don't have it in front of me  
4 either.

5 (Pause.)

6 STAFF DIRECTOR DANNENFELSER: There was  
7 language in the minutes, the earlier version of the  
8 minutes that said -- it did mention that the Vice  
9 Chair had a medical emergency with a grandchild and  
10 had to leave. As a result there was a lack of a  
11 quorum to approve the agenda. Later on, it said  
12 Chairman Reynolds indicated that Vice Chair Thernstrom  
13 and Commissioner Yaki had joined the teleconference,  
14 but had to leave. Commissioner Kirsanow then joined  
15 the teleconference. Commissioner Yaki rejoined the  
16 teleconference. Finally, Commissioners Taylor and  
17 Yaki left the teleconference.

18 VICE CHAIR THERNSTROM: Okay, so that's a  
19 little different than what I was just -- my phone  
20 died, except the base phone, so I can't get the  
21 minutes to look at it, but that's a little different  
22 than what I just heard. Is that not correct?

23 STAFF DIRECTOR DANNENFELSER: Yes, there's  
24 a proposed change to the minutes that were circulated.

25 VICE CHAIR THERNSTROM: What you just read

1 to me seems preferable certainly from my point of  
2 view.

3 (Pause.)

4 CHAIRMAN REYNOLDS: Mr. Staff Director,  
5 please read that language again?

6 STAFF DIRECTOR DANNENFELSER: The language  
7 from the prior minutes said --

8 (Phone ringing.)

9 CHAIRMAN REYNOLDS: I don't know what that  
10 is.

11 STAFF DIRECTOR DANNENFELSER: Vice Chair  
12 Thernstrom had a medical emergency with a grandchild  
13 and had to leave. As a result there was a lack of a  
14 quorum to approve the agenda. The proceedings went  
15 off the record at 11:46 a.m. and went on the back on  
16 the record at 12:28 p.m. Chairman Reynolds indicated  
17 that Vice Chair Thernstrom and Commissioner Yaki had  
18 joined the teleconference, but had to leave.  
19 Commissioner Kirsanow then joined the teleconference.  
20 Commissioner Yaki rejoined the teleconference.  
21 Finally, Commissioners Taylor and Yaki left the  
22 teleconference.

23 VICE CHAIR THERNSTROM: With respect to  
24 nobody else having an elaborate explanation. I don't  
25 want an elaborate explanation with respect to me as

1 well. It doesn't need to be part of the record if it  
2 is actually the case, two sick members of my family,  
3 but that's not a necessary part of the record.

4 CHAIRMAN REYNOLDS: Any other comments?

5 Vice Chair Thernstrom how do you vote?

6 VICE CHAIR THERNSTROM: What am I voting  
7 on? Am I voting on -- I'm suggested it be rewritten  
8 simply to conform with the description of other  
9 people, they left, they came back. I want language  
10 used with respect to me.

11 CHAIRMAN REYNOLDS: We're voting on the  
12 motion that I read into the record.

13 VICE CHAIR THERNSTROM: Which doesn't  
14 include that change.

15 CHAIRMAN REYNOLDS: That's correct.

16 VICE CHAIR THERNSTROM: I'm voting against  
17 it. I think out of courtesy, you have the same  
18 description for me as you do for the others who came  
19 and went. There is never an elaborate reason given in  
20 the record. He comes and goes. Ashley comes and  
21 goes. Michael Yaki comes and goes. We don't have  
22 descriptions of why.

23 CHAIRMAN REYNOLDS: I only used the facts  
24 that were available.

25 VICE CHAIR THERNSTROM: It can be changed

1 and it could be changed right now so that it conforms  
2 to what you've done with respect to other  
3 Commissioners. That's a simple courtesy to me.

4 CHAIRMAN REYNOLDS: My intransigence is --  
5 would explain it as I believe there's been a concerted  
6 effort to defeat quorum and I want the record to  
7 reflect with precision what actually happened. So to  
8 the extent I have detailed surrounding what happened  
9 on the 24th, I just want to put it in the record.

10 VICE CHAIR THERNSTROM: Well, whether or  
11 not I have a sick grandchild and a sick husband,  
12 actually, is irrelevant to your scenario in which  
13 there is a concerted, deliberate conspiratorial effort  
14 to defeat quorum.

15 CHAIRMAN REYNOLDS: I'm thinking. Bear  
16 with me, folks.

17 (Pause.)

18 Let's vote. Commissioner Gaziano?

19 COMMISSIONER GAZIANO: Yes.

20 CHAIRMAN REYNOLDS: Commissioner Heriot?

21 COMMISSIONER HERIOT: Yes.

22 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

23 COMMISSIONER KIRSANOW: Yes.

24 CHAIRMAN REYNOLDS: Commissioner Melendez?

25 COMMISSIONER MELENDEZ: Abstain, I wasn't

1 here for that meeting.

2 CHAIRMAN REYNOLDS: Commissioner Yaki?

3 COMMISSIONER YAKI: No.

4 CHAIRMAN REYNOLDS: Commissioner Taylor?

5 COMMISSIONER TAYLOR: I was walking over  
6 to get a bite to eat and I was in the elevator and  
7 missed part of the discussion.

8 COMMISSIONER GAZIANO: You don't want it  
9 repeated.

10 CHAIRMAN REYNOLDS: Okay, it passes. Bear  
11 with me.

12 Okay, I move that we adopt the minutes of  
13 the October 8, 2009 meeting. Is there a second?

14 COMMISSIONER HERIOT: Second.

15 CHAIRMAN REYNOLDS: The change that I've  
16 proposed is that in the section titled approval of the  
17 agenda the first sentence should be revised to say  
18 "Chairman Reynolds moved to amend the agenda to table  
19 consideration of motions related to the National Civil  
20 Rights Conference until a later meeting when  
21 Commissioners Melendez and Yaki would be present."

22 Under the section titled program planning  
23 the first sentence after ACORN, insert the words  
24 "regarding voter registration fraud."

25 Discussion?

1 Vice Chair Thernstrom?

2 VICE CHAIR THERNSTROM: I abstain, I  
3 didn't have a chance to go through them carefully.

4 CHAIRMAN REYNOLDS: Commissioner Gaziano?

5 COMMISSIONER GAZIANO: Yes.

6 CHAIRMAN REYNOLDS: Commissioner Heriot?

7 COMMISSIONER HERIOT: Yes.

8 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

9 COMMISSIONER KIRSANOW: Yes.

10 CHAIRMAN REYNOLDS: Commissioner Melendez?

11 COMMISSIONER MELENDEZ: Yes.

12 CHAIRMAN REYNOLDS: Commissioner Yaki?

13 COMMISSIONER YAKI: Abstain.

14 CHAIRMAN REYNOLDS: Commissioner Taylor?

15 COMMISSIONER TAYLOR: Yes.

16 CHAIRMAN REYNOLDS: And I vote for it  
17 also.

18 Next up is the October 16, 2009 minutes.  
19 I move that we adopt, but I also propose the following  
20 changes. Under the section titled "State Advisory  
21 Committee Issues" on page three, the first sentence  
22 should be changed to read "Chairman Reynolds ask if  
23 any Commissioners want to move to appoint Liz Barbee-  
24 Wooten to the Hawaii State Advisory Committee" --

25 COMMISSIONER GAZIANO: May I make a

1 friendly -- offer a friendly amendment to that  
2 sentence?

3 CHAIRMAN REYNOLDS: Sure.

4 COMMISSIONER GAZIANO: That even as  
5 amended doesn't reflect the fact that Commissioners  
6 reviewed correspondence from Ms. Barbee-Wooten. It  
7 also slightly inaccurately -- the following sentence  
8 says "No Commissioner so moved." Actually,  
9 Commissioner Melendez moved and then withdrew his  
10 motion, so I would like to substitute the following, I  
11 suppose two sentences or three sentences. That whole  
12 section under State Advisory Committee should read  
13 "After a brief summary of the correspondence from Ms.  
14 Barbee-Wooten, Chairman Reynolds asked if any  
15 Commissioners wished to offer a motion to appoint her  
16 to the Hawaii State Advisory Committee. Commissioner  
17 Gaziano asked and received confirmation that  
18 Commissioners Melendez and Taylor were still  
19 participating by phone. Ultimately, no Commissioner  
20 chose to advance a motion to appoint Ms. Barbee-  
21 Wooten."

22 CHAIRMAN REYNOLDS: The next proposed  
23 change under the section titled Program Planning on  
24 page four, the title of that section should read  
25 "Update on the FY 2010 project on the status of sex

1 discrimination in higher education admissions." And  
2 then finally on the same page in paragraph three, that  
3 same section, change "Dr. Lerner agreed to provide  
4 Commissioners a list of 12 to 15 private colleges" to  
5 "Dr. Lerner agreed to provide Commissioners a list of  
6 12 to 15 public and private colleges."

7 Are there any other proposed changes?

8 COMMISSIONER YAKI: This is Commissioner  
9 Yaki.

10 CHAIRMAN REYNOLDS: Yes.

11 COMMISSIONER YAKI: I think that  
12 everything after the sentence on page three, "no  
13 formal votes were taken thereafter, but the remaining  
14 Commissioners proceeded with an informational meeting"  
15 should be struck, given that there was no quorum. And  
16 as was stated to me by the General Counsel, there can  
17 have been no agreement to do anything, given the fact  
18 that there was a lack of quorum. So I ask that the  
19 minutes show that basically after quorum was lost,  
20 there be nothing else other than adjournment should be  
21 reflected to whatever that time was.

22 CHAIRMAN REYNOLDS: Okay, I'm sorry,  
23 Commissioner Yaki, could you walk me through this.

24 COMMISSIONER YAKI: After the loss of  
25 quorum, the General -- I asked the General Counsel

1 what is the impact on the workings of the Commission.

2 And while you can have an informal meeting and  
3 discussion, you cannot actually do anything that can  
4 be regarded as official business. The idea that Dr.  
5 Lerner agreed to do anything during that is therefore  
6 not allowed for under the situation where there is a  
7 lack of quorum.

8 Working backwards since that basically is  
9 the fruit of the discussion that starts with the  
10 remaining Commissioners discuss a time table, blah,  
11 blah, blah, blah, all that should be struck from the  
12 minutes.

13 CHAIRMAN REYNOLDS: Okay. Can we get  
14 confirmation that we lost a quorum at that point in  
15 time?

16 COMMISSIONER YAKI: There is a paragraph  
17 right above that where it says the Staff Director  
18 advised the Commissioners of the loss of quorum.

19 CHAIRMAN REYNOLDS: Okay, I support  
20 Commissioner Yaki's recommendation.

21 COMMISSIONER HERIOT: I guess I don't  
22 quite understand here. At that point it becomes  
23 minutes of the informal meeting. Is that a problem?  
24 We can't decide anything?

25 CHAIRMAN REYNOLDS: Mr. Blackwood, please

1 weigh in.

2 MR. BLACKWOOD: This is David Blackwood.  
3 The question that was raised by Commissioner Yaki at  
4 the last meeting was after a quorum is lost can staff  
5 be directed to do anything. And the short answer is  
6 no. Whether the Commission chooses to have minutes of  
7 an informal meeting at which nothing, no executive  
8 action can be taken, I leave to you, but he is correct  
9 when he says that there can't be something in the  
10 minutes that say someone was directed to do something.

11 CHAIRMAN REYNOLDS: Okay, my view is -- my  
12 limited understanding of this issue, based on this  
13 short conversation is that we do have the authority to  
14 include informal conversations in our minutes. My  
15 preference is that we don't. I think it's a better  
16 practice -- the minutes should reflect official  
17 meetings. That's the basis for my support of  
18 Commissioner Yaki's proposal.

19 COMMISSIONER HERIOT: I'm sorry, what does  
20 it say that we did? I don't have it in front of me.

21 CHAIRMAN REYNOLDS: Commissioner Yaki, can  
22 you help out?

23 COMMISSIONER YAKI: Yes, in the last  
24 question, and the last page, there is discussion about  
25 the focus on which universities to be chosen,

1       etcetera, etcetera and the last sentence states that  
2       Dr. Lerner agreed to provide Commissioners a list of  
3       12 to 15 private colleges, blah, blah, blah, blah,  
4       blah. And I think that --

5               COMMISSIONER HERIOT:     But it doesn't say  
6       that we directed anything.

7               COMMISSIONER YAKI:     We can split hairs  
8       about whether or not we wish to ask people who are in  
9       the room whether it seemed as if the Commission at  
10      that time was essentially asking Dr. Lerner to do that  
11      and whether asking or directing or what have you is  
12      whatever. This is exactly why the Chairman is correct  
13      because of the fact that we're actually going to be  
14      approving some of this stuff anyway later.  
15      Officially, having this in the minutes is  
16      unnecessarily confusing, given that it was essentially  
17      informal and not a formal part of what the Commission  
18      did or was empowered to do.

19              COMMISSIONER HERIOT:    I don't agree that  
20      we can't have something in the minutes where members  
21      of the staff say they're going to do something.

22              CHAIRMAN REYNOLDS:     And I agree with that  
23      point also. I think that we should just vote on the  
24      matter.

25              COMMISSIONER HERIOT:    What are we voting

1 on?

2 CHAIRMAN REYNOLDS: On the amendments that  
3 have been offered including -- I guess we need to do  
4 this one at a time.

5 STAFF DIRECTOR DANNENFELSER: Mr. Chair?

6 CHAIRMAN REYNOLDS: Yes.

7 STAFF DIRECTOR DANNENFELSER: Just a  
8 technical point on the change that you proposed  
9 earlier where you said under the section titled  
10 program planning page 4, just your special assistant  
11 and I have just gone over it and there's just a small  
12 grammatical point that we believe that it should say  
13 update on the status of the FY 2010 project on sex  
14 discrimination in higher education admissions.

15 CHAIRMAN REYNOLDS: Okay, so I left that  
16 status.

17 STAFF DIRECTOR DANNENFELSER: It's just  
18 putting it in a different place in that heading. It  
19 was moving it further up in that heading to make it  
20 more clear.

21 CHAIRMAN REYNOLDS: Okay. All right, so  
22 let's vote on the first two amendments and we'll vote  
23 on the third last.

24 Vice Chair Thernstrom?

25 VICE CHAIR THERNSTROM: I'm sorry. I

1 don't have these absolutely straight. I'm going to  
2 abstain from all three.

3 CHAIRMAN REYNOLDS: Commissioner Gaziano?

4 COMMISSIONER GAZIANO: Yes.

5 CHAIRMAN REYNOLDS: Commissioner Heriot?

6 COMMISSIONER HERIOT: Yes.

7 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

8 COMMISSIONER KIRSANOW: Yes.

9 CHAIRMAN REYNOLDS: Commissioner Melendez?

10 COMMISSIONER MELENDEZ: Abstain.

11 CHAIRMAN REYNOLDS: Commissioner Yaki?

12 COMMISSIONER YAKI: Abstain.

13 CHAIRMAN REYNOLDS: Commissioner Taylor?

14 COMMISSIONER TAYLOR: Yes.

15 CHAIRMAN REYNOLDS: And I vote for it

16 also.

17 Okay, next up we are voting for -- voting  
18 on the third revision. Basically, Yaki's proposal.  
19 Vice Chair Thernstrom has abstained.

20 CHAIRMAN REYNOLDS: Commissioner Gaziano?

21 COMMISSIONER GAZIANO: Can I pass? I just  
22 want to read -- the motion is to strike everything  
23 after the loss of quorum?

24 CHAIRMAN REYNOLDS: Yes.

25 COMMISSIONER GAZIANO: Okay. I'd like to

1 pass then.

2 CHAIRMAN REYNOLDS: Commissioner Heriot?

3 COMMISSIONER HERIOT: I'm looking at the  
4 documents here now. Exactly where are we?

5 CHAIRMAN REYNOLDS: Page three, after the  
6 second --

7 COMMISSIONER HERIOT: I don't want to  
8 strike the whole thing. I might be willing to make  
9 some changes to it, but I'll vote no on the motion.

10 CHAIRMAN REYNOLDS: Commissioner Melendez?

11 COMMISSIONER MELENDEZ: Yes.

12 COMMISSIONER KIRSANOW: Commissioner  
13 Reynolds, I was under the impression we were striking  
14 everything after Dr. Lerner agreed to provide  
15 Commissioners a list of 12 to 15 private colleagues.  
16 If we're striking everything after quorum was lost,  
17 then I would vote no.

18 CHAIRMAN REYNOLDS: Commissioner Melendez?

19 COMMISSIONER MELENDEZ: Yes.

20 CHAIRMAN REYNOLDS: Commissioner Yaki?

21 COMMISSIONER YAKI: Yes.

22 VICE CHAIR THERNSTROM: Mr. Chairman, I  
23 understand it now. I'm voting yes on striking the  
24 material after the quorum was lost, absolutely. I'm  
25 sorry. I've now paid sufficient attention.

1 CHAIRMAN REYNOLDS: Commissioner Taylor?

2 COMMISSIONER TAYLOR: Yes, strike it.

3 CHAIRMAN REYNOLDS: I vote to strike it  
4 also.

5 Commissioner Gaziano?

6 COMMISSIONER GAZIANO: No.

7 VICE CHAIR THERNSTROM: You've got me down  
8 as a yes on that, right?

9 CHAIRMAN REYNOLDS: Yes, I do.

10 VICE CHAIR THERNSTROM: Okay.

11 CHAIRMAN REYNOLDS: The motion passes.

12 We're up to the October 30, 2009 minutes. Here are  
13 the changes that I propose. Under the minutes section  
14 on page 3, first full paragraph, third sentence,  
15 number two, delete the word "the" as it appears before  
16 Daphne Barbee-Wooten and insert "that were" before the  
17 clause called to our attention by Commissioner  
18 Gaziano.

19 So the revised sentence should read "The  
20 Commissioners voted to table consideration of Daphne  
21 Barbee-Wooten indefinitely unless she can establish  
22 that the racially offensive remarks that she is  
23 reported in various news accounts to have made and  
24 that were called to our attention by Commissioner  
25 Gaziano are inaccurate."

1 Do I hear a second?

2 COMMISSIONER GAZIANO: Second.

3 CHAIRMAN REYNOLDS: Discussion? Vice  
4 Chair Thernstrom, how do you vote?

5 VICE CHAIR THERNSTROM: Yes.

6 CHAIRMAN REYNOLDS: Commissioner Gaziano?

7 COMMISSIONER GAZIANO: Yes.

8 CHAIRMAN REYNOLDS: Commissioner Heriot?

9 COMMISSIONER HERIOT: Yes.

10 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

11 COMMISSIONER KIRSANOW: Yes.

12 CHAIRMAN REYNOLDS: Commissioner Melendez?

13 COMMISSIONER MELENDEZ: Abstain.

14 CHAIRMAN REYNOLDS: Commissioner Yaki?

15 COMMISSIONER YAKI: Point of  
16 clarification. Is this the only amendment you're  
17 seeking because this suffers from the same defect as  
18 the last minutes.

19 CHAIRMAN REYNOLDS: Yes.

20 COMMISSIONER YAKI: Then -- well, you  
21 didn't reflect that. I was waiting to make the  
22 statement that we lost quorum at the bottom of page  
23 three, so therefore, basically page four should be  
24 stricken in conformity with our previous vote.

25 CHAIRMAN REYNOLDS: Okay, I'm sorry,

1 please speak up.

2 COMMISSIONER YAKI: At the bottom of page  
3 three, it indicates we lose quorum. Therefore I would  
4 ask as a friendly amendment, given our previous vote  
5 that we remove page four from the minutes.

6 CHAIRMAN REYNOLDS: Okay.

7 COMMISSIONER HERIOT: We're halfway  
8 through the vote. We have a friendly amendment.

9 COMMISSIONER YAKI: We can do this  
10 separately after this, Mr. Chair.

11 CHAIRMAN REYNOLDS: Okay.

12 COMMISSIONER YAKI: On this one I will  
13 abstain and then I will ask to make a motion on the  
14 minutes.

15 CHAIRMAN REYNOLDS: Okay. Commissioner  
16 Taylor?

17 COMMISSIONER TAYLOR: Yes.

18 CHAIRMAN REYNOLDS: If you're going to try  
19 to open this up again, I'm going to vote yes, despite  
20 the fact that I'm going to support Commissioner Yaki,  
21 at least I believe I am.

22 Okay, the motion passes.

23 Commissioner Yaki?

24 COMMISSIONER YAKI: I'd like to make a  
25 motion that the full paragraph entitled Update on FY

1 2010 Project blah, blah on page four ending with added  
2 to the list be stricken because of the lack of quorum.

3 CHAIRMAN REYNOLDS: I second it. Do we  
4 need to have a discussion?

5 Vice Chair Thernstrom?

6 CHAIRMAN REYNOLDS: Yes.

7 CHAIRMAN REYNOLDS: Commissioner Gaziano?

8 COMMISSIONER GAZIANO: No.

9 CHAIRMAN REYNOLDS: Commissioner Heriot?

10 COMMISSIONER HERIOT: For the same reason  
11 I gave before, I'd be happy to make changes, but not  
12 to strike the whole thing, so I vote no.

13 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

14 COMMISSIONER KIRSANOW: No.

15 CHAIRMAN REYNOLDS: Commissioner Melendez?

16 COMMISSIONER MELENDEZ: Yes.

17 CHAIRMAN REYNOLDS: Commissioner Yaki?

18 COMMISSIONER YAKI: Yes.

19 CHAIRMAN REYNOLDS: Commissioner Taylor?

20 COMMISSIONER TAYLOR: No quorum was  
21 present, correct?

22 VICE CHAIR THERNSTROM: That's correct.

23 COMMISSIONER TAYLOR: Strike it.

24 CHAIRMAN REYNOLDS: So that's a yes.

25 VICE CHAIR THERNSTROM: Yes.

1 COMMISSIONER TAYLOR: That's a yes to  
2 strike.

3 CHAIRMAN REYNOLDS: Sorry, sorry. And I  
4 vote yes also.

5 Okay, the motion passes.

6 COMMISSIONER KIRSANOW: Mr. Chairman, this  
7 is Kirsanow, I need to leave the call.

8 CHAIRMAN REYNOLDS: Okay, I move to  
9 approve the minutes of the November 20, 2009 meeting.  
10 Is there a second?

11 COMMISSIONER GAZIANO: second.

12 CHAIRMAN REYNOLDS: Okay, Vice Chair  
13 Thernstrom?

14 VICE CHAIR THERNSTROM: Yes.

15 CHAIRMAN REYNOLDS: Commissioner Gaziano?

16 COMMISSIONER GAZIANO: Yes.

17 CHAIRMAN REYNOLDS: Commissioner Heriot?

18 COMMISSIONER HERIOT: Yes.

19 CHAIRMAN REYNOLDS: Commissioner Melendez?

20 COMMISSIONER MELENDEZ: Yes.

21 CHAIRMAN REYNOLDS: Commissioner Yaki?

22 COMMISSIONER YAKI: Yes.

23 CHAIRMAN REYNOLDS: Commissioner Taylor?

24 COMMISSIONER TAYLOR: Yes.

25 CHAIRMAN REYNOLDS: And I vote for it

1 also. It passes.

2 Next up, Mr. Staff Director. Please give  
3 us your report.

4 STAFF DIRECTOR DANNENFELSER: Thank you,  
5 Mr. Chairman. During the period leading up to October  
6 16, September 29th to October 16th, the Office of  
7 Civil Rights' evaluation received 95 written  
8 complaints, two congressional complaints, one walk-in  
9 complaint and 20 email complaints, two facsimile  
10 complaints and 131 telephone complaints of which 67  
11 were repeat calls. In total, staff received and  
12 processed 251 complaints during that period.

13 We have received the comments from  
14 Commissioners regarding the briefing on Title IX  
15 Athletics. We had an error with the cover on that  
16 report, so we are working with GPO to get a new cover  
17 for that report and then we will be incorporating --

18 COMMISSIONER HERIOT: What was the error?

19 STAFF DIRECTOR DANNENFELSER: The original  
20 cover that was chosen just had women on the cover and  
21 since the findings and so on did reflect that this was  
22 really about men and women, we felt it was more  
23 appropriate to have a cover that would show men and  
24 women engaged in athletics as opposed to just women.

25 COMMISSIONER HERIOT: We're not paying

1 extra for this, are we?

2 STAFF DIRECTOR DANNENFELSER: I believe we  
3 will.

4 COMMISSIONER HERIOT: I'm happy to put  
5 rabbits on the cover.

6 CHAIRMAN REYNOLDS: Male or female?

7 COMMISSIONER HERIOT: Doesn't matter.

8 VICE CHAIR THERNSTROM: Let's vote on the  
9 rabbits.

10 STAFF DIRECTOR DANNENFELSER: And then the  
11 Chairman pointed out with regard to the MEPA report, I  
12 believe we're looking at, given our vote today, there  
13 was some earlier time lines that had been discussed,  
14 but I believe we'd be having concurring comments by  
15 January 13th and rebuttals by February 14th. The  
16 January 13th date would help accommodate the holidays,  
17 given Commissioners more than the normal 30-day  
18 period. That would be, I guess, about 10 extra days  
19 to accommodate the holidays.

20 COMMISSIONER GAZIANO: I'm sorry, I was  
21 momentarily distracted.

22 STAFF DIRECTOR DANNENFELSER: That would  
23 be on the MEPA briefing report. Although we may have  
24 to --

25 COMMISSIONER YAKI: Some Commissioners may

1 want to move the date.

2 STAFF DIRECTOR DANNENFELSER: We can  
3 possibly revisit that issue on December 16th since  
4 we'll be taking up I guess three different either  
5 findings or recommendations, potentially at that point  
6 in time.

7 We tabled some findings and  
8 recommendations. I think we might propose to put  
9 those on the schedule for December 16th.

10 COMMISSIONER YAKI: I'm sorry, I thought  
11 you said three other reports.

12 STAFF DIRECTOR DANNENFELSER: No, just the  
13 ones that were tabled during the meeting.

14 I would also like to propose that  
15 Commissioners provide initial comments on the illegal  
16 immigration report that was distributed earlier to  
17 provide those comments by January 3rd. Staff would  
18 then return drafts, send a draft with the edits  
19 incorporating Commissioners' comments back to  
20 Commissioners by January 8th in anticipation of the  
21 Commission voting on that report on January 15th and  
22 then subsequently February 15th would be concurring  
23 and dissenting views and March 17th Commissioners'  
24 rebuttal statements.

25 For the time being, I think we would hold

1 off on timetables relating to the STEM report until we  
2 get a better idea of where we are with some of the  
3 hearings and briefings that are being considered.

4 We did hire a new budget chief, John  
5 Ratcliffe, who is now on board. He started on  
6 November 9th and he joins us from the Military Sealift  
7 Command. He brings with him a wealth of experience in  
8 accounting, financial management, implementation of  
9 internal controls and contract administration. I hope  
10 you will all join me in welcoming John. He's been a  
11 very valuable addition to this staff in the short time  
12 he's been here.

13 CHAIRMAN REYNOLDS: Welcome aboard.

14 STAFF DIRECTOR DANNENFELSER: I did sent  
15 out recently an update on the September statistics for  
16 the website. They were not available at the prior  
17 meeting, but they since have been made available to  
18 us, so we'll continue to provide that information to  
19 you on a regular basis.

20 COMMISSIONER GAZIANO: I don't have an  
21 electronic version, but always even if it's a few  
22 weeks late, if you would include them in the printed  
23 Staff Director's report as well.

24 Staff Director's Report

25 STAFF DIRECTOR DANNENFELSER: Okay.

1       Regarding the library. The library staff received 132  
2       telephone inquiries. They completed 49 simple  
3       reference requests and performed 21 research projects  
4       of various sizes. An additional 83 research requests  
5       were completed utilizing automated search services.  
6       Regarding publications statistics, there were 248  
7       requests and 160 email requests for publications that  
8       were received during this period; 289 publications  
9       were mailed; and 44 different publications were  
10      requested. "Getting Uncle Sam to Enforce Your Civil  
11      Rights" and a catalog of publications, once again were  
12      the most frequently requested publications and there  
13      were 55 requests for publications still in process at  
14      that point.

15               Also, I want to provide Commissioners with  
16      an update. We've been going through a process of the  
17      website redesign and the Office of the Staff Director  
18      and ASCD are currently working to finalize a suggested  
19      redesign in the pre-flight format that we will then  
20      send to Commissioners for input. So I do expect that  
21      within the next couple of weeks, we'll be able to send  
22      that to Commissioners to review and get your input so  
23      that we can then move to get that website redesigned  
24      up on the web.

25               Also, with regard to the clearinghouse

1 project, we did get subsequently from the Department  
2 of Education an agreement that they would send us the  
3 requested information. They did make a case that they  
4 don't call it "Call Home." I believe I sent that out  
5 to Commissioners in an email, but they would provide  
6 basically the information that we had requested and  
7 they said they would begin to do that in December.  
8 They would ask for a 15-day lag time at the end of a  
9 month so presumably that would mean that we would  
10 expect something about December 15th from the  
11 Department of Education. We've also received a pretty  
12 good amount of information from the Department of  
13 Justice. We've received some information also from  
14 the Department of Labor. The EEOC has said that they  
15 regret that they are unable to comply with our request  
16 and they basically referred us to their website for  
17 information.

18 The National Technical Information  
19 Services is currently working on coding the website  
20 for placing that information up there. Our IT  
21 specialist is also working on a sample of the Justice  
22 Department materials that we've got to put that up  
23 there. There is a draft site that the IT specialist  
24 has put together and I can send that to Commissioners  
25 for your review. We do expect that National Technical

1 Information Services will have a working draft  
2 available for us in January from the various  
3 information that we are sending them. So we will then  
4 make that available to Commissioners for review as  
5 well.

6 That's my report at this time.

7 CHAIRMAN REYNOLDS: Questions?

8 COMMISSIONER HERIOT: I've got a question  
9 or comment. My understanding is we've had some  
10 problems with staff reports that contain sometimes --  
11 at least once a serious error.

12 COMMISSIONER YAKI: Commissioners, I need  
13 to drop off for a few minutes.

14 COMMISSIONER HERIOT: You know --

15 VICE CHAIR THERNSTROM: I have to go  
16 myself.

17 COMMISSIONER HERIOT: The Commission makes  
18 errors on its own. I really don't want to have that  
19 blame for errors that are being made in the SAC  
20 report. So could we ask that the Staff Director to  
21 come up with a plan under which we can make it clear  
22 on our website that we are not responsible for the  
23 contents of the SAC reports.

24 CHAIRMAN REYNOLDS: In terms of content,  
25 they're independent.

1                   COMMISSIONER HERIOT:       Yes, they are  
2                   sovereign on that and we are not. We need to have  
3                   that on the website.

4                   STAFF DIRECTOR DANNENFELSER: I believe  
5                   SAC report does have a disclaimer on the cover.

6                   COMMISSIONER HERIOT: It's important that  
7                   it be made extremely clear and that the whole  
8                   structure of the website be such to make that clear.

9                   STAFF DIRECTOR DANNENFELSER: We'll work  
10                  on something to make that more explicit.

11                  CHAIRMAN REYNOLDS: Any other comments?

12                  COMMISSIONER GAZIANO: Mr. Staff Director,  
13                  thank you for drawing our attention again to the  
14                  document, the routine regular document request. I  
15                  don't want to necessarily take too much more time  
16                  today except to say that I think I'd be interested in  
17                  hearing what you and the General Counsel suggest for  
18                  agencies that are insufficiently responsive and that  
19                  we work with the Chairman to place that on the agenda  
20                  and you work in advance of whenever that agenda item  
21                  is so that we can take appropriate steps to see that  
22                  agencies that should be providing us material aren't  
23                  just referring us to their websites.

24                  STAFF DIRECTOR DANNENFELSER: Okay, I will  
25                  consult with the General Counsel and come up with a

1 proposed response for Commissioners to consider.

2 COMMISSIONER HERIOT: Yes, I very much  
3 agree with Commissioner Gaziano on this. We need to  
4 move on this.

5 STAFF DIRECTOR DANNENFELSER: Okay, any  
6 other questions?

7 CHAIRMAN REYNOLDS: All right, folks.  
8 Thank you very much. We're done.

9 (Whereupon, at 1:02 p.m., the meeting was  
10 concluded.)

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