

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION MEETING

+ + + + +

FRIDAY

FEBRUARY 9, 2007

+ + + + +

WASHINGTON, DC

+ + + + +

The Commission convened at 9:00 a.m., in Room 550 at 624 Ninth Street, Northwest, Washington, D.C., Gerald Reynolds, Chairperson, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairperson

ABIGAIL THERNSTROM, Vice Chairperson

JENNIFER C. BRACERAS, Commissioner

PETER N. KIRSANOW, Commissioner

ARLAN D. MELENDEZ, (via telephone),
Commissioner

ASHLEY L. TAYLOR, JR., Commissioner

MICHAEL YAKI, (via telephone) Commissioner

KENNETH L. MARCUS, Staff Director

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STAFF PRESENT:

IMAMI AFRYKA
DAVID BLACKWOOD, General Counsel
MARGARET BUTLER
CHRISTOPHER BYRNES, Attorney Advisor to the
Office of the Staff Director + Acting
Deputy General Counsel, Office of the
General Counsel (OGC)
RANITA CARTER
DEBRA CARR, ESQ., Associate Deputy Staff
Director, Office of the Staff Director
(OSD)
PAMELA A. DUNSTON, Chief, Administrative
Services and Clearinghouse Division
(ASCD)
BARBARA FONTANA
DEREK HORNE, Attorney Advisor
TINALOUISE MARTIN
SOCK-FOON MACDOUGALL, Acting Assistant Deputy
EMMA MONROIG, Solicitor + Parliamentarian
EILEEN RUDERT
BERNARD QUARTERMAN, JR.
MOHOMMAD SULEIMAN KHAN
MARIA O. THOMPSON
KIMBERLY TOLHURST
MICHELE YORKMAN RAMEY

COMMISSIONER ASSISTANTS PRESENT:

LISA NEUDER
KIMBERLY SCHULD

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

2 9:09 A.M.

3 CHAIRPERSON REYNOLDS: Are
4 Commissioners Yaki and Melendez, are you still
5 on?

6 COMMISSIONER MELENDEZ: Yes.

7 CHAIRPERSON REYNOLDS: Okay, you
8 provide us with a quorum, so please let me
9 know if you get off the line.

10 The meeting will come to order.
11 This is a meeting of the U.S. Commission on
12 Civil Rights at 624 9th Street, Room 540 in
13 Washington, D.C.

14 All of the Commissioners are
15 present with the exception of Abigail
16 Thernstrom. Commissioners Yaki and Melendez
17 are participating by phone. And we expect
18 Vice chair Thernstrom to arrive shortly.

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

21 **I. Approval of Agenda**

22 CHAIRPERSON REYNOLDS: We'll have a
23 couple of motions to amend. I move that we
24 amend the agenda. Is there a second?

25 COMMISSIONER TAYLOR: Second.

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1 CHAIRPERSON REYNOLDS: Discussion?

2 All in favor, please say aye.

3 (Chorus of ayes.)

4 Any in opposition? Any
5 abstentions? The motion carries.

6 I move to add an item labeled
7 motion to keep the record of the Supplemental
8 Educational Services under No Child Left
9 Behind Act briefing open for public comment in
10 Section 5 and to add an item labeled
11 Mississippi SAC immediately following the
12 discussion of the Alabama SAC under State
13 Advisory Committee issues. Is there a second?

14 COMMISSIONER TAYLOR: Second.

15 CHAIRPERSON REYNOLDS: Discussion?
16 All in favor say aye.

17 (Chorus of ayes.)

18 CHAIRPERSON REYNOLDS: All in
19 opposition? Any abstentions? The motion
20 carries.

21 The second item is the approval of
22 the minutes of the January 26, 2007 business
23 meeting.

24 **II. Approval of Minutes of the**
25 **January 26, 2007 Meeting**

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1 CHAIRPERSON REYNOLDS: Well,
2 actually, this is the business meeting. May I
3 have a motion?

4 COMMISSIONER TAYLOR: So moved.

5 CHAIRPERSON REYNOLDS: Second?

6 COMMISSIONER KIRSANOW: Second.

7 CHAIRPERSON REYNOLDS: Discussion?

8 All in favor, please say aye.

9 (Chorus of ayes.)

10 CHAIRPERSON REYNOLDS: Any in
11 opposition? Any abstentions? The motion
12 carries.

13 Next up we have announcements.

14 **III. Announcements**

15 CHAIRPERSON REYNOLDS: And this is,
16 as you know, the celebration of Black History
17 Month. During National Black American History
18 Month we honor the heritage and the
19 accomplishments of Black Americans and
20 recognize their extraordinary contributions to
21 the United States. The greatness of America
22 is reflected in the contributions of Black
23 Americans from all walks of life throughout
24 the history of the United States. Examples
25 includes the writing of DuBois, Baldwin, Ralph

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1 Ellison, Alex Haley and others; the music of
2 Mahalia Jackson, Billie Holiday, Duke
3 Ellington, and Billy Strayhorn.

4 So in recognition of past and
5 present achievements of Black Americans, the
6 United States Commission on Civil Rights calls
7 upon public officials, educators, librarians
8 and all people of the United States to observe
9 this month with appropriate programs and
10 activities that highlight and honor the
11 contributions made by Black Americans to our
12 nation.

13 Okay, Mr. Staff Director, do you
14 have anything?

15 COMMISSIONER MELENDEZ: Mr.
16 Chairman?

17 CHAIRPERSON REYNOLDS: Yes.

18 COMMISSIONER YAKI: I would also
19 like to add to the record the recognition of
20 the fact that just this month we had the first
21 Super Bowl coached by -- both teams were
22 coached by African Americans, and an African
23 American won the Super Bowl coach for the
24 first time.

25 CHAIRPERSON REYNOLDS: That's

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1 right. And one lost, too.

2 VICE CHAIRPERSON THERNSTROM: I
3 didn't hear that.

4 CHAIRPERSON KIRSANOW: An African
5 American coach lost for the first time also.

6 (Laughter.)

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

8 CHAIRPERSON REYNOLDS: Mr. Staff
9 Director, do you have anything to add to your
10 written report?

11 STAFF DIRECTOR MARCUS: Thank you,
12 Mr. Chairman. I do have a few words about the
13 Commission's budget, the PART and the SACs, a
14 new Commission staff.

15 First, to update the Commission, we
16 expect that we will soon have appropriations
17 in the form of continuing resolution for the
18 current fiscal year. As the Commission is
19 aware, we requested \$9,308,000 and change for
20 this fiscal year as a part of the President's
21 budget. However, the House of Representatives
22 passed a continuing resolution that would fund
23 the Commission at only \$8,933,000. The Senate
24 is currently debating the funding resolution.
25 Closure was filed yesterday to limit debate.

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1 We anticipate that the Senate will follow the
2 House's lead and that we would have the
3 continuing resolution that is under \$9
4 million, that is approximately \$300,000 less
5 than what we have requested and will mean
6 various reductions as compared to our plan.

7 The specific impact, as a result of
8 this CR will include that we will not be able
9 to hire the additional two full-time attorneys
10 within the Office of General Counsel that we
11 had proposed to hire. We will not be able to
12 conduct the additional State Advisory
13 Committee travel for which we had assigned
14 funds, we will not be able to issue the
15 Spanish language public service announcements
16 most likely this year that we had requested.
17 And we will not be able to backfill for a
18 social scientist who led the office for Civil
19 Rights Evaluation. All of those things that
20 we had requested, many of them were things
21 that we had specifically requested as
22 additional funds that I anticipate that we
23 will not be able to do this year.

24 In addition, of course, we will be
25 able to do fewer briefings than we had

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1 initially anticipated, but the Commission has
2 already voted to reduce the number of
3 briefings being done in this fiscal year.

4 In addition, the President has just
5 forwarded his budget to the Congress and we
6 will need to advance our request as well. We
7 do have a request that is ready to go. We are
8 a little bit late, although much less late
9 than the Agency has been in the past.

10 I have, as Commissioners may
11 recall, issued an administrative instruction
12 that changes the process for budget
13 formulation, specifically by providing that
14 the Commissioners in addition to voting on the
15 budget justification, as you have done in the
16 summer, will also have an opportunity to vote
17 on any changes made between the budget
18 justification and the budget request which we
19 are about to make; in other words, an
20 opportunity to vote as to whether the changes
21 that we have to make in order to reflect the
22 amount that's actually in the President's
23 budget, whether that's accurate. And we have
24 some suggestions that we will be making about
25 how to deal with the \$192,000 shortfall

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1 between the initial budget justification and
2 the budget request that we will be submitting.

3 Essentially, the way we can close
4 that gap without impairing Agency functions
5 and while ensuring continuity of all staff
6 positions is by refraining from hiring
7 additional secretaries for the Central and
8 Western Regions who had to backfill for recent
9 retirements and by refraining from hiring an
10 additional attorney-advisor in the Office of
11 General Counsel, as we had planned, and by
12 only conducting 8 briefings, rather than 11,
13 which is consistent with the Commission's
14 recent vote as well.

15 CHAIRPERSON REYNOLDS: Anything
16 else?

17 STAFF DIRECTOR MARCUS: Well, that
18 is it on the budget. I should say a few words
19 about the PART which is the Program Assessment
20 and Rating Tool process for the Office of
21 Management and Budget.

22 CHAIRPERSON REYNOLDS: Excuse me,
23 Ken, before we move on to another topic, I
24 just want to highlight the fact that the
25 Agency continues to shrink. It is the

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1 incredible federal shrinking agency. Our flat
2 budget is over time impairing our ability to
3 carry out our statutory obligations and
4 Congress will have to act in the not too
5 distant future if we're going to continue to
6 carry out our statutory obligations.

7 COMMISSIONER MELENDEZ: I have a
8 question. This is Mr. Melendez.

9 CHAIRPERSON REYNOLDS: Yes.

10 COMMISSIONER MELENDEZ: As far as
11 the 2008 budget, at what point are the
12 Commissioners going to review that?

13 STAFF DIRECTOR MARCUS: That's a
14 good question, Commissioner Melendez. The
15 question for review is whether the
16 Commissioners agree that the changes that I
17 suggested are appropriate. The Commissioners,
18 of course, reviewed the budget last summer and
19 I would suggest that the Commissioners address
20 that question as well. And my recommendation
21 is that we do it at the soonest possible
22 instance.

23 The House Appropriations Committee
24 has indicated to us a likelihood that they
25 will want to conduct a hearing regarding the

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1 Commission's operations and a possibility that
2 that hearing will take place on March 9, which
3 is the same date on which we have scheduled
4 both a Commission business meeting and a
5 briefing on the topic of domestic wiretapping
6 and the war on terror. How we deal with that
7 conflict and whether the Appropriations
8 Committee would be amenable to changing the
9 date is something that we don't know, as we've
10 just gotten word of that.

11 By the way, the House Authorizing
12 Committee has also informed the public of
13 their oversight priorities for this year and
14 this Agency is included on the list of their
15 priorities, but we do not, at this point,
16 expect that a hearing will take place prior to
17 March 9.

18 So my recommendation is that we
19 should look at that budget question at the
20 soonest opportunity. We were not able to come
21 up with the recommendations that I mentioned a
22 week in advance of this meeting and I know
23 that Commissioners typically like to have a
24 week to review and consider. So my suggestion
25 would be that we consider having a special

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1 meeting perhaps by conference call at the
2 soonest opportunity between now and the March
3 meeting. And that might be a topic for future
4 business or something that we could add to the
5 agenda. If we were to issue a notice in the
6 Federal Register of a future meeting, the
7 soonest that we could possibly have a separate
8 meeting for that topic by conference call
9 would be the Tuesday after President's Day.

10 COMMISSIONER MELENDEZ: Another
11 question, Ken. As far as the budget, I know
12 that you have recommended in a letter to the
13 House of Representatives that we're going to
14 allot a certain amount of money to the regions
15 and I'm not sure exactly what that means. I
16 know that the staffs continually have a lot of
17 problems operating. They're not even able to
18 meet face-to-face because we don't really even
19 have a base that actually goes out to each
20 SAC. Even if that were a \$1,000 or whatever
21 it may be for one face-to-face meeting. And I
22 know it's been handled just case by case, but
23 at some point in the budget I'd like to see
24 what it would take to actually fund a SAC at a
25 minimal amount even for one meeting, face-to-

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1 face per year, something like that. And I
2 think that should be part of the budget. At
3 least we can see what that expense would
4 possibly be.

5 STAFF DIRECTOR MARCUS: Thank you,
6 Commissioner. At this point, I am encouraging
7 the existing charter committees to meet at
8 least by phone and preferably face-to-face, as
9 much as possible. I would say that staffing
10 and scheduling of members at this point is as
11 much a constraint as money. We have had
12 recently SAC conference calls. For instance,
13 there was a California State Advisory
14 Committee conference call that took place
15 earlier this week. I do anticipate that there
16 will be further meetings, both by conference
17 call and face-to-face over the next couple of
18 months, including we'll soon have a face-to-
19 face meeting of the Georgia State Advisory
20 Committee. There are other committees that
21 have requested and for which I'm approving
22 funds for meetings, particularly in the
23 Southeast. I anticipate receiving a request
24 from the California State Advisory Committee
25 for a meeting in late March and it looks like

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1 we should be able to fund that.

2 I'm urging our regional staff to
3 try to put together meetings as best they can
4 for the newly chartered committees. At this
5 point, at a regional level, my priorities are
6 to make sure that we can get our unchartered
7 State Advisory Committee chartered as quickly
8 as possible and to make sure that at the same
9 time we are having at least in each region
10 some meetings and face-to-face meetings,
11 particularly to deal with the nationwide
12 priorities such as the prison project to
13 support our upcoming statutory report.

14 We're also looking at ways that we
15 can decentralize at least a portion of the
16 budget in order to provide for greater
17 authority and accountability at the level of
18 the Regional Directors. That work is going
19 on, but it is hampered by the limited amounts
20 of money that we do have. I think that given
21 the small number of chartered SACs, they
22 should all be able to meet face-to-face, but
23 when we get all of the SACs chartered, we
24 would be talking about 51 committees and the
25 idea of having multiple face-to-face meetings

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1 by the 51 committees is something that I think
2 will require a greater amount of funding than
3 we have right now.

4 COMMISSIONER MELENDEZ: I would
5 just like to address this in the 2008 budget,
6 hopefully we can talk about it again?

7 STAFF DIRECTOR MARCUS: I have
8 recommended, yes, that there be an additional
9 subsequent discussion about the 2008 budget.

10 COMMISSIONER MELENDEZ: Just one
11 other comment. I know that as far as planning
12 for these SACs, I know that they need at least
13 six months if they're going to plan some major
14 meeting such as the meeting out in Utah that
15 has to do with Native Americans. I think if
16 they know what their budget is, I think they
17 can plan better as far as assembling speakers
18 and all the different -- the same thing that
19 we have to do. They just need a lot more time
20 to plan that.

21 And then the other question I have
22 is I know that we lost our -- we don't have a
23 Budget Director and I know that that's crucial
24 and critical to whatever we're doing within
25 our office and so what are the plans there and

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1 what do you see? I know that somebody has to
2 be holding the fort down as far as without a
3 Budget Director, so what's the status on that?

4 STAFF DIRECTOR MARCUS: That's an
5 excellent question, Commissioner, and yes, I
6 would say that that function is one of the
7 highest priorities that we have operationally
8 in terms of strengthening the work that we're
9 doing. In the recent vacancy in that
10 position, that's been officially vacant now
11 for certainly over a week. I don't know if
12 it's been officially vacant for two weeks, but
13 it's been from the Director of Management, I'm
14 getting the indication it's been about a week
15 or so.

16 During that period, the under
17 staffing has been compensated really by, I
18 think, an extraordinary extra bit of hard work
19 from our Director of Management who is much
20 more detailed right now and hands on in the
21 budget area than she would otherwise be. And
22 I think that our Budget Analyst is also
23 stepping up and doing additional work. And it
24 does create additional strain throughout the
25 organization and particularly within the area

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1 of the Office of Management.

2 We have looked at that and I would
3 say that my concern is that this is a critical
4 function, Budget and Finance. It is a
5 function that historically and especially over
6 the last several years has been a major source
7 of weakness for the Agency, not just during
8 the prior tenure of the former Director, but
9 prior to that. And it is an area where we
10 have had considerable difficulty recruiting
11 and attracting high-level personnel.

12 Now I would say that we have
13 recently strengthened our recruitment ability
14 through exemplary work by the Director of HR
15 which has been recognized by OPM and because
16 of that work we have been much more effective
17 in recruiting very strong candidates in some
18 positions, notably in Attorney Advisor
19 positions. We are able to attract a large
20 number of qualified attorneys and other
21 persons. But in light of our financial
22 records and the well-publicized problems that
23 we've had in that area, it has been
24 significantly harder to attract people in that
25 area.

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1 I've also been concerned about our
2 ability using recruitments and internal hires
3 to staff that function at the highest possible
4 level that we can. For that reason, we have
5 been having discussions over the last few
6 months now with the General Services
7 Administration about expanding the scope of
8 the work that they are doing.

9 Now I would say one of the bright
10 spots in our financial function lately has
11 been the good quality work that we are getting
12 at GSA. Other agencies were not willing to
13 come in and provide us full accounting
14 services, but GSA was willing to do it and
15 they were willing to do it at a lower price
16 point than we had gotten quoted elsewhere and
17 I think that their work is a part of the
18 reason, together with hard work from
19 Commission staff that we were able to get
20 unqualified opinions on our financial
21 statements. So we are looking to see to what
22 extent they can expand that, ideally, to the
23 point where we can outsource to them the
24 maximum possible extent of the financial
25 function. Now we have considered them to be

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1 full-service accounting, but there are a
2 number of functions previously conducted by
3 the Director of Budget and Finance and we are
4 discussing with them the extent to which they
5 can take over many of those functions.

6 There are some things that I think
7 should still be done in-house. There are
8 reconciliations that I would like to have done
9 in-house, if only to serve as a check or
10 control on the work being done by GSA.
11 Additionally, since GSA is located in, I
12 believe in Kansas, and does not have on-site
13 personnel, there is some coordination work
14 that needs to be done here.

15 GSA has finally agreed in principle
16 to negotiate a Memorandum of Understanding
17 under which they would assume significantly
18 greater aspects of the Budget and Finance
19 function which I think would be a real step
20 forward in solidifying that function and their
21 agreement in principle to do so, I think is a
22 real tribute to that agency and their
23 willingness to be of assistance.

24 It is taking a while as inter-
25 agency Memorandum of Understanding frequently

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1 do and we will need to carefully work with
2 them on the Memorandum of Understanding and to
3 determine based on the results of that
4 negotiation what the remaining tasks have to
5 be done so we can determine what additional
6 staffing is required at the Agency.

7 Our hope is that there will be
8 little additional work that has to be done,
9 but until we execute the Memorandum of
10 Understanding, we won't know exactly what
11 grade level is required or how exactly to
12 craft the position description.

13 CHAIRPERSON REYNOLDS: Ken, could
14 you provide us with an estimate in terms of
15 when you believe we will hear, get a
16 definitive answer from GSA?

17 STAFF DIRECTOR MARCUS: The process
18 has been taking a few months now. I am
19 hopeful that we will have something finalized
20 by the March meeting, but I certainly am not
21 in a position to provide any sort of assurance
22 of that, because we've not seen yet even a
23 first draft, so we don't yet know whether
24 we're on the same page.

25 Based on our conversations with

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1 them, it seems like we're on the same page,
2 but you really need to see the paper before
3 you know.

4 CHAIRPERSON REYNOLDS: So they've
5 agreed in principle to do this and we're
6 talking about just working out the details?

7 STAFF DIRECTOR MARCUS: That's
8 right.

9 COMMISSIONER YAKI: Ken?

10 STAFF DIRECTOR MARCUS: Yes.

11 COMMISSIONER YAKI: On a totally
12 unrelated topic, as we get the Staff
13 Director's report for January, what
14 perturbations are going on with regard to the
15 March hearing? What contingencies are we
16 looking at for rescheduling that indicates
17 that we have an oversight hearing that day?

18 STAFF DIRECTOR MARCUS: Well,
19 that's a good question and a tough question.
20 The possibility of the oversight or rather the
21 appropriations hearing arose only, I believe
22 it was just yesterday afternoon.

23 We have been working on bringing in
24 speakers and making at least preliminary phone
25 calls to try to get speakers who are

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1 consistent with the concept paper.

2 Commissioner Yaki, you suggested
3 that we invite the -- forgive me if I get the
4 name wrong. I think it's the American-Arab
5 Anti-defamation Committee which --

6 COMMISSIONER YAKI: Anti-
7 discrimination.

8 STAFF DIRECTOR MARCUS: I'm sorry,
9 Anti-discrimination Committee. Congresswoman
10 Mary Rose Oakar=s Committee. And we have
11 examined the concept paper and that group is
12 consistent with the concept paper. And we are
13 reaching out to that organization. They've
14 certainly cooperated with us in the past,
15 including the recent past, and we're hopeful
16 that they would participate.

17 I think recently Andrew McCarthy
18 has been recommended as a potential speaker.
19 We're reaching out to him and to other
20 potential speakers. So that's in process
21 right now.

22 There are, I think, two
23 difficulties that are arising. One is the
24 scheduling challenge and since we just heard
25 yesterday afternoon that there's a possible

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1 conflict, we're not sure whether, for
2 instance, the Appropriations Committee might
3 have any flexibility on the date or not. If
4 not, then I suppose we would have to look into
5 the question of postponement, but that's not
6 something that we've reached yet, since this
7 is all essentially news to us.

8 CHAIRPERSON REYNOLDS: Or moving
9 the date of the Commission meeting.

10 STAFF DIRECTOR MARCUS: Or moving
11 the date of the Commission meeting, that's
12 right.

13 There is one wrinkle though with
14 the topic and I don't know if this is an
15 appropriate time to address that?

16 CHAIRPERSON REYNOLDS: Sure.

17 STAFF DIRECTOR MARCUS: The wrinkle
18 with the topic is that we, under the concept
19 paper, are addressing the domestic wiretapping
20 in the War on Terror and specifically, looking
21 at issues of the legality and
22 constitutionality of programs such as the --
23 what has been called the Terrorist
24 Surveillance Program.

25 The most important, arguably, legal

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1 and constitutional issues have been whether
2 that program can be conducted absent the use
3 of warrant and absent Court involvement. The
4 recent announcement by the Administration that
5 this will be going through the FISA Court has,
6 at a minimum, significantly changed the issue.
7 Many of the legal arguments or debates are no
8 longer, shall I say, forward looking. There
9 may be historical questions of legality, but
10 they're no longer a part.

11 We have not essentially changed the
12 approach from what has been approved by the
13 Commission, but there are people who have
14 asked the question, do we still address the
15 same topic in the same way now that events
16 have changed, or do we make changes to it?

17 Commissioner Yaki, please correct
18 me if I get this wrong, I think that you have
19 suggested, for instance, that we look at
20 questions such as who is being listened to or
21 how are people selected, things of that sort,
22 and perhaps the way the FISA Court is used.
23 That's not exactly within the approved scope,
24 but it's close to it.

25 Alternatively, we could continue

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1 exactly under the approved scope, even though
2 the relevance may be a little bit different
3 than it was, or we could take it in a somewhat
4 different direction. One other possible
5 direction we could look at is to broaden the
6 scope, for instance, to look at little bit
7 more broadly at civil rights in the War on
8 Terror including, but not limited to the
9 wiretap program. That possibility arose in
10 part through conversations that I've had with
11 other federal agencies, including especially
12 the Office of the Director of National
13 Intelligence.

14 I approached them to find out
15 whether there were issues, either specific to
16 the terrorist surveillance program or
17 generally with respect to the issue of civil
18 rights protections that would be with publicly
19 discussing and that are relevant to the
20 protections that we do or don't have, but
21 which can be discussed in an open setting. I
22 think people are aware that there is a
23 commission that's been established to look
24 into such questions called the White House
25 Privacy and Civil Liberties Board and they're

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1 looking specifically into issues such as civil
2 liberties protections in the wiretap program,
3 but it's my understanding from talking to that
4 agency that they have been able to get
5 meaningful information about questions like
6 who is being listened to only through the use
7 of security clearances that they have
8 obtained, but that we don't have and the
9 information they've gotten is not such that
10 they could have it publicly aired.

11 On the other hand, I have heard
12 from the Office of the Director of National
13 Intelligence that there are some real
14 questions about civil rights and the War on
15 Terror that could be addressed, publicly.
16 They may relate a little bit more broadly to
17 questions about I guess there have been
18 allegations about the Defense Department
19 conducting surveillance on protesters or other
20 U.S. citizens, questions about the function of
21 the FISA Court, questions about data mining
22 procedures, questions that exceed the current
23 scope that could be discussed. And they have
24 raised the possibility that they might be able
25 to discuss from an intelligence perspective

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1 what protections exist or don't, but that
2 they're not sure if they would be able to do
3 it if the scope of the briefing were limited
4 to the wiretap issues.

5 COMMISSIONER YAKI: I understand.
6 I would like to be kept very much engrossed in
7 these discussions. This was my topic and
8 certainly there are other organizations we can
9 also consult with that I can think of that
10 would also be helpful and perhaps helping
11 either find other areas of focus within the
12 topic as is or where we can broaden the topic
13 to make it as topical and informative as
14 possible. So if you could keep that in mind,
15 I would appreciate that.

16 STAFF DIRECTOR MARCUS: Certainly.

17 COMMISSIONER BRACERAS: This is
18 Jennifer Braceras.

19 My concern is just that if we
20 broaden it too much, it becomes scattered and
21 we have different panelists talking past each
22 other and it's not a productive discussion,
23 but that said, this is Commissioner Yaki's
24 topic and I would defer to his view on how you
25 should proceed. However Commissioner Yaki

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1 wants to sort it out, he has my proxy.

2 COMMISSIONER YAKI: Thank you,
3 Jennifer, I appreciate that.

4 CHAIRPERSON REYNOLDS: Commissioner
5 Thernstrom?

6 VICE CHAIRPERSON THERNSTROM: I
7 second what Jennifer just said. It is your
8 topic, Michael, and I want you to have first
9 say on it.

10 I do have a very strong feeling,
11 however, that we do a better job when we focus
12 on a manageable question and that to define
13 this too broadly is really to dilute the
14 effectiveness of any findings and
15 recommendations that we might come up with and
16 in fact, weaken the whole enterprise.

17 So I would urge -- I would hope
18 that we could structure this in a way such
19 that the briefing were really quite focused.

20 COMMISSIONER YAKI: Thank you. I
21 appreciate that.

22 STAFF DIRECTOR MARCUS: I will
23 continue, but before I do, I'm not sure if I
24 have any different marching orders or whether
25 this is something that we should address later

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1 in the meeting or otherwise.

2 At present, this is scheduled for
3 March 9 which is the next meeting. We do have
4 an approved concept paper. The approved
5 concept paper is fairly narrow and relates
6 just to the domestic wiretapping. It seems to
7 me if we were to expand it, it would require
8 essentially a vote or something of that sort.

9 COMMISSIONER BRACERAS: Can I just
10 make a motion that the Staff Director work
11 with Commissioner Yaki to formulate the panels
12 for the briefing and the scope of the briefing
13 and that's it.

14 VICE CHAIRPERSON THERNSTROM: Well,
15 it is not a silly question, it seems to me of
16 expanding it. It's simply restating its focus
17 or perhaps it's just simply a question of
18 restating the focus.

19 COMMISSIONER BRACERAS: That's what
20 I'm saying is we're all in agreement on the
21 general topic and I'm willing to just give
22 discretion to the Staff Director to work with
23 Commissioner Yaki on the details and if we
24 need a motion, you know, to do that, then we
25 can put it in a motion form.

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1 It doesn't bother me if the panels
2 that the Staff Director and Commissioner Yaki
3 come up with are technically a little bit
4 outside of the scope of the concept paper we
5 originally approved. I'm willing to provide
6 that discretion to the Staff Director now to
7 do what he sees fit in light of changed legal
8 circumstances.

9 VICE CHAIRPERSON THERNSTROM: I
10 agree with that. I also think that in terms
11 of looking backwards, the question as
12 currently formulated, is a little out of date.
13 But nonetheless, looking backwards, it may not
14 be irrelevant to the future, so that it's --
15 so our previous formulation may not, in fact,
16 be quite as irrelevant as one might think.

17 CHAIRPERSON REYNOLDS: I agree with
18 Vice-Chair Thernstrom. I still think that
19 this issue is relevant despite the changed
20 approach and it's worthy of our attention.

21 I think that Commissioner Braceras'
22 suggestion is a good one and I second it.

23 VICE CHAIRPERSON THERNSTROM: Good.
24 We're all agreed. Michael, it's in your
25 hands.

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1 COMMISSIONER YAKI: Thank you.

2 CHAIRPERSON KIRSANOW: Don't mess
3 it up.

4 (Laughter.)

5 VICE CHAIRPERSON THERNSTROM: We'll
6 fire you.

7 COMMISSIONER YAKI: I wanted to go
8 for a couple of appropriations for a field
9 hearing, but I guess we don't do that.

10 COMMISSIONER BRACERAS: Do we need
11 a vote? Or just so you get the sense of the
12 Commission that it's okay to move forward --

13 COMMISSIONER TAYLOR: And to the
14 extent the Staff Director and Commissioner
15 Yaki revise a concept such that the Staff
16 Director and the Office believe that it's
17 necessary for us to vote on a new concept, we
18 can do it by way of a poll vote.

19 STAFF DIRECTOR MARCUS: That's
20 sufficient for me.

21 COMMISSIONER BRACERAS: The other
22 thing, if we vote now to give him the
23 discretion, I don't think we need another vote
24 later.

25 VICE CHAIRPERSON THERNSTROM:

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1 That's not necessary.

2 CHAIRPERSON REYNOLDS: Okay, as
3 long as there is no objection, we don't need
4 to have an official vote on this issue.

5 COMMISSIONER BRACERAS: It's
6 adapted as you see fit.

7 VICE CHAIRPERSON THERNSTROM: I
8 mean I am very concerned about this possible
9 scheduling conflict because this is a
10 complicated issue. Putting together a really
11 good panel is not going to be easy and I hope
12 we know sooner, rather than later, whether
13 we've got -- whether we need to move the time
14 of this meeting.

15 COMMISSIONER BRACERAS: Michael,
16 can you pull some strings on the Hill to get
17 them not to do their hearing that day?

18 COMMISSIONER YAKI: Actually, I was
19 just sending emails on that right now.

20 (Laughter.)

21 COMMISSIONER BRACERAS: We'll leave
22 that in your able hands.

23 VICE CHAIRPERSON THERNSTROM: Yes.

24 STAFF DIRECTOR MARCUS: Thank you.
25 Another issue that I think the Commissioners

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1 should be aware of is the Commission's use of
2 the OMB Program Assessment and Rating Tool
3 process, known as PART.

4 Commissioners may recall that this
5 is a lengthy, resource-intensive and very
6 rigorous process that is required of most
7 executive agencies. Frankly, it's not
8 something that anyone looks forward to.
9 Officials at other agencies I've talked to
10 have frankly dreaded the process.

11 We were exempt from the
12 requirement. We were not required to use the
13 PART. However, we chose voluntarily to use
14 the PART, based on the recommendation of GAO
15 and the vote of the Commission to implement
16 GAO recommendations.

17 And we did so, although it wasn't
18 required, in the hope that it would provide us
19 with some useful direction on how we can
20 improve our management and operations beyond
21 what had been specifically recommended under
22 the GAO process.

23 Now we've gone through the first
24 phase of it now and we have received an
25 overall rating from OMB. We knew from the

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1 beginning that the rating would not be good.
2 We knew from the beginning that it is
3 essentially impossible for any Agency that
4 doesn't have a current strategic plan to get
5 what you might call a passing grade and we
6 were aware of significant weaknesses within
7 the Agency. And I don't think that the
8 ultimate determination of PART is really
9 surprising in that respect.

10 Approximately three percent of
11 federal programs are rated ineffective which
12 is the lowest rating of the PART. That refers
13 to ineffectiveness of program management,
14 program purpose and design, strategic
15 planning, etcetera. I think that that is
16 essentially where we would have been had the
17 process been completed in 2005. We were not
18 within the category of ineffective. However,
19 we were in the next category up which is
20 results not demonstrated which includes
21 approximately 22 percent of all federal
22 programs.

23 This reflects, I think, both that
24 there have been significant improvements that
25 have been acknowledged by OMB, because without

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1 those significant improvements we certainly
2 would have been in the bottom category. Also,
3 then we have significant progress that we need
4 to make, especially in the area of finalizing
5 the strategic plan, but also in other parts of
6 management and operations.

7 The PART process did involve OMB
8 determining that the Commission has taken
9 meaningful steps to correct strategic planning
10 deficiencies. Even though we haven't
11 finalized the strategic plan, they recognized
12 even as of several months ago when they
13 assessed us that we were making meaningful
14 steps. OMB also recognized that we are tying
15 our budget requests to annual performance
16 goals. This is something that was not true a
17 couple of years ago, but it's one of the
18 innovations through our reforms.

19 They've also recognized that the
20 Commission collaborates and coordinates
21 effectively with new APHIS programs and that
22 we're taking meaningful steps to address
23 management deficiencies. So we have gotten
24 some kudos there. On the other hand, overall,
25 I would say the score reflects the fact that

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1 we have some way to go and are working on that
2 and have developed through the process a plan
3 to correct deficiencies, including, among
4 other things, the finalization of the
5 strategic plan.

6 Through this process, I think that
7 we've gotten some helpful learning that has
8 gone into the measures that are in our draft
9 strategic plan and I think we have further
10 learned it will help us in further refining
11 strategic measures.

12 CHAIRPERSON REYNOLDS: Ken, this is
13 your discussion of the strategic is a nice
14 segue into where we are with respect to the
15 standards for briefing reports. It's my
16 understanding that until that piece is
17 completed that affects a number of items
18 including our ability to complete the
19 strategic plan, is that right?

20 STAFF DIRECTOR MARCUS: It is
21 correct that we are still in the midst of that
22 process and it is correct that it does affect
23 a number of things that are coming up,
24 including especially it's holding up the
25 Inspector General's report and it is certainly

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1 affecting what we're going to do on all of our
2 briefings that are coming up. I don't know
3 that the strategic plan per se is held up, but
4 certainly other things are as well, and I am
5 concerned about the prospect that we might go
6 on to the Hill without having come to closure
7 on it.

8 Happily enough, we did have the
9 first, at least partial meeting of the working
10 group on briefings which was conducted just
11 earlier this week. We have not been able to
12 come up with a meeting time when all
13 Commissioners have been able to participate,
14 but we at least had a preliminary meeting with
15 some of the Commissioners, so we've gotten a
16 start.

17 CHAIRPERSON REYNOLDS: I strongly
18 urge the members of the working group to
19 rearrange their busy schedules to have the
20 meetings necessary so that we can, the full
21 Commission can receive a recommendation in
22 light of the hearing that's going to take
23 place on the Hill. We would all be in a
24 better position if we went to that hearing,
25 having put that issue behind us, and also the

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1 related issues.

2 STAFF DIRECTOR MARCUS: If there
3 are no further questions on that, the last
4 thing I would like to say is that despite
5 staff attrition, we have been able to bring
6 some new people on. For instance, we're very
7 pleased that we were able to hire Ms. Kimberly
8 Tolhurst for the Office of General Counsel.
9 She has practiced anti-trust for several years
10 as an associate at the distinguished law firm
11 of Crowell & Moring in Washington, D.C. Most
12 recently she served as senior attorney for the
13 Battered Women's Justice Project. She's a
14 graduate from the University of Virginia and
15 William and Mary Law School. During law
16 school, she spent a summer as an intern here
17 at the Commission and we're delighted to have
18 her on board.

19 CHAIRPERSON REYNOLDS: Is she here,
20 present?

21 STAFF DIRECTOR MARCUS: Yes.

22 CHAIRPERSON REYNOLDS: Welcome
23 aboard.

24 STAFF DIRECTOR MARCUS: In
25 addition, we have three new legal interns who

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1 are helping us this summer. And they are much
2 needed. As you know, the Office of the
3 General Counsel is very understaffed which is
4 affecting the time table, not just for
5 briefing reports, but for the statutory
6 report. They are Maria Thompson, M. Suleiman
7 Khan from Michigan State University and Rabia
8 El-Hage from George Mason University. Are
9 they here at all?

10 CHAIRPERSON REYNOLDS: Okay, thanks
11 for helping out.

12 STAFF DIRECTOR MARCUS: If there
13 are no further questions --

14 COMMISSIONER KIRSANOW: I just
15 wanted to confirm, we're operating currently
16 in a continuing resolution at \$8.9 million,
17 budget at \$8.9 million?

18 STAFF DIRECTOR MARCUS: Yes,
19 Commissioner.

20 COMMISSIONER KIRSANOW: And you
21 indicated that there was going to be a closure
22 vote at some point in the future?

23 STAFF DIRECTOR MARCUS: We're
24 hopeful that it will be today.

25 COMMISSIONER KIRSANOW: Okay. Is

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1 there any prospect that our budget would be
2 anything greater than \$8.9 million at any
3 point in the near future?

4 STAFF DIRECTOR MARCUS: I suppose
5 that until they finalize the process it could
6 be either greater or lower, but we have no
7 reason to think that it will be anything
8 different than the figure that came out of the
9 House.

10 COMMISSIONER KIRSANOW: Okay.

11 CHAIRPERSON REYNOLDS: What was
12 that figure?

13 STAFF DIRECTOR MARCUS: I believe
14 it's \$8,933,000.

15 CHAIRPERSON REYNOLDS: Is that
16 through September 15th of this year?

17 STAFF DIRECTOR MARCUS: I believe
18 it's through the end of September.

19 CHAIRPERSON REYNOLDS: End of
20 September, I'm sorry, September 30th of this
21 year?

22 STAFF DIRECTOR MARCUS: Yes.

23 CHAIRPERSON REYNOLDS: Okay.
24 Anything else?

25 STAFF DIRECTOR MARCUS: That's it,

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1 thank you.

2 CHAIRPERSON REYNOLDS: Okay, if
3 there are no additional questions, so we will
4 move on to the Quality Information Guidelines
5 which is the next item on the agenda.

6 **V. Management and Operations**
7 **Quality Information Guidelines**

8 CHAIRPERSON REYNOLDS: In Section
9 15A of the Treasury and General Government
10 Appropriations Act for Fiscal Year 2001,
11 Congress required that federal agencies issue
12 guidelines ensuring and maximizing the
13 quality, objectivity, utility and integrity of
14 information, including statistical information
15 disseminated by the agency; and (b) establish
16 administrative mechanisms allowing effective
17 persons to seek and obtain correction of
18 information, maintained and disseminated by
19 the agency that do not comply with these
20 guidelines. These guidelines are based on
21 guidelines issued in 2002 by the Office of
22 Management and Budget.

23 According to these guidelines, the
24 agency should not disseminate substantive
25 information that does not meet a basic level

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1 of quality. The more important the
2 information, the higher the quality standards
3 to which it should be held.

4 The Quality Information Guidelines
5 for the Commission were previously published
6 in the Federal Register on July 24, 2006 and
7 received no comments during the notice and
8 comment period. These guidelines are
9 substantively the same.

10 I move that the Commission approve
11 the Quality Information Guidelines sent to the
12 Commissioners on December 6 and that the Staff
13 Director send these guidelines to the Federal
14 Register for publication.

15 May I have a second?

16 VICE CHAIRPERSON THERNSTROM:

17 Second.

18 CHAIRPERSON REYNOLDS: Discussion?

19 COMMISSIONER MELENDEZ: Yes,

20 Commissioner Melendez here. We had a
21 discussion on this on Wednesday with the group
22 for procedures on briefings and it's my
23 understanding that was not, the Director was
24 going to determine how the guidelines will
25 affect the briefing reform procedures and I

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1 think that was determined partially whether or
2 not we should vote on this today.

3 STAFF DIRECTOR MARCUS: Yes, thank
4 you, Commissioner. I have reviewed this
5 material again with that question in light and
6 also conferred with the General Counsel on
7 this point.

8 It is clear from the face of the
9 documents that these guidelines will apply, if
10 approved, to briefings as well as to other
11 documents. However, these guidelines will not
12 in any way alter certain of the questions
13 regarding briefing procedures that have been
14 raised previously. Specifically, questions
15 have arisen as to the applicability or
16 inapplicability of legal sufficiency review,
17 editorial review board or affected agency
18 review to briefing reports. And I know a
19 question was raised during the working group
20 meeting as to whether these guidelines would
21 alter in any way that applicability. And I
22 think that the answer is clearly no.

23 It is true that these guidelines do
24 discuss, particularly in Section 3, the
25 Commission's existing policies and procedures

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1 to ensure and maximize information quality.
2 And in the course of that discussion, there is
3 a summary of procedures included within AI 1-
4 6, which include the legal deficiency and
5 defame and degrade review as well as editorial
6 policy review and other reviews of the sort.

7 However, this section which
8 describes those procedures merely provides a
9 summary of the existing procedures and does
10 not purport to alter them in any way. So
11 whether the Commission approves or disapproves
12 this guideline should not affect the question
13 as to whether those protections in AI 1-6
14 apply to briefings.

15 COMMISSIONER MELENDEZ: Okay, one
16 other question. Is it true that until we pass
17 these guidelines, there is no process for
18 someone who wants a correction of information
19 the Commission has publicly disseminated?

20 STAFF DIRECTOR MARCUS: I don't
21 know that I would accept that. This policy
22 certain provides some very formal processes
23 including a formal avenue for complaints and a
24 formal process for appeals. Even with this
25 though people have the opportunity to write to

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1 us if they think any of the information is
2 inaccurate in any way and for us to review it,
3 although not through the same formal
4 mechanisms.

5 And there is an example of this
6 that I can give. And it's sort of an
7 unfortunate example and it deals with a person
8 who was mentioned by a witness during the
9 briefing on campus anti-Semitism. Now as the
10 Commissioners will recall, that briefing was
11 unusual in the number of institutions and
12 individuals who were discussed, some of whom
13 in a negative light. And for that reason, the
14 Agency engaged in an unusually substantial
15 defame and degrade review, contacting a couple
16 of dozen individuals and educational
17 institutions to provide them with an
18 opportunity to respond if they felt that they
19 had been defamed or degraded within the
20 meaning of the policy.

21 However, even though we engaged in
22 a very laborious process, more rigorous and
23 extensive than we have for other briefings, it
24 turned out that there was at least one person
25 who fell through the cracks, who was discussed

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1 in the course of a lengthy written statement
2 by one of the witnesses, who was mentioned in
3 a negative light, but for whom we had
4 inadvertently not sent a defame and degrade
5 letter. And that person wrote to us to
6 express concern that she felt that she had
7 been defamed. It was a difficult issue.

8 Initially, the response from the General
9 Counsel was that there were some things that
10 had been said by the witness to which this
11 complainant did not challenge. And since they
12 were not challenged or contested, we certainly
13 should not change them in way, but that there
14 was one small statement within it that she did
15 contest. And since there was some question
16 about it, we went back to the witness to see,
17 since it was his statement whether he would
18 have objection to deleting that portion of it
19 and he did not. So we took out, it was less
20 than a sentence, it was a few words.

21 We then received another letter
22 from the same person who said that she had
23 issued a public apology. The issue, I don't
24 know if this is too much length for an
25 explanation, she admitted that as a student

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1 she had disseminated materials by David Duke
2 addressing Israel or Jewish people, but she
3 contended she was not aware at the time who
4 David Duke was and there was a factual
5 disagreement about whether she'd apologized,
6 whether she still agreed with the content of
7 the material or not.

8 However, based on the second round
9 of information, and then we found that there
10 was, in fact, a formal, written apology that
11 she had written and not only that, but that
12 the entire incident had taken place several
13 years ago. It was older than most of the
14 other incidents that took place that were
15 discussed with the briefing. So we contacted
16 the author, the witness, and we mentioned this
17 issue, the fact that it was more outdated, the
18 fact that the witness had apologized and so on
19 and so forth and that there were potential
20 additional defame and degrade issues.

21 And he indicated that he did not
22 think that the entire sentence or less than
23 the sentence that remained was really that
24 significant and that he would agree just to
25 deleting it all together.

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1 So we have taken that as one
2 sentence from the statement of one of the
3 witnesses that we took out. That's something
4 that I think would fall within this policy and
5 we would now, if we pass this, have a
6 formalized policy, but we dealt with it
7 informally in that way.

8 COMMISSIONER BRACERAS: Just out of
9 curiosity, did that all take place after
10 publication?

11 STAFF DIRECTOR MARCUS: It did.

12 COMMISSIONER BRACERAS: So now the
13 hard copies are being retracted and
14 republished?

15 STAFF DIRECTOR MARCUS: Well, we
16 have done two things. On the website -- the
17 website is the way most people review our
18 reports, so we changed the website. And we
19 essentially finished the run of the
20 publication, but it's still in very high
21 demand, so we have to do a reprint and the
22 reprint --

23 COMMISSIONER BRACERAS: The reprint
24 will reflect the change.

25 STAFF DIRECTOR MARCUS: That's

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1 right, that's right.

2 COMMISSIONER YAKI: This matter had
3 been brought to my attention. I have
4 forwarded it to the Staff Director and I just
5 want to thank you, Ken, for your diligence and
6 to the staff for their diligence in pursuing
7 this issue.

8 STAFF DIRECTOR MARCUS: Certainly.
9 Thank you, Commissioner.

10 COMMISSIONER MELENDEZ: Ken,
11 Commissioner Melendez here. How does the
12 Inspector General's report -- did he comment
13 on this whole guideline issue?

14 STAFF DIRECTOR MARCUS: I have to
15 say offhand I don't recall whether he
16 commented on the guidelines. I certainly can
17 say he didn't criticize us for it. It's
18 possible that he noted the guidelines. He
19 might not have perhaps because we hadn't
20 passed it. In the event that we do pass the
21 guidelines, we will certainly forward them to
22 him in the event that he cares to make -- add
23 any mention to them in his report.

24 COMMISSIONER MELENDEZ: Okay, I
25 think he should receive a copy of this. Thank

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1 you.

2 STAFF DIRECTOR MARCUS: We'd be
3 pleased to forward him one.

4 CHAIRPERSON REYNOLDS: Okay, at
5 this moment, if there are no further comments
6 or questions, all in favor, please say aye.

7 (Chorus of ayes.)

8 CHAIRPERSON REYNOLDS: Any
9 objections? Any abstentions? The motion
10 passes unanimously.

11 I move that we keep the record of
12 No Child Left Behind and Supplemental
13 Education Services briefing open for 30 days
14 from the date of the briefing in order to
15 provide the public the time to submit
16 comments. Is there a second?

17 COMMISSIONER KIRSANOW: Second.

18 CHAIRPERSON REYNOLDS: Discussion?
19 All in favor, say aye.

20 (Chorus of ayes.)

21 Any objections? Any abstentions?
22 The motion passes unanimously.

23 Next up is Program Planning.

24 **VI. Program Planning**

25 CHAIRPERSON REYNOLDS: We will now

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1 consider the topic of program planning for
2 2009 in two stages; first, the adoption of the
3 National Conference on Civil Rights, and
4 second, the adoption of a statutory report and
5 three projects for briefings.

6 The draft strategic plan says that
7 the Commission will have as its goal to
8 support a national conversation on the current
9 civil rights issues that will identify civil
10 rights priorities for policymakers. The
11 Commission hopes to support a national
12 conversation on current civil rights issues by
13 convening a national conference in 2009 to
14 elicit varied multi-disciplinary and
15 bipartisan perspectives on civil rights in the
16 21st century.

17 The draft strategic plan also says
18 that the Commission will achieve this goal by
19 preparing a 50 State Report in which the
20 Commission's individual SACs identify civil
21 rights priorities facing their states and
22 regions. However, there still has not been a
23 formal vote on the strategic plan, therefore a
24 motion is proposed to conduct a national
25 conference in 2009 on civil rights issues in

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1 the 21st century. Under this motion, the
2 Commission will seek to draw at least 100
3 participants made up of scholars,
4 practitioners, policymakers and other
5 specialists to elicit varied and bipartisan
6 perspectives on civil rights issues in the
7 21st century.

8 Participants would address
9 perspectives on civil rights in the 21st
10 century, including both broad themes and
11 discrete topics. This conference will result
12 in a report of findings entitled "Civil Rights
13 Priorities for the 21st Century." This report
14 will also identify issues and research topics
15 to round out the Commission's programmatic
16 planning for 2010 through 2012, lay the
17 foundation for updating the Commission's
18 strategic plan in 2011 and identify any areas
19 where the Commission's powers and mission need
20 to be expanded to respond to emerging
21 challenges.

22 Is there a second?

23 VICE CHAIRPERSON THERNSTROM:

24 Second.

25 CHAIRPERSON REYNOLDS: Discussion?

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1 COMMISSIONER MELENDEZ: Yes.
2 Commissioner Melendez here. The national
3 meeting we're going to have in 2009, two
4 questions. Since we're talking about budget
5 constraints, I think at some point we need to
6 know whether we can anticipate the cost would
7 be and then the other question is how does
8 this play into this? Is it just some written
9 testimony that they send in and we incorporate
10 it into something?

11 CHAIRPERSON REYNOLDS: I think your
12 first question is a very good one. With the
13 discussion that we had earlier in the meeting
14 about budget constraints, we need to have a
15 conversation about whether this is feasible
16 and to that end, I turn to the Staff Director.

17 STAFF DIRECTOR MARCUS: This
18 conference is a central part of the strategic
19 plan as currently written and as preliminarily
20 approved. It is suggested for the year 2009
21 which is the year for which we are now doing
22 program planning, in the event that it is
23 approved now, the next step will be to conduct
24 a budget call during which the staff will try
25 to assess the costs and it would be presumably

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1 included in the proposed budget estimate that
2 we would submit first for a Commission vote,
3 hopefully in the summer time, and then send
4 off to OMB in the fall.

5 We haven't yet assessed exactly how
6 much it is, but however much it seems like it
7 will cost that would then go in the budget
8 estimate and we'll see whether Congress and
9 the President are willing to fund it. It may
10 well require us to seek more money for 2009
11 than we're seeking for 2008.

12 COMMISSIONER MELENDEZ: Just
13 another comment. Commissioner Melendez here.

14 One of my concerns is the number of
15 actual potential briefings because I know that
16 it sounds to me like we're only going to do
17 three and I think that Commissioner Yaki, I
18 think, he had a priority that I believe was
19 worth -- and I had one also on disparate
20 treatment of Native Americans, having to do
21 with -- it's almost like lawlessness on Indian
22 Reservations and that it basically missed the
23 cutoff, but I think we'd like to see those
24 included so that we have at least either four
25 reports or five instead of three and if it was

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1 up to me, because of the national meeting that
2 we can't have four or five reports for the
3 year, then I would have a concern in not
4 supporting the national meeting at the expense
5 of less briefings.

6 CHAIRPERSON REYNOLDS: Ken, is it
7 true we're talking about three briefings for
8 '09?

9 STAFF DIRECTOR MARCUS: This is
10 true. We proposed, before people voted, we
11 indicated that we thought that if we were
12 doing both a statutory report and a conference
13 and then a report coming out of the
14 conference, as well as the 50 States SAC
15 report that feeds into the conference report,
16 that we would be hard pressed to do three
17 reports. That's an estimation, but that's
18 what we felt we would be able to responsibly
19 do.

20 CHAIRPERSON REYNOLDS: Commissioner
21 Braceras?

22 COMMISSIONER BRACERAS: Yes, just
23 to respond to Commissioner Melendez' concerns,
24 first, I would suggest that the rankings that
25 we came up with, it's always been my

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1 understanding that those are presumptions and
2 it's a vehicle for opening discussion, but
3 it's by no means binding, right? Those
4 rankings we came up with?

5 CHAIRPERSON REYNOLDS: Well, I mean
6 we can vote on them now and accept them and
7 decide to change later or we can amend what we
8 have now.

9 COMMISSIONER BRACERAS: Right, but
10 I mean my understanding was that we submit our
11 choices and if the Staff Director's Office
12 ranks them and that that document is then a
13 vehicle for discussion, it's not cut and dry.

14 CHAIRPERSON REYNOLDS: It's not
15 done.

16 COMMISSIONER BRACERAS: Right.

17 STAFF DIRECTOR MARCUS: That's
18 correct.

19 COMMISSIONER BRACERAS: So that's
20 the first thing. The second thing is to the
21 extent that the topics that Commissioner Yaki
22 or Commissioner Melendez are concerned with,
23 to the extent that those topics might fit into
24 the national conference, it's possible that
25 they could be addressed there, is it not?

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1 CHAIRPERSON REYNOLDS: Would that
2 be acceptable Commissioner Melendez?

3 COMMISSIONER MELENDEZ: I think
4 it's a broad issue. It depends on how -- I
5 know there's going to be a number of
6 discussions. When you bring a broad, national
7 meeting, I'm sure it's going to be just a
8 million things that people are going to put
9 forth and I am still concerned about what are
10 we going to basically get out of that besides
11 a number of points of views on civil rights.

12 COMMISSIONER BRACERAS: Right, and
13 that's been the concern all along that I had,
14 but I think the idea of the conference is for
15 the Commission to be able to glean from the
16 conference sort of broad policy objectives for
17 the future, not to have a million little
18 discussions on a million little topics and I
19 know the conference was originally the
20 brainchild of Commissioner Kirsanow and I'm
21 sure he'll be working with the Staff Director
22 to kind of hone and narrow the scope of the
23 conference, but I think the idea, if I
24 understand it, was to bring together scholars
25 and practitioners and people from different

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1 areas and have several panels and have the
2 panels be focused panels and for the
3 Commission to be able to issue a report
4 afterwards about key issues for policymakers
5 to address going forward, that it wouldn't be
6 -- in other words, it wouldn't be a conference
7 for people to bring forth a million
8 grievances. It would be broad discussions of
9 emerging issues and trends.

10 CHAIRPERSON REYNOLDS: Question,
11 Commission Thernstrom?

12 VICE CHAIRPERSON THERNSTROM: Well,
13 I'm also concerned about having only three
14 briefings and well, two things. One, a
15 question for the Staff Director, is this -- is
16 the reduction down to three briefings a
17 budgetary matter or is it a staff capability
18 matter or a combination of both?

19 But the other thing is really a
20 question for Commissioner Kirsanow. I wonder
21 if since the purpose of the conference of this
22 kind of umbrella conference is to identify key
23 issues, I wonder if that process couldn't come
24 out of more briefings if they were properly
25 structured with that in mind because this

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1 looks to me like a very expensive undertaking.

2 COMMISSIONER BRACERAS: But it is
3 part of our strategic plan now.

4 VICE CHAIRPERSON THERNSTROM: It
5 is.

6 COMMISSIONER BRACERAS: And we've
7 had conversations about it for at least a
8 year. It's something we've agreed to do and I
9 think we -- you know, we need to think about
10 how we're going to focus it and how we're
11 going to cabin the discussions that take
12 place, but I don't think that we can reopen
13 the discussion on whether or not to have it at
14 this point.

15 COMMISSIONER KIRSANOW: If I could
16 respond to the Vice Chair's point. I don't
17 think it could be done through multiple
18 conferences. I think the idea of this is to -
19 - we've been in existence for 50 years and
20 many of the topics that we've addressed have
21 been exhausted. A lot of people have
22 questioned whether or not we have continuing
23 relevancy.

24 VICE CHAIRPERSON THERNSTROM:
25 Right.

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1 COMMISSIONER KIRSANOW: Many of us
2 here have wondered whether we have continuing
3 relevancy and it's to try to determine what
4 are the civil rights issues possibly for the
5 next 50 years and it's more over-arching than
6 simply including some additional briefings.

7 Now I do think that it's a major
8 undertaking and I'm concerned that we're going
9 to have a flat-line budget for the foreseeable
10 future which means at some point we kind of
11 flicker out of existence. There's going to
12 become a point where we start to cannibalize
13 our resources and we're simply paying staff
14 salaries and we're not going to be able to
15 produce anything. That's a very real prospect
16 and I think it's something that we're going to
17 have to keep in mind as we go forward. It
18 could very well be the case that by 2009 we
19 don't have the capability to do this.

20 It could very well be by 2009 we
21 may have the capability to do something
22 similar to this, but not as ambitious a scale
23 and I think it's a work in progress. I think
24 it's something we're going to have to monitor
25 as time moves forward and we may have to make

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1 adjustments accordingly. And it could very
2 well be that we're not able to put on this
3 conference, and frankly, we may not even have
4 the capability to do more than three briefings
5 anyway. At \$8.9 million and for anything
6 similar to that over the next couple of years,
7 given the -- factoring in cost-of-living
8 increases and just general inflation, I think
9 that it's going to be a stretch for us to do
10 any more briefings, let alone have this
11 conference.

12 VICE CHAIRPERSON THERNSTROM: I
13 would emphasize, Commissioner Melendez, that
14 the rank ordering is tentative. It's not only
15 that we can discuss them today, but we can
16 discuss with the Commission and we can discuss
17 them in the future.

18 COMMISSIONER MELENDEZ: Is there
19 any way to include five for right now and then
20 as we get closer to end of 2008 or next year
21 as we see how the budgets actually come out
22 and we gain a cost for this national meeting
23 that we can leave five on and then basically
24 adjustments in the future?

25 COMMISSIONER: KIRSANOW:

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1 Commissioner, we're going to be making
2 adjustments throughout. That's been our
3 practice. We take a look at things, time
4 changes, sometimes projected briefings become
5 obsolete with the passage of time, just as our
6 wiretapping briefing may have to be amended.
7 So I don't think that as Commissioner Braceras
8 indicated that any vote that we take today is
9 written in stone and the rankings that we had,
10 we need to vote on and I would be receptive to
11 considering -- I know I had ranked very highly
12 several of the topics that I think you
13 suggested and I would be very receptive to
14 revisiting that.

15 COMMISSIONER YAKI: I have a
16 question. Couple of things. One, have we
17 voted on the final draft of the strategic plan
18 yet?

19 STAFF DIRECTOR MARCUS: We voted --
20 there was a vote to preliminarily accept it
21 subject to further review by OMB which has
22 occurred and by Congress which has not yet
23 occurred. So there will be an additional
24 final vote on acceptance of the strategic plan
25 in the future.

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1 COMMISSIONER YAKI: Let me just say
2 that first of all, with all due respect to
3 some of the previous speakers, the idea of a
4 national conversation is I hope advanced by
5 some of the Members of the Commission, so I
6 hope this will be a joint project. The entire
7 Commission, I know that I mention it in one
8 version. Commissioner Taylor has mentioned
9 it. It was mentioned by Commissioner
10 Kirsanow. So I am interested in having this
11 national conversation on to an agenda, I
12 support it.

13 I think that we have our agenda for
14 '09, given that we're still in '07. We don't
15 know what our budgetary capabilities will be
16 in '09. We don't know if any of us, how many
17 of us are going to be around in '09, depending
18 on when our appointments are up. And I would
19 simply say that we do what we've always done
20 which is we approve a list slightly larger
21 than that what we believe we might have
22 available. There have been times when we have
23 to mix and match, but otherwise -- or because
24 of priorities or changes in preference. We
25 have moved stuff around.

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1 So I would say that the best of all
2 worlds would be to say that we approve three
3 and two alternates and move forward.

4 COMMISSIONER MELENDEZ: I have
5 another question.

6 CHAIRPERSON REYNOLDS: Commissioner
7 Braceras was next up.

8 COMMISSIONER BRACERAS: Sorry, let
9 me just see if this might help or answer some
10 of your questions.

11 A few months ago when we were
12 setting the calendar for this coming year and
13 sort of moving things around and ironing out
14 what this calendar year would look like, we
15 basically came to an agreement that there were
16 certain months, including March where we would
17 let the minority Commissioners decide what
18 would be plugged in to that slot, the
19 Commissioners in the political minority.

20 And so and Commissioner Yaki and
21 Commissioner Melendez got together and chose
22 the wiretapping topic. I would be perfectly
23 happy to have a process where we decided on a
24 number of briefings, whether it be three or
25 five and allotted certain slots, certain

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1 number of those briefings to be selected by
2 those in the political minority so that that
3 way everybody gets to -- both sides of the
4 aisle, as it were, will have a chance to have
5 topics of their choosing addressed by the
6 Commission.

7 It wouldn't necessarily be an even
8 split. If we have an odd number of briefings,
9 I would recommend that those in the political
10 majority select the majority of briefings, but
11 if we did it three and two, for example, had
12 five briefings, three and two, I would be
13 perfectly happy just to say okay, Arlan and
14 Michael, you select these two topics amongst
15 yourselves and move forward.

16 CHAIRPERSON REYNOLDS: I am with
17 you part of the way. The topics that the
18 majority established, those topics are
19 negotiated. The minority makes friendly
20 amendments or asks for various changes. So I
21 am comfortable with the idea of ensuring that
22 the minority has an opportunity to select a
23 topic, but I think that it should be subject
24 to the usual give and take amongst all
25 Commissioners as opposed to just allowing the

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1 minority to establish the full --

2 COMMISSIONER BRACERAS: Yes, that's
3 fine. Ever since I was appointed to this
4 Commission, I've had a concern for the rights
5 of the political minority here and since I
6 really feel that the value added of the Civil
7 Rights Commission is to expand demand and to
8 inform the public on various topics, you know,
9 I think that the perspective of those in the
10 political minority is valuable. So let them
11 have topics that are important to them.

12 I think the problem with the
13 ranking system is sometimes we end up with a
14 list of topics that are -- we end up with a
15 list of topics that are palatable to the
16 majority, but it's not necessarily a balanced
17 set of topics, both in terms of politics and
18 in terms of substance. So, for example, we
19 may end up doing a lot on race and education
20 and very little on employment and gender or
21 whatever. Those are just examples.

22 But it doesn't always end up
23 creating the most balanced set of issues for
24 us to address.

25 CHAIRPERSON REYNOLDS: Commissioner

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1 Thernstrom?

2 VICE CHAIRPERSON THERNSTROM: I am
3 actually in agreement with Jennifer Braceras
4 here, which is really a recommendation for, as
5 it were, set aside for the political minority.

6 (Laughter.)

7 I mean there is a real partisan
8 imbalance on this Commission at this point and
9 I am concerned that both Arlan and Michael
10 feel as if we've got briefings scheduled that
11 they really are very eager to have and will
12 have a lot of input into the shaping of.

13 I also think, just to go back to a
14 previous topic, that given the uncertainty,
15 the budgetary uncertainty, even the
16 composition of the Commission uncertainty,
17 that it would be good in addition to hoping
18 for let's call it the Kirsanow conference,
19 that it would be good in our briefing reports,
20 in our findings and recommendations in the
21 future, to make some effort to include some
22 sentences about the relevance of this topic
23 and the relevance of our findings to kind of
24 the broader civil rights agenda as we go
25 forward, in a kind a preliminary way we begin

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1 to talk about that long range vision that
2 Commissioner Kirsanow has in mind as the point
3 of the larger conference.

4 So anyway, I'm on board with -- the
5 most important point here, I am on board with
6 Jennifer Braceras on that and I do feel very
7 keenly having been in the political minority
8 for probably longer than anybody else at this
9 table, that we don't want to freeze people out
10 in any -- partially, or in any respect.

11 COMMISSIONER KIRSANOW: Well, I
12 feel very strongly. Commissioner Braceras and
13 I have kind of Stockholm syndrome here.
14 Extraordinary sympathetic to having
15 Commissioners Melendez and Yaki have a topic
16 although generally opposed to minority set
17 asides. I think this is not was -- it is a
18 political set aside. It's a political
19 minority set aside.

20 I think the idea is and I wouldn't
21 be opposed to having maybe four potential
22 briefing topics. The point is throughout our
23 history, we have had the practice of having
24 six briefings set aside or in a hearing and
25 then as time passes, we amend them.

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1 And I suspect that's going to
2 happen in this particular case too. I also
3 think it's important and I'll try to
4 articulate this as well as I can, that I and I
5 think this also applies, although I haven't
6 substantiated it with Chairman Reynolds and
7 Commissioner Taylor, but I showered this
8 morning.

9 And if we could get that off to
10 Senator Biden, I'd appreciate that.

11 (Laughter.)

12 CHAIRPERSON REYNOLDS: Now, I want
13 to make sure that the record reflects that
14 Jennifer's proposal is -- at least the way I
15 view it is formalizing what we already do. I
16 don't want to give the impression that we have
17 frozen the minority out.

18 COMMISSIONER BRACERAS: No, no, no.
19 And I think that's exactly what we did,
20 especially a few months ago, when we were
21 formalizing the calendar for 2007. Just to
22 comment on the chair's concern that he raised
23 earlier is that obviously we would strive to
24 have all panels be balanced and to have
25 Commissioner input into the speakers that are

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1 invited on all panels. It doesn't mean okay,
2 two panels are going to be Yaki-Melendez
3 panels and that means that the Vice Chair has
4 no input into who comes to speak. No.

5 I'm simply saying in terms of the
6 topics we select, we allow those of the
7 political minority to pick topics that are of
8 interest or concern to them and then as with
9 all other briefings, we will continue to
10 strive for balance and objectivity and let all
11 Commissioners have input into the shape of the
12 panel.

13 CHAIRPERSON REYNOLDS: I am not
14 quite sure if we are agreeing on the last
15 three percent of your proposal. The way I
16 view it that we would all have an opportunity
17 to have input into all the topics regardless
18 of whether the proposal is supported by the
19 minority or the majority. Now that I can
20 support. But the idea that we would have a
21 carve-out where certain Commissioners would
22 not have any input -- I'm not talking about
23 the selection of the topic, but the details.

24 COMMISSIONER BRACERAS: I didn't
25 say that we --

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1 CHAIRPERSON REYNOLDS: That's what
2 I was unclear of.

3 COMMISSIONER BRACERAS: Yes. No,
4 no, no. There's no carve-out where people
5 don't have any input.

6 CHAIRPERSON REYNOLDS: Okay. I'm
7 with you now.

8 COMMISSIONER BRACERAS: I'm simply
9 saying that with respect to the choice of
10 topics --

11 CHAIRPERSON REYNOLDS: I've got
12 you.

13 COMMISSIONER BRACERAS: I'm willing
14 to say to the Democratic-appointed
15 Commissioners what are the topics of interest
16 to you and let's run with it. Discuss it
17 amongst yourselves.

18 COMMISSIONER TAYLOR: I hate to
19 speak, given the spirit of cooperation of I
20 feel.

21 COMMISSIONER BRACERAS: Are you
22 feeling the love?

23 COMMISSIONER TAYLOR: I am and
24 that's why I hate to speak because I don't
25 think I suffer from Stockholm that you all

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1 may suffer from.

2 (Laughter.)

3 COMMISSIONER TAYLOR: My sense is
4 that the process we have in place which in
5 many ways I think a set aside, even in this
6 context, truncates a policy that works and
7 what I see, Commissioner Melendez I'm thinking
8 specifically of what is now number four in the
9 disparate treatment of Native American victims
10 as the type of topic I was going to support,
11 what Commissioner Kirsanow said. That is, you
12 would have my support to move that up.

13 And in my view, the process the
14 working, given the composition of the
15 Commission and the good faith in which we're
16 all operating in in that it requires me, while
17 I may be in the political majority, to think
18 through what I put on the table that will
19 garner your support and Commissioner Yaki's
20 support and I think similarly, you all,
21 Commissioner Yaki, Commissioner Melendez, are
22 thinking through the proposals you all put on
23 the table in an effort to garner the support
24 of the political majority.

25 And I think that process is

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1 working, so I would hate to do anything.

2 CHAIRPERSON REYNOLDS: Well, how
3 about this, Commissioner Taylor? It's working
4 now with the current configuration of the
5 Commission. The value I see of Jennifer's
6 proposal is that we have what amounts to a
7 rule in place so that when the composition of
8 the Commission changes --

9 COMMISSIONER BRACERAS: Can I -- it
10 may be that we don't need a rule right now and
11 that's fine, although I like rules because
12 they're a little more lasting, but they too
13 can be changed in the future.

14 All I'm simply suggesting is that
15 for purposes of our planning today, we don't
16 necessarily need to adopt a rule. We decide
17 how many briefings we're going to have and we
18 compromise by allowing Commissioners Melendez
19 and Yaki to select two out of the five or one
20 out of the three, whatever the number is.

21 It doesn't have to be a formal
22 rule.

23 CHAIRPERSON REYNOLDS: I move that
24 we increase the number of briefings from three
25 to five, that the two briefings identified by

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1 Commissioner Melendez be added in the fourth
2 and fifth slot with the understanding that --

3 COMMISSIONER BRACERAS: We haven't
4 selected one for three. We have a presumptive
5 ranking, but I want to discuss that too.

6 CHAIRPERSON REYNOLDS: Right. At a
7 minimum, I move that we add slots four and
8 five and that those slots be filled by the
9 recommendations of the minority.

10 VICE CHAIRPERSON THERNSTROM: There
11 is a little bit of a puzzle here, Commissioner
12 Melendez, in that I know I and a few others
13 did vote for either educational discrimination
14 against Native Americans or disparate
15 treatment of Native American victims. I don't
16 know -- obviously, I think I did the education
17 and nobody else or nobody else joined in on
18 that.

19 But I am certainly open to -- I
20 know how strongly you feel about the
21 importance of a topic on discrimination
22 against Native Americans and I'm certainly
23 very open to discussing moving that up.

24 COMMISSIONER MELENDEZ: I think,
25 just a comment. When you look at the process

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1 that we've had in place, when you look at
2 voting on 20 items and then you recognize one
3 of the items you voted on only got two votes,
4 well you're asking the question if there's a
5 revote and you saw how the ranking is done, I
6 could revote on the top seven. Then you would
7 change your vote. So that's kind of -- that's
8 the issue that we face.

9 COMMISSIONER BRACERAS: These
10 aren't binding choices. We're going to have a
11 discussion now about them and all I've done is
12 indicate a willingness and Ashley has
13 indicated a willingness and I think others at
14 this table have too to listen to your concerns
15 and move your choices up. This list is just
16 for purposes of discussion.

17 COMMISSIONER MELENDEZ: I was only
18 -- what Abigail was saying about she had
19 thought that maybe that was an important issue
20 on Native Americans and she has no idea that I
21 was looking at another Native American issue,
22 but if she hadn't known that after she sees
23 the ranking now, if she would revote, she
24 would probably taken into consideration what I
25 was thinking along those lines --

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1 COMMISSIONER BRACERAS: That's why
2 we're having this discussion now.

3 COMMISSIONER MELENDEZ: -- clearly
4 when we first vote.

5 CHAIRPERSON REYNOLDS: Okay, folks,
6 let's circle back and see what we would were
7 actually considering. I believe I moved to
8 have the conference on civil rights priorities
9 in the 21st century.

10 COMMISSIONER TAYLOR: Let me speak
11 to that issue, if I may? I think and this
12 goes back to the Staff Director's comment
13 about us actually planning ahead such that we
14 can go back to Congress, specifically the
15 appropriators, and say to them this is the
16 type of conference that we should be doing and
17 this the type of conference that I think would
18 be appropriate to go back and ask for a
19 supplementation of our budget.

20 So I support it for that reason. I
21 think it's forward looking. It's emerging
22 issues and I think it's something that both
23 parties, particularly both political parties
24 involved in the appropriation process should
25 support in terms of enhancing, if necessary,

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1 our budget.

2 CHAIRPERSON REYNOLDS: Okay, at
3 this point, are we ready to vote? Are there
4 additional comments or questions?

5 VICE CHAIRPERSON THERNSTROM: Wait
6 a minute, what's the vote?

7 COMMISSIONER BRACERAS: Voting on
8 the chair's motion regarding the 2009
9 conference.

10 VICE CHAIRPERSON THERNSTROM: Okay.

11 CHAIRPERSON REYNOLDS: All in
12 favor?

13 (Chorus of ayes.)

14 CHAIRPERSON REYNOLDS: Any
15 abstentions, any objections? The motion
16 passes unanimously.

17 As a part of this project we would
18 authorize the Staff Director to solicit input
19 from SAC members on the topics.

20 May I have a motion to authorize
21 the Staff Director to request the assistance
22 of SACs in identifying civil rights priorities
23 in their respective states? Under this
24 motion, the Staff Director would be authorized
25 to incorporate information obtained from the

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1 SACs into the Commission's 2009 report
2 entitled "Civil Rights Priorities for the 21st
3 Century."

4 COMMISSIONER YAKI: Question.

5 CHAIRPERSON REYNOLDS: Yes.

6 COMMISSIONER YAKI: Who has final
7 say over that? Would it be us?

8 CHAIRPERSON REYNOLDS: Over?

9 COMMISSIONER YAKI: In other words,
10 if we get suggestions from the SAC, do we
11 necessarily have to incorporate them or can we
12 say no?

13 CHAIRPERSON REYNOLDS: We can say
14 no.

15 COMMISSIONER YAKI: Okay.

16 STAFF DIRECTOR MARCUS: May I
17 address the tentative proposal just to make
18 sure we understand this?

19 CHAIRPERSON REYNOLDS: Sure.

20 STAFF DIRECTOR MARCUS: The notion
21 for authorization to get input is part of the
22 50 state report. What I would envision is
23 that I would ask some questions in the same
24 way and in the same format of all committee
25 members in each state in order to get a sense

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1 of what each chartered State Advisory
2 Committee considers to be the top civil rights
3 issues in their state. And so we'll come up
4 with a template so that we can ask them what
5 do you consider to be the top civil rights
6 issues within the State of Kentucky or
7 Tennessee or what have you? And I hope
8 through that to be able to get sort of a
9 tabulation of what are considered to be the
10 top issues within each committee and then that
11 would be compiled into a document, the 50
12 State Report, which would, in turn, be part of
13 the final document that comes out of the
14 conference.

15 Now as to what extent the answers
16 that we get from them about what they consider
17 to be the important issues in their state, to
18 what extent that affects what goes on in the
19 conference, of course, that's entirely up to
20 the Commissioners for their consideration.

21 At any rate, that is how I envision
22 it.

23 COMMISSIONER BRACERAS: I had
24 almost envisioned that they would be, in some
25 sense, two separate things, that the

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1 conference would be more paradigmatic in terms
2 of discussing broad themes and paradigms for
3 conceptualizing what is a civil rights issue
4 in our country. Is it something that's
5 limited, for example, to disparate treatment
6 or is it something that is properly considered
7 a civil rights issue if it's a broad social
8 trend. These are issues we've discussed even
9 just last time when we discussed the issue of
10 education and whether or not it's a civil
11 rights issue and does it fall within our
12 mandate because either of charges of
13 discrimination or not. So I thought
14 my view was that it would be a more thematic
15 discussion.

16 CHAIRPERSON REYNOLDS: Well, but we
17 would also have the opportunity if there was
18 something, some information provided by one of
19 the SACs that we could incorporate it into the
20 other piece, if we decided that it supported
21 what we were trying to do.

22 COMMISSIONER BRACERAS: Yes, we can
23 iron all this out at another time.

24 CHAIRPERSON REYNOLDS: Yes. So
25 Commissioner Yaki, does that satisfy you?

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1 COMMISSIONER YAKI: Yes, fine.

2 (Laughter.)

3 CHAIRPERSON REYNOLDS: Michael, did
4 you take a nap on us?

5 COMMISSIONER YAKI: No, actually, I
6 had the mute on and I couldn't figure out how
7 to get it unmuted.

8 CHAIRPERSON REYNOLDS: Okay. All
9 right, somebody tell me where are we?

10 COMMISSIONER YAKI: I took a nap
11 about five minutes ago.

12 (Laughter.)

13 COMMISSIONER BRACERAS: So now
14 we're going to discuss the briefings.

15 CHAIRPERSON REYNOLDS: Yes

16 COMMISSIONER KIRSANOW: We had a
17 motion on the table.

18 COMMISSIONER BRACERAS: We voted,
19 didn't we?

20 COMMISSIONER TAYLOR: No, we had
21 questions and commentary.

22 CHAIRPERSON REYNOLDS: All in
23 favor, please say aye.

24 (Chorus of ayes.)

25 CHAIRPERSON REYNOLDS: Any

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1 objections? Any abstentions? The motion
2 carries unanimously.

3 Okay, on December 15th, the Staff
4 Director shared with Commissioners potential
5 2009 project topics and asked for additional
6 suggestions in order to get a head start on
7 program planning for that year. The projects
8 were based on staff and SAC member
9 suggestions. All concepts that received some
10 Commissioner support during 2008, but which
11 were not ultimately selected were also
12 included on this list.

13 Commissioners did not submit any
14 additional suggestions, so a final list was
15 recirculated on January 17th to determine
16 Commissioner preferences. The Staff Director
17 asked Commissioners to follow a procedure
18 similar to the one followed for May 2005 and
19 May 2006 planning meetings in selecting
20 potential projects. Specifically, the process
21 asks Commissioners to rank potential projects
22 in order to streamline the process of
23 developing a slate of potential candidates
24 bearing in mind that in 2009 on the
25 preliminary-approved strategic plan, the

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1 Agency would be putting much of its resources
2 into the 2009 project, "Civil Rights
3 Priorities for the 21st Century."

4 Given that this would require us to
5 produce both a statutory report and a
6 substantial clearinghouse report, we should
7 not plan to do more than three briefings and
8 briefing reports during 2009. All
9 Commissioners submitted rankings by February
10 7th. The Office Staff Director tabulated the
11 results of this ranking and they are as
12 follows: the Fair Housing Initiative to
13 combat housing discrimination received 25
14 points; civil rights enforcement at the
15 Department of Homeland Security received 18
16 points; civil rights enforcement at the
17 Department of Health and Human Services
18 received 4 points.

19 I'd like to stop right here and
20 have a discussion about the rankings of these
21 statutory --

22 VICE CHAIRPERSON THERNSTROM: Wait,
23 I don't understand those rankings. Four
24 points only on Department of Health and Human
25 Services?

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1 CHAIRPERSON REYNOLDS: That's
2 correct.

3 VICE CHAIRPERSON THERNSTROM: How
4 did it end up in the top three?

5 COMMISSIONER BRACERAS: No, no.

6 VICE CHAIRPERSON THERNSTROM: I'm
7 sorry, you said statutory reports, of course.
8 I'm sorry, I'm not thinking. I'm asleep on my
9 feet today.

10 CHAIRPERSON REYNOLDS: Is there --
11 well, desire for discussion?

12 Are we satisfied with the rankings?

13 Okay, I will move on. The potential
14 briefings for 2009 are as follows: school
15 choice as a civil right received 23 points;
16 racial disparities in health care access and
17 outcome received 22 points; misuse of
18 disparate impact theory received 14 points;
19 disparate treatment of Native American victims
20 and criminal investigation and prosecution
21 received 9 points; application of state and
22 local marriage and family law to gay and
23 lesbian Americans received 9 points; single
24 sex education received 6 points; protecting
25 the civil rights of our country's aging

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1 population received 4 points; federal efforts
2 to combat human trafficking received 4 points;
3 and assessment of language accessible services
4 received 2 points; education value of
5 diversity in undergraduate education received
6 2 points; education discrimination against
7 Native Americans' education received 2 points;
8 consumer discrimination against Native
9 Americans received 1 point; and finally,
10 minority home ownership received 1 point.

11 So okay, I move that the statutory
12 report for 2009 based on the fact that there
13 were 25 points in support of it, I move that
14 Fair Housing Initiative to combat housing
15 discrimination be the statutory report for
16 2009. Is there a second?

17 COMMISSIONER KIRSANOW: Second.

18 CHAIRPERSON REYNOLDS: Discussion?

19 All in favor?

20 (Chorus of ayes.)

21 Any objections? Any abstentions?

22 The motion carries unanimously.

23 Okay, next I'd like to have a
24 discussion about the top three vote getters
25 for briefings which are school choice as a

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1 civil right; racial disparities in health
2 care, access and outcomes; and the misuse of
3 disparate impact theory, recognizing that our
4 previous discussion about adding to other
5 briefings.

6 Commissioner Braceras?

7 COMMISSIONER BRACERAS: I just want
8 to ask a question about number three, the use
9 of disparate impact theory, because it seems
10 to me that that is the type of broader topic
11 that we would discuss at the conference and
12 you know, it's a topic that's close to my
13 heart. I've written a Law Review article on
14 it. But it doesn't seem to me to fit with
15 these other briefing topics because it's more
16 of a theoretical discussion than some of these
17 other more substantive discussions.

18 Also, I would note that we did do a
19 briefing on disparity studies which is not
20 exactly the same, but is related to this topic
21 and so as much as I am interested in this area
22 of the law, I did not support it as one of my
23 top choices for the reasons I just stated. So
24 I don't know if anybody else has any thoughts
25 on that.

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1 CHAIRPERSON REYNOLDS: How about
2 you Commissioner Thernstrom

3 VICE CHAIRPERSON THERNSTROM: Well,
4 first place I would like the title changed to
5 "Use of Disparate Impact Theory" rather than
6 "misuse."

7 I agree with Commissioner Braceras.
8 Unless we really state it in a focused way, I
9 mean I don't want some kind of general
10 theoretical discussion of disparate impact,
11 but if it was stated as the use of disparate
12 impact theory and then we -- I can't remember
13 the description now, but --

14 COMMISSIONER BRACERAS: I also feel
15 that -- I guess it depends on what we think
16 the goal of briefings, what the goal is of
17 having these briefings. They're sort of
18 vehicles to engage the public and to engage
19 the media in thinking about civil rights
20 issues. Disparate impact theory isn't exactly
21 something that the average man on the street
22 is going to get fired up about. It's a little
23 technical.

24 It might be -- if we're using these
25 briefings to sort of shine a spotlight on key

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1 topics, it's not the sexiest topic outside of
2 the legal community. And although it
3 certainly is extremely important, I do think
4 it's more of a thematic, philosophical
5 discussion that could be wrapped into our
6 conference. That's all.

7 COMMISSIONER KIRSANOW: I agree
8 with Commissioner Braceras. In addition, I
9 would note that we've got pending either
10 before the Supreme Court now or coming up the
11 pipeline a number of cases that could render
12 this, if not completely moot, substantially
13 circumscribed its importance.

14 VICE CHAIRPERSON THERNSTROM: Well,
15 we have also got specific topics here like
16 disparate treatment of Native American victims
17 and criminal investigation that can raise the
18 larger issue of how you think about
19 disparities.

20 CHAIRPERSON REYNOLDS: Okay, I
21 sense a consensus developing.

22 COMMISSIONER YAKI: Really?

23 COMMISSIONER TAYLOR: You all can't
24 interpret this as yet? May I make a --

25 CHAIRPERSON REYNOLDS: Well, I was

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1 about to ask for someone to articulate what
2 that consensus is.

3 COMMISSIONER TAYLOR: In light of
4 this discussion and our earlier discussion, I
5 would suggest that we take disparate treatment
6 of Native American victims and criminal
7 investigation and prosecution and move that to
8 number three.

9 CHAIRPERSON REYNOLDS: Michael
10 would you like to disagree?

11 COMMISSIONER YAKI: Nope.

12 VICE CHAIRPERSON THERNSTROM: Do
13 you have your mute button on?

14 COMMISSIONER BRACERAS: Arlan, is
15 that the one he wanted.

16 COMMISSIONER MELENDEZ: That's
17 fine, thank you.

18 COMMISSIONER YAKI: 2009 is a long
19 way away.

20 VICE CHAIRPERSON THERNSTROM: We
21 all agree.

22 COMMISSIONER BRACERAS: Yes, it's a
23 long way away.

24 VICE CHAIRPERSON THERNSTROM: This
25 is an exercise that has a --

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1 COMMISSIONER YAKI: The revolution
2 may yet occur.

3 COMMISSIONER BRACERAS: Dream on.
4 (Laughter.)

5 VICE CHAIRPERSON THERNSTROM: It is
6 a shame you missed the look on Jennifer
7 Braceras' face just now.

8 CHAIRPERSON REYNOLDS: Okay, so
9 what we've established, we have one of the
10 three selected. Additional conversation about
11 the other two items?

12 COMMISSIONER BRACERAS: Yes, I
13 think we should sort of throw open discussion
14 of all of these topics and I'll just make a
15 few comments and then look forward to hearing
16 what my colleagues think about these things.
17 But racial disparities in health care access,
18 that will, of course, raise the theoretical
19 question of when disparities are significant
20 and when disparate impacts is significant to
21 warrant either policy changes or legal action.

22 So that would sort of raise that topic and
23 I'm not sure which way that cuts, one way or
24 the other.

25 I guess I just want to make a pitch

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1 for the single sex education topic because it
2 is an incredibly hot topic right now. It may
3 have completely cooled off by 2009 and it may
4 not be relevant, but I think it's an issue
5 that has relevance to a lot of average
6 Americans. I think the Department of
7 Education just released regulations related to
8 the provision of single sex classrooms and
9 schools at the elementary and secondary level.
10 So I think it's timely and we don't do a whole
11 lot with gender Title IX. And so I would just
12 like to make a pitch for moving that one up.

13 CHAIRPERSON REYNOLDS: How would
14 you feel if we made that a significant
15 component under school choice as a civil
16 right? Does that topic fit comfortably under
17 that?

18 COMMISSIONER BRACERAS: Not
19 necessarily because I have long believed that
20 issues of gender and sex discrimination have
21 been neglected during my time at the
22 Commission and I'd like to see it discussed in
23 and of itself. It's a large topic. If you do
24 single sex education broadly, and you're
25 discussing both Title IX and equal protection

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1 concerns and you're discussing primary,
2 secondary education and beyond, you're
3 discussing the college level and if you're
4 discussing both private and public
5 institutions, it's a very large topic. It
6 brings us back to the VMI case and it's
7 regulatory, it's statutory, it's
8 constitutional. So I think there's a lot of
9 meat there for a briefing in and of itself.

10 CHAIRPERSON REYNOLDS: That's true.

11 Commissioner Kirsanow?

12 COMMISSIONER KIRSANOW: I
13 originally had this in my top three and I
14 think it's a very important topic. I also had
15 health care as one of my top three. It
16 strikes me that one of the reasons I put
17 health care up there is I think it's an
18 important issue. I also think it's something
19 that could inform what I anticipated would be
20 an on-going debate with respect to health care
21 reform. I didn't think we would resolve that
22 before 2009. But when I rethink it some more,
23 it's one of those topics that -- and I don't
24 have any necessarily empirical data to support
25 this, but it's my general sense that it's one

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1 of those topics that we've not been very
2 successful in doing very well, whereas single
3 sex is something I think falls within the
4 orbit of topics which we traditionally have
5 done relatively well.

6 I'm not suggesting that we supplant
7 health care with single sex, but I would be
8 receptive to doing that or expanding to four
9 and making health care number four.

10 CHAIRPERSON REYNOLDS: You mean
11 six.

12 COMMISSIONER KIRSANOW: Six,
13 whatever it may be.

14 CHAIRPERSON REYNOLDS: Okay,
15 Commissioner Thernstrom?

16 VICE CHAIRPERSON THERNSTROM: I
17 didn't list it as one of my topics simply
18 because I think there's a paucity of data and
19 now maybe that will change by 2009.

20 COMMISSIONER BRACERAS: You're a
21 social scientist and I'm a lawyer, and so we
22 come at the question maybe from different
23 angles. And there may be a paucity of data,
24 but there are a whole host of legal rulings
25 and regulations and legal theories that could

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1 be explored.

2 CHAIRPERSON REYNOLDS: Public
3 policy issues.

4 COMMISSIONER BRACERAS: And public
5 policy issues. And of course, those are -- we
6 need data, that's true. But there may be some
7 value in collecting what data is out there and
8 identifying areas where data should be
9 collected going forward.

10 VICE CHAIRPERSON THERNSTROM: Okay.
11 I want to raise another question.

12 CHAIRPERSON REYNOLDS: Separate
13 from this single sex issue?

14 VICE CHAIRPERSON THERNSTROM: Yes,
15 separate from the single sex issue.

16 I see minority home ownership only
17 got one point. Gee, it seems to me that our
18 number one topic of fair housing initiative,
19 and I'm just looking for the description here.
20 It's again a question of whether a narrower
21 focus, that is on minority home ownership, as
22 getting to the broader issue might make more
23 sense, but I would have to stare once again at
24 the descriptions here. I mean I have, in
25 general, a preference for specificity over

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1 these very broad --

2 COMMISSIONER BRACERAS: We still
3 need a statutory report and those tend to be
4 broader by definition.

5 VICE CHAIRPERSON THERNSTROM: Okay.
6 My eyes are wandering between the statutory
7 report, sorry, again. Right. Sorry about
8 that.

9 I can't seem to read. Sorry about
10 that.

11 CHAIRPERSON REYNOLDS: Okay, the
12 single sex issue. Pete, did I hear you
13 entertain the notion of not doing the --

14 COMMISSIONER KIRSANOW: Health
15 care?

16 CHAIRPERSON REYNOLDS: Yes.

17 COMMISSIONER KIRSANOW: I thought
18 single sex had been one of my top three. I
19 think it's an important issue. I think it's
20 one that is much more targeted than health
21 care disparities. Again, that's such a topic.

22 I'm not sure we first of all had the
23 expertise to handle that well. And it's such
24 a meaty topic, despite the fact that will be a
25 hot topic, I think we're better suited to

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1 handle single sex.

2 CHAIRPERSON REYNOLDS: So can I
3 translate that as a motion from you two to
4 replace the briefing on access to health care,
5 to replace that with single sex?

6 COMMISSIONER KIRSANOW: Yes.

7 VICE CHAIRPERSON THERNSTROM: You
8 know, before we vote on that --

9 COMMISSIONER YAKI: Whoa, whoa,
10 whoa, whoa, whoa.

11 VICE CHAIRPERSON THERNSTROM: It
12 seems to me we need to discuss other topics.
13 I agree, whoa, whoa, whoa.

14 COMMISSIONER BRACERAS: Let's throw
15 it open.

16 CHAIRPERSON REYNOLDS: Who's next?
17 Commissioner Taylor?

18 COMMISSIONER TAYLOR: I would just
19 like to raise some questions about the topic
20 that received the most support. School choice
21 as a civil right.

22 VICE CHAIRPERSON THERNSTROM:
23 Question mark.

24 COMMISSIONER TAYLOR: It's a
25 question mark. And is the intention here to

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1 have that theoretical discussion, should
2 school choice be a civil right on the same
3 plain as other quote civil rights? Is that
4 our intention?

5 CHAIRPERSON REYNOLDS: I haven't
6 read the write up, so I don't recall whether -
7 -

8 VICE CHAIRPERSON THERNSTROM: There
9 you go, I've got the same problem with that.

10 COMMISSIONER BRACERAS: I am trying
11 to understand what the problem is.

12 CHAIRPERSON REYNOLDS: It's a
13 question.

14 CHAIRPERSON REYNOLDS: We should
15 focus not so much on the title, but what the
16 actionable --

17 COMMISSIONER TAYLOR: And there
18 seems to be a disconnect, I guess that's my
19 point. There seems to be a disconnect between
20 the title and the description. My question is
21 what are we intending to control?

22 CHAIRPERSON REYNOLDS: I think that
23 the description should control as opposed to
24 the title.

25 COMMISSIONER TAYLOR: Okay.

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1 VICE CHAIRPERSON THERNSTROM: We
2 need a question mark after is school choice a
3 civil right or something.

4 CHAIRPERSON REYNOLDS: Okay, other
5 comments?

6 Commissioner Yaki, do you want to
7 weigh in?

8 COMMISSIONER YAKI: On everything?

9 CHAIRPERSON REYNOLDS: Anything you
10 like.

11 COMMISSIONER BRACERAS: Anything
12 and everything.

13 COMMISSIONER YAKI: I am not so
14 quick to throw out the health care issue. I
15 think it's an important issue. I think for
16 the Asian American community it's very
17 important, especially among the newer
18 immigrants from Southeast Asia. It's
19 important for the African American community.
20 I think it's important for the Latino
21 community as well and it may be hard to get a
22 handle on it, but it's a briefing and I have
23 my own version of what a briefing is.

24 Everyone else has their own
25 version. But for me, it's a perfect choice

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1 for a briefing simply because it allows us to
2 have people come from those communities and
3 raise these issues and point out areas that
4 might need improvement or where wrongs may be
5 committed or omissions being committed in
6 terms of treatment. I think it is when we
7 start talking about whether school choice is a
8 civil right or not, access to health care
9 comes to mind as one of those fundamental
10 rights to which all Americans are entitled and
11 when that access is not meted out in
12 proportion to and based on zip code or the
13 color of one's skin, I think it's important
14 for us to address it.

15 I would not support moving it down
16 the rung. It a high number of points and if
17 we're moving stuff that more support, we could
18 probably be talking the next two hours about
19 all the other things that maybe got two points
20 or one point or what have you.

21 COMMISSIONER BRACERAS: One of my
22 problems with this ranking system is it
23 doesn't give us the benefit of consultation
24 with our colleagues and so you know it's
25 important to me to hear what Michael and

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1 Arlan's first choice for a topic is and what
2 Commissioner Thernstrom thinks is an important
3 topic or why she thinks a topic may be
4 unimportant.

5 So you know, I don't give these
6 rankings that much credence, except it's just
7 sort of a first cut at what seems to be
8 popular.

9 And I guess the other sort of
10 theoretical question I would raise is for
11 school choice and health care raise big
12 picture questions about civil rights issues in
13 the 21st century. And I love both topics, but
14 aren't they more of the paradigmatic questions
15 that we're going to be asking at the
16 conference? In other words, the traditional
17 civil rights model deals with disparate
18 treatment and individual discrimination. But
19 looking forward into the 21st century, aren't
20 some of these other issues like the ability to
21 choose your own school and receive an
22 education and have access to health care,
23 aren't those really the issues?

24 COMMISSIONER YAKI: I think
25 Jennifer is right, Commissioner Braceras is

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1 absolutely correct and I'm just wondering if
2 maybe we should simply say that our intention
3 is to have the conference, the statutory
4 report and a minimum or maximum of three
5 briefings and that the subject of those
6 briefings will be culled from this list in
7 late '08 because presumably by then we'll have
8 a better handle on how the national
9 conversation will be structured in such a way
10 that we know whether or not some of the issues
11 that Commissioner Braceras brings up, I bring
12 up, other people bring up might not be a more
13 proper topic of discussion within that and
14 then having that being decided, we can then
15 decide okay, now we know these things are
16 being addressed or covered in some way in the
17 national conference. The briefings that we
18 looked at should have as little overlap as
19 possible and now we go back to this and
20 revisit whether or not what the two and one
21 should be.

22 COMMISSIONER BRACERAS: I like
23 Michael's idea. And I would just say so you
24 all know where I'm coming from is that I
25 envision that the conference would have panels

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1 on education and health care and then maybe a
2 panel of methodologies that would discuss
3 disparate impact versus disparate treatment
4 theory and things of that nature. And the
5 briefings should really be highly focused
6 discussions of specific topics and not
7 theoretical in nature. So, for example, this
8 June we're scheduled to do a school choice
9 related topic on the Blaine Amendment. That's
10 a narrow slice of the school choice issue, but
11 the theoretical question of whether education
12 and choice in education is a civil right, to
13 me, that's more properly addressed through our
14 national conference.

15 So I would just -- whether we pick
16 specific briefing topics or not, I would
17 envision briefings being finely honed, limited
18 discussions of specific issues.

19 CHAIRPERSON REYNOLDS: Commissioner
20 Kirsanow?

21 COMMISSIONER KIRSANOW: Yes,
22 Commissioner Yaki's statement has appealed to
23 me also. I thought for a long time there was
24 an element of absurdity for us to program out
25 three years, two years in advance and I never

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1 knew why we continued to do that and I sat
2 here as Mark Steyn would say, "never
3 underestimate the seductive power of inertia"
4 and we just continue to do it.

5 In the mean time, we would
6 constantly be rearranging these briefings or
7 eliminating some, adding others, some would
8 become moot, some would become hot and I think
9 especially given that when envisioning --
10 Commissioner Braceras calls is paradigmatic
11 approach with respect to the conference. Now
12 maybe we should revisit the whole idea of
13 projecting outward with program planning two
14 years hence.

15 It might be that we keep our powder
16 dry until we see precisely what are the
17 relevant topics and in fact, what even emerges
18 from the conference.

19 STAFF DIRECTOR MARCUS: The
20 strategic plan is a five-year plan, of course.

21 But the budget process is one that we're
22 working on right now. And the challenge that
23 we've had from an operational perspective that
24 annual program planning is essentially is the
25 first substantive step in the process of

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1 developing the budget estimate.

2 COMMISSIONER KIRSANOW: Understood.
3 But I guess my point is with the exception of
4 briefings that are of such magnitude that
5 staff needs tremendous lead time to prepare
6 and/or we don't have a real handle on what the
7 budget would be because of the magnitude and
8 generally, if it's of that magnitude I would
9 query whether there should be briefings at
10 all.

11 We are generally able to budget a
12 briefing within a certain range.

13 COMMISSIONER BRACERAS: Regardless
14 of the topic.

15 COMMISSIONER KIRSANOW: Exactly
16 right. And unless we're doing a field hearing
17 and we factor in travel costs, but it looks to
18 me like we probably have pretty good
19 historical data to show what the average
20 briefing costs and we can say we're going to
21 do three briefings or four briefings and
22 that's factored into the budgetary process.
23 But I don't know. I'm just suggesting that
24 that's the approach to take.

25 STAFF DIRECTOR MARCUS: We may be

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1 able to do that. We'll have to give it a
2 little thought and establish that and OMB. In
3 general, we've gotten pressure from OMB to be
4 as specific as possible about the programs and
5 then about the amount of money and we've tried
6 to show how different briefings might cost
7 different amounts of money, largely as a
8 function of our expectation of how many of the
9 witnesses would have to come from out of town
10 and whether some briefings we anticipate would
11 have a greater number of speakers than others.

12 I suppose we could try to do
13 something that's a little bit more generic and
14 say something like we'll do three or whatever
15 of a longer list with more of an approximate
16 and we thought we would have to see how much
17 pushback we get.

18 COMMISSIONER TAYLOR: I am getting
19 a sense of deja-vu here. I recall us having
20 this same conversation a year ago and we
21 adopted the approach we adopted, be careful of
22 my language here, because for purposes of what
23 the Staff Director needs to do, what the Hill
24 needs to see, we had to have a certain level
25 of specificity and we all acknowledged that we

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1 would continue to re-analyze the issue and
2 respond to issues that may be hot.

3 COMMISSIONER YAKI: Would you
4 rephrase to say, Ashley, we just engaged in a
5 little subterfuge to give them what they want
6 even though we knew we were going to change it
7 anyway?

8 COMMISSIONER TAYLOR: What you just
9 said, see, that's spoken like a man who feels
10 like he's in the majority on the Hill.

11 (Laughter.)

12 COMMISSIONER YAKI: I'm proud to
13 say it too.

14 VICE CHAIRPERSON THERNSTROM: No,
15 absolutely. I think that's correct. Yes.
16 Given them the wanted level of specificity.
17 It's fairly meaningless.

18 I do want to say something about --
19 what was it -- racial disparities in health
20 care access. That is a very hot topic at the
21 moment. It's in the mainstream media.

22 COMMISSIONER BRACERAS: But either
23 way we're talking about '09.

24 VICE CHAIRPERSON THERNSTROM: I
25 understand that. I do think it does fall into

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1 the category of specific topics that are
2 appropriate for briefings, but frankly, I
3 don't care what we put down for '09 because
4 it's, you know, this a formal exercise. It
5 doesn't have much --

6 CHAIRPERSON REYNOLDS: We have to
7 do something and I think that we all
8 understand that whatever we decide upon today
9 is there's a high probability that it will be
10 changed somewhere down the line. So a vote
11 today is not a -- well, what we vote on today
12 is unlikely to occur in the order and the form
13 that we vote on it. So I would suggest, at
14 least put this out for consideration is that
15 we vote for the top vote getters, expand --
16 well, the top five vote getters and -- the top
17 three vote getters for briefings and the
18 fourth and fifth slot be -- that we use the
19 recommendations from Commissioners Yaki and
20 Melendez and be done with this.

21 COMMISSIONER YAKI: I don't see why
22 -- let me just --

23 CHAIRPERSON REYNOLDS: Michael,
24 could you please describe what you were just
25 doing?

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1 COMMISSIONER YAKI: I was making a
2 protein shake.

3 (Laughter.)

4 Why do we need to -- Ken, tell me
5 if this is wrong. Why couldn't we say we have
6 tentatively approved a list of say seven of
7 which we will pick three that will comport
8 with blah, blah, blah. Do we need to say
9 these are the three blah, blah, blah? I
10 really don't care. I agree we can change it
11 any time we want, but my -- I am now being
12 resistant to -- just because it's OMB, I'm
13 always resistant to anything OMB says, so do
14 we have to do it that way or can we say this
15 is the list from which we will pick three and
16 all within the general range of time and
17 resources within our budget, blah, blah, blah.

18 STAFF DIRECTOR MARCUS: Michael,
19 I'm prepared to try and see what they say. I
20 know that if we did not give them a list at
21 all and just said we would take whatever is
22 pressing at the time that it would not work
23 and they pressed us to give the specifics, but
24 we've never actually tried to say that we will
25 do whichever three out of the following seven

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1 are most prominent to the national concerns at
2 the time. We've never tried that. The one
3 difficulty that it has is that we will not --
4 we then won't even be trying to give
5 specificity in dollar amounts. In the past,
6 we've said we'll do these whatever. We'll do
7 these eight and one costs X dollars and two
8 costs Y dollars.

9 COMMISSIONER YAKI: Okay, it's more
10 staff work for you.

11 STAFF DIRECTOR MARCUS: It's
12 actually less staff work, but the problem is
13 it's more vagueness, so we can just wait and
14 see how they react to that.

15 CHAIRPERSON REYNOLDS: Ken, can we
16 provide historical data and where appropriate
17 make adjustments? I mean we have done a
18 number of briefings and we have historical
19 data and I suspect that the costs fall within
20 a fairly narrow range.

21 STAFF DIRECTOR MARCUS: I am
22 prepared to give it a try and see. If this is
23 the way the Commissioners want to go, we would
24 say we're going to do whichever three out of
25 the following seven and we would anticipate

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1 that they would cost an average of so many
2 dollars to do them.

3 VICE CHAIRPERSON THERNSTROM: If we
4 took the top six, we would draw the line under
5 single sex education. It seems to me that
6 makes sense.

7 COMMISSIONER YAKI: I am for that.

8 STAFF DIRECTOR MARCUS: We could
9 give it a try. This would provide less
10 specificity than we have done in the past and
11 so I think we would just have to report back
12 in the event we got some sort of adverse
13 reaction.

14 COMMISSIONER YAKI: Why don't we
15 empower the Staff Director to rather than
16 having to report back, do what Commissioner
17 Thernstrom said which is give them the range
18 and if they say no, we want you to do the
19 three, then just pick three.

20 (Laughter.)

21 COMMISSIONER BRACERAS: Top six,
22 removing disparate impact. The top six
23 without disparate impact. So it's choice,
24 health care, Native American, gay and lesbian
25 marriage and single sex. That's five.

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1 CHAIRPERSON REYNOLDS: Well, in
2 addition to that what about --

3 VICE CHAIRPERSON THERNSTROM: No, I
4 was just taking the top six, disparate impact
5 got 14 points, but you know, fine, we can
6 eliminate that and go down to the next one.

7 COMMISSIONER BRACERAS: Aging
8 population?

9 VICE CHAIRPERSON THERNSTROM: Aging
10 population. I was just, you know, not getting
11 into the four points and two points.

12 CHAIRPERSON REYNOLDS: Someone
13 explain to me -- we've already voted to
14 provide the minority with two additional
15 slots. That's a particular approach. It
16 seems to me that we're taking a different
17 approach to the issue now by picking the top
18 six.

19 COMMISSIONER BRACERAS: Right.

20 CHAIRPERSON REYNOLDS: So are we
21 shelving? Are we inadvertently undoing the
22 motion we just approved?

23 COMMISSIONER BRACERAS: What are
24 the two, what are the top two that
25 Commissioners Melendez and Yaki support?

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1 COMMISSIONER YAKI: Well, under the
2 old list they were four and five.

3 COMMISSIONER BRACERAS: Forget the
4 list. Just tell me the names of those.

5 COMMISSIONER YAKI: The Native
6 Americans and criminal investigation
7 prosecution one was Commissioner Melendez'
8 first choice. And mine was the gay and
9 lesbian issue.

10 COMMISSIONER BRACERAS: Okay, so
11 those two are captured.

12 CHAIRPERSON REYNOLDS: So it works
13 then.

14 COMMISSIONER YAKI: Right.

15 VICE CHAIRPERSON THERNSTROM: I'll
16 stick with my recommendation. We draw a line
17 under single sex. The rest didn't get enough.

18 COMMISSIONER YAKI: I am with that.

19 STAFF DIRECTOR MARCUS: So we draw
20 a line under single sex and that includes
21 disparate impact or do we drop that?

22 COMMISSIONER BRACERAS: I really
23 think disparate impact should be removed, but
24 for the reasons I stated. It's just not the
25 same type of topic.

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1 COMMISSIONER YAKI: For the purpose
2 of this exercise I am indifferent.

3 CHAIRPERSON REYNOLDS: Okay,
4 Jennifer, how do you feel about just leaving
5 it in with the understanding that --

6 COMMISSIONER BRACERAS: That's
7 fine. I won't be here anyway.

8 (Laughter.)

9 I'm not going to be here then.

10 VICE CHAIRPERSON THERNSTROM: I
11 want to change to use not misuse.

12 COMMISSIONER BRACERAS: It's
13 already been changed.

14 VICE CHAIRPERSON THERNSTROM: Has
15 it?

16 CHAIRPERSON REYNOLDS: You made
17 your comment --

18 COMMISSIONER YAKI: Where will you
19 be, Jennifer?

20 COMMISSIONER BRACERAS: Where will
21 I be?

22 COMMISSIONER YAKI: Yes.

23 COMMISSIONER BRACERAS: I will not
24 longer be on the Commission. Who knows what
25 the future holds.

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1 (Laughter.)

2 VICE CHAIRPERSON THERNSTROM: She
3 is running for President.

4 COMMISSIONER YAKI: Everyone else
5 is.

6 CHAIRPERSON REYNOLDS: Okay, so
7 here is the -- if I can articulate this new
8 arrangement. We will just agree to consider
9 the top six vote getters without identifying
10 rank order.

11 Is there a second to this approach?

12 COMMISSIONER TAYLOR: Second.

13 CHAIRPERSON REYNOLDS: We've had
14 our discussion, all in favor?

15 (Chorus of ayes.)

16 Any objections? Any abstentions?

17 COMMISSIONER BRACERAS: If I could
18 just make one comment though.

19 CHAIRPERSON REYNOLDS: Of course.

20 COMMISSIONER BRACERAS: Go ahead.

21 VICE CHAIRPERSON THERNSTROM:
22 Jennifer, go ahead.

23 COMMISSIONER BRACERAS: My only
24 comment is that's great, we've got our list of
25 things to consider in the future, but I would

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1 eliminate any relevance from that point
2 forward of the points, because there will be
3 different Commissioners on then and people's
4 views would have changed. So that's out list
5 and who cares what got 23 points and who got 6
6 points. It makes it completely irrelevant.

7 CHAIRPERSON REYNOLDS: That's how
8 it works in practice. I fully expect minority
9 homeownership of one point.

10 COMMISSIONER BRACERAS: That's
11 dropped off now.

12 CHAIRPERSON REYNOLDS: Well, in
13 2009 it will be back on because some
14 Commissioner will think that it's extremely
15 important, so I say this only to agree with
16 you that these points have little or not
17 consequence.

18 COMMISSIONER YAKI: And who is
19 going to bring that up again?

20 CHAIRPERSON REYNOLDS: I wouldn't
21 be surprised. Okay, the motion passed
22 unanimously.

23 The next item on the agenda is
24 consideration of the briefing report on
25 affirmative action in American law schools.

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1 **VI. Affirmative action in American Law**

2 **Schools Briefing Report**

3 CHAIRPERSON REYNOLDS: I move that
4 the Commission approve for publication Part A
5 of the draft report reflecting Commissioner
6 and panelist input on the briefing the
7 Commission held on June 16, 2006 on
8 affirmative action in American law schools.
9 Part A, as distributed in draft form to
10 Commissioners on January 18, 2007 contains the
11 following: an executive summary with a brief
12 overview of the issue and why the Commission
13 chose to conduct this briefing; a summary of
14 the proceedings consisting of synopses of
15 panelists' oral statements during the
16 briefing; and a synopsis of the question and
17 answer sessions. Actually, no. The last item
18 is copies of the panelists' written
19 statements.

20 Is there a second?

21 VICE CHAIRPERSON THERNSTROM:

22 Second.

23 COMMISSIONER BRACERAS: I have a
24 comment I'd like to discuss. The current
25 executive summary includes and in my view

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1 should not, a summary of findings and
2 recommendations. So we can't vote to approve
3 that if we haven't voted to approve Part B.

4 CHAIRPERSON REYNOLDS: Okay, I am
5 sorry.

6 COMMISSIONER BRACERAS: In other
7 words, the process has been bifurcated so that
8 Part A of the document is a summary of
9 testimony essentially.

10 CHAIRPERSON REYNOLDS: Right.

11 COMMISSIONER BRACERAS: And Part B
12 is finding the recommendations, but Part A
13 also includes an executive summary that
14 summarizes the findings and recommendations.

15 CHAIRPERSON REYNOLDS: I see. I'm
16 with you.

17 COMMISSIONER BRACERAS: So that
18 needs to be -- maybe we just don't want it on
19 the executive summary right now at all.

20 CHAIRPERSON REYNOLDS: Okay, well,
21 let's reverse the order then.

22 COMMISSIONER BRACERAS: No, we
23 can't reverse the order. I think -- no, no,
24 no. I think we need to -- my view is that at
25 a bare minimum, the Commission should be able

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1 to almost unanimously approve a document that
2 summarizes our briefing and that shouldn't be
3 controversial.

4 CHAIRPERSON REYNOLDS: Okay. I
5 see.

6 COMMISSIONER BRACERAS: And we
7 should be able to publish that regardless of
8 what happens with findings and
9 recommendations. So I'd like to vote on that
10 today and hopefully pass that today, but the
11 executive summary cannot contain something, a
12 summary of something we haven't approved.

13 CHAIRPERSON REYNOLDS: Could there
14 be a vote on Part A exclusive of the summary
15 of findings and recommendations?

16 COMMISSIONER BRACERAS: Yes, that's
17 what I'm saying.

18 So I'm making a substitute motion
19 that we vote on Part A of the document,
20 affirmative action in American law schools,
21 minus the part of the executive summary which
22 begins on page five and carries over to all of
23 page six.

24 CHAIRPERSON REYNOLDS: And seven.

25 COMMISSIONER BRACERAS: Right, and

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1 seven. So the part of the executive summary
2 that we're not voting on is page six, seven
3 and the bottom of page five that begins with
4 the word "based".

5 CHAIRPERSON REYNOLDS: Yes.

6 COMMISSIONER BRACERAS: "Based on
7 the record, the Commission finds that" --
8 we're not voting to approve that and if we
9 only approve Part A, it will be published
10 without that language, all of the language.

11 CHAIRPERSON REYNOLDS: Okay. I
12 second it.

13 All in favor?

14 (Chorus of ayes.)

15 Any objections? Any abstentions?
16 The motion carries unanimously.

17 COMMISSIONER BRACERAS: I have one
18 more technical thought, question. In the
19 version that we seek to publish, will these
20 charts and graphs be made any bigger because I
21 find most of them impossible to read.

22 VICE CHAIRPERSON THERNSTROM: They
23 are impossible to read.

24 COMMISSIONER BRACERAS:
25 Particularly the one on page 36, but all of

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1 the graphics --

2 CHAIRPERSON REYNOLDS: We should be
3 able to increase the font size without too
4 much problem.

5 COMMISSIONER BRACERAS: Okay, so
6 Kim tells me the margins have been changed
7 because this is a tracked-changes version, so
8 it doesn't accurately reflect the size of the
9 graph?

10 STAFF DIRECTOR MARCUS: That's what
11 I'm advised. When the proposed changes are
12 accepted, it will increase the size of the
13 graphics.

14 COMMISSIONER BRACERAS: Okay, well,
15 just be mindful of that as I'm sure you will
16 be. They don't do any good if you can't read
17 them.

18 CHAIRPERSON REYNOLDS: Okay, I move
19 that the Commission approve the publication of
20 Part B of the report reflecting --

21 COMMISSIONER BRACERAS: Did we vote
22 on Part A?

23 CHAIRPERSON REYNOLDS: Yes. It
24 passed unanimously.

25 I move that we approve the

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1 publication of Part B of the report reflecting
2 Commissioner and panelists' input on the
3 briefing the Commission held on June 16, 2006
4 on affirmative action in American law schools,
5 Part B as distributed in draft form to
6 Commissioners on January 18, 2007.

7 COMMISSIONER BRACERAS: Just to be
8 clear, Part B begins on page 135? Are we
9 talking about pages 135 through 137 only?

10 CHAIRPERSON REYNOLDS: I don't
11 know. I believe that's right. Essentially,
12 we're voting on what we deleted from Part A.

13 COMMISSIONER BRACERAS: No, that's
14 the summary of it. Now we're voting on more
15 specific --

16 CHAIRPERSON REYNOLDS: The
17 findings, the actual findings and
18 recommendations.

19 Okay, discussion.

20 COMMISSIONER MELENDEZ: A question.
21 Commissioner Melendez. Doesn't this tie in
22 to what we're working on as part of the
23 procedures?

24 COMMISSIONER BRACERAS: Yes.

25 COMMISSIONER MELENDEZ: Of the

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1 working group? Why would we be voting on this
2 if we're still not finished with that part?

3 COMMISSIONER BRACERAS: Well, I
4 think the answer is that we can't grind the
5 wheels of production to a halt while we wait
6 for all the members of the working group to
7 sort it out.

8 On the other hand, I agree with you
9 and maybe -- I agree with you that it's
10 somewhat troubling that we would be voting to
11 approve findings and recommendations when
12 there are members of this Commission who don't
13 even think there should be findings and
14 recommendations in these reports and maybe the
15 answer to that is that until we have our
16 procedures finalized, we simply issue Part A
17 as a clearinghouse report. I don't know.

18 CHAIRPERSON REYNOLDS: I would
19 suggest that the -- well, whatever we come up
20 with as procedures, I'd like to entertain the
21 notion of just having the rules apply
22 prospectively as opposed to -- depending on
23 what happens, this document -- we may have to
24 completely rework it.

25 COMMISSIONER BRACERAS: Right.

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1 CHAIRPERSON REYNOLDS: A lot of
2 work has gone into this and to hold it hostage
3 to rules that are not --

4 COMMISSIONER BRACERAS: No, I
5 understand that, but I just -- I want to
6 express on the record my sympathy for
7 Commissioners Melendez' and Yaki's view that
8 briefing reports are not necessarily
9 inappropriate vehicle for findings and
10 recommendations. And I think I expressed
11 several months ago the view that I was not
12 going to continue to vote on reports that
13 included findings and recommendations unless
14 and until we had a process.

15 So for now --

16 CHAIRPERSON REYNOLDS: A formal
17 process.

18 COMMISSIONER BRACERAS: A formal
19 process. So for now, I have to say that I'm
20 inclined not to support Part B, not because I
21 don't agree with the findings and
22 recommendations. I think they're stellar and
23 I agree with all of them, but for process
24 reasons and I guess I also just want to say on
25 the record that I think why I come down on all

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1 this is basically somewhere in between I think
2 where Commissioner Thernstrom is and
3 Commissioners Melendez and Yaki, because I do
4 think that if we are going to have findings
5 and recommendations attached to briefing
6 reports, I sort of agree with comments
7 Commissioner Thernstrom has made earlier that
8 that's something that we should decide on a
9 case by case basis and it will be fact
10 specific to the briefing.

11 On the other hand, I think that
12 findings and recommendations need to be
13 structured in a different way and I've said
14 before that my personal model for how this
15 should be done is the way the Title 9
16 Commission, at the Department of Education
17 dealt with findings and recommendations. And
18 so in order to keep things simple, it
19 basically established a process where for each
20 finding and recommendation, there was a vote
21 taken individually on each finding and
22 recommendation and the vote on each finding
23 and recommendation was noted so in other
24 words, you know, four votes for it, five votes
25 against it, or whatever.

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1 And the brief paragraph under each
2 finding and recommendation describes in one or
3 two sentences the arguments made by the
4 proponents and opponents of the finding and
5 recommendations. I think that that's a much
6 more streamlined, honest and balanced way to
7 submit findings and recommendations. It
8 avoids lengthy, treatise-like dissents and it
9 also allows people to vote on particular
10 findings and recommendations without having to
11 swallow the entire package, hook, line and
12 sinker.

13 So I do not like the current way we
14 make findings and recommendations, although I
15 recognize that there may be a need for them in
16 some cases. And I'll say again that I agree
17 with all the findings and recommendations in
18 this report, but for procedural reasons I
19 don't think I can support them today.

20 CHAIRPERSON REYNOLDS: Does that
21 take the form of voting against it or an
22 abstention?

23 COMMISSIONER BRACERAS: I'll have
24 to think about that for a minute.

25 CHAIRPERSON REYNOLDS: Commissioner

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1 Thernstrom?

2 VICE CHAIRPERSON THERNSTROM: Look,
3 I'm not in disagreement with you, Jennifer,
4 that the process needs to be revised. We are
5 revising it, obviously, such that it is
6 structured in quite a different way in the
7 future. But this report comes out of an
8 existing process and the process is in
9 conformity with that -- there's nothing novel
10 about it, it's in conformity with that which
11 has applied to all our previous briefing
12 reports.

13 COMMISSIONER BRACERAS: You know
14 what, with all due respect, I actually don't
15 think it complies with an existing process
16 because this whole model that we've moved to
17 in the past few years of doing more briefings
18 and fewer hearings itself is one that we've
19 sort of cobbled together as we went along.

20 VICE CHAIRPERSON THERNSTROM: But
21 the --

22 COMMISSIONER BRACERAS: We never
23 actually did it.

24 VICE CHAIRPERSON THERNSTROM: But
25 our most recent briefing reports do not

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1 differ.

2 COMMISSIONER BRACERAS: No, no, of
3 course. Right. This is the same format and
4 model as our current briefing reports, but we
5 as a Commission never collectively discussed
6 or decided to do them that way. They emerged
7 that way and they've been great, but we never
8 had a formal discussion about process at all.

9 VICE CHAIRPERSON THERNSTROM:
10 Nevertheless, this is part of the existing
11 order, as it were. I mean I'm all for
12 changing that, but I am not for holding this
13 up and I don't think that there's a
14 justification for doing so and it's not
15 because I agree with the findings. I'm a big
16 process person. I just think, look, this --

17 CHAIRPERSON REYNOLDS: I have a
18 proposal. Why don't we vote on Part A.

19 COMMISSIONER BRACERAS: We already
20 did.

21 CHAIRPERSON REYNOLDS: Okay, and
22 table Part B until our procedures are in
23 place.

24 VICE CHAIRPERSON THERNSTROM: Well,
25 that means that this report is going to held

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1 unpublished for a long time.

2 CHAIRPERSON REYNOLDS: A year?

3 COMMISSIONER BRACERAS: No, because
4 we held this hearing on June 16th.

5 So if you table it, by the time
6 it's published, it's over a year.

7 VICE CHAIRPERSON THERNSTROM: Mr.
8 Chairman, I don't think that's right. I just
9 don't think that's right.

10 CHAIRPERSON REYNOLDS: Okay.

11 COMMISSIONER BRACERAS: Well, I
12 think I was very clear at our last business
13 meeting that I was uncomfortable supporting
14 findings and recommendations until we had a
15 process in place. And so for that reason I
16 think what I will do here today is abstain on
17 that question.

18 CHAIRPERSON REYNOLDS: Vice Chair
19 Thernstrom --

20 COMMISSIONER BRACERAS: With
21 respect to this report.

22 CHAIRPERSON REYNOLDS: Vice Chair
23 Thernstrom makes a very good point. That
24 suggestion was made as an attempt to take your
25 considers into consideration, but there are

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1 also countervailing issues as brought up by
2 Vice Chair Thernstrom.

3 Commissioner Kirsanow?

4 COMMISSIONER KIRSANOW: The
5 question I have is do we have any kind of
6 reasonable ETA for when we will have these
7 procedures in place?

8 CHAIRPERSON REYNOLDS: Based on our
9 track record, it doesn't look good.

10 COMMISSIONER KIRSANOW: Okay.

11 VICE CHAIRPERSON THERNSTROM:
12 People who testified -- you may be getting the
13 same emails saying where's our report?

14 COMMISSIONER KIRSANOW: I will
15 reiterate that I don't like the process that
16 we currently have. I prefer a process that is
17 similar to what she just described. I agree
18 in the general themes of the findings and
19 recommendations, but I think there's a matter
20 of process that needs to be followed before
21 they're issued.

22 I would not be adverse to the
23 proposal that the Chairman made and that is
24 that we voted to hold in abeyance Part B until
25 such time as we have a system in place. My

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1 hope would be that that might provide some
2 greater incentive to get that system in place
3 more quickly. And I think it's important to
4 have findings and recommendations on this
5 particular matter.

6 If we don't have a process in
7 place, I don't think we're ever going to issue
8 findings and recommendations on this matter.
9 It will not happen. So it seems to me that
10 the options are we vote down a process of
11 findings and recommendations never to be
12 resurrected. Number two is we hold this in
13 abeyance, get a process and then vote on it
14 and maybe it will prevail. Maybe it won't.
15 That is the findings and recommendations. And
16 number three, well, those are actually the two
17 options. There's a third one that doesn't
18 really make a lot of sense.

19 COMMISSIONER BRACERAS: What was
20 that?

21 COMMISSIONER KIRSANOW: It doesn't
22 matter. I'm not going to go into it.

23 VICE CHAIRPERSON THERNSTROM: So we
24 don't publish anything?

25 COMMISSIONER KIRSANOW: We don't

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1 publish anything right now.

2 COMMISSIONER YAKI: The third
3 option is rock, paper, scissors.

4 COMMISSIONER KIRSANOW: It's not
5 even that good.

6 VICE CHAIRPERSON THERNSTROM: It's
7 going to be published and republished?

8 COMMISSIONER BRACERAS: No, the
9 first option is publish only portion A. The
10 second option is wait on the whole document
11 until we have a process.

12 CHAIRPERSON REYNOLDS: Let's
13 revisit the conversation.

14 VICE CHAIRPERSON THERNSTROM: We'll
15 have no document published until --

16 CHAIRPERSON REYNOLDS: Can we
17 commit that the working group will conclude
18 its work and we have recommendations by the
19 next meeting so that we can vote on the new
20 procedures and vote on the entire document or
21 Part B?

22 VICE CHAIRPERSON THERNSTROM: I
23 very strongly believe in regarding this as a
24 finished product at this point. Part of the
25 old order we will change the procedure going

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1 forward, but I mean --

2 COMMISSIONER KIRSANOW: I think the
3 problem is -- you may be correct, but I am not
4 convinced we're past that.

5 COMMISSIONER BRACERAS: There is no
6 old order. We've sort of done it ad hoc. And
7 even with respect to the last report, I forget
8 what it was, but the last report that we voted
9 on at a business meeting and I know you
10 weren't here, Vice Chair, but we went through
11 each finding and recommendation and I believe
12 we voted on them one at a time.

13 CHAIRPERSON REYNOLDS: Our rules
14 allow us to do that.

15 COMMISSIONER BRACERAS: So there's
16 no one way of dealing with these reports.
17 We've handled them in several different ways
18 and we are handling them a different way
19 today.

20 CHAIRPERSON REYNOLDS: I don't
21 think the Vice Chair disagrees with that. I
22 think that what she's saying is that we have a
23 document that's growing stale.

24 COMMISSIONER TAYLOR: In that
25 regard, just to let you know where I am on

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1 this, I would be inclined to vote against
2 publishing what we are calling Part B, pages
3 135 to 137, because it is my sense after the
4 working group meeting that we are going to be
5 able to reach an accommodation in fairly short
6 order and in the spirit of what I anticipate
7 being a group that comes up with an
8 accommodation that will come back and
9 recommend to this committee. I would be
10 inclined to vote against Part B for purposes
11 of getting Part A and the entire document out
12 into the mainstream in response to concerns
13 you all hearing this being a stale document.

14 CHAIRPERSON REYNOLDS: So
15 Commissioner Taylor, are you talking -- you
16 want to table Part B?

17 COMMISSIONER TAYLOR: Right --

18 COMMISSIONER BRACERAS: No, he
19 wants to go ahead and publish Part A.

20 CHAIRPERSON REYNOLDS: Yes, but to
21 table Part B?

22 COMMISSIONER TAYLOR: Right.

23 VICE CHAIRPERSON THERNSTROM: I
24 don't understand this process. I mean you
25 publish in our usual publish form Part A and

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1 what, after we agree on findings and
2 recommendations that whole document is
3 republished with the findings and
4 recommendations?

5 COMMISSIONER BRACERAS: No.

6 COMMISSIONER TAYLOR: No.

7 COMMISSIONER BRACERAS: It's not.
8 They're added to the website or they go out as
9 a press release or whatever.

10 VICE CHAIRPERSON THERNSTROM: Our
11 experience with findings and recommendations
12 is that when you're dealing with the media,
13 when you're dealing with people who might in
14 any way be interested in this topic, they are
15 interested in the findings and
16 recommendations. They walk the bottom line.

17 COMMISSIONER BRACERAS: I
18 understand that, but I'm not going to allow
19 our desire to get media coverage or our desire
20 to be relevant -- let me finish -- or to
21 influence policy, change my view that we need
22 a better process.

23 VICE CHAIRPERSON THERNSTROM: We do
24 need a better process going forward.

25 CHAIRPERSON REYNOLDS: How about

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1 this? Let's just table the whole -- both
2 parts, Part A and Part B.

3 COMMISSIONER BRACERAS: I guess my
4 question is this. Part A is a great document.
5 It has a lot of juicy information. It will be
6 relevant to law students and scholars. Why
7 would you not publish Part A?

8 CHAIRPERSON REYNOLDS: Because it's
9 a little --

10 COMMISSIONER BRACERAS: I think --

11 CHAIRPERSON REYNOLDS: Abbie makes
12 a good point, too. When you publish a
13 document, you publish a document as opposed to
14 publishing it in a piecemeal fashion.

15 COMMISSIONER BRACERAS: But you're
16 assuming that you're going to have majority
17 support on this Commission for ever publishing
18 findings and recommendations and I'm not
19 showing that that's the case.

20 CHAIRPERSON REYNOLDS: No, no.
21 That's why I'm suggesting that we table the
22 whole thing until we get our procedures in
23 place which Ashley has committed to --

24 COMMISSIONER TAYLOR: Either option
25 is fine with me. I just think, again, Abbie,

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1 I am focusing on not simply this report. I'm
2 focusing on our discussion and how we treat
3 these reports going forward.

4 VICE CHAIRPERSON THERNSTROM: I am
5 totally with you on the process going forward.

6 I do not think that it is legitimate to hold
7 this particular report up.

8 COMMISSIONER BRACERAS: It's not
9 holding it up. I think that the option we're
10 discussing is an option to publish a
11 clearinghouse report without findings and
12 recommendations. It's not holding it up.
13 It's publishing a different version.

14 CHAIRPERSON REYNOLDS: The value of
15 the document, it seems to me, is significantly
16 reduced if we issue it in a piecemeal fashion,
17 especially the findings and recommendations.
18 That's --

19 COMMISSIONER BRACERAS: I have to
20 say I'm sorry. I think this is MFB-like. I
21 mean basically the argument that I'm hearing
22 is well, the staff has done the work, let's
23 just get it out.

24 VICE CHAIRPERSON THERNSTROM: No.

25 CHAIRPERSON REYNOLDS: No, that's

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1 not the argument. What I said was that it is
2 -- well, first it's unusual to have a report
3 that is published on two separate dates,
4 especially when the meat -- the question is
5 asked, so what is the Commission's position on
6 this issue? When they look at Part B, they're
7 looking -- okay, fine, what's their position?

8 COMMISSIONER BRACERAS: This all
9 goes back to your definition of a briefing and
10 what we had under the MFB regime was a regime
11 where she conflated the two in order to get
12 what she wanted. And so I thought, frankly,
13 under the new regime that we had sort of gone
14 back to separating the two so that hearings
15 were more formal and had findings and that
16 briefings were basically just that, briefings
17 to spotlight an issue for the public and let
18 people draw their own conclusions.

19 Now that doesn't mean that there
20 can never be findings and recommendations, but
21 the thought was that the process would be
22 fundamentally different and that there
23 wouldn't be just a laundry list of
24 recommendations that you had to vote on hook,
25 line and sinker.

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1 CHAIRPERSON REYNOLDS: That's not -
2 - we don't have to vote on the findings, hook,
3 line and sinker. We always had the ability to
4 vote on each finding and each recommendation.

5 In terms of a resolution, it seems to me
6 either --

7 COMMISSIONER BRACERAS: I'm willing
8 to vote for the whole package now, if we can
9 go through and vote on every finding and
10 recommendation separately and if in the report
11 it is noted how many votes for, how many votes
12 against, and --

13 CHAIRPERSON REYNOLDS: I support
14 that friendly amendment.

15 COMMISSIONER BRACERAS: And -- I'm
16 not done. There's a statement added after
17 each finding and recommendation, one sentence,
18 proponents, supporters of this finding felt
19 whatever; opponents of this finding were
20 concerned that whatever. No dissents, that's
21 it.

22 I'll vote for it that way.

23 COMMISSIONER YAKI: I'm going to
24 object to the no dissents issue on that one.

25 VICE CHAIRPERSON THERNSTROM: Yes,

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1 we can't have a no dissents.

2 CHAIRPERSON REYNOLDS: I think it's
3 important.

4 COMMISSIONER BRACERAS: Once again
5 that gets us back to then what is the
6 difference between a hearing and a briefing,
7 because if a briefing report is going to be a
8 full-fledged report with full-fledged
9 dissents, with findings and recommendations,
10 then it's really just a matter of semantics.
11 It's the same thing as a hearing, except that
12 you haven't issued subpoenas and you're not
13 calling it a hearing. There's really -- and
14 it's shorter. There's no substantive
15 difference. It's just shorter.

16 CHAIRPERSON REYNOLDS: I would have
17 concerns telling a Commissioner, adopting a
18 position that tells a particular Commissioner
19 that you cannot file a dissent and articulate
20 your --

21 COMMISSIONER BRACERAS: But you're
22 assuming -- Commissions do that all the time.
23 Look at the Title IX Commission that you were
24 a part of didn't have lengthy, bar review-like
25 dissents. It is very streamlined and easy to

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1 read and user friendly.

2 COMMISSIONER YAKI: Are you
3 calling my dissents bar review-like?

4 (Laughter.)

5 COMMISSIONER BRACERAS: No, it's
6 not that, your dissents are well written,
7 Michael, but it goes to the question of what
8 is the purpose of these documents. Are our
9 briefings simply are shorter versions of
10 hearings without the subpoenas or are they
11 something different in kind? And I have
12 always felt that they're something different
13 in kind.

14 CHAIRPERSON REYNOLDS: I think that
15 needs to be worked out initially amongst the
16 working group --

17 COMMISSIONER BRACERAS: It does and
18 that's why I won't vote for it until it is.

19 CHAIRPERSON REYNOLDS: And then the
20 full Commission will vote on it, but I think
21 that your proposal, I like it. I'm interested
22 to hear what the other Commissioners, Vice
23 Chair --

24 VICE CHAIRPERSON THERNSTROM: If
25 you think of the Iacacca bill briefing,

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1 without the findings and recommendations, it
2 would be dead on arrival.

3 COMMISSIONER BRACERAS: But see and
4 that begs the question as to what the purpose
5 is. Is the purpose -- let me finish -- is the
6 purpose to be influential?

7 VICE CHAIRPERSON THERNSTROM: This
8 is totally irrelevant.

9 COMMISSIONER BRACERAS: To me, the
10 process is more important than whether or not
11 we're --

12 VICE CHAIRPERSON THERNSTROM: I
13 agree that process is important. I just want
14 it to apply in the future.

15 COMMISSIONER BRACERAS: And frankly
16 --

17 VICE CHAIRPERSON THERNSTROM: This
18 is a briefing from last June.

19 COMMISSIONER BRACERAS: I agree
20 with that, believe me, it's stale. But I have
21 always felt that this Commission can be best
22 utilized if it acts more in the vein of a
23 think tank than a policy activist.

24 VICE CHAIRPERSON THERNSTROM:
25 That's not --

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1 COMMISSIONER BRACERAS: Whether or
2 not we influence legislation doesn't matter,
3 if we're putting out materials that are useful
4 to scholars and from which scholars can draw
5 their own conclusions.

6 VICE CHAIRPERSON THERNSTROM: Well
7 --

8 CHAIRPERSON REYNOLDS: We are
9 having a conversation that should take place
10 amongst the working group.

11 COMMISSIONER BRACERAS: I'm just
12 explaining to you why I can't vote for it as
13 is.

14 CHAIRPERSON REYNOLDS: I understand
15 that. Jennifer put a compromise on the table.

16 VICE CHAIRPERSON THERNSTROM: It's
17 going to take us the rest of the afternoon, do
18 you realize that to go through these one by
19 one.

20 COMMISSIONER BRACERAS: Well, then
21 let's just vote up or down.

22 COMMISSIONER YAKI: Well, the facts
23 that there are no dissents, I can't do that.

24 CHAIRPERSON REYNOLDS: We haven't
25 settled on that matter, Michael.

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1 VICE CHAIRPERSON THERNSTROM: And I
2 don't understand why if we vote on the
3 findings and briefings but allow dissents, why
4 doesn't that solve the problem?

5 CHAIRPERSON REYNOLDS: Commissioner
6 Kirsanow?

7 COMMISSIONER KIRSANOW: I agree
8 with many of the points that have been made
9 with one exception, that by voting on this at
10 some point later than today somehow this
11 report is going to be that much more stale. I
12 don't necessarily agree with that. It's been
13 nine months.

14 COMMISSIONER BRACERAS: It's
15 already stale.

16 COMMISSIONER KIRSANOW: Ten months
17 isn't going to make any difference. Second is
18 it strikes me that we have got kind of an
19 atomized position among the Commissioners.
20 I've heard maybe five or six different
21 positions as to how we should approach this,
22 so I don't think that we're going to have the
23 majority vote on any of them today.

24 I don't like moving forward without
25 a procedure.

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1 CHAIRPERSON REYNOLDS: Can we table
2 the whole thing?

3 COMMISSIONER KIRSANOW: My
4 preference would be, again, we're operating in
5 traditional vacuum.

6 CHAIRPERSON REYNOLDS: What
7 information is missing?

8 COMMISSIONER KIRSANOW: First of
9 all, we've got a working group that's working
10 on a process. That may be a process in which
11 all of us can work and at some point it's
12 done. I would table this report, voting on
13 it, until that is done.

14 VICE CHAIRPERSON THERNSTROM: Then
15 it may end up being -- I've got a question for
16 Commissioner Yaki.

17 If we voted on the findings and
18 recommendations today, and if they were
19 approved, and if we said to you look, you can
20 write a dissent, just as long as the briefing
21 report, as far as I'm concern -

22 COMMISSIONER YAKI: longer, longer

23 VICE CHAIRPERSON THERNSTROM:
24 whatever length. Would that solve the problem
25 for you of voting today on the entire package?

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1 COMMISSIONER YAKI: No. I was
2 under the impression and I am in support of my
3 fellow working group member, Commissioner
4 Braceras and Commissioner Taylor that we can
5 work to resolve this issue. I mean I have --
6 there may be points of compromise that I can
7 come to on briefing reports other than what
8 you already know is my hard and fast belief
9 that it's inappropriate to do findings and
10 recommendations on briefing reports. But I
11 have been listening to this and thinking about
12 how I can work to accommodate some of the
13 issues that I care about and still meet what
14 is the inevitable majority position that could
15 prevail on this. But I want to do that in the
16 context of the discussion of the working
17 group, otherwise, I'm not going to be prepared
18 to spend about an hour talking about the
19 report itself today and if a vote were forced
20 on it today, I would rather not.

21 I would rather see if there's a way
22 that we can work out the procedures within the
23 working group so that we don't have these 20
24 to 30 minute debates prior to each report
25 every time it comes up.

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1 CHAIRPERSON REYNOLDS: I move that
2 we table the entire report. Is there a
3 second?

4 VICE CHAIRPERSON THERNSTROM:
5 Second.

6 CHAIRPERSON REYNOLDS: All in
7 favor?

8 (Ayes.)

9 CHAIRPERSON REYNOLDS: Any
10 objections? Any abstentions?

11 COMMISSIONER BRACERAS: I abstain.

12 COMMISSIONER TAYLOR: Abstain.

13 CHAIRPERSON REYNOLDS: The motion
14 passes. Let the record reflect that
15 Commissioners Braceras and Taylor abstained.

16 VICE CHAIRPERSON THERNSTROM: So
17 the plan is to bring this up again at?

18 COMMISSIONER TAYLOR: The pressure
19 now is full square on the working group.

20 CHAIRPERSON REYNOLDS: Commissioner
21 Taylor has committed and offered to pay a fine
22 if he fails to --

23 COMMISSIONER TAYLOR: Using
24 Commissioner Yaki's checkbook.

25 CHAIRPERSON REYNOLDS: Whatever

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1 works, but anyway the plan is that the working
2 group will get its work done between now and
3 the next meeting.

4 COMMISSIONER YAKI: I need to find
5 a checkbook.

6 VICE CHAIRPERSON THERNSTROM: Wait
7 a minute, when do we have to see the
8 recommendations of the working group?

9 CHAIRPERSON REYNOLDS: It would
10 have to be at least a week before the next --

11 VICE CHAIRPERSON THERNSTROM:
12 Exactly, the working group is committing
13 itself to finishing its work at least a week
14 before the next meeting.

15 COMMISSIONER BRACERAS: Everybody
16 is staring at me.

17 COMMISSIONER TAYLOR: The answer is
18 yes.

19 COMMISSIONER BRACERAS: Well, I
20 think, right, and we're just going to have
21 accept the fact that some of our
22 communications may have to be done by email
23 because the problem is people on the West
24 Coast prefer an afternoon schedule and because
25 of my work schedule, and having the kids all

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1 afternoon on some days, I need a morning
2 schedule and so that's what's been one of the
3 problems in finding a time when we all can
4 meet.

5 CHAIRPERSON REYNOLDS: Well, that
6 problem will remain.

7 COMMISSIONER BRACERAS: We'll have
8 to resolve it, but maybe some of it's done
9 with email.

10 CHAIRPERSON REYNOLDS: Okay. SACs.

11 VII. State Advisory Committee Issues

12 CHAIRPERSON REYNOLDS: We're going
13 to recharter two SACs today. I move that we
14 recharter the Alabama State Advisory
15 Committee. Under this motion the Commission
16 appoints the following individuals to that
17 Committee based on the recommendations of the
18 Staff Director: David Beito, who is also
19 nominated as chair; Valerie Askew-Williams,
20 Margaret Brown, Richard Finley, Ed Haden,
21 Silvia Hoyos, Randy Kelley, Merceria Ludgood,
22 Raphael Maharaj, Harriet Means, Charles
23 Nuckolls, Mary Elizabeth Peters, and William
24 D. Smith.

25 I also move that -- oh no. The

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1 Commission will serve as uncompensated
2 government employees. Under this motion, the
3 Commission authorizes the Staff Director to
4 execute the appropriate paperwork for the
5 appointment.

6 Is there a second?

7 VICE CHAIRPERSON THERNSTROM:

8 Second.

9 CHAIRPERSON REYNOLDS: Discussion?

10 COMMISSIONER MELENDEZ:

11 Commissioner Melendez. Is this for Alabama?

12 CHAIRPERSON REYNOLDS: Yes.

13 COMMISSIONER MELENDEZ: Again, my
14 concern -- and who is the chair of this now or
15 was recommended?

16 CHAIRPERSON REYNOLDS: It would be
17 David Beito. Have I mangled his name?

18 COMMISSIONER MELENDEZ: Again,
19 there are two people, Mr. Haden and Mr. Smith,
20 who are basically, my concern is in the
21 documents we have in the recharter package,
22 there's very little said about them as far as
23 work in civil rights and that's always been my
24 comment on some of these. I don't know where
25 they came from, but that's just my comment for

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1 those two.

2 CHAIRPERSON REYNOLDS: Okay, at
3 least with respect to Ed Haden, I know that he
4 worked up on the Hill for I believe Jeff
5 Sessions and worked on civil rights issues.

6 Ken, can you give me some help with
7 the other individual?

8 STAFF DIRECTOR MARCUS: Haden, I
9 recall. I'm just trying to pull Mr. Smith up.

10 CHAIRPERSON REYNOLDS: Apparently,
11 the same is true for Smith.

12 Additional comments or questions?

13 COMMISSIONER MELENDEZ:
14 Commissioner Melendez. There's the issue that
15 on the applications that they sent in, they
16 don't really write too much about themselves.
17 I'm trying to find it, but I thought maybe
18 they didn't write enough about themselves on
19 the applications, things that tell us they
20 have done all these things, but it's not in
21 what they wrote down.

22 STAFF DIRECTOR MARCUS: Okay, I
23 will certainly encourage regional staff to
24 make sure that more of the information is
25 pulled out and put on to the essay question

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1 about background.

2 COMMISSIONER MELENDEZ: Yes,
3 because that's always my concern. I look at
4 the application, if I only see a sentence or
5 two on what they've done, then I'll question
6 that.

7 CHAIRPERSON REYNOLDS: Additional
8 questions or concerns?

9 All in favor, please say aye.

10 (Chorus of ayes.)

11 CHAIRPERSON REYNOLDS: Any
12 abstentions? Any objections?

13 COMMISSIONER YAKI: Yes.

14 CHAIRPERSON REYNOLDS: That was
15 from Commissioner Yaki?

16 COMMISSIONER YAKI: Yes.

17 CHAIRPERSON REYNOLDS: The motion
18 passes. Please let the record reflect that
19 Commissioner Yaki opposed.

20 COMMISSIONER YAKI: Said no.

21 COMMISSIONER MELENDEZ: I
22 abstained.

23 CHAIRPERSON REYNOLDS: Oh, and in
24 addition, let the record reflect that
25 Commissioner Melendez abstained from the vote.

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1 Okay. Next is the rechartering of
2 the Mississippi State Advisory Committee. I
3 move that the Commission recharter the
4 Mississippi State Advisory Committee. Under
5 this motion, the Commission appoints the
6 following individuals to that Committee based
7 on the recommendations of the Staff Director:

8 Bradley Clanton, who is also nominated as
9 chair; Victoria Cintra, Goyo De La Cruz,
10 Willie Green, Elizabeth Powers, Wendy Rosas-
11 Altieri, Ronald Rychlak, Sue Sautermeister,
12 Walter Scott, Forest Thigpen and Leroy Walker.

13 The members will also serve as
14 uncompensated government employees and under
15 this motion, the Commission would authorize
16 the Staff Director to execute the appropriate
17 paperwork for their appointment.

18 Is there a second?

19 VICE CHAIRPERSON THERNSTROM:

20 Second.

21 CHAIRPERSON REYNOLDS: Discussion?

22 COMMISSIONER MELENDEZ:

23 Commissioner Melendez here. Looking at the
24 package again, the chair, Mr. Clanton, my
25 understanding, but I looked at some of the

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1 other candidates, Ms. Elizabeth Powers, who
2 has a great deal more experience as far as
3 being on the SAC before and I wondered why Mr.
4 Clanton was picked. Could the Staff Director
5 comment on that?

6 STAFF DIRECTOR MARCUS: Yes, Mr.
7 Clanton was the chief counsel to the House of
8 Representatives Judiciary Committee
9 Subcommittee on the Constitution and Civil
10 Rights which is the authorizing committee for
11 this Commission and through his work there, he
12 had developed what would appear to be a
13 substantial knowledge both about the
14 Commission itself, the mission of the
15 Commission, and the environment in which the
16 Commission operates. He certainly has a very
17 distinguished background in his experience as
18 the former chief counsel of our Oversight
19 Committee seemed to give him a particularly
20 interesting and useful perspective on the work
21 that we do.

22 COMMISSIONER MELENDEZ: What do you
23 think about Ms. Powers? Do you have any
24 comment on her?

25 STAFF DIRECTOR MARCUS: I am

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1 certainly recommending Ms. Powers for
2 membership on the committee.

3 (Pause.)

4 COMMISSIONER MELENDEZ: No other
5 questions.

6 CHAIRPERSON REYNOLDS: That being
7 the case, all in favor say aye.

8 (Chorus of ayes.)

9 CHAIRPERSON REYNOLDS: Any
10 abstentions?

11 COMMISSIONER MELENDEZ: Abstain.

12 CHAIRPERSON REYNOLDS: Any
13 objections?

14 COMMISSIONER YAKI: Object.

15 CHAIRPERSON REYNOLDS: Please let
16 the record reflect that Commissioner Yaki
17 abstained

18 --

19 COMMISSIONER YAKI: No, I voted no.

20 CHAIRPERSON REYNOLDS: Okay.
21 Please let the record reflect that
22 Commissioner Yaki voted in opposition and that
23 Commissioner Melendez abstained.

24 Folks, we are done.

25 VICE CHAIRPERSON THERNSTROM:

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1 Fantastic.

2 CHAIRPERSON REYNOLDS: Hold on, we
3 are not done. We do need to schedule a date
4 and time to discuss the budget.

5 **VIII. Future Agenda Items**

6 CHAIRPERSON REYNOLDS: Folks, let's
7 get out our calendars.

8 VICE CHAIRPERSON THERNSTROM: I
9 don't have mine with me.

10 (Laughter.)

11 CHAIRPERSON REYNOLDS: Then we will
12 do this by email.

13 VICE CHAIRPERSON THERNSTROM: Yes.
14 I forgot my palm pilot.

15 STAFF DIRECTOR MARCUS: Can there
16 be an agreement to hold a conference call to
17 discuss these issues at a date and time to be
18 decided subsequently?

19 CHAIRPERSON REYNOLDS: Yes.

20 VICE CHAIRPERSON THERNSTROM: Yes.

21 CHAIRPERSON REYNOLDS: We're done.

22 COMMISSIONER BRACERAS: We need a
23 motion to adjourn.

24 COMMISSIONER YAKI: In scheduling a
25 conference call, you can also do it after

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1 hours East Coast time which comes close to the
2 end of the day West Coast time.

3 COMMISSIONER TAYLOR: I don't know
4 if I can do that.

5 COMMISSIONER YAKI: If the mornings
6 aren't working for people.

7 VICE CHAIRPERSON THERNSTROM: I
8 mean why can't you do that with the working
9 group as well, just do it in the evenings?

10 COMMISSIONER YAKI: That's what I'm
11 saying right now.

12 CHAIRPERSON REYNOLDS: Well, that
13 presents --

14 COMMISSIONER TAYLOR: I am
15 obligated to put the kids to bed and give them
16 a bath and those duties.

17 (Laughter.)

18 COMMISSIONER TAYLOR: I am. I've
19 got three kids.

20 (Laughter.)

21 CHAIRPERSON REYNOLDS: Okay, well,
22 we will work it out.

23 VICE CHAIRPERSON THERNSTROM: How
24 late do they stay up?

25 COMMISSIONER TAYLOR: I've got to

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1 read them a book, put them to bed.

2 COMMISSIONER KIRSANOW: Motion to
3 adjourn.

4 **IX. Adjourn**

5 CHAIRPERSON REYNOLDS: Okay. I'm
6 sure no one is going to object.

7 (Whereupon, at 11:59 a.m., the
8 Commission meeting was concluded.)

9

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