The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 3:00 p.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

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

STAFF PRESENT:

JOHN BLAKLEY
TERESA BROOKS
MARGARET BUTLER
CHRISTOPHER BYRNES
DEBRA CARR, ESQ., Associate Deputy Staff Director
RANITA CARTER
PAMELA A. DUNSTON, Chief, Administrative Services and Clearinghouse Division
PATRICIA JACKSON, Chief, Budget and Finance Division
SOCK-FOON MACDOUGALL
ALEXIS MANKS
TINA LOUISE MARTIN
EMMA MONROIG, Solicitor/Parliamentarian
EILEEN RUDERT
AUDREY WRIGHT

COMMISSIONER ASSISTANT PRESENT:

CHRISTOPHER JENNINGS
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Adjourn 120
P-R-O-C-E-E-D-I-N-G-S

3:03 P.M.

CHAIRMAN REYNOLDS: The meeting will come to order. It looks like we have quite a few folks from the great State of Hawaii. Welcome.

First order of business, we have a new addition to the Commission staff. Her name is Shoshana, Shoshana Marcus. And Ken is a brand new dad.

(Applause.)

And her middle name is USCCR, right?

(Laughter.)

Okay, this is a meeting of the U.S. Commission on Civil Rights, held on May 4, 2006 at 624 9th Street, N.W., Room 540, Washington, D.C. All of the Commissioners are present. If the meeting is not completed this afternoon, the meeting will be adjourned until tomorrow after the briefing. To avoid this, I suggest that we work until 6 p.m. Any objections to working until 6? Very good.

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

I. Approval of Agenda

CHAIRMAN REYNOLDS: May I have a motion to approve the agenda?
VICE CHAIRMAN THERNSTROM: So moved.

CHAIRMAN REYNOLDS: Is there a second?

COMMISSIONER MELENDEZ: Second.

CHAIRMAN REYNOLDS: Would anyone like discussion? Okay, let's vote. All in favor say aye.

(Ayes.)

CHAIRMAN REYNOLDS: All in opposition?

(No response.)

CHAIRMAN REYNOLDS: Any in opposition? Any abstentions? Okay, the motion passes unanimously.

First, we have a motion to amend today's agenda. I move to amend the agenda to add an item labeled Briefing in Omaha, Nebraska on Creation of Racially Identifiable School Districts. I'd like to place that immediately following the discussion on Program Planning.

Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion? All in favor, say aye.

(Ayes.)

CHAIRMAN REYNOLDS: Any in opposition, please say no.

(No response.)

CHAIRMAN REYNOLDS: Any abstentions? The
motion passes unanimously.

The second is approval of the minutes for the March 10, April 3rd and April 7th, 2006 meetings.

II. Approval of Minutes of March 10, April 3, and April 7, 2006 Meetings

CHAIRMAN REYNOLDS: May I have a motion for the approval of these minutes?

COMMISSIONER KIRSANOW: So moved.

CHAIRMAN REYNOLDS: Is there a second?

VICE CHAIRMAN THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion? All in favor say aye.

(Ayes.)

CHAIRMAN REYNOLDS: Any folks in opposition, please say no.

(No response.)

CHAIRMAN REYNOLDS: Any abstentions? The motion passes unanimously.

Next up, we have the Announcements.

III. Announcements

CHAIRMAN REYNOLDS: This month is Asian Pacific Heritage Month. I am pleased to announce that May is Asian Pacific Heritage Month. This year's theme is "Freedom for All, a Nation We Call Our Own."

I would encourage all Americans to celebrate the
extraordinary contributions and accomplishments of the Asian Pacific Americans with community festivals and educational activities.

At this point I will turn it over to the Staff Director for his report.

IV. Staff Director's Report

STAFF DIRECTOR MARCUS: Thank you, Mr. Chairman, Madam Vice Chair, Commissioners, just a few brief remarks to supplement my written report.

First, I would like to explain that nowadays the first cheerful face you're likely to see as you enter the Office of the Staff Director is Ms. Teresa Brooks who joins us in the Office of the Staff Director on a detail. She has been with the Civil Rights Commission for nearly five years, but has just recently joined us as an Assistant to the Office of the Staff Director.

Also, joining us temporarily in the Office of the Staff Director is Margaret Butler who has been a civil rights analyst in the Office of Civil Rights Evaluation for eight years and she joins us on a stint as Acting Special Assistant to the Staff Director. You recall Margaret Butler's excellent work in the recent Funding Report. She replaces Mr. Aonghas St. Hilaire who departed the Commission on April 28 to
accept a position at the U.S. Census Bureau.

Additionally, I'd like to acknowledge the extraordinary work being done by Dr. Sock-Foon MacDougall. You will appreciate tomorrow her work in putting together the briefing on Historically Black Colleges and Universities. In addition to that work as a civil rights analyst, she is also temporarily acting as the Acting Deputy Assistant Staff Director for Civil Rights Evaluation in light of the departure of Terri Dickerson.

I'd also like to say that we're very pleased that we have gotten acceptances from excellent speakers for our June briefing on Affirmative Action and Law Schools. We will, at that point, hear from Professor Richard Sander at the University of California at Los Angeles Law School, as well as Professor Richard O. Lempert, currently on leave from the University of Michigan Law School while serving as Division Director for the Social and Economic Sciences at the National Science Foundation. Professor Lempert is one of the co-authors of "The Real Impact of Eliminating Affirmative Action in American Law Schools, an Empirical Critique of Richard Sander's Study", which was published in Stanford Law Review.

In addition, we will hear in June from Mr.
Steve Smith, Chair of the American Bar Association's Council on the Section of Legal Education and Admissions to the Bar, who will address the Council's proposed changes and the standards by which law schools are accredited by the ABA. In addition, Professor David Bernstein, currently Visiting Professor at the University of Michigan Law School, will address that same topic.

Those are my comments for today, unless there are any questions from the Commission.

VICE CHAIRMAN THERNSTROM: I have -- go ahead, Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Mr. Staff Director, do we have a location for the June briefing yet?

STAFF DIRECTOR MARCUS: The June briefing will be here at Headquarters.

COMMISSIONER KIRSANOW: Is David Bernstein, the same David Bernstein from George Mason?

STAFF DIRECTOR MARCUS: Yes, Commissioner. He is at George Mason, but visiting Michigan.

VICE CHAIRMAN THERNSTROM: I want to welcome myself the number of people interested, obviously, in our Native Hawaiian Government Report and I wondered whether, what kind of response you have
gotten, Mr. Staff Director. In general, what kind of feedback you have gotten to our work? There are a number of people in the audience. It's controversial, probably.

STAFF DIRECTOR MARCUS: Certainly, Madam Vice Chair. The Commissioners are, of course, aware of the feedback received during the formal public comment period which is summarized in our draft report. That feedback included both comments in support of the so-called Akaka Bill, as well as comments in opposition. The supporters included various elected officials and organizations including the American Bar Association.

The opponents of the legislation were a large number of individuals and a few organizations. In general, the opposition correspondence far outweighed the correspondence in support of the Akaka Bill.

There's also been extensive media coverage of what is described as a leaked version of the draft report that has come out and in that media coverage, various people, including Members of Congress are quoted as being upset about or opposed to the draft report.

Since the media articles have come out,
I've received a substantial number of emails from people with Hawaii addresses, all of the messages that I have received have been from people who are supportive of the Commission's work and wanted to say thank you for what they understand the draft report to contain.

CHAIRMAN REYNOLDS: Any other questions?

Next we'll deal with the National Report on Voting Rights Act.

V. Program Planning: Voting Rights Act Statutory Report

This report is the Commission's statutory report on the enforcement of civil rights by the Federal Government that has to be done annually. This year, it has been done on the Voting Rights Act in order to provide Congress with a basis on whether to extend the temporary sections of the Voting Rights Act. This report was distributed in draft form to Commissioners on March 2, 2006 for the Commission's March 10, 2006 meeting, and again, with minor changes indicated in strike through on March 30, 2006.

There was a motion at the March meeting to postpone consideration and voting of this project in order to provide the Commissioners with additional time to review the draft report and the concurring and
dissenting opinions. There are now various proposed amendments to the Voting Rights Statutory Report. Before the same is approved, I would ask that the Vice Chair read the motion into the record.

VICE CHAIRMAN THERNSTROM: And the Vice Chair is trying to find the material. And also -- I was also trying to find, I know that Commissioner Yaki has written a dissent. I have written concurrence, as it were, and I wonder -- I haven't been able to find those in this material here, both of them.

Mine is a response to Commissioner Yaki's dissent.

CHAIRMAN REYNOLDS: What I'm missing is the dissent.

VICE CHAIRMAN THERNSTROM: We're still missing the dissent.

STAFF DIRECTOR MARCUS: Madam Vice Chair, your concurrence is being distributed right now. I believe that Commissioner Yaki's concurrence or rather dissent was distributed electronically.

VICE CHAIRMAN THERNSTROM: I did receive it electronically. I want to make sure everybody had a copy, has a copy.

Anyway --

CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: I just have a procedural question. This is not to be taken the wrong way, other than as I recall, when we gave the dates for the deadline for dissenting, concurring opinions to be brought, it was supposed to be done by a time certain. That date came, I believe, the day that our -- in April, the last day that we had a meeting, was the date upon which the dissenting and concurring opinions were due.

And I have no problem with the fact that this may have been extended. If someone has written a concurrence in response to my dissent, which was sent that afternoon of April, I would like the opportunity to respond to the response to my dissent. I was unaware that we were going to be able to read each other's concurrences or dissents -- or whatever -- because in fact, the deadline was that day and I submitted mine pretty much at the end of the day on that particular day.

STAFF DIRECTOR MARCUS: Mr. Chairman, if I may address the first factual portion of that?

CHAIRMAN REYNOLDS: Yes, sure.

STAFF DIRECTOR MARCUS: The other part may be a motion or may be a policy matter for discussion.

For the April meeting, there were motions
that involved due dates for responses to, I believe, three different reports. Some of them had due dates on the day of the meeting and some were for two weeks following. It had been my understanding that the motion essentially extended by one month both the due dates for the concurrences and dissents, as well as the suggestions for when things would be published. That had been my understanding of the motion, but that was my interpretation.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: Just as a point of parliamentary inquiry then, having been one of the four Members at the meeting, you were otherwise engaged in a much more lofty goal of and duty to your family, and being present at the birth of your daughter, it was pretty clear that the -- I did not hear the motion that way. I had simply heard that we were going to defer the consideration of it until then.

I did not hear in the motion that we were also going to be specifically extending the deadline of concurrences and dissents until -- for a month later. And quite frankly, I'm a little miffed, because I worked my tail off to meet that deadline, knowing that that was the one that had been set by a
motion of the Commission. The holdover, I thought, was simply for consideration of the report, not for everything else in between. If I had known that, I would have requested the opportunity to review what somebody had written about mine, so I could write about theirs.

CHAIRMAN REYNOLDS: Commissioner Yaki, is there a way out of this to provide with you an opportunity to revise your dissent, if you decide that that's what you want to do?

COMMISSIONER YAKI: Yes, I would.

VICE CHAIRMAN THERNSTROM: Let me speak to this. This process can go on forever. Then I can respond to him and you know, I've been through this before in my service on this Commission which the question of back and forth endlessly comes up and the resolution has not been and I've been in your position, the resolution has not been to allow a response and then another response and so forth.

I would say to you, Commissioner Yaki, that I think you have written the response to my concurring statement that is, it seems to me, you wrote what you wanted to say and needed to say and it can't be said better. It's excellent.

And I can't imagine that there's anything
-- I mean we've got a basic split here in our view of this issue. It's very nicely laid out in these two statements and I'm very reluctant to once again postpone a vote, a final vote, so that we can get a statutory report out.

COMMISSIONER YAKI: I'm not suggesting that. I'm not suggesting that --

VICE CHAIRMAN THERNSTROM: Well, wait a minute. If we have a final vote today, we can get it out immediately and this is an issue that is currently, this Senate is about -- it's actually started --

CHAIRMAN REYNOLDS: What I had in mind is that the briefing report would be issued immediately along with your concurrence and we would issue, we would publish Commissioner Yaki's document as soon as he presented it.

VICE CHAIRMAN THERNSTROM: Well, I think it needs to be a package. Am I wrong?

CHAIRMAN REYNOLDS: I think that's the best way to do it.

VICE CHAIRMAN THERNSTROM: At that point I'm going to be wanting a response to him. I mean it doesn't make any sense.

We both said what we have to say about
COMMISSIONER YAKI: Let me be very honest about this. I had about four thousand other things going on at the time. I knew this deadline was coming up on April whatever it was, April 3rd, 4th, 5th, whatever the eventual date was, because we had -- in fact, in a previous email on another subject, on deadlines, I had spoken with the Staff Director who said that deadlines may only be specifically extended by motion of the body. So just to let you know, this was -- I thank you that you think it's an excellent work. Quite honestly, I don't think it was everything that I wanted it to be simply because I did not feel that I had enough time, but I wanted to respect that deadline and decided to put out what it is that I felt I could put out, given that time deadline that I had.

If I had known that the extension was to include -- forget even responding to what you had to say, Madam Vice Chair. But if I had had an additional week or two weeks, or a month in this case, to have actually been able to work on this, I would have produced a much different document than what I did.

CHAIRMAN REYNOLDS: I think that we have a solution, but it's not perfect. I think it's extremely important that this document be issued, that
we vote on it and if it passes that we publish it as soon as possible. I am sympathetic, Commissioner Yaki, to your desire to write a document that takes into account all of the criticism that was submitted by other Commissioners and in this particular case, you're saying you didn't have the opportunity because Commissioner -- Vice Chair Thernstrom's response was submitted after the deadline.

VICE CHAIRMAN THERNSTROM: Not after the deadline as I understood it.

COMMISSIONER YAKI: Well, I would like to see the transcripts of that to see whether or not we specifically included in there the deadlines for dissents or -- that being aside -- I just want to say, if we're going to vote on this today, I want my dissent in there. I do not want it separately packaged. I don't want it in a trailing document. I want it in there.

VICE CHAIRMAN THERNSTROM: That's my whole point. We need to get this report out. It's time to get it out. You wrote an excellent dissent. I don't see how it can be any better. We both of us wrote under -- you can't imagine the number of bowls I'm juggling in life. I wrote under enormous pressure too. Could I do a better perfect document? Of
course, I could do a more perfect document, but that's always true of anything I write.

The point is both of us have crystal clear statements where we're coming from and I don't see how yours could be better, frankly, and I've read an awful lot of stuff on voting rights.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I was present at the meeting. I don't recall what the precise motion was. I would prefer to get this document out immediately. However -- and my vote would be to get it out immediately.

However, in the interest of comity -- I -- T-Y -- if Commissioner Yaki was amenable to having a statement submitted within a week or so that would be a trailing statement, his dissent being published along with everything else concurrently with the majority draft, then I'd be amenable to that. I think there's no meeting of the minds as to what the deadline is supposed to be and frankly, I don't recall. And even if we did have a meeting of the minds, I think there's some dispute as to what had happened and I think that we're a collegial body and we can accommodate that.

CHAIRMAN REYNOLDS: Commissioner Braceras?
COMMISSIONER BRACERAS: I don't know the legislative timetable, but what's the downside to granting Commissioner Yaki's request?

VICE CHAIRMAN THERNSTROM: The legislative timetable is that the Senate has started hearings. It has had one hearing so far. The rest are coming very rapidly. There will be -- there will be a vote in the Senate and there is some possibility that this report is of some use to some Senators and can play a role including Commissioner Yaki's dissent, which as I said, is excellent. I'd like to see that play a role as well as the rest of --

COMMISSIONER BRACERAS: Just to be clear, what exactly is it, Commissioner Yaki, that you're asking for in terms of delay or extension? What is the precise request on the table?

COMMISSIONER YAKI: I think there are sort of two things going on here. One is that what I sense is that the Commission doesn't want to delay voting on the report today. If that is the case, then I have no case because I do not want my dissent floating either.

COMMISSIONER BRACERAS: What's your best case scenario? What would you --

COMMISSIONER YAKI: My best case --

COMMISSIONER BRACERAS: I'm asking you
what you would prefer.

COMMISSIONER YAKI: My best case scenario is that I'd be allowed time to revise and probably expand my dissent.

COMMISSIONER BRACERAS: How much time?

COMMISSIONER YAKI: Well, the thing is I could probably -- I think we need -- until the next meeting is too long. I think that would probably be too much to ask. I would say that 10 days and then if we had to have a special just phone call to approve it with concurring and dissenting statements, that would be fine with me.

CHAIRMAN REYNOLDS: Well, what about a compromise where we would vote, we would get both, well, all the documents out today and we would -- when your document is ready and after you've amended it, we would just supplement? Actually, just replace the dissent that would go out along with the briefing with your amended document?

COMMISSIONER YAKI: I think I'm going to go for simplicity here because simplicity, I think -- I'm now going to decide that I wanted to make a point about the deadline. I wanted to make a point about fairness. I wanted to make a point about clarity of these proceedings. The fact is that as I look at
this, it's getting more complicated and it's taking more time than it should. I'm ready to debate the report, get it out one way or the other with what I've got and we'll just go from there.

VICE CHAIRMAN THERNSTROM: And I want to repeat again, I really think it's terrific what you already wrote. I wouldn't say it if I didn't think that.

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I mean I am concerned about fairness and Commissioner Yaki's -- the issues that he raises. And I guess my personal view is if it wouldn't be too onerous to wait 10 days and have a poll vote via fax on the entire document, obviously we wouldn't be able to discuss it publicly, that's fine with me. I think we all know where we're going to come out on this report.

I have no problem with that if the legislative calendar is such that that's doable. That's still relevant.

VICE CHAIRMAN THERNSTROM: It's not doable. Then we're opting out of having anybody who is involved in the legislative process read this report.

COMMISSIONER BRACERAS: Ten days makes a
difference?

VICE CHAIRMAN THERNSTROM: Ten days absolutely makes a difference.

COMMISSIONER BRACERAS: Okay.

CHAIRMAN REYNOLDS: There's a risk that there could be a vote within that 10-day period.

COMMISSIONER BRACERAS: What about five days?

VICE CHAIRMAN THERNSTROM: Jennifer, this is --

COMMISSIONER YAKI: Commissioner Braceras, I appreciate what you're saying. I would say at this point I was just surprised that this deadline which I always thought was hard and fast had magically extended and I just knew how much I'd thrown out in my rush to try and get what -- distill down what I could. Maybe that was an editing process that I would have been involved in anyway.

I just want to say for the future and for the record, if we're going to do these kinds of extensions, we should make it very clear whether or not that includes the deadlines for dissenting and other kinds of -- and concurring statements because that -- what I got from the April meeting was we were simply going to put over consideration of the final
draft of the report that had included everything else, including the dissenting and concurring statements at the deadline they were submitted, not that that had somehow also put over the deadline for writing it as well.

CHAIRMAN REYNOLDS: Well, I think in the future we should be careful. We need to be more precise on these matters.

COMMISSIONER YAKI: So I'm going to now withdraw my parliamentary question and why don't we talk about the report?

STAFF DIRECTOR MARCUS: Mr. Chairman, if I may, I think there's one point of clarification that's needed for the staff which is to know whether the deadlines for concurring and dissenting statements for the other reports from the April meeting also were -- whether they were extended or whether they've also expired.

COMMISSIONER YAKI: I think the gloss of interpretation is now that they go along with the extension.

STAFF DIRECTOR MARCUS: That had been my prior interpretation, but as Commissioner Yaki indicates --

VICE CHAIRMAN THERNSTROM: My
understanding all along has been that those deadlines are tied to the actual votes by the Commission on these reports.

COMMISSIONER YAKI: I know, but as a point of information, usually they trail by about two weeks. Because we had already put it off from March, I had agreed, I had specifically agreed that the dissenting statements would be due the same day as consideration of the report. So there was a very special exception tied in there to the VRA report in deference, quite frankly, to concerns raised by members here that we didn't want to have a trailing again and we wanted to get this out as soon as possible. That was the exception I think that perhaps proves the rule, but we should just --

VICE CHAIRMAN THERNSTROM: This needs to be, in the future, needs to be --

CHAIRMAN REYNOLDS: And in addition, I think it would be -- Ken, when you receive concurrences of dissents, they should be -- if they're in final form, distributed, because I don't believe I received yours.

VICE CHAIRMAN THERNSTROM: I have crashed to do mine.

CHAIRMAN REYNOLDS: All right, let's --
VICE CHAIRMAN THERNSTROM: Also, like Commissioner Yaki, without the time to do it, really.

CHAIRMAN REYNOLDS: Okay, well, we're going to get out of here before six, let's -- do we have a second?

VICE CHAIRMAN THERNSTROM: I did not read this motion. You wanted me to read this motion.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRMAN THERNSTROM: Now you need me to read the entire thing, rather than have people stare at it, okay, fine.

I did one last run through on the statutory report and just picked up a few things I would like to see changed. None of them is make or break. But they were put in the form of a motion. So I move that a motion be approved with the following changes to the Voting Rights Statutory Report.

Does everybody have this document?

COMMISSIONER BRACERAS: No.

CHAIRMAN REYNOLDS: That was emailed the very last day by itself and was a little confusing.

COMMISSIONER BRACERAS: I don't have it with me.

CHAIRMAN REYNOLDS: Okay, Vice Chair Ternstrom, why don't you just read the portion of the
document that you would like edited and just read in the edits.

COMMISSIONER BRACERAS: Thanks. I looked at it. I just don't have it.

VICE CHAIRMAN THERNSTROM: Sure. This is picky stuff.

Bottom of page one, last paragraph, last sentence, "Commission reported in the late 1950s and early 1960s" -- has everybody got this? Because I want to wait until people have it.

Commissioner Yaki, do you have it yet?

COMMISSIONER YAKI: The amendments?

VICE CHAIRMAN THERNSTROM: No, the report itself, so you can stare at the report.

COMMISSIONER YAKI: I'm looking at it.

VICE CHAIRMAN THERNSTROM: "The Commission reported in the late 1950s and early 1960s on the pervasive discrimination in voting that then existed throughout most of the South and which led" it reads and I simply want "that led parallel construction."
That's all.

I'm being nitpicky here. So instead of "which led", "that led."

Page 10. I was bothered -- after the first sentence of the second full paragraph, so it
currently reads "Covered jurisdictions may not implement voting changes unless and until they obtain federal preclearance." I wanted a sentence added "The Justice Department has 60 days to respond to a request for a voting change." In other words, it's not an indefinite preclearance process. Put in the information that this is a 60-day process.

Page 16. And this is more substantive. After the first sentence of the first full paragraph where it says "In Georgia, the gap between white and black registration rates narrowed steadily" and gives some figures here. I wanted to put in here, but again, none of this is make or break for me, "These are remarkable figures given the educational and economic disparities between the two racial groups and the high correlation between socio-economic status and voter participation."

All right, next page, 17. Just before the end of the fifth bullet, page 17. The bullet --

CHAIRMAN REYNOLDS: The bullet is on 18, isn't it?

VICE CHAIRMAN THERNSTROM: Pardon me, it's got to be 18. I was working with a different document. Hold on, let me just take a clip off here. Okay, the fifth bullet -- I'm sorry, I'm lost on my
own point here.

"If Section 5 is extended, should Congress alter the procedure by which covered jurisdictions may seek to bail out from coverage and/or amend the formula for determining geographic coverage." I wanted to add "such as updating the trigger to reflect registration and turnout figures in the 2004 election." That just spells out the point about -- the question here about amending the formula. The real issue here is whether the trigger should be updated. And I don't think it's clear. I don't think anybody is going to know what we're talking about otherwise.

Okay, page 20. There's a footnote here, footnote 75, "the one divergent decision since 1982 was the Supreme Court's determine that Section 5 generally does not cover changes to the powers and duties of elected officials. See, Presley versus Ida County. That's accurate if we're talking about since 1982, but it's -- I think it would be more informative to add the following sentence, "However, also note that changes do not need to be precleared that have been ordered by a Federal Court and do not reflect the policy preferences of elected officials." Connor versus Johnson.
COMMISSIONER BRACERAS: Officials shouldn't be capitalized.

VICE CHAIRMAN THERNSTROM: Yeah, I didn't capitalize that. Somebody else did. Right. Officials should definitely not be capitalized.

Okay, page 21. Well, and this is a substantive disagreement. First full paragraph in 21, there's the sentence: "Decisions by the Supreme Court, however, have narrowed the scope of the Section 5 discrimination standard." I would take that sentence out because I would argue they haven't narrowed the scope of the Section 5 nondiscrimination standard since its scope was inflated beyond what anything the Supreme Court ever had signed on to previously. And so it's just brought back in line with the core Supreme Court decisions. I would take the sentence out.

COMMISSIONER YAKI: Where is that again?

VICE CHAIRMAN THERNSTROM: It is first full paragraph on page 21 at the end, under the heading, Section 5 Pre-clearance Standard. The end of the paragraph says "Decisions by the Supreme Court, however, have narrowed the scope of the Section 5 nondiscrimination standard." I happen to think that that's an inaccurate statement and I would like it
deleted.

COMMISSIONER YAKI: That's where I'm going
to disagree on that.

VICE CHAIRMAN THERNSTROM: Yes.

(Laughter.)

COMMISSIONER BRACERAS: Surprise, surprise.

VICE CHAIRMAN THERNSTROM: Pardon me?

COMMISSIONER BRACERAS: Surprise, surprise.

VICE CHAIRMAN THERNSTROM: Yeah, well, right. Then page 21, another sentence I would delete. This is the second paragraph, the sentence reads "The scope of the preclearance standard was apparently well-established when Congress last extended Section 5 in 1982." I don't know what that sentence says, "was apparently well-established." I don't think it was - - I mean I think the legal standards under Section 5 have frankly been a mess and so nothing was well-established.

COMMISSIONER BRACERAS: So you would just delete the whole thing?

VICE CHAIRMAN THERNSTROM: I would delete that, yes, exactly.

Okay. Third paragraph on that same page
21. Oh, this is just stylistic. It says -- the third sentence of the third paragraph -- very bottom of the page. "Presented for preclearance were not based on appropriate application of the Section 5 standards, but instead were based on" -- I just didn't like the two "based on" and I wanted to say "rested on".

COMMISSIONER BRACERAS: Which one?

VICE CHAIRMAN THERNSTROM: I can't remember which one I wanted. Somebody else typed these up. I sent them in as possible corrections. I don't know which one I wanted, but we can figure it out right now. "But instead rested on a department policy", whatever. Yes, the second one.

Okay, page 39.

COMMISSIONER YAKI: I can flip a coin right now if you want.

VICE CHAIRMAN THERNSTROM: No, we will do the second one. I think it makes more sense on the second one.

I know I'm nitpicking. I'm a nitpicker. Jennifer is worse than I am.

Okay, page 39. The sentence from -- where are we here -- "from July 1982 through June 2004" -- I don't even see this sentence on 39.

STAFF DIRECTOR MARCUS: Is that the very
VICE CHAIRMAN THERNSTROM: I've got a different version here.

What I've got is not at the top of 39.

(Pause.)

It's on the annexation. I can't find it.

CHAIRMAN REYNOLDS: Okay, is it substantive?

STAFF DIRECTOR MARCUS: Top of page 41, perhaps the second line from the top?

CHAIRMAN REYNOLDS: Are we working with the same document?

VICE CHAIRMAN THERNSTROM: Well, no, because I've got this red-lined version here.

It reads "From July 1982 through June 2004, the Justice Department annexation objections prevented the diminution of the effective exercise of the electoral franchise in 2,000 cities." Well, I want to change it from -- same dates obviously -- "the Justice Department's annexation objections prevented the diminution of the" -- I want to delete that and -- I want to delete that because I don't think it's accurate and also replace "supported" with "demanded" in the last sentence of the paragraph. I just don't think it's an accurate sentence.
I don't think that's what was going on with the annexation objections. I mean objections occur -- I mean the Supreme Court cases that started the whole train -- the annexation train going down the road was -- what was it, *Perkins versus Matthews* I think it was, but in any case, it was an annexation that was proposed by a black City Council member. It had nothing to do with effective exercise of the electoral franchise and yet it became a means to force the city to go from at-large voting to Single Member Districts, even though there had been members of the City Council elected under the at-large system. I mean these annexation cases, in my view, are shall we say curious to the core. And I don't think this is an accurate description of what the annexation objections involve.

The Justice Department forces cities that have at-large voting to go to Single Member Districts even when not one -- even when you're annexing areas that are -- have no population whatsoever and do not change the racial balance. It's a way of getting around the retrogression standard. I want that sentence out.

CHAIRMAN REYNOLDS: Anything else?

VICE CHAIRMAN THERNSTROM: Yes, page 41.
I know this is taking longer than it should here.

      Okay, good. 41. Third sentence of the first paragraph. Where it says "clearly improved the electoral opportunity of minority voters", I want simply "were not retrogressive."

CHAIRMAN REYNOLDS: Is that it?

VICE CHAIRMAN THERNSTROM: No. One last one, same page. "As a result of the Supreme Court's Bossier Parish decision, the Justice Department no longer objects to changes from at-large to mixed election systems based on discriminatory purpose or Section 2 violation." I want it deleted and I'm not even sure why right now. Just one second. Since I can't remember what was bothering me, where is the Bossier Parish?

CHAIRMAN REYNOLDS: I don't know and I wasn't able to find it.

VICE CHAIRMAN THERNSTROM: Maybe it's gone.

CHAIRMAN REYNOLDS: Here we are.

(Pause.)

VICE CHAIRMAN THERNSTROM: That's fine. Axe that. I don't know what was bothering me.

COMMISSIONER BRACERAS: Can I make a friendly amendment to her motion, a couple more
nitpicky things?

CHAIRMAN REYNOLDS: Let's hear it.

COMMISSIONER BRACERAS: None of these are substantive. They're just with respect to the Executive Summary.

On page 2, the first full paragraph that starts "Faced with mounting unrest" -- just reading this over again on the plane, it seems as if that doesn't belong there because the paragraph before is talking about the Commission's work, and the paragraph after that goes back to talking about the Commission's work. And it almost seems as if something was deleted and this was still left in and it didn't -- it doesn't seem to flow. So I thought that that paragraph should be moved to where -- to the section on the overview of the Voting Rights Act.

CHAIRMAN REYNOLDS: Which page is that?

COMMISSIONER BRACERAS: It's on page five. So it would be the first paragraph of page five.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER BRACERAS: It just seems like a non sequitur there.

CHAIRMAN REYNOLDS: You would lift it in its entirety and it would be the first paragraph under the overview section?
COMMISSIONER BRACERAS: Correct.

CHAIRMAN REYNOLDS: Any other suggested revisions?

COMMISSIONER BRACERAS: Yes, just two small things on the Executive Summary. Going back to page one, the last sentence of the first paragraph: "At the same time, some have questioned the continuing utility of the expiring provisions at this juncture". I would just delete "at this juncture."

CHAIRMAN REYNOLDS: That's what I was going to say. Why do we have "at this juncture"?

COMMISSIONER BRACERAS: Put a period at the end of "provisions."

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER BRACERAS: And then one final suggestion. In the last paragraph that carries over to the next page, it begins "The U.S. Commission on Civil Rights" and ends with the clause that says "since its formation in 1957". I would just take that clause and put it up at the beginning so that it says "Since its formation in 1957, the U.S. Commission on Civil Rights" blah, blah, blah, blah. And the sentence would end with a period after the Voting Rights Act, "Federal Voting Rights Act".

CHAIRMAN REYNOLDS: I like that better.
COMMISSIONER BRACERAS: I know they are nit picky, but I think the Executive Summary is important because sometimes that's all congressional staffers read. So I think it should flow.

CHAIRMAN REYNOLDS: Okay, any other suggested revisions?

Okay, at this point I hope everyone -- I hope someone has written done all of the suggested revisions. At this point, I guess it would be useful, well first --

VICE CHAIRMAN THERNSTROM: That was a motion.

CHAIRMAN REYNOLDS: That's right. We need a second.

COMMISSIONER KIRSANOW: Second.

VICE CHAIRMAN THERNSTROM: And including a friendly amendment.

COMMISSIONER BRACERAS: Do you accept the amendment?

VICE CHAIRMAN THERNSTROM: I accept the friendly amendment.

CHAIRMAN REYNOLDS: Okay, discussion. I hope that if, I know that Commissioner Yaki, that he's going to object to at least one of --

COMMISSIONER YAKI: Two.
CHAIRMAN REYNOLDS: Two?

COMMISSIONER YAKI: Possibly three.

CHAIRMAN REYNOLDS: Okay. Well, just

--

COMMISSIONER YAKI: Rather than segregate

it all out, just go up or down on the whole package.

That would be easier.

CHAIRMAN REYNOLDS: Okay, that's fine. Do

we need additional discussion? Okay, all in favor of

Commissioner Braceras' amendment along with Vice Chair

Thernstrom's, please say aye.

(Ayes.)

All in opposition?

COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Okay, please let the

record show that Commissioners Yaki and Melendez voted

against the motions, and the remaining Commissioners

voted in favor of the motion.

Okay, now we vote on the document. I move

that the Commission approve the Voting Rights

Statutory Report, as amended, along with any

dissenting or concurring statements received from the

Commissioners by the close of business today. Is

there a second?
VICE CHAIRMAN THERNSTROM: I second it.

CHAIRMAN REYNOLDS: Discussion? Okay, all in favor please say I. Sorry.

Yes, Commissioner Yaki?

COMMISSIONER YAKI: Two things. One, in my dissent, the first sentence it should say named, not names. Secondly, Commissioner Melendez wishes to join my dissent. I'd like to have that reflected in the final version. Third, and I'll just be very brief because my dissent pretty much says it all. And this goes I think with one of the last points I've made is that I think it's unfortunate that the lack of resources at the Commission have constrained us to the point where I think that in comparison to previous reports that the Commission has done on the extension of the Voting Rights Act, that we have a report that I think lacks focus on the two new dynamic and expanding communities in our country, Latino and Asian Americans.

I think that that is clearly a resource deficiency rather than that of any deliberate oversight by members of the staff or the Commission. I think it just goes to the point of how we put this report on overdrive at a time when we're in severe budget crisis. But I think that will have an impact.
on how this report is received and treated because of its lack of focus on those two communities.

I think that finally, just as a very simple statement, yesterday or the day before, yesterday, I think it was on the steps on Capitol Hill, there was a bipartisan, bicameral group of Members of the House and Senate leadership on both the Democratic and Republican sides, all pledging their support for renewal of the temporary extensions of the Voting Rights Act, and I just wish that we could have joined them with this report.

CHAIRMAN REYNOLDS: Any other comments?

COMMISSIONER MELENDEZ: One of the issues, I know the issue bottom line on this is whether or not the Voting Rights Act should be reauthorized in all those different sections, section 5 and section 203. And I know that many of the Native American reservations, Arizona, Alaska, and certain counties in South Dakota actually come under this preclearance of Section 5. And what I get from at least the grass roots level is that there's a lot of discrimination, a lot of intimidation that's still happening today.

I know that there's a lot of people who come to think that everything is kosher, and there's not a lot of discrimination, those things aren't
happening. I think that as Commissioner Yaki pointed out in his dissent, you know some of the things that we measured to say that things are okay, and that we should basically let those provisions expire, I just feel that based on what I see in America today that there's still a lot of intimidation and things that are happening, and that the Commission should support reauthorization of the Voting Rights Act. That's just how I feel.

I recognize that everyone has an opinion and we could take no stance on it, but I know that on other areas and some of the other things that we'd be discussing today that the Commission has taken a stance to either fully support or not support different things, or take no stance on it. This is just one where I feel that the way things are happening and discrimination in America that the Commission should support reauthorization. So that's just my opinion. I know we all have a different opinion.

CHAIRMAN REYNOLDS: Thank you.

COMMISSIONER BRACERAS: Just to be clear and set the record straight, Commissioner Melendez said we should all support reauthorization of the
Voting Rights Act. I don't think there's a single person in this room who doesn't support the Voting Rights Act. The issue is the specific temporary provisions that were emergency provisions and intended to be temporary, which are up for reauthorization. The entire act is not up for reauthorization; something that may be obvious to everyone in this room, but something that is not obvious to the general public, indeed it's become a bit of an urban legend that the entire act is up for reauthorization, and that certain people want to take away the right to vote in certain communities, which is obviously not the case.

So just so the record is clear, we're talking here about the temporary emergency provisions of the Voting Rights Act, and not the act as a whole.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

VICE CHAIRMAN THERNSTROM: I think it's important to say, Commissioner Melendez, that this -- and Commissioner Yaki, to both of you, this shouldn't be our last word on the Voting Rights Act. You know, I think obviously budgetary and other constraints did force us to narrow the scope of the report perhaps, but this is an ongoing issue. And I hope we will take the occasion in the future to revisit some of the
questions that you raised.

CHAIRMAN REYNOLDS: Commissioner Yaki.

COMMISSIONER YAKI: Yes, let me just, I just want to say in response to what has been laid on the table, yes, I think that certainly the House and Republican leadership yesterday knew that they were talking about the temporary provisions of the Voting Rights Act. But I think to say that the fact that they were temporary indicates perhaps people foresaw there may not be a need for them anymore, I think is correct, in part. But I think incorrect in that the nature of the wrong sought to be remedied, and that is the ability of local governments to change the way polling places are located, to engage in voter intimidation or harassment in terms of registration or poll checking, in terms of how legislative districts are drawn by government, can't be seen in a vacuum.

I think as Commissioner Melendez accurately pointed out, and as I point out in my dissent, there is -- one would wish there is a vacuum called racism in this country. But it is not. It exists, it is prominent, it is prevalent. We saw it with I think in the response to Katrina. We've seen it in the news reports everyday of horrible crimes still being committed in parts of this country based
on what someone looks like or where they think that they come from.

And as much as one would like to think that the people in government have none of those traits, the fact is that everyone is human and the continued usage of Section 2 throughout this country to change one of the permanent provisions of the Act. But the mere fact that it is still out there and being used to attack voting systems and schemes, cannot but lead to the conclusion that those types of behaviors is still out there and Section 5 provides an easier remedy, one with the full force of the United States Government behind it, in order to capture, prevent, and discourage these types of schemes.

Finally, the one point that I think cannot be stressed enough is the deterrent impact of Section 5. Section 5 for whatever good it has done, it has done lots of good over the years, has done one thing I think no one can dispute. That is it is like the proverbial stop sign at the intersection. It has prevented people from going through and crossing the boundaries and I think that its continued presence as a stop sign is something that cannot be underestimated and was not addressed in the report.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?
VICE CHAIRMAN THERNSTROM: Well, the special provisions to the Voting Rights Act were not only temporary. They were, as Commissioner Braceras said, they were emergency provisions. They were only upheld by the U.S. Supreme Court as such. Unless you want to argue there's a permanent emergency in this country, I think that they're not so easy to justify more than 40 years later. And there are indeed serious constitutional questions about whether today, again, more than 40 years later, there is an emergency that justifies them.

There's serious questions about whether there is congruity and proportionality between wrong and remedy as *Flores v. Boerne* demands and serious questions of whether the extension of these special provisions, of these emergency provisions which will undoubtedly be passed by Congress, will survive constitutional scrutiny. An excellent scholar, Professor at NYU Law School who has been, as it were, on the political left throughout the history of the enforcement of the Voting Rights Act, Samuel Issacharoff, has written a very good article in the *Columbia Law Review* saying hey folks, this cannot survive constitutional scrutiny.

So I think that that is a question that
can't simply be brushed under the table, as it were.

Now the number of suits that have been won under Section 2, I don't want to debate this act endlessly, but I mean that says something not about disfranchisement in this country today, it seems to me. It says something about the legal standards under Section 2 which in my view are a total distortion of what that amendment, permanent amendment to the act was supposed to be all about in 1982. And as to the deterrent impact of Section 5, no, I would not describe it as a -- the provision as a stop sign. I would describe it as equivalent to a curfew after a riot. The riot is over, the curfew should end. But I don't think we should endlessly debate this, the substance of this issue, which we do very well in -- which you contribute to in an important way in your dissent.

CHAIRMAN REYNOLDS: Okay, I'll just make a quick comment. I agree with Commissioner Yaki that racism exists. As far as I'm concerned it will always exist, but that is the not the factual predicate that resulted in the passage of the Voting Rights Act. What was in place was a racial cast system, mostly in the South. The Supreme Court has described the deviation from the historical allocation of power
between the Federal Government and the States, at least in this regard, as extraordinary. The facts that were in place at the time were extraordinary and the question is do we have a sufficient factual predicate in the 21st Century that would justify the continuation of the Federal Government's enhanced role. I believe that the report does a good job of discussing facts and proxies for levels of disenfranchisement.

Now after having said that, I'll ask any other discussion?

Okay. At this point, we have a second, I believe?

VICE CHAIRMAN THERNSTROM: Yes, we do.

CHAIRMAN REYNOLDS: Okay, good. All in favor say aye.

(Ayes.)

CHAIRMAN REYNOLDS: All in opposition? Please let the record reflect that Commissioners Yaki and Melendez voted in opposition and that the remaining Commissioners voted in support of the motion.

The next matter on the agenda is a motion to approve publication of the Native Hawaiian Government Reorganization Act Briefing Report dealing
with Senate Bill 147.

V. Program Planning: Report from the Briefing on the Native Hawaiian Government

According to information we have heard, the Senate is likely to take up the proposed Native Hawaiian Government Reorganization Act no later than the third week of May 2006. As with all civil rights issues, it's important that the voice of the Commission be heard.

In addition, unfortunately, a draft of the Commission's Native Hawaiian Report has been leaked to the press and the press is now mischaracterizing what is in the report. For this reason, it is important that the Commission approve the report and issue it as soon as possible.

While the Commission would normally wait for concurring and dissenting statements to be prepared, in this instance, because of the regrettable lapse, the whole document should be made immediately available to the public. Also the public can see what it says.

Accordingly, I move that the report be immediately released in its present form and to formally print it through the Government Printing Office with any concurring or dissenting opinions
received within two weeks.

VICE CHAIRMAN THERNSTROM: I second the motion.

CHAIRMAN REYNOLDS: I'm sorry, brain freeze. Commissioner Braceras?

COMMISSIONER BRACERAS: I'd like to make a motion to make a few small nitpicky edits.

CHAIRMAN REYNOLDS: Okay. Let me catch up to you.

COMMISSIONER BRACERAS: And they're basically nonsubstantive, so it shouldn't change the nature of our discussion afterwards.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER BRACERAS: On page 12, in the second full paragraph, the one that begins "Commissioner Braceras" -- about midway through that paragraph, there's a sentence that begins "Several Commissioners asked whether self-governance could be extended to Puerto Ricans, lack of familiarity with the Puerto Rican situation prevents solid answers, but the question was raised about whether other groups of people can make similar arguments for obtaining rights through self-governance programs."

I would just like to delete the first part of that sentence, primarily because I believe I was
the one who raised the issue.

CHAIRMAN REYNOLDS: You were.

COMMISSIONER BRACERAS: And it was really just a hypothetical and a sort of a musing and I don't think it is particularly relevant to the report itself.

What I would propose is deleting everything through -- well, I would leave "Several Commissioners asked whether" and then I would delete everything from "self-governance" down to the next time it says the word "whether" so that the sentence would now read "Several Commissioners asked whether other groups of people could make similar arguments for obtaining rights through self-governance programs period" without reference to the Puerto Rican situation, particularly because I believe we're going to be having a briefing specific to the Puerto Rican question at another time, so I'd like to delete that.

CHAIRMAN REYNOLDS: Okay, so let me see if I got this right, so it would read "Several Commissioners asked whether other groups of people" -- is that where I jump down?

VICE CHAIRMAN THERNSTROM: Yes.

COMMISSIONER BRACERAS: Correct.

CHAIRMAN REYNOLDS: Okay.
COMMISSIONER BRACERAS: And then in the findings section, page 16, finding 2, the last sentence. I'd just like to recommend changing "in violation" to say "to violate" -- "may be found to violate the fifth and fourteenth amendments" instead of "in violation of".

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER BRACERAS: Finding number 4. "Although the Supreme Court has upheld the equal protection challenges against legislation, I would say "equal protection challenges to legislation." So replace the word "against" with the word "to".

And the final edit, also in finding number 4, in the sentence that begins "accordingly" -- it currently reads "Accordingly, allotting benefits on the basis of race in the situation where a Native Hawaiian entity had not satisfied" etcetera, etcetera, etcetera. I would delete the three words "in the situation" and I would change "had" to "has" so that it reads: "Accordingly, allotting benefits on the basis of race where a Native Hawaiian entity has not satisfied" -- yadda, yadda, yadda.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER BRACERAS: So I move that those changes be incorporated into the text.
VICE CHAIRMAN THERNSTROM: Do you see a second on that?

CHAIRMAN REYNOLDS: Is there a second?

VICE CHAIRMAN THERNSTROM: Yes.

CHAIRMAN REYNOLDS: And let's vote. All in favor of Commission Braceras' amendments, please say aye.

(Ayes.)

CHAIRMAN REYNOLDS: Those in opposition, please say no.

Let the record reflect that Commissioner Melendez objected to the proposed -- to the motion.

COMMISSIONER YAKI: And Yaki.

COMMISSIONER BRACERAS: And why?

COMMISSIONER MELENDEZ: I think it's not to that motion. I think in the general discussion, I would probably object to a lot of --

VICE CHAIRMAN THERNSTROM: Wait a minute. There's only -- there's a specific motion with a little bit of nitpicking about language here.

COMMISSIONER MELENDEZ: It's not that so much.

VICE CHAIRMAN THERNSTROM: But I mean --

COMMISSIONER BRACERAS: That's what we're
voting on.

VICE CHAIRMAN THERNSTROM: That's what we're voting on.

CHAIRMAN REYNOLDS: We're not voting on the substantive motion at this point.

VICE CHAIRMAN THERNSTROM: We're just voting on this nitpicking stylistic.

COMMISSIONER MELENDEZ: I won't vote against it.

CHAIRMAN REYNOLDS: Please let the record reflect that Commissioners Yaki and Melendez abstain and the remaining Commissioners voted to approve Commissioner Braceras' motion.

Okay, Commissioner Taylor?

COMMISSIONER TAYLOR: A question which could lead to a possible motion. Our recommendation on page 18, I always wonder when we're discussing these issues whether including sort of as a standard phrase "in its current form" after Native Hawaiian Government Reorganization Act of 2005 in its current form, because I know that there are a number of amendments floating around.

VICE CHAIRMAN THERNSTROM: Right, yes.

COMMISSIONER TAYLOR: And our views could change, depending on the amendments that are
ultimately adopted, so I wonder whether including that phrase would be helpful.

CHAIRMAN REYNOLDS: There's a motion, is there a second?

COMMISSIONER TAYLOR: Is this a discussion, I say that because this may have been a discussion you all have had in the past.

VICE CHAIRMAN THERNSTROM: No, no, no, no. We haven't and I think it's a very good idea and I second it. Make it a motion and I second it.

CHAIRMAN REYNOLDS: Okay, all in favor, please say aye.

(Ayes.)

COMMISSIONER YAKI: Parliamentary question. What do we mean by "current form"?

VICE CHAIRMAN THERNSTROM: Just what exists today on the table.

COMMISSIONER YAKI: Well, from what I understand there is a version that exists that was passed out of Committee and then there is a substitute amendment that has been introduced, but I don't know the status of that yet.

So what is it that we're talking about?

COMMISSIONER TAYLOR: My recommendation would then be to be specific. I think that's helpful,
that we include a phrase to indicate that we are talking about the version of the document or the act that was circulated when we had our discussion in briefing.

COMMISSIONER BRACERAS: And cites to it by bill number.

COMMISSIONER TAYLOR: Yes, so we all know what we are talking about. So when folks pick up this record in 10 years, they know exactly what we meant.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Point of information.

There were two versions circulated. There was the version that was in our packets and the version that was circulated by the staff person for Senator Akaka.

CHAIRMAN REYNOLDS: Okay, well.

COMMISSIONER YAKI: And that actually goes to what I believe is one of the fundamental problems with this. I'm going to speak on this as regard to, with regard to this motion. Because I am uncertain as to what version some of these recommendations go to, these findings go to, I think that there are serious issues with the findings themselves in terms of whether they would have any relevance at all to which version or what. There are other deeper problems to discuss, but I just think as to this particular
motion, I'm not sure. I'm still puzzled as to what the staff, which version the staff was looking at when they were preparing their analysis of the legislation contained in the findings of this report.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

VICE CHAIRMAN THERNSTROM: Would it be a disaster to simply amend this to read "The Commission recommends against passage of any legislation that would discriminate on the basis of race or national origin". In other words, take out the reference to the actual act itself. Is that, are we losing a lot by doing that? Or gaining something by it? We're obviously gaining something.

CHAIRMAN REYNOLDS: But that's the only change. I think it's clear that we're talking about -- I mean, it's clear which piece of legislation that we're talking about, at least in general. And I don't think we lose much by striking it out in this section.

COMMISSIONER BRACERAS: I like the Vice Chair's recommendation, but I think I would strike even more language because obviously we're all against legislation that discriminates on the basis of race or national origin. The question is do we think that this legislation does that? So I might say "The
Commission recommends against any legislation that would subdivide the American people into discrete subgroups, accorded varying degrees of privilege". And maybe there needs to be something else thrown in there to clarify, but --

VICE CHAIRMAN THERNSTROM:  Wait.

Something has to go before subgroups and accorded. Well, okay. It doesn't have to be -- "subgroups that are"?

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: I agree with the Vice Chair's motion and the spirit of the motion. I think, however, for purposes of our discussion on the substantive issues, it may be helpful if we identify the legislation we're focusing on for purposes of addressing any concerns raised by Commissioner. We're not going to be able to skirt the issue by identifying the document we're talking about, when we really get down to brass tacks.

VICE CHAIRMAN THERNSTROM: All right. What do we do about the fact that Commissioner Yaki has said that there are actually two -- Commissioner Yaki, would you repeat that again? There were two at the time? Two competing bills?

CHAIRMAN REYNOLDS: One of the, it's my
understanding that one of the witnesses circulated another version of the legislation.

VICE CHAIRMAN THERNSTROM: One of the witnesses.

COMMISSIONER YAKI: Yes.

VICE CHAIRMAN THERNSTROM: But that does not have the same standing as --

CHAIRMAN REYNOLDS: That's correct.

VICE CHAIRMAN THERNSTROM: All right. So it seems that we can ignore that.

COMMISSIONER YAKI: Yes, we could.

VICE CHAIRMAN THERNSTROM: How would you like it to read?

COMMISSIONER TAYLOR: Do we have a copy of what we're talking about?

CHAIRMAN REYNOLDS: I don't believe so. The bottom line is that the staff director distributed copies of a version of the legislation and we can confirm, we can confirm that that is the document that we worked off of.

COMMISSIONER TAYLOR: I'm happy with that as long as identify it.

STAFF DIRECTOR MARCUS: If I may. The witness to whom the Vice Chair referred distributed a copy of the substitution amendment. That was the
current version as of the date of the Commission meetings. As far as we know, it's the current one now. This document is based on that version of the bill.

However, to the best of my knowledge, what it said about that version also applies to the earlier version. The substance applies to both. So I don't know that there is any difference. I'm not aware of any version of the bill for which the proposed findings and recommendations don't apply.

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: So just to be clear, we want to reference the bill that's been passed at a Committee? And that's the bill that we're going to reference here and that's the bill that these findings were made in reference to. So does everything in here actually apply to that particular version?

STAFF DIRECTOR MARCUS: Yes it does, Commissioner Braceras.

COMMISSIONER BRACERAS: Just want to make sure. Okay.

CHAIRMAN REYNOLDS: Any other questions or comments?

VICE CHAIRMAN THERNSTROM: I'm lost as to
where we are.

CHAIRMAN REYNOLDS: Okay, we had a vote on Commissioner Braceras' motion to amend the edits that we voted on. And at this point, we'll have a -- bear with me. Okay, I move that the report in its present form go to the Government Printing Office with any occurring or dissenting opinions received within two weeks and that --

VICE CHAIRMAN THERNSTROM: I'm lost as to the final resolution of our language on the recommendation.

CHAIRMAN REYNOLDS: All right. Did we make a decision on this issue?

COMMISSIONER KIRSANOW: What’s the bill number?

COMMISSIONER BRACERAS: We need the bill number.

STAFF DIRECTOR MARCUS: I believe S147.

COMMISSIONER KIRSANOW: Why don't we just interject that and be done with it?

COMMISSIONER BRACERAS: "The Commission recommends against passage of S147 or any other legislation that would further subdivide the American people into discrete subgroups, accorded varying degrees of privilege."
COMMISSIONER YAKI: I've really got to object again on purely point of information grounds. We had two versions of S147 that were circulated. There was the version that came out of committee and there was the version that is in the nature of the substitute that was the product in negotiation between Justice, the White House, and Senator Akaka's office.

CHAIRMAN REYNOLDS: And that was the document that was introduced at the briefing. Is that correct?

COMMISSIONER YAKI: Right. But we are talking, what you were talking about is the version of S147 as it came out of committee.

CHAIRMAN REYNOLDS: I don't believe that's true. I believe that the Staff Director indicated that the document that we worked off, the document --

COMMISSIONER YAKI: That's not the document we had in our packets. The document that we had in our packets was the one that came out of committee. If that's the document that this analysis is based upon, I want to identify that specifically because we cannot just be saying, making analysis of legislation that, of which there is version one and version two, and say that we're applying it only to version one. Because if we didn't study version two,
how can we possibly make the conclusions that we intend to stand by?

We looked at the version that came out of committee. That is the one that was in our packets. That is the one I heard the Staff Director to say was in our packets. If that is the version, I want -- we should specifically refer to that. Otherwise, we will look like fools in case there is a substitute, or as Commissioner Taylor said, when he was attempting to do this by saying current form, we do not want to be making blanket statements on legislation that could be substantially different from -- but could carry the same bill number.

CHAIRMAN REYNOLDS: Commissioner Yaki, are you aware of any substantive differences that would offend, that would impact this report? Differences between the, what came out of committee versus the document that was distributed?

COMMISSIONER YAKI: As a matter of fact, there are a number of differences. The differences go towards treatments of sovereign immunity. It goes towards the extension of federal law including civil rights laws to provisions, to the Native Hawaiian Commission that would be set up. Especially with regard to the sovereign immunity issues, which go
directly to the core of some of the criticisms that
were made by the report, I think we should be very,
very careful.

That, in fact, is the basis of much of
what I want to talk about, and that is there is a
fundamental lack of how should I call it, real
targeting of these critiques with regard to what it is
what we're really talking about.

I certainly am looking more at the Akaka
substitute, which was the product of discussions with
the White House and with DOJ, with Interior, as
something that is going to be probably one of the
vehicles that is going to be discussed by the Senate.

That legislation has in it different provisions
concerning some of the critical issues of sovereign
immunity, the nature of the coverage of existing
federal law, etcetera, that these findings seem to
find shortcomings in.

And if it is based on the legislation that
existed out there as it came out of the McCain
Committee, I think we're talking apples and oranges.

COMMISSIONER KIRSANOW: What is the risk
of identifying the marker for what we considered in
this report? This is not rocket science. Bill number
plus when it was discharged from committee, the date
it was discharged from committee. This is not rocket science. We should be able to put six words in here to identify that.

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: But I think Commissioner Yaki raises a larger problem because even if we clarify that we're referring to the bill that came out of committee, if that's not what the Congress is focusing on right now then some, not all, but some of our findings are irrelevant. So it may be that we need to revise them.

CHAIRMAN REYNOLDS: At this point, I don't think that anyone has pointed out any provisions, any sections in the document and demonstrated, at least to my satisfaction, that we've gotten the facts wrong.

COMMISSIONER BRACERAS: Well, for example in finding number 7. Is it number 7? Wait a minute. No, I'm sorry. There is somewhere, and I'd have to look at it more carefully at the portion of this document that refers to the sovereign immunity question and those other questions that may not be actually in the findings. That may be in the testimony.

CHAIRMAN REYNOLDS: I mean, one of the core issues is a constitutional issue, whether Native
Hawaiians should be treated in a constitutional sense in the same way that American Indians are treated. That issue isn't impacted in terms of the public policy implications of this document, whether we should have a situation where you would have different classes of citizenship in the State of Hawaii. I don't believe that that issue is affected in any way by the subsequent version.

COMMISSIONER BRACERAS: You're correct. My only point is to say that it might be worth giving this another once over with an eye towards making sure that the precise findings we have here are relevant to both versions of the legislation. And maybe it is. I just would like to reconsider that.

CHAIRMAN REYNOLDS: Okay, Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I think Commissioner Braceras makes a good point, but I would object to it because I don't think that we should be revising the report based on the version of the bill that we did not consider nor adduced evidence on.

COMMISSIONER BRACERAS: I don't think. That's not what I'm suggesting, just to be clear. I'm suggesting that we take 10 minutes to re-read the findings and make sure that they are general enough to
be statements of policy and of theory that aren't necessarily specific to a bill that may no longer be the most relevant version. That's all.

CHAIRMAN REYNOLDS: Commissioner Thernstrom?

VICE CHAIRMAN THERNSTROM: I was about to say something very similar. You've got a fluid legislative picture here and all we have to do here, it seems to me is to make sure that as we have stated these findings, they can apply to whatever is likely to emerge because after all, you're not going to have a huge deviation of what we've looked at.

COMMISSIONER BRACERAS: Right.

CHAIRMAN REYNOLDS: I agree.

COMMISSIONER BRACERAS: I just want to --

CHAIRMAN REYNOLDS: I'm sorry, Commissioner Braceras?

COMMISSIONER BRACERAS: I just want to take 10 minutes to re-read it, that's all.

COMMISSIONER KIRSANOW: Point of parliamentary. Are we considering the amendment or is this the discussion?

CHAIRMAN REYNOLDS: Right now, this is the second, if I remember correctly, friendly amendment. Jennifer first and then Ashley proposed a change to
the recommendation on page 18. And we are discussing --

VICE CHAIRMAN THERNSTROM: I think I seconded it. I'm not sure. But in any case, that's what's on the table.

CHAIRMAN REYNOLDS: So does anyone -- would anyone like to put something on the table in terms of the course of action?

VICE CHAIRMAN THERNSTROM: Yes, I would like a few minutes to stare at the findings. And are we getting a copy?

STAFF DIRECTOR MARCUS: We're getting a copy, yes.

VICE CHAIRMAN THERNSTROM: We're getting a copy of the bill.

COMMISSIONER TAYLOR: The formal motion would simply be that we identify the version of the bill that was the subject of the hearing and the subject of our discussion and we identified in the recommendation section.

VICE CHAIRMAN THERNSTROM: But one would hope that our findings, the bill changes, that our findings are still appropriate.

COMMISSIONER TAYLOR: Right.

VICE CHAIRMAN THERNSTROM: And that's the
point of this staring for a minute, getting a copy of
the bill and staring for a minute at these findings.

CHAIRMAN REYNOLDS: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: In spite if we
take that procedure, I will tell you right off the bat
if we utilize that procedure I will vote against the
report without any question.

VICE CHAIRMAN THERNSTROM: Why?

COMMISSIONER KIRSANOW: We have spent and
staff has spent and has done a commendable job
incorporating all the testimony that accurately
reflects the written statements and testimony,
incorporated into this thing and then tried to analyze
the facts and put into findings and recommendations
and then in a minute we're going to take a look at
substitute legislation and possibly amend this? I
would vote against that in a heartbeat. There's no
way that would get my vote.

VICE CHAIRMAN THERNSTROM: Nobody is
suggesting that.

CHAIRMAN REYNOLDS: Well, okay, from my
vantage point the core issues that were discussed at
the briefing, they're not affected should we do this.
Should we have multiple levels of citizenship? Should
the Government distribute benefits and burdens on the
basis of race? And does Congress have the authority
to create a tribe? The core issues that we discussed
are not affected by the subsequent legislation.

COMMISSIONER YAKI: Mr. Chairman, forgive
me, but I think under current law the answer to all
your questions is yes. When you consider what the
United States Government has done with regards to
Native American tribes and Alaska Natives who are not
tribes --

CHAIRMAN REYNOLDS: You're debating the
merits now. I was making a smaller point. And that
point being that the subsequent legislation does not
affect this document because the core issues that were
discussed, they're not in any way affected by the
subsequent legislation.

Now we will discuss these issues on the
merits eventually, but at this point I propose that we
take a 10-minute break.

COMMISSIONER TAYLOR: Let me try to
clarify something. I was not suggesting that we refer
to a document in this recommendation section and then
get a different document and review it quickly and
look at our findings.

I was suggesting quite the opposite, that
is, we pick a target --
COMMISSIONER KIRSANOW: I agree with that.

COMMISSIONER TAYLOR: Okay.

COMMISSIONER YAKI: That's all I'm asking.

CHAIRMAN REYNOLDS: Let's take a 10-minute break. We can think about this during the break and so let's reconvene in 10 minutes.

(Off the record.)

CHAIRMAN REYNOLDS: Okay, let's get started. At this point, I'd like to ask the Staff Director, in those long 10 minutes, was he able to get any information that would add any light to which version of the document was used in putting together the report?

STAFF DIRECTOR MARCUS: Yes, Mr. Chairman.

The primary basis for the report was the version of the legislation from the Committee on Indian Affairs reported by Senator McCain with an amendment in the nature of a substitute on May 16, 2005.

CHAIRMAN REYNOLDS: Okay, Commissioner Yaki, does that answer your question what was the version that was -- what version --

COMMISSIONER YAKI: Yes. I'd just like to see that reflected in the finding, in the recommendation.

CHAIRMAN REYNOLDS: Okay.
VICE CHAIRMAN THERNSTROM: Well, we can just insert that.

CHAIRMAN REYNOLDS: And Commissioner Taylor, you're comfortable with that?

COMMISSIONER TAYLOR: That would be the substance of my motion.

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: All right, a little progress. Okay, so --

VICE CHAIRMAN THERNSTROM: Wait a minute, we've got a motion that's been seconded. Let's get a vote on it. This is changing the language of the recommendation.

COMMISSIONER KIRSANOW: I seconded.

CHAIRMAN REYNOLDS: That's right. Okay, so how would it read?

Let's get the language nailed down.

COMMISSIONER YAKI: As reported out of committee on May 16, 2005.

CHAIRMAN REYNOLDS: Okay. All right, all in favor?

(Ayes.)

COMMISSIONER YAKI: I'm abstaining.

CHAIRMAN REYNOLDS: Why am I not surprised.
COMMISSIONER YAKI: I can abstain.

CHAIRMAN REYNOLDS: I know you can.

COMMISSIONER BRACERAS: He doesn't want to lend credibility to the overall report.

CHAIRMAN REYNOLDS: Okay, we have one abstention.

Commissioner Melendez?

Okay, let the record reflect --

(Laughter.)

Let the record reflect --

COMMISSIONER YAKI: In that case I will join and make it unanimous.

CHAIRMAN REYNOLDS: Okay, so the motion passes unanimously.

VICE CHAIRMAN THERNSTROM: Now you can have a fit about the rest of it.

CHAIRMAN REYNOLDS: Absolutely. Now the fun part.

Okay, I have read this twice.

COMMISSIONER TAYLOR: Are copies circulated?

CHAIRMAN REYNOLDS: What are you referring to?

COMMISSIONER TAYLOR: The bill as reported out of committee on --
VICE CHAIRMAN THERNSTROM: We don't need the bill any more.

COMMISSIONER TAYLOR: Okay, all right.

CHAIRMAN REYNOLDS: Okay, I'm going to read the motion into the record once again. I move to issue the Report on Native Hawaiians immediately in its present form and to formally print it through the Government Printing Office with any concurring or dissenting opinions received within two weeks.

Is there a second?

VICE CHAIRMAN THERNSTROM: I second it.

CHAIRMAN REYNOLDS: Discussion. Yes, Commissioner Yaki?

COMMISSIONER YAKI: What?

(Laughter.)

COMMISSIONER YAKI: I haven't raised my hand yet.

CHAIRMAN REYNOLDS: I have a feeling,

COMMISSIONER YAKI: I'm deferring first to Commissioner Melendez.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER MELENDEZ: The motion again, could you just restate that? You're saying we have two weeks and for some reason this gets tabled, two weeks from the new date?
VICE CHAIRMAN THERNSTROM: No.

CHAIRMAN REYNOLDS: No, we're now debating the main motion.

COMMISSIONER BRACERAS: The merits.

CHAIRMAN REYNOLDS: The merits.

COMMISSIONER BRACERAS: We're debating the merits.

VICE CHAIRMAN THERNSTROM: The merits, but you have two weeks to write a dissent.

COMMISSIONER YAKI: I'll go first.

CHAIRMAN REYNOLDS: But the report will go out immediately.

COMMISSIONER MELENDEZ: I'll go ahead.

COMMISSIONER YAKI: Wait, the report would go out without the dissents?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: No, no, no, no, no, no. Wait, wait, wait -- when have we done that? That is wrong.

CHAIRMAN REYNOLDS: What was wrong was the initial leak of the document. The document now, at least one newspaper has it. The document is being discussed in the public. There will be subsequent articles written about our report, based on not the report itself, but on the original news article and I
think that since it's already out the door, we need to
get this in the hands of the public so that they can
look at the document itself as opposed to relying,
just recycling the original article.

   I concede that this is a deviation from
what we normally do. It is my strong preference that
packets, that briefing reports go out in total, but in
this case, we have a story that is out there and folks
are citing to the -- at least the comments, the
characterizations of the report that was contained in
the original news story that --

   COMMISSIONER YAKI: Let me just ask a
procedural question on this, because this has puzzled
-- this is now really starting to puzzle me. If, for
example, today we voted on the Voting Rights Act
report, in that report substantial portions of that
report, well, not substantial, but portions of that
report were read aloud and into the record, presumably
for the entire public to hear and see. They could
tell what the debate was about. One could ascertain
from talking with us afterwards what it was about.
And yet, the report isn't out. So what is the
difference?

   CHAIRMAN REYNOLDS: The difference is that

   --
COMMISSIONER YAKI: We're talking about you --

CHAIRMAN REYNOLDS: What we say here is that this is for public consumption, a confidential document was released to a newspaper. I think that there is a difference. We presume that anything said at these meetings can be used in the press, as opposed to our confidential reports.

COMMISSIONER YAKI: I think we need some clarification of this from the Counsel on this, because I thought that once this report -- for example, when we were discussing a report on whatever, on Adarand or something like that and we're discussing it during that meeting, and what you are telling me is that if a reporter comes up to me that day and says can I see the section of the report that talks of those findings, it is still at that point confidential?

CHAIRMAN REYNOLDS: Well, I'm surprised at your question. Our documents that are circulated amongst the Commissioner and staff, those documents are confidential until they are released to the public, until there is a vote. We haven't voted on the document yet. The presumption is that the documents will not be distributed to third parties.
COMMISSIONER YAKI: I just come from a different world in terms of the Public Records Act, I presume, the Public Records Act in California, the Brown Act, the Sunshine Act involved at the local sector. To me --

CHAIRMAN REYNOLDS: Even drafts are exempt.

COMMISSIONER YAKI: No, I understand drafts are exempt.

CHAIRMAN REYNOLDS: That's all we have.

COMMISSIONER YAKI: When we vote upon a final, we're voting to make a report final. I guess I would like clarification. If we are voting to make this document final, that means that by the end of that meeting that document has become final with the amended changes. Why is it then still protected from being released the public?

CHAIRMAN REYNOLDS: It is not. The problem is that a vote has not occurred and the document has been circulated. I agree with the way you framed the issue. Once we have voted on the document, then the document is no longer a draft. It is a final document. It is subject to the Open Records Act. But that's not where we are now. A few days ago, the document was leaked. The document was...
discussed in a news article, and the document that was leaked is a draft.

COMMISSIONER YAKI: Well, the question I have still goes to however, whatever, how that document got out, whatever. The question still remains then does the result be that for those of us who have a contrary opinion of what is in this report have to then deal with the fact that this report gets sent out without our dissent simply because we feel we're being stampeded by one day of news when the fact is that with the Voting Rights Act today, which I would suggest has much more import to this Commission's perception amongst policymakers, amongst groups, amongst people on the Hill in that, and tell me if I'm not allowed to say what the recommendation of the report was. Am I?

VICE CHAIRMAN THERNSTROM: Yes.

COMMISSIONER YAKI: I'm looking at our counsel.

STAFF DIRECTOR MARCUS: Yes.

COMMISSIONER YAKI: Okay, that it had no recommendation as to whether the temporary extension, the temporary provision should be renewed or not, just simply questions that you go to it or not. That to me, from a policy perspective, is ten times more
important and if it stampedes out the door tomorrow without, and say we had followed the normal course and had dissents following two weeks or whatever later, I mean that's -- we wouldn't be saying well, we got to rush the whole thing out to publication and damn the dissents, would we? Or would we?

CHAIRMAN REYNOLDS: Are you saying that if the Voting Rights Act document report was leaked --

COMMISSIONER YAKI: No, I'm saying that if the Voting Rights Act, what we did today becomes like big news. I don't know if it will. Maybe no one cares. But if it became big news and you were concerned that people were distorting what it was that we did in the new cycle, today is Thursday, new cycle on Friday, and we were just getting hammered Friday, Saturday, Sunday, Monday. Would you then feel an obligation to put the report out without the dissents? I Just don't think that a day, two days, I don't know when this story came out. I know I got a call from the reporter and that's about it.

But all I know in terms of the timing of this, I just find it very odd that one day of news, two days of news, I have no idea how many days of news it is, causes us to completely rip apart the procedures that we had all agreed to early on in the
interest of comity and the interest of working
together, and when a similar situation involving say a
fire storm on another report that would be following
its normal course wouldn't have the same thing happen
to it.

CHAIRMAN REYNOLDS: I guess one
distinction is that in your scenarios, your other
scenarios do not involve a leak on a day or two before
we were supposed to vote on a document. My concern is
that basically reporters read other articles and
they're going to read that article and the manner in
which the document, the draft, was characterized will
be repeated. It will be repeated by other reporters
without the benefit of actually seeing what the
document says. They won't have an opportunity to
review the quoted language in the context in which it
occurred. So that's my concern.

COMMISSIONER YAKI: Okay, then let me just
say this. Maybe we're talking about two different
things here, Mr. Chairman. I have no problem with the
report as a text file being released for anyone who
wants to see it. I have a problem with the report as
a bound document of the Commission going out without
the dissents and concurring statements. In other
words, if a reporter calls up today and says "I'd like
to see it", send it out the door. I don't care.

CHAIRMAN REYNOLDS: So you don't have a problem --

COMMISSIONER YAKI: No, no. But I have a problem.

CHAIRMAN REYNOLDS: Let me make sure I understand you. So you don't have a problem if we have a vote on this and the document is released, but it is not sent to GPO, that we wait until we receive concurrences, dissents.

VICE CHAIRMAN THERNSTROM: Put it on the website.

COMMISSIONER YAKI: Because I think that's the practical -- but the practical impact of this is that on any major report that we do, if someone wants to find out after we have voted upon it during the day, to find out what it says, I think they have a right, I believe, to do it. I'm just saying I don't think there's any need to sort of panic about rushing this to production when you know, and let's be honest, the universe on this is with all due respect to all our friends from Hawaii here, rather small in terms --

CHAIRMAN REYNOLDS: I disagree.

COMMISSIONER YAKI: In terms of where this new cycle is headed.
CHAIRMAN REYNOLDS: I think the issue is extremely important. But I think, though, that we have a compromise. I didn't fully understand what your concern was. If I understand you correctly, you don't mind the document being released. What you do mind is the document being bound without concurrences and dissents.

COMMISSIONER YAKI: Let's put it this way. I don't mind the document being released with respect to reporters who have an interest in it. If this is going to be sent out to every Member of Congress, Senate, I would have a problem.

CHAIRMAN REYNOLDS: Okay. All right. Now after this discussion, I propose --

VICE CHAIRMAN THERNSTROM: Wait a moment. You've got Ashley wanting to say something.

CHAIRMAN REYNOLDS: Mr. Taylor?

VICE CHAIRMAN THERNSTROM: You've just been called up.

COMMISSIONER TAYLOR: My only thought is that we may want to defer this to discussion until after we actually discuss the substance and then folks may know whether they want to write a dissent or a concurrence?

CHAIRMAN REYNOLDS: Okay, although I have
a sneaking suspicion that Mr. Yaki has already started
working on his dissent.

    COMMISSIONER TAYLOR: Stranger things have
    happened. You never know.

    CHAIRMAN REYNOLDS: Okay. Vice Chair
    Thernstrom.

    VICE CHAIRMAN THERNSTROM: I think we do
    have a good compromise on this. I just wanted to say
    that Commissioner Yaki is right on the procedural
    point here, that leaks were business is usual under
    the previous chair and we never released a report
    prior --

    CHAIRMAN REYNOLDS: Well, there's a fix to
    leaks going back to the old way which was ridiculous.
    Commissioners did not receive drafts until it is
    published on the website.

    VICE CHAIRMAN THERNSTROM: Right. But I
    think he is right that it should not go out in bound,
    published form until the dissents or concurrences are
    included. I think it's a good compromise and I'm
    going to support it. I can't imagine a big discussion
    of the substance is going to change the basic picture.

    CHAIRMAN REYNOLDS: Why don't we take
    Commissioner Taylor up on his suggestion and have a
    discussion on the merits. I don't remember where we
are. Do we have a second? I read it into the motion actually about five times now. There was a second. Does anyone recall?

COMMISSIONER KIRSANOW: I remember I seconded something.

CHAIRMAN REYNOLDS: Okay, that's good enough.

COMMISSIONER YAKI: That was in 1984 though, wasn't it?

(Laughter.)

CHAIRMAN REYNOLDS: Commissioner Melendez was up.

COMMISSIONER MELENDEZ: Thank you, Mr. Chairman. I don't even know where to start. This is such a -- to a certain extent controversial and basically I think it's broader than just the issues of constitutionality and those things. I think you have to go back to a certain extent to the history of -- you know, I read a lot of the documents that were sent. This one here "From Mauka to Makai". I'm not sure if I pronounced that right, but I read a lot of the stuff.

You know, when I read it I thought these indigenous from Hawaii really went through similar things. I saw similar things to what happened to
Native Americans in the United States, you know. So I know the last time when we did have the testimony, I commented in the words of Grover Cleveland what he said was "a substantial wrong has thus been done which I do regard for our national character as well as the rights of the injured people require we should endeavor to repair."

And then I had a document that came from actually the Interior Department, I think it was this one here where they tried to work out some reconciliation to what had happened in 1883 with the overthrow of the Queen there at that time. And then I think the bigger picture is it seemed to me that the Federal Government was somehow trying to reconcile some of the things that had happened at that time and with the apology resolution, I believe in 1993 or so, the apology was under -- a few years back -- that they issued a resolution and that started a process of, I believe, even some of the U.S. Commission on Civil Rights going to Hawaii and taking testimony and other issues, addressing the wrongs that had been done to the indigenous people of the Hawaiian Islands.

So I kind of look at this as a bigger picture. I think we're talking about justice here also, even though we are part of the Federal
Government, whether we're on a Committee or whether Congress itself, you know, justice to me doesn't mean justifying a moral wrong committed against an indigenous people. I think the history of this country we have seen that happen. We've seen that happen when Grover Cleveland sent somebody, one of the former Congressman to find out what actually happened, whether or not it was actually legal or an act of war as to how they dethroned the Queen at that time.

Basically, what really happened, the report came back from Grover Cleveland's person that he sent there, that yes, a wrong had been committed and at that time he decided to right the wrong. Well, as we know, this country is famous for justifying the wrongs that it's done with the Foreign Affairs Committee at that time, I read that. And basically it sounded to me like the United States basically did their own reasoning through lawyers and attorneys, just like ourselves here with this Committee to justify some manner as to what you did wrongfully to that kingdom.

And the Native Americans, even today, we see the same things happening. And the problem is that the time they called it a Bayonet Constitution. And when I thought about it, it's a good thing that
the Pilgrims didn't come here. The first question we'd probably ask them was whether or not you're a provisional government, if that's your intention to set that up. And so I'm just saying when I read the history, I think what Grover Cleveland said about the credibility of the United States is still the question today. And I think I just ask the question, boy, if I was around in those times, I'd sure like to make a right, but here we sit today, basically and particularly in that same position, you know. It's not what would you do back in those times. I think you might be in that same situation today as we look at what do we do. Is it something we're trying to do to right a wrong?

Let's just -- the issue in a larger context -- but getting down to the report that actually came out of this Commission, I think that when I look at it, I see a lot of things that were kind of assumptions. And I think -- I just want to make some of those findings. I'm sure other people will talk about that.

There are some things in this report, I believe that were not really true statements. And one of the problems we have, a lot of the references have to do with Indian law because for some reason we're
trying to some way look at Indian law as far as ways
tribes are recognized and all those different things.
And some of our -- and the comments we have made from
our basically, our legal people here in the
Commission, basically it just seems that maybe there's
a lack of understanding of federal law as to how it's
applied to Native American Indian tribes, because I
look in the statements.

Let me give you an example of some of
those. In number 2 finding, let's just take that one.
The Office of Hawaiian Affairs currently administers a
racial preference. I don't know if that's actually a
fact or somebody's idea. I'd like to strike racial at
least and just say maybe it's a preference system
there

There's other things that have been said
by our people who put this report together that a
tribe had to have existed continuously and we know as
Native American tribes that that hasn't happened at
least for Native American tribes. We've been
terminated and came back to life, I guess. The
problem is we were always there. We might have been
in jail like the Queen, but the issue is you're
basically suppressed, so you can't really pull
Robert's Rules of Order meetings, if that's what
everybody is looking for to say that you are a continuous government. I guess the question would be are you still alive, would be whether or not you really existed as a tribal government.

The other issue, when we look to the final document, I see that the Commission sometimes takes no position and sometimes they decide to support something or not support something. I think this is such a controversial issue and I think maybe my colleague, Michael, might go under some of the other issues as far as nine findings and we'll probably talk a little bit about them.

But I think that because this issue is so controversial and people are kind of looking at it and I saw the publication that came from the SAC out in Hawaii, you know. I think our credibility to a certain extent is on the line here. And I would think that just to have -- the people in the United States look at us to be somewhat fair and I would think that at the very least we would take no position and send the report on to Congress, let them determine all these different things. Otherwise, I think that in my opinion, I don't think this report is ready to go out. I think we have to still go through and -- in fact, I'd like to strike Section 5, finding 5 completely.
Because the reason for that --

CHAIRMAN REYNOLDS: I'm sorry, which page are you on?

COMMISSIONER MELENDEZ: Seventeen. That one basically had -- and the issue isn't even relevant to the briefing as to testimony.

And a lot of assumptions are made that whether or not Hawaiians or whether or not that entity would have to come under the process for recognizing tribes, you know. That's not really as it's depicted. I think Congress has the authority -- there's many ways that they can grant federal recognition. They can do it by Executive Order. They can actually do it through a court system. But to assume through many times through these findings that this Hawaiian entity, if it were established, would have to come through the congressional -- I guess the way they're recognized, that it's the only process. I know that one time that only applied to the tribes within the United States, but it's not to say that Congress couldn't basically establish them as a tribe.

So the only point I'm making, I see a lot of areas within this at least tied to the federal recognition process that I don't even think maybe it should even be in here at some point.
Throughout the findings, there are statements that are premises upon the proposition that the federal acknowledgement criteria applied to Native Hawaiians and I don't think that's totally true. So I just see a lot of issues.

There's a statement in here in Finding 1. It says "In Finding 1, in like manner, the act would give the governing entity the ability to treat non-Native Hawaiians differently than Native Hawaiians is belied by the fact that the provisions of the U.S. Constitution would apply to the Native Hawaiian governing entity, including the Constitution, guarantees that all citizens shall be afforded equal protection." I mean that's the bottom line, but sometimes the report seems to be biased in a way that Native Hawaiians, if they were to come under the same status of Indian tribes that they for some reason wouldn't have the same protections of -- under the -- that's under the Constitution, equal protection and civil rights and all those different things.

But those type things are in here and a lot of times we're asking well, it just seems like opinionated or biased by whoever is writing this report. That's part of the problem that I have because this report is going to be scrutinized by a
lot of people and I think if we're going to put out a report like this, it better be accurate and we better confer with the people who do know Indian law and we better find out are we saying things that are actually true. So that's kind of what I see. That's all I wanted to say for right now.

I'll let Michael talk about it.

CHAIRMAN REYNOLDS: Ready?

COMMISSIONER YAKI: I think one of the largest deficiencies in this report is what Commissioner Melendez pointed out and that is the absence of any real grounding in and understanding of Indian or aboriginal law and constitutional law in the United States.

When you look, for example, at the Alaskan Natives who do not -- many do not follow any sort of set tribal patterns. They don't fit the classic definition of a tribe. Yet, they are completely granted the same protections as Native American tribes on the continental U.S.

You understand that Congress has and continues to reserve its plenary authority to determine recognition and sovereignty issues for the indigenous peoples of this -- of what became the United States.
One of the most important things I think to understand about that is I think findings 5 and 6, especially are completely inapplicable to this discussion. The idea that as Commissioner Melendez says that the federal acknowledgement process should be any part in evaluating the claims of Native Hawaiians is, I think, completely (a) misplaced; and (b) why are we relying on federal regs to determine what is essentially a constitutional issue?

I can name a dozen tribes. I'll just start with one, two, the Menominee and the Lytton Tribes. The Menominee Tribe was a tribe that had its recognition established, re-established after it had been disbanded in the 1940s. The Lytton Tribe had land given to it and given a historical character to it that did not exist at the time in order for it to evade the regulations within the Department of the Interior.

The fact, the idea that DOI and regulations should be at all applicable in the analysis of the Native Hawaiians is completely misplaced and I think lends substantially to a lack of credibility for this report.

Now, we can talk about this ad nauseam. The fact that Rice v. Cayetano has some biblical magic
in this is erroneous. It was a fifteenth amendment case dealing with state action. Again, Congress has the ability and in response to one of the first things that the Chairman said, under the theory espoused by the Chairman, we should not be -- Congress should not be in the business of recognizing any additional Native American tribes because we are "deciding to recognize people" in terms of discrete subgroups further subdividing this nation.

There are a number of Native American peoples in the continental United States who are still seeking recognition for wrongs done to them one hundred years ago. Maybe we should be adding to the statement oh by the way, we also believe that these regs that DOI have are basically unconstitutional because they lead to the perpetuation of and subdivision of Americans into discrete subgroups. That's certainly not, I don't think, what the Chairman means to say. And I don't understand in all fairness to peoples who may have been the first discoverers of the America -- of the western side of North and South America, depending on the archeological evidence that's out there, when you -- people who had extraordinary navigational abilities, far beyond that of Western Europe at a time when they're sailing
across not just little ponds but two, three thousand miles of open ocean. We settled on these islands, whose islands were basically, for lack of a better word, wrecked by the contact with white civilization and then whose government was essentially stolen by the United States in 1893, an act, by the way, which Congress in its authority, in its role, voted overwhelmingly to support an apology for that action.

I mean, excuse me, but we give any credence, with all due respect, to Mr. Burgess and his group of people who are very eloquent at sending emails and sending comments in when they're asked to, when the cold fact is that 84 percent of the Hawaiian people support this kind of legislation. I mean, the idea that we're giving credence and we're elevating people who believe that the, what's the report -- begins with an M. The Morgan report, you know, is the actual true story of the overthrow of Liliuokalani and her court, I think makes us look silly.

I can understand from a policy perspective, Mr. Chairman, where you come from in terms of the idea that, I mean we disagree on it, but I understand it. I understand where other people on this Commission come from. But I don't think it is wise to apply it in this instance to Native Hawaiians.
And certainly not to the history that Native Hawaiians have endured on their lands and on these islands.

Yes, is it a wonderful place? Is there the Aloha spirit? Of course, it is. I mean, it's one of the most beautiful places on God's earth to go visit, and you don't have to pay in Euros. It's a wonderful, beautiful place. But I have been there, I have seen the undercurrents. I have seen the poverty of the Native Hawaiians. I have seen, you know, I have talked to people who still burn with the injustice over a 100 years ago.

Are they working in the island? Are they in the government? Are they in the civil service? Yes. But scratch the surface a little bit and you'll find people who still believe to their heart that their paradise was stolen from them over 100 years ago and the fact that through endless circular logic, they are not even given the opportunity, which is what S147 would do. The opportunity to take baby steps in determining whether or not there can be some semblance of limited self-determination and self-governance, I think, is an insult to an important constituency of this Commission to a state, to an entire state, in this country.

(Phone rings)
If they're coming to get me, give me five minutes to run out the door.

(Laughter.)

I just believe that for -- that I know where you are, Mr. Chairman. I know where other members of this Commission are. I respect that position. I may not agree with it. I would just say that extending that doctrine to this particular example is misplaced, and doing it in this way when we have had extremely limited testimony about this. We have not heard, for example, from the Department of the Interior, from the Department of Justice. When we have not -- and to take a stand on a piece of legislation important to one particular state, and one particular people in this country I think is a disservice and I fear as Commissioner Melendez has said is that we could be undermining our credibility with that constituency, undermining our credibility in terms of our ability to opine about Indian law when we are clearly wrong all over the place in this report about Indian law, and why I voted, quite frankly, to support Commissioner Taylor's recommendation of isolating the report to that one document, when in fact three other iterations of this exists, that may solve a lot of the problems that you are talking
about.

I just wanted to go on record as saying that we're dealing with an area of law as Professor Heriot said very complex, but one where unlike Professor Heriot who seemed to say that the whole thing should be junked and tossed out, the fact is that as Christopher Bartolomucci said and others have said, in other legal forums, including by the way the hearing before Senator McCain had five witnesses, none of whom were named William Burgess or associated with him, where this is something that has had three reports done by different agencies that are not cited in here at all. To just ignore that history, to ignore the body of Indian law out there, to ignore the experts of Indian law out there, is to tread in very dangerous legal and scholarly waters that I don't think the Commission should do.

I think that we had a briefing on it. We heard interesting points of view. I find it, I'll just conclude with this. I find it ironic that for our statutory report, which involved the allocation of as much resources that we could possibly have, to get to issues as critical to this nation as the vote of the extension of the temporary provisions of the Voting Rights Act, that in there ultimately we decided
that we would pose questions for policymakers, pose
issues for them to consider as they went through a
renewal process that is getting near unanimous support
in the bodies of Congress.

But on this piece of legislation, on a
limited hearing, where I believe that we gave far too
much credibility to a small group of people who have
problems with this in Hawaii, and again, I just
reference the poll, which of course you can't find
anywhere in these documents. And yet we manage to
come down with a firm and hard recommendation on that.
I mean, the disparity to me could not be any greater.
And given the complicated issues, given the complex
Indian law issues, the complex issues involving an
analysis of the history of the Native Hawaiian
peoples, of the monarchy, of the Apology Resolution,
of the Hawaiian Homes Commission, etcetera, of the Act
of Statehood that incorporated all of this, of the 160
acts of Congress that have applied directly to Native
Hawaiians that have never been thrown out in any
Court, I think we're treading on the scholarly and
legal equivalent of a land mine.

I just say that compared to what we just
did with something as important as the Voting Rights
Act report, where we gave questions, if this were a
report that said we were the Civil Rights Commission and we want to make sure that whatever this entity does, it protects civil rights of all people in Hawaii. If we want to say that it must protect the civil rights of those people who are formed within that government, if it were to say that we are concerned and we want to make sure that these kinds of things should be looked at, I would have no problem with that.

But to say we want to dump this legislation which is overwhelmingly supported by the Hawaiian people as only a tentative first step in this, and doing it on the basis of very faulty analyses of law, of policy, and of regulations, I think is something I don't want this Commission to be associated with.

CHAIRMAN REYNOLDS: Okay, Commissioners Melendez and Yaki, I must say that your arguments, many of them, resonate with me. The injustices that occurred in Hawaii, who cannot feel for the folks who had to suffer those injustices? But after saying that though, I think that we should be mindful of our attempts to remedy historic wrongs. We need to be careful that we don't commit wrongs in the attempt to remedy historical wrongs.
I sit here as the father of two children, and my question, and moving away from the constitutional arguments, the public policy arguments, and when I ask myself as the father of two black children, if they would have moved to Hawaii, would they have the same benefits and burdens as Native Hawaiians? And if the answer is no, as a father, I have a problem with that. And quite frankly, I would have a problem with it to the same extent if Hawaiian children were to live in a state where they had, where their privileges weren't the same as the favored group.

You know, we have a decision to make. In the 21st century, do we want to continue to expand the use of racial classifications? I think that throughout the country's history, we've always used racial classifications, whether it is slavery, whether it is Jim Crow, whether it is preference policies. We have always used racial classifications. I think that it is odious, as it's been described by the Supreme Court, but we continue to do it.

I think that we do it at our own peril. We make arguments why in any particular case it is justified, and many of the arguments resonate with me. But I also see the dangers. There's some folks in
Nebraska who have, to their mind, very good reasons
for why they want to carve up the school district
based on using racial classifications to create
racially identifiable school districts. They have to
their mind very good reasons for doing this. I think
that as a principal response to these claims of
injustice and the folks in Nebraska, the folks who
supported the legislation, at least some of them feel
that this is necessary to undo wrongs.

Yes, I think that we have an obligation
and it's good public policy to try to address historic
wrongs. But we have to do so in a way that doesn't
create new problems. But I think that a principle
that we should consider embracing, not just in
rhetoric, but in terms of our public policy and our
legislation, is that the government's use of racial
classifications is not permitted.

Now that is not the state of the law
today. It is permitted. You passed a strict scrutiny
standard. You can do it. But I think that we're
playing with fire. This is a diverse nation and we
have many people here and we have many people here who
have been wronged. I don't think that there is any
group that has come to America who haven't been
screwed in some way or another when they've first
arrived. That seems to be a part of our tradition at least in the past.

The bottom line is I think that it is important that we have some over-arching principles that unite us all as a people, and I think that the notion of distributing benefits and burdens to groups based on different criteria, I think moves us away from that over-arching principle that we're all Americans and that we all have the same political obligations and political burdens and privileges and rights.

So while I believe that you made some powerful arguments, I still have concerns about the, I don't know what you want to call it, balkanization the country. I just think that it is dangerous in the long term. The world is not going to end tomorrow, but just extrapolating, this is not going to stop. With every success, there is another group who are going to come back and use the same arguments that have been used by the successful group. And to my mind, that leads to a dangerous place.

COMMISSIONER MELENDEZ: Let me ask a question, Mr. Chairman. You asked the question how would they get along if there were special, I guess, recognition in appropriations, or whatever went along
with it. How would people in Hawaii get along with if there was a group like that? The question would be this country, if we were in that situation right now, how would your children right now, where there's 550 tribes that are very recognized that get what you might term special appropriations for some reason, were just about the same reason as basically the taking of over I don't know how many millions of lands of Native Americans. Why did they give us a special recognition as a Native American entities? And how are you living alongside of them today?

I'll tell you why. Because the reservations that they put us on were probably the worst reservations, the most despicable land you could ever live on, where all of the basically the Caucasians took the nice pieces. It's probably the same situation in Hawaii.

If we looked at the amount of 200,000 acres, I bet if we went there today, and I have never been there to look at those lands, but I bet they are not the best pieces of the land on the water front. I bet they're probably up on a hill-side or probably some swamp that you can't even probably live on. And I'm just guessing, but you can check into that for yourself.
The reasons why can live alongside of us is because the United States controls probably most of the land. If you look at how much Indian tribes are set on, my tribe has 30 acres. Thirty acres. There are farms in the Midwest, probably President Bush's farm or ranch is probably larger than our whole reservation. So how do you get along? In Hawaii, it would really come down to how much land you have as opposed to what everyone else controls. They probably have that whatever was mentioned in that Homestead Act.

CHAIRMAN REYNOLDS: How many acres was that?

COMMISSIONER MELENDEZ: Something like -- I forget what the amount of acreage is, but that's probably what you're talking about. There's no way that the people that control Hawaii, and if the Queen were alive, and let's give that scenario, and she had on acre upon a mountain top, would we be trying to restore her today or would we be trying to get our legal experts for some way to not give her that right to restore herself on one acre of land.

I know there are probably some people who would say yeah, we would be trying to restore. No, we wouldn't. We would be trying to do the same thing
that the history of the country has always been trying to do. We'd try to find some way legally through our lawyers to say, just like they did back there with the people that they threw in there, we'd be doing the same thing today, because this country has never changed in that philosophy. And that's really the truth about it.

So the issue is are we going to right our wrong and let them have their minute land when they controlled the whole islands and let them operate like Native Americans, like us, on their 30 acres? You could probably do that and still live alongside them. I don't think it would devastate your children or anything like that. It hasn't devastated you living alongside Native American reservations in this country, so why would it in Hawaii. Unless you think for some reason they're going to expand and some reason that tribe, or whatever you want to call them, the entity that's recognized is going to in some way going to take over the Hawaiian islands, which I don't think anybody would let them do as far as a land base.

COMMISSIONER YAKI: And that's another thing, is that if you again, looking at the law, and looking at the actual text of the law that is in question versus the text, the text of the laws on the
books enacted by Congress with regard to Indian tribes, or Native American reservations, etc. I mean, one of the most interesting things and I'm going to put on my Hawaiian hat here, is the fact that you have so many diverse groups of people living in a very small area who for the most part, by and large, all get along really well.

I think that's a tribute to the Hawaiian people. It's a tribute to the fact that they're all in a small place and they all got to get along. But I think it also should say something about what kind of fears anyone would have about what this entity could or could not do. And I think it's why the State Advisory Commission is so vehemently opposed to what the Commission's actions could be here today.

And that is, and why they were upset about the hearing, and why they send us emails I'm getting all the time and faxes from the Staff Director. I just really beseech you, Mr. Chairman, that I understand what it is that you see and what it is you envision as the correct path for what our Nation should go to. But I sincerely believe that in the case of a Native Hawaiian people, it's seriously misplaced and we should instead look to a different guiding philosophy, and that is if your argument is if
we say yes, who else do we have to say yes to?

   My question is if we say no to them, how
do we explain it to them based on the fact that other
peoples, the Native Alaskans, the Native Americans,
continue to this day to hear the answer yes.

   CHAIRMAN REYNOLDS: Well, I don't think
that because in the case of Native Americans we have
in my view a constitutional distinction. And I know
you don't agree with me that this merely applies to
Native Americans, but I think that that distinction is
important and to move away from that would require a
constitutional amendment. The distinctions may with
respect to Native Americans, I think that it is
constitutional.

   COMMISSIONER YAKI: But Native Alaskans
don't fit that definition, Mr. Chair.

   CHAIRMAN REYNOLDS: I agree.

   COMMISSIONER YAKI: And yet there are
special acts of Congress that recognize their
sovereignty, that recognize tribal governments and
government relations.

   CHAIRMAN REYNOLDS: Okay, that is true.
And quite frankly, I do not know if that issue was
presented today how it would be treated. But the
bottom line is we have an issue in front of us and we
will have to eventually vote on it.

Commissioner Braceras?

COMMISSIONER BRACERAS: The only thing I want to say is that I think if you look at the recommendation that the Commission proposes, it is a recommendation that is normative and theoretical, as opposed to speaking to the constitutional question. And I think it is embodied very nicely in what the Chair just said in his first set of remarks, about the direction that he would like to see this country go. And that is towards one of unity and away from balkanization.

So I don't think that the precise recommendation that we're voting on confronts the constitutional question. Reasonable minds can differ about whether or not Congress is within its rights to propose this legislation, but the question is even if they do have the authority to propose it, whether or not it is a good idea. And I think the Chairman spoke quite eloquently as to why it is not a good idea. So I'm going to support the report and I'd like to call the question.

COMMISSIONER MELENDEZ: Can I comment?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER MELENDEZ: If we send a
report, I want to hopefully that we answer all of the
questions of the authorities on the report. For
example, in Finding 1, using ancestry it says as a
proxy for race, that Native Hawaiian government
Reorganization Act would likewise establish an
impermissible racial preference in the establishment
and operation of a government entity.

The question is what authority for this
conclusion, where is the cite to a law or a Court
ruling that supports this conclusion, rather than just
being opinionated by one of our attorneys?

In Finding 2, "The Office of Hawaiian
Affairs currently administers a racial preference
system and that's one where I said maybe we should
take out racial because it's just opinion in the form
of a substantial public trust, including cultivated
sugarcane, land, water rights and other natural
resources as well as any derivative profits." And
here again, what is the authority for this conclusion?
Where is the cite to a law or a Court ruling that
supports this conclusion? Indeed, no Court has never
held that the Office of Hawaiian Affairs administers a
racial preference system and one might well ask how is
the Office of Hawaiian Affairs and the programs it
administers under the authority of the Hawaiian State
Constitution relevant to the report on a Senate bill?

And Finding 9, "Furthermore, the passage by Congress of 160 statutes addressing the conditions of Native Hawaiians and the continuous efforts by the Federal Government to implement those statutes were not intended to imply a recognition of a distinct political entity." Again, where is the cite that would provide support for the statement of congressional intent? Are the drafters of the report former or current members of Congress?

The only point I'm making is that a lot of this is just opinion of maybe some of our attorneys and I think that they aren't -- I don't think they know Indian law based to make these type of assertions in this report.

COMMISSIONER BRACERAS: The question has been called.

COMMISSIONER YAKI: The question has been called, but it requires a two-thirds vote and I'm not going to vote for it to keep the debate open.

CHAIRMAN REYNOLDS: I'm sorry, you want to keep debate open, okay.

VICE CHAIRMAN THERNSTROM: Wait a minute, wait a minute. I want a parliamentary here. The question has been called. What's the next step?
STAFF DIRECTOR MARCUS: Madam Parliamentarian, can you answer the question?

MS. MONROIG: I believe you said you wanted to call the question? You want to end debate on this?

VICE CHAIRMAN THERNSTROM: Jennifer said "I called the question."

COMMISSIONER BRACERAS: The Vice Chair just asked what the next step is after that, that was the question.

VICE CHAIRMAN THERNSTROM: I mean somehow that was ignored. She had called the question.

CHAIRMAN REYNOLDS: It wasn't ignored. Maybe I shouldn't have done this, but I --

VICE CHAIRMAN THERNSTROM: I really do think you need to stick to Robert's Rules of Order.

STAFF DIRECTOR MARCUS: Madam Parliamentarian, is it the case that when the question is called, if it is seconded, the Chair determines whether there is a two-thirds vote in favor?

MS. MONROIG: Yes.

VICE CHAIRMAN THERNSTROM: And I'm seconding it.

CHAIRMAN REYNOLDS: Okay, well, we will have a vote on Jennifer's motion.
All in favor say aye.

(Ayes.)

All in opposition.

(Nos.)

Any abstentions?

If my math is right --

VICE CHAIRMAN THERNSTROM: The question has been called.

CHAIRMAN REYNOLDS: Yes.

VICE CHAIRMAN THERNSTROM: There cannot be any more discussion on this.

CHAIRMAN REYNOLDS: Okay, so let the record reflect that Commissioners Yaki and Melendez voted against the motion and the remaining Commissioners voted in favor. The motion passes.

COMMISSIONER YAKI: I have a point of information?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: Which is pertinent to the motion under Robert's Rules.

CHAIRMAN REYNOLDS: God help me.

VICE CHAIRMAN THERNSTROM: We have a parliamentarian here.

COMMISSIONER YAKI: I just have a question as to who drafted Findings 2, 5, 6 and 7?
CHAIRMAN REYNOLDS: I have no idea.

COMMISSIONER YAKI: I just want you to know they're factually wrong.

CHAIRMAN REYNOLDS: I think it's in the record that both Commissioner Melendez and you believe that there are factual inaccuracies in the document.

And as for the identity, I don't know and --

STAFF DIRECTOR MARCUS: They were prepared by staff and as Staff Director, I certainly take responsibility for anything contained in the documents. We have a career staff and the document was prepared by members of the career staff.

CHAIRMAN REYNOLDS: Okay, at this point, let's vote.

All in favor of the document, please say aye.

(Ayes.)

All in opposition?

(Nos.)

Abstentions?

(Abstention.)

COMMISSIONER KIRSANOW: Abstained, and for the record, my abstention has nothing to do with the work done by staff which I think was excellent in
terms of compiling accurately what was adduced at the hearing and all subsequent information received by the Commission related to this particular issue. And substantively, I would adhere to the comments made by the Chairman in response to Commissioner Yaki, which I think was one of the most succinct exigencies on the unity principle, but I think the Commission needs to keep in mind when addressing its primary functions related to providing counsel recommendation fact-finding with respect to issues pertaining to civil rights and voting rights to the Executive Branch and Legislative Branch.

So while I concur with the report as drafted in terms of what was presented at the hearing, I would nonetheless abstain.

CHAIRMAN REYNOLDS: Okay, I vote for it. But I just want to put on the record that I do -- many of the arguments made by Commissioners Melendez and Yaki, I found powerful, but -- and as for the document itself, I -- while I don't agree with everything that's in the document and I can say that about all the documents, at the end of the day I support it. So please let the record reflect that Commissioners Yaki and Melendez voted against the motion and that Commissioner Kirsanow abstained and the remaining
Commissioners voted in favor. So the motion passes.

VICE CHAIRMAN THERNSTROM: Let me say one final thing since you said something explanatory with respect to your vote, Mr. Chairman. The core issue for me here was the Government's use of racial classifications and I thought that we had here a split, basically over that issue and that is the issue that will continue to divide in various forms this Commission, because I thought it was the core issue. I went with voting for the report although, of course, Commissioners Yaki and Melendez add much that was useful and informative.

COMMISSIONER YAKI: Like I said, I would just say this and I appreciate everyone listening to both Commissioner Melendez and myself, but I just want to tell you that notwithstanding the viewpoints and the policy perspectives of the Chairman, Vice Chairman, Commissioner Kirsanow and Commissioner Braceras, which we can respectfully agree --

VICE CHAIRMAN THERNSTROM: What happened to Commissioner Taylor?

COMMISSIONER YAKI: And Commissioner Taylor who we can respectfully disagree with and we'll probably continue to in a tone of niceness throughout our terms, one concern I do have about this report
going out is that there are serious factual errors in the findings.

   It is one thing to say that we believe that this is what it's going to do. It's nothing to go into a long explanation of the Hawaiian monarchy which is wrong, which is about the federal regs which are wrong, about Finding 6 which is wrong. I mean I just think that it's one thing to put out a thought document which says all the things that you talk about that voices your concerns and says that we hope these are addressed or because of this we have serious reservations about it. It's another thing to have findings that are so easily attacked because they're just factually incorrect that it undermines what it is you're trying to do.

   VICE CHAIRMAN THERNSTROM: Well, Commissioner Yaki, I think all of us are going to look forward to your dissent.

   COMMISSIONER YAKI: It's just going to be facts and law. Facts and law.

   VICE CHAIRMAN THERNSTROM: And it will obviously enrich the document to have it.

   CHAIRMAN REYNOLDS: Okay, at this point I move that we adjourn this meeting. We will deal with the remaining issues that are on the agenda tomorrow.
after the briefing.

Thank you.

(Off the record.)

CHAIRMAN REYNOLDS: Commissioner Yaki, just so we are clear, the document will not be bound. We will put it on the website, but the document won't be bound.

VICE CHAIRMAN THERNSTROM: I think it is important to say on the website explicitly that we are expecting dissents from Commissioners Melendez and Yaki.

CHAIRMAN REYNOLDS: Okay, all right, see everyone tomorrow.

(Off the record.)

CHAIRMAN REYNOLDS: Okay, there is a motion that Commissioner Taylor wants to make and so Commissioner Taylor?

COMMISSIONER YAKI: He's referring to me.

CHAIRMAN REYNOLDS: First motion to reconvene.

COMMISSIONER TAYLOR: I need to make that motion. Having voted on the prevailing side, I'd like to move that we reconsider our vote.

COMMISSIONER TAYLOR: Is there a second?

COMMISSIONER KIRSANOW: Second.
CHAIRMAN REYNOLDS: Okay, all in favor?
(Ayes.)

Any in opposition?

Any abstentions?

Motion passes.

COMMISSIONER KIRSANOW: I'd like to make a very brief point. Those are pages 16 through 18 in terms of page numbers in the briefing report. And I would just like to adopt similar comments made by Commissioner Yaki with respect to the findings and recommendations.

As I said, I think the report itself summarizing what occurred at the hearing was excellent, but I think there was a disconnect between what was adduced at the hearing and some of the findings and recommendations which didn't necessarily reflect what had occurred at the hearing.

And having said that, I'll just shut up.

(Laughter.)

CHAIRMAN REYNOLDS: Thank you. I need you sitting next to me.

Okay --

VICE CHAIRMAN THERNSTROM: We've got a motion.

CHAIRMAN REYNOLDS: Commissioner Yaki.
VICE CHAIRMAN THERNSTROM: Wait a minute.

The motion has not been made yet.

COMMISSIONER YAKI: To reconsider, yes.

VICE CHAIRMAN THERNSTROM: Okay.

COMMISSIONER YAKI: Thank you very much, Mr. Chairman. On the main item, I would move that we strike the findings from the document, Findings 1 through 11 and simply have as the conclusion the amended -- the recommendation as amended earlier today.

CHAIRMAN REYNOLDS: Is there a second?

VICE CHAIRMAN THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion? All in favor.

(Ayes.)

Any in opposition? Any abstentions?

Motion passes unanimously.

I move that we adjourn.

VICE CHAIRMAN THERNSTROM: I second that.

(Whereupon, at 6:08 p.m., the meeting was concluded.)