

## U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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FRIDAY, JANUARY 20, 2006

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WASHINGTON, D.C.

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

PRESENT:

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

STAFF PRESENT:

JOHN BLAKELEY  
 RACHELLE BRACEY  
 TERESA BROOKS  
 CHRISTOPHER BYRNES  
 DEBRA CARR, ESQ., Associate Deputy Staff Director  
 TERRI DICKERSON, Assistant Staff Director  
 PAMELA A. DUNSTON, Chief, Administrative Services and  
 Clearinghouse Division  
 BARBARA FONTANA, Library  
 SETH JAFFE  
 SOCK FOON MACDOUGALL  
 TINALOUISE MARTIN, Director of Management  
 EMMA MONROIG, Solicitor/Parliamentarian  
 MIREILLE ZIESENISS

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COMMISSIONER ASSISTANTS PRESENT:

LISA NEUDER  
KIMBERLY SCHULD

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

9:40 a.m.

CHAIRMAN REYNOLDS: Okay. Welcome. This meeting will come to order.

This is a meeting of with most of the Commissioners participating in person with the exception of Commissioner Kirsanow who is participating by telephone.

**I APPROVAL OF AGENDA**

CHAIRMAN REYNOLDS: The first item on the agenda is the approval of the agenda. May I have a motion for the agenda?

COMMISSIONER YAKI: So moved.

CHAIRMAN REYNOLDS: A second.

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Discussion.

Jennifer, didn't you want to change an item on the agenda?

COMMISSIONER BRACERAS: This is where you want me to raise what we just talked about?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER BRACERAS: Okay. I guess I would like to move that we table the discussion of the Arizona SAC Report in order to reconsider the procedure that we passed in November for how we deal

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1 with SAC reports.

2 CHAIRMAN REYNOLDS: Okay. Second?

3 VICE CHAIRMAN THERNSTROM: I second it.

4 CHAIRMAN REYNOLDS: Discussion?

5 COMMISSIONER BRACERAS: Just by way of  
6 explanation, as I've already explained to the Chair, I  
7 have been uncomfortable with the language we adopted  
8 for considering SAC reports. And I'd just like to go  
9 back to the Committee and reconsider how we handle the  
10 SAC reports. And I'd like to try to come up with a  
11 way that wouldn't be quite so convoluted.

12 CHAIRMAN REYNOLDS: Additional comments,  
13 questions?

14 COMMISSIONER YAKI: Is there a motion for  
15 something?

16 CHAIRMAN REYNOLDS: Yes.

17 COMMISSIONER BRACERAS: Yes. There's a  
18 motion to table the discussion of the Arizona SAC  
19 Report, take it off the agenda.

20 COMMISSIONER YAKI: I absolutely agree  
21 with that. Okay.

22 COMMISSIONER BRACERAS: And to reconsider  
23 our process for how we vote to accept or not accept  
24 the SAC reports.

25 COMMISSIONER YAKI: I'll second that.

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1 COMMISSIONER BRACERAS: I basically  
2 already did, Michael.

3 COMMISSIONER YAKI: Yes, but you didn't  
4 get a democratic second.

5 COMMISSIONER BRACERAS: There you go.

6 I'm happy to talk to you later about what  
7 my concerns are. We can just save it for the working  
8 group.

9 CHAIRMAN REYNOLDS: Additional comments,  
10 questions? Okay. Let's vote.

11 All in favor, please say aye.

12 ALL: Aye.

13 CHAIRMAN REYNOLDS: All in opposition?  
14 Any abstentions? The motion passes.

15 Okay. The next motion to amend the agenda  
16 is to add a discussion on the SAC membership selection  
17 final rule as the first sub item under item 8 of the  
18 agenda. May I have a second?

19 COMMISSIONER TAYLOR: Second.

20 CHAIRMAN REYNOLDS: Okay. Discussion?

21 COMMISSIONER YAKI: We're changing the  
22 agenda?

23 CHAIRMAN REYNOLDS: Yes. We're basically  
24 going to vote on the final rule for SAC membership  
25 selection. Any comments, questions, concerns?

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1                   COMMISSIONER YAKI: Yes, Mr. Chair. As you  
2 know, I've continued to express my concerns about the  
3 final rule for selecting state advisory committee  
4 members. I am uncomfortable with the fact that the  
5 Commission is backtracking from its previous  
6 commitment to ensure that the diversity of the SACs  
7 should be reflective of the constituencies that we are  
8 charged to represent and protect, as well as the  
9 constituencies of the population that they represent  
10 in each state. I am concerned that the criteria used  
11 and the diminution of the role that effected  
12 constituencies should play in the membership of the  
13 SACs could eliminate, I think, a very good and  
14 historically reliable source of information and data  
15 on the ground for the Commission. So I am going to  
16 vote no on adoption of the final rule.

17                   CHAIRMAN REYNOLDS: Additional comments?

18                   Okay. I just have a brief one. The  
19 proposed rules, in my opinion, will not affect the  
20 effected constituencies. Anyone who has a  
21 demonstrated interest in civil rights is welcome.

22                   Our sole reason for doing this is to --  
23 well, our primary reason for doing this is to ensure  
24 that racial preferences are not used in the selection  
25 process and also to broaden the skill sets that

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1 members of the SACs possess.

2 COMMISSIONER YAKI: Mr. Chair, just in  
3 response. I respect your point of view. I understand  
4 broadening the skill set is a worthy goal. I don't  
5 believe that the administrative instruction; I  
6 understand that there was a letter promulgated by the  
7 Staff Director in the past that may have been  
8 contrary. But I don't believe that the administrative  
9 instructions as they were constituted have any sort of  
10 racial preference involved in there and instead sought  
11 to have representation that was reflective or  
12 proportional to the demographics of the population of  
13 the state for which they represented, which I believe  
14 is constitutionally viable. But we disagree on this.

15 And I would also just say notwithstanding  
16 with no reference to any of the members of this  
17 Commission, but I would are say that there are people  
18 who are interested in the issue of civil rights whose  
19 interests in civil rights are certainly not the same  
20 as mine.

21 CHAIRMAN REYNOLDS: That's correct.

22 COMMISSIONER BRACERAS: Point of  
23 information.

24 CHAIRMAN REYNOLDS: Yes.

25 COMMISSIONER BRACERAS: At this point

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1 we're just voting to add this discussion to the agenda  
2 under Roman numeral VIII, correct?

3 CHAIRMAN REYNOLDS: Yes.

4 COMMISSIONER BRACERAS: We'll have an  
5 opportunity --

6 CHAIRMAN REYNOLDS: No, this isn't to vote  
7 on the final rule.

8 COMMISSIONER YAKI: This is adding it.

9 CHAIRMAN REYNOLDS: Yes. Well, the actual  
10 vote will take place later on in the --

11 COMMISSIONER BRACERAS: Right. And we'll  
12 have an opportunity to raise these issues and discuss  
13 it further after the briefing, right?

14 CHAIRMAN REYNOLDS: Yes. Yes. Yes.

15 COMMISSIONER BRACERAS: Okay. So we're  
16 just voting right now to put it on.

17 CHAIRMAN REYNOLDS: To put it on the  
18 agenda.

19 COMMISSIONER BRACERAS: I just wanted to  
20 clarify that.

21 CHAIRMAN REYNOLDS: Okay. All right.

22 Commissioner Melendez?

23 COMMISSIONER MELENDEZ: Just a comment. I  
24 think that this is a very important issue, and I know  
25 that we had discussed it and I had a concern with

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1 changes to the SAC at one time, and I had to really  
2 fight to just get it an extension for two weeks to  
3 basically get some input from our local SAC within the  
4 state of Nevada. And I know it is still a concern.

5 When we get to issues that are of real  
6 concern to the Commission, I would hope that we could  
7 not be adding things on at the last minute. I hope  
8 that if it's a real debatable issue that we could put  
9 it on the agenda from the very beginning. Then we  
10 have an opportunity to know what's coming. I just  
11 think that on real important issues that we should  
12 agendize it real early so that we know it's coming in  
13 the following month to really have a good debate.

14 I think it's just when you add things on,  
15 I don't have a problem if they're not really  
16 important. But I think this is a real important issue  
17 and it should be agendized from the very beginning.

18 CHAIRMAN REYNOLDS: I appreciate your  
19 comments. And in this particular case, this issue has  
20 been discussed on several occasions. And I felt  
21 comfortable adding it to the agenda because everyone  
22 is well versed in the issues. But I do appreciate  
23 your comments and we'll strive to get these types of  
24 issues on the agenda at an earlier date.

25 Okay. At this point if there are no more

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1 questions or comments, let's vote. All in favor to  
2 adding to the agenda?

3 COMMISSIONERS: Aye.

4 CHAIRMAN REYNOLDS: All in opposition?

5 COMMISSIONERS: No.

6 CHAIRMAN REYNOLDS: All right. Any  
7 abstentions?

8 Please let the record reflect that  
9 Commissioners Braceras, Taylor, Thernstrom and  
10 Kirsanow voted in favor. And that Commissioners Yaki  
11 and Melendez voted in opposition.

12 The motion carries.

13 COMMISSIONER BRACERAS: And the Chair  
14 voted in favor, right?

15 CHAIRMAN REYNOLDS: Oh, yes. Yes. Thank  
16 you.

17 **II. APPROVAL OF 12/16/2005 MEETING MINUTES**

18 CHAIRMAN REYNOLDS: Okay. Next  
19 up is the approval of the minutes of the December 16,  
20 2005 meeting. May I have a motion?

21 VICE CHAIRMAN THERNSTROM: So moved.

22 CHAIRMAN REYNOLDS: A second?

23 COMMISSIONER BRACERAS: Second.

24 CHAIRMAN REYNOLDS: Any discussions or  
25 proposed changes?

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1 Okay. Let's vote. All in favor, please  
2 say aye.

3 COMMISSIONERS: Aye.

4 CHAIRMAN REYNOLDS: All in opposition?

5 CHAIRMAN REYNOLDS: Any abstentions?

6 The motion carries unanimously.

7 **III. ANNOUNCEMENTS**

8 CHAIRMAN REYNOLDS: Okay. Next  
9 up we're at the point where we'll do the  
10 announcements. In this case we just have one. On  
11 January 16, 2006 Dr. Martin Luther King, Jr. would  
12 have been 76 years old. We commemorate and honor the  
13 ideals for which Dr. King fought and celebrate how far  
14 we have come in realizing these ideals, while also  
15 taking time to ponder how best to reach the goals that  
16 we have not achieved.

17 Dr. King was a pivotal figure in the civil  
18 rights movements of the 1950s and 1960s. Dr. King was  
19 arrested over 30 times for participating in civil  
20 rights activities aimed at dismantling Jim Crow laws  
21 that kept the races separate and blacks subjugated by  
22 white rule.

23 Dr. King was instrumental in the  
24 successful Montgomery bus boycott in 1956 as well as  
25 spearheading the 1969 march on Washington, which

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1 brought together more than 200,000 people seeking  
2 justice. It was at this event where Dr. King delivered  
3 his "I Have A Dream" speech where he so artfully  
4 articulated the goal for which we all strive, which is  
5 that our children will one day live in a nation where  
6 they will not be known by the color of their skin, but  
7 the content of their character. For these and  
8 other activities he was awarded the 1964 Nobel Peace  
9 Prize.

10 Thanks to Dr. King's leadership our nation  
11 has made tremendous progress in eliminating  
12 discrimination. And on behalf of the Commission I say  
13 that we will continue to honor his legacy by moving  
14 the nation closer to his and our highest ideals.

15 Okay.

16 COMMISSIONER KIRSANOW: Jim?

17 CHAIRMAN REYNOLDS: Yes, Commissioner  
18 Kirsanow?

19 COMMISSIONER KIRSANOW: I just had, it's  
20 not really an announcement, but I simply wanted to  
21 note that my assistant Chris Jennings did another bang  
22 up job preparing an extensive examination of the civil  
23 rights record of Samuel Alito in anticipation of the  
24 nomination hearing.

25 I am pleased to forward that to everybody

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1 at some point in the future. But suffice it say that  
2 it was integral to the nomination hearing at least in  
3 terms of the civil rights component of the hearing.  
4 And it is a several hundred page document that he  
5 prepared at my direction. And it's just splendid  
6 work.

7 So I just wanted to commend him. I think  
8 he's not there because he's got a bout of food  
9 poisoning. But he did just a phenomenal job. And I  
10 can't commend him highly enough, as did some of the  
11 members of the Senate Judiciary Committee who very  
12 much appreciated his work.

13 CHAIRMAN REYNOLDS: Okay. Yes.  
14 Commissioner Kirsanow, I would appreciate a copy of  
15 the document when it's complete.

16 COMMISSIONER KIRSANOW: Will do.

17 COMMISSIONER BRACERAS: Well, Commissioner  
18 Kirsanow, I think all of us would. And, of course, all  
19 of us commend Chris Jennings on once again doing some  
20 very good work.

21 CHAIRMAN REYNOLDS: Okay.

#### 22 IV. BRIEFING

23 CHAIRMAN REYNOLDS: At this point we're  
24 going to start our briefing. The briefing is on the  
25 Native Hawaiian Government Reorganization Act.

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1           On behalf of the Commission on Civil  
2 Rights I welcome everyone to this briefing on the  
3 Native Hawaiian Government Reorganization Act. The  
4 Commissioner frequently arranges such public briefings  
5 with presentations from experts outside of the agency  
6 in order to inform itself and the nation of civil  
7 rights situations and issues.

8           At this briefing a panel of experts will  
9 advise the U.S. Commission on Civil Rights concerning  
10 a bill before Congress: Senate Bill 147, which would  
11 create government-to-government relationship between  
12 the United States and Native Hawaiians. Some argue  
13 that this bill is a reaction to the United States  
14 Supreme Court discussion in *Rice v. Cayetano* that held  
15 in 2000 that a policy allowing only Native Hawaiians  
16 to vote for trustees of the state's Office of Hawaiian  
17 Affairs violated the 15th Amendment of the  
18 Constitution which prohibits race-base exclusion from  
19 voting.

20           The bill defines Native Hawaiians by  
21 racial characteristics and residual sovereignty, and  
22 in doing so extends to Native Hawaiians the policy of  
23 self governance historically granted to American  
24 Indians and Alaska Natives.

25           Proponents of the legislation believe that

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1 it would represent a major advance in Native Hawaiians  
2 affairs while opponents believe that it would go  
3 beyond racial preferences and potentially create a  
4 race-based government.

5 In 1991 the Hawaii Advisory Committee to  
6 the U.S. Commission on Civil Rights issued a report on  
7 this topic entitled "Reconciliation at a Crossroads:  
8 The implication of the apology resolution and *Rice v.*  
9 *Cayetano* for federal and state programs benefiting  
10 Native Hawaiians."

11 This issue is one of national import. It's  
12 an issue that's important to all Americans. And for  
13 that reason we're delighted to conduct this briefing.

14 Okay. We will begin with our  
15 introductions. This morning we are pleased to welcome  
16 four experts on various aspects of the proposed Native  
17 Hawaiian Government Reorganization Act. I welcome all  
18 of you on behalf of the Commission, and I will  
19 introduce everyone and describe your background and  
20 then I will call on you according to the order in  
21 which you have been introduced.

22 First, we have Noelani Kalipi. I'm sorry,  
23 did I pronounce your name?

24 MS. KALIPI: Kalipi.

25 CHAIRMAN REYNOLDS: Kalipi. Thank you.

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1 Ms. Kalipi was born and raised in Hilo,  
2 Hawaii. She graduated with a bachelor's degree in  
3 government and politics and economics from George  
4 Mason University, and a JD from the National Law  
5 Center at George Washington University.

6 Ms. Kalipi served in the United States  
7 Army Judge Advocate Generals Corp from 1996 to 1999.

8 Ms. Kalipi is licensed to practice law in  
9 Hawaii and the District of Columbia.

10 She served as Senator Akaka's counsel from  
11 1999 to 2005 and advised him on legislative issues  
12 pertaining to veterans affairs, judiciary, homeland  
13 security, armed services, U.S. territories and Pacific  
14 Islands and finally, Native Hawaiians.

15 Ms. Kalipi was appointed Democratic Staff  
16 Director on the Senate Committee on Veterans Affairs  
17 in February of 2005.

18 Ms. Kalipi will deliver a written  
19 statement authorized by Patricia Zell, former  
20 Democratic Staff Director of the United States Senate  
21 Committee on Indian Affairs and editor of the *Indian*  
22 *Law Review*.

23 Thank you for being with us, Ms. Kalipi.

24 Next we will hear from H. William Burgess,  
25 an attorney who lives in Hawaii who is an opponent of

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1 the Hawaiian sovereignty movement and of government  
2 programs that give preferences to Native Hawaiians.

3 After attending the University of Virginia  
4 Law School and graduating in 1953, he enrolled in the  
5 U.S. Marine Corps from 1953 to 1958 as a fighter pilot  
6 and legal officer. Once out of the military, Mr.  
7 Burgess joined the law firm of Carlsmith & Carlsmith  
8 and then A. William Barlow.

9 In 1965 Burgess opened his own law office  
10 where he focused full time on business and real  
11 property litigation. From 1969 to 1972 he was the  
12 volunteer President of the Legal Aid Society. In 1979  
13 Mr. Burgess was one of the founders and first  
14 President of the Neighborhood Justice Center of  
15 Honolulu now called the Mediation Center of the  
16 Pacific.

17 In 1994 he retired from his practice and  
18 become a trustee for a Maui shopping center and a  
19 Chapter 11 reorganization. Mr. Burgess was  
20 instrumental in bringing two controversial lawsuits  
21 seeking to declare programs as unconstitutional.

22 In July of 2000 Mr. Burgess filed *Arakai*  
23 the state of Hawaii challenging the requirements that  
24 the trustees of the Office of Hawaiian Affairs be of  
25 Hawaiian ancestry on the basis of the 14th Amendment,

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1 the 15th Amendment and the Voting Rights Act. In  
2 December of 2002 the United States Court of Appeals  
3 for the 9th Circuit partly ruled in favor of the  
4 plaintiffs. The court based its decision on the  
5 plaintiffs' 15th Amendment argument.

6 In March of 2002 Mr. Burgess and attorney  
7 Patrick W. Hanifin filed a second lawsuit *Arakaki v.*  
8 *Lingle* challenging the constitutionality of the Office  
9 of Hawaiian Affairs and the Hawaiian Homes Commission  
10 Act. In 2005 in a two to one decision by the U.S. 9th  
11 Circuit Court of Appeals found that state taxpayers  
12 had standing to challenge the appropriation of tax  
13 moneys to, the office of Hawaiian Affairs, but  
14 dismissed the rest of the plaintiffs' claims. Mr.  
15 Burgess is a member of the Grassroots Institute of  
16 Hawaii, a nonprofit organization that has gained  
17 prominence through its intense campaign to educate the  
18 public and Congress about the Native Hawaiian  
19 Government Reorganization Act

20 Next we will hear from H. Christopher  
21 Bartolomucci, a partner at the law firm of Hogan and  
22 Hartson.

23 In law school he was an editor of the  
24 *Harvard Law Review*. Following law school he clerked  
25 for the Honorable William L. Garwood of the U.S. Court

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1 of Appeals for the 5th Circuit.

2 Mr. Bartolomucci served in the  
3 Administration of President George W. Bush as  
4 Associate Counsel to the President from January 20,  
5 2001 to August 15, 2003. While serving in the White  
6 House he assisted the President in matters ranging  
7 from the selection of federal judges to the  
8 consideration of pardon requests. He also served as  
9 counsel for the Inspector General of the District of  
10 Columbia, Associate Special Counsel to the Senate  
11 Whitewater Committee. And he's also a Bristow Fellow  
12 at the Office of the Solicitor General of the United  
13 States Department of Justice.

14 At Hogan and Hartson Mr. Bartolomucci  
15 focuses on appellant and Supreme Court litigation, and  
16 other litigation involving complex legal issues at  
17 both the trial and appellate levels. He has briefed  
18 numerous cases in the U.S. Supreme Court at the  
19 certari and merit stages for both private clients and  
20 the United States Government.

21 Finally, we have Gail Heriot, who is a  
22 professor law at the University of San Diego School of  
23 Law. Ms. Heriot was formerly Associate Dean for  
24 Academic Affairs and professor of law at George Mason  
25 University School of Law, and counsel to the Senate

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1 Judiciary Committee.

2 She also served as a litigation associate  
3 at Hogan and Hartson in Washington, D.C. and Mayer,  
4 Brown and Platt in Chicago.

5 After she graduated she worked as a law  
6 clerk for the Honorable Seymour F. Simon of the  
7 Supreme Court of Illinois.

8 She has numerous academic publications,  
9 such as faculty editor for "A Symposium On Direct  
10 Democracy: An Introduction" at the Journal of  
11 Contemporary Legal Issues; Standardized Tests Under  
12 the Magnifying Glass: A Defense of the LSAT Against  
13 Recent Charges of Bias" at the Texas Review of Law and  
14 Politics, and; also "Strict Scrutiny: Public Opinion  
15 and Racial Preferences on Campus. Should The Courts  
16 Finds a Narrowly Tailored Solution." And that was  
17 published at the Harvard Journal of Legislation.

18 Okay. Now that we've dispensed with the  
19 introductions, we can start.

20 Ms. Kalipi, please speak for 15 minutes.

21 MS. KALIPI: Good morning.

22 Thank you for providing me with the  
23 opportunity to present information related to S. 147,  
24 Native Hawaiian Government Reorganization Act of 2005.

25 I ask that my written statement along with

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1 that of Dr. Patricia Zell be included for the record.

2 CHAIRMAN REYNOLDS: It was.

3 MS. KALIPI: I have served as Senator  
4 Akaka's primary staffer on Native Hawaiian issues  
5 since 1999. I have brought with me information for  
6 each of the Commissioners, which was delivered to you  
7 in the blue packet.

8 The blue packet includes the substitute  
9 amendment to S. 147, which was negotiated between  
10 Hawaii's Congressional Delegation, Hawaii's Attorney  
11 General and officials from the Department of Justice,  
12 Office of Management and Budget and the White House.  
13 So this is the most recent and accurate version of the  
14 legislation.

15 The substitute amendment addresses  
16 concerns raised in the letter sent to Senators John  
17 McCain and Senator Byron Dorgan on July 13, 2005.

18 The packet also contains an information  
19 sheet about the substitute amendment, the committee  
20 report filed by the Senate Committee on Indian Affairs  
21 on S. 147 and numerous news articles regarding the  
22 legislation.

23 The customs, traditions and culture and  
24 Hawaii's indigenous peoples, Native Hawaiians, serve  
25 as a basis of society in Hawaii. The essence of

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1 Hawaii is captured not by the physical beauty of its  
2 islands, but by the beauty of its people and their  
3 willingness to welcome others into their society in  
4 order to share their culture, environment and lives.  
5 This attitude often referred to as the aloha spirit  
6 originates from the culture and traditions of Hawaii's  
7 indigenous peoples, Native Hawaiians.

8 Hawaii's motto "Ua mau ke ea o kay aina I  
9 ka pono: The life of the land is perpetrated in  
10 righteousness" captures the culture of Native  
11 Hawaiians. Prior to western contact, Native Hawaiians  
12 lived in an advanced society that was steeped in  
13 science. Native Hawaiians honored their land and  
14 environment and therefore developed methods of  
15 irrigation, agriculture, aquaculture, navigation,  
16 medicine, fishing and other forms of substance whereby  
17 the land and sea were efficiently used without waste  
18 or damage. Respect for the environment and for others  
19 formed the basis of their culture and tradition.

20 Unlike a number of other aboriginal peoples, the  
21 Native Hawaiians welcomed foreigners into their  
22 society. Over time this generosity resulted in the  
23 near decimation of the indigenous population and  
24 almost destroyed the precious traditions and culture  
25 of Hawaii. A monarchy was overthrown, a provisional

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1 government was established which proclaimed Hawaii a  
2 republic and transferred vast amounts of land to the  
3 United States.

4 The perpetuation of Hawaii's important  
5 cultural traditions were discouraged by these leaders  
6 who were convinced of their primacy and committed  
7 exclusively to the propagation of western values and  
8 conventions.

9 Despite these events the remaining Native  
10 Hawaiians continued to share their culture and  
11 tradition with non-Native Hawaiians and continued to  
12 include them in their society. Indeed, the spirit of  
13 aloha has endured and flourished in spite of  
14 pestilence, political upheaval and poverty. It  
15 transcends political and geographic demarcations and  
16 remains the noblest legacy of the Native Hawaiian  
17 people to their American brethren and to the world.  
18 For this reason efforts to preserve Native Hawaiian  
19 tradition, culture and custom are widely supported in  
20 Hawaii and are nonpartisan.

21 S.147, the Native Hawaiian Government  
22 Reorganization Act of 2005 is supported by Hawaii's  
23 congressional delegation, the Hawaii State  
24 legislature, the Governor of Hawaii and numerous  
25 organizations and associations as well as individuals

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1 in Hawaii and across the nation. The bill is also  
2 supported by the National Congress of American Indians  
3 and Alaska Federation of Natives.

4 The formal extension of the federal policy  
5 of self governance and self determination to Native  
6 Hawaiians provides parity in federal policies towards  
7 American Indians, Alaska Natives and Native Hawaiians.  
8 While Congress has enacted more than 160 statutes  
9 addressing the conditions of Native Hawaiians, the  
10 formal extension of the federal policy of self  
11 governance and self determination through a federally  
12 recognized government-to-government relationship has  
13 not happened. This bill corrects this oversight and  
14 injustice, thereby putting Native Hawaiians on an  
15 equal footing with their indigenous brethren, American  
16 Indians and Alaska Natives as 147 recognizes the  
17 political and legal relationship between Native  
18 Hawaiians and the United States.

19 The United States Supreme Court has  
20 acknowledged that Indian tribes were originally  
21 independent nations and European nations historically  
22 dealt with Indian tribes as such nations prior to the  
23 establishment of the American republic. Indian tribes  
24 lands were incorporated within the United States  
25 through military force or through treaty. American

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1 Indians were dispossessed of their lands by the United  
2 States and Congress later had to take remedial  
3 legislation to help alleviate the destruction and  
4 devastation visited upon Indian tribes by federal  
5 policies and actions.

6 Similarly, the Kingdom of Hawaii was a  
7 distinct independent nation with treaties with  
8 European nations and the United States. The United  
9 States Minister to Hawaii used U.S. forces to assist  
10 in the overthrow of the Hawaiian nation in favor of  
11 American settlers. But President Grover Cleveland  
12 recognized the overthrow as an international wrong.  
13 In 1898, five years after the overthrow, the United  
14 States annexed Hawaii. Twenty-three years later the  
15 Native Hawaiian people were destitute and Congress  
16 enacted the Hawaiian Homes Commission Act in 1920 to  
17 establish protected lands for Native Hawaiians who had  
18 been devastated by the overthrow.

19 It is also clear that Native Hawaiians are  
20 native in the same sense as American Indians, meaning  
21 aboriginal. Thus, when Congress deals with Native  
22 Hawaiians as an aboriginal peoples it legislates on  
23 the same basis as it does with American Indians. This  
24 is clear in the legislative history of the Hawaii  
25 Homes Commission Act of 1920.

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1           Only non-Indians consider American Indians  
2 a distinct race of people. American Indians consider  
3 themselves to be many peoples; Cherokee, Chippewa,  
4 Dakota, Pueblo and Navajo to name a few bound together  
5 by a common experience of dealing with the United  
6 States overthrow of tribal governments of seizure of  
7 tribal lands. The fact that some non-natives were  
8 included in the Kingdom of Hawaii does not make the  
9 kingdom non-native. And Indian tribes frequently  
10 incorporated non-natives whether French, American or  
11 otherwise, and this did not change the native  
12 character of the community. In fact, some Indian  
13 treaties and statutes provided for the allotment of  
14 Indian lands to non-Indians who had married into an  
15 Indian tribe.

16           The fact that the Kingdom of Hawaii was  
17 overthrown does not prevent Congress from dealing with  
18 Native Hawaiian people as a native government because  
19 Native Hawaiians remain a distinctly native community.

20           No one who spends anytime in Indian Country and then  
21 visits Hawaii could fail to recognize the many  
22 similarities between the circumstances of the native  
23 communities in the continental United States and in  
24 Hawaii.

25           Congress has declared that it has the same

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1 authority to deal with Native Hawaiians and American  
2 Indians under the Indian Commerce Clause. And those  
3 declarations are entitled to a presumption of  
4 constitutionality.

5 In short, a fair review of history cannot  
6 ignore the fact that there were aboriginal peoples in  
7 the United States of America prior to the formation of  
8 the American republic and the Constitution provides  
9 authority to Congress to deal with them as distinctly  
10 native communities, not based on race but upon  
11 political status as citizens of separate native  
12 polities that have been incorporated within the United  
13 States.

14 Finally, I would like to talk about the  
15 bill itself. We have worked hard to ensure that the  
16 bill strikes a careful balance between necessary  
17 structure and flexibility so that key issues such as  
18 the citizenship in the governing entity can be  
19 determined by Hawaii's indigenous peoples.

20 I hope all of you take the time to really  
21 examine the process in this bill. There are two  
22 processes. The first provides for the reorganization  
23 of the Native Hawaiian governing entity. It is not  
24 the creation of a new entity as much as it is  
25 restoring the right of Native Hawaiians to govern

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1 themselves, as do other indigenous peoples within the  
2 framework of federal law.

3 The second process is a negotiations  
4 process which provides that upon federal recognition  
5 the Native Hawaiian governing entity will negotiate  
6 issues such as the transfer of any lands, natural  
7 resources and assets commiserate with jurisdiction,  
8 grievances for historical wrongs and any governmental  
9 authority with the state of Hawaii and the United  
10 States. This negotiations process is inclusive and  
11 intended to represent all of the people of Hawaii.  
12 Before any transfers can be completed, enabling  
13 legislation at the state and federal levels if  
14 necessary, must be enacted.

15 Opponents to the legislation have made  
16 wild accusations as to what could potentially result  
17 from the enactment of this bill. In reality, the bill  
18 is about the process. The bill is about finally  
19 allowing Native Hawaiians to make some decisions.  
20 Many, both opponents and proponents, have advocated to  
21 Senator Akaka that he should attempt to predetermine  
22 the outcome of both of these processes. He has  
23 refused to predetermine either the structure of the  
24 entity or the negotiations process for he has  
25 confidence that the bill provides the tools necessary

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1 for the people of Hawaii, both native and non-native,  
2 to resolve the longstanding issues resulting from the  
3 overthrow of the Kingdom of Hawaii in order to provide  
4 a better future for all children of Hawaii.

5 It is an honor to present testimony before  
6 you this morning. I stand ready to answer your  
7 questions.

8 CHAIRMAN REYNOLDS: Thank you.

9 Next up, Mr. Burgess. You, too, will have  
10 15 minutes.

11 MR. BURGESS: Hi, and good morning.

12 Thank you for allowing me to come and  
13 share my views about this important subject -- is that  
14 better?

15 CHAIRMAN REYNOLDS: Yes.

16 MR. BURGESS: I've lived in Hawaii for 50  
17 years. The first two years as a Marine Corps legal  
18 officer and fighter pilot - in peacetime. And the rest  
19 of the years as an attorney in private practice. For  
20 the last 28 years I've been married to a lovely lady  
21 of Chinese, Filipino and Hawaiian ancestry. In the  
22 last eight years she and I have been litigating pro  
23 bono to bring back to Hawaii the idea that everybody  
24 should play by the same rules.

25 My wife puts it this way: She asks why

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1 should I get more rights and privileges than my  
2 Chinese cousins, my Filipino cousins, or my Irish-  
3 English husband just because I have some Hawaiian  
4 ancestry and they don't?

5 She deploras the effect of entitlements and  
6 the victimhood mentality on young Hawaiians. Based on  
7 her own life and family experience she knows that  
8 waiting for a free homestead or handouts is not the  
9 way to better your condition or to build wealth. Hard  
10 work is.

11 From my perspective as a lawyer I'm amazed  
12 that the entitlement programs in Hawaii have lasted as  
13 long as they have. Hawaii is the only state in the  
14 nation that gives homesteads restricted exclusively to  
15 people that are defined explicitly by race. The  
16 definition of Native Hawaiians in the Hawaii Homes  
17 Commission Act, for example, is any descendent of not  
18 less than one-half part of the blood of the races  
19 inhabiting the Hawaiian Islands previous to 1778.

20 The state also gives to the Office of  
21 Hawaiian Affairs, it's referred to locally as "OHA",  
22 for that very small racial group annual cash  
23 distributions of public land trust revenues. That's  
24 revenues before expenses. The state gives no cash  
25 transfers to any of the rest of the beneficiaries of

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1 the public land trust.

2 And as taxpayers we are appalled at the  
3 waste by the end of the Waihee administration in 1994  
4 when the public schools in Hawaii were crumbling, the  
5 state department of education couldn't even afford to  
6 buy books for the students or to repair or even to  
7 clean the restrooms and yet money and public resources  
8 were gushing out of the fist for the benefit of that  
9 same small racial group. And the more that was paid,  
10 the more demands were made, not only for that limited  
11 racial group, the 50 percent or more Hawaiians, but  
12 also for people with even a drop of Hawaiian ancestry.

13 And now the Akaka bill would push Hawaii  
14 over the cliff. It would permanently segregate the  
15 state of Hawaii and its people on grounds that the  
16 Supreme Court calls odious to a free people. Even  
17 Senator Akaka has acknowledged that the bill could  
18 lead to secession.

19 I'm not going to read my entire prepared  
20 statement, but I'd like to touch on just three reasons  
21 that I think it would be just plain nuts for Congress  
22 to go into the most integrated state and reverse  
23 course.

24 First, Kamehameha united us. Akaka would  
25 divide us forever.

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1           Second, the Indian tribe analogy does not  
2 work.     There is no Native Hawaiian tribe to be  
3 recognized, and there never has been since the Kingdom  
4 of Hawaii was created.

5           This is the third point. The U.S. did not  
6 overthrow the queen. When you look at history wearing  
7 blinders you get a distorted picture.

8           I would like to discuss just those three  
9 points in order.

10           First of all on the concept of unity and  
11 equality. The Supreme Court has explained that the  
12 United States Constitution contemplates an indivisible  
13 nation composed of indestructible states. And the  
14 first of America's self-evident truths is that all men  
15 are created equal: Every citizen of the United  
16 States, whatever her or his ancestry is entitled to  
17 the equal protection of the laws.

18           Those two basic rules of American  
19 democracy, unity and equality were embraced early on  
20 by Kamehameha the Great. Long before he united the  
21 islands and created the Kingdom of Hawaii in 1810,  
22 Kamehameha brought non-natives onto his forces and  
23 into his family. And ever since then non-natives have  
24 continued to intermarry, to assimilate and to  
25 contribute to the social, economic and political life

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1 of Hawaii both as leaders in high positions and as  
2 ordinary citizens.

3 The crux of the Akaka bill is that it  
4 would break up the state of Hawaii and it would  
5 discriminate between citizens of the United States  
6 solely based on their ancestry. Merely having a drop  
7 of the favored blood would make some people superior  
8 to all others forever. And we feel that that violates  
9 not only the United States Constitution, it dishonors  
10 and defies the fundamental laws of the Kingdom of  
11 Hawaii and the vision, particularly, of Kamehameha the  
12 Great which has made Hawaii today in many ways a model  
13 for the world.

14 As to the Indian tribe analogy, the Akaka  
15 bill supporters, as Noelani said, say all we want is  
16 parity; Alaska Natives and American Indians get all of  
17 these benefits. It's not fair that Native Hawaiians  
18 don't get some, too. But the Akaka bill would not  
19 just give Native Hawaiians parity, it would give them  
20 supremacy. No group of native Americans has the right  
21 to be recognized as a tribe simply because of  
22 ancestry. A preexisting, longstanding political  
23 entity is required without an existing tribe or polity  
24 of some kind there's nothing to be recognized.  
25 Congress cannot create tribes out of thin air. It can

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1 only recognize those historic tribes which still exist  
2 and function. And there has never been in Hawaii,  
3 even during the years of the Kingdom, a tribe or a  
4 government of any kind for Native Hawaiians separate  
5 from the government of the rest of the citizens of  
6 Hawaii.

7 Census 2000 showed about 400,000 persons  
8 who identified themselves as being of some degree of  
9 Hawaiian ancestry. Those entire 400,000 would qualify  
10 under the definition of Hawaiian as in the Akaka bill.  
11 Those 400,000 people reside throughout all the 48  
12 Census districts of the state of Hawaii and throughout  
13 all the 50 states. In California, for example, 60,000  
14 people identify themselves as being of Hawaiian  
15 ancestry. There is no way under Indian law that such  
16 a group could qualify for recognition as a tribe,  
17 because they are not governed by a single government,  
18 and they do not live in a separate community.

19 And the third point I'd like to talk about  
20 is the rest of the story about the Akaka bill. Just  
21 last Sunday on the *Honolulu Advertiser* there was a  
22 headline that said "Morgan Report Is Public At Long  
23 Last." The Morgan Report of February 26, 1894 is the  
24 final report of the Senate Committee on Foreign  
25 Affairs that was investigating the overthrow of the

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1 Hawaiian monarchy. The report consists of 800 pages  
2 of sworn testimony, exhibits and findings. That  
3 Committee was composed of six Democrats including the  
4 Chairman John Morgan and five Republicans. And the  
5 report concludes that despite the earlier statements  
6 by President Cleveland based on the report by his  
7 minister or his representative, former Congressman  
8 Blount, that the overthrow was instigated and aided by  
9 the United States. But the conclusion of the  
10 Committee, the bipartisan committee, was that in fact  
11 the U.S. troops had landed as peacekeepers to protect  
12 American lives and property and had remained  
13 completely neutral.

14 Now the advocates or the supporters of the  
15 Akaka bill frequently report President Cleveland's  
16 earlier statements, but they don't ever mention the  
17 fact that, after the Morgan Report, President  
18 Cleveland recognized, he accepted the verdict of  
19 Congress, he recognized the provisional government of  
20 Hawaii and subsequently the Republic of Hawaii as the  
21 lawful successor to the Kingdom of Hawaii.

22 Now, I would urge for your consideration  
23 the Morgan Report. It's available now digitized for  
24 the first time, easily accessible to the public. It  
25 can be found on the Internet at [morganreport.org](http://morganreport.org). No

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1 spaces. It's indexed, it's searchable and it's good  
2 reading because you can hear from people who were on  
3 the scene with personal knowledge.

4 I'd be happy to answer any questions that  
5 the Commission has.

6 CHAIRMAN REYNOLDS: We're going to hold  
7 off the questions until the end.

8 Mr. Bartolomucci, you have 15 minutes.

9 MR. BARTOLOMUCCI: Chairman Reynolds and  
10 members of the Commission, thank you for this  
11 opportunity to participate in the briefing on S. 147,  
12 the Native Hawaiian Government Reorganization Act of  
13 2005.

14 I'd hope to focus today on the issue of  
15 Congress' power to enact S. 147. The principal legal  
16 question presented by S. 147 is whether Congress has  
17 the constitutional authority to treat Native Hawaiians  
18 the way it treats other Native Americans, i.e.,  
19 American Indians and Native Alaskans. Constitutional  
20 text, Supreme Court precedent and historical events  
21 provide the answer.

22 Congress' broad power in regard to Indian  
23 tribes allows Congress to recognize Native Hawaiians  
24 as having the same sovereign status as the other  
25 indigenous peoples of this country. S. 147 would

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1 establish a process by which Native Hawaiians would  
2 reconstitute their tribal government.

3 Before Hawaii became a state, the Kingdom  
4 of Hawaii was a sovereign nation recognized as such by  
5 the United States. In 1893 American officials and the  
6 U.S. military aided the overthrow of the Hawaiian  
7 monarchy. A century later in 1993 Congress formally  
8 apologized to the Hawaiian people for the U.S.  
9 involvement in this regime change.

10 Congress has ample authority to assist  
11 Native Hawaiians in their effort to reorganize their  
12 governing entity. Congress' broadest constitutional  
13 power, the power to regulate commerce, specifically  
14 encompasses the power to regulate commerce with the  
15 Indian tribes. Based upon the Commerce Clause and  
16 constitutional provisions, the Supreme Court has time  
17 and again acknowledged Congress' plenary power to  
18 legislate regarding Indian affairs. As the Supreme  
19 Court said only two years ago in the case *United*  
20 *States v. Lara*, "The Constitution grants Congress  
21 broad general powers to legislate in respect to Indian  
22 tribes, powers that we have consistently described as  
23 plenary and exclusive."

24 Congress has used that broad power in the  
25 past to restore lost tribal sovereignty. In 1954

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1 Congress terminated the sovereignty of the Menominee  
2 Indian Tribe in Wisconsin. In 1973 Congress reversed  
3 course and enacted the Menominee Restoration Act which  
4 restored sovereignty to the Menominee.

5 Pointing to the Menominee Restoration Act  
6 the Supreme Court in *Lara* affirmed that the  
7 Constitution authorized Congress to enact legislation  
8 "recognizing the existence of Indian tribes" and  
9 "restoring previously extinguished tribal status."

10 S. 147 is patterned after the Menominee  
11 Restoration Act and would do for Native Hawaiians what  
12 Congress did for the Menominee.

13 S. 147 does not run afoul of the Supreme  
14 Court's 2000 decision in *Rice v. Cayetano*. In *Rice*  
15 the Court ruled that the state of Hawaii could not  
16 limit the right to vote in a state election to Native  
17 Hawaiians. But *Rice* did not address whether Congress  
18 may treat Native Hawaiians as it does other native  
19 Americans. Indeed, the Court in *Rice* expressly  
20 declined to address whether Native Hawaiians have a  
21 status like that of Indians in organized tribes or  
22 whether Congress may treat the Native Hawaiians as it  
23 does the Indian tribes.

24 Some opponents of S. 147 have pointed to  
25 *Rice* in support of an argument that the bill violated

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1 equal protection principles. But the Supreme Court  
2 has long held that congressional legislation dealing  
3 with indigenous groups is political, not racial, in  
4 character and therefore is neither discrimination nor  
5 unconstitutional. When Congress enacts laws for  
6 indigenous peoples it does so on a government-to-  
7 government basis. Scores of federal laws and  
8 regulations exist relating to American Indians, Native  
9 Alaskans and Native Hawaiians and none has ever been  
10 struck down as racially discriminatory.

11 At the end of the day a decision by  
12 Congress to treat Native Hawaiians like other native  
13 groups is a political decision and one that the courts  
14 are not likely to second-guess. In the 1913 case of  
15 *United States v. Sandoval*, which involved the New  
16 Mexico Pueblos, the Supreme Court ruled that Congress  
17 could treat the Pueblos as Indians even though their  
18 culture and customs differed from that of other Indian  
19 tribes. The Court decided that Congress' judgment was  
20 not arbitrary and that judicial review should end  
21 there. S. 147 easily passes that legal test.

22 That concludes my opening statement, and  
23 I'll be happy to answer the Commission's questions at  
24 the appropriate time.

25 CHAIRMAN REYNOLDS: Thank you.

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1 Professor Heriot?

2 PROFESSOR HERIOT: Thanks for inviting me  
3 to participate in this briefing.

4 In order to stick to the time allotted,  
5 I'm going to deviate a little bit from my draft text.

6 Let me start by saying Indian law is a  
7 very complicated area of the law full of  
8 contradictions and ripe for major reform. The last  
9 thing that it needs is a major expansion that would  
10 come, even with the recognition of an additional  
11 Indian megatribe. But the proposed Native Hawaiian  
12 Government Reorganization Act goes far beyond merely  
13 recognizing a very, very, very large tribe. And I  
14 believe that it does so in an unconstitutional manner.

15 First of all, I'm going to call it the  
16 Akaka bill for brevity.

17 The Akaka bill does not simply recognize  
18 an existing tribe. It creates that tribe, or more  
19 precisely it creates the mechanism for creating the  
20 tribe. The Constitution contains no clear statement  
21 of congressional authority to create or organize new  
22 Indian tribes. In fact, it's worth pointing out the  
23 Constitution contains no clear statement of  
24 congressional authority to regulate even existing  
25 Indian tribes as opposed to regulating commerce

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1 between the United States and Indian tribes. The  
2 authority to regulate existing tribes is sometimes  
3 said to derive from the necessity of dealing with  
4 reality. The existence of Indian tribes in this  
5 country in 1787 as well as today is a fact, and truly  
6 it was the intention of the framers to confer upon  
7 Congress the power to deal with that reality, whether  
8 that reality was considered a happy one, an unhappy  
9 one or something in between. But the power to  
10 authorize the creation of new tribes or even authorize  
11 the reorganization of a previously existing tribe is  
12 not merely the practical power to cope with the world  
13 as it is.

14 New tribes and newly reconstituted tribes  
15 alter the status quo in significant ways. If that  
16 power exists, what limits should be placed on it?  
17 Does Congress have the authority to create an Indian  
18 tribe from Mexican Americans living in Southern  
19 California, for the Amish in Pennsylvania or Orthodox  
20 Jews in New York?

21 By the way, religious groups would be  
22 among those most desiring tribal status since tribes,  
23 if they can be conceptualized as sovereign or quasi-  
24 sovereign entities are not governed by the Bill of  
25 Rights except insofar as the Indian Civil Rights Act

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1 imposed that legal responsibility upon them, which is  
2 only partial. Religious groups could therefore  
3 arguably surmount the establishment clause  
4 difficulties dealt with by the Supreme Court in the  
5 case of *Board of Education of Kiryas Joel School*  
6 *District v. Grumit* by becoming an Indian tribe. So  
7 this is not a fanciable issue.

8 It's been pointed out that in the past the  
9 Supreme Court has allowed Congress to reconstitute  
10 Indian tribes, in particular the Menominee Tribe. But  
11 I disagree that this has occurred in the past.

12 First, the Supreme Court has not put its  
13 mark upon this at all. It was never challenged in  
14 court. But more importantly, the Menominee Tribe was  
15 not extinguished by an act of Congress. What happened  
16 was federal supervision ceased in the 1950s as part of  
17 a general policy at the time to decrease federal  
18 supervision over Indian tribes with the thought that  
19 eventually perhaps these tribes would melt away. But  
20 the tribe continued to exist. It continued to be  
21 organized. It became a corporation with the members of  
22 the tribe as shareholders of that corporation.

23 And so by recognizing the Menominee Tribe  
24 again Congress was not in anyway creating a tribe. It  
25 wasn't recreating the mechanisms to put together a

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1 tribe. Those people who were members of the Menominee  
2 Tribe knew that they were members of the Menominee  
3 Tribe. There was a political unit and it was simply  
4 rerecognized by Congress and federal supervision was  
5 undertaken again. So that is quite distinguishable  
6 from this case.

7           Nevertheless, in examining the  
8 constitutionality of the proposed Akaka bill we can  
9 put all this aside, at least temporarily, because  
10 another issue looms much larger in an age in which  
11 racial entitlement are an important future of the  
12 political landscape in nearly every part of the  
13 country Hawaii is in a league by itself. Its Office  
14 of Hawaiian Affairs administers a huge public trust  
15 that in theory benefits all Hawaiians, but for reasons  
16 that are both historical and political in practice  
17 provides benefits exclusively for ethnic Hawaiians.  
18 Among other things, ethnic Hawaiians are eligible for  
19 special home loans, business loans, housing and  
20 educational programs. On the OHA website the caption  
21 proudly proclaims its racial loyalty saying, and I'm  
22 quoting here, "The Office of Hawaiian Affairs for the  
23 betterment of Native Hawaiians."

24           The proposed Native Hawaiian Government  
25 Reorganization Act is, in large measure, an effort to

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1 preserve that system. The constitutionality of the  
2 system has recently been called into question as a  
3 result of the Supreme Court's decision in *Rice v.*  
4 *Cayetano* and the 9th Circuit's decision in *Doe v.*  
5 *Kamehameha Schools*.

6 *Rice* held that Hawaii's election system  
7 under which only ethnic Hawaiians could vote for  
8 trustees of the Office of Hawaiian Affairs was a  
9 violation of the Constitution's 15th Amendment, which  
10 prohibits discrimination on the basis of race in  
11 voting rights.

12 *Doe* held that the prestigious King  
13 Kamehameha Schools which are privately wrong cannot  
14 give ethnic Hawaiians priority over students of other  
15 races and ethnicities for admission without violating  
16 42 USC Section 1981.

17 Given the result in these cases it is  
18 considered by many to be only a matter of time before  
19 other aspects of OHA's special benefits programs will  
20 be challenged in court on equal protection and other  
21 civil rights grounds and ultimately found contrary to  
22 law.

23 The best hope for those who favor these  
24 programs is to transform them from programs that favor  
25 one race or ethnicity over others, to programs that

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1 favor members of a tribe over non-members. As the  
2 Supreme Court has held in *Morton v. Mancari*, a case  
3 involving a hiring preference for tribal members at  
4 the U.S. Bureau of Indian Affairs, and I'm quoting  
5 here, "Such a benefit is granted to Indians not as a  
6 discreet racial group but rather as members of quasi-  
7 sovereign tribal entities." In other words, it's not  
8 race discrimination, it's discrimination on the basis  
9 of tribal membership.

10 The question I hear I think boils down to  
11 this: Can the United States Government and the state  
12 of Hawaii achieve by indirection what they very likely  
13 could not have achieved directly on account of the due  
14 process clause of the Fifth Amendment and the equal  
15 protection clause of the Fourteenth Amendment? I  
16 would respectfully submit that the answer is no.

17 Know however, that the *Mancari* decision,  
18 just as an aside, is a double-edged sword. If  
19 discrimination by the Bureau of Indian Affairs in  
20 favor of tribal members is not race discrimination,  
21 then presumably discrimination against tribal members  
22 by a state government is also not race discrimination.  
23 But that aside, it cannot apply to a tribal group that  
24 does not yet exist. The very act of transforming  
25 ethnic Hawaiians into a tribe is an act performed on a

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1 racial group, not a tribal group. When as here it is  
2 done for the purpose of conferring very large benefits  
3 on that group, it is an act of racial discrimination  
4 subject to strict scrutiny; scrutiny that likely  
5 cannot survive.

6 I think the best way of illustrating this  
7 is simply alter the facts slightly. If the state of  
8 Hawaii were operating its special benefits program for  
9 whites only or for Asians only, no one would dream  
10 that the United States could assist them in this  
11 scheme by providing a procedure under which whites or  
12 Asians could be declared a tribe. There are standards  
13 for determining what is a tribe and what is not a  
14 tribe. And important among them is that there be some  
15 sort of political unit that has continuously existed.

16 And that is very much not the case here. And just  
17 looking at the Akaka bill will illustrate that this is  
18 not the case since this sets up a procedure under  
19 which, for one thing, membership in the group can be  
20 defined. A tribe that exists doesn't need to be told  
21 by the United States Government who is in the group  
22 and who isn't. They don't need a mechanism of this  
23 sort. And hence, I would respectfully submit that  
24 there is no tribe here.

25 Rather than speak further, I think I will

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1 stop so that we can get on to what I suspect the  
2 members of the Commission are most interested in, and  
3 that their questions.

4 CHAIRMAN REYNOLDS: Well, I'd like to  
5 thank the panelists. This has been enlightening.  
6 This is a very important issue.

7 When it's appropriate for the state to  
8 distribute benefits and burdens on the basis of race  
9 or ethnicity is extremely important in a  
10 constitutional sense, but also in a public policy  
11 sense.

12 For me there are two questions that need  
13 to be asked. First is is it constitutional? And  
14 second, even if it is, is that something that we want  
15 to do or is it something that we want to expand? So  
16 the comments today are most appreciated.

17 And at this point I'll open up the floor  
18 for questions.

19 VICE CHAIRMAN THERNSTROM: If we may have  
20 a minute to question each to respond.

21 CHAIRMAN REYNOLDS: Okay. Would any of  
22 the panelists like to pose a question to another  
23 panelist?

24 VICE CHAIRMAN THERNSTROM: Or respond to  
25 another panelist.

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1 MR. BARTOLOMUCCI: Thank you. I just  
2 wanted to respond to a strong point made by Professor  
3 Heriot, that being her point that Congress may have  
4 the authority to recognize Indian tribes but doesn't  
5 have the authority to create a tribe. And as lawyers  
6 are to do, I want to present two counter arguments  
7 which are arguments in the alternative.

8 COMMISSIONER YAKI: This is why one lawyer  
9 is a town is poor but two lawyers in a town are rich.

10 MR. BARTOLOMUCCI: The first being  
11 assuming that Native Hawaiians now are not a tribe, I  
12 would point to the Supreme Court's decision in *Lara* in  
13 which Justice Breyer's opinion expressly stated that  
14 Congress has the authority to "restore extinguished  
15 tribal status." So that language, which was written  
16 in the opinion that the entire Court joined, would  
17 support Congress' power to take a tribe that  
18 previously existed and bring it back into existence,  
19 as in the case of *Menominee*.

20 And then my second response is that it's  
21 actually not clear to me that Native Hawaiians are not  
22 a tribe now. I think if you ask Ms. Kalipi, she would  
23 tell you that there still is a Native Hawaiian tribe.  
24 That nothing that Congress or the American Government  
25 could do could take away their status or destroy their

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1 sovereignty. And that what they're seeking is merely  
2 reorganization of the tribe and federal recognition of  
3 the tribe.

4 I can't speak for the Native Hawaiians,  
5 but I think they would say that their sovereignty is  
6 invalidable and was not taken away by the acts of 1893  
7 and that what they're seeking is a reorganization and  
8 recognition.

9 CHAIRMAN REYNOLDS: Professor Heriot a  
10 rejoinder?

11 PROFESSOR HERIOT: Just on the Breyer  
12 opinion. Breyer says that Congress has the authority  
13 when we're talking about tribal status. But I think  
14 what he means there is not the existence of the tribe.  
15 He doesn't talk about extinguishing the tribe. But  
16 status in terms of the eyes of the United States  
17 Government. So I don't think he's talking about  
18 anything beyond recognition.

19 Again, the *Menominee* case is the one  
20 that's always pointed to. That group did not disappear  
21 as a political unit. In fact, even before the  
22 Restoration Act, there had already been a decision by  
23 the Court that made it very clear that the Menominees  
24 continued to be sovereign in the sense that they  
25 continued to be exempt from Wisconsin law on issues of

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1 fishing and hunting rights which could only be if  
2 there's actually a tribe.

3 CHAIRMAN REYNOLDS: Okay. Ms. Kalipi?

4 MS. KALIPI: Yes. I just wanted to clarify  
5 or respond to a couple of points that Mr. Burgess  
6 made.

7 With respect to Senator Akaka, he has  
8 never advocated that this bill would lead to secession  
9 from the United States. He did an NPR interview where  
10 he was asked what the future of the governing entity  
11 would look like and he said my bill sets up a process.  
12 That's something that will be determined by the future  
13 generations of Hawaii by my grandchildren or whoever.

14 When the story was put on NPR they ran an  
15 independences piece and said some of the advocates  
16 even say this could lead to independence and they put  
17 that quote in there. But Senator Akaka has never ever  
18 said that this bill would lead to secession. His  
19 position is the bill would extend the federal policy  
20 of self governance and self determination, which is  
21 how indigenous peoples have self governance within the  
22 federal framework in the United States. So I just  
23 want to make that clear for the record.

24 Second, with respect to the Morgan Report,  
25 the Morgan Report has always been public as has been

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1 the Blount report. And it shows evidence of how the  
2 United States has flipped-flopped, for lack of a more  
3 articulate term, on dealing with Hawaii and Hawaii's  
4 history.

5 As you can see, the Morgan Report said  
6 that the United States remain neutral --

7 COMMISSIONER YAKI: It's important to say  
8 what the date of the Morgan Report was?

9 MS. KALIPI: It was in the 1800s. It was--

10 COMMISSIONER YAKI: This was not something  
11 that just came out?

12 MS. KALIPI: Right. No. The Blount report  
13 came out, that was President Cleveland's person. And  
14 then Morgan's report came out with the Senate  
15 Committee on Foreign Relations after that.

16 So one report said that the United States  
17 participated in the overthrow. The next report, the  
18 Morgan Report said they remained neutral. Similarly,  
19 in 1983 a Native Hawaiian Study Commission had a  
20 majority report and a minority report. A majority  
21 report saying that there was no trust relationship  
22 with Native Hawaiians. The minority report saying  
23 that they said that there was.

24 COMMISSIONER BRACERAS: Can I ask just a  
25 question about that specific point?

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1 MS. KALIPI: Sure.

2 COMMISSIONER BRACERAS: Obviously,  
3 historians can differ about the role of the United  
4 States.

5 MS. KALIPI: Right.

6 COMMISSIONER BRACERAS: You know in the  
7 events leading to the dissolution of that government.  
8 But can you just tell us your view on what the  
9 relevance of that is to this? I mean, in other words  
10 the decision by the United States Congress now as to  
11 whether or not to recognize Native Hawaiians as a  
12 separate tribe seems to me to be separate and distinct  
13 from that historical question.

14 MS. KALIPI: The reason I think it's an  
15 important clarification is because it goes to the  
16 points being made by opponents to the bill that this  
17 is a creation of a governing entity. Native Hawaiians  
18 believe that the Kingdom of Hawaii was our governing  
19 entity and when it was overthrown, and when we were  
20 prevented from having a government structure because  
21 we had a republic put upon us of which Native  
22 Hawaiians were not allowed to participate and it was  
23 their government, that goes directly to our argument  
24 that this is a restoration of a preexisting native  
25 government.

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1 COMMISSIONER BRACERAS: I see.

2 MS. KALIPI: So that's why we believe that  
3 the clarification is very important. Not that we  
4 would like to rehash what happened. What happened,  
5 happened historically.

6 COMMISSIONER BRACERAS: Yes.

7 MS. KALIPI: But the reason the point is  
8 important is for that very reason because there are  
9 those who claim that because the Kingdom of Hawaii,  
10 include non-Native Hawaiians, it was not a native  
11 government, and that's why I talked about it in my  
12 opening statement, Native Hawaiians were open but it  
13 was clearly their government.

14 COMMISSIONER BRACERAS: Yes.

15 MS. KALIPI: You know, and so they should  
16 not be penalized for having the wisdom to have  
17 processes to allow others to be part of their  
18 government. And when that government gets overthrown  
19 and they're no longer allowed to have that government  
20 and we get to link it up with our bill, the reason we  
21 have that process is because Native Hawaiians have not  
22 been allowed to have that governing structure. So we  
23 have to provide an opportunity for the reorganization  
24 of it. And we see it as a restoration of that  
25 government. And that's why I was going through that

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1 history.

2 So I just want to make clear that, you  
3 know, if we're going to go on the flip-flops rather  
4 then the current United States' position really is the  
5 1993 Public Law 103-150 where Congress apologized to  
6 Native Hawaiians on behalf of the United States for  
7 United States participation in the overthrow and  
8 committed to a process of reconciliation with Native  
9 Hawaiians.

10 CHAIRMAN REYNOLDS: Mr. Burgess?

11 MR. BURGESS: I'd like to respond to some  
12 of those points.

13 The Kingdom of Hawaii was not a tribe.  
14 The Kingdom of Hawaii was never exclusively of, by or  
15 for Native Hawaiians. For example, the first  
16 Constitution of the Kingdom of Hawaii in 1840 by  
17 Kamehameha III, began by saying, "God  
18 hath made of one blood all nations of men to dwell on  
19 the earth, in unity." The civil codes of the Kingdom  
20 of Hawaii provided that naturalized foreigners had the  
21 same rights and privileges and immunities as natives.

22 By the time of the overthrow, in fact by  
23 the Census of 1890, Hawaiians were in a minority of  
24 the inhabitants of Hawaii. The non-natives played  
25 important roles as judges, as elected officials in the

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1 legislature, as cabinet members and as business  
2 leaders.

3 So if the logic of the whole sovereignty  
4 movement is to restore the Kingdom which was  
5 wrongfully overthrown, then that certainly by no  
6 stretch of logic could justify creating an exclusively  
7 Native Hawaiian government. I mean, it would have to  
8 be an inclusive government of all the people of  
9 Hawaii. And that's, in effect, no different from what  
10 we already have.

11 The Morgan Report is important. It's true,  
12 as Commissioner Yaki said, that it has always been a  
13 public document but it's not available and just a few  
14 libraries have it. It's very difficult to find. Now  
15 it's out there and easily accessible. And that's the  
16 benefit of it. And it's really pretty good reading if  
17 you're interested in the subject because you're  
18 getting information from people who were there and  
19 living through the days and seeing exactly what the  
20 orders were to the Marines and the sailors that landed  
21 that day, just as they had on previous occasions to  
22 help the Kingdom of Hawaii restore order.

23 For example, after the election of King  
24 Kalakaua that he was accused of corruption and the  
25 supporters of Queen Emma who was his opponent in the

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1 election, they rioted and he asked for help. And the  
2 U.S. warship that was in harbor at the time sent some  
3 troops in and they helped restore order. But simply  
4 as peacekeepers. And that's the only role that the  
5 United States played in 1893 at the time of the  
6 overthrow.

7 And the Morgan Report is important because  
8 the Queen surrendered but on the request that the  
9 United States reinstate her to the throne. President  
10 Cleveland, after he got the Blunt report, he then  
11 tried to do exactly that. He sent a new Commissioner  
12 Willis to Hawaii to negotiate with the Queen to  
13 restore her to the throne. But he said that you  
14 should agree to amnesty for the people who did the  
15 overthrow. And the Queen said no. She insisted they  
16 are traitors and they have to be beheaded. And she  
17 finally backed down from that demand, which President  
18 Cleveland couldn't very well have actually complied  
19 with. She finally backed down with that demand a  
20 couple of months later, but by then President  
21 Cleveland had already referred it to the broader  
22 discretion and judgment of the Congress. And the  
23 report of the Morgan Committee is what resulted from  
24 that. And President Cleveland after that accepted it  
25 and moved on.

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1           That was not the only official  
2 congressional report. Also 1983 the United States  
3 Congress requested a thorough study of the events of  
4 the overthrow. And again, the official study was to  
5 the same conclusion; that the United States was not  
6 responsible.

7           CHAIRMAN REYNOLDS: Okay. Well, I suspect  
8 that Commissioner Yaki has a question or two.

9           COMMISSIONER YAKI: Go ahead. I was just  
10 waiting for -- we'll go by whatever order you choose  
11 to go in, Mr. Chairman, is fine with me.

12          CHAIRMAN REYNOLDS: Okay. Commissioner  
13 Melendez?

14          COMMISSIONER MELENDEZ: Yes. For either  
15 Mr. Burgess or Ms. Heriot. Thank you for coming out.

16           You argued that Congress is considering  
17 establishing a race-based government. It appears,  
18 however, like this legislation would put Native  
19 Hawaiians on similar footing to the legal status of  
20 American Indians and Alaska Natives. Do your  
21 objections to sovereignty for Native Hawaiians extend  
22 also to sovereignty for the Indians tribes? And how  
23 can you distinguish between the groups of indigenous  
24 people who all exercise sovereignty over the homelands  
25 prior to the arrival of the Europeans?

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1 PROFESSOR HERIOT: I'll go first. No, I  
2 have no objection to the status of Indians in the  
3 United States or I'm not familiar with the Alaska  
4 Native case. But I believe that Indian tribes  
5 preexisted the United States and that the federal  
6 government is fully authorized to recognize a tribe  
7 that exists and is functioning. And that's fine.

8 The difference between that is that it has  
9 been many, many years since there was anything  
10 approaching a tribal entity in Hawaii that there is no  
11 functioning tribe there now and that rather than  
12 recognizing Indian tribes in the United States,  
13 Congress is seeking to create a mechanism that would  
14 allow a tribe to be created. And that I don't think  
15 they have the authority to do.

16 COMMISSIONER MELENDEZ: On that same  
17 question, what would your definition of a tribe be?  
18 Basically because the word "tribe" basically didn't  
19 come out of a Native Americans for the tribes as  
20 they're called now. Actually, basically tribes in the  
21 United States have certainly a self governance that  
22 they demonstrated. So it may not have even been  
23 European style English governments as they are since  
24 the Reorganization Act of 1934. And who is to know  
25 exactly how they actually operated. Maybe they were

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1 similar to the way Hawaii operated as far as the queen  
2 and that hierarchy. So how would you respond?

3 PROFESSOR HERIOT: Yes, I think that it's  
4 actually a very interesting and very difficult  
5 question about what constitutes sufficient separate  
6 cultural and political existence here. It's certainly  
7 true that many groups that we would call tribes had  
8 very different political structures from those that  
9 we're used to today, and that's fine. But there has to  
10 be some continuous political unit there. There has to  
11 be something which is recognizable as a political  
12 structure. It can be very different from what I might  
13 choose if I were in charge of the world or what we  
14 might be use to, but there has to be something there.

15 And I think the tribes recognized on the mainland,  
16 all of those that I'm aware of, have had some  
17 political structure to them. But at this point, and  
18 it has to be continuous, at this point if there was  
19 ever a political structure of that sort in Hawaii, it  
20 doesn't exist anymore. And what I'm saying is  
21 Congress does not have the authority to go back and  
22 recreate it, assuming that it existed in the first  
23 place.

24 And, of course, the Kingdom of Hawaii  
25 itself was very much a multiracial political unit. And

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1 so, you know, how far do we have to go back before we  
2 find an ethnic group or unit there? I'm not certain.  
3 But I'm certain that it doesn't exist today.

4 CHAIRMAN REYNOLDS: Okay. Commissioner  
5 Taylor, any questions?

6 COMMISSIONER TAYLOR: Maybe just one or  
7 two preliminary questions, and I know I don't have to  
8 formally reserve the right to ask additional  
9 questions, but I suspect I will have some more.

10 CHAIRMAN REYNOLDS: We're not formal  
11 around here.

12 COMMISSIONER TAYLOR: I'm trying to get my  
13 mind around two basic concepts. One, supporters of  
14 this legislation -- and I want to make sure this  
15 assertion is correct. They don't take the position  
16 that this just creates a racial or ethnically based  
17 group, correct?

18 MS. KALIPI: Yes.

19 COMMISSIONER TAYLOR: It is, indeed, a  
20 tribe, right?

21 MS. KALIPI: It's a group of indigenous  
22 peoples.

23 COMMISSIONER TAYLOR: Okay. Which goes to  
24 the fact that -- well, if it's a group of indigenous  
25 peoples must they have a recognized political system

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1 in place in order for this to be viable in your view?

2 MS. KALIPI: Our position is that we had a  
3 political entity in place, it was overthrown. And when  
4 the republic was asserted you had to swear allegiance  
5 that you would not reform. So Hawaiians did the best  
6 they could in terms of maintaining their communities  
7 throughout without a government as others would  
8 perceive a government. And what this bill would do  
9 would be to recorrect that by providing a process for  
10 reorganization.

11 And the fact that Congress has always  
12 treated Native Hawaiians as they have with American  
13 Indians and Alaska Natives.

14 COMMISSIONER TAYLOR: So the key question  
15 is whether or not you can identify a point in time  
16 where there was indeed a structure? That's in your  
17 mind the key question. And if you can identify a  
18 point in time where there was a structure, regardless  
19 of the amount of time that has passed --

20 MS. KALIPI: Yes.

21 COMMISSIONER TAYLOR: -- then Congress is  
22 authorized to go back and, your words, recognize or  
23 restore rather than create?

24 MS. KALIPI: Yes.

25 CHAIRMAN REYNOLDS: Let me follow up on

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1 that. The issue of sovereignty when the Kingdom was  
2 overthrown a monarchy was in place. In terms of logic  
3 the monarchy is overthrown, didn't the sovereign  
4 entity in place at that time, wasn't it extinguished?

5 MS. KALIPI: No.

6 CHAIRMAN REYNOLDS: There wasn't a  
7 democracy in place at the time, so the sovereign did  
8 not reside in the people since it wasn't a democracy.  
9 The power of the sovereign resided in the queen?

10 MS. KALIPI: You could make that argument,  
11 yes, but the Native Hawaiians believe firmly that the  
12 monarchy was their government. It was similar to  
13 others. Hawaiian history is a little bit different.

14 For example, in comparison to when you  
15 compare the monarchies of European countries to the  
16 monarchy of Hawaii, the commoners had more of a role.  
17 In fact, the commoners worked for chiefs who then  
18 reported up to the monarch. And the commoners could  
19 move and if the commoners left that chief, the chief  
20 lost power and it similarly went upscale.

21 So it was -- the Hawaiian culture and  
22 tradition and form of government was different. And  
23 everyone feels that it was the Hawaiian government.

24 Now I think if you were to apply the  
25 western concept of a monarchy, then what you're saying

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1 with respect to the sovereignty of that governing  
2 structure residing with the sovereign, then your  
3 statement would be correct. But that's not how Native  
4 Hawaiians view it.

5 And I would also pose that the type of  
6 governing structure I would argue should not -- the  
7 fact that we didn't have a tribal government in the  
8 sense of what tribal governments looked like after  
9 1934 with the Indian Reorganization Act should not be  
10 held against Native Hawaiians in terms of what kind of  
11 governing entity they had.

12 CHAIRMAN REYNOLDS: Okay. And it's not  
13 going to be based raced. It would be raced on  
14 ancestry. But it wouldn't work it exactly like a  
15 racial preference in that non-Native Hawaiians would  
16 be -- you would have the ability to treat non-Native  
17 Hawaiians differently? You would be able to use  
18 classifications, those who can demonstrate Native  
19 Hawaiian ancestry versus those who don't? So the  
20 practical effects we have here, wouldn't the effect  
21 that you can maybe get a subsidized loan for a home or  
22 a car or to get an allotment, that would continue  
23 unabated? I have family who have lived in Hawaii for  
24 22 years. They would still be ineligible for those  
25 benefits?

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1 MS. KALIPI: Yes.

2 CHAIRMAN REYNOLDS: Okay.

3 MS. KALIPI: But I'd like to also make the  
4 clarifications that our position is that that's based  
5 on the political and legal relationship that the  
6 United States has with Native Hawaiians as an  
7 indigenous group, again going back to the fact that  
8 they had a preexisting government which is the whole  
9 basis of what we're talking about.

10 Second, I just want to make clear in terms  
11 of the processes in this bill. I think it's easy to  
12 jump to conclusions or assumptions about what this  
13 government will look like and what supposed  
14 entitlement or benefits and services will look like  
15 when, in fact, the bill defines Native Hawaiian for  
16 the sole purpose of identifying who can participate in  
17 the reorganization of the government, which I think is  
18 an important clarification.

19 VICE CHAIRMAN THERNSTROM: One follow-up  
20 preliminary question.

21 CHAIRMAN REYNOLDS: Yes, Commissioner  
22 Thernstrom.

23 VICE CHAIRMAN THERNSTROM: Maybe in my own  
24 mind I want some help on two very basic issues.  
25 Native people, indigenous people, and the government

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1 or political entity you are seeking to "restore," they  
2 sound different to me. The government that was in  
3 place did not sound like it was a government  
4 exclusively of Native Hawaiians.

5 MS. KALIPI: It wasn't.

6 VICE CHAIRMAN THERNSTROM: So how are you  
7 then restoring that --

8 COMMISSIONER YAKI: I would clarify. I  
9 would say at the time of dissolution it was not.

10 VICE CHAIRMAN THERNSTROM: It was not?

11 MS. KALIPI: This is how I would clarify  
12 it. With respect to Mr. Burgess' comments regarding  
13 the Census if you look solely at the Census in 18 -- I  
14 think it's between 1880 and 1893, right before the  
15 overthrown, Hawaiians I think you could extrapolate  
16 and say Hawaiians were only 40 percent of the Kingdom.

17 VICE CHAIRMAN THERNSTROM: Okay.

18 MS. KALIPI: The context of that is that  
19 we were in a period of influx with respect to sugar  
20 plantations and we had thousands and thousands of  
21 immigrant workers from China, Philippines, Japan and  
22 Portugal and they were included in that Census.

23 VICE CHAIRMAN THERNSTROM: In that Census.

24 MS. KALIPI: They were not participants in  
25 the government. Not all of them were participants in

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1 the government. In fact for a long time Japanese and  
2 Chinese immigrants were not allowed to participate and  
3 were discriminated against.

4 So everything has to be looked at in terms  
5 of context. If you were to make that assertion and  
6 look closely at it, Native Hawaiians were still the  
7 majority of people participating and it was still  
8 their government.

9 Now with respect to your question that  
10 goes back to what I said in my opening statement,  
11 which was it was a native government; whether or not  
12 it's a monarchy or albeit it a different form of what  
13 people have conceptualized a tribal government ought  
14 to be or may be, but this native governing entity made  
15 its own decision as to how it would allow foreigners  
16 to participate.

17 VICE CHAIRMAN THERNSTROM: Okay.

18 MS. KALIPI: And so my position and point  
19 is that because --

20 COMMISSIONER YAKI: They kind of came on  
21 visas.

22 MS. KALIPI: Because this government had  
23 that mechanism that didn't make that government non-  
24 native.

25 VICE CHAIRMAN THERNSTROM: Right. So as a

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1 policy matter then are you expressing a judgment on  
2 the appropriateness of establishing a new government  
3 through this reorganization process that would have  
4 the ability to say we are seeking to restore a  
5 government that at the time admitted foreigners, we  
6 may choose not to admit them? I mean is --

7 MS. KALIPI: The process allows the Native  
8 Hawaiians --

9 VICE CHAIRMAN THERNSTROM: To do that?

10 MS. KALIPI: -- to decide if they want to  
11 or they don't want to.

12 VICE CHAIRMAN THERNSTROM: I mean just as  
13 a supporter of the bill, is that a good thing in your  
14 view or a bad thing?

15 MS. KALIPI: I think that's a good thing.

16 VICE CHAIRMAN THERNSTROM: Okay.

17 MS. KALIPI: Because when you look at the  
18 history in Indian law and you look at the reason we're  
19 doing this with respect to the political and legal  
20 relationship and the ideals of the federal policy of  
21 self governance and self determination for indigenous  
22 peoples it's a decision that indigenous peoples are to  
23 make.

24 VICE CHAIRMAN THERNSTROM: Okay.

25 COMMISSIONER KIRSANOW: Mr. Chairman?

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1 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

2 COMMISSIONER KIRSANOW: Thank you.

3 I first want to, again, thank the staff  
4 for putting together a splendid panel.

5 I've got a number of questions, but I'll  
6 just ask one for now. And this is directed at anyone,  
7 but I think it's probably best directed at Professor  
8 Heriot and Mr. Bartolomucci. This is a subpart  
9 question.

10 Would a discrimination statute such as  
11 Title VII and its progeny and/or sovereign immunity  
12 apply to this sovereign governing entity if this  
13 Senate bill 147, I think it is, were to pass?

14 PROFESSOR HERIOT: If the bill were to  
15 pass in the condition that it's in right now,  
16 presumably there would be some level of sovereign  
17 immunity on the part of the tribe. There is an  
18 amendment that is being considered that would  
19 specifically subject the governing entity to the  
20 United States Constitution and to federal anti-  
21 discrimination laws. That same proposed amendment  
22 would clarify the sovereign immunity issue as well.

23 Just reading from the operative sentence  
24 here, this amendment would include a sentence "The  
25 Native Hawaiian governing entity and citizens of the

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1 Native Hawaiian governing entity shall be subject to  
2 liability in any court of the state of Hawaii in an  
3 action in tort by a person who is not a citizen of the  
4 Native Hawaiian governing entity to the same extent  
5 that the state and the citizens of the state would be  
6 subject to liability. in such an action."

7 So there's an amendment out there that  
8 might address itself to your question.

9 COMMISSIONER KIRSANOW: That's the Kyl  
10 Amendment?

11 PROFESSOR HERIOT: I believe this was done  
12 by Kyl's office.

13 COMMISSIONER KIRSANOW: With that such  
14 amendment do you believe that there would be Title VII  
15 application to the affairs of the governing entity.

16 PROFESSOR HERIOT: If this amendment is  
17 not included?

18 COMMISSIONER KIRSANOW: Right.

19 PROFESSOR HERIOT: If the amendment is not  
20 included, presumably the tribe is not subject to  
21 federal anti-discrimination laws.

22 COMMISSIONER KIRSANOW: And one practical  
23 question. The bill has a definition for Native  
24 Hawaiian that deals with lineal descendants and it has  
25 dates in there with respect to who is considered to be

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1 Native Hawaiian as a result of lineal descendency.  
2 And just a practical question. Is there some type of  
3 registry as to who was considered a Native Hawaiian in  
4 1893, I think is the one date and then the other date  
5 is 1921 for the Hawaii Homes Commission Act? Is there  
6 some kind of registry that had identified who was a  
7 Native Hawaiian at that time so that lineal  
8 descendants can be identified? That's the first  
9 question. And a subpart to that is if in fact there  
10 is some means by which to identify that person, is the  
11 one drop rule in effect? In other words, if the lineal  
12 descendent is one who by virtue of intermarriage would  
13 still be considered a Native Hawaiian even though  
14 they're one thirty-second Native Hawaiian? There used  
15 to be the old -- that for example identified someone  
16 who is black if they're great, great, great  
17 grandfather was black and everyone else was white.

18 And that's directed to anyone on the panel  
19 who wishes to answer.

20 MS. KALIPI: I'd just like to make one  
21 quick clarification on Professor Heriot. The  
22 amendments that are in your packet were drafted by  
23 Senator Kyl before the substitute amendment was  
24 negotiated with the Administration. So the substitute  
25 amendment has sovereign immunity provisions in it. And

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1 I would direct -- and it's sovereign immunity for the  
2 federal government and for the state government.

3 In addition --

4 COMMISSIONER BRACERAS: I'm sorry. Where  
5 do we find the substitute amendment.

6 MS. KALIPI: The substitute is in your  
7 packet on the left side right behind that factsheet,  
8 ma'am.

9 COMMISSIONER BRACERAS: Okay.

10 MS. KALIPI: That's the substitute  
11 amendment.

12 COMMISSIONER BRACERAS: And this is  
13 supported by the current Administration?

14 MS. KALIPI: It was negotiated with the  
15 Department of Justice, White House and Office of  
16 Management and Budget. And it addresses the concerns  
17 that they raised in their letter to Senators McCain  
18 and Dorgan.

19 COMMISSIONER BRACERAS: Okay. And I'm  
20 sorry, when did that language come out?

21 MS. KALIPI: That was in September.

22 COMMISSIONER BRACERAS: This one came out  
23 in September?

24 MS. KALIPI: Yes.

25 COMMISSIONER BRACERAS: Okay.

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1 CHAIRMAN REYNOLDS: The letter that  
2 Senator Kyl received also had a paragraph discussing  
3 some constitutional concerns.

4 MS. KALIPI: Yes. This amendment reflects  
5 negotiated language that could address anything short  
6 of ideology.

7 CHAIRMAN REYNOLDS: So the constitutional  
8 concerns that --

9 MS. KALIPI: Right. The constitutional  
10 concerns are still out there in terms of the  
11 ideological question of does Congress have the right  
12 to recognize Native Hawaiians as an indigenous people.

13 COMMISSIONER YAKI: The sovereign immunity  
14 section was actually negotiated --

15 MS. KALIPI: Right. Right.

16 COMMISSIONER YAKI: -- and put into the  
17 amendment, which was the second part of the Kyl.

18 MS. KALIPI: But the sovereign immunity  
19 provisions related to the federal and state  
20 governments were included in the substitute and are on  
21 pages 39 and 40 for your reference. I just want to  
22 make that clarification.

23 In addition, the bill provides on page 34  
24 of the substitute for the protection of the civil  
25 rights of members of the entity and those affected by

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1 the entity. And the bill had always provided that.

2 When the Secretary certifies the organic  
3 governing documents of this entity, one of the  
4 requirements is that the organic governing documents  
5 have to provide for the protection of the civil rights  
6 of the citizens of the governing entity and all  
7 persons affected by the exercise of governmental  
8 powers and authorities by the Native Hawaiian  
9 governing entity. So I would just like to make that  
10 clarification.

11 With respect to the registry --

12 VICE CHAIRMAN THERNSTROM: Wait a minute.

13 I don't think that answers Commissioner Kirsanow's  
14 question about the application, for instance, the '64  
15 Civil Rights Act, Title VII, whatever. I mean, I  
16 think the answer is no to that. It doesn't answer  
17 that problem.

18 COMMISSIONER TAYLOR: Or it's left open to  
19 the government to decide.

20 MS. KALIPI: It's left open to the  
21 governing entity as part of the process, ma'am, in  
22 developing its organic governing documents with the  
23 Secretary of the Interior having the check on it.

24 COMMISSIONER TAYLOR: So that governing  
25 entity could opt into the civil rights protections

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1 that all other Americans enjoy or --

2 MS. KALIPI: Or not. That would be up to  
3 the entity and the Secretary of the Interior in making  
4 the certification would have to comply with this  
5 requirement. So if the Secretary of the Interior  
6 determined that the organic governing documents did  
7 not meet this -- what I'm quoting on page 34 on lines  
8 1 through 6 of the substitute, then she could not  
9 certify the entity and not provide federal  
10 recognition.

11 COMMISSIONER TAYLOR: Okay. Before we get  
12 away, I want someone to answer the question about the  
13 one drop rule.

14 VICE CHAIRMAN THERNSTROM: Yes, I do, too.  
15 I was about to say that question was never answered.

16 COMMISSIONER TAYLOR: Yes.

17 MR. BURGESS: Could I take a try at that?

18 VICE CHAIRMAN THERNSTROM: And can I just  
19 add that, you know, it seems to me we got a semitic  
20 little dance here about racial groups and tribal  
21 groups. And, I mean, the definition here of the  
22 tribal group is a one drop of blood definition.

23 Now Mr. Burgess was about to speak.

24 MR. BURGESS: Okay. The definition in the  
25 Akaka bill, the shorthand for it is that anyone with

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1 an indigenous ancestor, no matter how remote, is  
2 eligible.. Whether it was 1921 or 1893 it says on --  
3 who had directly a descendent of someone who resided  
4 in the Hawaiian Islands on or before 1893. So that  
5 could go back as far as you want to go. And it could  
6 include anybody with one five hundredths. They would  
7 be eligible to participate in the creation of the new  
8 government.

9 VICE CHAIRMAN THERNSTROM: Okay.

10 COMMISSIONER BRACERAS: But it's anybody  
11 who resided on the island at that time? So it could  
12 be somebody who is white?

13 PROFESSOR HERIOT: No.

14 COMMISSIONER BRACERAS: No?

15 MR. BURGESS: I could be --

16 COMMISSIONER BRACERAS: Wait. I want to  
17 hear--

18 MR. BURGESS: If somebody could establish  
19 who was white now, could establish that he or she has  
20 an ancestor --

21 COMMISSIONER BRACERAS: Right. I'm not  
22 interested in what they look like now.

23 MR. BURGESS: Right.

24 COMMISSIONER BRACERAS: I'm interested in  
25 what group of people from the 1800s it applies to. In

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1 other words if 60 percent of the Islands was not  
2 native, do the direct lineal descendants of those  
3 people, they're not covered?

4 MR. BURGESS: No, no. No, they're not  
5 indigenous.

6 COMMISSIONER BRACERAS: Right.

7 MR. BURGESS: It's only people who are in  
8 indigenous.

9 COMMISSIONER BRACERAS: Right.

10 COMMISSIONER KIRSANOW: And see, that goes  
11 to my question how would you establish that one is a  
12 lineal descendent of someone who is a Native Hawaiian?  
13 Was there some central registry or is this thing  
14 something that could possibly be subject to fraud?  
15 Can people buy into it, as has been the case in other  
16 tribal cases? How does one establish that Joe Smith  
17 in 2006 was a lineal descendent of a beautiful  
18 Hawaiian as of 1893 or whatever the other date  
19 mentioned, '21 I think it is, was?

20 CHAIRMAN REYNOLDS: Okay. Commission Yaki  
21 is going to answer your question.

22 COMMISSIONER YAKI: Commissioner Yaki is  
23 going to answer your question and start in on his  
24 questions.

25 First, I want to say a warm aloha to the

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1 members of the Hawaiian community who have joined us  
2 in this room.

3 And actually your question, Peter, is one  
4 I wanted to address because it directly effects me.  
5 My grandfather was born on the Island of Hana. And he  
6 told us throughout his life, he was put in an  
7 orphanage when he was young. And he said the reason  
8 he was put in an orphanage was that his mother had  
9 died and his mother was Hawaiian. But the records of  
10 that orphanage were burnt to the ground in a fire, so  
11 I have no idea if I am one eighth or whatever, but all  
12 I do know is that as of now I cannot claim to be  
13 kanaka maoli or a Native Hawaiian, but I can tell you  
14 that as someone who goes to the Islands frequently, I  
15 think of it as home.

16 Part of I think the struggle that  
17 conceptually we're having here is because in addition  
18 to the normal role that we have in talking about  
19 traditional civil rights, Title VII, Title VI, Title  
20 IX Voting Rights Act, you name it, we are now dealing  
21 with the civil rights of indigenous peoples who form  
22 the backdrop for one of the less sanguine aspects of  
23 our nation's history. And in attempting to repair the  
24 damage done during those times, the federal government  
25 using its plenary authority under the Indian Commerce

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1 Clause and the Treaty Clause has created a special  
2 status, sovereign status within this country for  
3 Native American tribes.

4 Now, let's all be realistic here. The  
5 nomenclature that we're talking about is uniquely  
6 derived from western culture. If Columbus hadn't taken  
7 a wrong turn and thought he was in the East Indies, we  
8 would probably be using a much different term nowadays  
9 to talk about Native American indigenous peoples here.

10 But when we talk about tribes, when we talk about  
11 Indians and when we look to the words of the founders,  
12 I think we have to look to take them in the context of  
13 what they were seeing at the time, and those were the  
14 people who were native and on the land at the time.

15 In the subsequent years through '34,  
16 through the other acts that this government has  
17 established to attempt to right some of the wrongs  
18 done to Native Americans over the past, they have  
19 created this unique and, albeit limited as exhibits in  
20 the *Lara* court that the Congress has the ability to  
21 limit or expand sovereignty as it sees fit, but it has  
22 created this limited sovereignty between Indian  
23 organizations, and they call them tribe, they call  
24 them nations, I would simply call them sovereigns and  
25 the United States Government.

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1           So when Commissioner Kirsanow asked the  
2 question about Title VII, you know the question to ask  
3 is well what is the application of these laws right  
4 now as it relates to the sovereign status of Native  
5 American governments. And I think that the question  
6 right now, I think Professor Heriot has talked about  
7 how there's been some struggle and some tension over  
8 the application of these laws, but for right now a  
9 number of courts have said that a number of the laws  
10 that normally would apply to every citizen including,  
11 perhaps, some of our civil rights laws, may or may not  
12 extend to those tribal sovereigns that the United  
13 States has negotiated a treaty.

14           I think the questions that to me I want to  
15 ask go to that. Because I think we're getting bogged  
16 down in this semantic definition of what is a tribe or  
17 what is a Hawaiian. To me we wouldn't be having this  
18 debate if it were not for, quite frankly, the aloha  
19 spirit of the Hawaiian people over the years. If the  
20 Great King Kamehameha, if King Kalakaua, if Queen  
21 Liluokalani had decided that we're going to get a  
22 bunch of guns and get these people out of here because  
23 we're just sick and tired of the fact that our lands  
24 are being transferred and we have no property rights,  
25 and the only people that get to vote are the people

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1 that came here afterwards, and they lost and they  
2 exiled to Niihau, we wouldn't be having this  
3 discussion. It would be very clear what would have  
4 happened. They would have been isolated, put into a  
5 remote area. And we all know how little habitable an  
6 area of land there is in Hawaii. We wouldn't be  
7 having this discussion. It would be very neat and  
8 clear. It would be of question of, who knows, maybe  
9 we'd have a big casino on Niihau by now. But that's  
10 not what happened. That's not what the Hawaiians  
11 chose to do.

12 And by penalizing the Hawaiians, by making  
13 them neither fish or fowl, by saying that they're not  
14 a tribe nor or they really even native Hawaiians, I  
15 think is uniquely unfair given the fact that they  
16 simply chose a different path. They chose peaceful  
17 resistance, peaceful abdication rather than --

18 CHAIRMAN REYNOLDS: It's just --

19 COMMISSIONER YAKI: Well, I'm just saying,  
20 the question is -- there is question here. The  
21 question --

22 COMMISSIONER BRACERAS: Yes, what is the  
23 question, Senator Biden?

24 COMMISSIONER YAKI: If I were Senator  
25 Biden, I would be reading -- oh, never mind.

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1           But the question is there's a lot of talk  
2 about what this bill could lead to. But the fact is  
3 that this bill is really only just a process for  
4 something. And I would like for the elucidation for  
5 this Commission, I would direct this question to Ms.  
6 Kalipi. Does this bill create divisiveness? Does it  
7 create the prospect that Waikiki is going to become,  
8 you know, some other type of land? Does it transfer  
9 any new assets into this entity? And more  
10 importantly, what is the process that it really is  
11 setting up so we understand how far away we are from  
12 the parade of horrors that people are talking about  
13 here?

14           MS. KALUPI: The processes in the bill  
15 provide -- well, first of all to answer your question,  
16 with respect to divisiveness, we don't believe the  
17 bill would be divisive.

18           The vast majority of people, whether  
19 they're Native Hawaiians or non-Native Hawaiian in  
20 Hawaii appreciate Hawaiian culture, support Hawaiian  
21 culture and support the preservation of the culture  
22 and traditions. For that reason, almost every elected  
23 official in the state of Hawaii has come out in  
24 support of this bill. And for that reason the bill,  
25 even on the national level, is largely bipartisan.

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1 I'm pleased to see Senator Murkowski's staff here, and  
2 Senator Murkowski is a strong supporter of our  
3 legislation.

4 The reason that it doesn't lead to  
5 divisiveness is because the bill provides a process  
6 and a structured process to finally allow the people  
7 of Hawaii, native and non-native, to begin to discuss  
8 the longstanding issues resulting from the overthrow  
9 of the Kingdom of Hawaii. What's happened since the  
10 overthrow is that there was a lot of pressure to be  
11 western. So, for example, Senator Akaka as a child  
12 was told you cannot speak Hawaiian, you need to speak  
13 English. You need to not make trouble, don't raise  
14 these issues. Just fit in with the way everything is.

15 And as we've gone through, we're now two  
16 or three generations past the people who actually  
17 experienced the overthrow, we have a younger  
18 generation of Native Hawaiians who look back at the  
19 history and say wait a minute, why didn't we resolve  
20 this. And non-Native Hawaiians as well. Some who  
21 support Native Hawaiians and some who don't who say  
22 why haven't we discussed this, why is this still  
23 hanging out there. And we have a lot of  
24 misunderstanding, a lot of mistrust and we have a  
25 situation where it's not harmonious. We have a lot of

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1 people arguing and debating these issues.

2 So Senator Akaka's position is this bill  
3 provides the process for the people of Hawaii to begin  
4 to have a structured process to address these issues  
5 and not to -- his position would be if we don't pass  
6 the bill, we'll have more divisiveness.

7 Now with respect to the second part of the  
8 question, the second part of the question goes to will  
9 there be an immediate transfer of land if this bill is  
10 enacted? No, there won't. Nothing happens except  
11 that first the governing entity is reorganized and, I  
12 might add, the bill provides several checks for the  
13 federal government to be satisfied before federal  
14 recognition can even be conferred on the resulting  
15 reorganized governing entity, which in the Native  
16 Hawaiian's opinion, is not the best situation.

17 And second, upon federal recognition the  
18 governing entity then has to negotiate any proposed  
19 transfer of lands and authority to the governing  
20 entity. Following that enabling legislation at the  
21 federal and state levels have to be passed before  
22 anything can be transferred to the governing entity.

23 So, again, when we hit on process the  
24 reason we have this process is to be as inclusive as  
25 possible to allow the people of Hawaii, both native

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1 and non-native, to participate and to determine the  
2 outcome with the idea that we're bringing the state  
3 closer together and allowing the state as a whole to  
4 move forward.

5 COMMISSIONER KIRSANOW: If I could, I  
6 still have not gotten an answer to the second part of  
7 my question, that is how do we identify a Native  
8 Hawaiian? I made reference to whether or not there  
9 was a registry, and I know there are many vehicles  
10 that can be employed to try to establish that lineal  
11 descendent.

12 CHAIRMAN REYNOLDS: Commissioner Kirsanow,  
13 I think that we have a response coming from Mr.  
14 Bartolomucci.

15 MR. BARTOLOMUCCI: Yes. I wanted to point  
16 out that the definition in the bill is not the  
17 definition of who is a member of the Native Hawaiian  
18 entity. It is merely the definition that is used to  
19 establish an initial role of persons eligible then to  
20 vote for an interim governing council. .It's a well  
21 established principle of Indian law that it's up to a  
22 tribe to decide for itself who are the members of the  
23 tribe. And that is what will happen here.

24 The bill calls for the Secretary of the  
25 Interior to create a commission of experts in the area

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1 of determining Native Hawaiian ancestry and lineal  
2 descendency. And that commission will be responsible  
3 for establishing criteria for fitting the definition  
4 and deciding whether people do fall within the  
5 definition. Once that role is established, those  
6 folks will have the initial election to determine an  
7 interim council. But it will be later in the process  
8 that the Native Hawaiians will themselves decide who  
9 should be in the entity and what is the test?

10 VICE CHAIRMAN THERNSTROM: So in other  
11 words you're going to have experts decide who has one  
12 drop of blood? Isn't that what it amounts to?

13 MR. BARTOLOMUCCI: You'll have experts  
14 decide who meets this definition of do I have an  
15 ancestor who fits with the definition.

16 VICE CHAIRMAN THERNSTROM: People who have  
17 the right blood? But Gail wanted to say something.

18 PROFESSOR HERIOT: I wanted to say several  
19 things. One, I wanted to comment back here on the  
20 notion of the parade of horrors, will that occur.

21 The parade of horrors is already in  
22 place. The Office of Hawaiian Affairs already is  
23 managing a huge program of special benefits based on  
24 Hawaiian ethnicity. And this is simply an attempt to  
25 recast those benefits that already exist in terms that

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1 are not specifically racially. But I would --

2 COMMISSIONER YAKI: But you conceded in  
3 your testimony that if these were benefits given by a  
4 sovereign tribal government, there wouldn't be these  
5 kinds of questions asked.

6 PROFESSOR HERIOT: But that's the point.  
7 In order to create that sovereign tribal entity, the  
8 Act has to work on a racial group. If a group existed  
9 before, then it would not be a group that the United  
10 States is recognizing based on race. They'd be  
11 recognized based on sovereignty that exists. But you  
12 can't hand sovereignty someone and then say from now  
13 on I'm giving you these further benefits because  
14 you're a sovereign.

15 COMMISSIONER YAKI: But that is seen--

16 PROFESSOR HERIOT: The original gift of  
17 sovereignty --

18 COMMISSIONER YAKI: But if you took  
19 sovereignty from them, can't you give it back?

20 PROFESSOR HERIOT: It has to be  
21 continuous.

22 COMMISSIONER YAKI: Why?

23 PROFESSOR HERIOT: Because that's what the  
24 law says.

25 COMMISSIONER YAKI: But let me ask you

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1 this question: You say that it has to be continuous.

2 PROFESSOR HERIOT: Congress doesn't have  
3 any authority otherwise.

4 COMMISSIONER YAKI: Congress, I think, has  
5 plenty authority to decide in what constitutes a tribe  
6 for the purposes of its ability to determination  
7 recognition. I think that here we can -- I mean,  
8 again, I hate the fact that we keep on using the word  
9 "tribe." We are talking about an indigenous peoples  
10 who came to these islands thousands of years ago who  
11 had a community there, who anthropologists have said--

12 CHAIRMAN REYNOLDS: Commissioner Yaki,  
13 doesn't the Constitution discuss tribes, not  
14 aboriginal people?

15 COMMISSIONER YAKI: Yes.

16 CHAIRMAN REYNOLDS: And by inflating the  
17 history of Native Hawaiians --

18 COMMISSIONER YAKI: But the Constitution  
19 was written in 1787 by people who decided to call them  
20 tribes and Indians. And it also made  
21 characterizations of other ethnic groups that we don't  
22 deal with anymore.

23 CHAIRMAN REYNOLDS: The Constitution --

24 COMMISSIONER YAKI: The Constitution has  
25 changed has we characterize people, how we treat them.

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1 How we decide they're not three-fifths anymore has  
2 evolved over time. So all I'm saying is get away from  
3 the idea that we're tribes and into the fact of the  
4 mindset --

5 CHAIRMAN REYNOLDS: If we get away from  
6 the nomenclature --

7 COMMISSIONER YAKI: -- where here who  
8 lived here by themselves.

9 CHAIRMAN REYNOLDS: If you agree that  
10 Native Hawaiians have a different history and a  
11 different relationship with the U.S. Government, and I  
12 would like to suggest that because of this different  
13 history that that may justify different treatments.  
14 In one case you may recognize a tribe and another you  
15 may not recognize the Native Hawaiian people.

16 COMMISSIONER YAKI: Well, maybe the  
17 fortunate part was that they were on an island and  
18 they really couldn't force them off a thousand miles  
19 off of their normal, they're native grounds like we  
20 did to the Native Americans in this country. And maybe  
21 because of the way that the Hawaiian peoples are, that  
22 didn't become an option.

23 The fact, though, is that there was an  
24 organic government in there over time that if you read  
25 the history became slowly -- I'm not going to say the

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1 words I want to say, but changed over time. And then  
2 when it become completely inconvenient to have them  
3 around, we went in and knocked it out to the point  
4 where, you know, a hundred years later the United  
5 States Government has officially apologized for that  
6 unless, of course, we're denying that Congress ever  
7 apologized for that act in the first place, which one  
8 of our speakers seems to believe.

9 I mean, the idea that you cannot call  
10 Native Hawaiians indigenous peoples for the purposes  
11 of the Commerce Clause and the Treaty Clause I think  
12 is just not reading history and not reading -- I mean,  
13 it's just not reading history correctly.

14 CHAIRMAN REYNOLDS: Commissioner Braceras?

15 COMMISSIONER BRACERAS: I have a couple of  
16 narrow questions. But just to respond to my colleague  
17 here and his statement about the nomenclature that we  
18 use to discuss these issues. The fact of the matter  
19 is when you're dealing with a constitutional or legal  
20 question you have to deal with the text as written.  
21 And we all understand that the Constitution was  
22 written by dead white men and that some of the terms  
23 that they used or the things they put into place may  
24 not be palatable to us today. But that is what the  
25 amendment process is for. We have amended the

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1 Constitution numerous times. And the bottom line is  
2 unless you're willing to say that you don't want to be  
3 ruled by the Constitution because you don't like the  
4 nomenclature or use it, then you have to deal with the  
5 text as written. If the text says tribes, the text  
6 says tribes. So I'll get off the soapbox now about  
7 that.

8 But a question for Mr. Bartolomucci. Your  
9 remarks were very carefully limited to the  
10 congressional authority to pass this legislation. And  
11 I'm curious if you can give us a brief synopsis of  
12 your views of the propriety of the legislation,  
13 putting aside Congress' ability to do this? Is this a  
14 good thing for our country?

15 MR. BARTOLOMUCCI: Well, as I've  
16 indicated, what I did was study the legal issue of  
17 Congress' authority. And I haven't opined upon  
18 whether it's something Congress should adopt.

19 COMMISSIONER BRACERAS: I know. But I'm  
20 asking you to opine.

21 MR. BARTOLOMUCCI: Yes. Well, I want to  
22 make this point. And I was struck by this when  
23 Professor Heriot was making her point that well it's  
24 okay to treat as a tribe a group that's had a  
25 continuous existence, but not one that ended as a

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1 tribe. And her point basically is you can't bring  
2 them back. But, I find this somewhat ironic that it's  
3 okay to treat as Indian tribes, those tribes that we  
4 pushed off their lands and put into reservations. But  
5 if we went even further and we took away their  
6 sovereignty, if we overthrew a monarchy, if we did  
7 even more then we can't treat them as a tribe, we  
8 can't give fairness to that kind of group?

9 COMMISSIONER BRACERAS: And that's exactly  
10 why I want to get away from the semantic question of  
11 what is a tribe and go to the heart of the matter,  
12 which is simply is this piece of legislation something  
13 that's, in your view, good or bad for America?

14 MR. BARTOLOMUCCI: Well, I think there's a  
15 strong case to be made on equality grounds that Native  
16 Hawaiians ought to be treated the same as Native  
17 Alaskans or American Indians. No one doubts that  
18 Congress can and should treat Native Alaskans like it  
19 should, Indians in the lower 48 states. Yet Native  
20 Alaskans are very dissimilar culturally, ethnically --

21 COMMISSIONER BRACERAS: I guess what I'm  
22 getting at is do we want to increase and further  
23 perpetuate a system whereby certain groups are treated  
24 differently than others and there's a reason why they  
25 are, I understand that, but is that a system that we

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1 want to extend and expand as a policy matter?

2 MR. BARTOLOMUCCI: Well, you know, if  
3 you're making a slippery slope argument --

4 COMMISSIONER BRACERAS: I'm not making any  
5 argument. I'm just asking you whether in your view  
6 that's a system that should be expanded and if so,  
7 why.

8 MR. BARTOLOMUCCI: Well, I think it could  
9 be expanded to Native Hawaiians with some justice. But  
10 anticipating a possible slippery slope argument, I  
11 don't think it could go beyond Native Hawaiians. I  
12 think they are the last indigenous group in America.

13 COMMISSIONER BRACERAS: What about Native  
14 Puerto Ricans? I mean, the situation in Puerto Rico  
15 is quite different, but there were indigenous peoples  
16 on the island. They were killed off quite rapidly,  
17 unfortunately. But presumably there are Puerto Ricans  
18 to this day who can trace their lineage to the native  
19 peoples on that island. Puerto Rico is very much a  
20 mixed culture today of Spanish and African and some  
21 indigenous cultural aspects. So how does that differ  
22 or doesn't it?

23 CHAIRMAN REYNOLDS: Does inherent  
24 sovereignty remain in Puerto Rico?

25 MS. KALIPI: If I may, ma'am, it's because

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1 Puerto Rico is still a territory which is why, as a  
2 Congress, we're still dealing with what they want  
3 their political status to be, which is why they keep  
4 having their referendums of whether they're going to  
5 be a state of a commonwealth. I would make the same  
6 case for Guam and American Samoa.

7 COMMISSIONER BRACERAS: No, I understand.

8 And I believe this Commission is going to be looking  
9 into that very question later on. But as a  
10 theoretical matter, I understand that Puerto Rico's  
11 political status is still undecided. But let's just  
12 for the sake of argument hypothesize that Puerto Rico  
13 became a state. Is there an argument to be made that  
14 the people who can trace their heritage, Puerto Ricans  
15 who can trace their heritage back to the indigenous  
16 peoples of the island should be given a tribe by  
17 Congress? Would you view that as difference or not?

18 MS. KALIPI: In the context of what we are  
19 advocating with respect to indigenous peoples, I'm not  
20 unfortunately familiar with Puerto Rico's history so I  
21 don't know, you know, if there was a Puerto Rican  
22 government or if they were a part of the Spain. I  
23 apologize for --

24 COMMISSIONER BRACERAS: And I guess that's  
25 what I'm getting to. Does the argument for

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1 recognition of tribal status depend on the particular  
2 history, the political history of the territory and  
3 how it was incorporated or does it depend strictly on  
4 racial affiliation, custom, culture, culture  
5 identification? Because clearly in Puerto Rico, I  
6 mean the Puerto Ricans could vote tomorrow to become a  
7 state, but that wouldn't take away a cultural sense of  
8 community or cultural ties to indigenous traditions  
9 and rights. And so I'm trying to figure out what the  
10 determination hinges on. Does it hinge on cultural  
11 identity or does it hinge on political history?

12 MS. KALIPI: In my view it hinges on both.

13 Because the United States policy of self governance  
14 and self determination with indigenous peoples is  
15 based on the political and legal relationship the  
16 United States has with the preexisting sovereign  
17 entity that was there before the United States took  
18 that land and took over that area. So it would depend  
19 on what the political entity was at the time and how  
20 the history played into it. So my answer is it would  
21 depend on both of those issues.

22 And in your scenario in your hypothetical  
23 if Puerto Rico's history is similar to ours with  
24 respect to the fact that they are indigenous peoples  
25 whose government was overthrown and who had a native

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1 government and the United States has dealt with those  
2 indigenous peoples through a political and legal  
3 relationship, then yes. But it's in your  
4 hypothetical.

5 COMMISSIONER BRACERAS: I think it's very  
6 different in that sense. But it seemed that at least  
7 my colleague Commissioner Yaki was suggesting that the  
8 critical question was really not whether we call them  
9 a tribe or whether they had a political governing  
10 structure, but whether they were indigenous and  
11 whether they are culturally connected. And if that's  
12 the case, I see no reason why Puerto Ricans don't fall  
13 into that category.

14 COMMISSIONER YAKI: With due respect --

15 MR. BURGESS: Could I jump in,  
16 Commissioner Braceras.

17 COMMISSIONER YAKI: I need to respond.

18 COMMISSIONER BRACERAS: Yes.

19 COMMISSIONER YAKI: With due respect to  
20 Commissioner Braceras, that wasn't my point at all. My  
21 point was that we have a situation where you had an  
22 indigenous sovereign government that was dissolved by  
23 the United States for its own purposes. I never have  
24 said -- I mean, to me it's silly to almost talk about  
25 the issue of race here because certainly no one who

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1 practices Native American Indian law, whatever it's  
2 called nowadays, can say that the recognition of these  
3 tribes is not based in part of on the fact that they  
4 are ethnically a part and the fact that they are  
5 culturally and as a cohesive group apart from what  
6 government later came to take their land. The  
7 same situation as here with Hawaii.

8 I think I would like to hear one of the  
9 things that sort of creates the trail, I think, of how  
10 the government has over the years tried to understand  
11 its obligations to the Native Hawaiians has been for  
12 example, the Hawaiian -- is the Hawaiian Homestead --

13 MS. KALIPI: Hawaii Homes Commission Act.

14 COMMISSIONER YAKI: Hawaii Homes  
15 Commission Act, which was required to be part of the--  
16 its continuance was a condition for admission into the  
17 Union. Various acts with Congress over time I think  
18 you reference in your testimony have continued to talk  
19 about the indigenous peoples of Hawaii and the  
20 responsibility of the government.

21 Can anyone elaborate on those facts,  
22 because I think that would also help create the trail  
23 of responsibility?

24 CHAIRMAN REYNOLDS: Commissioner Yaki, Mr.  
25 Burgess wanted to respond. So before we go on to your

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1 question --

2 COMMISSIONER YAKI: Okay.

3 CHAIRMAN REYNOLDS: -- I'd like to give  
4 him an opportunity to respond.

5 MR. BURGESS: Yes. Thank you, Mr.  
6 Chairman.

7 A lot has been said that I think is just  
8 really incorrect. Indigenusness has no status and no  
9 effect at all under the Constitution. The  
10 Constitution doesn't mention indigenous. The very  
11 same arguments that I've heard advanced here today  
12 were made in the *Rice* case before the Supreme Court.  
13 And the argument was made that all indigenous people,  
14 whether they're a tribe or not, are entitled to have a  
15 special relationship, and the Supreme Court just did  
16 not accept that.

17 PROFESSOR HERIOT: Right.

18 MR. BURGESS: They simply decided without  
19 out.

20 The same argument was made in *Arakaki v.*  
21 *State*, which was our first lawsuit. And, again, the  
22 Court just rejected it because being indigenous has no  
23 effect under the laws of the United States.

24 There is an international movement to  
25 declare the rights of indigenous people. That has not

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1 been adopted by the United States. And the problem  
2 and the real danger of the Akaka bill is that it would  
3 immediately, as soon as it passes if it does and  
4 becomes law, it would recognize a new privileged elite  
5 in America consisting of anyone with an indigenous  
6 ancestor. Not just Native Hawaiians. That's one of  
7 the findings that would become effective immediately  
8 when the bill is passed. And that would have drastic  
9 consequences. It would bring about a radical change  
10 in Indian law.

11           Anyway indigenous to the lands that are  
12 now part of the United States would then have a right  
13 of self government and presumably, they would have the  
14 right to have the federal government assist them in  
15 creating their own new separate government. That would  
16 apply to Puerto Rico. It would certainly apply to any  
17 indigenous people living anywhere in the United  
18 States. And that would certainly include the Aztlan  
19 Movement, Mexicans who are seeking to liberate the  
20 southwestern part of the United States. It would  
21 apply to Indians who are now a part of the mainstream  
22 that don't participate as members of tribes. But they  
23 would then arguably simply because of being  
24 indigenous, they would have the right for self  
25 determination. I think that's the potential of this,

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1 of this bill. It's indeed a radical change. It would  
2 ultimately lead to the breaking up of every state and  
3 I think ultimately to, you know, what would happen.  
4 You know, where does it end? What would become of the  
5 indivisible Union composed of indestructible states?

6 I'd like to, if I may, also address a  
7 question that you mentioned, Mr. Chairman. A  
8 distinction between race and ancestry. In the *Rice*  
9 decision one of the points was that the definitions of  
10 Hawaiian are based on ancestry. But the United States  
11 said you're using ancestry as a proxy for race. And  
12 that's exactly the same use of ancestry here.

13 So although it's called ancestry instead  
14 of race in the Akaka bill, it's basically racial  
15 discrimination that's contemplated by the Akaka bill.

16 CHAIRMAN REYNOLDS: Okay. Commissioner  
17 Yaki, you were about to pose a question?

18 COMMISSIONER YAKI: No. I already posed a  
19 question.

20 CHAIRMAN REYNOLDS: Okay.

21 COMMISSIONER TAYLOR: I wondered,  
22 Commissioner Yaki, do you have any thoughts on what he  
23 just said? I'm wondering relative to the movement in  
24 the west and would we recognize a unique status for  
25 indigenous people if this were to pass?

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1 MS. KALIPI: I'd like to make a  
2 distinction.

3 COMMISSIONER TAYLOR: Okay.

4 MS. KALIPI: And the distinction is that  
5 Congress has passed 160 laws and statutes to address  
6 the conditions of Native Hawaiians. Congress has  
7 established political and legal relationship with  
8 Native Hawaiians since the time that we were a  
9 territory. And this bill just, again, formalizes that  
10 political and legal relationship. That's a big  
11 distinction then from making a jump to the idea that  
12 any indigenous peoples with which Congress hasn't had  
13 this kind of historical political and legal  
14 relationship with would have the ability to create a  
15 government which goes to, I think, what Chris was  
16 saying in response to Commissioner Bracer's question  
17 in terms of Hawaiians probably being the last  
18 indigenous group that would be able to comply with  
19 this.

20 COMMISSIONER TAYLOR: You raise an  
21 interesting point in my mind. Because what you have  
22 just said indicates to me that for your purpose at  
23 least the fact that we're talking about indigenous  
24 people is important, but what's more important is that  
25 the federal government decided to deal with this

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1 group. So that it's decision not to deal with other  
2 indigenous people in my view would be somewhat  
3 arbitrary if I were thinking about this issue. Why are  
4 they dealing with this indigenous group and not  
5 others? And does that make sense? Why aren't they  
6 dealing with those indigenous people if that is an  
7 important characteristic?

8 So what do we say to the next indigenous  
9 group of folks that have not been dealt with by the  
10 federal government? Why?

11 VICE CHAIRMAN THERNSTROM: Or the next  
12 group that calls themselves --

13 COMMISSIONER TAYLOR: That's my  
14 fundamental question. If this is really important  
15 relative to the status of a group being indigenous, if  
16 that's important, then shouldn't we apply that same  
17 principle to every indigenous group whether or not the  
18 federal government has decided to engage them or not?

19 COMMISSIONER YAKI: Well, actually, the  
20 federal government does apply that principle to many  
21 groups. You'll find that there are many organizations,  
22 individuals who say that they are members of this  
23 tribe or that tribe who have not been recognized yet,  
24 do not enjoy sovereignty, have to go through a very  
25 lengthy process through the Bureau of Indians Affairs,

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1 correct, in order to get that established. But, I  
2 mean, we could make the argument all day about whether  
3 or not we're omitting group one, group two, group  
4 three. The fact is that as the representative from  
5 Senator Akaka's office pointed out, the U.S.  
6 Government in a kind of half way there kind of  
7 attitude attempted to provide some sort of semi-  
8 recognition to the fact that would it did in the  
9 Hawaiian Islands was something that it was not  
10 entirely comfortable with and to the Hawaiian peoples.  
11 The Akaka bill, and let's just focus on the Akaka bill  
12 because that is the focus of this discussion, is  
13 simply to complete the process of creating the  
14 recognition between the two. It does not predetermine  
15 what the outcomes are, it does not predetermine who  
16 will be part of that outcome and does not predetermine  
17 what are the results of that outcome. It is simply to  
18 say we have basically ignored or neglected this  
19 decision since 1893 and beyond. We decided to punt it  
20 during statehood admission as well. And now, you know,  
21 finally as the government has become more progressive  
22 in its attitudes toward its native indigenous peoples  
23 to the tribes who exist, that perhaps we should accord  
24 the same respect and recognition to a peoples who were  
25 in 1778 a wholly indigenous, wholly insular society

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1 and who in 1893 whose government we decided was no  
2 longer useful to us.

3 CHAIRMAN REYNOLDS: Okay. Vice Chair  
4 Thernstrom?

5 VICE CHAIRMAN THERNSTROM: I believe in  
6 1959 Hawaii joined the United States with an  
7 overwhelming vote that Hawaiians wanted to become  
8 Americans. I don't think a problem in this country is  
9 that there's --

10 COMMISSIONER KIRSANOW: Commissioner  
11 Thernstrom, I could barely hear you. Are you near the  
12 microphone?

13 VICE CHAIRMAN THERNSTROM: Oh, I'm  
14 terribly sorry. What have I done with my microphone.

15 Can you hear me now? I'm terribly sorry.  
16 I dropped my microphone.

17 COMMISSIONER KIRSANOW: Yes.

18 VICE CHAIRMAN THERNSTROM: I said I'd  
19 thought in 1959 when Hawaii joined the United States  
20 there was an overwhelming vote on the part of  
21 Hawaiians that they wanted to become Americans. And it  
22 does seem to me that one of our problems in this  
23 country is not insufficient recognition of the  
24 distinctive culture and rights of racial, ethnic,  
25 other subgroups but the fact that we no longer assume

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1 in this country that Americans are Americans. And,  
2 you know, more recognition for a subgroup, I don't  
3 understand why that's a good thing. And it goes back  
4 to the questions that Commissioner Braceras and  
5 several other people raised: Why is this a good  
6 thing? We are -- the bill here with authorize, I  
7 don't see how you can get away from this -- authorize  
8 the creation of a race-based government for Native  
9 Hawaiians living throughout 50 states with a nightmare  
10 in terms of legal enforcement and a nightmare in terms  
11 of further dividing this country with respect to who  
12 is entitled to what because of ancestry. I mean, I  
13 didn't think that's what this country was all about.

14 I mean, the history here, obviously this  
15 would not have arisen before the rise of the whole  
16 regime of race-base entitlement and high levels of  
17 ethnic and racial consciousness in this society. And  
18 you say well the supporters say, you know, there's no  
19 commitment to a particular form of government. Well,  
20 we're talking about restoration of recognition, of  
21 separateness. Well, if we're talking about restoration  
22 why couldn't the government install a monarchy?

23 I don't know what we're going down the road here  
24 on.

25 And this question of bipartisan support. I

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1 mean, this seems to me, it doesn't pass the laugh  
2 test. Everybody knows that anytime a bill is before  
3 Congress that seems politically problematic to oppose  
4 because you could be labeled as racially insensitive,  
5 then the Republicans for good historical reason, I  
6 agree, run for cover and the Democrats, of course,  
7 like race-based entitlement. And so you got something  
8 that's called bipartisan.

9 I think that there are many Republicans on  
10 the Hill who would welcome a strong statement against  
11 this bill on the part of the Commission.

12 On the question of cultural identity. I  
13 was curious here. What is the intermarriage rate of  
14 Native Hawaiians? I mean, intermarriage rates are one  
15 of the good indications always for a group of cultural  
16 distinctiveness and whether groups have separate  
17 cultural identities. What is the cultural  
18 intermarriage rate? What is the intermarriage rate,  
19 I'm sorry.

20 MR. BURGESS: It's the highest by far of  
21 any state, more racial intermarriage in the state of  
22 Hawaii. And I think Hawaiians in particular, that has  
23 been studied and it's always been -- I think it's been  
24 mutual love affair between immigrants and Hawaiians  
25 from the beginning. But that I think has been

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1 documented in studies.

2 COMMISSIONER KIRSANOW: Commissioner  
3 Thernstrom, can I jump in real quick.

4 VICE CHAIRMAN THERNSTROM: Sure.

5 COMMISSIONER KIRSANOW: To comment on to a  
6 point you made. I've gone through the materials here  
7 and one of the things I was trying to discern is  
8 something related to Commissioner Thernstrom's  
9 statement about the vote for statehood. It's been  
10 nearly 50 years and I'm wondering what was the  
11 precipitating event? And I realize most of these  
12 things evolve over time, but what was the  
13 precipitating event that prompted the introduction of  
14 this bill at this particular point in time? And also  
15 along the lines of what Commissioner Thernstrom said  
16 is I remember it was Winston Churchill who said that,  
17 you know, democracy is the worst form of government  
18 except for all the others.

19 VICE CHAIRMAN THERNSTROM: It was  
20 Churchill.

21 COMMISSIONER KIRSANOW: In terms of,  
22 again, this goes to Commissioner Thernstrom's point,  
23 if there was a watershed event that prompted the  
24 introduction of this bill now 50 years later, what's  
25 the end gain here? In other words, it seems to me,

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1 yes, the United States Government has got all kinds of  
2 problems while going to Churchill's statement again,  
3 you know, except for all the others isn't that too  
4 bad? What is it about the form of government -- and I  
5 understand the whole idea is to have self rule and  
6 self governance and everybody wants to have their own  
7 form of government and the idea that cultural means  
8 sometimes a direct form of governance, but what does  
9 one hope to obtain that is separate and distinct or  
10 maybe better the current state of governance?

11 VICE CHAIRMAN THERNSTROM: Gail Heriot?

12 PROFESSOR HERIOT: I think this is all  
13 connected to the *Rice v. Cayetano* litigation which was  
14 pending at the time. And that this was very much  
15 focused on providing an alternate justification under  
16 the Constitution for the racial preference system that  
17 is operated by the Office of Hawaiian Affairs.

18 CHAIRMAN REYNOLDS: Okay. Just a quick  
19 comment.

20 COMMISSIONER BRACERAS: Wait. I'm sorry.  
21 I'd like to have some of the other panelists answer  
22 Commissioner Kirsanow's question. What is that you  
23 hope to achieve from this legislation? How would this  
24 legislation make things better for the native people  
25 of Hawaii. What is the end game?

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1 VICE CHAIRMAN THERNSTROM: Yes. I was  
2 going to ask the simple question. You start the  
3 sentence this is a good idea because.

4 COMMISSIONER BRACERAS: Right.

5 VICE CHAIRMAN THERNSTROM: What is the end  
6 of the sentence?

7 MS. KALIPI: The end of the sentence is  
8 because it allows the people of Hawaii to move forward  
9 as a state because it provides a structured process to  
10 allow us to deal with the longstanding issues of the  
11 overthrow. Because currently there's a lot of  
12 mistrust, misunderstanding and a lot of unresolved  
13 issues.

14 CHAIRMAN REYNOLDS: So you want to resolve  
15 those --

16 COMMISSIONER BRACERAS: But if you could  
17 wave a magic wand --

18 CHAIRMAN REYNOLDS: --historical wrongs?

19 COMMISSIONER BRACERAS: If you could wave  
20 a magic wand and resolve the mistrust, then there  
21 would be no need for this? In other words, the  
22 substantive benefits for --

23 MS. KALIPI: No. The substantive issues--

24 COMMISSIONER BRACERAS: -- that flow from  
25 this have nothing to do with it is what you're telling

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1 me?

2 MS. KALIPI: No. The resolution of those  
3 substantive issues need to happen for us to be able to  
4 move forward.

5 COMMISSIONER BRACERAS: Okay. I think  
6 that's the heart of Commissioner Kirsanow's question  
7 is that what is it substantively that you feel you  
8 need to achieve in order to move forward. Not just  
9 process.

10 VICE CHAIRMAN THERNSTROM: I mean, what  
11 are you saying? I want to right historical wrongs?  
12 There are a lot of historical wrongs to right in this  
13 country.

14 MS. KALIPI: It's more than historical  
15 wrongs, ma'am. It's the fact that there are  
16 outstanding issues that need to be resolved that  
17 people in Hawaii, both native and non-native, would  
18 like to resolve.

19 CHAIRMAN REYNOLDS: Is this the only  
20 vehicle.

21 COMMISSIONER BRACERAS: Let her finish.

22 MS. KALIPI: In addition with respect to  
23 respect to the Statehood Act, you know under the  
24 federal policy of self governance and self  
25 determination allows for dual citizenship. The federal

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1 policy just allows indigenous peoples to have greater  
2 autonomy over their natural resources and assets. It  
3 doesn't denounce being an American. We have many  
4 proud Native Hawaiians, Alaska Natives and American  
5 Indians who are proud to be American.

6 COMMISSIONER BRACERAS: So?

7 MS. KALIPI: So going back to that, I'd  
8 like to say that for us to finish that sentence, it  
9 finally provides the parity that Native Hawaiians have  
10 sought because we have always been treated like  
11 American Indians and Alaska Natives but our  
12 relationship has never been formalized. So we're like  
13 stepchildren and we're asking to be put at the same  
14 level.

15 COMMISSIONER BRACERAS: What's wrong with  
16 just being treated like Americans, African-Americans,  
17 Anglo-Americans, Irish Americans? I mean your  
18 response is well we want to be treated the same as  
19 other indigenous groups. And I guess the follow-up to  
20 that is but why?

21 VICE CHAIRMAN THERNSTROM: Yes, I mean I'm  
22 a part of the Israeli tribe, I suppose, as a Jew. I  
23 mean, I'm an American.

24 MS. KALIPI: The answer would be because  
25 Hawaii is our homeland. For all the ethnic groups that

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1 you just mentioned, many can go back to their homeland  
2 if they want to learn about their culture, their  
3 tradition or they want to experience what it's like  
4 to, with all due respect, ma'am, go back to Israel or  
5 whatever. With respect to indigenous peoples, this is  
6 our homeland and everyone has come in and taken it  
7 over and this is the least part with respect to the  
8 federal policy. This is a federal policy established  
9 by President Nixon that says that the federal  
10 government would deal with indigenous peoples in a  
11 government-to-government relationship. Native  
12 Hawaiians are seeking that.

13 COMMISSIONER BRACERAS: But there was a  
14 democratic vote on the issue of statehood, that was a  
15 democratic process.

16 MS. KALIPI: Right. That has nothing to do  
17 with the fact that -- this doesn't revolve, take away  
18 statehood. The federal policy allows you to be a  
19 state.

20 COMMISSIONER BRACERAS: Right.

21 MS. KALIPI: And allows you to have a  
22 government-to-government relationship with indigenous  
23 peoples. I think we're talking at cross purposes.  
24 We're not saying we don't want to be a state. We want  
25 to participate the way American Indians and Alaska

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1 Natives do as Americans in the federal policy of self  
2 governance and self determination.

3 COMMISSIONER BRACERAS: I think what  
4 several of us keep coming back to is you keep saying  
5 you want to be treated in the same manner as other  
6 Native American Indian tribes are treated under  
7 federal law.

8 MS. KALIPI: Right.

9 COMMISSIONER BRACERAS: And I'm trying to  
10 understand why is that necessary? In other words, why  
11 is the current state of affairs inequitable?, the  
12 current state of affairs being that you're treated  
13 like every other American citizen but you don't the  
14 special status of the Native American tribes? Why is  
15 that current state of affairs bad?

16 MS. KALIPI: Because like the American  
17 Indians and Alaska Natives we have longstanding issues  
18 with respect to lands, with respect to how our culture  
19 and our traditions are preserved. And for that reason  
20 we would like the current legal and political  
21 relationship that we currently have with the United  
22 States to merely be formalized.

23 COMMISSIONER BRACERAS: But, see, now I  
24 think you're getting to some of the substantive  
25 reasons. So land, partial autonomy, right?

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1 MS. KALIPI: Yes.

2 COMMISSIONER BRACERAS: And so I think  
3 that was the question that was originally asked by  
4 Commissioner Kirsanow is what are the substantive  
5 goals that you have, the substantive political goals.

6 MS. KALIPI: The substantive political  
7 goals would be to give Native Hawaiians greater  
8 autonomy over --

9 COMMISSIONER BRACERAS: Over what?

10 MS. KALIPI: -- any natural resources and  
11 lands that would be afforded to them through the  
12 negotiations process that is afforded in this --

13 CHAIRMAN REYNOLDS: These are tangible  
14 benefits in part, is what you're seeking. The  
15 cultural issues and resolving these longstanding  
16 distrust, that could be worked out outside of the  
17 context of this legislation. But the land piece, the  
18 tangible benefits that has to be -- the process that's  
19 on the table, that has to be enacted or signed into  
20 law in order to resolve the land issue?

21 MS. KALIPI: No, sir. With all due  
22 respect, we could pass legislation solely just dealing  
23 with the land issue if we wanted to.

24 VICE CHAIRMAN THERNSTROM: Well, wait a  
25 minute. Land in 50 states?

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1 CHAIRMAN REYNOLDS: No. Not and  
2 restricted to --

3 MS. KALIPI: In the United States. I  
4 mean, in the state of Hawaii. We're not advocating  
5 that we have land all over the United States outside  
6 the state of Hawaii.

7 CHAIRMAN REYNOLDS: No, no, no, no. You  
8 misunderstand me. You misunderstand me. For example,  
9 the trust that's in place now and the 200,000 acres of  
10 land to preserve that to ensure that Fourteenth  
11 Amendment attacks aren't successful. This process  
12 ultimately I assume is your hope that this process  
13 will ultimately lead to a set of laws that will  
14 protect the corpus of this process among other things?

15 MS. KALIPI: Yes. Yes. Yes.

16 COMMISSIONER YAKI: Right.

17 CHAIRMAN REYNOLDS: And that can't be done  
18 any other way? But the other issues, maintaining and  
19 preserving your culture, that can be done outside of--  
20 I mean, you don't need to have the government to  
21 preserve your culture, is that right?

22 MS. KALIPI: No, but it would allow Native  
23 Hawaiians to interact with everyone else in a way that  
24 is culturally sensitive. So --

25 COMMISSIONER BRACERAS: Can you give me an

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1 example of that? I'm not sure what that means.

2 VICE CHAIRMAN THERNSTROM: I mean, other  
3 groups in this country have a sense of culture and  
4 community and they interact with other people without  
5 giving up that sense of --

6 COMMISSIONER YAKI: Well, they didn't get  
7 their land stolen from them either.

8 COMMISSIONER BRACERAS: Or they got  
9 themselves stolen from their land in the case of  
10 African-Americans.

11 MR. BURGESS: No land was stolen from the  
12 Hawaiian people.

13 COMMISSIONER YAKI: No land was stolen  
14 until about 50 years ago in this state. I think part  
15 of the appreciation of the difficulty of this  
16 situation, and there is a lot of difficulty I think in  
17 understanding it from -- even I have difficulty  
18 understanding it, even though I have family who live  
19 in Oahu right now and I've followed this pretty  
20 carefully. But the fact is that, you know, whatever  
21 you want to call it there is I believe -- and I think  
22 this is what Ms. Kalipi was trying to say and maybe  
23 you should just say it better than I can, but the  
24 structure that the government has provided to attempt  
25 to provide some sort of recompense for the actions

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1 taken by the government over time, such as the Hawaii  
2 Homes Commission and others which really gave land  
3 that really wasn't all that friendly to homes,  
4 etcetera, was given only really half way in terms of  
5 the ability of the Native Hawaiians to have a feeling  
6 of control and autonomy over the decisions that were  
7 made. These are decisions that have been accorded and  
8 handed over to other American Indians tribes or  
9 sovereign nations. That process is not yet completed  
10 here.

11 It doesn't mean that they're non-  
12 Americans. I mean, if you want to look at the  
13 enrollment rates for the United States Army, they're  
14 probably some of the highest are from the Islands of  
15 Hawaii. So anyone who wants to go down that road had  
16 first better take a look at what the recruiting rates  
17 are. Because --

18 COMMISSIONER BRACERAS: I don't think  
19 anyone's gone down that road.

20 COMMISSIONER YAKI: Well, you know, when  
21 someone says you know we should be Americans first,  
22 yes, we are Americans. But we are Americans of  
23 heritage. We're proud of our heritage. And here we  
24 have a particular error in our history for a  
25 particular people that Congress is looking to try and

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1 right that wrong and put it in a position where there  
2 is a greater deal of autonomy, actual --

3 CHAIRMAN REYNOLDS: I think we're getting  
4 to the heart of the matter here. It's reparations.

5 COMMISSIONER YAKI: No, I don't think it  
6 is reparations.

7 CHAIRMAN REYNOLDS: Well, you used the  
8 term recompense.

9 COMMISSIONER YAKI: Well, I'm talking  
10 about the fact that over the years the government --

11 CHAIRMAN REYNOLDS: You're talking about  
12 land.

13 COMMISSIONER YAKI: But the government has  
14 put out these programs, but they do it like about half  
15 way, which is different.

16 VICE CHAIRMAN THERNSTROM: Well, you know,  
17 there are a lot of wrongs to be righted. Are we going  
18 to right them all?

19 COMMISSIONER YAKI: We can't. Well,  
20 sometimes if we can, we should. It's silly to say we  
21 can't right every wrong.

22 CHAIRMAN REYNOLDS: There are times when  
23 attempts to undue these cosmic wrongs just add on to  
24 the wrongs. There's some things that God will just  
25 have to straighten out.

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1 I think that when we try to, looking for  
2 slavery for example, there's not a check big enough  
3 that you can write that can just undue the harm that  
4 was just done to the Reynolds family.

5 COMMISSIONER YAKI: I can appreciate that.

6 CHAIRMAN REYNOLDS: But the attempt to do  
7 it through reparations, I think that it's divisive.  
8 And I understand, Ms. Kalipi, that you disagree with  
9 me that you think that it's not divisive.

10 MS. KALIPI: Oh, no, no, sir. I'm saying  
11 the bill is not reparations. If we're going to do  
12 reparations, we just pass a reparations bill. This is  
13 not about that.

14 CHAIRMAN REYNOLDS: But you couldn't pass  
15 a reparations bill and restrict it to Native  
16 Hawaiians.

17 MS. KALIPI: Oh, I think we could. We  
18 did. We did the Japanese American internment. In  
19 fact, one of the opponents to the bill has advocated  
20 instead of doing this bill where we have structure in  
21 process, we just slap \$20,000 to every Native  
22 Hawaiian. And that's not what this bill is about.

23 CHAIRMAN REYNOLDS: Well, we disagree as  
24 to the constitutional infirmities with that type of  
25 proposal. But in any event, I mean we have two

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1 patient Commissioners here.

2 COMMISSIONER TAYLOR: I just want to rise  
3 in defense of the principle that I hear at the heart  
4 of the argument for the supporters. And that is one of  
5 self determination, which I keenly appreciate. I  
6 guess we're trying to unring the bell is what we're  
7 trying to do in terms of addressing and recognizing  
8 what the federal government has done by way of going  
9 half way down the road and not going the whole way.  
10 And the importance of self determination of a people  
11 as they relate to the governing body, which quite  
12 frankly, I completely understand.

13 My concern, I guess, is the only way we  
14 can really do that is to truly advocate unringing the  
15 bell.

16 CHAIRMAN REYNOLDS: Which is impossible.

17 COMMISSIONER TAYLOR: I mean, how do you  
18 really unring the bell? I mean, it seems like we're  
19 trying to unscramble eggs. And I appreciate the  
20 attempt, but I mean how do you do it without saying  
21 we're going to separate from the United States and  
22 we're going to start this process of negotiation from  
23 the beginning? I mean, I'm trying to recognize the  
24 principle of self determination without the --

25 MS. KALIPI: Because it's a federal policy

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1 of self governance and self determination, which I'm  
2 sure Commissioner Melendez as a tribal leader has a  
3 lot more experience with. And it's within the federal  
4 framework. We're not trying to go back to --

5 COMMISSIONER YAKI: I mean, the federal  
6 government sets the terms and conditions.

7 CHAIRMAN REYNOLDS: Okay. Commissioner  
8 Melendez has been quite patient. Please?

9 COMMISSIONER MELENDEZ: Just a comment. I  
10 think that, and I've heard people say that this could  
11 lead to secession or that -- you know, and I think  
12 that what we have to understand here is similar to  
13 Native American tribes is that Congress is still in  
14 control. They're not going to let the Hawaiian people  
15 separate from the Union, the same way they're going to  
16 not let Indian tribes separate from the Union. They're  
17 still in control. If there are issues such as whether  
18 or not the Bill of Rights apply, I think that they  
19 would do the same thing in the process that Native  
20 Americans have put in place, is passing the Indian  
21 Civil Rights legislation which mirrors the Bill of  
22 Rights. May not be exactly the same, but I'm sure in  
23 this process that's what the Hawaiian organization or  
24 the recognition would do.

25 I think, you know, when we're talking

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1 about the question that was asked: What does it  
2 actually mean? Well, it probably means the same thing  
3 to the Hawaiians as it does to Native Americans as to  
4 what really happened in history. And you're right, you  
5 can't right every wrong. But you sure -- I think that  
6 the integrity of the United States in trying to,  
7 either whether you call it righting wrongs or to try  
8 to do something to recognize the injustices that have  
9 happened. I mean, even today there are things that  
10 Indian tribes in the United States are still trying to  
11 remedy, whether or not it the Allotment Act of the  
12 1880 and '89 where basically encroachment of non  
13 basically white people onto Indian reservations  
14 subdivided their reservations; even today they're  
15 still trying to buy lands back, they're trying to work  
16 with Congress under the law to actually do that.

17 So the issue is that there's a lot of  
18 things that have happened that the United States could  
19 actually make right. And can you right every wrong?  
20 Probably not. But can you make an attempt to right  
21 some of the things that have happened in the past?

22 I read the Queen's statement here, I guess  
23 it's her statement, in this public law. What she says,  
24 "Now to avoid any collision of armed forces and  
25 perhaps the loss of life I do under protest and

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1 impelled by said force yield my authority until such  
2 time as the Government of the United States shall upon  
3 the facts being presented to it undue the action of  
4 its representatives and reinstate me in the authority  
5 which I claim as the constitutional sovereign of the  
6 Hawaii Islands." I don't see very much difference  
7 then what happened to Native Americans in this land.  
8 And the question would be are we special interests  
9 because we have certain privileges that maybe  
10 Caucasian Americans and other ethnic groups within the  
11 United States don't? I would say that the reason we  
12 have that standing is because we're indigenous peoples  
13 to this North American continent, the same reason that  
14 the Hawaiian people are indigenous to those islands  
15 there. And it seems to me that, you know, they were  
16 basically -- whether you call them a tribe or not, I  
17 understand that they actually had certain several  
18 groups on each one of the islands until they came  
19 together in 1810 under the king who basically  
20 centralized the government there.

21 So, you know, I think that they're not  
22 asking for anything different than what Native  
23 American tribes in the United States have been  
24 granted. And I don't see a lot of differences in the  
25 way that they've been treated.

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1 CHAIRMAN REYNOLDS: Okay. I'm going to  
2 take one more question from the Staff Director.

3 STAFF DIRECTOR MARCUS: Thank you, Mr.  
4 Chairman.

5 I'd like to recognize that some of the  
6 panelists came a great distance to be here with us  
7 today and others joined us on short notice. So thank  
8 you all for the credit that you've brought to the  
9 Commission by your participation today.

10 And also recognize that several staff did  
11 excellent work in putting this together, including  
12 Office of General Counsel John Blakeley and Bernard  
13 Quarterman and Chris Byrnes of the Office of the Staff  
14 Director.

15 Mr. Burgess and Professor Heriot, I'd like  
16 to ask you a question about whether some of the  
17 qualms, any of the qualms that you've raised today  
18 might be addressed by a potential amendment to this  
19 bill, not the one that Professor Heriot addressed  
20 earlier, but rather one that might go to the selection  
21 criteria for the ultimate governing entity?

22 If I understood Mr. Bartolomucci earlier,  
23 he indicated that the legislation would not determine  
24 the membership of the ultimate governing entity and  
25 that as it stands if it were passed, the membership

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1 would be based on tribal law where the tribe could  
2 determine based on their own criteria who would be the  
3 members of the tribe. But what if there were an  
4 amendment to the bill that ensured that membership in  
5 the government entity would not be determined based on  
6 racial characteristics, that it might be determined by  
7 other grounds, for instance a lineal descent from  
8 persons who lived in Hawaii at a particular time  
9 regardless of racial characteristics? Would that  
10 address you have?

11 MR. BURGESS: Well, that wouldn't satisfy  
12 the laws as far as I understand it. Living at a  
13 particular place at a particular time in history has  
14 been held to be just a proxy for race. And that,  
15 indeed, is what the definition of ancestry does here  
16 in this case just as it did in the laws that were  
17 dealt with in the *Rice* case. But as far as an  
18 amendment, I heard Noe Kalipi say five or six times  
19 that this bill would afford a process where the people  
20 of Hawaii, native and non-native, would have an  
21 opportunity to discuss the matter and move forward.  
22 That's just the problem: The people of Hawaii if they  
23 don't have a drop of the magic blood, don't  
24 participate at all. And even people who have lived  
25 here for generations, I mean lived in Hawaii for

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1 generations, would not have any right to participate  
2 in the creation of the new government whereas some one  
3 of the blood, even if they came, they'd never been to  
4 Hawaii and never knew anything about Hawaii, they  
5 would have the right to participate. That's the  
6 problem.

7 And the way to allay that fear would be to  
8 require that before anything in the bill becomes  
9 effective, it first must be ratified by a vote of all  
10 of the people of Hawaii. That would certainly solve  
11 that problem. And if that were done and a vote was  
12 taken, so be it. I mean, we'll just have to live with  
13 it. But there is no process for that. In fact, the  
14 bill as written does not give Congress the final say.

15 It gives the Executive Branch doing the negotiation  
16 the final say. They have the ability and they may  
17 under the bill go back to Congress and go to the  
18 legislature of the state of Hawaii to ratify what  
19 they've done, but they don't have to do that. And my  
20 guess would be knowing the dynamics of the  
21 negotiation, that if a deal is cut, it's very unlikely  
22 that it's going to go back to Congress or to the state  
23 legislature. They're going to simply carry it out.

24 CHAIRMAN REYNOLDS: Professor Heriot?

25 PROFESSOR HERIOT: I agree with Mr.

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1 Burgess that ancestry is often simply a proxy for  
2 race. So if the bill were amended such that it were  
3 defined in terms of ancestry as of, say, 1775 and  
4 obviously that would be solely a particular racial  
5 group. On the other hand if the group were defined in  
6 ways that were based on ancestry as of, say, the  
7 1890s, that would include a lot of people who are not  
8 ethnically Hawaiian. And although that would not by  
9 any means get rid of all my problems with this bill, I  
10 nevertheless think it would make it a better bill than  
11 if it did not define the group in terms of simply  
12 ancestry without regard to race.

13           So I think it would make it a better bill.  
14 You'd have to have that go from step-to-step rather  
15 than just the initial group. But you'd have to have a  
16 requirement that there be no discrimination based on  
17 race or ethnicity at each stage as this group is  
18 formed. But although it would not, I don't think,  
19 make the bill constitutional because there are some  
20 problems with the bill, it nevertheless would be a  
21 better bill.

22           CHAIRMAN REYNOLDS: Okay. I'd like to  
23 thank the panelists for participating. This has been  
24 an outstanding presentation. So, thank you.

25           We will take a ten minute break.

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1 (Whereupon, at 12:21 p.m. a recess until  
2 12:44 p.m.)

3 CHAIRMAN REYNOLDS: All right. Folks,  
4 let's get started so we can finish up. All right.  
5 This is going to be a long day but I hope that if we  
6 work efficiently that we can get through the rest of  
7 the agenda.

8 Okay. I mean, we're too dedicated to  
9 leave.

10 Okay. Here we go. First up is a motion  
11 to keep the record of the Native Hawaiian hearing open  
12 for public comment. I'll make the motion. I move that  
13 the Commission keep the record open for this briefing,  
14 open in order to provide the public enough time to  
15 submit comments to the Commission and for the  
16 Commission to perform the requisite defame and degrade  
17 review. I recommend that the record be kept open for  
18 60 days after the completion of this briefing until  
19 March 21, 2006. Is there a second?

20 COMMISSIONER YAKI: Second.

21 CHAIRMAN REYNOLDS: Discussion?

22 VICE CHAIRMAN THERNSTROM: Yes. I just  
23 want to raise an issue here.

24 I was hoping we would bring this to a  
25 close by the April 7th meeting.

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1 CHAIRMAN REYNOLDS: Bring what to a close?

2 VICE CHAIRMAN THERNSTROM: Sorry about  
3 that. I don't have anything to clip it to, that's my  
4 whole problem.

5 I was hoping we could bring this a vote at  
6 the April 7th meeting. We are going to have  
7 congressional action on this sometime this spring. And  
8 so I wonder if we could work back from the April 7th  
9 meeting to reopen the question of whether working back  
10 from the April 7th meeting we need to reopen the  
11 question of how long the record is open.

12 CHAIRMAN REYNOLDS: Okay. How would you  
13 feel if we kept the record open until March 3rd?

14 STAFF DIRECTOR MARCUS: Actually, I think  
15 that the original date would be sufficient in order to  
16 get the document available for a vote on April 7th.

17 CHAIRMAN REYNOLDS: So that's not much to  
18 do once we get the comments in?

19 STAFF DIRECTOR MARCUS: I think it can be  
20 done quickly enough.

21 CHAIRMAN REYNOLDS: Okay.

22 VICE CHAIRMAN THERNSTROM: Well, but the  
23 document to be voted on has to be available to the  
24 Commissioners to be voted on April 7th --

25 CHAIRMAN REYNOLDS: Well, the comments

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1 coming in won't effect that process. Whatever records  
2 are sent in, we will keep them for the record.

3 STAFF DIRECTOR MARCUS: I think we can  
4 review them quickly enough to be able to turn this  
5 around in time.

6 VICE CHAIRMAN THERNSTROM: Okay. I would  
7 very much like for the record of this to come to a  
8 vote on April 7th. And I hope, Mr. Staff Director,  
9 that might be possible.

10 STAFF DIRECTOR MARCUS: Yes, I do think  
11 that that is possible.

12 VICE CHAIRMAN THERNSTROM: Okay.

13 CHAIRMAN REYNOLDS: Okay. Any other  
14 questions or comments? All right. let's vote. All  
15 favor please say aye.

16 COMMISSIONERS: Aye.

17 CHAIRMAN REYNOLDS: All in opposition?

18 COMMISSIONER: Aye.

19 CHAIRMAN REYNOLDS: Let the record reflect  
20 that the motion passed unanimously.

21 Also let the record reflect that  
22 Commissioner Kirsanow is no longer on the line.

23 **V. STAFF DIRECTOR'S REPORT**

24 CHAIRMAN REYNOLDS:

25 Next up is the Staff Director's Report.

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1                   STAFF DIRECTOR MARCUS:    Thank you, Mr.  
2 Chairman, Madam Vice Chair, Commissioners. In light of  
3 the hour, I will try to keep the remarks brief but  
4 will be open for questions and answers.

5                   I do have a few things that I would like  
6 to add beyond the contents of the monthly written  
7 Staff Director's Report.

8                   To start with I'd like to say that we do  
9 have some good news regarding the state advisory  
10 committees. As you know, the Commission's financial  
11 condition prevented the SACs from conducting face-to-  
12 face meeting during fiscal year 2004. And the  
13 Commission's fiscal year '05 budget does not provide  
14 funding for SAC face-to-face meeting. However, as we  
15 concluded the first fiscal quarter of 2005 we achieved  
16 sufficient savings to allow for a limited number of  
17 additional meetings for the state advisory committees.  
18 This will enable me to provide travel for face-to-face  
19 meetings by each of the currently chartered state  
20 advisory committees.

21                   Now as you know, there are only too small  
22 number of SACs that are currently chartered, but we  
23 will be able to approve travel for one face-to-face  
24 meeting, that I hope will take place within the next  
25 few months for each of our current SACs.

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1 CHAIRMAN REYNOLDS: And do we have a  
2 proposed budget for that meeting?

3 STAFF DIRECTOR MARCUS: I am getting  
4 proposed budgets for each of the meetings separately.

5 CHAIRMAN REYNOLDS: Okay.

6 STAFF DIRECTOR MARCUS: The amounts will  
7 differ depending on the travel issues, the size of the  
8 state, etcetera, etcetera. It's typically a couple or  
9 a few thousand dollars per meeting. We should have no  
10 problem approving the ones that have been recommended  
11 so far. And I'm sure that there will be a way for each  
12 of the states to have a face-to-face meeting as long  
13 as they don't go overboard with the nature of the  
14 meeting they want to have.

15 I've communicated this to our regional  
16 offices and they are now working on the state  
17 committees to arrange meetings over the next few  
18 months and to develop budgets accordingly. My hope is  
19 that this will help to reinvigorate our state advisory  
20 committees.

21 Speaking of state advisory committees, on  
22 November 4, 2005 the Commission published for public  
23 comment its proposed rule change for selecting state  
24 advisory committee members. Comments were received  
25 from 13 sources, including past and present state

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1 advisory committee members; a nonprofit public policy  
2 organization, a lawyer's organization, an agency of  
3 the federal government and a private citizen. The  
4 comment closed on December 5, 2005.

5 Based on the comments received, the Office  
6 of General Counsel prepared the final draft of the  
7 rule which was distributed to you on January 13, 2006  
8 for a vote at this meeting.

9 I could discuss that later on further if  
10 there are questions.

11 I'm also glad to report that over the last  
12 week we have issued a series of four administrative  
13 instructions which are intended to implement a number  
14 of GAO recommendations as well as the work of the  
15 working group on reform. For instance, last week I  
16 issued AI-16 concerning national project developments  
17 and revised AI-91 concerning the public affairs unit.  
18 I also issued AI-92, a new AI concerning internal  
19 communications.

20 Each of you should have received a copy.  
21 If you not, please do let me know. They have also  
22 been distributed to the staff.

23 I would also like to say a work to bring  
24 you up to date on strategic planning. As you are  
25 aware, the Commission originally agreed on April 8,

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1 2005 to implement all GAO and OPM recommendations  
2 contained in reports issued from 1997 through April 6,  
3 2005 by mid-January 2006 consistent, however, with any  
4 strictures or confines imposed by the Anti-Deficiency  
5 Act and to the extent that the recommendations are  
6 nonrepetitive and funds are available for  
7 implementation.

8 On December 16, 2005 the Commission  
9 subsequently voted to extend implementation of these  
10 recommendations to mid-February, 2006 and directed me  
11 to apprise the Commission of any additional extensions  
12 required by further cooperation with the House  
13 Subcommittee on the Constitution in revising the  
14 agency's draft strategic plan. The reason for the  
15 December extension of time was that we have been talks  
16 with the House Authorizing Committee which has asked  
17 us to discuss with them and GAO future potential  
18 changes to the strategic plan, and we're trying to  
19 work with them rather than to prematurely finish the  
20 project.

21 Staff continued to work with the House  
22 Subcommittee on the Constitution and the GAO on the  
23 draft strategic plan. On Monday we plan to have a  
24 meeting with congressional staff, GAO staff and I  
25 believe also with OMB representation. As a result of

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1 this meeting, there may be subsequent time to  
2 incorporate new comments from Congress and GAO. I  
3 would have to apprise the Commission that a further  
4 extension may be required since depending on the  
5 nature of the input it may be unfeasible to complete  
6 all implementation by the February meeting.

7 I would also like to indicate that we have  
8 provided a performance and accountability report with  
9 the audit of Williams Adley for our fiscal year 2005  
10 to OMB. The Commissioners should have received copies  
11 of that. We are not yet able to publicly discuss that  
12 since it has not reached full clearance. But I would  
13 say that the completion of this audit is a milestone  
14 for the agency. It is, of course, required by law and  
15 it really is a first in quite some time that we have  
16 had a full scope audit of the Commission for the year.

17 And I'm very pleased by that.

18 I would say that the development of the  
19 PAR, the Performance Accountability Report, really  
20 involved a very significant amount of strategic  
21 analysis and work. And I would like to thank the staff  
22 for it and particularly to commend Debra Carr for her  
23 extraordinary dedication to it including work all  
24 through the holiday weekend in order to get the  
25 document in time for the Sunday midnight deadline. And

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1 we did get it in just a little bit before the deadline  
2 of Sunday, the night of the holiday weekend.

3 Those are the issues that I have for now,  
4 but I'd be happy to take questions and comments.

5 CHAIRMAN REYNOLDS: Questions? There  
6 being none.

## 7 VI. PROGRAM PLANNING

8 CHAIRMAN REYNOLDS: Next is program  
9 planning. Next we'll deal with the national report on  
10 the Voting Rights Act. On August 6, 2007 several core  
11 provisions of this Act that are temporary are due to  
12 expire. This report to the Commission's statutory  
13 report on the enforcement of civil rights by the  
14 federal government has to be done annually. This year  
15 it has been done on the Voting Rights Act.

16 At our December 18, 2005 meeting the  
17 Commission amended the scope of this report and  
18 eliminated work formally assigned to the Office of  
19 Civil Rights Evaluation. This was done so that the  
20 Commission can submit timely findings and  
21 recommendations to Congress since Congress has  
22 expedited the reauthorization of the Voting Rights  
23 Act.

24 We also directed staff to provide us with  
25 a draft of this report in time for us to vote on the

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1 report during this meeting. The Staff Director has  
2 provided us with a draft report as directed. This  
3 draft includes some significant independent staff  
4 analysis including data analysis, case analysis,  
5 substantial editorial review and the inclusion of  
6 several significant new graphics as well as the work  
7 of the consultant Mark Posner.

8 On the other hand, the Staff Director has  
9 apprised us that in his estimation the current draft  
10 could be significantly improved if additional time is  
11 allowed for further staff analysis, another round of  
12 editorial review and another round of Commissioner  
13 comments.

14 So based on those reasons, I move to  
15 extend the vote on the national report on the Voting  
16 Rights Act until March 10, 2006.

17 VICE CHAIRMAN THERNSTROM: I second it.

18 COMMISSIONER BRACERAS: Point of  
19 information. This is not the briefing?

20 CHAIRMAN REYNOLDS: That's correct.

21 VICE CHAIRMAN THERNSTROM: It's on the  
22 statutory report.

23 CHAIRMAN REYNOLDS: Okay. Have a second  
24 discussion? Yes?

25 VICE CHAIRMAN THERNSTROM: I want to

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1 commend the staff on the work they've done on this  
2 statutory report and in the charts here and shifting  
3 the date that it became available and so forth. It's  
4 really, I think, a wonderful job. And I am voting,  
5 obviously, to allow more time to do additional work,  
6 but that does not come out of any discontent with the  
7 work that has been done, which I'm full of admiration  
8 for. So I thank the members of the staff who have  
9 come up with what I think is a very strong document.

10 I mean, as everybody knows here, I am want  
11 to put a million with track changes in my computer, a  
12 million comments and so forth in margins. I didn't  
13 find anything to comment on on this report. I thought  
14 it was really well done. So, again, my thanks to the  
15 staff.

16 COMMISSIONER YAKI: Well, that's scary.

17 VICE CHAIRMAN THERNSTROM: I have stopped  
18 making comments. But most of -- you know, the -- that  
19 work was done in great part by Mark Posner and it is,  
20 as far as I'm concerned, just terrific. So that's a  
21 man on your side of the table.

22 CHAIRMAN REYNOLDS: Okay. Let's vote. All  
23 in favor say aye.

24 COMMISSIONERS: Aye.

25 CHAIRMAN REYNOLDS: Any objections? Any

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1 abstentions. The motion carries.

2 Let's see, where am I? Okay. I'll read  
3 the next motion into the record.

4 I move that the Staff Director develop a  
5 proposals to communicate with college students about  
6 their rights and remedies when faced with anti-semitic  
7 harassment.

8 Do I have a second?

9 COMMISSIONER BRACERAS: Yes. A second.

10 CHAIRMAN REYNOLDS: Discussion?

11 COMMISSIONER BRACERAS: Yes, I have a  
12 question.

13 CHAIRMAN REYNOLDS: Yes.

14 COMMISSIONER BRACERAS: Maybe I'm  
15 completely out of it, but at some point finding the  
16 recommendations were circulated, right?

17 CHAIRMAN REYNOLDS: Yes.

18 COMMISSIONER BRACERAS: Draft. Very  
19 preliminary draft?

20 CHAIRMAN REYNOLDS: They were tabled. And  
21 so we're going to have revisit that issue in the  
22 future.

23 COMMISSIONER YAKI: Is that the next  
24 motion?

25 VICE CHAIRMAN THERNSTROM: When did they

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1 tell us --

2 COMMISSIONER BRACERAS: In December.

3 CHAIRMAN REYNOLDS: Was it last meeting?

4 STAFF DIRECTOR MARCUS: They were one of

5 the December --

6 COMMISSIONER BRACERAS: In December.

7 STAFF DIRECTOR MARCUS: -- issues that

8 were tabled until this meeting.

9 VICE CHAIRMAN THERNSTROM: That's what I  
10 was going to say, they were tabled until meeting.

11 COMMISSIONER BRACERAS: Right. So that's  
12 what I'm asking about. What's happening with those  
13 and how does that relate to the current motion?

14 CHAIRMAN REYNOLDS: There's your answer.

15 COMMISSIONER BRACERAS: So how does it  
16 relate to the current motion?

17 CHAIRMAN REYNOLDS: Well, that's a very  
18 good point. The document, the booklet has to have  
19 content. And the content, presumably, would consist at  
20 least in part, the recommendations. So it seems to me  
21 that we need to put the --

22 COMMISSIONER BRACERAS: So the draft that  
23 was circulated earlier, is it still something we  
24 should be reviewing or is that wait until we get a new  
25 version?

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1 CHAIRMAN REYNOLDS: No. Wait until you get  
2 the second one.

3 Okay. How about this? I move that we  
4 table this issue with the understanding that we would  
5 circulate the recommendations. And once we've dealt  
6 with that issue, then we would move forward developing  
7 educational materials.

8 COMMISSIONER BRACERAS: Was the Staff  
9 Director about to say something? It looks like you  
10 were?

11 STAFF DIRECTOR MARCUS: No. We could take  
12 them in either way. They've been circulated. We have  
13 the materials or we could wait.

14 As I understand it, the public education  
15 campaign is intended to address the rights that  
16 students would have under the federal civil rights  
17 laws, whereas the findings and recommendations related  
18 to a number of issues. Perhaps one or two were  
19 related intentionally, but they're essentially two  
20 different --

21 COMMISSIONER BRACERAS: Two separate  
22 documents?

23 STAFF DIRECTOR MARCUS: Two separate  
24 documents.

25 COMMISSIONER BRACERAS: Okay. That's

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1 fine. So are we still going to proceed with both of  
2 those documents, the findings and recommendations as  
3 well as the civil rights guidance?

4 CHAIRMAN REYNOLDS: Well, we just tabled  
5 the recommendations. There was no --

6 COMMISSIONER BRACERAS: Well, we tabled  
7 them until now.

8 CHAIRMAN REYNOLDS: Yes.

9 COMMISSIONER BRACERAS: Or did we table  
10 them indefinitely?

11 CHAIRMAN REYNOLDS: Until this meeting.

12 COMMISSIONER BRACERAS: Okay. So I was  
13 just wondering did somebody have a problem with them  
14 or--

15 CHAIRMAN REYNOLDS: Yes, I had a problem.

16 COMMISSIONER BRACERAS: Okay. I just  
17 wasn't aware of what was going on.

18 CHAIRMAN REYNOLDS: Yes. I had some  
19 issues with it and that's why it was tabled. And we  
20 weren't able to get back to the document in time for  
21 this meeting. So it's my fault.

22 COMMISSIONER BRACERAS: Okay. Is that  
23 something we need to discuss as a Commission what  
24 substantive concerns you have?

25 CHAIRMAN REYNOLDS: I don't think so, but

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1 I just -- I wanted it to be clear of the  
2 jurisdictional issue. The jurisdictional issue for  
3 OCR, it's national origin -- I wanted it to be clear  
4 that it was based on national origin and not religion.  
5 And --

6 COMMISSIONER BRACERAS: I see.

7 CHAIRMAN REYNOLDS: -- I thought that as  
8 the document was drafted, I thought there were some  
9 ambiguities.

10 COMMISSIONER BRACERAS: Okay.

11 CHAIRMAN REYNOLDS: I also thought that it  
12 would be easy to fix.

13 COMMISSIONER BRACERAS: Okay.

14 CHAIRMAN REYNOLDS: So that was my issue.

15 COMMISSIONER BRACERAS: That's fine. That  
16 answered it, that's exactly what I was wondering. But  
17 that is still something we're going to try to produce  
18 as a Commission?

19 CHAIRMAN REYNOLDS: Yes. Yes. Unless  
20 there's a movement, unless there's a majority of folks  
21 who decide that they don't want to move forward with  
22 the recommendations and/or the educational materials.

23 COMMISSIONER BRACERAS: No. I mean, I  
24 think it's a good idea to have two documents; one that  
25 outlines student's rights and responsibilities, I

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1 guess, and one that makes findings and recommendations  
2 based on the hearing. I would love to see us put out  
3 documents on both of those.

4 CHAIRMAN REYNOLDS: Okay.

5 STAFF DIRECTOR MARCUS: If it's the  
6 consensus of the Commission, we would certainly be  
7 pleased to revise the proposed findings and  
8 recommendations to make more clear that jurisdiction  
9 under the Civil Rights Act of 1964 is based on  
10 national origin as opposed to religion. That would be  
11 fairly easy and we could recirculate it in time for  
12 the next Commission meeting.

13 CHAIRMAN REYNOLDS: Yes, it's an easy fix.

14 And I presume that there would be no controversy. I  
15 think that we'll have complete consensus on this one.

16 STAFF DIRECTOR MARCUS: As for the public  
17 education campaign, we have given a little bit of  
18 thought to it and it might be useful just to mention  
19 the direction that we were thinking we might go in to  
20 see if that's consistent with the interests of the  
21 Commission. At least at present it appears we have  
22 very limited funding of it. And so the question is how  
23 can we take limited funding and get the word out as  
24 best we can.

25 An approach that has been developed by

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1 staff is the notion of providing an electronic  
2 document, which is available on the website, and which  
3 provides the rights in depth. That way we could  
4 provide it in a little bit more detail than we would  
5 be able to if we were actually publishing a pamphlet  
6 where we would have to distribute large numbers. And  
7 then we could compliment that with a poster that would  
8 be distributed informing people generally of the issue  
9 and telling them where on our website they could find  
10 the information based on the --

11 COMMISSIONER BRACERAS: Well, certainly,  
12 couldn't we have some of the folks that we had  
13 testify? I mean, if they are aware of the document,  
14 they might take it upon themselves to distribute to  
15 campuses?

16 STAFF DIRECTOR MARCUS: We certainly  
17 could. Our hope would be that whichever way we but  
18 particularly if we have the poster, that we would want  
19 to try to work with a nongovernmental association,  
20 perhaps one that we had testify, perhaps there are  
21 others out there that would be able to get the word  
22 out.

23 COMMISSIONER BRACERAS: Right.

24 STAFF DIRECTOR MARCUS: And so we've been  
25 looking into different forms of partnership.

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1 COMMISSIONER BRACERAS: Sounds good.

2 STAFF DIRECTOR MARCUS: But is the hope is  
3 that they can get the word out.

4 We've looked at the prospect of publishing  
5 approximately a thousand posters and providing an  
6 electronic pamphlet on the website.

7 COMMISSIONER BRACERAS: Great.

8 CHAIRMAN REYNOLDS: Vice Chairman  
9 Thernstrom?

10 VICE CHAIRMAN THERNSTROM: So we've been  
11 held up by a rather narrow legal question, that is  
12 national origin versus religion under Title VI. Is  
13 there a larger issue here?

14 CHAIRMAN REYNOLDS: No.

15 VICE CHAIRMAN THERNSTROM: No. So this is  
16 easy to resolve?

17 CHAIRMAN REYNOLDS: Yes.

18 VICE CHAIRMAN THERNSTROM: Okay.

19 CHAIRMAN REYNOLDS: Any other questions or  
20 comments?

21 COMMISSIONER BRACERAS: No. That answered  
22 my questions.

23 CHAIRMAN REYNOLDS: Okay. His timing is  
24 impeccable. We're about to vote. All in favor of  
25 tabling the motion to develop campus anti-semitism

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1 educational materials please say aye.

2 COMMISSIONERS: Aye.

3 CHAIRMAN REYNOLDS: Any in opposition.

4 COMMISSIONER BRACERAS: I'm sorry.

5 CHAIRMAN REYNOLDS: Yes.

6 COMMISSIONER BRACERAS: We're tabling? I  
7 thought that we were authorizing the Staff Director to  
8 develop those materials. Now we're tabling that.

9 CHAIRMAN REYNOLDS: Oh, well, I thought  
10 that.

11 COMMISSIONER BRACERAS: I'm sorry.

12 CHAIRMAN REYNOLDS: Okay. Where I left  
13 off, I started looking at my little gizmo here, is  
14 that we would look at the recommendations to see what  
15 would be incorporated and to be --

16 COMMISSIONER BRACERAS: Well, they're two  
17 separate documents.

18 CHAIRMAN REYNOLDS: Yes, but the  
19 information in one could be used in the other. But if  
20 people are comfortable, I don't have strong feelings  
21 one way or the other. I was just responding to what I  
22 felt was a concern about one going before the other.

23 COMMISSIONER BRACERAS: No. I thought that  
24 the current motion was to authorize the Staff Director  
25 to begin the process of developing the --

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1 CHAIRMAN REYNOLDS: How about this? How  
2 about this then? This vote is to -- this motion is to  
3 develop campus anti-Semitism education materials,  
4 that's what we're going to vote on.

5 COMMISSIONER BRACERAS: All of them?  
6 Whatever they are?

7 CHAIRMAN REYNOLDS: Okay. All in favor?

8 COMMISSIONERS: Aye.

9 CHAIRMAN REYNOLDS: Okay. Any in  
10 opposition? Any abstentions? The motion carries.

11 That's one less thing that we have to  
12 carry over until next month.

13 Okay. I'm going to move that the  
14 Commission keep the record open on the briefing on  
15 campus anti-semitism until February 10, 2006. This  
16 will enable the staff to complete the defame and  
17 degrade process and to admit the additional statements  
18 received from outside organizations. Is there a  
19 second?

20 COMMISSIONER TAYLOR: Second.

21 CHAIRMAN REYNOLDS: Discussion?

22 VICE CHAIRMAN THERNSTROM: Wait a minute.

23 So is this we tabled --

24 COMMISSIONER BRACERAS: We didn't table  
25 anything.

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1 VICE CHAIRMAN THERNSTROM: Last month.

2 CHAIRMAN REYNOLDS: The recommendations.

3 COMMISSIONER BRACERAS: We didn't table  
4 anything. We just authorized the Staff Director --

5 VICE CHAIRMAN THERNSTROM: I understand.  
6 But what's now happening with the recommendations?

7 CHAIRMAN REYNOLDS: The recommendations  
8 will be presented next month.

9 STAFF DIRECTOR MARCUS: At the next month  
10 with --

11 VICE CHAIRMAN THERNSTROM: That's  
12 unrelated to the motion you just made?

13 CHAIRMAN REYNOLDS:

14 DEAN: Well, no. The record will remain  
15 open so outside organizations will still have an  
16 opportunity to submit statements.

17 VICE CHAIRMAN THERNSTROM: Okay. But it  
18 needed a new motion?

19 COMMISSIONER BRACERAS: No.

20 VICE CHAIRMAN THERNSTROM: No. Okay.

21 COMMISSIONER BRACERAS: The staff can  
22 begin work on it or they already have and when new  
23 information comes in, they can incorporate it as they  
24 see fit until the --

25 VICE CHAIRMAN THERNSTROM: Okay. So

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1 having tabled it until this meeting, we don't need to  
2 incorporate in this motion some indication that --

3 COMMISSIONER BRACERAS: We didn't table  
4 anything. We just authorized the staff to --

5 VICE CHAIRMAN THERNSTROM: We did at the  
6 last meeting.

7 CHAIRMAN REYNOLDS: You're saying that we  
8 need to have something in the record extending it an  
9 additional month officially?

10 VICE CHAIRMAN THERNSTROM: Yes, that's  
11 exactly what I'm saying.

12 CHAIRMAN REYNOLDS: Okay.

13 VICE CHAIRMAN THERNSTROM: That's right.

14 CHAIRMAN REYNOLDS: What's she saying is  
15 that we tabled the recommendations until this meeting  
16 and she just wants to put something on the record so  
17 that the record reflects that we further extended it  
18 until next month.

19 COMMISSIONER BRACERAS: Okay.

20 CHAIRMAN REYNOLDS: So, on that note, I  
21 move that the recommendations concern of the campus  
22 anti-semitism briefing be postponed until the February  
23 meeting. Is there a second?

24 VICE CHAIRMAN THERNSTROM: Well, and that  
25 the record be kept open. Isn't it one part --

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1 CHAIRMAN REYNOLDS: Yes. Yes. Thank you.

2 COMMISSIONER TAYLOR: Second.

3 CHAIRMAN REYNOLDS: Any discussion? All  
4 in favor?

5 COMMISSIONERS: Aye.

6 CHAIRMAN REYNOLDS: All in opposition?  
7 Any abstentions.

8 Let the record reflect that the motion  
9 carried unanimously.

10 **VII. MANAGEMENT AND OPERATIONS**

11 CHAIRMAN REYNOLDS: Okay. The  
12 next motion up, I move to extend the deadline for the  
13 Commission implementation of the recommendations from  
14 the Government Accountability Office and the Office of  
15 Personnel Management contained in reports issued from  
16 1997 through April 6, 2005. The Commission originally  
17 agreed on April 8, 2005 to implement these  
18 recommendations by mid-January 2006. On December 16,  
19 2005 we subsequently voted to extend the  
20 implementation of these recommendations to mid-  
21 February, 2006 and directed the Staff Director to  
22 apprise us of any additional extensions required by  
23 further cooperation with the House Subcommittee on the  
24 Constitution in revising the agency's strategic plan.

25 The Staff Director has informed us that

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1 the staff is continuing to work with the House  
2 Subcommittee on the Constitution and GAO on the draft  
3 strategic plan and has a meeting scheduled for next  
4 Monday to discuss additional input. After approval of  
5 the new strategic plan, it would take at least one  
6 month to implement the GAO and OPM recommendations. I  
7 now move that the Commission instead implement these  
8 recommendations as expeditiously as possible  
9 consistent with the need to continue cooperating the  
10 House Subcommittee on the Constitution and revising  
11 the Commission's draft strategic plan. This motion  
12 would replace all previous deadlines for  
13 implementation of these recommendations.

14 Is there a second?

15 VICE CHAIRMAN THERNSTROM: Second.

16 CHAIRMAN REYNOLDS: Discussion? All in  
17 favor please say aye.

18 COMMISSIONERS: Aye.

19 CHAIRMAN REYNOLDS: Any objections? Any  
20 abstentions? The motion carries unanimously.

21 Next up, I move that the Commission  
22 meeting previously approved for Friday, July 7, 2006  
23 instead be held on Friday, July 28, 2006. And this  
24 was in response to a request from one of the  
25 Commissioners.

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1 Is there a second?

2 VICE CHAIRMAN THERNSTROM: Second.

3 CHAIRMAN REYNOLDS: Discussion? All in  
4 favor?

5 COMMISSIONERS: Aye.

6 CHAIRMAN REYNOLDS: Any objections? Any  
7 abstentions?

8 COMMISSIONER TAYLOR: Let me suggest this  
9 is now the July 4th meeting.

10 CHAIRMAN REYNOLDS: The motion carries.

11 **VIII. STATE ADVISORY COMMITTEES**

12 CHAIRMAN REYNOLDS: Okay.

13 Commissioner Taylor, as Chairman ont he task force on  
14 state advisory committees, do you have a motion to  
15 approve a final rule on select state advisory  
16 committee members?

17 COMMISSIONER TAYLOR: I do. Thank you.

18 I move that the Commission approve the  
19 draft final rule on selecting state advisory committee  
20 members. The Commission approved a proposed rule on  
21 selecting SAC members at the October 31, 2005 business  
22 meeting and it was published in the *Federal Register*  
23 for notice and comment on November 4, 2005. The  
24 period for notice and comment closed on December 5th  
25 of that same year and staff prepared the draft final

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1 rule based on the comments received during that  
2 period.

3 The draft amends 45 CFR Section 703(a) and  
4 (b) as follows:

5 (a) Subject to exceptions made from time-  
6 to-time by the Commission to fit special  
7 circumstances, each advisory committee shall consist  
8 of at least 11 members appointed by the Commission.  
9 Members of the advisory committees shall serve for a  
10 fixed term to be set by the Commission upon the  
11 appointment of a member subject to the duration of  
12 advisory committees as prescribed by the charter  
13 provided that members of the advisory committee may at  
14 anytime be removed by the Commission.

15 (b) No person is to be denied an  
16 opportunity to serve on a state advisory committee  
17 because of race, age, sex, religion, national origin  
18 or disability. The Commission shall encourage  
19 membership on the state advisory committee to be  
20 broadly diverse.

21 Once the Commission approves this draft  
22 final rule the Office of the Staff Director will  
23 submit it for publication in the *Federal Register* and  
24 the rule will become effective 30 days after  
25 publication in the *Federal Register* at which point the

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1 Commission can proceed with soliciting recharter  
2 packages from the state advisory committees.

3 CHAIRMAN REYNOLDS: Is there a second?

4 VICE CHAIRMAN THERNSTROM: I second.

5 CHAIRMAN REYNOLDS: Discussion? All in  
6 favor please say aye.

7 COMMISSIONERS: Aye.

8 CHAIRMAN REYNOLDS: All in opposition?  
9 Any abstentions?

10 Please let the record reflect that the  
11 Chairman, Commissioner Braceras, Commissioner  
12 Thernstrom and Commissioner Taylor support the motion.  
13 And Commissioner Yaki and Commissioner Melendez oppose  
14 with no abstentions.

15 Okay. Commissioner Taylor, we're not  
16 finished with you yet. I understand that you have a  
17 second motion regarding the state advisory committees.

18 COMMISSIONER TAYLOR: I do. And I'd move  
19 that the Commission recommend that Congress extend the  
20 term of the state advisory committees and their  
21 members to four years when it considers  
22 reauthorization legislation for the Commission. And  
23 that the Commission authorize the Chairman to advise  
24 the pertinent congressional committee of this  
25 recommendation.

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1           Although two years is the maximum term  
2 generally allowable under the Federal Advisory  
3 Committee Act, the situation at the Commission in my  
4 view at least, warrants an exception. The  
5 Commission's SACs are different from the usual  
6 advisory committees addressed in the FACA statute  
7 because they are well established as part of the  
8 Commission and they play an important role in the  
9 overall mission of our agency.

10           The Commission's regulations currently  
11 applied to the FACA to "management, membership and  
12 operations of the state advisory committees and their  
13 subcommittees. FACA limits the term of such  
14 committees to two years with various exceptions. One  
15 exception is that Congress may specifically exempt an  
16 advisory committee from the usual limit by statute.  
17 This could be accomplished, of course, during the  
18 Commission's reauthorization."

19           Two years is an insufficient period of  
20 time for SAC membership given the time and resources  
21 necessary for rechartering. We have seen that the  
22 effort necessary for rechartering 51 SACs consumes a  
23 substantial amount of regional resources and reduces  
24 the resources available for SAC activities. We have  
25 also seen over time that the constant exploration of

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1 SACs had led to a situation in which we frequently  
2 have a large number of unchartered SACs. Expanding  
3 the terms of the SACs and the members would enable the  
4 regional staffs to focus their activities on important  
5 state and local civil rights activities rather than  
6 diverting their resources to the rechartering process.

7 This motion would have the Commission  
8 recommend that Congress specifically exempt us from  
9 FACA's two year cap in our reauthorizing statute. This  
10 recommendation would be invited in a letter from the  
11 Chairman to the relevant congressional committees.

12 CHAIRMAN REYNOLDS: Okay. And is there a  
13 second?

14 VICE CHAIRMAN THERNSTROM: Yes, I second  
15 it.

16 CHAIRMAN REYNOLDS: Discussion? All in  
17 favor say aye.

18 COMMISSIONER TAYLOR: One moment. I think  
19 we should add that since our last meeting when this  
20 issue was raised and we all knew that we would vote on  
21 it at this meeting, I think the Staff Director could  
22 elaborate on this point, that we have received a  
23 number of documents from the SAC chairs in support of  
24 this motion, if I'm stating those comments correctly.

25 STAFF DIRECTOR MARCUS: That's right. Yes,

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1 Commissioner Taylor. We did earlier this week get the  
2 word out to chairman of currently chartered state  
3 advisory committees and tried through them to get the  
4 word out to additional committee members.

5 We've heard back and I wish we had been  
6 able to get it out a little bit sooner, but we heard  
7 back from five or six of them. And they all took  
8 essentially the same position, which is that all of  
9 the ones who responded to us indicated that they would  
10 favor the recommendation that we ask Congress to  
11 extend the SAC period to four years.

12 At the same time we also asked their view  
13 about a related issue as to whether we should keep the  
14 term of SAC chairs at two years, even if the charter  
15 period of the SAC extended to four. And they  
16 unanimously so far have indicated that they would  
17 disagree with that proposal because they think that  
18 chairman need a greater amount of time to come up to  
19 speed and oversee the projects of the SACs.

20 CHAIRMAN REYNOLDS: Okay. All in favor  
21 say aye.

22 COMMISSIONERS: Aye.

23 CHAIRMAN REYNOLDS: Any objections? Any  
24 abstentions. Please let the record reflect that  
25 Commissioner Yaki and Commissioner Melendez abstain

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1 and the remaining Commissioners voted in favor of the  
2 motion.

3 COMMISSIONER TAYLOR: One moment, I'd like  
4 to move that this next motion be tabled until the next  
5 meeting.

6 CHAIRMAN REYNOLDS: Is there a second?

7 VICE CHAIRMAN THERNSTROM: Second.

8 CHAIRMAN REYNOLDS: Discussion? All in  
9 favor say aye.

10 COMMISSIONERS: Aye.

11 CHAIRMAN REYNOLDS: Any objections. Any  
12 abstentions. The motion carries unanimously.

13 Okay.

14 VICE CHAIRMAN THERNSTROM: And I'm moving  
15 that the next motion to accept for publication for the  
16 Arizona state advisory --

17 COMMISSIONER BRACERAS: That's already  
18 been tabled.

19 VICE CHAIRMAN THERNSTROM: Oh, it's  
20 already been tabled. That's right. Forgot that. I  
21 was about to move that it be tabled.

22 **IX. BRIEFING REPORTS**

23 CHAIRMAN REYNOLDS: Okay. Now we're going  
24 to deal with the Voting Rights Act Briefing Report as  
25 opposed to the statutory report. Okay. I move to

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1 approve the report produced by the Office of Civil  
2 Rights Evaluation on the briefing of the Commission  
3 held on October 7, 2005 on the reauthorization of the  
4 Voting Rights Act. Is there a second? Pretty please.

5 COMMISSIONER BRACERAS: Second.

6 CHAIRMAN REYNOLDS: Thank you.

7 COMMISSIONER BRACERAS: This is the final  
8 version we're receiving incorporate Commissioner  
9 comments, yes?

10 CHAIRMAN REYNOLDS: Yes.

11 VICE CHAIRMAN THERNSTROM: Discussion?

12 CHAIRMAN REYNOLDS: Yes.

13 VICE CHAIRMAN THERNSTROM: No. This is  
14 not possible. We have not had a chance to -- I mean, I  
15 just got this last night on my computer. I don't have  
16 a printed out version. I have had no time to read it.

17 CHAIRMAN REYNOLDS: Would you like to  
18 table this issue?

19 VICE CHAIRMAN THERNSTROM: I would like to  
20 table this issue. And there were --

21 COMMISSIONER BRACERAS: Well, it's just  
22 assuming it incorporated all your redlines.

23 VICE CHAIRMAN THERNSTROM: No, no. Well,  
24 wait a minute. Some of my redlines were I need to go  
25 back to the transcript because I need to check on

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1 things that actually went into the meeting. I haven't  
2 got the transcript yet.

3 COMMISSIONER TAYLOR: I second the motion  
4 to table it.

5 CHAIRMAN REYNOLDS: All in favor? Any  
6 objections?

7 COMMISSIONER YAKI: Similarly we haven't  
8 been getting transcript for the past few months.  
9 What's happened.

10 COMMISSIONER BRACERAS: Yes.

11 STAFF DIRECTOR MARCUS: Commissioners have  
12 not gotten in the last few months?

13 COMMISSIONER YAKI: No.

14 STAFF DIRECTOR MARCUS: Make sure that we  
15 look at it and start getting them out.

16 CHAIRMAN REYNOLDS: And some of the old  
17 ones also, the ones that we didn't receive. It's an  
18 easy fix.

19 Okay. We can adjourn.

20 VICE CHAIRMAN THERNSTROM: Oh, fantastic.

21 COMMISSIONER BRACERAS: Oh, wait. I'm  
22 sorry. May I ask a question?

23 CHAIRMAN REYNOLDS: Yes.

24 COMMISSIONER BRACERAS: Could we get a  
25 rundown on the scheduled briefings for the next couple

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1 of months?

2 CHAIRMAN REYNOLDS: Okay. Ken, are you  
3 prepared to review this information?

4 STAFF DIRECTOR MARCUS: I'll try.

5 COMMISSIONER BRACERAS: March is no longer  
6 Sanders, right?

7 STAFF DIRECTOR MARCUS: That's right.  
8 February is the Patriot Act. Now for the Patriot Act  
9 three of our original speakers have agreed that they  
10 would be able to participate in February. Those are  
11 Professor Viet Dinh, former Congresswoman Mary Rose  
12 Oakar and Mr. Parvez Ahmed. However, Andrew McCarthy  
13 and Michael Ledeen are no longer available. We are now  
14 looking at substitutes for them, and we're certainly  
15 amenable for ideas of people to include the  
16 appropriate substitutes to Mr. Ledeen or for Mr.  
17 McCarthy.

18 COMMISSIONER YAKI: We should also make  
19 that meeting a 9:00 meeting, don't you think?

20 CHAIRMAN REYNOLDS: What time did we start  
21 today?

22 COMMISSIONERS: 9:30.

23 VICE CHAIRMAN THERNSTROM: No. I much  
24 prefer 9:30.

25 COMMISSIONER YAKI: Okay. Well, I thought

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1 we were doing a -- wasn't it your bright idea last  
2 time that --

3 CHAIRMAN REYNOLDS: Well, it is helpful in  
4 that we have been able to start. But Vice Chair  
5 doesn't get up too early.

6 VICE CHAIRMAN THERNSTROM: But, no, but  
7 that was that --

8 CHAIRMAN REYNOLDS: That's a joke. That's  
9 a joke.

10 VICE CHAIRMAN THERNSTROM: That was  
11 serious.

12 COMMISSIONER BRACERAS: The thought was  
13 that if people had to leave the meeting early, either  
14 to catch a flight or because they were participating  
15 from their home location and needed to get off the  
16 phone, that by starting at 9:00 we can have half an  
17 hour for the business portion of the meeting to take  
18 the necessary votes before people have to catch a  
19 plane. So I still favor that. But we can take it on  
20 a month-by-month basis.

21 COMMISSIONER YAKI: I definitely favor it  
22 in February because that's my personal --

23 COMMISSIONER TAYLOR: We should have some  
24 SAC issues to vote on at the February meeting as well.

25 VICE CHAIRMAN THERNSTROM: Well, if you're

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1 making a personal request for February, I'm certainly  
2 happy to go --

3 COMMISSIONER BRACERAS: Yes, let's just  
4 take it month-by-month.

5 CHAIRMAN REYNOLDS: Okay.

6 VICE CHAIRMAN THERNSTROM: But I would  
7 like not to change it as a general rule.

8 CHAIRMAN REYNOLDS: Okay. So we don't  
9 need a vote on that. Just as an administrative  
10 matter.

11 COMMISSIONER BRACERAS: February, right.

12 CHAIRMAN REYNOLDS: Okay.

13 COMMISSIONER BRACERAS: Okay. So March?

14 STAFF DIRECTOR MARCUS: March, I believe,  
15 and we would have to check, but I believe that March  
16 is the month for minority representation at the  
17 Census.

18 COMMISSIONER BRACERAS: That's right.  
19 Okay.

20 STAFF DIRECTOR MARCUS: We do not yet have  
21 a panel to announce for March.

22 COMMISSIONER BRACERAS: And April?

23 STAFF DIRECTOR MARCUS: We can apprise you  
24 after the meeting.

25 CHAIRMAN REYNOLDS: Yes. Would it be best

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1 if we circulate a list.

2 COMMISSIONER BRACERAS: So we're looking  
3 forward to the Patriot Act and to the minority  
4 representation of the Census; those are the two  
5 issues?

6 STAFF DIRECTOR MARCUS: Those are the two  
7 coming up on the next --

8 CHAIRMAN REYNOLDS: Ken, please distribute  
9 an email that lists the remaining briefings for the  
10 year.

11 STAFF DIRECTOR MARCUS: That would be  
12 fine.

13 VICE CHAIRMAN THERNSTROM: And we are  
14 scheduled through what in terms of briefings, to what  
15 month?

16 STAFF DIRECTOR MARCUS: We have briefings  
17 that are scheduled through late in 2007, but we  
18 haven't accepted briefings for every month in that  
19 period. So we really have a two year schedule, but we  
20 have open months throughout.

21 VICE CHAIRMAN THERNSTROM: And do we want  
22 suggestions for topics?

23 STAFF DIRECTOR MARCUS: Sure. I think that  
24 that would be appropriate perhaps in the planning  
25 meeting and under February or perhaps March.

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1                   VICE CHAIRMAN THERNSTROM:  Let's all think  
2 about the open slots.

3                   CHAIRMAN REYNOLDS:  Commissioner Yaki, you  
4 had a question or comment?

5                   COMMISSIONER YAKI:  Nope.  I withdraw it.

6                   COMMISSIONER TAYLOR:  I want to make one  
7 announcement  before  the  benediction  is  given.  
8 Hopefully, we'll have a SAC chair meeting sometime, a  
9 working group meeting rather within the next two weeks  
10 to discuss how we go about accepting SAC reports.  
11 We'll address that issue as well as the term of the  
12 chair for SACs, as well as the overall relationship  
13 between the SACs and the Commission, which is a  
14 discussion I hope we can continue to have.  And we will  
15 make sure that we coordinate with all Commissioners'  
16 calendars prior to setting the meeting.

17                   CHAIRMAN REYNOLDS:  Good luck.

18                   STAFF DIRECTOR MARCUS:  And I'd also  
19 recommend a meeting of the working group on the  
20 budget.  Coming up fairly soon are a number of budget  
21 issues including special assistant issues.

22                   CHAIRMAN REYNOLDS:  Okay.  We're done.

23                   (Whereupon, at 1:25 p.m. the meeting was  
24 adjourned.)

25

**NEAL R. GROSS**

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