The Commission convened in room 540 at 624 9th Street, N.W., Washington, D.C. at 9:30 a.m., GERALD A. REYNOLDS, Chairman, presiding.

PRESENT:

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

STAFF PRESENT:

TYRO BEATTY, Director, Human Resources Division
DAVID BLACKWOOD, General Counsel, OGC
MARGARET BUTLER
CHRISTOPHER BYRNES, Attorney Advisor to the Office of the Staff Director
DEBRA CARR, Associate Deputy Staff Director, OSD
RANITA CARTER
PAMELA A. DUNSTON, Chief, ASCD
BARBARA FONTANA
LATRICE FOSHEE
DEREK HORNE
MAHA JWEIED
SOCK-FOON MacDOUGALL
TINALOUISE MARTIN (via telephone)
EMMA MONROIG, Solicitor/Parliamentarian
BERNARD QUARTERMAN, JR.
EILEEN RUDERT
KIMBERLY TOLHURST
AUDREY WRIGHT
MICHELE YORKMAN RAMEY
COMMISSIONER ASSISTANTS PRESENT:

LISA NEUDER
RICHARD SCHMECHEL
KIMBERLY SCHULD
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Adjourn
P-R-O-C-E-E-D-I-N-G-S
(9:38 a.m.)

CHAIRMAN REYNOLDS: Good morning, everyone. The meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. And this meeting is being held at 624 9th Street, Northwest, room 540, Washington, D.C.

With the exception of Commissioner Braceras, all of the commissioners are physically present. Commissioner Braceras is participating by phone.

This morning we focus our attention on business and administrative issues at the Commission.

I. Approval of Agenda

CHAIRMAN REYNOLDS: The first item on the agenda is the approval of the agenda. I move that we approve the agenda. Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please signify by saying aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)
CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion passes unanimously.

II. Approval of Minutes of March 9 Meeting

CHAIRMAN REYNOLDS: The second item is the approval of the minutes of March 9th of 2007. I move that we approve those minutes. Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please say aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any objections?

(No response.)

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion passes unanimously. Excuse me. I am in the process of coming down with a cold. I may lose my voice before it's all over.

III. Announcements

CHAIRMAN REYNOLDS: The announcements, April 15th is the 60-year anniversary of Jackie
Robinson's breaking Major League Baseball's color barrier. He became the first black American Major League Baseball player of the modern era in 1947.

He was a member of six World Series teams, earned six consecutive all-star game nominations and won several awards during his career. And he was inducted into the baseball Hall of Fame in 1962.

In recognition of his accomplishments, both on and off the field, Robinson posthumously received a Congressional Gold Medal and the Presidential Medal of Freedom.

On March 29th, the Tuskegee Airmen, a group of black American pilots who flew with distinction during World War II as the 332nd fighter group of the U.S. Army Air Corps received --

COMMISSIONER MELENDEZ: The Red Tails.
CHAIRMAN REYNOLDS: -- received the nation's highest civilian award, the Congressional Gold Medal, for fighting to defend their country while facing bigotry at home.

Although they were not allowed to practice or fight with their white counterparts, the Tuskegee Airmen distinguished themselves by escorting bomber aircraft with unusual fuel losses during World War II.

Prior to the Tuskegee Airmen, no U.S. military pilots
had ever been black Americans.

At this point we will hear from the Staff
Director. We will hear his report.

STAFF DIRECTOR MARCUS: I thank you, Mr.
Chairman, Madam Vice Chair, commissioners.

IV. Staff Director

STAFF DIRECTOR MARCUS: We do have a few
issues for this morning. First, on March 29th, 2007,
I testified before the U.S. House of Representatives
Committee on Appropriations Subcommittee on Commerce,
Justice, Science, and Related Agencies in support of
the agency's request for fiscal year 2008
congressional appropriations.

Chairman Mollohan, Ranking Member
Frelinghuysen and Member Ruppersberger were present
during my testimony. The agency's budget request was
generally well-received. And both Chairman Mollohan
and Ranking Member Frelinghuysen praised Commission
leadership for the success of certain of its reforms.

There were a number of concerns or
questions that were expressed from the committee,
including, for instance, concerns that members had
about our process for external review of commission
reports, the timeliness of state advisory committee
rechartering, and Commissioner Melendez's criticisms
regarding the briefing procedures or lack of briefing procedures.

However, in general, I think the tone of the congressmen's remarks were positive. They were particularly impressed with our ability to get a clean audit for last year. And they were also impressed with the seriousness with which we have taken the most recent GAO audit.

Just this week, the Commission entered into an agreement with GSA to provide expanded services to the Commission regarding budget and finance. I've mentioned in the past that we were working with GSA to execute this MOU. Under this agreement, GSA will be providing a substantial number of the services that were previously provided by our Budget and Finance Division chief.

There are some tasks that we will still need to do in-house that they cannot do, including, for instance, doing reconciliation of some of their work and doing some coordination that can only be done on the premises here. But this will involve a substantial undertaking by GSA to do the work previously done by the Budget and Finance Division. And I think it is an excellent way of ensuring that we get high-quality work in budget and finance.
Within the last week, the staff posted on FedBizOps the statement of work for the audit. We are getting ready once again to ensure a timely audit for this fiscal year.

The statement of work is largely similar to the one that we did last year with the exception that the Commission is now able to indicate to potential auditors that we did receive unqualified opinions on all of our financial statements last year and also that we now have an accounting system that is finally fully compliant with the joint financial management improvement plan based on our work with GSA.

So we are hopeful that this will signal to potential auditors that we are not only a fully auditable agency but that the audit work can be undertaken at a reasonable time and expense level.

This week, as directed by the Commission, we held a roll-out of the campus anti-semitism public education campaign. The launch of the Website is scheduled for today, but we held a meeting with interested groups from the higher education community as well as from the Jewish community and civil rights community about the work that we were doing to communicate to college students about what their
rights are and what remedies they have in the event that they face anti-semitism.

We do have an example of the poster that is being disseminated. The content had previously been approved by the Commission with some changes. The changes have now been approved. And it was I think very successfully executed by GPO.

GPO was here for the roll-out, including members of their creative team. In addition, we are disseminating the hard copy card, which has essentially the same image that you can see on the easel and the same message. And the Web site will roll out.

One of the creative features of the Web site is the way in which it participates in our viral campaign. As the commissioners may recall, a goal of the Website is to inform students of what their rights are but also to make sure that students around the country know about our complaint line, what they can do. So we use the poster, the flyer, and the electronic card as a means of letting people know the URL address of our new Website and also the phone number and e-mail address for our complaint line.

An interesting feature of the Website is that the electronic version of this card can now be
e-mailed directly from the site. We had a number of staff members who did a lot of great work, too many to thank by name.

I would say Sock Foon MacDougall coordinated the entire project, that Michele Yorkman was able to do the Website in-house, juggling it with all of our other work so that we did not incur additional expenses for the electronic side. Margaret Butler and Maha Jweied and others provided other sorts of support. And we had a substantial team of other people.

So this was I think successful. One organization sent us a letter describing as momentous our campaign.

VICE CHAIRPERSON THERNSTROM: Have there been any hits so far on the Website? Do you know?

STAFF DIRECTOR MARCUS: The Website is scheduled to be launched this morning --

VICE CHAIRPERSON THERNSTROM: Oh, this morning? Okay.

STAFF DIRECTOR MARCUS: -- as part of this meeting.

VICE CHAIRPERSON THERNSTROM: Right.

STAFF DIRECTOR MARCUS: We have completed a proposed state advisory committee for the State of
Michigan and the Commonwealth of Virginia, which has been distributed to members. And I am pleased that the potential members who have been identified have both a very wide range of experience and a wide range of expertise and community involvement.

I would like, if I may, to say a few more words about it, particularly in light of correspondence that we have just received from the Hill. And I think that commissioners should have received not directly the correspondence from Chairman Conyers and Chairman Nadler.

The recommendation for the Michigan advisory committee includes a former chairman of the U.S. Commission on Civil Rights, president of the Michigan Asian Pacific American Bar Association, and the American Indian affairs specialist for the Michigan Department of Civil Rights, chairperson of the Michigan Civil Rights Initiative, regional director of the American Hour of Discrimination Committee, the executive director of the American Civil Liberties Union of Michigan, the pastor of the Ypsilanti Bible Church, and the deputy director and director of community affairs for Chairman Conyers. So we have, just to name a few of them, some very distinguished people among the recommended members.
Similarly, the proposed members for the Virginia state advisory committee include a former staff director of the U.S. Commission on Civil Rights, the former chief of staff of the Employment Division --

COMMISSIONER YAKI: I am sorry. Excuse me. But why are we going through this now if it's not a discussion item yet? I think it's appropriate to note the letter, but I don't think we need to go into a debate about the merits of the different people unless you want to start it right now.

VICE CHAIRPERSON THERNSTROM: Well, wait a minute. We're not into a debate. We're simply hearing what the list is.

COMMISSIONER YAKI: That list is already an agenda item. So why are we doing it now?

VICE CHAIRPERSON THERNSTROM: I would like to hear from the Staff Director. Usually when it is an agenda item -- what is the down side of hearing the list from the Staff Director as part of his report?

COMMISSIONER YAKI: Because it is already on the agenda. And the list is part of the agenda. So, therefore, we discuss it during that part of the agenda. He is simply noting the fact that we got a letter late yesterday from Chairman Conyers and
Subcommittee Chairman Nadler. And I think that's appropriate, but to go into a defense of whatever it is is something that is more appropriate for the agenda item. And we're not at that place right now.

STAFF DIRECTOR MARCUS: I will be happy to wrap it up. I have discussed this in prior meetings. And when I have done this, I was not aware of any concern.

I will simply say that there is a wide variety of

COMMISSIONER YAKI: Well now there is a big concern.

STAFF DIRECTOR MARCUS: a wide variety of very impressive individuals who have been recommended.

COMMISSIONER YAKI: Oh, yes.

STAFF DIRECTOR MARCUS: Those are my comments. If there are any questions from the members?

COMMISSIONER MELENDEZ: Commissioner Melendez.

I just had a question about the appropriation. I know that our budget was a big concern. As you know, we were decreased down to $8.8 million. And we had talked about trying to in some way -- we recognize that the Staff Director cannot --
well, the Staff Director cannot advocate against the
doctrine of such an employee for the federal government.

But I think that we had talked about
trying to some way advocate for more funding for the
Commission because we are really under-funded. So we
had talked about if there is some way to mention that
maybe you cannot advocate for that, but at least
individual commissioners had concerns with the amount
of money that we are getting to adequately operate
here within the Commission.

So did we have that opportunity to
absolutely ask the people at the hearing that that is
a big issue?

STAFF DIRECTOR MARCUS: There was talk
about individual commissioners who might want to send
letters in their individual capacity. I am not aware
of any letters that were sent. And they certainly
weren't shared with me.

COMMISSIONER MELENDEZ: Okay. We can
still do that?

STAFF DIRECTOR MARCUS: If you are asking
whether commissioners legally can do that, I would say
that I have distributed the best legal advice that OGC
has. And I would simply say that I have nothing to
add on the legality of it.
Since the commissioner mentions the need for more money, I suppose I should also add -- and this is very significant -- that both the chairman and the ranking member noted fairly strongly their belief that our agency needs more money than what is requested.

They both in very strong terms acknowledged the importance of the mission of the agency. They indicated their belief that we have been under-funded in prior years. And they expressed a concern that we should receive more money than is requested.

COMMISSIONER MELENDEZ: Just a couple of updates. Could you also -- I note you did comment on this, but we still have a statutory report for 2007 that we still have some deadline dates. What is our status on that?

STAFF DIRECTOR MARCUS: We are woefully behind. As the commissioner may recall, we have had a lot of attrition in the Office of General Counsel in the last year or so. And we have just put some people back on. But we still are understaffed there.

We are at this point, I would say, more than a month, probably more than six weeks or two months behind on that. But the Office of General
Counsel is working very hard to put a draft together. And I would expect to have a draft in a shape that I can circulate, I'm hoping, between now and the next meeting.

Now, because we are trying to get it out much sooner in the year than we have done in the past, it will not look as polished, I don't think, or as complete as prior drafts. There are still substantial areas where the research is not yet completed.

This is, as the commissioner may recall, a very data-intensive project. The research has been very intensive and is required on a district by district basis checking on court records and checking on the status of proceedings where no one seems to have checked on them for quite some time.

So we are behind. The draft will not be polished or completed on time, but we will provide the best that is available at some time over the course of the next month.

VICE CHAIRPERSON THERNSTROM: Is there any further discussion? I have obviously taken over. Gerry had to step out. The Chairman had to step out. Is there further discussion of the Staff Director's report at this point?

COMMISSIONER MELENDEZ: Just one other
question. What is the status of our hiring here in the office? You know, you had mentioned that. Could you give us an update of who has been hired in the last six weeks or something like that?

STAFF DIRECTOR MARCUS: I'm sorry? The people hired in the last six week?

COMMISSIONER MELENDEZ: Yes. Is there new staff?

STAFF DIRECTOR MARCUS: Maybe someone could remind me. I don't believe we have new staff who have actually come on board in the last six weeks.

I do anticipate new staff will come on board between now and the next meeting, whom I hope to be able to introduce at that time. And they would include a new attorney adviser in the Office of the Staff Director to take over the work that Derek Horne had been doing since he is moving into the regional structure as well as a special assistant for the Chairman has been previously approved.

We are working to identify a person who can help on the procurement side, but that person will not be an employee but, rather, would be part of a contracting operation.

COMMISSIONER YAKI: Do we have a head of OCRE yet?
STAFF DIRECTOR MARCUS: We do not have a new head of OCRE, but we are fairly far along in the process. I don't know whether we will have someone who is on board by the next meeting, but I certainly hope to have one within the next few meetings.

It's a Senior Executive position. So the procedures are a little bit more intensive.

COMMISSIONER MELENDEZ: Just a final question. How is the staff morale here within the Commission? I understand we have done some surveys to try to get some feedback as to how everything is going within the operations here.

STAFF DIRECTOR MARCUS: As with any agency, that is a complicated question. And there are at any given time people with higher and people with lower.

I would say that over the last few years, the morale at this agency has been lower than it should be and lower than at other federal agencies. And I don't believe that in the last two years we have been able to significantly improve that. I think we have improved it in some areas. And in other areas it may actually have declined. And that is a concern.

Just over the last few years our budget in relative terms has continued to decline. The number
of staff has significantly declined while the amount of work has not. So I think that the workload has been increasing. We have had less money than other agencies for bonuses, for training, and for travel.

So I would say in general our staff has faced a lot of challenges over the last couple of years and that that is an issue. At the same time, I would say I have been impressed by a number of signs of great commitment and passion by individual staff members and some extraordinary work in certain areas that has been done that shows unflagging enthusiasm by at least some staff members in some area that I think can be a source of pride.

COMMISSIONER MELENDEZ: Thank you. You know, my point is that the budget even affects morale to some extent because people do a lot more than they normally would. So I just wanted to point that out. So thank you.

STAFF DIRECTOR MARCUS: Thank you, sir.

VICE CHAIRPERSON THERNSTROM: Are there any other questions or comments with respect to the Staff Director's report?

COMMISSIONER YAKI: Yes. I have a question. Do we have any idea of anticipated personnel changes in the regions?
STAFF DIRECTOR MARCUS: Yes. We are anticipating that we will have continued attrition. And there are three retirement-eligible officials we anticipate will retire within the course of the next month or so.

COMMISSIONER YAKI: And what rank are these people?

STAFF DIRECTOR MARCUS: They are senior people that include the regional director of our Chicago office, the regional director of our Denver office, and our analyst in Los Angeles.

COMMISSIONER YAKI: And there is no regional director in L.A. right now as is, correct?

STAFF DIRECTOR MARCUS: That's correct.

COMMISSIONER YAKI: So with the retirement of the analyst, that pretty much leaves no one in the Western region?

STAFF DIRECTOR MARCUS: We will need to backfill for the analyst to replace him. That's correct.

COMMISSIONER MELENDEZ: Just a comment. Can you give us a revised time line for the statutory report --

STAFF DIRECTOR MARCUS: I would happy to provide it as soon as we can and certainly between now
and the next meeting.

COMMISSIONER MELENDEZ: Okay. And if there are any surveys you want to send us on morale, that would be fine, too, if you could. I would like to see those.

STAFF DIRECTOR MARCUS: Yes. There is a survey. If I had not communicated it to the commissioners, I certainly will.

COMMISSIONER MELENDEZ: Okay. Thank you.

VICE CHAIRPERSON THERNSTROM: Any other comments on the staff director's report?

(No response.)

V. Management and Operations

-2007 Calendar

VICE CHAIRPERSON THERNSTROM: Otherwise let us move on to the 2007 calendar. We need to approve this calendar of meetings and briefings. Some commissioners have requested that we amend it to -- I'm sorry, sir? Do you want to stop me in my tracks here or no?

STAFF DIRECTOR MARCUS: Maybe if you could give us just a moment?

VICE CHAIRPERSON THERNSTROM: Okay.

(Pause.)

VICE CHAIRPERSON THERNSTROM: Is there a
problem on discussing the calendar?

STAFF DIRECTOR MARCUS: No. I'm sorry.

VICE CHAIRPERSON THERNSTROM: Oh, okay.

Anyway, do we have the calendar, the proposed calendar, here? I do not have this.

COMMISSIONER YAKI: I didn't see it in my packet either.

VICE CHAIRPERSON THERNSTROM: Yes. I do not have it. I'm happy to continue, though the Chair has just arrived back. Mr. Chairman, we're in the middle of discussing this, beginning to discuss the calendar.

Some commissioners have requested that we amend the calendar to ensure that we have enough time to handle pending issues at business meetings. And the suggestion is that meetings would consist of either business or briefings but not both unless we have an unusual or pressing need to conduct business during a month dedicated to a briefing.

And so I would like a motion to revise the 2007 business meeting briefing calendar in order to cancel the business meeting previously scheduled for the months of June, October, and November, move the briefing scheduled for July to August.

Revising the calendar will enable us to
focus on the briefings scheduled for those months under the revised calendar. The June briefing will remain, "School Choice: The Blaine Amendments and Anti-Catholicism."

There will now be an August briefing, previously scheduled for July, which will be "Minority Children in State Foster Care and Adoption."

The October briefing will remain "Discrimination Against Native Americans in Border" --

CHAIRMAN REYNOLDS: Is there something about being chair today that ruins your voice?

VICE CHAIRPERSON THERNSTROM: Yes. Well, this Chair has got not a new disease but just a lingering cough from an old sickness. So I'm not lethal in any way.

PARTICIPANT: In that regard.

VICE CHAIRPERSON THERNSTROM: In that regard. Yes. I hope I'm lethal in other regards.

And the November briefing will remain "Minorities in Special Education." So we need a motion on this to change it. And do people actually need the list, which I do not have? Do people need to stare at this calendar?

CHAIRMAN REYNOLDS: Does anyone need this calendar?
VICE CHAIRPERSON THERNSTROM: None of us have it.

STAFF DIRECTOR MARCUS: I sent a staff member to try to make copies.

VICE CHAIRPERSON THERNSTROM: Yes. It would be helpful to have it right in front of us.

COMMISSIONER KIRSANOW: Maybe we should move on to the next agenda item while we are waiting for the --

COMMISSIONER YAKI: And while we are waiting for the cough drops to take effect.

CHAIRMAN REYNOLDS: I will resume my duties.

VICE CHAIRPERSON THERNSTROM: Yes. Please do.

CHAIRMAN REYNOLDS: Okay. So we are going to table this issue until we get copies of the calendar. The next item up is -- yes, Commissioner Braceras?

COMMISSIONER BRACERAS: Like the others, I have the motion but not the calendar. Could someone e-mail it to me?

VICE CHAIRPERSON THERNSTROM: Could somebody e-mail it to you?

STAFF DIRECTOR MARCUS: Perhaps we will...
have someone fax it to you. Is that equally acceptable?

COMMISSIONER BRACERAS: Unfortunately, no.

STAFF DIRECTOR MARCUS: I think Ms. Schuld is taking care of that.

COMMISSIONER YAKI: Clarification. So under the proposed calendar, July and September would now be business meetings?

VICE CHAIRPERSON THERNSTROM: We are holding this until we get a calendar in front of us so we can all intelligently discuss this.

-Website Updates

CHAIRMAN REYNOLDS: The next item up is the Website updates. I move to authorize the Staff Director to post the following documents on the Commission's public Website.

The first item is the letter to Major League Baseball commending it for hosting its first ever civil rights game. The letter was signed by all commissioners except Commissioner Melendez.

The second item to be posted would be the letter sent to Major League Baseball signed by Commissioners Yaki and Melendez expressing concern over the participation of a team in the civil rights game with a mascot representing Native Americans.
Three, the third item is the Staff Director's March 29th testimony before the House Appropriations Subcommittee for Commerce, Justice, Science, and Related Agencies.

And the fourth item is the Commission's January 31st, 2007 letter to the House Appropriations Committee on Commission reforms.

Is there a second?

VICE CHAIRPERSON THERNSTROM: I second it.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor, please signify by saying aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any objections?

(No response.)

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion passes unanimously.

-2007 Calendar (Continued)

CHAIRMAN REYNOLDS: I guess we can jump back now. Do we all have calendars in front of us now?

VICE CHAIRPERSON THERNSTROM: Jennifer,
have you got a calendar?

COMMISSIONER BRACERAS: I am looking. No.

VICE CHAIRPERSON THERNSTROM: Well, I
don't think you are in disagreement with the basic
thrust of this.

COMMISSIONER BRACERAS: No, of course not.

VICE CHAIRPERSON THERNSTROM: I think the
first question is, is anybody in disagreement with
separating briefings and business, if possible?

CHAIRMAN REYNOLDS: I assume that everyone
is in support of separating business meetings from
briefings, but I could be wrong. Does anyone have any
thoughts?

COMMISSIONER HERIOT: I guess for the
record, I am willing to do it, you know, to have a
full day's agenda. That's not a problem for me. I am
a worker today.

CHAIRMAN REYNOLDS: You are in the
minority.

(Laughter.)

VICE CHAIRPERSON THERNSTROM: Well, Gerry,
let's talk about this for a second. She's in the
minority, I believe, because of concerns on the part
of the West Coast participants. Is that not correct?

CHAIRMAN REYNOLDS: Yes.
COMMISSIONER BRACERAS: Not exactly. I mean, they are concerns of the West Coast participants. They are also concerns by, I believe, Ashley and myself because of the need to get back to our families.

CHAIRMAN REYNOLDS: Well, what we have to do, though, is to balance our workload with our personal lives. And sometimes we have to make sacrifices on the personal side, as we all do.

COMMISSIONER BRACERAS: Gerry, I understand that, but the reality is that both Ashley and I have to leave by a certain time on Fridays. And if the meetings go beyond that certain time, we will rarely, if ever, be in attendance. That's the way it is.

VICE CHAIRPERSON THERNSTROM: Jennifer, what time do you have to leave on Fridays?

COMMISSIONER BRACERAS: Well, historically I have always been on the 3:45 flight, preferably the 2:45, but I can make the 3:45 and make it work. Now, you know, I'm only --

COMMISSIONER TAYLOR: I have that same schedule. I take the train.

COMMISSIONER BRACERAS: So that's what we have always done. And my proposal with briefings and
meetings was initially made because what we were finding is that we were never getting the work of the Commission done because we had briefings and then people like myself and folks on the West Coast couldn't get out. So we were not getting the work done. So we could go ahead and be here all day.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I am in favor of whatever the majority would like to do. I could stay here as long as necessary or truncate the meetings, but there was I think a second consideration. And that is that if we had day-long meetings, that might necessitate those who are on the West Coast to stay over a night, which impacts our budget.

COMMISSIONER BRACERAS: That's right.

COMMISSIONER YAKI: Now, to add, the other reason why this was a serendipitous change is that we were informed that it made more budgetary sense to not be running and logistical sense not to be running 9 to ten briefings a year as is.

So, if I recall, how originally the genesis of this came about was a mutually beneficial convergence of the fact that briefings at 1:00 o'clock meant that Commissioner Melendez and I were leaving after about an hour and a half of testimony at the
And at the same time budget constraints and the reality of time and personnel and the backlog in our briefing reports date meant that we were cutting back from a full schedule to about eight.

COMMISSIONER BRACERAS: That is right. And I think there was a giant feeling that it was important to produce quality reports, even if that meant fewer reports, that we were going to exercise quality over quantity.

CHAIRMAN REYNOLDS: I think that there are good reasons to do this. I just want to say that there will be some issue, some emerging issue, that will come up that we will have to handle.

So there may be occasions where we deviate from this. And I would assume that it would only be under circumstances that are significant where we would deviate.

COMMISSIONER KIRSANOW: I agree.

VICE CHAIRPERSON THERNSTROM: I have a question. Oh, Pete, you do, too?

COMMISSIONER KIRSANOW: No.

VICE CHAIRPERSON THERNSTROM: If we look back at the record of meetings, let's say, over the last year, have there been months in which we could
have skipped the business section of the meeting without any cost to the functioning of the agency? We're going to have quite a few months here in which we do not have a discussion of business.

COMMISSIONER BRACERAS: My concern is not that we are limiting the business portion of the meetings to the months that we would be briefing so much as it is that we make sure we satisfy ones like this one, where we only do that and that when we have to conduct business in the other months, those discussions are much shorter and streamlined.

I never anticipated that we would have months where we would probably never have to do any business. The notion of having a separate business meeting was to take off the items on our agenda without having to worry that speakers were being made to wait until we could have the full airing and not let our business meeting be taken over by the briefing.

COMMISSIONER YAKI: And to underscore Commissioner Braceras' point, I think I can point to more than several meetings at which due to the length of the briefing or attendance or other matters that intervened, we basically had to try and reschedule the business portion of the meeting to a teleconference,
which is always problematic at best with all of our very divergent schedules. And those I always find to be a poor substitute for the robust discussion that we have in person at the Commission.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: But, Commissioner Yaki, that simply reinforces a concern of mine, which is that if we simply eliminate -- and I understand what Commissioner Braceras has said. Look, this will not necessitate eliminating business discussions. But I don't want to structure it such that we are having months in which we do not discuss business that is important and we end up on these teleconferences.

COMMISSIONER BRACERAS: We'll make sure we deal with it, but we have months where we have months where we have no briefings. For all the reasons that --

VICE CHAIRPERSON THERNSTROM: Right. And that is a slightly different point, it seems to me, than the one that comes through on this calendar. The one that comes through on this calendar, I mean, the calendar suggests no business at the meetings at which we are holding briefings. So I think it's important not to --
COMMISSIONER BRACERAS: We did offer that
with the knowledge that we will try to do business to
a minimum on --

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes. It always
seemed to me that the business meeting was scheduled
in the morning. I guess the question would be if you
scheduled all briefings in the morning -- and I always
wondered whether or not we were planning to
accommodate the people that were coming in to
participate in presentations at the briefing.

And it always seemed to me I always
wondered why we didn't have a business meeting at 1:00
and then go as much into it so people could get out of
here at 3:00 and if you didn't accomplish what was on
the agenda, then you would just table it to the next
business meeting. At least you would get two hours of
business meeting after lunch and take care of
briefings in the morning if you were going to -- that
would be the only scenario that I could see if you
were going to combine both of them. I would hate to
see a business meeting in the morning than to try to
going through afternoon briefing.

I just think that the briefing was more
important than the business meeting. So I don't know
if we ever thought about that scenario.

CHAIRMAN REYNOLDS: If we are going to do a briefing and also handle some business, we can pick some topics that are not controversial, that is not going to soak up a lot of time. So that's a way where we could get some business done while at the same time, at least on the same day, have a briefing.

VICE CHAIRPERSON THERNSTROM: Provided we can, in fact, postpone the controversial issues that come up like the one that has come up today with the letter.

STAFF DIRECTOR MARCUS: If I may just briefly respond to Commissioner Melendez's question, we did consider flipping it and having the briefings in the morning and the business meetings in the afternoon. And, in fact, we tried that for a few times.

The concern that was expressed by some commissioners is that they felt it wasn't working because we would lose the quorum during the business meeting, the business meeting would fail; whereas, the briefing would not by our guidelines require a quorum. So that was the reason we switched it around last time.

COMMISSIONER MELENDEZ: So did we break
for lunch? Does that have a big impact into trying to come back after 1:00 or something like that? If you just went straight through, would it --

STAFF DIRECTOR MARCUS: Well, we have had times where we have broken for lunch. I'm not sure if we have had times where we didn't break for lunch.

COMMISSIONER YAKI: There have been more times than not that we haven't.

STAFF DIRECTOR MARCUS: There have been more times where we haven't?

COMMISSIONER YAKI: Yes. I would say break for lunch is the exception, rather than the rule. But just I don't think we need to beat this horse anymore. I would say this is an imperfect compromise amongst the many items that we have.

I think that the Chairman's point about we can schedule nominal type business that we have to get out that we need to get housekeeping reports, whatever, out not controversial reports, but staff director reports, whatever, during the days that we have briefings.

But I do not want to see briefings starting at 1:00 o'clock in the afternoon. It just does not work for me. I need to get on the 5:30 flight. Everything else is usually all booked up.
And as we accrete more toward the spring and summer months, if you go to Dulles at 3:00 o'clock in the afternoon, you're in for a nightmare of epic proportions going through security. And I don't want to leave early from these briefings because I find them enjoyable and very thought-provoking and part of why I enjoy being a commissioner, because it allows us to take heed of the important issues of the day.

And to say, "Well, you know, we're going to put them in the afternoon because we can lose quorum because we might have to leave" I think is a disservice to the folks on the West Coast.

VICE CHAIRPERSON THERNSTROM: Let me just ask a question. So what we are talking about here is both May and June being briefings? And we don't have the next business, real business, discussion until July 13th. Is that correct?

STAFF DIRECTOR MARCUS: That is correct. And it is an anomaly. The basic rule seems to be that we would alternate from month to month between business meetings and briefings.

VICE CHAIRPERSON THERNSTROM: Well, it is not true. September is business and then not until December 3rd again.

STAFF DIRECTOR MARCUS: The reason for the
first anomaly that you mentioned is that --

COMMISSIONER KIRSANOW: We voted on it.

STAFF DIRECTOR MARCUS: -- it was a vote

last month to flip this month's meeting and next.

COMMISSIONER BRACERAS: Right. This month

was supposed to be the briefing.

STAFF DIRECTOR MARCUS: Right. So that

does create the unfortunate situation that there would

not be another business meeting until July.

VICE CHAIRPERSON THERNSTROM: Well, but we

have got the same thing between September and

December. Pete, I just don't see how we can go that

long without --

COMMISSIONER BRACERAS: Well, again, you

know, my suggestion is to do the briefings first.

VICE CHAIRPERSON THERNSTROM: We can't

afford to lose our quorum, however, for business

meetings.

CHAIRMAN REYNOLDS: Ken, for those months

where we have back-to-back briefings, I mean, looking

at what's in your "In" basket now, is it possible for

you to determine if we could take care of housekeeping

matters during those two months?

STAFF DIRECTOR MARCUS: It is difficult to

assess because we seldom have a month where it doesn't
appear to me that there is a lot going on that it would be useful to get commissioner input.

VICE CHAIRPERSON THERNSTROM: Yes, exactly.

STAFF DIRECTOR MARCUS: If the question is, if push comes to shove, can we do without commissioner input for an extra 60 days, formal input, I think we can try to do it. I don't see any of our obligations that we would be disregarding if we did it that way.

There would be state advisory committees that staff would be ready to recharter but where the charter would be delayed for 30 or 60 or 90 days because we don't have a meeting. And there might be occasional issues where input would be useful and we can only get it informally.

COMMISSIONER BRACERAS: Why don't you just do November and December?

STAFF DIRECTOR MARCUS: I don't see any reason why. It might have been inadvertent that we had them in this order. The "Minorities and Special Education" had been voted for November 9, but there is no reason that I can think of why they wouldn't be switched.

COMMISSIONER BRACERAS: Well, just flip
them and then for the understanding that there may be
--

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I am new here, but I
am a bit confused. I am feeling somewhat
uncomfortable with all of this. Civil rights issues
haven't gotten any less important, and we aren't being
paid any less money.

It seems to me that why don't we just
schedule telephone conferences, but why don't we then
start, you know, an hour earlier? We started at 9:30
today. If we started at 8:30, we could get more done.

Again, I am willing to be here as often as
is necessary to get the job done. And I'm not feeling
very comfortable with a notion of cutting back on any
kind of project.

CHAIRMAN REYNOLDS: Commissioner Heriot's
suggestions, some of them, have been considered; for
example, starting earlier. Some of us are willing to
do that. Some of us are not.

COMMISSIONER BRACERAS: Well, also on
cutting back, we are not trying to do. We are putting
quality over quantity. I know it is expensive, but
they were what we had before. And they were not based
on personal convenience but, rather, the reality that
we can only afford to do a certain number of things.

CHAIRMAN REYNOLDS: Well, I think that a significant driver in this conversation has to do with schedules, people feeling that they need to be home, people who believe that they need to be at the airport by a certain time. And that is having its effect on how we do business.

Vice Chair Thernstrom? Then Commissioner Kirsanow.

VICE CHAIRPERSON THERNSTROM: Look, I take very seriously what the Staff Director just said, that a month rarely goes by in which there are not important issues having to do with the functioning of this agency that need to be discussed.

And I don't think that these telephone conference calls from our experience with them in the past are a substitute. They are an exercise in frustration.

CHAIRMAN REYNOLDS: Well, they are less effective.

VICE CHAIRPERSON THERNSTROM: They are really less effective.

CHAIRMAN REYNOLDS: They are less effective, but we still manage to get things done. It's not the --
VICE CHAIRPERSON THERNSTROM: We do, but I don't think that they answer the problem that we're creating here.

COMMISSIONER BRACERAS: If I may, I mean, why do they not answer the problem?

VICE CHAIRPERSON THERNSTROM: Because there is a world of difference between the conference calls and meeting in --

COMMISSIONER BRACERAS: No, that is not my question. Let me finish my question.

VICE CHAIRPERSON THERNSTROM: I'm sorry.

COMMISSIONER BRACERAS: Why does it not answer the problem? Pass a motion where some months there are business meetings and some months there are briefings first, business meetings second.

VICE CHAIRPERSON THERNSTROM: If we can keep the quorum for the business meetings. That was the issue. I raised that question only because the Staff Director raised that question of concern about keeping a quorum for the business meeting when the business meeting is not first thing.

COMMISSIONER BRACERAS: Well, right. And that is going to happen sometimes. There is really no other way.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?
Then Commissioner Melendez.

COMMISSIONER KIRSANOW: I am not sure that the views being expressed are necessarily in conflict. I think they are reconcilable.

I agree with Commissioner Heriot that, you know, we need to get these things done. And I'm not sure why we are focused on the tail end of the day. Why not start at 8:00? Why not start at 7:30? Get the business meetings done when we've got --

COMMISSIONER BRACERAS: The Vice Chair doesn't want to.

COMMISSIONER KIRSANOW: Well, we have got --

VICE CHAIRPERSON THERNSTROM: 7:30, no, I don't.

COMMISSIONER KIRSANOW: -- to go when we know we have a quorum and then start the briefing. I don't want to rush the briefings so that we have sufficient time to get to a business meeting.

I think the briefings are the guts of what we do. And, frankly, I mean, it has worked to some degree in the past, not perfectly, but my understanding was before I got to the Commission, I think, before anyone else here got onto the Commission, the Commission had traditionally had
day-long meetings. And I have got to believe, with all due respect to everybody here, -- and I am sensitive to everyone's schedule. I'm not making any comments with respect to anybody's schedule, but I have got to believe that those commissioners had schedules that they tried to accommodate also.

So I am in favor of having this schedule where we have got business meetings or days that are devoted solely to business, but I don't think that we can go more than a month without addressing some business.

And I don't see why we can't front load those situations. Everyone gets in on Thursday night anyway or most often people get in on Thursday night, maybe not all the time. And there may be occasions when we have one or two commissioners who aren't present. That's happened in the past. But we still have a quorum. We can conduct the business.

I think we should endeavor to get as much done as we can while we are here face to face. Conference calls are a poor substitute.

COMMISSIONER YAKI: I agree.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Well, since we are now in the realm of throwing everything out on the table,
I have always said on more than one occasion that I did not see why if we had to have a situation where we needed to transact business and we had a rather lengthy briefing, briefing schedule, with adequate notice, we could break it up and have the business portion Thursday afternoon.

COMMISSIONER BRACERAS: We did that before. I thought that went very well.

COMMISSIONER YAKI: I mean, we are flying out. We have to fly out Wednesday, rather than Thursday, but I would rather do that than have to be flying out on Saturday.

CHAIRMAN REYNOLDS: Okay. What does that do to our budget.

VICE CHAIRPERSON THERNSTROM: Jennifer, can you do that?

STAFF DIRECTOR MARCUS: It does cost money to have people in for an extra night, but it's not going to bust the budget.

CHAIRMAN REYNOLDS: All right. Any other thoughts? Commissioner Heriot?

COMMISSIONER HERIOT: I teach a class Wednesday night. I will in the future. I actually teach it Thursday nights these days, but I took the Red Eye this morning. But as long as it's late enough
in the afternoon, I can do that.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Well, the one other thought in terms of this break for lunch, I mean, if everybody leaves the building and goes to a restaurant, it becomes a real break. If we brought in food and had a continuous meeting, we would get a lot more done.

COMMISSIONER YAKI: Was there a catering budget request in the appropriations?

(Laughter.)

VICE CHAIRPERSON THERNSTROM: We can all make this a brown bag affair. We can all chip in, whatever, but I think if we're going to --

COMMISSIONER YAKI: The no-doughnut rule?

VICE CHAIRPERSON THERNSTROM: We need to have a --

COMMISSIONER YAKI: We need some lobbyist to hang around here.

VICE CHAIRPERSON THERNSTROM: There are ways of getting more work done when we are here.

COMMISSIONER MELENDEZ: I guess the question would be, how early can we start the briefing that is acceptable to all of us? I mean, on Capitol Hill, they have 8:00 o'clock maybe they're having
briefings because of their schedule.

So I don't see why we can't start at 8:00, run through lunch. I mean, if we had to pay for our own sandwiches right after the briefing and have a working meeting while we have somebody run down to the deli, that might work also.

I think we are looking at a time frame from something like 8:30 to 2:30 and trying to squeeze both the briefing meeting and just a meeting into all of that. I think it can all be done, but we have to all agree to 8:30 to 2:30 and then work right through lunch because I also have a commitment on Wednesday nights that's very hard for me to -- that's why I travel out here on Thursday. I have many meetings on Wednesday evenings. That's difficult for me.

CHAIRMAN REYNOLDS: Okay. It sounds like we have at least two competing ideas. One would be to start on Thursday afternoon. The other would be to start early, 8:30 to 2:30. Now, of those two options --

COMMISSIONER TAYLOR: Mr. Chair? As to that second option, let me add these two thoughts. The first is that I don't think as a body we have focused in the past on being as efficient as possible with the use of our time. That just hasn't been one
of our goals. I think it should be. And that has caused part of the problem. And I think as a --

COMMISSIONER YAKI: This is government mystery. I don't know what you are talking about.

COMMISSIONER TAYLOR: I was going to say it's a governmental body. Unfortunately, if you just create more time and don't focus on efficiency, you tend to just fill in the time, rather than focusing on efficiency.

COMMISSIONER YAKI: Private sector folks.

COMMISSIONER TAYLOR: And so for that reason, I would --

VICE CHAIRPERSON THERNSTROM: This is a shocking statement.

COMMISSIONER TAYLOR: I would be in support of the second proposal, focusing on Commissioner Melendez's suggestion that we start the briefings early. We have business meetings one month. We have a briefing the next month. We start the briefing early in the morning. We are all prepared to work through lunch for two and a half, three hours after the briefings.

And I suspect if we do all of those things and focus on being efficient and using our time wisely, we will have plenty of time to accomplish our
work.

CHAIRMAN REYNOLDS: I think that that approach is sound in theory. The one thing, though, that I want to point out in practice, I mean, when we deal with controversial issues, it takes up a lot of time. When we deal with noncontroversial issues, like the calendar, it takes up a lot of time.

And we have not demonstrated much restraint. We will discuss important issues to death. And we will discuss issues that are not very important. We can spend a lot of time on them.

So, in theory, I think we should try it, I think, but okay. Well, she beat you.

COMMISSIONER HERIOT: I have just one sentence to say, and that is that with issues as controversial as some of those that we discussed, it is important to be collegial and let everyone have their say. And that interferes sometimes with efficiency, but I would go with collegiality over efficiency.

CHAIRMAN REYNOLDS: And to add to that, because of -- well, when I started here, there was a lot of -- well, in the past, there had been a lot of bad blood. And so one of the things that we have done is to ensure that everyone gets an opportunity to have
their say. We bend over backwards to ensure that people have an opportunity to have their say. And one of the costs is meetings that tend to drag on.

Commissioner Yaki?

COMMISSIONER YAKI: I would just like to end this conversation by saying there are good ideas, let's just get this thing done with, give discretion to you and the Staff Director as we go along to figure out what the business is like for a particular month and whether we need to do X or Y, communicate that early enough to the commissioners, and move on.

CHAIRMAN REYNOLDS: Is everyone comfortable with that approach?

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER TAYLOR: Yes.

COMMISSIONER HERIOT: So we are reserving the possibility of having Thursday meetings?

COMMISSIONER YAKI: Yes.

COMMISSIONER HERIOT: And early meetings?

CHAIRMAN REYNOLDS: Or early, or early, and/or early.

VICE CHAIRPERSON THERNSTROM: Wait a minute. How late on a Thursday so that Gail Heriot can get here? How late on a Thursday could we start a meeting? I don't want to start a meeting without
COMMISSIONER HERIOT: If worse comes to worst, I could take the Red Eye on Wednesday.

VICE CHAIRPERSON THERNSTROM: No.

COMMISSIONER YAKI: I would say a 5:00 to 7:00 meeting is probably doable given that the earliest flights from the East to the West Coast start about 6:30-7:00 o'clock in the morning. They get in about 3:00.

COMMISSIONER HERIOT: From San Diego, they get in about like from 3:30.

COMMISSIONER YAKI: Yes. And then you have to --

VICE CHAIRPERSON THERNSTROM: It's not that late.

COMMISSIONER YAKI: -- rush hour. By the time you get here, 5:00 o'clock would be --

COMMISSIONER TAYLOR: 5:00 o'clock?

COMMISSIONER YAKI: Yes.

COMMISSIONER HERIOT: I can meet at 5:00 o'clock. And, again, I can take the Red Eye. I think that would be --

STAFF DIRECTOR MARCUS: The one point I would add is that if the meetings go late, there is some point at which there are additional fees that we
incur, both for overtime court reporting and also for those employees who are required to be paid overtime at a certain hour. So that's just one thing we have to balance in.

COMMISSIONER YAKI: Just keep that in mind.

CHAIRMAN REYNOLDS: Yes. We will keep that in mind when we make our decisions.

COMMISSIONER MELENDEZ: I just don't see how I can get here any earlier. I mean, I took the 6:20 through San Francisco on United. I got here to Dulles, I think it was -- I got to the hotel at 6:00 o'clock. So I'm just saying that's the earliest I --

COMMISSIONER YAKI: The one down side about trying to do the Thursday is if there is any weather delay on the West Coast or East Coast.

VICE CHAIRPERSON THERNSTROM: Yes. I think that Thursday is --

COMMISSIONER YAKI: One time I was supposed to do a conference call with you guys at 4:00, thinking my plane landed at 3:15. My plane landed at 5:00 p.m.

VICE CHAIRPERSON THERNSTROM: Yes. I think that Thursday is unrealistic. I really do. It took me six and a half hours to get here yesterday
from Boston because --

COMMISSIONER YAKI: That is because you were bicycling.

(Laughter.)

VICE CHAIRPERSON THERNSTROM: Yes, I know. The plane was bicycling.

CHAIRMAN REYNOLDS: Okay. We will go with Commissioner Yaki's recommendation essentially. The motion that is on the table right now is to vote for the -- I am going to regret this. Did we resolve the issue of whether we want to flip the November and December?

VICE CHAIRPERSON THERNSTROM: No, we didn't, but we should do that.

CHAIRMAN REYNOLDS: Okay. So is everybody comfortable switching the order so that on the November 9th --

COMMISSIONER YAKI: Remember, December 3 is a Monday.

CHAIRMAN REYNOLDS: I'm sorry?

COMMISSIONER YAKI: December 3 is a Monday. Remember, we did that because Jennifer's and Peter's term may expire at the end of that week. And we wanted to do it before then so we could all do Auld Lang Syne or Welcome Back or do a roast or just heave
them out the door.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: Okay. So I don't know if that has a consequence for how we schedule --

CHAIRMAN REYNOLDS: We can still throw them out the door if the briefing is moved to the 3rd.

COMMISSIONER YAKI: Yes. I have no objection.

CHAIRMAN REYNOLDS: Okay. So we are going to vote.

COMMISSIONER MELENDEZ: Mr. Chairman?

CHAIRMAN REYNOLDS: Mr. Melendez?

COMMISSIONER MELENDEZ: For August, do we have a date yet or is that something we decide after?

CHAIRMAN REYNOLDS: No, we don't.

COMMISSIONER YAKI: Yes. How come we don't have a date?

STAFF DIRECTOR MARCUS: We have not previously had an agreement to have this briefing in August.

COMMISSIONER YAKI: Usually we don't do August.

STAFF DIRECTOR MARCUS: Usually we don't do August. The idea of having an August briefing would be a way of ensuring that we don't have
briefings --

COMMISSIONER YAKI: It's so hot here in August.

VICE CHAIRPERSON THERNSTROM: Oh, you know, violins are playing over here.

CHAIRMAN REYNOLDS: We have air conditioning. I think that we can handle it. Folks, we need to bring this --

COMMISSIONER YAKI: The Bay area, man. We've got --

CHAIRMAN REYNOLDS: We need to bring this to a close. So let's vote on the --

COMMISSIONER YAKI: I move that we adopt the proposed calendar as amended with the flip of the November and December meetings with instructions to the Chairman and the Staff Director as appropriate to determine whether we need early starts on any of the days that we have briefings.

CHAIRMAN REYNOLDS: Is there a second?

COMMISSIONER HERIOT: I am still confused. How does this calendar differ from the calendar that existed before?

CHAIRMAN REYNOLDS: Does anyone have the original?

COMMISSIONER YAKI: Yes. The original --
STAFF DIRECTOR MARCUS: The second page of this document shows the existing briefing schedule.

COMMISSIONER HERIOT: Okay.

CHAIRMAN REYNOLDS: So we are changing August --

COMMISSIONER HERIOT: I get it. Never mind.

CHAIRMAN REYNOLDS: Okay. Let's take a look at our calendars for August. Pick a date.

COMMISSIONER MELENDEZ: How about the 10th?

CHAIRMAN REYNOLDS: Okay. The 10th is on the table. Does everyone have a calendar?

VICE CHAIRPERSON THERNSTROM: I'm looking for mine. Hold on.

COMMISSIONER HERIOT: I'm okay. I can remember my calendar for August.

VICE CHAIRPERSON THERNSTROM: She's lying on a beach.

COMMISSIONER BRACERAS: I can only come for the 24th in August or the 31st.

COMMISSIONER YAKI: The 31st?

COMMISSIONER BRACERAS: Oh, you're right.

CHAIRMAN REYNOLDS: So the 10th doesn't --

VICE CHAIRPERSON THERNSTROM: What dates
are we talking about?

CHAIRMAN REYNOLDS: What about the 17th?

COMMISSIONER KIRSANOW: Twenty-fourth.

COMMISSIONER YAKI: Jennifer said she can't do the 17th.

COMMISSIONER BRACERAS: I've got stuff going on that day.

CHAIRMAN REYNOLDS: Okay. The 24th?

COMMISSIONER KIRSANOW: I can do the 24th.

COMMISSIONER HERIOT: Is the 10th out?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: Is the 3rd out?

COMMISSIONER HERIOT: Then I can do any date.

COMMISSIONER YAKI: Is the 3rd out?

COMMISSIONER KIRSANOW: No.

CHAIRMAN REYNOLDS: We didn't consider the 3rd.

COMMISSIONER YAKI: Why didn't we consider --

COMMISSIONER BRACERAS: The 25th --

COMMISSIONER HERIOT: The 3rd is out for me.

COMMISSIONER YAKI: Wait, wait, wait.

COMMISSIONER BRACERAS: I am basically
booked.

VICE CHAIRPERSON THERNSTROM: Say that again, Jennifer. I'm sorry.

COMMISSIONER YAKI: Jennifer just basically said, "I'm irrelevant in this discussion."

CHAIRMAN REYNOLDS: Okay, folks. We need to end this.

COMMISSIONER MELENDEZ: September is the 21st for a meeting in September. So it would be about a month.

COMMISSIONER KIRSANOW: Twenty-fourth.

COMMISSIONER MELENDEZ: Twenty-fourth?

That would work.


VICE CHAIRPERSON THERNSTROM: There is this horrible groaning over there.

CHAIRMAN REYNOLDS: Okay. So Commissioner Yaki has made the motion. I second it. We have had the discussion, I hope.

STAFF DIRECTOR MARCUS: May I just ask by way of clarification whether Commissioner Yaki's motion to give a certain amount of discretion to the Chairman and the Staff Director would enable us to
schedule a business meeting on one of the days currently scheduled only for a briefing if it were necessary to deal with --

COMMISSIONER YAKI: Yes, yes.

STAFF DIRECTOR MARCUS: Thank you.

CHAIRMAN REYNOLDS: Okay. All in favor please signify by saying aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any opposition?

(No response.)

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion carries unanimously.

Vice Chair Thernstrom, I did not know where you left off. So where are we?

VICE CHAIRPERSON THERNSTROM: We are --

COMMISSIONER YAKI: Pretty much nowhere.

VICE CHAIRPERSON THERNSTROM: No. That's not true. Hold on a second.

COMMISSIONER YAKI: We did the Website updates.

VICE CHAIRPERSON THERNSTROM: Yes. We have done the Website updates.

COMMISSIONER YAKI: We have not done the
launch of the Website.

VICE CHAIRPERSON THERNSTROM: Procedures for briefing reports.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: Wouldn't we rather launch the Website before we get into that.

CHAIRMAN REYNOLDS: Okay. So we did not -- okay.

-Anti-Semitism Public Education Campaign Web Pages

CHAIRMAN REYNOLDS: On January 20th, 2006, the Commission voted to have the Staff Director produce public education campaign materials to communicate with college students to educate them about their rights and about the available remedies in the event they face anti-semitic discrimination on campus.

Staff worked with the GPO to develop a poster and flyer, which the Commission unanimously approved on July 28th, 2006. More importantly, staff also developed a campus anti-semitism Website, which will be situated within the Commission's general Website at www.usccr.gov. The Commission approved the new Website on March 9th, 2007, agreeing that the Website should be launched during this meeting.

This campaign has already received a great
deal of favorable attention as well as support from
countless organizations within both the higher
education community and the Jewish community.
Yesterday, for example, one national higher education
association praised this campaign as momentous.

We are pleased to launch the Website this
morning. The particulars, Michele, please press the
button launching this. Drum roll, please. Very good.

STAFF DIRECTOR MARCUS: And we are live.

(Applause.)

CHAIRMAN REYNOLDS: Once again I would
like to thank the staff for its excellent work in
putting together the materials and the Website.

VICE CHAIRPERSON THERNSTROM: We all thank
the staff.

CHAIRMAN REYNOLDS: Okay.

CHAIRMAN REYNOLDS: If I am correct, we
are up to procedures for briefing reports.

VICE CHAIRPERSON THERNSTROM: Yes.

-Procedures for Briefing Reports

CHAIRMAN REYNOLDS: I would like to move
-- well, the working group spent quite a bit of time
coming up with various proposals. We did not reach a
consensus in terms of what the procedure should be.

I am going to move to amend our policies
on national projects to provide these procedures for all briefings. All briefings will be subject to the requirement of a concept paper, a defame and degrade review, commissioner review of the initial draft of the report, external review of the report, and final revision of the report.

Editorial review and legal sufficiency will be provided when they are appropriate and on a case-by-case basis at the discretion of the Staff Director. Affected agency review will be used when there is another agency that is affected by our report to the same extent as other national office reports.

Also under this motion, once a briefing report with findings and recommendations is submitted for a vote, the vote would be conducted in a bifurcated fashion. Commissioners would first vote to approve part A of the report, what Commissioner Braceras has called the clearinghouse portion of the report, containing the executive summary, a description of the topic and summary of the proceedings as well as Commission's questions.

Commissioners would then vote on part B of the report. This vote would consist of an item-by-item vote on each finding and each recommendation. Those votes receiving a majority vote
would be included in the report with a vote tally and a sentence explaining any opposition vote for that item.

The ability of commissioners to provide concurring or dissenting statements would not be affected by this policy.

Is there a second?

COMMISSIONER YAKI:  Point of order.

CHAIRMAN REYNOLDS:  Yes?

COMMISSIONER YAKI:  I don't have a copy of that motion in my binder. Was that sent later?

CHAIRMAN REYNOLDS:  This is on the fly. This is something that after looking at all of the motions that came down, I am putting this one on the table since we didn't have a consensus.

COMMISSIONER YAKI:  Can we get copies of that so I could read it more carefully --

CHAIRMAN REYNOLDS:  Sure, sure.

COMMISSIONER YAKI:  -- before offering even comment on it?

STAFF DIRECTOR MARCUS:  It will take a few minutes to get copies made.

CHAIRMAN REYNOLDS:  Okay.

COMMISSIONER YAKI:  I would just ask as a point of courtesy that whenever we have new motions on
items, that they be distributed prior to the meeting, if possible, at the day of, or anything that basically is sent Thursday on, I would appreciate it if it were available in hard copy at each commissioner's place, desk on Friday mornings because it is very difficult to get to a printer when you're in a hotel.

CHAIRMAN REYNOLDS: No. I think that that is a -- well, as a rule, we generally distribute motions ahead of time, but yesterday sitting down and looking at what we had, I decided to put this on the table to jump-start the conversation.

But you are right. It would be best if we and to the extent possible provide hard copies to all the commissioners.

VICE CHAIRPERSON THERNSTROM: Yes. I mean, this is very difficult to deal with as simply in oral form here.

CHAIRMAN REYNOLDS: Yes. We are going to table this and move to strategic planning.

-Strategic Planning

CHAIRMAN REYNOLDS: The draft strategic plan was approved by the commissioners and was sent to the Office of Management and Budget. The comments made by OMB are included in the draft and appear in the gray boxes to the right of the text of the report.
The most important change was to strengthen and clarify the measures to hold the agency accountable for results before submitting the strategic plan to the appropriate congressional committees.

The additional changes by OMB, comments, must be approved by the commissioners. At our last meeting, the commissioners agreed to table the motion until today.

I would like to move that the Commission adopt the proposed preliminary draft strategic plan distributed to the commissioners on March 1st of 2007 subject to one change. Instead of requiring a 50-state SAC report by 2010, we will require a multi-SAC report based on as many SACs as we have been able to charter by that time.

Please note that approval of this motion does not constitute approval of the final strategic plan as the draft strategic plan remains preliminary and must be further vetted by OMB and Congress.

Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER MELENDEZ: Mr. Chairman,

Commissioner Melendez.
I had asked a number of questions to the Staff Director on the strategic plan. And he did answer me on many of those questions, but basically some of the questions I asked were whether or not some of the I don't know whether you call them goals within the strategic plan were actually realistic, you know.

And I think his answer to many of the questions I asked was that they're ambitious. So whether that means the same thing, you know, but I'm just saying that as it stands now, I don't really support. I think that it still needs some work on this plan.

That's just my opinion. So I just wanted to say that.

CHAIRMAN REYNOLDS: Your opinion is important. And I guess I would respond, in part, by saying that this is still preliminary. And there still will be opportunities to improve it.

COMMISSIONER MELENDEZ: Right. Just another comment because we have a new commissioner. Also, I don't know if she has had an opportunity to actually go through the plan herself because I remember when I came on this Commission, there were some issues that I had just come on as a new commissioner. And I asked for some like table of the
month so that I had an opportunity to kind of go through it. And they gave me two weeks on -- I forgot what that issue was but the same situation as facing us here with a new commissioner.

So I think everybody should have an opportunity. I know everybody is busy, but I am not sure if everybody has totally gone through my questions that I had with the Staff Director on this plan and also maybe have some yourself. I'm just laying that out there.

So I just want you to consider that in this motion because this is really a step forward where we're going here with the Commission and has to do with budgeting issues that make it either realistic to attain whatever is in this plan.

And I just see our budget going kind of the opposite direction as to what our ambitious vision is here. So I just think that all of the commissioners have to kind of take that into account as they vote on this.

And if you do need more time, I would suggest you consider that in your motion. Thank you.

CHAIRMAN REYNOLDS: Other comments?

(No response.)

CHAIRMAN REYNOLDS: Okay. Did we have a
second?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Okay. Are we ready to vote? All in favor please signify by saying aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any opposition?

COMMISSIONER MELENDEZ: Opposed.

CHAIRMAN REYNOLDS: Any abstentions?

(Whereupon, there was a show of hands.)

CHAIRMAN REYNOLDS: Okay. Please let the record reflect that Commissioner Yaki abstained from the vote, Commissioner Melendez voted against the motion, and the remaining commissioners voted in favor of it. So the motion carries.

COMMISSIONER YAKI: Do you want to break?

VICE CHAIRPERSON THERNSTROM: He says hopefully.

CHAIRMAN REYNOLDS: Yes. Let's take a five-minute break.

(Whereupon, the foregoing matter went off the record at 10:54 a.m. and went back on the record at 11:07 a.m.)

CHAIRMAN REYNOLDS: On the record. Okay. Everyone should have in front of them a copy of the motion. Jennifer, are you there?
COMMISSIONER BRACERAS: I'm here.

CHAIRMAN REYNOLDS: Very good and, Jennifer, did you receive the email?

COMMISSIONER BRACERAS: No, I guess not.

CHAIRMAN REYNOLDS: Okay. You guess not.

COMMISSIONER BRACERAS: I received the calendar --

CHAIRMAN REYNOLDS: Okay. The motion, well, we're at the discussion point. Comments? Concerns? Commissioner Heriot.

COMMISSIONER HERIOT: I just have a question in that I'm not familiar some of the jargon here. When you refer to an external review of the report, who is the external reviewer?

CHAIRMAN REYNOLDS: Staff Director. Well, that's not the answer. Please respond to Commissioner Heriot.

STAFF DIRECTOR MARCUS: The Commission adopted a procedure within the last few months under which we have new objectivity criteria for Commission reports including briefing reports as well as other reports. Under those procedures, the Staff Director is required to make certain certifications about objectivity procedural issues such as the balance of speakers. After the Staff Director makes those
certifications, the certification is then reviewed by
an outside reviewer who may be either a member of the
State Advisory Committee or an outside paid consultant
selected by the Staff Director.

COMMISSIONER HERIOT: Okay. So this is at
the Staff Director's discretion.

STAFF DIRECTOR MARCUS: That's correct.

COMMISSIONER: And it's not substantive.

STAFF DIRECTOR MARCUS: People have -- I
find difficult sometimes the distinction between what
is called "substantive" and what's called
"procedural." It does not deal with whether the
content of the report is good or bad or problematic.
It goes to whether the determinations of whether
certain procedures have been applied to ensure the
objectivity of the report.

COMMISSIONER HERIOT: Such as?

STAFF DIRECTOR MARCUS: Such as a
numerical balance of varying and opposing points of
view.

CHAIRMAN REYNOLDS: Okay. Commissioner
Kirsanow, did you have a comment or a question?

COMMISSIONER KIRSANOW: What would be the
effective date of this if it passed?

CHAIRMAN REYNOLDS: I would assume it
would be today since we have --

COMMISSIONER KIRSANOW: Let me be more specific. Any briefing reports that are in the pipeline, would it apply to this or would it only apply prospectively to briefing that occur hence forth.

STAFF DIRECTOR MARCUS: This is a very good and difficult question and probably one that we should try in a more formalized way to bring. It has been my understanding that all of the recent prior decisions on procedure both in the iterations of AI 1-6 and the motions apply to those activities that take place after the date of the approval. Now that's a little bit more complicated than it sounds in that some of the procedures relate to what happens at the briefing itself. So it applies to all of the briefings that take place afterwards. Some of them apply to the national planning for the briefing which takes place two years in advance.

COMMISSIONER KIRSANOW: I'm sorry for interrupting, Mr. Staff Director. The one thing that I see has not been done or may not have been done, I'm not sure, for some of them, it may have been, in terms of this motion for any ending briefings, that is briefings we've already had and that are waiting the
production of a report, is the motion of the concept paper. I don't recall getting concept papers on briefings that we've had already. Maybe I -- I know we've gotten one from statutory report. I think we got something, an explanation, of what we're doing with respect to, for example, No Child Left Behind. But I'm not sure the notion of concept paper -- that the notion of a concept paper was applied to any of the other briefings we've done.

STAFF DIRECTOR MARCUS: I believe external review has not yet occurred because it is a procedure that was developed I believe in January. So it applies to reports of briefings that took place since January. We've not yet had a vote on the report of any briefing that took place since January. Concept papers though have been done so far as I recall for all or substantially all of the briefings we've had so far. Some of them were developed in connection with the annual planning. So it would be for the planning meeting.

COMMISSIONER KIRSANOW: Okay.

CHAIRMAN REYNOLDS: Vice Chairperson Thernstrom.

VICE CHAIRPERSON THERNSTROM: I'm back to the extent of the questions. So the Staff Director
said he had a line between -- Sorry about that.

(Microphone.) I'm back to the question of the general review of the report. The Staff Director said the line between procedural and substantive review is a little blurred now and then he talked about making sure that the report met the standard of objectivity. Well, does that apply to the findings and recommendations?

STAFF DIRECTOR MARCUS: The external reviewer would not address the findings and recommendations per se. He would only address whether certain procedural requirements have been met. I should say that this motion as the Chairman read it would not affect in any way the use of external review for briefing reports because the Commission has already voted a couple of months ago to use external review for all national products including briefing reports. So this is one of the few things where we've already clearly said we're going to be doing it.

VICE CHAIRPERSON THERNSTROM: Right. But I understand it that external review, if we agree to have findings and recommendations on briefing reports, that external review does not apply to the findings and recommendations and I just want to make sure that, I just want this to be on the record, we're not going
to cut some kind of objectivity test for findings and recommendations.

CHAIRMAN REYNOLDS: Commissioner Melendez and the Commissioner Taylor.

COMMISSIONER MELENDEZ: My concern, at least in that part of the whole process, is it almost sounded to me like an external reviewer would actually have some checkout box. He would look to see if certain components were actually done. So it almost sounded to me like he may not even read some standard portion of the report. He may just look at a list and say, "That's in here. This is in here. That's in there." So to me that kind of seemed like that's our external review and if it's different, then you need to tell me that it's something more than some checkoff box that just goes down and checks that certain things are in there as opposed to maybe given some opinion as to whether or not the whole report means something other than just a checkoff box.

STAFF DIRECTOR MARCUS: Again, this motion does not affect in any the external review. That's something that was already decided by vote at least a couple of months ago and it's memorialized in AI 1-6 in the associated appendix and it does essentially involve completing a checkoff box. It does not entail
the reviewer developing a separate opinion about findings and recommendations or anything else.

CHAIRMAN REYNOLDS: Commissioner Heriot.

COMMISSIONER HERIOT: I'm just seeking further clarification on this external review. Suppose an external reviewer has that checklist and decides that the procedures were not followed but the Commission disagrees. What happens then?

CHAIRMAN REYNOLDS: We have not had to wrestle with that.

COMMISSIONER HERIOT: Don't we want to know what happens?

COMMISSIONER THERNSTROM: Yes, we do want to know.

STAFF DIRECTOR MARCUS: The checkoff box has to be completed before the materials can be forwarded to the Commission. But I'm not aware of anything that constrains the Commission from making its own ultimate determinations.

COMMISSIONER HERIOT: So we never see the report until the external reviewer has.

STAFF DIRECTOR MARCUS: You will have seen at least one draft previously.

COMMISSIONER HERIOT: What would be the procedure if you received an external review that said
this was not complied with and the Staff Director disagrees preliminarily and believes that it has been complied with. Let's start with that possibility. Then what happens next?

   STAFF DIRECTOR MARCUS: I think we would have to -- I would have to take this back and report to you either at the next meeting or in the interim.

   CHAIRMAN REYNOLDS: Right.

   COMMISSIONER HERIOT: That's important in terms of what the procedure is here because one day that's going to happen. It's best not for it to be an explosive situation when it happens. It's best if we know what the procedure is right off the bat especially if we've already gotten this in our AI 1-6.

   We need to know what it means. So we need a policy on that.

   CHAIRMAN REYNOLDS: Okay. Commissioner Kirsanow and then Commissioner Melendez.

   COMMISSIONER KIRSANOW: Yes. First, I concur with Commissioner Heriot on that. It strikes me though that simply in terms of raw delegation of powers we would be the ultimate arbiter of that.

   CHAIRMAN REYNOLDS: Right.

   COMMISSIONER KIRSANOW: And we would probably have to vote on it.
CHAIRMAN REYNOLDS: Yes.

COMMISSIONER KIRSANOW: And determine whether or not we're going to go forward. But it's a good thing to memorialize that so that we're acting consistent with what we've already designated as our procedure. The question I have is in going through this, unless I'm missing something, how does this fundamentally differ from the procedure used in our statutory report. Other than in paragraph two, I really don't know that there are many differences between the way we handle briefing reports and statutory reports and not that that's a good or bad thing. I just want to know how it does differ.

STAFF DIRECTOR MARCUS: The statutory report also has at least one or two other requirements, for instance, the requirement of the discovery plan and I believe there's also a discovery of the outline that also has to be done and an opportunity for the Commissioners to see it. The statutory plan has -- Let me see.

COMMISSIONER KIRSANOW: That's correct. My recollection is it comes back to the Commissioners for our input also.

STAFF DIRECTOR MARCUS: That's right.

COMMISSIONER KIRSANOW: Yes, because we
don't have that stuff in here.

STAFF DIRECTOR MARCUS: That's right and I'm not sure where you're calling the second paragraph, but with the statutory report, the editorial review, legal (Background noise) review, are part of the process. It's not --

COMMISSIONER KIRSANOW: Right. It's discretionary.

STAFF DIRECTOR MARCUS: That's right.

CHAIRMAN REYNOLDS: Commissioner Melendez.

COMMISSIONER MELENDEZ: Yes. Just I think this whole process really has to do with having a quality report that comes out of this whole process where I looked at this here where it says "Editorial" about the seventh line down, "Editorial review and legal sufficiency review will be provided when they are appropriate on a case-by-case basis at the discretion of the Staff Director." And really I have a problem with that because in my opinion an AI 1-6 has been changed in February. So the question would be what were we operating on before February 6 and what was the reason we changed it to that point and have we been operating on what was changed in February when we changed AI 1-2. So AI 1-6 seems to be kind of like shooting from your hip where you change it. But
we really have to understand the reasons for it because even what we're talking about here would change AI 1-6 again.

So it sounds to me like AI 1-6 is a discretion of us in some way putting some policies in place. In my opinion, I think what you want to do is take out discretion from a Staff Director to make those calls. I think the process have to be something where we're following some process with limited discretion.

Otherwise, we're always going to questioning the Staff Director as the authority that we give him to make the discretion of himself. So I think just a statement in here is what I'm trying to make to ensure that we have a policy that takes a lot of discretion out. That's just my opinion as to what's written here if we're trying to come up with a policy that's pretty much set in stone, not totally. Nothing's really set in stone, but I'm just saying that maybe we need to go back to the reasons of the change of AI 1-6 back in February and what did we accomplish with that and if this is something that will constantly be changing AI 1-6 as we change it again in October. I don't know. So that's my question on this whole process.
CHAIRMAN REYNOLDS: Mr. Staff Director, why is it that some of these items are mandatory while others are discretionary?

STAFF DIRECTOR MARCUS: I think that the distinction between editorial review and legal sufficiency on the one hand and some of the others is that editorial review can take a substantial amount of resources and the balance of whether it's justified to a report will depend on a lot of factors like the availability of resources and the complexity of the document, perhaps whether there are findings and recommendations, whether there's a substantial amount of staff work or analysis or whether there isn't a substantial amount of analysis.

The way we've been doing editorial review boards requires three staff members to take usually a significant amount of time, at least a few days, and put aside all of their work to focus on this. So the question is to what extent do we want staff members to be working on new projects or to be spending additional time on review of old ones.

Legal sufficiency review is important for some documents. For instance, it's important for documents that have either legal citations or legal claims or there might be some sort of legal problem.
But there are other sorts of documents where it's easy
to say that there aren't either legal citations or
legal issues, but that sending it to OGC might take
awhile for them to go through and putting aside other
work that they're working on.

COMMISSIONER MELENDEZ: Okay. Just
another comment. You know, an editorial review, it
almost sounded to me like we were doing nothing more
than a spell check on it, whatever that means. So I
think every one of these that has editorial review
really has to tell the Commission exactly what does
that mean and are we actually following that so that
it's more in-depth than spell check. I don't fully
understand what that components means as far as these
other things, the legal sufficiency, and I've always
been not real clear as to exactly what we were saying
as far as those various things I mentioned because
we're talking about quality here and I think they are
all components of quality.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: I think what
Commissioner Melendez is saying and it really does
open the door to another debate here is what he would
like to see in the way of editorial review is a review
of the substance of the points in the briefing so that
he would define editorial in a very broad way and please correct me if I'm wrong on this.

I mean as it is we're having a lot of trouble getting these briefing reports out. We have a balanced panel of experts who come and we honestly report what they have to say and then go on. In my view, it's essential to go on for findings and recommendations. I do not think that an editorial review in any sense that encompasses substance is appropriate here.

COMMISSIONER MELENDEZ: Right. My point was that we had talked about when people come and give their testimony we basically when we were talking about whether or not we should approve without findings and recommendations we would just say what they said. Let Congress or the President make up his mind as to what was said by all these people who had testified. Then we got into the issue of if you go beyond that and even our staff here under the Staff Director started to insert their own opinions on what those people have said. The question is who do you actually believe when we're inserting our own opinions because many times it's who is whose side and who is actually believing who when we have two people advocating for a certain position, two people against
and then we have our staff basically inserting their opinions. They might line up with somebody I don't agree with. So at some point --

VICE CHAIRPERSON THERNSTROM: Wait a minute. At what point are they inserting their opinions?

COMMISSIONER MELENDEZ: I thought we were --

VICE CHAIRPERSON THERNSTROM: Before the findings and recommendations?

COMMISSIONER MELENDEZ: Well, I think that was actually happening in my opinion.

STAFF DIRECTOR MARCUS: I'm not aware of it.

VICE CHAIRPERSON THERNSTROM: I mean when and what part of the briefing is it happening? Not in this --

COMMISSIONER MELENDEZ: For example, when we did the Native Hawaiians that's the reason that the whole thing got thrown out without findings and recommendations because the people that testified in my opinion, there was a lot of insertion if you want in those findings and recommendations.

VICE CHAIRPERSON THERNSTROM: Okay. So you're concerned about the findings and
recommendations. This is not a comment on anything that comes prior to the findings and recommendations.

COMMISSIONER MELENDEZ: I still am not clear as to this whole process as we're talking about it and we're almost ready to make a motion to approve this paper here which I still have tremendous questions on and I think, our working group, part of the problem is we never could connect to actually fully meet adequacy. I think we cancelled about three or four calls because people couldn't make the call and a lot of this, like you said, was done on conference calls where a couple of us were there. A couple of us were not. So I'm saying we adequately have actually gotten to the bottom of all these many issues I've talked about. That's my opinion and here we're ready to vote on this.

VICE CHAIRPERSON THERNSTROM: Wait a minute. This has -- There are two separate issues here. One is the question of findings and recommendations in these briefing reports and the other is the report prior to the list of findings and recommendations. Are you concerned about the editorial review and its meaning with respect to any part of these reports other than the findings and recommendations?
COMMISSIONER MELENDEZ: Again, I'm not sure exactly like I said whether or not editorial review actually met some checkoff list that actually didn't even work. A person hadn't even read the report. So the only point I'm making, I'm not real comfortable with this whole -- the many issues that are on this paper here.

So I could raise a number of questions on this. I'm sure others will also. But I'm just saying if we're ready to vote on this, I'm not real comfortable with it.

CHAIRMAN REYNOLDS: Commissioner Yaki and then Commissioner Kirsanow.

COMMISSIONER YAKI: Just to pick on Commissioner Melendez's point and in response to Commissioner Thernstrom, I think that quite frankly it goes to both. I have chosen because it gets to be, I think, ticky-tacky at some point, but other points I've been rather disturbed to see what was cobbled out of my questions and answers to panelists in some of these reports. Whether something is in quotations or not or something is characterized a certain way, to me in the end I'm willing not to get too much into it because it then starts getting into a wholesale relearning. But to the extent that there's editorial
review of that, I think that would be very useful.

I also think that editorial review goes to the question of whether or not, and I think this goes to Commissioner Melendez's second point, there is substantial evidence in the record before us to substantiate some of the findings at the very least in these reports and I think that Native Hawaiian is a good example of that. But I also think that there are other examples as well including in the report that we're going to be discussing today where I find it very difficult to accept the notion that anyone who was doing editorial review and all of us write. All of us do writings and we all know that we get questioned by our editors whether or not a statement that we make that is sweeping as the need to be substantiated by a bibliography or other sorts of things rather than simply our own take of what we believe the state of literature to be and I believe an editorial review can and should go toward that. But there are bigger issues involved here and we're just doing this in chunks. So I'm going to reserve the rest of my remarks for later.

VICE CHAIRPERSON THERNSTROM: I would just like him to clarify something he said before he goes on.
COMMISSIONER YAKI:  I'm sorry.

CHAIRMAN REYNOLDS:  Vice Chairperson Thernstrom would like you to clarify a statement you made.

VICE CHAIRPERSON THERNSTROM:  Yes. Has there been an occasion, I'm speaking again not to the question of finding some recommendations, but you complained about, for instance, on occasion, the summary of your own remarks, your own questions posed. I don't remember an occasion on which, but maybe you do, I haven't had the opportunity to correct the characterization of what I said at the briefing.

COMMISSIONER YAKI:  It kind of gets to be completely honest, Commissioner Thernstrom, it gets to the point where if I know that I'm going to basically be trashing on the report anyway, what's the point of adding in three or four more lines to make a point that I thought I was making clear a little more clear or a little bit less editorialized.

VICE CHAIRPERSON THERNSTROM:  Wait a minute. That's your choice not to have your voice properly represented in the body of the briefing report. It seems to me that this is for the record as it were for the ages and it seems to me that it's in your interest to have your voice properly reflected
and I don't see what that has to do with applying some
recommendations and questions. It's completely
separate question and our procedures do allow you to
collect your own voice.

COMMISSIONER YAKI: That may be. On the
other hand, if we want to start going down this road,
to me paragraph two of this motion does nothing more
than ratify the status quo that many of us were
attempting to change. By providing a case-by-case
discretion for all briefing reports, the Staff
Director is basically, I believe, the status quo as it
sits right now.

CHAIRMAN REYNOLDS: But that's not what it
says. Certain issues in certain areas the Staff
Director has discretion. In other areas, the Staff
Director does not.

COMMISSIONER YAKI: It says, "Editorial
review and legal sufficiency will be provided when
they are appropriate on a case-by-case basis at the
discretion of the Staff Director." What about that
sentence am I not understanding?

CHAIRMAN REYNOLDS: Prior to that, we also
talk about a concept paper, defame and degrade, and
the fact that the Commissioners will receive an
initial draft. There will be an external review of
the report and a final revision of the report. None of those items are discretionary.

COMMISSIONER YAKI: With all due respect, Mr. Chair, it's like putting spackle on a leaking hole as far as I'm concerned. Fine. We have been doing concept papers as the Staff Director pointed out. Defame and Degrade, I think we have been doing as the Staff Director has pointed out on a number of occasions especially with regard to a report where we had something corrected, even though if we had done defame and degrade. We do have initial review of the initial draft and we do review the final revision, of course.

What I am talking about is that it goes to what I call the unknown data that comes into these reports and that is the stuff that appears in the findings and recommendations which is why I think editorial review is necessary there as well. It's not just about objectivity. It's also about the academic scholarship involved in those findings. So they're not just simply taken out of thin air based upon extraneous research or points and information that was not before us in the record of these briefings and which is why quite frankly I have had the most trouble with briefing reports to begin with.
When we have four people testify, two on one side, two on another, it stands to reason to me that you are not going to be getting everything that you would need to move onto the next level which is now we're going to take a position. That to me is something that I might have done at the Board of Supervisors in San Francisco. But let me tell you. That is not what I would want to see done at the United States Commission on Civil Rights which is far greater mandate, far greater responsibility, far greater impact, than whether or not we approve zoning for someone's backyard expansion. This is not that kind of a thing.

When we have again just two people on either side talking about that, talking about an issue, I don't understand how we can possibly find that there is clear and preponderant evidence or testimony on one side or the other. The reason we're talking about this is because there are going to -- I admit.

There are going to be occasions when if we did an issue on campus racism which I think actually we should expand now this to campus racism in general given what's going on in the world today and I don't think that any of us here would have a panel in which
there would be two white supremacists and any of us would agree with their point of view. But those exceptions, I think, proving the rule when you have a situation like we did in the report that we'll be talking about later today. I think that this kind of editorial and legal editorial review is not just should be at the discretion of the Staff Director. I believe that at some point the Commission should be able to direct that it be mandatory.

VICE CHAIRPERSON THERNSTROM: But I was trying to separate the findings and recommendations question from the rest of it because I think we need to talk about that separately. You are merging the two.

CHAIRMAN REYNOLDS: Vice Chairperson Thernstrom, Commissioner Kirsanow is next up in the queue.

VICE CHAIRPERSON THERNSTROM: I'm sorry.

COMMISSIONER KIRSANOW: Many of the issues raised by Commissioners Melendez and Yaki are obviously important issues, but I think that this procedure contemplates those issues. We do have a mechanism to address these matters such as the ability to file a dissent, the ability to review these things, and also these is the first time we will have a vote.
on each discrete item which that vote (Microphone noise) further someone who is a third party can look at it and decided for himself whether or not this is the position, the unanimous position, or if it's a mixed position, divided up positions.

In terms of editorial review, my understanding of editorial review would be simply that. It's a rote process that doesn't get into the substance of the findings and recommendations. I think that's what our charge is and I think there's nothing in this that detracts from that.

In fact, when we had briefings in the past, this is an improvement insofar as even to the extent there are no changes in certain aspects of the procedure, at least it's in writing. So we can make reference to it and we have a check on ourselves, whereas in the past, we haven't had that and in the past, you would have reports that were wildly untettered to the testimony that was received or any of the documents we received.

Commissioner Yaki was making the point when we have a balanced panel, there's really a great difficulty entailed in coming up with findings and recommendations. But simply because the panel is balanced doesn't mean that the evidence adduced is
balanced. A good example would be K through 12 education that we had in July of last year when we had a balanced panel, but all of the evidence with the exception of maybe one or two discrete reports to which they referred seemed to suggest proposition A as opposed to proposition B.

And I think that to the extent that there's an disagreement that that's what all the evidence suggests, there is an ability to file a dissent. There's an ability for us to have a review as Commissioners and talk about it. We, I think, have been collegial in that respect. Again, I hate referring to the past, but the fact is that's our starting point and in the past there was no ability for commissioners to have any input. We would simply get this thing. It would be a complete product and then we would vote on it. Whereas here we could look at it and say, "Wait a minute. This doesn't have any connection to what was adduced at the hearing and may be amended as a result." But I think there are some safeguards. Is it a perfect procedure? I'm agnostic about it, but I think this is something that I could lend my support to.

CHAIRMAN REYNOLDS: Commissioner Heriot.

COMMISSIONER HERIOT: I just want to
clarify here. I assumed that it would be in order for a commissioner to make a motion to amend a report.

CHAIRMAN REYNOLDS: That is correct.

COMMISSIONER HERIOT: Even at the final stages.

CHAIRMAN REYNOLDS: That is correct.

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER HERIOT: And that it would be in order for the Commission to vote to require the Staff Director to conduct a legal sufficiency review.

CHAIRMAN REYNOLDS: That is correct.

COMMISSIONER HERIOT: If they think it's appropriate. Okay.

CHAIRMAN REYNOLDS: Commissioner Melendez.

COMMISSIONER MELENDEZ: Again, I want to understand the process because I would ask the Staff Director to give us an example of what we call an editorial review process and in the process we'd determine how the reviewer is chosen. That would seem to me if we're would saying the A-1 process is important we could read that or is it something where he would say, "Chris Burns, I want you to read this."

So I'm talking about what process is it that tells certain people are the reviewers and all those different things and then how are their concerns
reported into this document. So I'm not sure exactly what this process is.

Maybe the Staff Director can tell us how does the review process actually work, how does he choose the so-called panel and are they the same people or different people? Are we shooting from the hip or is it something that's really laid out that certain people are on this panel? I don't totally understand how that works right now.

STAFF DIRECTOR MARCUS: I would be happy to. I construe the term "editorial review" as being harmonized with editorial review board as the term is used in AI 1-6 and elsewhere in the AIs. So we do spell out at least some aspects of what's done in editorial review.

It is a process for a panel of usually three members of the staff to review a document usually with the focus on a few things in mind such as the balance of the document, the support for propositions in the document as well as what would normally think of as editorial issues more narrowly construed which is to say the quality of the writing as well as the quality of the analysis.

I typically like to have both continuity and change on the panels. I like to have a rotation
of members of the panels. I do like to have one person see as many of these as possible so that I can get an assessment of how does this stack up especially if we're talking about regional products as well. How did this stack up with comments on the one we got last month or the one we got the month before? But I also like to have people from different offices and people who were not involved in the preparation of the underlying document. Typically, I try to have at least one person who is from a headquarters office other than the Office of the Staff Director and when possible, I will get one person from the regional office and I'll try to vary it up depending upon the work load of different offices and the needs that we have and I like to try and get different skill sets involved. I might like to have an attorney on it but not necessarily three attorneys. If possible, I like to have at least one other social scientist or analyst and I try to get different office perspectives on the document. And that's true whether it's the editorial review board for a regional document or an editorial review board for a national document.

COMMISSIONER MELENDEZ: Okay. Just one other question. How does the editorial review and all the staff that you have working on that play into the
findings? Is that the basis for the findings that have come out say in the affirmative action in law schools which we'll be talking about later today? Is that the basis where all that comes from?

STAFF DIRECTOR MARCUS: You know, to the best of my knowledge, I have not made changes in the editorial review board process as opposed to what we've done before, although I haven't spoken with the prior staff director about it. The custom and practice has been not to include findings and recommendations in the editorial review process.

Typically, they were not included there because the notion was that that's not editorial. That's more of a policy issue. They have been included more recently in a couple of editorial review boards, but it's not required and it wasn't usually the way it was done in the past.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: Commissioner Yaki, I have to say that, I can't resist saying that, when you said if we have a balanced panel who, let's say, it's an issue that lends itself to this kind of polarization, two on one side, two on the other side and then you look at the findings and recommendations and you said, "Gee. It was a balanced panel, but the
findings and recommendations, particularly the recommendations, probably don't seem to reflect that two and two balance." My reaction is fine. Let's have more imbalanced panels and then there will be findings and recommendations which will flow clearly from what has been before us, presented to us, and I don't think that that's what you want. Look, we have balanced panels and, you know, we start to think ourselves. That seems to me our job.

COMMISSIONER YAKI: And there's a difference between thinking for ourselves and -- Well, let me put it as kindly as I can. My concern about the briefing reports and where we were headed, the direction that we were headed in in conversations with Commissioner Braceras and Taylor and Melendez on briefing reports is my concern that we deviated from the original concept of what briefings were supposed to be. They were supposed to be briefings. They were not supposed to become briefing reports. It was supposed to be a way of hearing an issue, listening to what's going on and then in terms of thinking for ourselves, Commissioner Thernstrom, I thought that it would be appropriate for us to ask further questions, to develop that four people in two hours could not possibly begin to develop with us. It would be
explore additional lines of inquiry, of research, of whatever that would lend itself to a more credible product in the end.

What we are doing here and what you call thinking for ourselves to me does nothing more than create a procedural fig leaf for the imposition of certain views as a result of these reports. If that's where they are going, I mean, I certainly don't have the votes on this commission to deal with that. But I'm just telling you that in the spirit of compromise and seeking to broker some harmony on this issue, a topic that has not been addressed but one that was addressed seriously by Commissioners Braceras, Taylor, Melendez and myself came up in the context of two things, one that there was this discord on the Commission over the fact that at least two of us here believe that it was not the original intent of briefing reports to then proceed off on policy at full speed based on two hours of testimony, No. 1.

But No. 2 and more importantly, was the fact that in so doing, we created a fairly substantial backlog of work for our own staff for our own product to the point where it was starting to become stale. Omaha is becoming stale. In terms of the developments going on in Omaha today, it was a great hearing
envisioned by the Chair to go there and to send and offer our viewpoint and our and our moral authority there. It helped galvanize a lot of people into coming forth and putting out points of view. And then every month I get an email from someone saying is the report ready, is the report ready, is the report ready, and life is just moving on there.

So the compromise that we started talking about was to have something along the lines of two or three full-blown briefing reports. That would be my concession to go ahead, put out what you want to put out. I can't stop it. But at the same time, let's also not forget the fact that there are some issues where a briefing is just a briefing and we can talk about it and we can ask about more questions. We can look for certain lines of inquiry and move on and that has the added impact of reducing the backlog on the staff from attempting to justify and defend what goes on in these findings and recommendations that we're going to fighting about for two hours later on today.

That's where we were going and I was quite willing to make that kind of compromise. I don't see that here today and so you can understand my dissatisfaction with the result and why -- I'll just stop talking about it and why don't we just vote it through since
I'm not going to prevail on it.

COMMISSIONER BRACERAS: Can I be heard?

CHAIRMAN REYNOLDS: Yes. Commissioner Braceras.

COMMISSIONER BRACERAS: (Speaking from unmiked location.)

CHAIRMAN REYNOLDS: Commissioner BRACERAS, Jennifer, can you go closer to the microphone on your phone?

COMMISSIONER BRACERAS: Yes. Can you hear me now?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER BRACERAS: Hello?

CHAIRMAN REYNOLDS: That's better.

COMMISSIONER BRACERAS: All right. The first is as I said from the beginning that there are two sets of issues here. One involves front end procedures and has to do what happens at the staff level. The other has to do with back end procedures and how we as commissioners procedurally handle these reports.

So one possibility is to go on to aspects. The other part is that although we have something today that doesn't end for today on this and I think that the working group can continue to tinker with
these policies and fine-tune them. I think if I'm not mistaken the rationale for bringing these policies and procedures forward for a vote today is so that we can move forward with the reports that are becoming stale, obviously a work in progress for dealing with them until such time that we can come up with something better.

We should always strive for something better and I'm willing to continue to do that. But I do think it's critical that we get some procedures in place today so that we can review the reports better on the table and that will be coming to the table in the next two months. That I guess goes to, I think, it was Commissioner Kirsanow said, as to whether what we're approving is prospective or retrospective. I would argue that with at least with respect to the back-end procedures and how Commissioners vote on and profit from anything we vote on today will be tied to any subsequent vote we take under 4 CFR before, today or in the future until we come up with something different. That's all I have to say about that.

CHAIRMAN REYNOLDS: Okay. Are there other questions? Commissioner Taylor.

COMMISSIONER TAYLOR: Very quick comments.

First is that this is not, I think, the final word on
this. I think we should continue to work even after
this vote today. I think it's important though to
vote on this today to move the reports in the pipeline
at some point. The ones in the pipeline really worry
me and we're holding ourselves back.

But the larger issue to Commissioner
Yaki's point of the issue of briefings evolving is
that when the briefings were first raised the thought
was that frankly there would be a lot of briefings
every year. And I want to point out to everyone if we
look at our calendar we've adopted, we have four
listed and I think we've had two more that are not
listed. We have actually reduced the number of
briefings that we intend to hold throughout the year
and I think that in large measure addresses the point
raised by Commissioner Yaki and even his suggested
compromise of two to three is not a far cry from the
six briefings we're going to end up with in reality.

I think we've had two lines that have been
getting closer and closer and I think they are very
close now and I think that marginal difference is not
a reason to hold back the reports in the pipeline
today. But I think even that marginal difference can
be reconciled over the next two months with a little
bit of work. So we should do both, I think,
CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: I agree we should bring this to a vote and I also agree that this is not the final word. I would say however that there remain on the table very important disagreements that I don't think are going to get papered over with further discussion.

CHAIRMAN REYNOLDS: Commissioner Melendez.

COMMISSIONER MELENDEZ: Just going back to where we started discussing this whole process, I don't know when it was, the issue actually was whether or not it sounded to me like AI 1-6 applied to all reports, statutory, all the different reports we had. At the time, we were going to ask a question as far as formal hearings, you know, that would be where we can subpoena witnesses basically and maybe there's more process and procedures on recommendations and findings in hearings. So I wasn't even sure whether or not this Commission was supposed to doing briefings that led up to hearings, maybe we're the eyes and ears, and when important issues in this country come in the form of a briefing, we sure knew it wasn't coming from the SACs. I mean I never really heard what was going on there that really trickled into the Commission here. So it seemed to me with all the
different briefings that we were holding some of those
would actually be so important that they'd actually
end up being a hearing. I'm not sure whether that's
part of the process or not.

But at the very beginning, the question
was should AI 1-6 be for all reports. It sounded
logical to me. But then at some point, we started to
change. At some point in February and all these
different reasons, it sounds like we wanted to become
more discretionary in not having this legal
sufficiency and editorial review and all that stuff.
We wanted to kind of give them more discretion. To
me, it sounded like we should just maintain that all
reports coming out of the Commission are quality, that
we should applied the same AI 1-6 standards to
everything. I think that's where we kind of went off
on some watered-down process with discretion in it
within the Staff Director doing some of this.

That's my issue here and not only that.
In the GAO Report of 2006, it sounded like he was
actually looking at those very things that we're
talking about today. So in my opinion, if we make
this motion here today, we haven't really increased
quality. Actually, we've decreased the quality of the
reports that are going to come out of this Commission.
So that's the reason I would oppose this. I just think that there's a lot more work we have to do to come to some agreement. Thank you.

CHAIRMAN REYNOLDS: The work will continue and ask for AI 1-6 applied to whole briefing. At least one Commissioner has taken the position that that rule applies to all reports, but other Commissioners have taken a different position. For example, I don't believe, that AI 1-6 when that rule was put into place, I don’t believe that there was an intent to have it apply to briefing reports. There was no discussion at that time. Well, at the time that it was put into place, the discussion centered around our national reports. It was some months later when we decided to do briefings. Well, the briefings, the decision to do briefings came after the decision to apply the standards that are in AI 1-6. So I just want to be clear that there is a disagreement as to whether we intended AI 1-6 to apply to both briefings and national reports.

COMMISSIONER BRACERAS: Can we call the question?

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRMAN REYNOLDS: All in favor please signify by saying aye.
(Chorus of ayes.)

CHAIRMAN REYNOLDS: In all in opposition.

(Two opposed.)

COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: Opposed.

CHAIRMAN REYNOLDS: Please let the record reflect that Commissioners Yaki and Melendez opposed the motion. The remaining Commissioners support it. The motion carries.

VI. PROGRAM PLANNING - AFFIRMATIVE ACTION IN LAW SCHOOLS BRIEFING REPORT

CHAIRMAN REYNOLDS: The next item on the agenda is the Affirmative Action in Law School Briefing Report. Consideration of this report was postponed until the new procedures for briefing reports were approved. That this has now been resolved, may I have a motion that the Commission approve for publication along with any concurring and dissenting statements submitted by any Commissioner by March 23 -- I'm sorry. Hold on. How much time do folks -- How much time will folks need to review? Will two weeks suffice?

VICE CHAIRPERSON THERNSTROM: No.

CHAIRMAN REYNOLDS: Okay. A month?

COMMISSIONER BRACERAS: To review what?
CHAIRMAN REYNOLDS: To review the report.

COMMISSIONER BRACERAS: Which report are you talking about?


COMMISSIONER BRACERAS: Haven't we reviewed that for a month?

STAFF DIRECTOR MARCUS: I think the question is if anyone wants to write a concurring or dissenting opinion that hasn't yet been completed, how much additional time they will need.

CHAIRMAN REYNOLDS: That's right.

COMMISSIONER BRACERAS: Okay. Thank you.

CHAIRMAN REYNOLDS: Will 30 days do?

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER YAKI: No.

VICE CHAIRPERSON THERNSTROM: Wait a minute. How much time do you -- Do you want a year?

COMMISSIONER BRACERAS: -- probably three or four.

COMMISSIONER YAKI: I'm sorry. Perhaps the fact that as a partner in a law firm, I have other responsibilities as well.

VICE CHAIRPERSON THERNSTROM: I'm sorry.

COMMISSIONER YAKI: This is a very heavy
month for me.

VICE CHAIRPERSON THERNSTROM: Yes. I'm sorry. I apologize, Commissioner Yaki.

COMMISSIONER YAKI: I have patients that are going berserk right now. I've been basically -- I email back and forth to my office and I'm on travel half this month devoted toward these case.

VICE CHAIRPERSON THERNSTROM: I'm sorry. I apologize for that. I do. It was uncalled for.

CHAIRMAN REYNOLDS: Okay. Commissioner Yaki.

COMMISSIONER YAKI: I would like 45 days.

CHAIRMAN REYNOLDS: Any objections to 45 days?

(No response.)

CHAIRMAN REYNOLDS: Okay. All right. So the dissents and conferring statements will be submitted 30 days from today.

COMMISSIONER YAKI: Forty-five.

CHAIRMAN REYNOLDS: I'm sorry. Forty-five days from today. Part A of the Affirmative Action in Law Schools Briefing -- I'm sorry. This draft reflects Commissioner and panelists' input on the briefing the Commission held on June 16, 2006 on Affirmative Action in American Law Schools.

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Part A as distributed in draft form to Commissions on April 5, 2007 contains an executive summary with a brief overview of the issue and an explanation of why the Commission chose to conduct this briefing. A summary of the proceedings consisting of synopses of the panelists' oral statements during the briefing and a synopsis of the question and answer sessions and finally copies of the panelists' written statements.

Under this motion if a majority of the Commissions votes to adopt Part A of the briefing report the Commission will then open discussion on Part B. Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion.

COMMISSIONER YAKI: Point of order. In terms of the new procedures that we adopted today, I'd like to know whether or not what effected agency review was conducted with regard to this report.

CHAIRMAN REYNOLDS: May I amend your -- Offer a friendly amendment and ask whether this report conforms to the procedures that we just adopted.

COMMISSIONER YAKI: That can be it, but I was just asking about effected agency reviews since our findings and recommendations make mention of
various agencies.

STAFF DIRECTOR MARCUS: I know that Commissioner Melendez previously asked that question and I responded to all of the Commissioners and my recollection is that the answer on this one is that there was no agency that was deem to require a review. So it did not go to any agency for that.

COMMISSIONER YAKI: What determines -- I don't mean to beat a dead horse, but what determines whether or not an agency is entitled to review or not because it says there's another agency affected by the report. Here we're talking about the National Academy. We're talking about Congress. I just wanted to know whether or not -- And by implication through this, the Department of Education, I'm just wondering if they had been consulted as part of this as well.

STAFF DIRECTOR MARCUS: In general the question is whether the work of other agencies is assessed or described or analyzed or criticized in any way with which they would need to comment on or correct and that was considered not to be the case for this document.

COMMISSIONER YAKI: It wasn't?

STAFF DIRECTOR MARCUS: That's correct.

COMMISSIONER YAKI: Not withstanding the
fact that these standards dealt with the Department of
Education in terms of Standard 211 and -- I'm just
curious. The answer is no?

STAFF DIRECTOR MARCUS: The answer is no.

COMMISSIONER YAKI: Okay.

CHAIRMAN REYNOLDS: Other questions?

Comments?

VICE CHAIRPERSON THERNSTROM: Call the
question.

COMMISSIONER YAKI: No, we're going to go
on the findings recommendations that we're going to
vote on each one one at a time, right?

CHAIRMAN REYNOLDS: No, first we have to
vote on Part A before we get to Part B.

COMMISSIONER KIRSANOW: Okay.

CHAIRMAN REYNOLDS: All in favor, please
signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections? Opposed?

COMMISSIONER YAKI: Opposed?

CHAIRMAN REYNOLDS: Abstentions?

COMMISSIONER MELENDEZ: I abstain.

CHAIRMAN REYNOLDS: Please let the record
reflect that Commissioner Yaki opposes the motion.

Commissioner Melendez abstains and the remaining
Commissioners voted in the affirmative.

COMMISSIONER YAKI: I'll change my vote to abstain.

CHAIRMAN REYNOLDS: Okay. Please let the record reflect that both Commissioners Melendez and Yaki abstain from the vote. The remaining Commissioners vote in favor. The motion carries.

Okay. Since the Commission has adopted Part A of the briefing report, we will address Part B. Part B as distributed in draft form to Commissioners on April 5, 2007 contains the Commission's findings and recommendations. Under this motion, the Commission will vote individually on each finding and recommendation.

The first finding reads as follows: "Richard Sander, November 2004, Article, Systematic Analysis of Affirmative Action in American Law Schools in the Stanford Law Review, attributed disparities between white and African American law students in grades, graduation and bar passage rate to an academic mismatch. Specifically, Professor Sander concluded that large racial preferences employed by law schools in admissions had demonstratively counterproductive effects on their intended beneficiaries, that is, many African American law school applicants are admitted to
law schools for which they are not academically qualified." Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.
CHAIRMAN REYNOLDS: Discussion.
(No response.)
CHAIRMAN REYNOLDS: Okay. I'll call the question. All in favor?
(Chorus of ayes.)
CHAIRMAN REYNOLDS: All in opposition?
COMMISSIONER MELENDEZ: Aye.
COMMISSIONER YAKI: Aye.
CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Melendez and Yaki oppose the motion. The remaining Commissioners vote in favor. The motion carries.
COMMISSIONER BRACERAS: Just a point of information. Is that going to be specifically indicated under finding, how many votes for and how many against?
CHAIRMAN REYNOLDS: Yes. I believe that our new rule requires that.
VICE CHAIRPERSON THERNSTROM: Yes, with the identification of.
COMMISSIONER BRACERAS: Yes.
CHAIRMAN REYNOLDS: Of the Commissioners.
who --

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Okay. I move -- The second finding is "both Sander's supporters and critics have agreed that there are significant disparities between white and African American law students in terms of grades, graduation and bar passage rates. However, others disagree with Sander's assertion that academic mismatch is the culprit. Data that would enable researchers to further evaluate the strength of the academic mismatch theory is not widely available." Discussion. Commissioner Yaki.

COMMISSIONER YAKI: Yes, I move to amend this one to state that "both Sander's supporters and critics have agreed that there are strikingly significant disparities between white and African American law students in terms of grades, graduation and bar passage rates. The vast majority of the literature disputes Sander's statistical and scientific conclusions and do not agree with Sander's assertion that academic mismatch is the culprit."

That's how I would amend it.

CHAIRMAN REYNOLDS: Okay. Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: I can't go
along with that. First place --

COMMISSIONER YAKI: Of course, you can't.

VICE CHAIRPERSON THERNSTROM: Yes. First place, if there aren't significant disparities, then why is this even an issue?

COMMISSIONER YAKI: Exactly.

VICE CHAIRPERSON THERNSTROM: I mean if there are trivial disparities we shouldn't even be talking about the question. And, no, I can't possibly sign on to the notion that to some suggestion that Sander's work lacks --

COMMISSIONER HERIOT: We don't have a second yet. So there's no --

COMMISSIONER KIRSANOW: Yes, we need a second to amend it.

VICE CHAIRPERSON THERNSTROM: I'm sorry.

CHAIRMAN REYNOLDS: Okay. Is there a second?

COMMISSIONER BRACERAS: Yes, second.

CHAIRMAN REYNOLDS: All right. Vice Chair Thernstrom, have you completed your thought?

VICE CHAIRPERSON THERNSTROM: The second thought was simply that the second part of Commissioner Yaki's amendment suggests that Sander's work lacks integrity and that there is some kind of at
least widespread consensus on that. I can't sign onto
that either.

CHAIRMAN REYNOLDS: Additional comments?

Commissioners Yaki.

COMMISSIONER YAKI: Let me just defend my
characterization. At the hearing, we heard Professor
Sander discuss his methodology and then discuss his
reformulated methodology. He did not really indicate
that there were others who had taken the same
methodology and reached the same conclusion.

To the contrary, we heard a number of
different reports, not just from Professor Lempert,
but Professor Ayres and Professor Brooks, and other
professors at UCLA, as I said, in the Stanford Law
Review article. There were too many responses that
they could even publish to the original Sander
finding. There are still problems, quantitatively and
with the Sander second revised proposal. And that to
me was pretty clear and continues to be pretty clear
that Dr. Sander, Professor Sander, pretty much stands
alone.

Whether he's right or not you may choose
to believe he's right, Commissioner Thernstrom. But
certainly from an objective point of view, the vast
amount of research out there today refutes what Sander
is saying and I don't see why it should not be put in there. Certainly the idea that the supporters and critics are evenly matched is quite absent -- The inference is completely wrong and I think that that should be highlighted in there.

CHAIRMAN REYNOLDS: Commissioner Yaki, it seems to me that there is a dispute over the methodological approach. But the issue that's on the table here is whether there are significant disparities in terms of grades, graduation and bar passage.

COMMISSIONER YAKI: But part of --

CHAIRMAN REYNOLDS: Hear me out.

COMMISSIONER YAKI: Okay.

CHAIRMAN REYNOLDS: And these facts I don't believe are in dispute.

COMMISSIONER YAKI: I would say that if you read the testimony of Professor Lembert, he indeed takes issue with the fact that the disparities are as great A.S. Sander says. They attack the control group and when you have a control group that is wrong, you're going to get result that are wrong and whether you agree or disagree with that, the fact is that there is disagreement on whether or not the disparities are significant or not especially with
regard to some of the factors that are put forth in this. I'm just trying to be factual and correct in this particular characterization of Sander's research and the criticisms of it and I think that you will find people who will say that you will get different disparities depending on the different datasets you get. Some may be significant. Some may not be and Lempert had charts that show that the disparity in some instances was not as great as Sander would assert it to be.

COMMISSIONER BRACERAS: Excuse me. I'm sorry. I just wanted to tell you all that I'm going to step away from the phone for a moment or two. I will be back. But I'll just tell you now it's going to be the questions that I'm not participating in from now until the time I get back. But I need to --

VICE CHAIRPERSON THERNSTROM: And you don't have any immediate comment on this.

COMMISSIONER BRACERAS: I have no immediate comment. I just wanted the record to reflect that I'm stepping away and I'll let you know when I'm back.

CHAIRMAN REYNOLDS: Okay. Thank you.

Commissioner Kirsanow.

COMMISSIONER KIRSANOW: I don't want to
belabor the point. I think that there was considerable evidence adduced at the hearing with respect to the characterization of the three sentences that are contained in this Finding No. 2.

I think if memory serves correctly, Professor Lembert was talking in terms of certain grades, not even grades because some of these institutions don't even have grades by which you can measure. But to the extent there are grades, there are disparities in those grades and they're significant. There is the testimony that we deduced and I think Lembert even agreed with this is that on a 1,000 point scale there's about 135 point difference between blacks and whites in terms of their academic performance.

There is significance difference in terms of -- and this was not disputed either that approximately 50 percent of all black students in law schools cluster in the bottom 10 percent of the law school classes which would actually make the bottom 10 percent virtually all black. I consider that to be a significant disparity, maybe a deplorable disparity, maybe a -- I don't know what other adjective we can use.

And bar passage rates, I don't think there
was any dispute there, although he did -- maybe it would be cabined in terms of bar passage rates in terms of certain states. California, we didn't have a bar passage rate for, but for the states that we have bar passage rates, blacks were six times as likely to fail. That's astonishing. That's not just significant. That's astonishing. Six times as likely to fail and I think all the other witnesses concurred with that including Professor Bernstein from George Mason. So I would agree with the first one --

COMMISSIONER YAKI: He is on your side though.

COMMISSIONER KIRSANOW: And that's why you disagree with him. We are talking about the testimony that was adduced.

And in terms of the second sentence, "others disagree with Sander's assertions" suggests that there are multiple people that disagree with one person. It's not as if we're trying to suggest that the proposition is evenly matched. Others disagree with him, but we had Sander in front of us and he's the one in front of us that had conducted a full-scale study. Professor Lembert did not. And they both agreed that we need more research on this. I think everybody concludes that this is preliminary research
and I know Professor Sander is seeking to conduct more comprehensive research including bar passage rates from the State of California.

CHAIRMAN REYNOLDS: Commissioner Taylor.

COMMISSIONER TAYLOR: As to the first sentence, I think from my recollection of the evidence at least and the material from my perspective indicated that the disparities were significant and indeed -- As to the second sentence, others disagree could be read to imply a balance of views and I think at this point, I think it's accurate to say that a vast majority of literatures is again saying this on the mismatch issue. And the third point, that is that everyone agrees you need more research on the mismatch issues specifically is a valid statement. So that reason I think we should keep "significant." I don't mind changing the second sentence to indicate that at this point Sander is not in the majority and indeed there is not a balanced argument in that regard and that they both agree that you need more evidence to determine who's right. That was my recollection of the evidence.

CHAIRMAN REYNOLDS: Okay. Let's call the question.

VICE CHAIRPERSON THERNSTROM: Can I --
CHAIRMAN REYNOLDS: Commissioner Thernstrom.

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRMAN REYNOLDS: That's quite nice.

VICE CHAIRPERSON THERNSTROM: Thank you, dear. I'm scribbling here. I'm drawing. I actually have a problem with the last sentence stated that there will be researchers to further evaluate the strength of the academic mismatch there is not widely available -- I don't know what "widely" means, but I mean it is available and Professor Sander continues to work on it, not as well as other people though. There are a lot of people working on it.

COMMISSIONER KIRSANOW: It may not be readily available because he's having significant difficulty.

VICE CHAIRPERSON THERNSTROM: All right. Readily-available. That he is not --

COMMISSIONER KIRSANOW: -- drawing that information out because --

VICE CHAIRPERSON THERNSTROM: But nobody is at the end of the road in terms of exploring this issue.

COMMISSIONER KIRSANOW: I don't disagree with you. He's saying that he's having a difficult
time and others have had a difficult time teasing out the information because it's being kept more closely than the secrets to the Manhattan Project.

VICE CHAIRPERSON THERNSTROM: And I really don't care in the Academy which I have no respect for in general what the balance of agreement is on Sander's assertions, but that seems to me simply saying others disagree. Okay. That is accurate. Others disagree. I don't care what the numbers are.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRPERSON THERNSTROM: I would like it to remain as is. In other words, I would like us to vote on this as the motion was.

COMMISSIONER KIRSANOW: There is been an amendment we had to vote on, Commissioner Yaki's amendment first and then we will vote on this one.

CHAIRMAN REYNOLDS: Okay. All in favor of Commissioner Yaki's amendment, please signify by saying aye.

COMMISSIONER YAKI: Aye.

COMMISSIONER MELENDEZ: Aye.

CHAIRMAN REYNOLDS: All in opposition?

(Chorus of nays.)

CHAIRMAN REYNOLDS: Okay. Please let the record reflect that Commissioners Melendez and Yaki
voted in the affirmative. The remaining Commissioners voted against. The motion does not carry.

Next up we're going to vote on the original motion. All in favor please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All in opposition?

COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Okay. Please let the record reflect that Commissioners Yaki and Melendez voted in the negative. The remaining Commissioners voted in the affirmative. The motion carries.

Okay. I move that we adopt the Finding No. 3 which reads: "Minority lost students may better gauge their likelihood of academic success at a given law school and future career prospects if law schools and the entities responsible for granting admission to the bar publicly disclose the extent to which they use race and admissions data on academic performance, bar passage rates, graduation rates, student loan default rate and grade point averages disaggregated by rates. Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion.
Commissioner Yaki.

COMMISSIONER YAKI: Why don't we just put on every law school sign, every law school, a warning for minority students "Don't come here. You're likely to fail." This is an amazing endorsement, a stereotype threat and I can't endorse it.

CHAIRMAN REYNOLDS: Okay. I -- Jump right in, Commissioner Heriot.

COMMISSIONER HERIOT: I'm thinking about maybe a motion to amend this. Is it really the data that we want desegregated by race or desegregated by academic credentials? A student of any particular race shouldn't want to know how the people of my race do. They should want to know how do people of my academic credentials do because that's what matters and the notion that we should look at this by race I think is a big mistake. This is an issue of academic credentials.

COMMISSIONER KIRSANOW: I would agree with that and I'd also strike the first word in this, minority. I think all students may better gauge how they would perform and the problem is I think Professor Bernstein read maybe an apocryphal email from the student from Colorado Law School who happened to be a minority student self-identified and thought
that this was a bait and switch where she was encouraged and lured to go to this place with the promise that she was going to graduate and everything and have a fine academic career and fine legal career and found out that in fact had she known what individuals with her grade point average and LSAT scores, how they fare in law school, she would have found some other place to go to rather than spend all the money going to Colorado State or Colorado Law School. But I would suggest, I would amend the friendly amendment to strike "Minority law students" and just put "law students."

COMMISSIONER HERIOT: Yes.

VICE CHAIRPERSON THERNSTROM: Commissioner Heriot, do you also want to strike then "the extent to which racial preferences are used"?

COMMISSIONER HERIOT: I don't know about that.

COMMISSIONER KIRSANOW: I happen to think personally since I'm an amendment to the friendly amendment I would keep that in.

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER KIRSANOW: Or possibly segregate to the subcategory 3(a). But nonetheless that is pertinent.
VICE CHAIRPERSON THERNSTROM: Right.

COMMISSIONER KIRSANOW: What we did have was testimony that referenced a study and I believe it was by the Center for Equal Opportunity.

VICE CHAIRPERSON THERNSTROM: It was.

COMMISSIONER KIRSANOW: It showed the greater the preference the greater the likelihood of -- I'm sorry. Maybe we shouldn't have quoted somebody else, but the fact of the matter is if somebody else has another study let him put it forth and that studied showed the greater the preference the more likely the student is to flunk out and I think it is the job of this Commissioner to alert minorities to these kinds of difficulties. This is not a good thing for minorities that are being sold the Santa Claus version of what it's like to go to college and law school and then they flunk out or do poorly and that just breeds resentment.

But more importantly is those individuals who celebrate the number of people who are in school have failed to graduate I would suggest are not acting necessarily in the best interest of minorities. I would rather think that it's more likely to yield a better society where we're celebrating the number of those who graduate and become productive members of
society. Garbage input, garbage output.

CHAIRMAN REYNOLDS: Commissioner Yaki, you have a question.

COMMISSIONER YAKI: No. Just a heavy sigh.

COMMISSIONER HERIOT: Let's make this more of an official motion.

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER HERIOT: I move that this be amended to read No. 3 "Law students may better gauge their likelihood of academic success at a given law school and future career prospects if law schools and the entities responsible for granting admission to the bar publicly disclose the extent to which they use race and admission and data on academic performance, bar passage rates, graduation rates, student loan default rates and grade point averages disaggregated by academic credentials."

COMMISSIONER KIRSANOW: Second.

VICE CHAIRPERSON THERNSTROM: Good. Like it.

CHAIRMAN REYNOLDS: Commissioner Melendez.

COMMISSIONER MELENDEZ: I don't know that distributing this kind of information could result in misuse that actually harms minorities. I'm just...
saying that you'd better sure that that's not going to happen and I think that even the Staff Director may, this question may have been raised by your staff people as far as it gets to be a legal thing and I'm not sure what you're feeling on this component here. I just feel uncomfortable with distributing information like that that has a potential to harm minority students and I think you have to really think that out as to could that be possible.

COMMISSIONER KIRSANOW: I'm just -- Just as a question to --

COMMISSIONER BRACERAS: I'm back.

COMMISSIONER KIRSANOW: How does this harm the minority students?

COMMISSIONER MELENDEZ: I'm not sure.

COMMISSIONER KIRSANOW: Are you referring to personally identifying?

COMMISSIONER MELENDEZ: And who we give that information to, I guess, would be the question.

VICE CHAIRPERSON THERNSTROM: It seems to me the thrust here is to help minority students and other students, not only minority. That was why this was amended who are entering law school with credentials that are way below average. Those are the average student.
CHAIRMAN REYNOLDS: So in effect this is a form of consumer protection. Potential law students would have additional information on which to base their decision.

COMMISSIONER YAKI: Then why have the criteria and if they use race and admissions then?

CHAIRMAN REYNOLDS: That would shed some light and provide some transparency as to what schools are actually doing. I think it would be helpful for researchers. I think that as a public policy matter if you're going to do it well and you think that there's value to it then there should be no reason to hide the extent to which racial preferences are used in the omissions process.

COMMISSIONER YAKI: I think you're just making them ensure that they're targets for Ward Connolly and I object to that.

CHAIRMAN REYNOLDS: This is not going to prevent Ward Connolly -- This does not provide Ward Connolly with any additional abilities to move forward with an initiative. He's doing it in the absence of this data.

COMMISSIONER KIRSANOW: Mr. Chairman. There is a technical reason to provide this kind of information going beyond a policy reason. One is that
there are a number of individuals who are apply to a law school with sterling credentials thinking that with these credentials they're going to get admitted, at least, based on the objective criteria set forth in the various publications that say what the admissions rates are. However, they then come to find out that they've been rejected and don't know the reasons therefore.

A little bit further data reveals that sometimes they are rejected because someone with less sterling credentials gets admitted because there is a racial preference in place. Those individuals have spent time and energy and money applying to those places when they probably could have devoted their attention to applying to another school that doesn't have this regime in place.

COMMISSIONER YAKI: So you just want to make sure that their resentment is based on fact. Is that what you're trying to do?

COMMISSIONER KIRSANOW: No, it's consumer protection.

COMMISSIONER YAKI: That's just ridiculous.

COMMISSIONER KIRSANOW: Right now -- It's curious. It's very curious that law schools as I say
protect like the secrets to the Manhattan Project what
the degree of preference is. The reason --

COMMISSIONER YAKI: That's because there
are people out there like others not in this room who
are going to sue them and that's in a half second.

COMMISSIONER KIRSANOW: There are people
who are concerned about their protection. There are
people who are concerned about black and Hispanic law
students who are being sold a pig in a poke saying,
"Come on in here. Spend your money here and whether
you graduate..."

COMMISSIONER YAKI: That's not the data
that C- about African Americans in Michigan.

COMMISSIONER KIRSANOW: And whether or not
you graduate is a wholly different proposition.

CHAIRMAN REYNOLDS: Gentlemen. Let's --

COMMISSIONER KIRSANOW: It's very similar
to the schools that invite black athletes in and say
"Come on here. Play for us" and then don't graduate
them. "We love your presence here as mascots and
everybody else, but whether or not you graduate,
that's your problem, not ours."

CHAIRMAN REYNOLDS: Commissioner Heriot.

COMMISSIONER HERIOT: I may be able to put
Commissioner Yaki's mind at rest a bit. Ward
Connolly's initiatives, of course, only apply to public universities. As a result, he has access to this information through FOIA requests anyway. The reason for this finding is not for Ward Connolly or anyone else who might wish to pursue a public initiative but rather for individual applicants.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: I mean I hate to play social scientist here and intellectual and scholar, but, you know --

CHAIRMAN REYNOLDS: But you can't help myself.

VICE CHAIRPERSON THERNSTROM: I can't help myself and the more information that a reliable source that I have to think about very hard problems and these are tough problems, the better off we all are so that we're not just trading accusations and suppositions and frankly junk that is ideologically driven. So I just -- More information is better than less information.

COMMISSIONER KIRSANOW: If racial preferences are such a good thing, why don't college comp it? Why don't they say we give you a ten percent preference? We give you a 50 percent preference? Why are they hiding it?
VICE CHAIRPERSON THERNSTROM: Absolutely.
And we're -- because we believe in it. Absolutely.
There's an argument for them.

CHAIRMAN REYNOLDS: Okay. Let's vote.

All in favor, please say aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: As amended.

COMMISSIONER BRACERAS: Aye. I'm back.

COMMISSIONER KIRSANOW: Did she hear the amendment by the way?

CHAIRMAN REYNOLDS: Commissioner Braceras, the motion was amended.

COMMISSIONER BRACERAS: Could you read it to me please?

CHAIRMAN REYNOLDS: Commissioner Heriot, would you mind?

COMMISSIONER HERIOT: Okay. Commissioner Braceras, this is for No. 3. Under the motion, it would read, "Law students may better gauge their likelihood of academic success at a given law school and future career prospects if law schools and the entities responsible for granting admission to the bar publicly disclosed the extent to which they use race and admissions and data on academic performance, bar passage rates, graduation rates, student loan default
rates and grade point averages disaggregated by academic credentials."


CHAIRMAN REYNOLDS: Okay. All in opposition?

COMMISSIONER YAKI: Absolutely.

COMMISSIONER MELENDEZ: Aye.

CHAIRMAN REYNOLDS: Please let the record reflect that Commissioners Yaki and Melendez voted against the finding and the remaining Commissioners voted against the finding as amended by Commissioner Heriot. Okay. One of those days. The remaining Commissioners voted to support the motion. So the motion carries.

COMMISSIONER HERIOT: Clarification. Was that -- It was my motion, I know. But are we treating that though as a vote on the actual finding or is that just a motion to substitute and now do we have to vote again on the finding?

COMMISSIONER YAKI: No, it's a supremacy motion. So it carries as is. And the underlying motion, there's no need for a vote.

COMMISSIONER HERIOT: Okay.

CHAIRMAN REYNOLDS: Okay. I move that the
following finding be adopted. It reads as follows:
"The impact of racial preferences in law school admissions is an important matter of public policy and particularly the public would benefit from further social science research on such preference's impact on African American and other minority law students. Admitting students into law school for which they might not academically be prepared could harm their academic performance and hinder their ability to obtain and secure gainful employment in the legal profession. Law school entails significant investments of time and financial resource and law students often take out extensive Federal and private loans to finance their education. Racial preferences that contribute to any academic mismatch might therefore also contribute to income and wealth disparities between whites and African Americans." Is there a second?

VICE CHAIRPERSON THERNSTROM: I second it.

CHAIRMAN REYNOLDS: Discussion. Yes. Commissioner Yaki.

COMMISSIONER YAKI: Yes, I'm just wondering why we don't have as a finding the fact that there are many studies that would indicate that the number of African American lawyers would decrease
under the Sander's model utilizing his mismatch theory
and correction model.

CHAIRMAN REYNOLDS: Well -- I'm sorry.
I'm just --

COMMISSIONER YAKI: You have Katherine Barnes. You have Ayres and Brooks and you have Lempert all stating that the elimination of these items would actually result in a decrease in the number of African Americans who would be entering the bar.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: I believe that what the research finds is a cascading effect such that students who are preferentially admitted today to schools where they are mismatched with the average law student at those schools are going to go to a school that say one tier lower that the only students who will be out of the profession entirely are those at the very bottom who cannot drop down another tier. But those students are not passing the bar exam.

CHAIRMAN REYNOLDS: Chairman Heriot, do you have a question?

COMMISSIONER YAKI: But we're not making those distinctions. We're not talking about the subtleties of these studies. We're not talking about
the fact that there's contrary evidence that would say
that students at the top tier law schools do well and
do have good bar passage rates. We're not talking
about that and instead we're simply creating this
incredible stereotype threat of guess what. You're
not going to make it in law school and you're not
going to make it in life and I just can't subscribe to
that.

VICE CHAIRPERSON THERNSTROM: Actually,
they don't do well at the top law schools, but in any
case, I'm sorry.

COMMISSIONER HERIOT: All finding of Fact
No. 4 says is this might be so.

COMMISSIONER KIRSANOW: That's right.

COMMISSIONER HERIOT: And so it's not
really --

COMMISSIONER YAKI: But it doesn't give
the contrary point of view.

COMMISSIONER KIRSANOW: But it says who
would benefit from further social science research.

COMMISSIONER YAKI: But there is already
an existing contrary point of view. Rather than
simply saying would benefit from further research,
there is already an existing contrary point of view.

COMMISSIONER HERIOT: But that's already
in No. 2.

COMMISSIONER YAKI: Professor Lempert talked about it.

COMMISSIONER HERIOT: That's in No. 2.

COMMISSIONER YAKI: No. It simply says there's disagreement, not that in the actual conclusions of 4 that there is actual disagreement on what those conclusions actually are. Two is just blather. Four is specific and four has specific reputations by Lempert, Brooks, Ayres, Barnes, etc.

COMMISSIONER KIRSANOW: But these aren't conclusions in four. No. 2 is --

COMMISSIONER YAKI: They are findings.

COMMISSIONER HERIOT: They are finding that it's possible.

COMMISSIONER KIRSANOW: Right.

COMMISSIONER YAKI: But we're not talking about the other side at all.

COMMISSIONER KIRSANOW: No. 2 acknowledges a disagreement --

COMMISSIONER YAKI: No. 2 acknowledges nothing.

COMMISSIONER KIRSANOW: No. 2 acknowledges --

COMMISSIONER YAKI: No. 2 just
acknowledges that maybe there's a --

(Both speaking at once.)

COMMISSIONER KIRSANOW: But it says right here others disagree.

COMMISSIONER YAKI: -- maybe there are people who disagree.

COMMISSIONER KIRSANOW: It says others disagree.

COMMISSIONER KIRSANOW: Commissioner --

COMMISSIONER YAKI: It doesn't say anything about what the disagreement is.

COMMISSIONER KIRSANOW: -- further research on the disagreement.

CHAIRMAN REYNOLDS: Gentlemen. Keep it civil.

COMMISSIONER YAKI: We're civil. We're just talking loud. Four does not state what the disagreement is with regard to these particular findings and the contrary conclusions driven by other researchers who have taken Sander's data.

CHAIRMAN REYNOLDS: Are you suggesting that we don't have the ability to make distinctions and judge the -- to essentially choose amongst competing arguments?

VICE CHAIRPERSON THERNSTROM: And put it
all in terms of "might contribute."

COMMISSIONER KIRSANOW: But you have a predicate in No. 2 that says we have a disagreement. No. 4 says we need further research to tease that out and find out who's right and who's wrong.

COMMISSIONER HERIOT: And that's an important issue. If it might be true, it's important enough to study.

COMMISSIONER YAKI: But it posits that there is this thing to study and if you read Lempert and Ayres and Brooks, they're not entirely as conclusive on what their definition of academic mismatch is as what Sander defines academic mismatch. So because of that, you're essentially putting the cart before the horse. That's why -- Forget it. Just vote on it. I'm going to lose on it anyway. What the hell do I care.

COMMISSIONER KIRSANOW: Mr. Chair, I do have a question on -- Just to throw out. Not that I would necessarily disagree with this, but something for consideration. The last sentence "Racial preferences that contribute to any academic mismatch might therefore also contribute to income and wealth disparities between whites and African Americans." It may make some logical sense, but that seems to be a
little bit of a leap from where the rest of where No. 4 is. I'm just throwing that out. I don't necessarily disagree with it, but it does give me a little pause.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRPERSON THERNSTROM: I don't have a problem with it.

COMMISSIONER YAKI: Okay. Of course not.

CHAIRMAN REYNOLDS: All right. Let's call the vote unless there are other questions or comments. All in favor please say aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All in opposition?

COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: No.

COMMISSIONER BRACERAS: I'm sorry. I'm back.

COMMISSIONER YAKI: Is there a seven second delay after Peter and my latest exchange, Jennifer?

CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Melendez and Yaki voted against the motion and the remaining Commissioners voted to support the motion. The motion carries.

I move that Finding No. 5 be adopted.
Finding No. 5 reads as follows: "Despite research questioning the impact and extent of racial preferences in law school admissions, the American Bar Association adopted Standard 211 in August of 2006. Under Standard 211, law schools seeking accreditation from the American Bar Association must demonstrate by concrete action a commitment to having a student body that is diverse with respect to race among other aspects of diversity." Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion.

COMMISSIONER YAKI: Why do we have the first sentence in there?

VICE CHAIRPERSON THERNSTROM: I don't know why we don't start with simply "The American Bar Association adopted Standard 211..."

COMMISSIONER KIRSANOW: I agree. I would excise the first clause.

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRMAN REYNOLDS: The first sentence?

VICE CHAIRPERSON THERNSTROM: No, in the first sentence.

COMMISSIONER KIRSANOW: Beginning with -- It would start "The American Bar Association adopted Standard 211 in August 2006."
VICE CHAIRPERSON THERNSTROM: Right.

COMMISSIONER KIRSANOW: And then go on from there.

CHAIRMAN REYNOLDS: Commissioner Taylor.

COMMISSIONER TAYLOR: I would agree with that. Just a question. I just don't recall the evidence on this point. Did the American Bar Association discuss the issues of bar passage rates, graduation rates, student loan default rates, grade point averages, disaggregated by academic credentials with regard to race?

VICE CHAIRPERSON THERNSTROM: No.

CHAIRMAN REYNOLDS: I don't believe so.

COMMISSIONER TAYLOR: So they passed this new standard without answering those questions or at least knowing --

VICE CHAIRPERSON THERNSTROM: Correct.

COMMISSIONER TAYLOR: Then I think we should -- I thought the point of the first phrase in that clause was to demonstrate that they were doing something in the face of all of these questions. So in my mind, an appropriate addition would be the ABA passed this in the absence of knowing X. That's the important point.

COMMISSIONER KIRSANOW: That's right and I
think we specifically asked Professor Smith who was the ABA representative maybe not everything that you're asking. But I know I asked at least one question related to that and he answered back as I recall, you might want to look at the record, was they hadn't looked at that.

VICE CHAIRPERSON THERNSTROM: The first clause does not --

COMMISSIONER TAYLOR: Right. It doesn't do that.

VICE CHAIRPERSON THERNSTROM: It doesn't do that.

COMMISSIONER TAYLOR: Right.

VICE CHAIRPERSON THERNSTROM: So would you like to formulate --

COMMISSIONER TAYLOR: I won't. I tell you what. Let's just strike the first clause and keep it. I'm going to write something on my own I think. I can't come up with it right now.

VICE CHAIRPERSON THERNSTROM: Fine.

COMMISSIONER TAYLOR: But on that point, I'll just write something.

VICE CHAIRPERSON THERNSTROM: I would like to call the question.

CHAIRMAN REYNOLDS: All right. All in
favor signify by saying aye.

VICE CHAIRPERSON THERNSTROM: Of the amended. As amended.

CHAIRMAN REYNOLDS: Yes.

VICE CHAIRPERSON THERNSTROM: Yes.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Any objections?

(No response.)

CHAIRMAN REYNOLDS: Any abstentions?

COMMISSIONER YAKI: Aye.

CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Yaki and Melendez abstain. The remaining Commissioners voted to support the motion as amended.

COMMISSIONER MELENDEZ: I vote no.

CHAIRMAN REYNOLDS: I'm sorry. Okay. Let the record reflect that Commissioner Yaki abstained. Commission Melendez voted against the motion. The remaining Commissioners voted in support of the motion as amended. The amended motion is approved.

Okay. I move that Finding 6 be adopted and Finding 6 reads as follows: "The American Bar Association also enacted official interpretations to help guide law schools in these demonstrations of concrete action. Interpretation 211-2 permits law
schools `consistent with the U.S. Supreme Court's
decision in Grutter v Bollinger' to use race and
ethnicity in their admissions process to promote equal
opportunity and diversity. Interpretation 211-3
states that `the determination of the law school
satisfaction of these obligations is based on the
totality of the law schools actions and the results
achieved.' Given these interpretations, it's
difficult to see who law schools could satisfy their
obligations under Standard 211 without the use of
racial preferences. To this extent some have argued
that the standard strongly although implicitly
encourages the use of racial preferences in
admissions." Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRMAN REYNOLDS: Any discussion?

Commissioner Heriot.

COMMISSIONER HERIOT: I actually have a
minor point that applies not just to six but
unfortunately to five which we've already done here.
The American Bar Association itself is not the
accrediting agency. It's the American Bar
Association's Council on Legal Education and Admission
to the Bar or something like that and what happened in
August of 2006 was that the ABA House of Delegates
didn't ratify rather than adopt the standard.

COMMISSIONER YAKI: It's the Council on Section of Legal Education Admissions to the Bar.

COMMISSIONER HERIOT: We might want to amend five and six to refer to the Council and leave out the date because I think it's the Council that does the adopting and the House of Delegates that simply ratified. Because what happens is if the House of Delegates fails to ratify, the Council then doesn't have to accept that. They can then repromulgate it and the second time it takes even without the ABA's intervention and that has to do with any trust law settlement that goes back a couple of years with the Department of Justice. If we want to get it right, we might as well get it right.

VICE CHAIRPERSON THERNSTROM: Yes. Let's have a motion to amend both of those.

COMMISSIONER HERIOT: Yes. I move that both five and six be changed to substitute the words "American Bar Association's Council..."

COMMISSIONER YAKI: "On Legal Education and Admission to the Bar."

COMMISSIONER HERIOT: "Adopted Standard 211" and leave out the date "in August of 2006." Just put "in 2006." Strike the word "August."
COMMISSIONER KIRSANOW: Second.

COMMISSIONER YAKI: Actually, that should be called the Section. They don't call it the Council.

COMMISSIONER HERIOT: Section. And same for No. 6.

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Okay. All in favor of --

COMMISSIONER HERIOT: And the same for No. 7.

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Okay. Why don't we take some time and --

VICE CHAIRPERSON THERNSTROM: We don't need time.

COMMISSIONER HERIOT: That's just separate. We can split on this. It's a separate issue. It's noncontroversial.

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRMAN REYNOLDS: All right. All in favor of the motion to -- Is that --

COMMISSIONER YAKI: Jennifer's baby is kind of going through these changes right now.

(Off the record comments.)
CHAIRMAN REYNOLDS: Okay. All in favor to adopt the motion as articulated by Commissioner Heriot please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Any objections?

(No response.)

CHAIRMAN REYNOLDS: And abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion carries unanimously.

VICE CHAIRPERSON THERNSTROM: And it affects five, six and seven.

CHAIRMAN REYNOLDS: So that gets us back to six. We've had the discussion. Is that right?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Okay. The floor is open. Any questions?

COMMISSIONER YAKI: No. I'm not even going to go there.

COMMISSIONER KIRSANOW: Call the question.

CHAIRMAN REYNOLDS: You have a question?

COMMISSIONER KIRSANOW: No. I call the question.

VICE CHAIRPERSON THERNSTROM: Call the question, yes.
CHAIRMAN REYNOLDS: All in favor please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All in opposition?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Yaki and Melendez voted against the motion. The remaining Commissioners voted in favor of the motion. The motion carries.

Finding No. 7. I move that we adopt Finding No. 7 and Finding No. 7 reads as follows: "The American Bar Association..." The amendment that we made before would that be applicable here?

COMMISSIONER HERIOT: Yes, we applied it here.

CHAIRMAN REYNOLDS: Okay. Please give me the name of this. "The American Bar Association..."

COMMISSIONER YAKI: Section on Legal Education and Admissions to the Bar.

COMMISSIONER HERIOT: It's Council of the Section on Legal Education and Admissions to the Bar.

COMMISSIONER YAKI: Pardon? Yes, the Council of the Section.

COMMISSIONER HERIOT: Yes.

COMMISSIONER YAKI: It's bizarre.
COMMISSIONER HERIOT: They like lots of words at the ABA.

VICE CHAIRPERSON THERNSTROM: The problem with lawyers in general.

COMMISSIONER YAKI: I would not begin to debate that.

CHAIRMAN REYNOLDS: And that's on Legal Education to the --

COMMISSIONER YAKI: On Legal Education and Admissions to the Bar.

VICE CHAIRPERSON THERNSTROM: They get paid by the word.

COMMISSIONER TAYLOR: Amen.

CHAIRMAN REYNOLDS: Finding 7 reads as follows: "The American Bar Association Council of the Section on Legal Education and Admissions to the Bar rounded Standard 211 and the Supreme Court's 2003 decision in Grutter v Bollinger, he Supreme Court's deference to the University of Michigan Law School's judgement that racial diversity was essential to its educational mission, was predicated on the `Expansive Freedom's Speech and Thought associated with the University environment' which give higher institutional institutions "a special niche in our Constitutional tradition." The Court recognized the
traditional judicial deference to the right of colleges and universities to select those students who will contribute the most to the robust exchange of ideas of a means to achieve a goal that is of paramount importance to the fulfillment of its mission and understands the American Bar Association Council of the Section on Legal Education and Admission to the Bar displaces the judgement of individual law schools to decide the importance of diversity and substitutes its own." Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion.

COMMISSIONER MELENDEZ: Yes. Is that last sentence that you read where "it displaces the judgement of individual law schools to decide the importance of diversity and to substitute its own" is that actually true? I just want to know.

COMMISSIONER KIRSANOW: Professor Bernstein testified to that effect. That would be a legal judgement, one with which I concur. I suspect that Michael doesn't. But to the extent that Standard 211 kind of subsumes *New Hampshire v Sweaze*, it does displace it because *Grutter* only applied to education institutions of higher learning such as colleges and said we're going to do because we grant great autonomy.
to these educational institutions pursuant to New Hampshire v. Sweaze.

In doing that, taking 211, it takes away the discretion that Grutter presupposes that these institutions are going to exercise it. An institution can decide it's not a part of their educational mission to have diversity. It's not -- whatever that school may be. Another may say it is a part of their educational mission. That's part of the discretion subsumed in New Hampshire v. Sweaze. This takes that away and says you must do that.

CHAIRMAN REYNOLDS: Commissioner Yaki.

COMMISSIONER YAKI: I was just going to sigh heavily continually. But with regard to six and seven, we're distorting what the testimony was by Dean Smith at the hearing. The standard itself has admissions as only one criteria by which the ABA will measure "concrete actions." It is not -- And if you read 211 which I just did and it talks -- Here. The interpretation of 211-3 "The determination of law school satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special
concern for determining the potential of these applicants through the admissions process, special recruitment efforts, programs of the system meeting the academic and financial needs of many of these students and that creates a more favorable environment for students from under-represented groups." Dean Smith talked about those in his testimony. This obsessive focus in six and seven on admissions, I think, distorts his testimony and is why I'm going to be voting against them.

COMMISSIONER TAYLOR: Question. I actually had the same question as Commissioner Melendez and I was taken halfway home by your explanation but not all the way there, this reason. As I saw the argument being framed, you were right in the sense that it took the discretion out but only with respect to one of many criteria that were required to use so that the law school could not say that is not part of our mission and therefore for purposes of our comprehensive review remove that particular aspect of review. Law schools could no longer do that. So in that respect, it does displace the law school's judgement but not totally because it is one of many factors they consider. That's how I had it framed in my mind.
COMMISSIONER KIRSANOW: Right. It's one of many factors in terms of Grutter but not in terms of meeting the accreditation standard here. In Grutter, the University of Michigan Law School program supposedly, admissions program, met Constitutional muster because race was only one factor among many in a holistic review. It was flexible plus factor not applied in a mechanical way. This applies it in a mechanical way and therefore displaces the discretion that you were just talking about.

COMMISSIONER YAKI: How? It's just one of a number of factors. It doesn't say it have to be --

COMMISSIONER KIRSANOW: Now if you listen to not just Dean Smith's testimony and he didn't dispute this. The uncontroverted testimony of Professor Bernstein was when he talked to a number of other law school deans is no, this is how we do it because the ABA calls you up and says what's going on here and everyone knows if you don't meet these numbers, out the door you go. So that testimony was uncontroverted.

CHAIRMAN REYNOLDS: Additional questions?

COMMISSIONER YAKI: That's because no one could question who he had called and he had no evidence of anyone who he had called and told about
it. So how can you dispute that with which comes from there?

COMMISSIONER KIRSANOW: He was sitting right next to me.

COMMISSIONER YAKI: And that for me is the flaw of these briefings in general and why in a truncated proceeding where I'm looking at my watch because it's getting close to the time I have to get out the door and maybe I could have and should have picked up on it. I don't know or maybe I was just ignoring all the blather coming out of his mouth. I don't know.

COMMISSIONER KIRSANOW: You could have controverted him if you had wished.

COMMISSIONER YAKI: I will in my dissent.

CHAIRMAN REYNOLDS: Okay. Commissioner Heriot.

COMMISSIONER HERIOT: The school marm in me insists we correct the lack of a comma after the word "environment" and before the word "which."

COMMISSIONER KIRSANOW: And it should come after the quotation marks.

VICE CHAIRPERSON THERNSTROM: No. Before the quotation marks.

COMMISSIONER YAKI: Before the quotation
marks.

COMMISSIONER HERIOT: It's before the quotation marks.

COMMISSIONER KIRSANOW: Is it? I'm not a school marm.

VICE CHAIRPERSON THERNSTROM: I'm a school marm, too. Before the quotation marks.

CHAIRMAN REYNOLDS: Okay. So we will not, I assume, need to vote on this.

COMMISSIONER HERIOT: I hope we don't have to vote.

CHAIRMAN REYNOLDS: Yes. If there are no other questions, comments or discussion we can vote. All in favor, please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All opposed?

COMMISSIONER KIRSANOW: Jennifer?

COMMISSIONER BRACERAS: Aye.

CHAIRMAN REYNOLDS: All in opposition?

COMMISSIONER MELENDEZ: No.

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Yaki and Melendez voted against the motion. The remaining Commissioners voted in favor of the motion. The motion carries.
VICE CHAIRPERSON THERNSTROM: I have a small stylistic recommendation on these. I guess it's five, six and seven that we don't each time say the American Bar Association Council of the Section on Legal Education and Admissions to the Bar but simply the first --

CHAIRMAN REYNOLDS: Just say ABA.

VICE CHAIRPERSON THERNSTROM: The first time put in parens, ABA Council or something like that so we don't have this cumbersome language with each one of these.

CHAIRMAN REYNOLDS: Okay. So we are up to No. 8.

COMMISSIONER HERIOT: Eight?

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER HERIOT: There is no eight.

COMMISSIONER YAKI: There is no eight.

VICE CHAIRPERSON THERNSTROM: Now we're starting on the recommendations.

CHAIRMAN REYNOLDS: That's right. Okay. I move that we adopt the following recommendation which reads as follows: "The National Academy of Sciences or another appropriate grant-making entity should fund independent research on the impact of racial preferences on racial disparities in law school
academic performance, bar passage rates, graduation rates, student loan default rates and future income. State bar associations should cooperate with this research." Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion.

COMMISSIONER YAKI: I recommend we do not.

VICE CHAIRPERSON THERNSTROM: I'm sorry.

What are you recommending?

COMMISSIONER YAKI: That we do not.

COMMISSIONER HERIOT: Call the question.

CHAIRMAN REYNOLDS: Okay. That was concise. Thank you. All in favor, please signify by saying aye.

(Chorus of ayes.)

COMMISSIONER YAKI: Garbage in, garbage out. No.

COMMISSIONER HERIOT: Did you take nays on that?

CHAIRMAN REYNOLDS: I was deciding whether to have some fun, but no. All in opposition?

COMMISSIONER MELENDEZ: No.

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: And Jennifer?

COMMISSIONER BRACERAS: I did aye.
CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Yaki and Melendez voted against the motion. The remaining Commissioners voted in favor of the motion. The motion carries.

I move that we adopt Recommendation 2 which reads as follows: "Law schools should voluntarily provide disclosure to the public and at the very least to potential applicants on student academic performance, attrition, graduation, bar passage rates, student load default rates and future income disaggregated by race and ethnicity."

COMMISSIONER KIRSANOW: Friendly amendment. I would change "race and ethnicity" to "academic credentials."

VICE CHAIRPERSON THERNSTROM: Yes, I agree with that.

COMMISSIONER HERIOT: Yes. Okay.

CHAIRMAN REYNOLDS: All in favor of the amendment please say aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

CHAIRMAN REYNOLDS: Any abstentions?

COMMISSIONER YAKI: To the amendment itself?
CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: Or to the main motion?

CHAIRMAN REYNOLDS: To the amendment.

VICE CHAIRPERSON THERNSTROM: I have a question about it.

COMMISSIONER YAKI: Abstain.

VICE CHAIRPERSON THERNSTROM: Is it possible in changing it to "academic credentials" that phrase could open the door to definitional gains as to what academic credentials are?

COMMISSIONER HERIOT: But so can race and ethnicity.

VICE CHAIRPERSON THERNSTROM: Well, it could mean some kind of holistic blah, blah, blah that has very little to do with LSAT scores, very little to do with college grade point averages, etc.

COMMISSIONER YAKI: You just gave the argument against Sander. So there we go.

VICE CHAIRPERSON THERNSTROM: No, I have not given the argument against Sander. I've given the argument for typing this up slightly.

COMMISSIONER HERIOT: We could have a definition.

COMMISSIONER KIRSANOW: Yes.

COMMISSIONER HERIOT: Within the meaning
of these findings of facts and recommendations. Academic credentials mean high GPA --

VICE CHAIRPERSON THERNSTROM: I think that is necessary.

COMMISSIONER HERIOT: -- and LSAT.

CHAIRMAN REYNOLDS: Okay. May I have a motion to this effect?

COMMISSIONER KIRSANOW: "Academic credentials" as used herein shall be defined as college grade point average, cumulative grade point average and LSAT scores.

VICE CHAIRPERSON THERNSTROM: Thank you.

COMMISSIONER HERIOT: Where do we want to put that?

COMMISSIONER KIRSANOW: Right at the end.

VICE CHAIRPERSON THERNSTROM: Right at the end.

COMMISSIONER HERIOT: At the very end of the recommendation.

COMMISSIONER KIRSANOW: Yes, because I think that may be the only place where it's used.

COMMISSIONER YAKI: Don't you want to say the school that they went to as well? Doesn't it have an impact on GPA?

VICE CHAIRPERSON THERNSTROM: Pardon me?
COMMISSIONER KIRSANOW: I'm sorry.

COMMISSIONER YAKI: Nothing. I'm just trying to help you.

COMMISSIONER KIRSANOW: We appreciate your help.

VICE CHAIRPERSON THERNSTROM: But I know it was a brilliant suggestion.

COMMISSIONER KIRSANOW: What's the suggestion?

COMMISSIONER YAKI: Isn't part of the data that they looked at is also the tiered school from which they graduated from in the first place?

COMMISSIONER HERIOT: I don't know how to come up with the data for that. You can't generate that as easily.

CHAIRMAN REYNOLDS: So the first vote will be on the definition of --

VICE CHAIRPERSON THERNSTROM: Adding the definition. One sentence which adds the definition of academic credentials.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER TAYLOR: Let me put a word of caution on the table. I hesitate to try to craft the definition as we sit here today. I fear we're going to miss something that could really be important and I
would be inclined not to put a definition in.

COMMISSIONER KIRSANOW: At all?

COMMISSIONER TAYLOR: Yes, I like just academic credentials. I'm fearful sitting here that we're going to --

VICE CHAIRPERSON THERNSTROM: Let me tell you schools go to town with vague phrases like that.

COMMISSIONER TAYLOR: Sure. But I would just like to put more thought into a definition.

COMMISSIONER HERIOT: These aren't binding anyway and it can be changed if you do define it in that they have to use a band and the band could be larger or smaller.

CHAIRMAN REYNOLDS: Okay. Where are we folks?

VICE CHAIRPERSON THERNSTROM: I would like to vote on the motion as amended with the definition and we can revisit it later.

COMMISSIONER TAYLOR: Okay. It seems like when I start putting definitions in on the fly I get nervous.

VICE CHAIRPERSON THERNSTROM: This is not really --

COMMISSIONER KIRSANOW: You make a good point but I think that we can revisit it.
VICE CHAIRPERSON THERNSTROM: We can revisit it. It's not --

COMMISSIONER KIRSANOW: We're not crafting legislation.

COMMISSIONER BRACERAS: When are we going to revisit it if it's going --

VICE CHAIRPERSON THERNSTROM: This is not a fancy definition. We're simply saying that we regard the word "academic" as referring to cumulative GPAs and LSATs.

COMMISSIONER BRACERAS: That's fine with me, but as long as we know --

VICE CHAIRPERSON THERNSTROM: And it doesn't refer to the sob story you can give to the law school about why you're really qualified even though your LSAT scores are terrible and --

COMMISSIONER BRACERAS: But let's just be clear that the language we vote on is the language that will be public.

CHAIRMAN REYNOLDS: Okay folks.

COMMISSIONER YAKI: No. I'm sorry.

CHAIRMAN REYNOLDS: That was just a reflex.

COMMISSIONER YAKI: That's right.

(Laughter.)
CHAIRMAN REYNOLDS: Okay. We're voting on Recommendation 2 as amended. All in favor, please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All in opposition?

COMMISSIONER MELENDEZ: No.

COMMISSIONER YAKI: No.

COMMISSIONER TAYLOR: I'm going to abstain.

CHAIRMAN REYNOLDS: Okay. Let the record reflect that Commissioner Taylor abstained, that Commissioners Yaki and Melendez voted against the motion. The remaining Commissioners voted in favor. The motion carries.

Okay. I move that we adopt Recommendation 3 which reads as follows: "Congress should enact legislation requiring law schools receiving Federal financial assistance..."

COMMISSIONER KIRSANOW: I'm not sure we actually voted on the whole notion.

COMMISSIONER HERIOT: Did we vote two up or down?

COMMISSIONER YAKI: That was the vote. We already did --

COMMISSIONER KIRSANOW: I thought we were
voting on the amendment dealing with --

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Wait.

COMMISSIONER KIRSANOW: -- the amendment dealing with the addition of the definition.

COMMISSIONER HERIOT: Yes. We added --

CHAIRMAN REYNOLDS: Okay. I thought what I read into the record that -- I did mush it all together.

COMMISSIONER KIRSANOW: You did?

COMMISSIONER YAKI: I thought he did.

COMMISSIONER HERIOT: I thought it was two separate because I haven't written down anything that suggests that we've voted on two yet.

CHAIRMAN REYNOLDS: Okay. If that's the case.

COMMISSIONER HERIOT: At worse, it would be just duplicating. Better that than skipping.

CHAIRMAN REYNOLDS: Okay. Here is the recommendation that we're voting on. It reads as follows: "Law schools should voluntarily provide disclosure" --

(Off the record discussion.)

CHAIRMAN REYNOLDS: "Law schools should voluntarily provide disclosure to the public and at
the very least to potential applicants on student academic performance, attrition, graduation rates, bar passage rates, student loan default rates and future income disaggregated by academic credentials which is defined as cumulative GPA and LSAT scores."

COMMISSIONER HERIOT: I thought we defined it in nine because if you define it only in two, then you have to go back to three of the findings and define it there as well. I thought we added the definition of academic credentials as nine.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: What?

CHAIRMAN REYNOLDS: What do you mean by -- You mean have it as a separate sentence?

COMMISSIONER HERIOT: Yes. You need it to be separate from two because we want it to be applicable to three on findings as well.

COMMISSIONER YAKI: What?

CHAIRMAN REYNOLDS: So if I understand you, this should be a standalone. The definition should standalone so that it applies to all --

COMMISSIONER KIRSANOW: Right.

COMMISSIONER YAKI: Why don't you just put it in three instead and not worry about another No. 9 and then it will refer by inference back to No. 3?
COMMISSIONER HERIOT: I thought we just did it that way and since that --

COMMISSIONER YAKI: No. Three in the first one, not three in the second. You talk about academic credentials in two.

COMMISSIONER HERIOT: Three and two.

COMMISSIONER YAKI: Whatever. I'm just trying to make it simpler.

CHAIRMAN REYNOLDS: Okay folks.

COMMISSIONER YAKI: If you put it up in the findings thing, then it will refer downward rather than to having put it in the back and refer upwards.

VICE CHAIRPERSON THERNSTROM: I agree with that. A point of agreement. Let everybody note.

COMMISSIONER YAKI: I'm not going to vote for it though.

CHAIRMAN REYNOLDS: But we do appreciate your note. Okay. Where is the first time that phrase is used?

COMMISSIONER HERIOT: I think it's Findings 3.

CHAIRMAN REYNOLDS: Three, Findings, disaggregate. Okay. So we're going to go back and vote again.

COMMISSIONER KIRSANOW: I move to amend
Finding No. 3 to add at the very end "academic credentials" as used in these findings and recommendations "as defined as cumulative college grade point average and LSAT scores."

CHAIRMAN REYNOLDS: Is there a second?
VICE CHAIRPERSON THERNSTROM: Second.
CHAIRMAN REYNOLDS: Discussion.
(No response.)
CHAIRMAN REYNOLDS: All in favor, please signify by saying aye.
(Chorus of ayes.)
CHAIRMAN REYNOLDS: Any in opposition?
COMMISSIONER MELENDEZ: No.
COMMISSIONER YAKI: No.
CHAIRMAN REYNOLDS: Jennifer?
COMMISSIONER BRACERAS: I said aye.
CHAIRMAN REYNOLDS: Okay. The motion passes unanimously. So now we're back to --
COMMISSIONER KIRSANOW: Three.
CHAIRMAN REYNOLDS: We have finished with Recommendation 2. Is that correct?
COMMISSIONER KIRSANOW: Yes.
CHAIRMAN REYNOLDS: Okay.
VICE CHAIRPERSON THERNSTROM: Yes. We're on Recommendation 3.

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CHAIRMAN REYNOLDS: Okay. I move that we approve Recommendation 3 and Recommendation 3 reads as follows: "Congress should enact legislation requiring law schools receiving Federal financial assistance to disclose to the public detailed data on the extent to which they take race into account in making admissions decisions. These details should include: (1) whether they take race, color or national origin into account; (2) the race, color and national origin groups for which membership is considered a plus or a minus factor; (3) a description of how group membership is considered including the weight accorded to such membership; (4) whether targets, goals or quotas are used; (5) a statement explaining a group membership is given particular weight and its relationship to the diversity rationale; (6) a description of the consideration given to using race neutral alternatives to achieve those goals; (7) how frequently the need to give weight to group membership is reassessed; (8) what nonracial factors are considered in the admissions process; and (9) an analysis of any correlation between membership in a favored group to placement in remediation program, graduation rates and student loan default rates." Is there a second?

COMMISSIONER KIRSANOW: I would move to
amend Subpart 9 to say "an analysis of any correlation between academic credentials to placement in remediation program, graduation rates and student loan default rates."

COMMISSIONER HERIOT: Second.

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki.

COMMISSIONER YAKI: Are we in discussion? Are we in the discussion phase now?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: Two points, one a point of procedure. This is, I believe, taken almost verbatim from legislation by Representative Peter King of New York, a legislation which --

COMMISSIONER KIRSANOW: Steven King of Iowa.

COMMISSIONER YAKI: Or whatever. One of those guys.

(Laughter.)

COMMISSIONER YAKI: Whichever it is, they lost 337 to 77 in Congress, No. 1. No. 2, aside from a very brief oblique mention of it in the Sander testimony, again this is something that comes from outside sources, that given the fact that it's already been, had hearings and such, it would have been
instructive to have known what the hearings about this legislation said rather than simply repeating it as if it had never existed before when in fact it has. And finally, I would just say that the chances of this happening in this Congress are slim to none and slim is leaving town.

CHAIRMAN REYNOLDS: Other comments? Questions?

COMMISSIONER YAKI: This is a garbage recommendation.

VICE CHAIRPERSON THERNSTROM: Wait a minute. That has been your mantra, should we call it.

COMMISSIONER YAKI: I wonder why.

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Okay folks. All in favor of the recommendation as amended, please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Is anyone opposed to the motion?

COMMISSIONER YAKI: Yeah.

CHAIRMAN REYNOLDS: And, Jennifer, that was an aye.

COMMISSIONER BRACERAS: Yes, it was.

CHAIRMAN REYNOLDS: Please let the record
reflect that Commissioners Yaki and Melendez voted against the recommendation and that the remaining Commissioners voted in support, in favor of the recommendation. So the recommendation is adopted.

The next recommendation is Recommendation 4. I move that it be approved. It reads as follows:

"As an interim measure, the American Bar Association should pursuant to its accreditation authority require law schools to disclose the details recommended in Recommendation 2." Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion.

(No response.)

CHAIRMAN REYNOLDS: All in favor, please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Does anyone oppose the recommendation?

COMMISSIONER YAKI: Yep.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Melendez and Yaki voted against the recommendation. The remaining Commissioners voted in favor of it. The recommendation is approved.

Next up we have Recommendation 5. "Should
states require the authorities responsible for granting admission to the bar and their jurisdiction to disclose bar passage rates disaggregated by academic credentials." Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion.

(No response.)

CHAIRMAN REYNOLDS: All in favor, please signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Commissioner Yaki, do you oppose or abstain from this vote?

COMMISSIONER YAKI: Do I have a choice?

CHAIRMAN REYNOLDS: Sure you have choices.

COMMISSIONER YAKI: The answer is I oppose.

CHAIRMAN REYNOLDS: Okay. Let the record reflect that Commissioner Melendez did not vote. He stepped out of the room. Commissioner Yaki voted against the recommendation.

COMMISSIONER YAKI: I move to keep the roll open until Commissioner Melendez returns.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: I assume that there
will be no objectives.

VICE CHAIRPERSON THERNSTROM: No objections to that. Is there going to be a surprise?

COMMISSIONER YAKI: No, I wanted to do it on the record.

VICE CHAIRPERSON THERNSTROM: I know but I suspect we could put it on the record right now.

COMMISSIONER YAKI: No, you can't vote for somebody else. That just can't be done.

VICE CHAIRPERSON THERNSTROM: I'm not serious, Michael.

COMMISSIONER KIRSANOW: Do you have his proxy?

VICE CHAIRPERSON THERNSTROM: He gave me his proxy. Right. All right. Let's go onto Recommendation --

COMMISSIONER YAKI: Maybe we should go back to Florida and have another hearing.

CHAIRMAN REYNOLDS: Okay. So --

COMMISSIONER YAKI: Obviously, No. 6 needs a big correction because we're not dealing with the Americans with Disabilities Act provision but Section 211. Section 212 is the Americans with Disabilities Act provision of the state bar standard.

CHAIRMAN REYNOLDS: Good catch.
COMMISSIONER YAKI: And that should be changed for seven and eight as well.

COMMISSIONER KIRSANOW: Yes.

COMMISSIONER YAKI: So I will move that Section 212 be amended to read Section 211 in Recommendations 6, 7 and 8.

CHAIRMAN REYNOLDS: Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

COMMISSIONER KIRSANOW: That's not noncontroversial. I think we can do that.

COMMISSIONER YAKI: I know he's so uncomfortable seconding my motion.

CHAIRMAN REYNOLDS: Okay. We will fix it.

(Commissioner Melendez enters.)

COMMISSIONER YAKI: We kept the roll open for you on No. 5.

CHAIRMAN REYNOLDS: Commissioner Melendez, we assumed you would support it.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Okay. Let the record reflect that Commissioner Melendez along with Commissioner Yaki voted against it. The remaining Commissioners voted for it. The recommendation is approved.

Onto Recommendation 6, I move that we
adopt it. It reads as follows: "The ABA should revise the recently adopted Standard 211 to delete any requirement that law schools seeking accreditation demonstrate a commitment to diversity. The standard should instead be revised to permit law schools the freedom to determine whether diversity is essential to their academic mission consistent with Grutter v Bollinger. Accordingly, the ABA should appeal Interpretation 211-2 so as to most clearly preserve law schools academic freedom in the accreditation process." Is there a second?

COMMISSIONER KIRSANOW: I would move a small amendment, stylistic more than anything, to delete "any" in the first sentence. It says, "The ABA should revise the recently adopted Standard 211 to delete any..." I would change that to "the requirement." There is only one requirement in that standard.

VICE CHAIRPERSON THERNSTROM: Yes, I agree with that and also "The standard should be revised to permit law schools, consistent with Grutter v Bollinger, the freedom to determine whether..." It's a little bit confusing to have that consistent with Grutter v Bollinger at the very end.

COMMISSIONER KIRSANOW: I agree.
CHAIRMAN REYNOLDS: Any other comments?

COMMISSIONER MELENDEZ: I would just comment that this side deletes requirements that schools demonstrate a commitment to diversity then basically.

CHAIRMAN REYNOLDS: That's correct and that it be left up to the schools whether they --

COMMISSIONER YAKI: Can discriminate or not.

COMMISSIONER KIRSANOW: Well, they're all discriminating right now.

COMMISSIONER YAKI: I'm sure they are.

CHAIRMAN REYNOLDS: Okay folks. All in favor of the recommendation as amended, signify by saying aye.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All in opposition?

COMMISSIONER MELENDEZ: No.

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Yaki and Melendez voted against the recommendation. The remaining Commissioners voted to adopt it. Recommendation 6 is adopted.
Okay. I move that we adopt Recommendation No. 7 which reads as follows: "The ABA should revise Interpretation 211-3 to make it clear that the organization will not judge a law school's commitment to diversity by the results achieved." Is there a second? Pretty please.

COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: Thank you.

Discussion.

COMMISSIONER YAKI: Yes. I just wanted to say for six, seven and eight it's a very sad, sad day when diversity is a four letter word at this Commission.

COMMISSIONER KIRSANOW: It's a sad day when discrimination seems to supplant equal protection at this Commission.

COMMISSIONER YAKI: Then maybe you should -- Never mind.

COMMISSIONER HERIOT: But I would like to point out that seven does not do that anyway.

COMMISSIONER KIRSANOW: That's right.

CHAIRMAN REYNOLDS: Okay folks. Let's withdraw the six shooters and we'll continue to work through these.

(Off the record comments.)
CHAIRMAN REYNOLDS: Commissioner Melendez.

COMMISSIONER MELENDEZ: I just think that the ABA's recommendation already is good enough.

CHAIRMAN REYNOLDS: Okay. Other comments? Questions?

COMMISSIONER KIRSANOW: The other comment I have is that I understand this recommendation based on the manner in which 211 is drafted. But 211 in and of itself is somewhat vague and I think this replicates the vagueness.

VICE CHAIRPERSON THERNSTROM: I agree with this.

COMMISSIONER BRACERAS: I see your point.

COMMISSIONER KIRSANOW: I don't know that I would vote for this and I'm not sure how this actually much lends to our recommendations.

VICE CHAIRPERSON THERNSTROM: I agree with this. We don't need this.

COMMISSIONER TAYLOR: In fact, both 7 and 8.

CHAIRMAN REYNOLDS: Any other comments?

VICE CHAIRPERSON THERNSTROM: All right. I'm going to vote against it. I agree with this and people looking at this just aren't going to know what it means.
CHAIRMAN REYNOLDS: Let's finish the
discussion before we start voting.

COMMISSIONER HERIOT: Yes. Maybe we need
to clarify a little bit for me here. I don't quite
understand that.

COMMISSIONER KIRSANOW: The way for me,
the way this reads can be susceptible of a number of
interpretations with which I may or may not agree and
I have a little bit of a background as we all do
having heard the testimony. I'm not so sure how this
would be interpreted by the broader public or by any
our stakeholders.

For example, it says that "it should be
revised to make it clear that the organization will
not judge a law school's commitment to diversity by
the results achieved." I'm not so sure what "results
achieved" means. Standing along, I understand based
on the evidence that we receive what it means, but I'm
not sure without more elaboration what this actually
means. So I'm a little hesitant to vote for it.

VICE CHAIRPERSON THERNSTROM: We need to
beef it up if we're going to --

COMMISSIONER KIRSANOW: I don't know that
this adds that much to our report.

VICE CHAIRPERSON THERNSTROM: Right. I
agree.

COMMISSIONER YAKI: Just strike it.

COMMISSIONER KIRSANOW: That's what I would do.

CHAIRMAN REYNOLDS: Other comments?

(No response.)

COMMISSIONER HERIOT: Is that a motion to strike then?

COMMISSIONER KIRSANOW: Yes, I would move to strike.

COMMISSIONER YAKI: I'll vote for that.

CHAIRMAN REYNOLDS: I mean we just vote and if it doesn't get the majority, then it's done.

COMMISSIONER YAKI: Yes. That will make a vote for yes.

CHAIRMAN REYNOLDS: Okay. All in favor of Recommendation No. 7 please signify by saying aye.

(No response.)

CHAIRMAN REYNOLDS: All in opposition?

(Chorus of nos.)

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

COMMISSIONER YAKI: You could have made it a motion to strike and I could have gone on the record as voting with you.
COMMISSIONER KIRSANOW: You are voting with me.

COMMISSIONER YAKI: It's not the same thing. I mean an affirmative vote versus a no vote.

CHAIRMAN REYNOLDS: Commissioner Heriot, was that an abstention?

COMMISSIONER HERIOT: I abstain. I still haven't figured this out.

COMMISSIONER TAYLOR: Correct.

CHAIRMAN REYNOLDS: Okay. Let the record reflect that Commissioners Heriot, Taylor and Reynolds abstain.

VICE CHAIRPERSON THERNSTROM: Do you know what? I'm changing mine to an abstention also since I can't that out. The reason is I can't figure that out.

COMMISSIONER YAKI: You can't give me one victory, Abigail. Is that it?

(Laughter.)

VICE CHAIRPERSON THERNSTROM: You got the victory. We've struck it.

CHAIRMAN REYNOLDS: Okay. Let the record reflect that Commissioners Heriot, Taylor, Thernstrom and Reynolds abstained. The remaining Commissioners voted against the recommendation. I'm sorry.
Jennifer, am I correct in assuming that you voted against it?

COMMISSIONER BRACERAS: I did. I was just thinking about Commissioner Thernstrom's comments. Yes, I'll keep my vote against it.

CHAIRMAN REYNOLDS: So this constitutes a victory for Commissioners Yaki and Melendez. That was a joke, folks.

(Laughter.)


VICE CHAIRPERSON THERNSTROM: Got to work on your sense of humor, Jerry.

CHAIRMAN REYNOLDS: I'm not going to quit my day job.

Recommendation 8, I move that we approve it. It reads as follows: "The ABA should revise Interpretation 211-1 to make it clear that the Constitutional and statutory provisions at the Federal, state and local levels remain binding, legal obligations for all law schools even if they conflict or appear to conflict with Standard 211 and its official interpretations." Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion.
COMMISSIONER KIRSANOW: I just had a question and maybe staff knows this. My recollection is that subsequent to the, was it the July meeting, I'm sorry, June meeting, that there was an amendment to 211 to make that clear or maybe it was Stephen Smith who testified that there was going to be a clarification. Does anybody know?

STAFF DIRECTOR MARCUS: My understanding also is that there was an amendment which deleted language which many said created an explicit conflict.

COMMISSIONER KIRSANOW: Right.

COMMISSIONER HERIOT: I thought, maybe I'm wrong, but I thought that this second sentence in Interpretation 211-1 was the modification. "A law school that is subject to such Constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable Constitutional or statutory provisions." That was the addition.

COMMISSIONER BRACERAS: I think Commissioner Heriot is correct on that one.

COMMISSIONER KIRSANOW: So the question is does that clarify it sufficiently.

CHAIRMAN REYNOLDS: Folks.

COMMISSIONER YAKI: Not my fight.
VICE CHAIRPERSON THERNSTROM: Commissioner Heriot, do you think that we need this at this point?

COMMISSIONER BRACERAS: I think we need to do something about it because certainly the ABA did attempt to say initially that law schools broke the law and how they may have changed that under pressure. So I think we nevertheless want to be very clear that legal obligations come before accrediting obligations. So I think it was my suggestion that we maintain a reference to that and it may not be clear and it may be -- but I just want to be clear that it's more important for law schools to comply with the law than it is for them to comply with the ABA.

VICE CHAIRPERSON THERNSTROM: Do we lose anything by including this in our list of findings? We don't even if it's duplicative.

COMMISSIONER KIRSANOW: I don't have a problem with it as written. I just had a question as to whether or not that clarification had been made.

VICE CHAIRPERSON THERNSTROM: Right.

COMMISSIONER KIRSANOW: And if this, in fact, if we already have reference to that clarification my only question was does that satisfy us. I'm not sure.

VICE CHAIRPERSON THERNSTROM: I know. I'm
just asking since we don't have an answer to that question whether we need it.

COMMISSIONER BRACERAS: I have a suggestion. How about taking out the first part that says "ABA should revise" and just simply state "Law schools should be clear that Constitutional and statutory provisions" blah, blah, blah.

VICE CHAIRPERSON THERNSTROM: That's fine.

COMMISSIONER BRACERAS: We're not asking the ABA to do anything. We're simply reminding the law schools of where their primary obligations lie.

VICE CHAIRPERSON THERNSTROM: Right, and then strike "for all law schools." But "Law schools should be clear at the outset." Strike "for all law schools."

COMMISSIONER BRACERAS: That's right.

CHAIRMAN REYNOLDS: Commissioner Melendez.

COMMISSIONER MELENDEZ: No, I didn't have a comment.

CHAIRMAN REYNOLDS: All right.

VICE CHAIRPERSON THERNSTROM: And then it should read "even if these obligations conflict."

COMMISSIONER BRACERAS: Right. "Or appears to," right?

VICE CHAIRPERSON THERNSTROM: Right.
COMMISSIONER BRACERAS: -- right now.
"Even if they conflict or appear to conflict."

VICE CHAIRPERSON THERNSTROM: Right.

COMMISSIONER BRACERAS: "Standard 211 and its interpretation." So in other words, "Standard 211 and its official interpretation" can say what they want. I don't want any ABA bureaucratic on the sly telling people, "You never really..."-- valid initiative that the people voted for. So whether it appears to them or somebody else tells they're not at the point because they have to comply the law first.

VICE CHAIRPERSON THERNSTROM: Right. I'm in agreement with this.

CHAIRMAN REYNOLDS: Okay. All in favor of this recommendation as amended, please signify by saying aye.

(Chorus of ayes.)

COMMISSIONER KIRSANOW: I would move to hold open the record so that Commissioner Yaki can register his vote on this.

VICE CHAIRPERSON THERNSTROM: That's fine.

In the meantime while we're doing that --

CHAIRMAN REYNOLDS: One thing.

Commissioner Melendez, do you vote for this or against it or abstain?
COMMISSIONER MELENDEZ: Which number is this?

COMMISSIONER KIRSANOW: No. 8

COMMISSIONER MELENDEZ: I'm opposed.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRPERSON THERNSTROM: I hate to do this but I do want to go back for one minute to Finding 2. I am still very bothered by the last sentence "is not widely available." You know, I still don't know why we have that in there as it don't bother folks to pursue this topic.

COMMISSIONER KIRSANOW: "Readily available"?

VICE CHAIRPERSON THERNSTROM: Why do we need that sentence?

COMMISSIONER YAKI: Are we still talking about this?

VICE CHAIRPERSON THERNSTROM: No, I know.

COMMISSIONER KIRSANOW: How do you vote on No. 8?

CHAIRMAN REYNOLDS: You don't need to know. Just say no.

COMMISSIONER YAKI: No. 8? Could you reread that? No.

COMMISSIONER HERIOT: You're aware of the
new phrasing of it.

COMMISSIONER YAKI: It doesn't matter.

COMMISSIONER HERIOT: Okay.

COMMISSIONER KIRSANOW: Commissioner Yaki will be given $1 million bonus.

CHAIRMAN REYNOLDS: Okay. The suggestion, are you comfortable?

VICE CHAIRPERSON THERNSTROM: I'm suggesting we cut the last sentence on Finding 2. I'm uncomfortable with the notion, with any notion, that further research is less than feasible.

COMMISSIONER HERIOT: It just says "further evaluate." So all the data that's out there is out there.

CHAIRMAN REYNOLDS: This would be in addition to the body of information that's out --

COMMISSIONER HERIOT: It's almost redundant. The data that's not there yet is not there yet.

VICE CHAIRPERSON THERNSTROM: Is that the way it's going to be read? The fact is we have a bunch of scholars working on this question. They're trying to get the data. Sander himself is trying to get more data.

COMMISSIONER HERIOT: Yes, but in that
respect, the data isn't widely available. But with regard to that research, it's true.

VICE CHAIRPERSON THERNSTROM: This seems to suggest we can't answer crucial questions and will not be able to.

CHAIRMAN REYNOLDS: My sense is -- Well, the impression that I have is, Vice Chair Thernstrom, I think you're reading a lot into it.

VICE CHAIRPERSON THERNSTROM: Okay. All right. Fine. I'll drop it.

CHAIRMAN REYNOLDS: Where are we, folks?

VICE CHAIRPERSON THERNSTROM: We're at the State Advisory Committee. I have one other remark to make before we go onto this. This is too cumbersome a process. Surely, there is some way of doing this --

COMMISSIONER KIRSANOW: Poll votes.

VICE CHAIRPERSON THERNSTROM: Whatever.

COMMISSIONER BRACERAS: I have to disagree with you. I think this is precisely the type of stuff, the good discussion, that we never had under Mary Frances Berry that is good for us to have in open forum and I think some of the changes that were made today, some of them substantive and some of them nit-picky, all make it much better document and they would not have been made if we hadn't gone through this
exercise and, yes, it's time-consuming and, yes, it's laborious but frankly, I think it's the most important work we can do, much more important than voting on the schedule.

VICE CHAIRPERSON THERNSTROM: Jennifer, my point is --

COMMISSIONER HERIOT: I have a proposal though. What if we had a rule that says we have to vote on each finding and recommendation upon the request of any individual Commissioner so that if in the future there is some report where nobody really wants to do this, that we can bypass it.

VICE CHAIRPERSON THERNSTROM: Jennifer, my point is not that this wasn't valuable. The only point is is there a way to do it in a more expeditious way and the answer may be no.

COMMISSIONER BRACERAS: I don't think so because I think the public has the right to hear the debated substantive issues and that is really what we are paid to do, not vote on the scheduling.

VICE CHAIRPERSON THERNSTROM: I'm not sure we were debating substantive issues today.

COMMISSIONER HERIOT: I think it was a good thing to go through these things one at a time on this report.
COMMISSIONER YAKI: Yes. I know I thought
I was.

COMMISSIONER BRACERAS: I think the edits
that were made were all excellent and it's a much
better product because we looked at them one at a
time.

VICE CHAIRPERSON THERNSTROM: All right.

COMMISSIONER BRACERAS: Even the nit-picky
things like what you call the Council or what have
you. That wouldn't have been made if we hadn't
brought it up here.

VICE CHAIRPERSON THERNSTROM: All right.
I withdraw my comments.

VII. STATE ADVISORY COMMITTEE ISSUES

CHAIRMAN REYNOLDS: All right. Next up is
the State Advisory Committee Issues. We are
rechartering right now Virginia.

COMMISSIONER BRACERAS: I'm sorry, folks.
At this time, I need to get off the call because I
need to go to the doctor and take one of the kids to
the doctor since we're all sick here.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER BRACERAS: Which is why I
couldn't be there in person. So I'm signing off.

Thank you and we'll see you in May.
CHAIRMAN REYNOLDS: Very good.

(Commissioner Braceras exits meeting.)

CHAIRMAN REYNOLDS: We are rechartering two state advisory committees. May I have a motion to recharter the Virginia State Advisory Committee? Under this motion, the Committee appoints the following individuals to that committee based on the recommendations of the Staff Director, Linda Chavez, Lloyd Cohen, Stanley Cook, Morris Cooper, Tao Du, Rachel Fisher, James Hengley, Curt Levy, Richard Samp, Janeen Sims, Andrew Shannon, Raoq Su, Jason Torcinski and Lacey Ward.

Furthermore, I also move that the Commission appoint Linda Chavez as Chair of the newly rechartered Virginia State Advisory Committee. These members will serve as uncompensated Government employees and the Commission approves the hard work that they will no doubt contribute to this SAC. Under this motion, the Commission authorizes the Staff Director to execute the appropriate paperwork for the appointment. Is there a second?

COMMISSIONER KIRSANOW: Second.

COMMISSIONER YAKI: I move to divide the question.

CHAIRMAN REYNOLDS: Okay. Someone explain
to me what that means?

COMMISSIONER TAYLOR: Membership and chair?

COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: I'm sorry.

COMMISSIONER TAYLOR: Membership and chair. That's all.

COMMISSIONER KIRSANOW: Divided on the membership and chair.

CHAIRMAN REYNOLDS: Okay. So --

COMMISSIONER TAYLOR: Second.

CHAIRMAN REYNOLDS: All right.

COMMISSIONER YAKI: Actually, there is no second on a motion to divide the question. It's a privileged motion. Discussion.

CHAIRMAN REYNOLDS: And we're talking about the chair, right?

COMMISSIONER YAKI: No, the membership.

COMMISSIONER MELENDEZ: I wanted to talk about SACs in general because at the beginning of the Staff Director's report we could have talked about but then kind of waited for this time to talk about SACs in general. My understanding is that there will be several retirements in the coming months from the Commission regional office and this plays into it.
because we're talking about a process of how recommendations for the names that are submitted to the Commission actually come to us.

So my concern is that we're losing a number of regional office people there or the people that head up those offices and I just need to know how do we plan to facilitate that without chairs because I think they play into this whole issue of recommendations coming from the different regions as far as the SAC.

I never totally understood what the process is on that because at some point, I thought that maybe they had some hand in recommending or whether or not it was the Staff Director here that recommends or whether or not it was the Commissioners that throw a couple names into the hat. So I think before we start to get in there, I think we should define exactly what is the process because I think the outcome obviously plays into this because we're supposed to have a diverse array of people that end up on these SAC committees and we raised it a number of times that it seems to be not staffed just along party lines, but it doesn't seem to be staffed evenly as far as women on these committees.

If we look at the Virginia SAC, we have 21
percent women, 79 percent men. We have two Democrats, seven Republicans, five Independents. We seem to be many times turning out to be Republicans from what I've seen so far. So I'm just saying at some point we're supposed to be somewhere close to balance on this, but we've raised this on a number of other recharter packages. So I just think that we need to talk about, have frank discussion, as to what is this process? Is it working or did the regional director submit names and we're not really listening to them and I'd like to even ask on this one who did the regional staff recommend for that and then have the Staff Director tells us why some of those names were rejected or others inserted in their place and I think that's a fair question that we really need to know those answers before we vote on this, not only this one, but the Michigan SAC also. I'm just raising that question up front.

COMMISSIONER YAKI: Point of order. I would request a two minute recess to talk with the Chair.

CHAIRMAN REYNOLDS: Sure. Off the record.
(Whereupon, the foregoing matter went off the record at 1:39 p.m. and went back on the record at 1:58 p.m.)
CHAIRMAN REYNOLDS:  On the record.  Okay.

We were scheduled to vote on the Virginia and Michigan rechartering packages for Virginia and Michigan. We have received a letter from the Chairman of the Committee of the Judiciary, John Conyers. The letter is also signed by Gerald Nadler who is the Chairman of the Subcommittee on the Constitution Civil Rights and Civil Liberties.

Rather than -- And in this letter, they have raised questions about our process in terms of selecting members for the SACs. Rather than vote on these rechartering packages, we believe that out of deference and respect for the Chairman that we respond to the letter prior to voting. So I move that we table the vote on the rechartering packages for the states of Virginia and Michigan until next month. Is there a second?

COMMISSIONER KIRSANOW:  Second.

CHAIRMAN REYNOLDS:  All in favor?

(Chorus of ayes.)

CHAIRMAN REYNOLDS:  Any in opposition?

(No response.)

CHAIRMAN REYNOLDS:  Any abstentions?

(No response.)

CHAIRMAN REYNOLDS:  The motion passes
unanimously. Folks, we are --

COMMISSIONER YAKI: Out of here.

CHAIRMAN REYNOLDS: I'm sorry.

COMMISSIONER HERIOT: Look at your agenda.

Is that --

VICE CHAIRPERSON THERNSTROM: That was the whole reason for doing this was to get out.

CHAIRMAN REYNOLDS: We are adjourned. Off the record.

(Whereupon, at 2:00 p.m., the above-entitled matter was concluded.)