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MEETING

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FRIDAY, AUGUST 16, 2013

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

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner (via
telephone)

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner (via telephone)

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner (via telephone)

MARLENE SALLO, Staff Director

JENNIFER CRON HEPLER, Parliamentarian

STAFF PRESENT:

MARGARET BUTLER, Acting Chief, OCRE

IVY L. DAVIS, Director, ERO

BARBARA DELAVIEZ, ERO

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

LENORE OSTROWSKY, Acting Chief, PAU

JOHN RATCLIFFE, Chief, Budget and Finance

MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

ALEC DEULL (via telephone)

TIM FAY

KENESHIA GRANT

JOHN MARTIN

CARISSA MULDER

JUANA SILVERIO

ALISON SOMIN

KIMBERLY TOLHURST

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

(9:33 a.m.)

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

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

COMMISSIONER HERIOT: Yes, I am here.

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

Is the person the Staff Director present?

MS. SALLO: Present.

CHAIRMAN CASTRO: Okay, is the court reporter present?

COURT REPORTER: Present, Mr. Chair.

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

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

5 CHAIRMAN CASTRO: Yes, I did.

6 VICE CHAIR THERNSTROM: Okay, good.

7 CHAIRMAN CASTRO: I did, yes.

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

10 I. APPROVAL OF AGENDA

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

13 VICE CHAIR THERNSTROM: Second.

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

16 COMMISSIONER ACHTENBERG: Mr. Chairman?

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

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

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

25 COMMISSIONER HERIOT: I second the

1 motion. Sorry, this is Gail.

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

7 COMMISSIONER GAZIANO: Mr. Chair?

8 CHAIRMAN CASTRO: Yes, Commissioner
9 Gaziano.

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

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

16 COMMISSIONER ACHTENBERG: Bring them
17 back in September.

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

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

25 CHAIRMAN CASTRO: Mississippi.

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

4 CHAIRMAN CASTRO: No.

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

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

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

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

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

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

6 CHAIRMAN CASTRO: Madam Vice Chair?

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

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

14 MS. SALLO: Not directly.

15 CHAIRMAN CASTRO: Okay.

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

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

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

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

7 (Chorus of aye.)

8 CHAIRMAN CASTRO: Any opposed?

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

11 CHAIRMAN CASTRO: Okay, any abstentions?

12 (No audible response.)

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

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

18 (Chorus of aye.)

19 CHAIRMAN CASTRO: Any opposed?

20 (No audible response.)

21 CHAIRMAN CASTRO: Any abstentions?

22 (No audible response.)

23 CHAIRMAN CASTRO: That passes.

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

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

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

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

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

25 This Commission has played an important

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

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

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

1 that.

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

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

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

17 VICE CHAIR THERNSTROM: I have a
18 question.

19 CHAIRMAN CASTRO: Yes, Madam Vice Chair?

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

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

25 VICE CHAIR THERNSTROM: Right. And do

1 you know of specific events that individuals --

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

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

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

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

10 VICE CHAIR THERNSTROM: Yes, please do.

11 MS. SALLO: Okay.

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

14 II. PROGRAM PLANNING

15 VOTE TO APPROVE AND ADOPT THE FINAL DRAFT OF THE

16 "CIVIL RIGHTS IMPLICATIONS OF

17 EMINENT DOMAIN ABUSE" REPORT

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

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

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

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

10 Madam Vice Chair.

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

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

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

24 (No audible response.)

25 CHAIRMAN CASTRO: If not, then we will

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

2 Madam Vice Chair, how do you vote?

3 VICE CHAIR THERNSTROM: Yes.

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

6 COMMISSIONER KIRSANOW: Yes.

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

9 COMMISSIONER HERIOT: Yes.

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

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

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

18 COMMISSIONER ACHTENBERG: Yes.

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

21 COMMISSIONER YAKI: Aye.

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

24 COMMISSIONER KLADNEY: Yes.

25 CHAIRMAN CASTRO: And I vote yes. So

1 the report passes unanimously. Great, thank you.

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

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

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

15 So do I have a motion on that proposal?

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

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

22 COMMISSIONER GAZIANO: Second.

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

25 COMMISSIONER KLADNEY: I believe the

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

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

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

12 MS. SALLO: Top of page five.

13 VICE CHAIR THERNSTROM: Yes?

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

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

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

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

24 COMMISSIONER GAZIANO: Which footnote,
25 11?

1 COMMISSIONER KLADNEY: Footnote 11.

2 COMMISSIONER GAZIANO: Okay.

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

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

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

13 COMMISSIONER HERIOT: Yes, could you?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 COMMISSIONER GAZIANO: Someone can

1 borrow mine.

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

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

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

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

25 So why don't we say something like

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

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

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

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

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

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

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

1 COMMISSIONER KLADNEY: Yes.

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

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

11 CHAIRMAN CASTRO: Give it another shot.

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

14 VICE CHAIR THERNSTROM: Perceived
15 restriction is right.

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

18 VICE CHAIR THERNSTROM: Yes.

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

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

23 CHAIRMAN CASTRO: That sounds like a
24 motion.

25 COMMISSIONER KLADNEY: But what about

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

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

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

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

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

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

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

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

22 VICE CHAIR THERNSTROM: Mistakenly
23 believed.

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

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

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

11 COMMISSIONER KLADNEY: Of blank and
12 blank.

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

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

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

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

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

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

1 COMMISSIONER KLADNEY: Yes.

2 VICE CHAIR THERNSTROM: I agree with
3 that.

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

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

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

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

19 COMMISSIONER KLADNEY: Oh, okay.

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

22 COMMISSIONER KLADNEY: Okay.

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

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

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

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

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

8 MS. SALLO: Okay.

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

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

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

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

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

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

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

25 CHAIRMAN CASTRO: Okay, so we have a

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

4 VICE CHAIR THERNSTROM: Second.

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

8 Vice Chair, how do you vote on that?

9 VICE CHAIR THERNSTROM: Yes.

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

12 COMMISSIONER KIRSANOW: Yes.

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

15 COMMISSIONER HERIOT: Yes.

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

18 COMMISSIONER GAZIANO: Yes.

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

21 COMMISSIONER ACHTENBERG: Yes.

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

24 COMMISSIONER YAKI: Aye.

25 CHAIRMAN CASTRO: Commissioner Kladney,

1 how do you vote?

2 COMMISSIONER KLADNEY: Yes.

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

5 Okay, your next one?

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

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

15 COMMISSIONER KLADNEY: Yes, ma'am.

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

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

25 COMMISSIONER HERIOT: Could you read

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

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

13 COMMISSIONER HERIOT: That is true.

14 COMMISSIONER KLADNEY: It is not true.

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

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

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

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

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

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

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

9 COMMISSIONER KLADNEY: That is factually
10 accurate.

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

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

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

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

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

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

1 guidelines?

2 COMMISSIONER KLADNEY: I believe no.

3 VICE CHAIR THERNSTROM: Guidance, I
4 mean.

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

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

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

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

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

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

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

1 COMMISSIONER KLADNEY: Go ahead,
2 Commissioner Heriot.

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

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

11 COMMISSIONER KLADNEY: Actually, --

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

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

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

25 COMMISSIONER KLADNEY: Actually, yes.

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

4 COMMISSIONER KLADNEY: May I have the
5 floor?

6 CHAIRMAN CASTRO: Yes, you may.

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

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

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

16 COMMISSIONER KLADNEY: Mr. Chair --

17 CHAIRMAN CASTRO: Hold on.

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

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

1 Commissioner Kladney, please proceed.

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

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

14 CHAIRMAN CASTRO: Commissioner Heriot?

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

24 CHAIRMAN CASTRO: Commission Gaziano?

25 COMMISSIONER GAZIANO: That was actually

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 So there is a change in the --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 COMMISSIONER HERIOT: I can't hear you.

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

25 COMMISSIONER HERIOT: Can't hear you.

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

7 COMMISSIONER KLADNEY: Right but I still
8 --

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

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

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

17 COMMISSIONER KLADNEY: Well, my --

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

20 COMMISSIONER KLADNEY: I would --

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

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

25 COMMISSIONER KLADNEY: Well my initial

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

3 CHAIRMAN CASTRO: Right.

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

8 COMMISSIONER GAZIANO: Mr. Chair?

9 CHAIRMAN CASTRO: Yes, Commissioner
10 Gaziano?

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

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

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

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

1 COMMISSIONER HERIOT: Second.

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

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

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

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

16 So Madam Vice Chair, how do you vote?

17 VICE CHAIR THERNSTROM: No.

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

20 COMMISSIONER KIRSANOW: No.

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

23 COMMISSIONER HERIOT: No.

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

1 COMMISSIONER GAZIANO: No.

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

4 COMMISSIONER ACHTENBERG: Yes.

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

7 COMMISSIONER YAKI: Yes.

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

10 COMMISSIONER KLADNEY: Yes.

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

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

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

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

4 COMMISSIONER KLADNEY: Pardon me?

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

8 CHAIRMAN CASTRO: It exposes them to.

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

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

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

19 CHAIRMAN CASTRO: Exposes them to.

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

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

25 MS. OSTROWSKY: All right may I read

1 this?

2 CHAIRMAN CASTRO: Yes, please.

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

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

10 CHAIRMAN CASTRO: Could you take out
11 subjective?

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

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

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

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

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

24 CHAIRMAN CASTRO: Sure, you may.

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

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

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

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

21 COMMISSIONER GAZIANO: I don't
22 understand.

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

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

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

5 CHAIRMAN CASTRO: Commissioner Kladney?

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

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

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

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

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

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

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

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

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

21 CHAIRMAN CASTRO: Okay, so --

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

25 COMMISSIONER KLADNEY: No, no --

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

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

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

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

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

17 COMMISSIONER KLADNEY: Judgment is
18 sufficient.

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

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

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

25 CHAIRMAN CASTRO: How about the

1 individual judgment of the EEOC? Would that --

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

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

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

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

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

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

18 COMMISSIONER HERIOT: Read the sentence.

19 COMMISSIONER KLADNEY: How about
20 considered?

21 MS. OSTROWSKY: I like discretionary
22 better.

23 (Laughter.)

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

1 discretionary?

2 MS. OSTROWSKY: Sure.

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

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

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

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

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

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

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

1 thing.

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

4 MS. OSTROWSKY: Yes, the point --

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

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

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

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

1 make an individual assessment.

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

4 MS. OSTROWSKY: Right.

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

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

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

23 COMMISSIONER KIRSANOW: Can't hear.

24 COMMISSIONER KLADNEY: Pardon?

25 CHAIRMAN CASTRO: He's back.

1 COMMISSIONER KIRSANOW: Can't hear.

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

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

8 COMMISSIONER HERIOT: Can't hear.

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

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

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

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

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

25 COMMISSIONER KLADNEY: So I would be

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

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

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

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

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

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

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

18 COMMISSIONER HERIOT: Can't hear.

19 COMMISSIONER ACHTENBERG: Can't hear.

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

1 to individual hiring decisions."

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

5 VICE CHAIR THERNSTROM: Or discretionary
6 she said.

7 MS. OSTROWSKY: Or discretionary.

8 CHAIRMAN CASTRO: Oh, she is using both.

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

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

13 However, I do with --

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

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

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

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

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

1 COMMISSIONER HERIOT: No.

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

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

11 COMMISSIONER HERIOT: Could you read
12 that?

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

15 CHAIRMAN CASTRO: Yes.

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

18 CHAIRMAN CASTRO: Okay.

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

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

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

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

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

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

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

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

1 and continues to the top of paragraph nine.

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

5 Madam Vice Chair, how do you vote?

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

8 CHAIRMAN CASTRO: Pass? Okay.

9 Commissioner Kirsanow, how do you vote?

10 COMMISSIONER KIRSANOW: No.

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

13 COMMISSIONER HERIOT: No.

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

16 COMMISSIONER GAZIANO: No.

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

19 COMMISSIONER ACHTENBERG: Reluctantly,
20 yes.

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

23 COMMISSIONER YAKI: Aye.

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

1 COMMISSIONER KLADNEY: Yes.

2 CHAIRMAN CASTRO: I vote yes.

3 Madam Vice Chair?

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

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

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

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

15 So do I have a second on that motion?

16 COMMISSIONER KLADNEY: Second.

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

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

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

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

1 So could you read how I have suggested?

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

4 VICE CHAIR THERNSTROM: Yes.

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

7 VICE CHAIR THERNSTROM: Yes, I
8 understand.

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

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

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

18 COMMISSIONER KIRSANOW: Can't hear.

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

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

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

1 COMMISSIONER HERIOT: Why?

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

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

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

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

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

13 CHAIRMAN CASTRO: You do?

14 COMMISSIONER HERIOT: I do.

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

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

25 CHAIRMAN CASTRO: Okay, so that will be

1 my motion. Do I have a second?

2 VICE CHAIR THERNSTROM: Second.

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

6 Madam Vice Chair, how do you vote?

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

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

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

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

19 COMMISSIONER KIRSANOW: I will vote yes.

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

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

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

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

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

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

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

13 COMMISSIONER ACHTENBERG: My faux foes.

14

15 COMMISSIONER GAZIANO: Oh, okay.

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

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

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

23 CHAIRMAN CASTRO: You are going to pass.

24 Commissioner Kladney, how do you vote?

25 COMMISSIONER KLADNEY: No.

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

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

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

8 CHAIRMAN CASTRO: Okay. Commissioner
9 Yaki?

10 COMMISSIONER YAKI: I pass again.

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

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

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

17 COMMISSIONER YAKI: Yes.

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

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

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

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

3 CHAIRMAN CASTRO: Is there a second?

4 VICE CHAIR THERNSTROM: Second.

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

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

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

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

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

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

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

20 CHAIRMAN CASTRO: I don't know.

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

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

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

3 COMMISSIONER YAKI: Yes.

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

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

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

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

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

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

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

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

3 So that was certainly an important
4 understanding --

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

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

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

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

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

25 COMMISSIONER GAZIANO: The understanding

1 that was reached --

2 COMMISSIONER HERIOT: Can't hear.

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

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

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

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

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

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

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

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

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

17 Vice Chair Thernstrom, how do you vote?

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

20 CHAIRMAN CASTRO: Yes.

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

23 CHAIRMAN CASTRO: As amended.

24 VICE CHAIR THERNSTROM: As amended.

25 CHAIRMAN CASTRO: Commissioner Kirsanow,

1 how do you vote?

2 COMMISSIONER KIRSANOW: Yes.

3 CHAIRMAN CASTRO: Commissioner Heriot,

4 how do you vote?

5 COMMISSIONER HERIOT: Yes.

6 CHAIRMAN CASTRO: Commissioner Gaziano,

7 how do you vote?

8 COMMISSIONER GAZIANO: Yes.

9 CHAIRMAN CASTRO: Commissioner

10 Achtenberg, how do you vote?

11 COMMISSIONER ACHTENBERG: I'm going to

12 pass, Mr. Chair.

13 CHAIRMAN CASTRO: Commissioner Yaki, how

14 do you vote?

15 COMMISSIONER YAKI: No.

16 CHAIRMAN CASTRO: Commissioner Kladney,

17 how do you vote?

18 COMMISSIONER KLADNEY: No.

19 CHAIRMAN CASTRO: I am passing for the

20 moment.

21 Madam Commissioner Achtenberg?

22 COMMISSIONER ACHTENBERG: I will vote

23 no.

24 CHAIRMAN CASTRO: Okay. And I will vote

25 no.

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

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

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

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

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

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

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

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

25 We are still on the topic of the EEOC

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

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

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

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

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

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

3 COMMISSIONER KLADNEY: Second.

4 COMMISSIONER HERIOT: Second.

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

7 Madam Vice Chair, how do you vote?

8 VICE CHAIR THERNSTROM: Yes.

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

11 COMMISSIONER KIRSANOW: Yes.

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

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

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

18 COMMISSIONER GAZIANO: Yes.

19 CHAIRMAN CASTRO: Did you say yes?

20 COMMISSIONER GAZIANO: Yes.

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

23 COMMISSIONER ACHTENBERG: Yes.

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

1 COMMISSIONER YAKI: Aye.

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

4 COMMISSIONER KLADNEY: Yes.

5 CHAIRMAN CASTRO: And I vote yes.

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

8 DISCUSSION AND VOTE ON 2014 USCCR

9 BUSINESS MEETING CALENDAR

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

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

17 COMMISSIONER KLADNEY: Mr. Chairman?

18 CHAIRMAN CASTRO: Yes.

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

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

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

25 CHAIRMAN CASTRO: Okay.

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

4 CHAIRMAN CASTRO: Okay.

5 COMMISSIONER ACHTENBERG: Mr. Chairman?

6 CHAIRMAN CASTRO: Yes, Commissioner
7 Achtenberg?

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

11 CHAIRMAN CASTRO: Okay.

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

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

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

24 CHAIRMAN CASTRO: Okay.

25 COMMISSIONER HERIOT: But I prefer to

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

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

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

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

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

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

15 COMMISSIONER HERIOT: Okay.

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

18 COMMISSIONER HERIOT: No.

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

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

25 Commissioner Achtenberg, you also

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

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

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

8 COMMISSIONER ACHTENBERG: That works for
9 me.

10 CHAIRMAN CASTRO: July 25th?

11 COMMISSIONER ACHTENBERG: Works for me.

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

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

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

19 VICE CHAIR THERNSTROM: As amended?

20 CHAIRMAN CASTRO: Pardon me?

21 VICE CHAIR THERNSTROM: As amended?

22 CHAIRMAN CASTRO: As amended, yes.

23 COMMISSIONER HERIOT: Second.

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

1 (Chorus of aye.)

2 CHAIRMAN CASTRO: Any opposed?

3 (No audible response.)

4 CHAIRMAN CASTRO: Any abstentions?

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

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

8 CHAIRMAN CASTRO: Abstain?

9 COMMISSIONER GAZIANO: -- record my
10 abstention.

11 CHAIRMAN CASTRO: Okay.

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

15 CHAIRMAN CASTRO: Yes.

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

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

20 COMMISSIONER YAKI: Thank you.

21 MS. SALLO: You're welcome.

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

1 DISCUSSION AND VOTE ON 2014 STATUTORY

2 ENFORCEMENT REPORT TOPIC

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

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

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

23 CHAIRMAN CASTRO: Okay.

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

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

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

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

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

11 COMMISSIONER KLADNEY: So your proposal
12 is?

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

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

1 MS. SALLO: Mr. Chair?

2 CHAIRMAN CASTRO: Madam Staff Director.

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

13 COMMISSIONER KLADNEY: Mr. Chairman?

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

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

22 You are saying --

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

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

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

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

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

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

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

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

23 CHAIRMAN CASTRO: Let's recess.

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

1 (Pause.)

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

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

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

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

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

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

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

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

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

18 But anyway --

19 VICE CHAIR THERNSTROM: And local.

20 COMMISSIONER GAZIANO: Yes, and local.

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

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

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

11 CHAIRMAN CASTRO: Do we have a second?

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

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

16 VICE CHAIR THERNSTROM: Commissioner
17 Gaziano, --

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

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

25 CHAIRMAN CASTRO: It did not include

1 federal is what you are saying?

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

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

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

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

25 CHAIRMAN CASTRO: Madam Staff Director,

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

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

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

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

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

18 CHAIRMAN CASTRO: Madam Vice Chair?

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

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

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

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

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

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

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

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

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

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

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

18 CHAIRMAN CASTRO: Commissioner Kladney?

19 COMMISSIONER KLADNEY: I missed that
20 comment.

21 CHAIRMAN CASTRO: Commissioner
22 Achtenberg is persuaded.

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

25 CHAIRMAN CASTRO: Okay.

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

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

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

13 MS. SALLO: That would be the plan.

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

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

21 CHAIRMAN CASTRO: Indeed.

22 COMMISSIONER KLADNEY: I would be a
23 delight.

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

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

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

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

12 Madam Staff Director?

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

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

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

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

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

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

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

25 MS. SALLO: Yes, ma'am.

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

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

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

13 MS. SALLO: Yes.

14 COMMISSIONER GAZIANO: Okay, then --

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

17 CHAIRMAN CASTRO: Correct.

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

22 COMMISSIONER HERIOT: That's true.

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

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

5 CHAIRMAN CASTRO: Does that work for
6 everyone?

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

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

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

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

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

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

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

3 CHAIRMAN CASTRO: Correct.

4 MS. SALLO: Yes.

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

9 MS. SALLO: Correct.

10 CHAIRMAN CASTRO: Correct.

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

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

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

21 COMMISSIONER GAZIANO: Pacific time.

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

24 COMMISSIONER HERIOT: Pacific time?

25 COMMISSIONER GAZIANO: That's been the

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

4 COMMISSIONER KLADNEY: Old wounds.

5 COMMISSIONER HERIOT: Old wounds.

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

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

10 CHAIRMAN CASTRO: Correct.

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

13 CHAIRMAN CASTRO: Correct.

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

16 MS. SALLO: Absolutely.

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

19 MS. SALLO: Yes, ma'am.

20 VICE CHAIR THERNSTROM: Thank you very
21 much.

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

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

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

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

9 MS. SALLO: I have the discretion.

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

12 Okay, I think that works for everyone.

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

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

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

1 same time?

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

4 CHAIRMAN CASTRO: Stagger them, then.

5 COMMISSIONER HERIOT: Yes.

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

9 CHAIRMAN CASTRO: Okay.

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

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

15 MS. SALLO: No.

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

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

20 MANAGEMENT OPERATIONS

21 STAFF DIRECTOR'S REPORT

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

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

1 all in bulk.

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

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

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

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

25 I also wanted to take an opportunity to

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

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

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

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

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

3 That would be all.

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

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

9 IV. APPROVAL OF STATE ADVISORY COMMITTEE

10 APPOINTMENT SLATES

11 MAINE

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

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

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

6 Do I have a second?

7 COMMISSIONER KLADNEY: Second.

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

11 Madam Vice Chair, how do you vote?

12 VICE CHAIR THERNSTROM: Yes.

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

15 COMMISSIONER KIRSANOW: Yes.

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

18 COMMISSIONER HERIOT: Yes.

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

21 COMMISSIONER GAZIANO: No.

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

24 COMMISSIONER ACHTENBERG: Yes.

25 CHAIRMAN CASTRO: Commissioner Yaki, how

1 do you vote?

2 COMMISSIONER YAKI: Aye.

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

5 COMMISSIONER KLADNEY: Yes.

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

8 RHODE ISLAND

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

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

1 Do I have a second?

2 COMMISSIONER KLADNEY: Second.

3 CHAIRMAN CASTRO: Second, Commissioner
4 Kladney.

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

7 MS. SALLO: She's gone.

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

10 COMMISSIONER KIRSANOW: Yes.

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

13 COMMISSIONER HERIOT: Yes.

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

16 COMMISSIONER GAZIANO: No.

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

19 COMMISSIONER ACHTENBERG: Yes.

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

22 COMMISSIONER YAKI: Aye.

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

25 COMMISSIONER KLADNEY: Yes.

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

4 TENNESSEE

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

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

21 Is there a second?

22 COMMISSIONER KLADNEY: Second.

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

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

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

3 Commissioner Kirsanow, how do you vote?

4 COMMISSIONER KIRSANOW: Yes.

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

7 COMMISSIONER HERIOT: Yes.

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

10 COMMISSIONER GAZIANO: No.

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

13 COMMISSIONER ACHTENBERG: Yes.

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

16 COMMISSIONER YAKI: Aye.

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

19 COMMISSIONER KLADNEY: Yes.

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

23 WEST VIRGINIA

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

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

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

16 Do I have a second?

17 COMMISSIONER KLADNEY: Second.

18 CHAIRMAN CASTRO: Thank you.

19 Madam Vice Chair is absent.

20 Commissioner Kirsanow, how do you vote?

21 COMMISSIONER KIRSANOW: Yes.

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

24 COMMISSIONER HERIOT: Yes.

25 CHAIRMAN CASTRO: Commissioner Gaziano,

1 how do you vote?

2 COMMISSIONER GAZIANO: No.

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

5 COMMISSIONER ACHTENBERG: Yes.

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

8 COMMISSIONER YAKI: Aye.

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

11 COMMISSIONER KLADNEY: Yes.

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

14 V. ADJOURN MEETING

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

17 Do I have a second?

18 COMMISSIONER KLADNEY: Second.

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

21 (Chorus of aye.)

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

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

