The meeting convened telephonically at 11:00 a.m., Abigail Thernstrom, Vice Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, CHAIRMAN
ABIGAIL THERNSTROM, VICE CHAIRMAN
TODD F. GAZIANO, COMMISSIONER
GAIL L. HERIOT, COMMISSIONER
PETER N. KIRSANOW, COMMISSIONER
ASHLEY L. TAYLOR, JR., COMMISSIONER
MICHAEL YAKI, COMMISSIONER

MARTIN DANNENFELSER, Staff director

STAFF PRESENT;
DAVID BLACKWOOD, General Counsel
IVY DAVIS
DEMITRIA DEAS
PAMELA A. DUNSTON, Chief, ASCD
MAHA JWEIED
TINALOISE MARTIN, Director, Office of Management
EMMA MONROIG, Solicitor and Parliamentarian
LENORE OSTROVSKY, Attorney/Advisor, OSD
EILEEN RUDERT
KIMBERLY TOLHURST
AUDREY WRIGHT
MILITSA SAMARDZIJA, Consultant
COMMISSIONER ASSISTANTS PRESENT:

TIM FAY
JACK KAMMEN
DOMINIQUE LUDVIGSON
KIMBERLY SCHULD
HANS VON SPAKOVSKY
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>AGENDA ITEM</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Approval of Agenda</td>
<td>6</td>
</tr>
<tr>
<td>II. Program Planning:</td>
<td></td>
</tr>
<tr>
<td>FY 2008 Statutory Report:</td>
<td>8</td>
</tr>
<tr>
<td>Enforcing Religious Freedom in Prison</td>
<td></td>
</tr>
<tr>
<td>Discussion of Part B</td>
<td>56</td>
</tr>
<tr>
<td>FY 2009 Briefing Topic:</td>
<td></td>
</tr>
<tr>
<td>Employers' Rights to Specify English</td>
<td></td>
</tr>
<tr>
<td>as the Language of the Workplace</td>
<td>194</td>
</tr>
<tr>
<td>III. Future Agenda Items</td>
<td>197</td>
</tr>
<tr>
<td>Adjourn</td>
<td></td>
</tr>
</tbody>
</table>
PROCEEDINGS

Time: 11:05 a.m.

VICE CHAIR THERNSTROM: Thank you very much.

This -- Have we got, by the way, the reporter with us here? Mrs. Staff Director, do you know that we have got a reporter?

STAFF DIRECTOR DANNENFELSER: The reporter is on.

VICE CHAIR THERNSTROM: This is Vice Chair Thernstrom. It is 11:10 a.m. Eastern Daylight Time on September 30, 2008. We are having a telephonic meeting with all Commissioners participating, all Commissioners who are able to participate coming from different locations.

I will call the name of each Commissioner in order to determine if there is a quorum to hold a meeting. Commissioner Gaziano?

COMMISSIONER GAZIANO: Here.

VICE CHAIR THERNSTROM: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Here.

VICE CHAIR THERNSTROM: Commissioner Heriot?

COMMISSIONER HERIOT: Here.
VICE CHAIR THERNSTROM: Commissioner Melendez? Commissioner Malendez?

STAFF DIRECTOR DANNENFELSER: He won't be here today.

VICE CHAIR THERNSTROM: He will not be here? Okay. Commissioner Yaki, I know, will not be here.

Commissioner Taylor?

STAFF DIRECTOR DANNENFELSER: Yaki is there.

VICE CHAIR THERNSTROM: Yaki is here? Oh, I'm delighted to hear that. So, Commissioner Yaki, you are on with us?

COMMISSIONER YAKI: Yes.

VICE CHAIR THERNSTROM: Yes. Okay, that was a very low yes. I hope you will speak up as we proceed.

Commissioner Taylor?

COMMISSIONER TAYLOR: Present.

VICE CHAIR THERNSTROM: Thanks. And is the Staff Director present?

STAFF DIRECTOR DANNENFELSER: Present.

VICE CHAIR THERNSTROM: And I understand the Court Reporter is on the line.

The meeting will come to order. If a
Commissioner wants to make a statement, please identify yourself first. Whenever it is necessary to take a vote, the following procedure will be followed.

   I will call out the name of each Commissioner. The Commissioner should then answer yes, no, or abstain. After the vote is concluded, I will read out how each of you has voted to ensure that the tally is correct.

COMMISSIONER YAKI: Point of order.

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER YAKI: This is Commissioner Yaki. Since I may have to jump off any moment, where are we on quorum? Do we have enough?

VICE CHAIR THERNSTROM: We seem to have enough: Gaziano, Kirsanow, Heriot.

STAFF DIRECTOR DANNENFELSER: Six, I believe, at the moment counting Commissioner Yaki.

VICE CHAIR THERNSTROM: Yaki, Taylor and myself.

COMMISSIONER YAKI: I couldn't tell is Kirsanow was on or not.

COMMISSIONER KIRSANOW: Yes, I am on.

COMMISSIONER YAKI: Okay. I didn't want to leave you below quorum. So I just wanted to make sure. Okay.
STAFF DIRECTOR DANNENFELSER: Madam Vice Chair.

VICE CHAIR THERNSTROM: Yes.

STAFF DIRECTOR DANNENFELSER: Could you just have the Court Reporter confirm that they are on the line?

VICE CHAIR THERNSTROM: Will the Court Reporter please identify that he or she is on the line?

COURT REPORTER: I am on the line. Can you hear me?

VICE CHAIR THERNSTROM: Yes, I can. So as I understand it, we have Commissioners Gaziano, Kirsanow, Heriot, Yaki, Taylor. That is the total list at the moment. Correct?

I. APPROVAL OF AGENDA

VICE CHAIR THERNSTROM: Okay. We need a motion to approve the agenda. Can I have somebody make a motion?

COMMISSIONER GAZIANO: Gaziano. So move.

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER HERIOT: That was Gail Heriot.

VICE CHAIR THERNSTROM: Gail Heriot.
seconded. Any discussion? And we will have a vote, and again I guess I have to go through the roll call on every vote. Is that correct, Mr. Staff Director? Is that what I understand?

STAFF DIRECTOR DANNENFELSER: Yes.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER HERIOT: You can't do "Hearing no objection"?

VICE CHAIR THERNSTROM: Can I do "Hearing no objection"?

STAFF DIRECTOR DANNENFELSER: Yes, we can do "Hearing no objection."

VICE CHAIR THERNSTROM: Okay. Hearing no objection, do I have approval for the agenda?

COMMISSIONER HERIOT: Yes.

VICE CHAIR THERNSTROM: That is unanimous consent on approving the agenda, as I understand it, having heard no objection.

I'm sorry. I'm just getting my bearings here. Okay.

II. PROGRAM PLANNING

FY 2008 STATUTORY REPORT

ENFORCING RELIGIOUS FREEDOM IN PRISON

VICE CHAIR THERNSTROM: We are moving on to the statutory report that is Enforcing Religious
Freedom in Prison, September 22, 2008. The draft of the FY 2008 statutory report on Enforcing Religious Freedom in Prison was sent to you.

I now move that the Commission approve for publication, along with any concurring and dissenting statements submitted by any Commissioner by October 14, 2008. I'm sorry, I still have a cough after all these weeks.

COMMISSIONER HERIOT: Before you move that, wouldn't it be -- Before anybody seconds that, wouldn't it be quicker to move it with the corrections that I have suggested, so that we could just use that as our starting point and not have to amend the motion?

VICE CHAIR THERNSTROM: Well, no, I think not, because we have got -- It is not only your corrections. I think it would be better to --

COMMISSIONER HERIOT: But we certainly don't want to do these one at a time.

VICE CHAIR THERNSTROM: Well, for you to introduce friendly amendments, to put them in. I have amendments, and I don't know whether Commissioner Gaziano does as well, but I would prefer to just approve this motion, and then in the discussion you make a motion, a friendly motion.
COMMISSIONER HERIOT: That is going to be one more motion, no matter what.

VICE CHAIR THERNSTROM: It is. I think, since I also have some changes, Commissioner Gaziano may have some changes, there may be other people who want to weigh in.

COMMISSIONER HERIOT: Again, not just me. You know, we could save one more motion, but we are wasting it on this discussion.

VICE CHAIR THERNSTROM: So let's just move on here.

So I now move that, as I said, we approve for publication, along with any concurring and dissenting statements submitted by any Commissioner by October 14, 2008, Part A of the statutory report.

Part A as distributed contains a summary of the report, four chapters dealing with the following matters: Chapter 1, introduction and overview; chapter 2, prisoners' free exercise claims; 3, the Department of Justice enforcement of prisoner's free exercise rights; and lastly, Chapter 4, judicial response, analysis of cases alleging religious discrimination in prison.

Under this motion, if a majority of the Commission votes to adopt Part A of this statutory
report, the Commission will then open discussion on Part B. If Part A fails to obtain a majority of votes, discussion of Part B, obviously, becomes moot. This bifurcated vote is taken pursuant to the policy adopted by Commissioners at the April 13, 2007, business meeting.

So can I have a motion to adopt Part A?

COMMISSIONER HERIOT: You just made it, didn't you?

VICE CHAIR THERNSTROM: Did I just make it?

COMMISSIONER HERIOT: Yes.

VICE CHAIR THERNSTROM: I made it. Okay.

I need a second.

COMMISSIONER KIRSANOW: Kirsanow. Second.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER HERIOT: I then move to amend the motion to include the list of changes that I suggested in the e-mail message that was distributed yesterday.

VICE CHAIR THERNSTROM: Okay. This comes under changes, discussion, questions. The first point here by Commissioner Heriot is to -- a motion to amend. So Commissioner Heriot has a list of proposed changes to Part A, and --
COMMISSIONER HERIOT: I don't have a second yet, though.

COMMISSIONER KIRSANOW: Kirsanow. Second.

VICE CHAIR THERNSTROM: Yes. Kirsanow has seconded that. Do we need any discussion?

COMMISSIONER HERIOT: We just have to now vote on whether or not to amend your motion to include my changes as well, and then we can discuss.

COMMISSIONER GAZIANO: I do have a few other amendments. So whatever the --

COMMISSIONER HERIOT: We are going to do this one at a time. So we are going to have to vote on it one at a time.

COMMISSIONER GAZIANO: Oh, no, I don't want to vote on yours, since you have been so helpful. I don't want to vote on yours one at a time, since you have been so helpful.

COMMISSIONER HERIOT: No. My motion, not his, and then you can make motions as well. But if we vote in my motion, then we are discussing the report as my amendments go, and then we can add other people's amendments.

COMMISSIONER GAZIANO: That's fine by me. I just wanted to understand, when we are voting, we are not voting finally.
COMMISSIONER HERIOT: No, just changing the motion at this point.

VICE CHAIR THERNSTROM: Right. Commissioner Heriot, what I was planning to do, but you -- Okay, fine.

COMMISSIONER HERIOT: I can't vote for the motion the way it is now. I need my changes in before I can vote yes.

VICE CHAIR THERNSTROM: I understand that. I was planning to -- All right. I do not think we needed a separate vote on the question of whether you can offer a friendly amendment. I was going to simply offer -- I was going to simply have a vote on Part A as amended by the friendly amendment. But whatever, we can have a vote. If you say procedurally we need to, we can have a vote on your motion to have a friendly amendment.

COMMISSIONER HERIOT: If it is friendly, you can say "Hearing no objection."

VICE CHAIR THERNSTROM: Any objection to Commissioner Heriot's motion to amend the motion to approve Part A? Hearing no objection, Commissioner Heriot, you've got the floor here.

COMMISSIONER HERIOT: I don't need the floor except to say that the suggestions that I put in
the list, I think, improve the report and allow me to vote for it.

VICE CHAIR THERNSTROM: Okay. So nobody on the phone needs to -- Is there any discussion whatsoever?

COMMISSIONER YAKI: Commissioner Yaki has discussion.

VICE CHAIR THERNSTROM: Okay. Commissioner Yaki.

COMMISSIONER YAKI: Before I vote on this, I wanted to ask some procedural questions that go to the AIs regarding our statutory report obligation.

VICE CHAIR THERNSTROM: Right.

COMMISSIONER YAKI: Do we have the Statutory report checklist for this report?

VICE CHAIR THERNSTROM: I have it someplace right here. I just have to find it on my desk. Yes, go on?

COMMISSIONER YAKI: When was it sent?

STAFF DIRECTOR DANNENFELSER: When was it sent to Commissioners?

COMMISSIONER YAKI: Yes.

STAFF DIRECTOR DANNENFELSER: It was sent with the package that was mailed to commissioners on the 23rd.
COMMISSIONER YAKI: Okay. I don't have that.

STAFF DIRECTOR DANNENFELSER: With the hard copy of the statutory report, the checklist was in that Federal Express package.

COMMISSIONER YAKI: Okay, I will look at that.

VICE CHAIR THERNSTROM: I am staring at it right now.

COMMISSIONER YAKI: Was it in the e-mail that you sent or was it only --

VICE CHAIR THERNSTROM: No. it came as hard copy to me with the statutory report.

COMMISSIONER GAZIANO: This is Gaziano. I received a hard copy of it as well, and I have it in front of me.

COMMISSIONER YAKI: Did any of the -- I'd like to know if there is any information about who -- Other than staff, direct staff, were there any special assistants or consultants who worked on rewriting the report after the comment period provided to the Commissioners?

VICE CHAIR THERNSTROM: Mr. Staff Director, do you want to answer that?

STAFF DIRECTOR DANNENFELSER: Well, we had

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-- As we noted earlier, we had asked former Staff Director Ken Marcus to provide us with some feedback, particularly on the legal aspects of the report, and I distributed his comments.

He had a proposed revision that combined Chapters 1 and 2 into Chapter 1, and then he had a number of other suggestions throughout the report that were considered.

COMMISSIONER GAZIANO: This is Gaziano. Just a point of clarification to Commissioner Yaki. Who are you concerned about working on it? I certainly sent in typos and things at various times. I certainly hope that the staff looked at those and corrected some of those typos.

What is the focus of your question?

COMMISSIONER YAKI: I was simply asking who other than direct staff, excluding special assistants, from that notion, worked on the report after the comment period provided to the Commissioners.

STAFF DIRECTOR DANNENFELSER: I believe some of the Commissioners have consultants that they presumably consulted with during the course of --

COMMISSIONER YAKI: No, I am talking about after the comment period.
COMMISSIONER HERIOT: When was the comment period?

COMMISSIONER YAKI: It was due -- When was the comment period closed? I think it was like -- It was like -- It was about a month ago. It was before the last meeting.

COMMISSIONER HERIOT: Really, I didn't know there was a close to the comment period. I've been working on this thing the whole time.

COMMISSIONER GAZIANO: Well, again my temporary special assistant that you so graciously approved has provided me with a lot of information, but I think that is excluded from your question, isn't it?

COMMISSIONER YAKI: Yes. It is not whether they provided you with information. It is whether any of them worked directly with staff after the comment period. Simple question.

VICE CHAIR THERNSTROM: Well, again I don't know the answer. So, Mr. Staff Director, you need to answer that.

STAFF DIRECTOR DANNENFELSER: I believe the comments we received from Ken Marcus, for instance, were received during that period, and he was --
VICE CHAIR THERNSTROM: During the comment period? Is that what you are saying?

STAFF DIRECTOR DANNENFELSER: Yes. I believe that was up until, I believe it was August 22nd. So we had comments from him prior to that, and I am not aware of other information.

COMMISSIONER YAKI: There were no comments by Mr. Marcus after that period or assistants or rewriting by Mr. Marcus after that period?

STAFF DIRECTOR DANNENFELSER: I don't believe so, no. He sent in his comments at the end of that period, and then we considered them and incorporated them.

COMMISSIONER YAKI: So nor were there any comments or assistance given by special assistants.

COMMISSIONER GAZIANO: Again, I am trying to clarify your question. Whether I conveyed information or my special assistant, my temporary consultant acting as special assistant conveyed them, why is that an issue?

COMMISSIONER HERIOT: Yes, I don't understand this notion that there is like a closed period where we are not supposed to give comments anymore. I had no knowledge of that.

COMMISSIONER YAKI: That has always been
COMMISSIONER HERIOT: Well, if so, I am very happy to amend that rule right now.

COMMISSIONER YAKI: We should, but I understood --

COMMISSIONER HERIOT: I would move to -- If you are taking that position, I would be happy to change that rule during this meeting.

COMMISSIONER YAKI: We cannot change a rule retroactively.

VICE CHAIR THERNSTROM: Hold on a minute, Michael. Michael, hold on. I have a question for the Court Reporter. Are you okay that people are not giving their names? Can you now identify voices? The question for the Court Reporter.

COURT REPORTER: I am doing pretty well. I will interrupt if I have any problems, if you need me, it will take a few seconds to get on the line.

VICE CHAIR THERNSTROM: Fine. I just wanted to know if you were okay, because people are dropping the identification. Commissioner Yaki, you were talking. Go ahead.

COMMISSIONER YAKI: Commissioner Yaki was simply stating that this has been a rule that I have followed and been dealing with for the past three
years on the Commission.

My understanding was that it was a rule designed to end the volleying back and forth and move to produce a final report that the Commissioners who thought that they had had up to the comment period would not be blindsided by huge chunks of revisions by other Commissioners after the fact.

So if what I am hearing is that the Staff Director accepted changes and revisions and comments from Commissioners outside the August 22nd deadline, that is indeed news to me.

I mean, what Commissioner Heriot proposed in her amendment is perfectly proper, and that is received publicly and were able to look at it and understand what the changes were at that time, but this document was not meant to be a moving target for an unindendent period of time; and if that is not the case, I would like the Staff Director to please explain or relate to us those who did abide by the August 22nd deadline, what came in and what changes were made based on comments from Commissioners after that period of time.

COMMISSIONER GAZIANO: Commissioner Yaki, this is Commissioner Gaziano. I just wanted to sort of clarify again what I hope you are not concerned
about, and that is it certainly makes sense to me that we are urged by staff to get the bulk of our comments in by a particular time. Otherwise, I don't see -- It is very difficult for them to create an orderly process; and I assume that that was when the bulk of comments were received. But I continued, certainly, to study it.

As you know from the record we recreated, my consultant acting as special assistant, I don't think, was even hired until after that time. He has mostly been reporting to me, but I think at times I suggested that he share some thoughts with other special assistants.

Those other special assistants may have shared them with Commissioners. I don't know whether other Commissioners then shared them with staff. Some of these were in the nature of typos.

I certainly hope you don't think that further input is outside the productive use of our time and expertise.

COMMISSIONER YAKI: Typos are typos, Commissioner, I have no issue with.

COMMISSIONER HERIOT: This is silly. There is no rule that says you can't continue to give comments. There's just the convenience of the staff.
COMMISSIONER YAKI: No, there is a rule.

COMMISSIONER HERIOT: And the convenience of the staff has to do with whether or not we get the draft out on time.

COMMISSIONER YAKI: Commissioner Heriot, there is a rule.

COMMISSIONER HERIOT: The draft is out on time.

COMMISSIONER YAKI: There is a rule.

COMMISSIONER HERIOT: This is all very moot, and let’s go on.

COMMISSIONER YAKI: There is a rule.

COMMISSIONER HERIOT: We are trying to turn out a decent report.

COMMISSIONER YAKI: We adopt these rules for a specific reason.

COMMISSIONER HERIOT: Not for the reason that you are specifying.

COMMISSIONER YAKI: This was adopted by a majority --

COMMISSIONER HERIOT: We are adopting these rules for the convenience of the staff, so that the staff may turn out a report on time, so that we can then get our second report out on time, as required by the law.
COMMISSIONER YAKI: You are a majority.
You are a majority.

VICE CHAIR THERNSTROM: Look, there is no possibility that that conversation was properly recorded by the Court Reporter, because you were both talking at once.

COMMISSIONER YAKI: Exactly, and that is why I did it.

VICE CHAIR THERNSTROM: And none of us could follow it, and this telephonic meeting cannot be conducted that way. It is impossible for us to have an orderly meeting with that kind of back and forth.

COMMISSIONER YAKI: Well, Commissioner --

VICE CHAIR THERNSTROM: Hold on a minute.

Mr. Staff Director, there is -- I think we need a clarification here on what is permitted and what is not permitted after that deadline expires, because a number of us have continued to stare at this document.

I will at this meeting -- Obviously, I have not circulated before hand. I will have some suggestions for tiny little revision. There is nothing substantive.

COMMISSIONER GAZIANO: Madam Vice Chair, this is Gaziano. I just respectfully request that the Staff Director could say what he understood the rules
to be or may understand, if he has an opinion, but we
are the ultimate interpreter of our own rules.

VICE CHAIR THERNSTROM: I understand.

COMMISSIONER GAZIANO: I don't know that
it is up at this point to go through that, but I will
be clear with Commissioner Yaki, that some of the
matters that I communicated were not significant in
any way, and I suppose other -- but they were not just
typos. I said that many of them were typos, and that
is certainly the type of thing I hope we all were
communicating.

If we noted a substantive error but not a
big one -- a chart didn't add up to 100 percent -- I
certainly hope people would have continued to
communicate those kind of concerns.

COMMISSIONER YAKI: Commissioner -- Madam
Chair, this is Commissioner Yaki. Before the Staff
Director answers, perhaps you would help out with this
response, and that was what I was trying to convey to
Commissioner Heriot before she attempted to shout me
down.

It had to do with the fact that these were
rules promulgated by the majority when I first came on
the Commission three years ago to protect against
abuses in the statutory report process that they
perceived were -- they were the victims of during prior iterations of the Commission.

It was designed to ensure that at some point the ball stopped rolling, stopped work on it, and that there were no sort of complete rewrites done by Commissioners in the majority of the time, so that the minority had no idea that additional information was being circulated and written into a report at that time.

These were rules that Commissioner Braceras and the Braceras Subcommittee and I, which I think Commissioner Kirsanow and Commissioner Reynolds are very familiar with, promulgated to basically create some order for the process, rather than have a rolling draft that some Commissioners were unaware of.

Now there is nothing that prevents someone from, at a meeting, introducing new sections or revisions in a public, transparent manner that allows full and robust discussion about it, but the point of having the deadline was not silly at all.

It was to, in effect, put a brake on what was perceived as an abuse by a prior Commission of the statutory report process and the rights of the minority at that time; and ironically, the rights of the minority at that time were expressed by the then
majority that was extant at the time that I assumed my Commissionership in February of 2005, and these rules, I think, came into effect later in the spring of that year, led by Commissioner Braceras.

So I want to make sure that that background is given, because these were not silly, and these were not whatever. Typos, I have very little problem with. Substantive issues, I do. I think substantive issues should be brought up separately at the time that the report is debated and discussed by the Commission, that there is complete transparency for the project, rather than having the minority have to go through and try and pick out what else changed other than what they knew of in the course of the draft.

COMMISSIONER GAZIANO: Gaziano again. If I could just maybe try to ask a different question, that might help.

VICE CHAIR THERNSTROM: I would like to respond.

COMMISSIONER GAZIANO: Let me just make my little point. I certainly hope they also made other substantive changes that were in the order of mistakes that aren't just typos, but if your concern is did other commissioners see drafts that you didn't see,
why don't you just ask that question. So I will. I don't think so.

Did the Staff director circulate subsequent drafts to some Commissioners that weren't shared with all Commissioners?

COMMISSIONER HERIOT: Not to me.

COMMISSIONER GAZIANO: I don't think so.

VICE CHAIR THERNSTROM: Commissioner Gaziano, I would like to respond to Commissioner Yaki here, and then the Staff director can weigh in as well.

Look, I don't think deadlines are silly. I am totally in agreement with you. I remember well having joined this Commission in January of 2001. I remember the history of abuse of this process.

I am a process person in general. So I am very sympathetic to what you are saying. We've got rules. They were adopted. I want them followed.

If we have had a rolling draft here, that is one -- That is a question that we need an answer from. The question is, do we have -- Have we had a rolling draft, and I would like to hear from the Staff Director on that. Is that an accurate description?

STAFF DIRECTOR DANNENFELSER: I don't think so. This is the Staff Director. It took longer...
for the staff to incorporate the many changes
requested by the Commissioners. So that is why it was
ultimately sent out on September 23rd, this final
version that is before the Commission today.

So the Commissioners were all given an
opportunity to make sure that every Commissioner had
an opportunity to submit comments by August 22nd, and
I believe that other things that came in in the
meantime were in the nature of technical changes, but
staff certainly continued to consult with other staff
in trying to find ways to improve the report.

There were various concerns that were
expressed by the Commissioners, and some wanted some
very substantive changes to the report. Commissioner
Gaziano's point during the comment period, of course,
that we do some outreach and a legal expert on
religious liberty to make sure that we are citing
these cases properly, and then we decided that Ken
Marcus would be a good person, both because he is a
religious liberty expert, and he is also familiar with
the procedures of the Commission.

So that was one of the types of outreach
that we did, and of course, that was very much above-
board, and his comments in their entirety were shared
with all of the Commissioners.
VICE CHAIR THERNSTROM: So, Commissioner Yaki, what I am hearing here is, number one, I am in total agreement with your point, but number two, the rules that we set in place have not been violated. Does that -- Can we close the matter there and move on or is there some problem that you think needs further discussion here, because I will absolutely stick with you if I think rules have been violated. I do not hear any information that would lead me to conclude that that is the case.

COMMISSIONER YAKI: Fine. Move on.

VICE CHAIR THERNSTROM: Okay. So let us move on.

COMMISSIONER YAKI: But I thought the question needed to be asked.

VICE CHAIR THERNSTROM: Oh, that's fine. It's fine.

COMMISSIONER YAKI: I don't think that these rules are silly.

VICE CHAIR THERNSTROM: No, I don't think they are silly in the slightest. We worked long and hard on fashioning them. The Braceras group was very responsible in doing so, and they responded to a real defect in the processes by which the Commission fashioned these statutory reports.
So I am totally sympathetic with what you are saying. I just don't hear any violation of those rules. But I thank you for raising the question. I think it was an important one to raise.

All right. Where are we here?

STAFF DIRECTOR DANNENFELSER: I guess the Commission has adopted Commissioner Heriot's motion with the package of amendments, and there are other Commissioners who apparently had amendments that they would like to have considered to Part A.

VICE CHAIR THERNSTROM: Right. Commissioner Gaziano, and I have myself some proposed amendments. Commissioner Gaziano, do you have some proposed amendments that you would like to bring up at this time?

COMMISSIONER GAZIANO: Do we want to vote first on Gail's, or have we?

COMMISSIONER HERIOT: I think there were no objections.

VICE CHAIR THERNSTROM: There were no objections.

COMMISSIONER GAZIANO: Okay. Well, then to Part A I have several more on findings and recommendations, but --
VICE CHAIR THERNSTROM: Findings and recommendations are Part B.

COMMISSIONER GAZIANO: Right. I understand. I am just warning that is where I will be heavily involved, but on page 25, the last sentence on that page, the lack of grievances filed under this category seems odd. I don't know that we have a basis for saying that, and I would like that to be struck.

VICE CHAIR THERNSTROM: I haven't gotten to that page yet.

STAFF DIRECTOR DANNENFELSER: Madam Vice Chair, there is some concern among the staff whether we went through the procedures to make sure that we adopted Commissioner Heriot's friendly amendment. So if we could have a second to her motion.

VICE CHAIR THERNSTROM: I had seconded, and I believe somebody else had.

COMMISSIONER HERIOT: I thought Pete did.

VICE CHAIR THERNSTROM: Commissioner Kirsanow did.

STAFF DIRECTOR DANNENFELSER: That's right. Commissioner Kirsanow. Okay. All right. Thank you then.

VICE CHAIR THERNSTROM: Yes. Okay, page 25. Look, the pagination of mine is slightly off, I
discovered, in going through it this morning with Tim Fay. What paragraph are you talking about?

COMMISSIONER GAZIANO: I have two different -- I'm sorry, I have two different versions, and it is Chapter 25 in mine.

VICE CHAIR THERNSTROM: You mean page 25?

COMMISSIONER GAZIANO: I'm sorry, yes, page 25. Let me see.

COMMISSIONER YAKI: While Commissioner Gaziano is doing this -- Commissioner Yaki -- as a point of order, Staff Director, is the hardbound version different than the e-mail version?

STAFF DIRECTOR DANNENFELSER: No, I don't believe so. Unless there is some hardware installation that people have that would cause it to shift, but not a lot.

COMMISSIONER YAKI: Because on my e-mail one, which I am working off right now, several parts of the report were highlighted or had some gaps in there, and I didn't know if those had been changed or not.

STAFF DIRECTOR DANNENFELSER: There were a few instances, I believe, with footnotes where there were some things highlighted, and staff was working to correct those.
COMMISSIONER YAKI: Okay.

COMMISSIONER GAZIANO: Mine is right after the -- Page 25 in mine is the page after Table 2.4.

VICE CHAIR THERNSTROM: Yes. Okay, I've got that, and what paragraph?

COMMISSIONER GAZIANO: It is the last paragraph on my page 25. It begins "General: Grievances defined by BOP."

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER GAZIANO: Then "The lack of grievances filed" -- See, it seems odd to some author. I'm not sure that -- and I don't really care that much about this one. There is another one that I feel stronger, but I don't know that it needs our commentary in this respect.

VICE CHAIR THERNSTROM: I agree with that. I would like to strike that sentence. Anybody got any problem with striking that sentence?

STAFF DIRECTOR DANNENFELSER: Commissioner Gaziano, could you just repeat the sentence that you are moving to strike?

COMMISSIONER GAZIANO: They are talking about -- The previous sentences are talking about the level of claims for religious rituals, and then the sentence I want to strike says, quote, "The lack of
grievances filed under this category seems odd."

STAFF DIRECTOR DANNENFELSER: That is the very last sentence on page 25.

VICE CHAIR THERNSTROM: Yes. So do you have a second for your motion?

COMMISSIONER HERIOT: Second.

STAFF DIRECTOR DANNENFELSER: Commissioner Heriot, second. Vice Chair, I am sorry I interrupted you. Let me turn it back to you.

VICE CHAIR THERNSTROM: I was just saying I had already seconded by, in effect, saying I want that sentence struck as well.

Okay. Commissioner Gaziano, you got more suggestions?

COMMISSIONER GAZIANO: Yes.

STAFF DIRECTOR DANNENFELSER: Vice Chair, should we do those -- Should we vote on that particular strike?

COMMISSIONER HERIOT: Hearing no objection.

VICE CHAIR THERNSTROM: Hearing no objection, we are striking that sentence. Anybody object? No.

COMMISSIONER HERIOT: We are amending the main motion to include striking that sentence.
VICE CHAIR THERNSTROM: Well, okay. We are amending the main motion. I was going to just go through the Gaziano ones and have a motion to accept them, but that's fine.

COMMISSIONER HERIOT: Yes, but then each one of them just amends the main motion.

VICE CHAIR THERNSTROM: Yes. Okay, we are amending the motion to strike that sentence. Commissioner Gaziano?

COMMISSIONER GAZIANO: It was page 97 of the printed version. It is page 99 of another one, but the bound version, 97, conclusion to Chapter 4. So it is the very last part of this before findings and recommendations, the second to last bullet.

I would strike that bullet. It makes sense to me that --

VICE CHAIR THERNSTROM: Please read it out loud for the Court Reporter.

COMMISSIONER GAZIANO: I would strike the second to last bullet, and it says, "The Department of Justice has not evidenced a high level of activity on behalf of plaintiff claims other than to defend the Constitutionality of the statute."

That could be, I think, misread. I think I know what the drafters intended. It certainly makes
sense to me, if prisoners find lawyers, volunteer lawyers to defend them, that the Justice Department wouldn't feel the need.

The Justice Department is a rather unique and almost exclusive authority to defend the Constitutionality of the statute. It may make it look to someone like they are putting disproportionate resources in that kind of defense, but it will be read by some, I think, in an inappropriate way.

COMMISSIONER HERIOT: Yes, I agree with that. We wouldn't expect the Department of Justice to be intervening in these cases. They are really not -- You know, that is not what they do. These cases are individual prisoner versus state prison or state prison workers.

VICE CHAIR THERNSTROM: And your motion is to simply, Commissioner Gaziano, to simply strike that bullet point entirely?

COMMISSIONER GAZIANO: That is correct. The chart speaks for itself. It provides us sufficient information.

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: I was going to say, Commissioner Heriot, are you seconding it?

COMMISSIONER HERIOT: Yes.
VICE CHAIR THERNSTROM: Okay. Any objection to doing that, to striking that bullet point?

COMMISSIONER GAZIANO: And I will move later to strike the corresponding part of the findings in this regard.

VICE CHAIR THERNSTROM: Well, that is fine.

COMMISSIONER HERIOT: Wait.

VICE CHAIR THERNSTROM: We are holding that. Okay, Commissioner Gaziano. Well, hearing no objection, we are striking that bullet point.

COMMISSIONER HERIOT: Amending the main motion.

VICE CHAIR THERNSTROM: Amending the main motion.


VICE CHAIR THERNSTROM: Okay. We have got one objection here, and Commissioners Gaziano, Kirsanow, Heriot, Taylor and myself agree to strike that bullet point.

COMMISSIONER HERIOT: Well, we have to do it by name. You have to do a roll call. That's your rule.
VICE CHAIR THERNSTROM: Right. Okay, thanks.

Commissioner Gaziano?

COMMISSIONER GAZIANO: Aye.

VICE CHAIR THERNSTROM: Kirsanow?

COMMISSIONER KIRSANOW: Yes.

VICE CHAIR THERNSTROM: Heriot?

COMMISSIONER HERIOT: Aye.

VICE CHAIR THERNSTROM: Yaki?

COMMISSIONER YAKI: No.

VICE CHAIR THERNSTROM: Taylor?

COMMISSIONER TAYLOR: Yes.

VICE CHAIR THERNSTROM: And I vote yes as well. So we have five Ayes, one Nay. The motion passes. Okay, Commissioner Gaziano.

COMMISSIONER GAZIANO: No further to offer at this time.

COMMISSIONER HERIOT: Call the question on the main motion.

VICE CHAIR THERNSTROM: Pardon me?

COMMISSIONER HERIOT: Call the question on the main motion.

VICE CHAIR THERNSTROM: No, because I have some suggestions.

COMMISSIONER HERIOT: Oh, I'm sorry. I'm
sorry.

VICE CHAIR THERNSTROM: Okay, on the very first page of Chapter 1, Introduction and Overview, I think this is simply a reader friendly suggestion for change and, obviously, it is a motion on my part.

On the third paragraph of the first page -- that is the paragraph right above Methodology -- where there is a list, it says, "The Commission studies the processes through which prisoners seek redress for religious discrimination at four levels."

I want bullet points before each one of those levels. It will just be a friendlier reading, easier reading for people.

And with the same point with the first paragraph under Methodology. I would like to have this list in the form of bullet points, and in addition, I don't like the word time frames, qualitative and quantitative data of various types and time frames. We don't need time frames.

So that is my first motion, and does anybody want to second that?

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: Anybody object to creating some bullet points there just simply for easier reading? Hearing no objection --
STAFF DIRECTOR DANNENFELSER: Madam Vice Chair, you are striking the words "and time frames" as well?

VICE CHAIR THERNSTROM: Yes. Just put "qualitative and quantitative data of various types and at various times," I guess it goes. I don't like -- I happen not to like this word time frames.

COMMISSIONER GAZIANO: I struck the same myself, Madam Chairman. Thank you for offering.

VICE CHAIR THERNSTROM: Okay, so we need to vote on those bullet points. It has been seconded, the motion. Then is there any objection to turning those two paragraphs into bullet points? Hearing none, that motion passes.

The second page, and I'm not going to have a lot of these, I promise. The second page, the first -- no, second sentence after "Incidents of alleged religious discrimination", "The Commission requested data on religious grievances from several prisons including a few each of" -- no, this is too awkward, "including federal, state and privately managed institutions and two jails". We don't need "a few each of". I just want to strike that --

COMMISSIONER GAZIANO: Gaziano, second, you're reading my mind.
VICE CHAIR THERNSTROM: Okay, so that is a stylistic change of striking "a few each of". Anybody got an objection to that, any discussion necessary? Hearing none the motion passes unanimously.

Okay, going onto page 29 --

COMMISSIONER YAKI: I abstained from the last vote.

VICE CHAIR THERNSTROM: I'm sorry. Court Reporter, we have an abstention from the last vote on striking those two words.

COMMISSIONER YAKI: I keep flipping back and forth between mute and I sometimes flip the wrong switch.

VICE CHAIR THERNSTROM: All right, does that mean I now have to have a roll call?

COMMISSIONER HERIOT: No, it's still not an objection.

COMMISSIONER YAKI: You can just note that.

VICE CHAIR THERNSTROM: Okay. Commissioner Yaki has abstained. Okay, this is just typos. You've got a list, starting on page 28 of examples of grievances and a list of allegations. The end of the list on page 29 after eight -- no, just before eight, there's an and after -- no, I'm sorry,
just before nine there's an and after the semicolon. That and should be struck and there should be an and instead before the numeral 10. This is on the top of page 29. This is just grammatical and then at the end of religious programs, there should be a period.

COMMISSIONER GAZIANO: Madam Chair, I certainly agree. This is Gaziano, I certainly agree with the change but I was going to try to offer or suggest that someone offer a motion. There are many other little ones I noticed, but that we would authorize the staff to make such grammatical and typo corrections. Style changes may be debatable but would that move things along?

VICE CHAIR THERNSTROM: No, Commissioner Yaki, I've got almost nothing more. Why don't we just go through them.

COMMISSIONER GAZIANO: Okay, but then I would like to offer that motion anyway so that we know that --

COMMISSIONER HERIOT: I've got one written down for this, so we can get to it after we adopt Section A. It's most important that we get to the Section A question before one of us croaks.

COMMISSIONER GAZIANO: Okay, go ahead, sorry.
VICE CHAIR THERNSTROM: I'm sorry.

COMMISSIONER GAZIANO: I'll offer the motion later.

VICE CHAIR THERNSTROM: Okay. Where were we? Did we have a vote on that change?

COMMISSIONER HERIOT: One of the ones that you just mentioned is this one at the top of page 29, I got that but I didn't get it quite right. I forgot to strike the and before 9, but I did get the fact that it ends in a semicolon, and there's no and before 10.

VICE CHAIR THERNSTROM: I thought you had, yeah.

COMMISSIONER HERIOT: So we just need to strike the and.

VICE CHAIR THERNSTROM: Strike the and. Any objection to striking the and before 9 and putting in and before --

COMMISSIONER HERIOT: I got that part. All you need to do is strike the and.

VICE CHAIR THERNSTROM: Okay, very good. Any objection? If I hear none, the motion passes.

COMMISSIONER YAKI: I'm just -- record me as an abstention.

VICE CHAIR THERNSTROM: Okay, Commissioner
Yaki would, once again, like to be recorded as abstaining on that motion.

Page 40, the summary of Chapter 2 is confusing to start that summary by saying "Chapter 2 examined". It's like wait a minute, was Chapter 2 something other than I just read? Is there a reference back to a former chapter which is -- it should be "This chapter", so nobody gets confused. It's a tiny stylistic change.

COMMISSIONER HERIOT: I second.

VICE CHAIR THERNSTROM: Pardon me?

COMMISSIONER HERIOT: I second that.

VICE CHAIR THERNSTROM: I second that.

Any discussion on that? Instead of "Chapter 2 examined", we just have "This chapter examined". And here is my last one, on page 44, "The Department of Justice's" --

STAFF DIRECTOR DANNENFELSER: Madam Vice Chair, did you ask if there were no objections?

VICE CHAIR THERNSTROM: I'm sorry. Are there any objections or abstentions?

COMMISSIONER YAKI: I'll abstain.

Commissioner Yaki abstains.

VICE CHAIR THERNSTROM: Commissioner Yaki abstains once again. Mr. Court Reporter, we have one
abstention here, Commissioner Yaki. I'm sorry. I apologize.

And on page 40 and this is my last one, it's summary -- no, I'm sorry, page 44, "The Department of Justice's Civil Rights Division", I just wondered whether we -- "since the OJ Civil Rights Division CRD was established in 1957, I'd like to add or make note or some way -- it was part of the 1957 Civil Rights Act."

COMMISSIONER HERIOT: That's in the footnote.

VICE CHAIR THERNSTROM: Okay, is that good enough for you?

COMMISSIONER HERIOT: Yeah, it's good enough for me.

VICE CHAIR THERNSTROM: All right.

COMMISSIONER HERIOT: That has to be aside anyway.

VICE CHAIR THERNSTROM: All right, that's the --

COMMISSIONER HERIOT: I changed, however, in -- and my motion changes the footnote to say it was established by the Civil Rights Act rather than after because it sounds like it sort of sprung up separate, which is wrong.
VICE CHAIR THERNSTROM: Yeah, and it is wrong. It should read, "It was established by".

COMMISSIONER HERIOT: Yeah, it's in my motion, so it's okay.

VICE CHAIR THERNSTROM: Okay, all right, fine. Those are the end of my motions to slightly append this document and I think they have all been approved with some abstentions. So I think we can move on now to the Motion as -- to vote on the motion as amended to approve Part A. Any further discussion?

(No response.)

VICE CHAIR THERNSTROM: Hearing none, let me have a vote.

STAFF DIRECTOR DANNENFELSER: Madam Vice Chair, I think Tim Fay would like to speak for a moment.

VICE CHAIR THERNSTROM: Sure.

MR. FAY: Pardon me, Madam Vice Chair. This is Tim Fay. Did you have some concern about the religious classifications and the limitations on that data?

VICE CHAIR THERNSTROM: Thank you very much. I did send that around to people and then promptly forgot about it. I do have -- I did have a problem with the religious classifications and I hope
people got my suggestion with respect to that. I --
in other words, I was proposing a disclaimer and here
I'm introducing it as part of the discussion of
approving Part A in its entirety.

I circulated a proposed disclaimer
regarding the religious classifications and I would
like to see it at the beginning of the report noting
that there are several important limitations regarding
the religious affiliations categories, traditions,
practices, of prisoners which are used in this report.

Did everybody get my e-mail on that because otherwise
I will read the three points I make.

COMMISSIONER HERIOT: I see it. I got it.

VICE CHAIR THERNSTROM: Is there anybody
who did not get it and --

COMMISSIONER YAKI: I didn't get it.

VICE CHAIR THERNSTROM: I'm sorry, who is
this, Commissioner Yaki?

COMMISSIONER YAKI: Yes.

VICE CHAIR THERNSTROM: Okay, well, let me
just then run quickly through the points. Three
points, first, "Prisoners' religious affiliations are
self-reported and as such, are not easily subjected to
verification against any external objective standard.

Indeed there is no universally accepted objective
definition of religious affiliation tradition or practice".

Two, "Various federal, state and local authorities as well as individual prisons and jails use different methods of classifying the religious affiliation of inmates."

Third, "The breadth and scope of prisoners' religious affiliations and traditions presented in this report has in some cases, necessitated grouping similar", quote unquote "similar religions together for the purpose of data analysis. This is an imperfect solution and various authorities disagree on which traditions can be combined into a meaningfully", quote unquote, "similar categories".

As an alternative we could say we've addressed some of these concerns by recommending that prisoners -- that prisons and the various prison authorities A, "Standardize the categories of religious traditions and practices and, B, improve the collection of these data".

COMMISSIONER HERIOT: We can't vote on that until we've voted on the rest of these.

VICE CHAIR THERNSTROM: No, we can't but you know, we can --

COMMISSIONER HERIOT: But we can
incorporate the first part now.

VICE CHAIR THERNSTROM: Right, and so any discussion of this motion of mine that we have a disclaimer at the beginning of the report?

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: You second it.

Any discussion?

COMMISSIONER YAKI: This is Commissioner Yaki. It seems to me that we're wading directly into the heart of the free exercise clause and I'm a little worried about how we characterize what other people's actions may be that in fact, may violate that clause. So I'm going to vote no.

VICE CHAIR THERNSTROM: Now, wait a minute. Explain that a bit further to me. I'm sorry to take people's time but I'd like to understand the point. That is all -- in my view all I was suggesting is, look, there are -- there are potential objections to this report saying well, wait a minute, there are different methods of classifying religious -- the religious affiliation of inmates. The data is limited because there are -- because the religious affiliations are self-reported and so forth.

Tell me again what a problem with saying look, we understand it's a pre-emptive move on our
part. We understand the potential for some objections here and we recognize that this is imperfect information.

COMMISSIONER HERIOT: I think the comment goes more to the optional conclusion than it goes to the first part.

VICE CHAIR THERNSTROM: All right, well, we're not going to discuss the optional conclusion at the moment. How about just cross that out. How about simply the three points in which we say -- in which we inject a little modesty into the report in terms of you know, what we know and what we don't know?

COMMISSIONER YAKI: Well, I don't see that as a -- as a little point of limitation. I see that as an important -- an important disclosure in the main body that talks about, you know, that there -- that by the fact that we are relying upon definitions or categories created by these authorities.

COMMISSIONER HERIOT: We're actually giving this real prominence, though, aren't we? We're giving this -- we're putting this disclaimer up front so you should be especially happy with it.

COMMISSIONER YAKI: Well, it depends where -- I mean, there's up front and then there's -- I don't think this is a three-point thing. I think this
is much -- requires much more prominence than --

COMMISSIONER HERIOT: It's going to be at
the beginning of the report. That's as prominent as
something can be.

VICE CHAIR THERNSTROM: I just want some
academic integrity here, Commissioner Yaki.

COMMISSIONER YAKI: No, I know and I want
some academic integrity as well, but I just think that
just because you put something at the front, doesn't
necessarily mean how you put it in the front is going
to do it. And I think it demands a longer discussion
about the problematic data that we are forced to rely
upon based upon authority whose ability to interpret
the First Amendment is suspect at best.

VICE CHAIR THERNSTROM: Well --

COMMISSIONER HERIOT: You should be all
the more for this then.

VICE CHAIR THERNSTROM: Just a minute,
because getting into an argument with Commissioner
Yaki about whether he should or should not be for it
doesn't, it seems to me, advance the discussion here.

Commissioner Yaki, is there -- and then I
have a question for the staff director on -- a
procedural question. Would you feel -- I mean, is
there a form in which you could put this that makes
this point that you would be more comfortable with, and I realize you're going to say, "I can't do it on the spot, this minute". And so then my -- the question goes to the staff director, is there a way of kind of holding this -- the exact formulation of this disclaimer.

COMMISSIONER YAKI: I mean, I will probably do it in my defense. I don't want to waste any more time. I just wanted to raise it as an issue that I have as concern about. The way that you choose to deal with it is how -- the majority chooses to deal with it, is how you're going to choose to deal with it. I think that if I went off on writing -- writing a gambit that that would delay the report and I don't want to be associated with that.

So I just want to raise my objections, the reason for it, and move on.

VICE CHAIR THERNSTROM: All right, then we will move on. I was just trying to arrive --

COMMISSIONER YAKI: No, I appreciate, Commissioner Thernstrom, your attempt to incorporate this in the process, but I think that ultimately it would run into buzz saws from other Commissioners and we'd be debating this and nauseam in which case, they go back to your original anyway, so why bother?
VICE CHAIR THERNSTROM: All right. So I need now -- and it has been seconded by Commissioner Heriot. I need a vote on putting this disclaimer at the front of the report. Commissioner Yaki, you are voting nay.

COMMISSIONER YAKI: No, I'm going to abstain.

VICE CHAIR THERNSTROM: You're abstaining. Have I got yea votes from all of the Commissioners?

COMMISSIONER GAZIANO: Yea.

VICE CHAIR THERNSTROM: Okay, Court Reporter, we have here five yea's and an abstention from Commissioner Yaki on putting this disclaimer, the three points, at the front of the report. So, onto -- I think -- onto I believe what we need to do now is to approve the motion to accept Part A as amended.

COMMISSIONER GAZIANO: Point of order.

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER GAZIANO: I just want to make sure that my subsequent motion to authorize typo corrections would not be out of order if we vote at this time.

COMMISSIONER HERIOT: I think that's right, isn't it?

VICE CHAIR THERNSTROM: Absolutely.
COMMISSIONER GAZIANO: Okay, then I'm willing to proceed.

VICE CHAIR THERNSTROM: If anybody finds typos, obviously, we don't want to end up with typos in the final report. Okay, vote on Part A. Why don't I start with you, Commissioner Yaki?

STAFF DIRECTOR DANNENFELSER: Madam Vice Chair.

VICE CHAIR THERNSTROM: Yeah.

STAFF DIRECTOR DANNENFELSER: This is the staff director. I just wanted to point out the Executive Summary would come in Part A but the concern there is that that should really be finalized after the report is finalized and we know what the -- it would incorporate the findings and recommendations. So I believe we might want to have an understanding that the Executive Summary will be incorporated as the Commission completes its work on this report today.

VICE CHAIR THERNSTROM: Okay, that understanding should then be part of the package of approval of Part A. We are expecting down the road, an Executive Summary.

COMMISSIONER HERIOT: Are we going to get an opportunity to approve or not approve of that Executive Summary?
VICE CHAIR THERNSTROM: I would hope so. Is that correct, Mr. Staff Director?

STAFF DIRECTOR DANNENFELSER: I think we could do that by notational voting.

VICE CHAIR THERNSTROM: Yeah, I mean, I really want to see what the Executive Summary looks like. I'm sure other people do, too.

Any objection to that proposal, that we -- no, I put it as part of the motion to approve Part A with the understanding that we will have a chance to review that Executive Summary. So let us have a vote on this approving Part A.

Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

VICE CHAIR THERNSTROM: Kirsanow?

COMMISSIONER KIRSANOW: Yes.

VICE CHAIR THERNSTROM: Heriot?

COMMISSIONER HERIOT: Yes.

VICE CHAIR THERNSTROM: Yaki?

COMMISSIONER YAKI: No.

VICE CHAIR THERNSTROM: Taylor?

COMMISSIONER TAYLOR: Yes.

VICE CHAIR THERNSTROM: And I'm voting yes, so we have once again five yea votes and this time not an abstention but a nay vote from
Commissioner Yaki.

COMMISSIONER GAZIANO: This is Gaziano. I move at this time to authorize the staff to correct not only typographical -- obvious typographical errors, but also clear and obvious grammatical errors that any of us might point out to the staff or that the staff may notice on their own and obviously, misspellings and similar non-substantive corrections.

COMMISSIONER HERIOT: Don't say non-substantive because that includes stylistic things that we might not approve of. It should be misspellings, typographical errors, punctuation errors and simple and clear grammatical errors that can be fixed without seriously changing the sentence.

VICE CHAIR THERNSTROM: I agree with that because --

COMMISSIONER GAZIANO: That is a clarification of my motion.

COMMISSIONER HERIOT: And one more, and Blue Book errors.

COMMISSIONER GAZIANO: Certainly. Be glad to include that.

VICE CHAIR THERNSTROM: Yeah, I agree because something can be read as a substantive change that is masquerading as a technical or other --
COMMISSIONER HERIOT: So as that motion was contributed to by us, I would second that.

VICE CHAIR THERNSTROM: Okay, all right.

So wait a minute. Wasn't it your own motion?

COMMISSIONER GAZIANO: It was my motion.

VICE CHAIR THERNSTROM: Oh, it's your motion, yes, okay. Okay, and you're accepting the rewriting of that motion.

COMMISSIONER GAZIANO: Yes.

**DISCUSSION OF PART B**

VICE CHAIR THERNSTROM: Okay. We need to vote on that. Any objections to that? Hearing none, it has been approved. So Part A is approved, let us go on to Part B, which as distributed in draft form to the Commission on September 24th, 2008, contains the Commission's findings and recommendations. Under this motion the Commission will vote individually on each finding and recommendation. Those findings and recommendations receiving a majority vote will be included in the report with the vote tally and a sentence explaining any opposition to the item that has been voted on.

So Finding 1, can we have a motion that the Commission approve Finding 1 which reads as follows: "Conflicts over the exercise of religious
liberty in prisons are inherently difficult even intractable at times. While incarcerated persons maintain the right to exercise their religion, their ability to do so is tempered by the unique health, safety and administrative concerns of state and federal correctional institutions.

The First Amendment, State Religious Freedom Restoration Acts, Civil Rights of Institutional Persons Act and the Religious Land Use and Institutional Persons Act or the Religious Freedom Restoration Act where federal prisoners are concerned, together address the religious rights of prisoners and the interests of the American people in maintaining order and ensuring safety".

And by the way, I forgot to point this out, but the first time that I think it was RLUIPA in the draft we got was mentioned. RLUIPA was not -- the full name of the act was not spelled out and needs to be. And it needs to be identified. Anyway, so --

COMMISSIONER HERIOT: I had a potential amendment to this one.

VICE CHAIR THERNSTROM: Yes, okay.

COMMISSIONER GAZIANO: And I do, in turn.

VICE CHAIR THERNSTROM: Okay, so first I move that we accept it. Is there discussion and then
we'll have -- is there a second and then we'll move onto the -- can I hear a second on it?

COMMISSIONER GAZIANO: Second and then I suppose we can move to amend.

VICE CHAIR THERNSTROM: Yeah, absolutely.

Any changes, discussion or questions regarding this motion. So, Commissioner Heriot?

COMMISSIONER HERIOT: I wanted to add the Prisoner Litigation Reform Act, (PLRA), in parenthesis to the list of statutes and I would also like to add the words, and remedies after religious rights, so that it would read "religious rights and remedies for prisoners", because I think part of the point that we're making in this report is that the two go together.

VICE CHAIR THERNSTROM: Yes, so you're talking about the last sentence where the last part of the last sentence together address the religious rights and remedies.

COMMISSIONER HERIOT: Yeah, and in the litany of statutes include the Prisoner Litigation Reform Act (PLRA).

VICE CHAIR THERNSTROM: Right, right. Do we have a second for that motion? I'll second it. Any discussion of that motion? Is there unanimous
approval or have we got some dissents or --

COMMISSIONER YAKI: Commissioner Yaki will abstain.

VICE CHAIR THERNSTROM: Commissioner Yaki abstains and we have five yeas on that. Okay, any other discussion of this first finding?

COMMISSIONER GAZIANO: I move to amend it further in two minor respects. I'd rather substitute in the second sentence "the right to practice their religion", since I think that --

VICE CHAIR THERNSTROM: Rather than --

COMMISSIONER GAZIANO: -- the lay reader, particularly the lay readers will pay attention to this. Certainly, no one is trying to tell prisoners what they can, you know, say in their prison cells. It's really the -- or think. It's really the practices that's at issue. My, I think, other suggestion is in the last sentence after "the rights", and we've now added "and remedies of prisoners and the interests of", I would like to add "prison officials and the American people".

A lot of the safety concerns at issue are primarily for the protection of prison officials and secondarily to the American people.

COMMISSIONER HERIOT: Question. Haven't
we used the word "practice" in a more narrow sense?

VICE CHAIR THERNSTROM: I was going to say
the same thing.

COMMISSIONER HERIOT: In other parts of
the --

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER GAZIANO: Pardon?

COMMISSIONER HERIOT: Haven't we used the
word "Practice" in other parts in this report in a
more narrow sense than you mean, so that we'll have a
confusing conflict between what practice means?

COMMISSIONER GAZIANO: I will yield if you
all feel strongly. I think that in the -- this
particular sentence you're talking about the second
clause is their ability to do so. It's the practices
that are mostly limited by health, safety and
administrative --

COMMISSIONER HERIOT: But we've used the
word "practice" in other parts of the report in a very
narrow sense that didn't include lots of the RLUIPA
objections. I mean, that's one of our sub-categories
somewhere, I think.

COMMISSIONER GAZIANO: I thought that was
confusing all along but I didn't fight it there, so I
won't fight it here. Strike my first suggestion then,
if you all suggest otherwise. But I would ask your consideration for the second.

COMMISSIONER HERIOT: Fine, for the record, I agree with you that that word "practice" was used in a weird way in the body of the report, but I let it go and I don't think it would be a good idea to now go back and --

VICE CHAIR THERNSTROM: We are not going back to it.

COMMISSIONER GAZIANO: Okay.

VICE CHAIR THERNSTROM: We have a motion on the floor.

COMMISSIONER GAZIANO: I'll withdraw that one.

VICE CHAIR THERNSTROM: We have a motion on the floor simply to add "interests of" -- how did you put it -- "prison officials"?

COMMISSIONER GAZIANO: "Prison officials and the American people".

VICE CHAIR THERNSTROM: "And the American people" in the last --

COMMISSIONER HERIOT: I second that one.

VICE CHAIR THERNSTROM: Any discussion, any further discussion? Any abstentions or nays?

COMMISSIONER YAKI: Yes.
VICE CHAIR THERNSTROM: Commissioner Yaki, you are what, which one?

COMMISSIONER YAKI: Abstaining.

VICE CHAIR THERNSTROM: You are abstaining. So one abstention, Commissioner Yaki, five yeas and the motion passes.

Okay, Finding 2; can I have a motion --

COMMISSIONER GAZIANO: Do we now vote on the finding as amended?

VICE CHAIR THERNSTROM: I'm sorry, we do. Can we have a vote on the finding as amended? All approve?

COMMISSIONER GAZIANO: Aye.

VICE CHAIR THERNSTROM: We've got -- let's just put it the other way. Once again, any nays or abstentions? Commissioner Yaki, you obviously have either an abstention or a nay.

COMMISSIONER YAKI: I'm abstaining.

VICE CHAIR THERNSTROM: You're abstaining so Commissioner Yaki abstains and five yeas, am I correct on that? Is anybody else abstaining? Okay, moving on to Finding 2. Obviously, the motion passes.

Finding 2, can I have a motion that the Commission approve Finding 2 which reads as follows:

"Some two million persons are incarcerated in the
United States with 93 percent of those located in state and local correction facilities. The percentage of prisoners professing non-Christian faith tend to be larger than their proportion within the non-incarcerated adult population in the United States aged 18 and older. Federal and state prisons have encountered difficulty in recruiting chaplains for these faiths, particularly Islam. Therefore, prisons rely heavily on religious contractors, volunteers and faith-based organizations to meet inmates' religious needs. State prisons draw even more heavily on the service of religious contractors and volunteers, than do federal prisons but have less uniform vetting procedures for them. The shortage of chaplains and the resulting practice of prisons relying on contractors and volunteers have" -- Grammatik, no, have is right -- "have ramifications for both inmates' religious accommodation and national security".

So can I have a motion to approve that and there will be amendments in the discussion period. Can I have a motion --

COMMISSIONER GAZIANO: So moved.

VICE CHAIR THERNSTROM: And a second, I'll second it myself. Any discussion? Well, let me start out the discussion. Just a couple of grammatical
things here. I don't like the sentence, "Federal and State prisons have encountered difficulty in recruiting chaplains for these faiths particularly Islam". I would prefer a dash, "Particularly for the adherents of the Islamic faith or", and then period. "Therefore, prisons rely heavily on religious contractors," et cetera.

Then at the bottom last sentence, "The shortage of chaplains and the resulting practice of prisons relying", I would prefer, "at the reliance on contractors", instead of "relying", just in my view reads more smoothly and yeah, it's just smoothing out of the language.

So I am moving that those two small changes be made. They are just minor changes in wording. They obviously have no substantive import.

COMMISSIONER HERIOT: Okay.

VICE CHAIR THERNSTROM: Is there -- are there any objections or abstentions? Hearing none, it is approved unanimously. Any other discussion of this finding? Okay, can we have a motion to -- well, we already had a motion to -- do we need another motion now to approve it? We had a motion to -- I guess we do as amended. Is that correct? Somebody --

COMMISSIONER HERIOT: We're still on 2?
COMMISSIONER GAZIANO: Yeah, that's correct.

COMMISSIONER HERIOT: Yeah.

VICE CHAIR THERNSTROM: Yeah, okay, so we need a motion to approve as amended Finding 2. I so move. Is there a second?

COMMISSIONER HERIOT: Second, although I think that's the pending main motion anyway but --

VICE CHAIR THERNSTROM: Pardon me?

COMMISSIONER HERIOT: I think that might be the pending main motion anyway. Whatever, let's just vote on it.

VICE CHAIR THERNSTROM: Let's just vote on it. Any abstentions or objections to approving Finding 2 as amended?

COMMISSIONER YAKI: I abstain.

VICE CHAIR THERNSTROM: Okay, Yaki abstains and five Commissioners approve.

Finding 3, can I have a motion that the Commission approve Finding 3, which reads as follows: "Religious grievances make up a very small proportion of all grievances filed in prisons regardless of jurisdiction, federal, state or local. They make up a similarly small proportion of complaints from or on behalf of inmates to the US Commission on Civil
Rights. The types of religious grievances reported in federal and state prisons are similar.

The Federal Bureau of Prisons, the BOP does not collect information on grievances in federal prisons related to religious items/literature and religious grooming/head cover. These two categories are among the most common bases for all RLUIPA litigation by state prisoners".

So --

COMMISSIONER GAZIANO: So moved.

VICE CHAIR THERNSTROM: So moved. Second?

I will second it. Let's have any discussion.

COMMISSIONER GAZIANO: This is Gaziano. I would like to amend the recommendation in two respects and possibly a third if I hear any support for the third. The phrase "from, or on behalf of, inmates to", I would substitute "filed with" so the sentence would essentially read --

VICE CHAIR THERNSTROM: Yes, I understand.

COMMISSIONER GAZIANO: "Similarly a small proportion of complaints filed with the U.S. Commission on Civil Rights".

COMMISSIONER HERIOT: I'm sorry, I missed that, Todd. What did you say?

VICE CHAIR THERNSTROM: He's just
simplifying it. He's saying --

COMMISSIONER GAZIANO: The sentence would read, "They make up a similarly small proportion of complaints filed with the U.S. Commission on Civil Rights".

VICE CHAIR THERNSTROM: We'd get rid of all that fancy --

COMMISSIONER GAZIANO: And the second change I would suggest in the next sentence, "The types of religious grievances reported" it should be "by federal and state prisons".

VICE CHAIR THERNSTROM: Yes, of course. Yes.

COMMISSIONER GAZIANO: Okay, there are either grievances in or grievances reported by.

VICE CHAIR THERNSTROM: Yeah.

COMMISSIONER GAZIANO: And if there's support from others, I think the last two sentences are kind of optional observations. I'm not sure I support the recommendation when we come to it, but I wonder if there's any support for, strong support for those last two sentences.

COMMISSIONER HERIOT: Can we -- when we get to the recommendation, if it fails to pass, then we'll include in that motion, going back and striking
the two sentences there.

COMMISSIONER GAZIANO: That's fine with me.

COMMISSIONER HERIOT: Because otherwise we wanted it here so we really can't decide at this point.

COMMISSIONER GAZIANO: That's fine.

VICE CHAIR THERNSTROM: All right, so you -- at the moment you have two motions. Is that correct, Commissioner --

COMMISSIONER GAZIANO: Correct.

COMMISSIONER HERIOT: Two corrections.

COMMISSIONER GAZIANO: Two corrections which is a motion.

VICE CHAIR THERNSTROM: Yeah, which is a motion. Let's have a vote on those two corrections which are obviously, stylistic. Anybody abstaining or opposed to those stylistic changes?

COMMISSIONER YAKI: I'm abstaining.

VICE CHAIR THERNSTROM: Commissioner Yaki abstains and five Commissioners approve. So we need a vote on Finding 3 then as amended with the stylistic changes. I move we approve Finding 3. Have I got a second there?

COMMISSIONER HERIOT: Second.
VICE CHAIR THERNSTROM: Any abstentions or
dissents from the approval of Finding 3?

COMMISSIONER YAKI: I abstain.

VICE CHAIR THERNSTROM: You abstain.

Commissioner Yaki abstains and five Commissioners
approve of Finding 3 with the stylistic changes we
have already voted on.

Okay, Finding 4, can I have a motion that
the Commission approve Finding 4, which reads as
follows: "Inmates professing non-Christian faiths are
more likely than other inmates to make claims about
free exercise limitations in both federal and state
prisons. Muslim, Jewish and Native American male
inmates acting" -- I'm not a lawyer, "initiated the
largest number of RLUIPA cases studied by the
Commission". Okay, have I got a motion to approve
that finding?

COMMISSIONER GAZIANO: So moved.

VICE CHAIR THERNSTROM: I will second it.

Any discussion of that finding?

COMMISSIONER HERIOT: I just wanted to say
for the record here that I think it was a mistake for
the report generally to refer to Native American
religions as Native Americans because a lot of people
are going to be confused into believing that is a
racial rather than a religious category but it's all through the report and I didn't move to correct it elsewhere, so I'm not moving it here.

COMMISSIONER GAZIANO: I might support such a move just because we didn't elsewhere, the people are going to pay particular attention to the recommendation.

COMMISSIONER HERIOT: Okay, if you can come up with language, I'll support it, Muslim, Jewish and --

COMMISSIONER GAZIANO: Native American religions.

VICE CHAIR THERNSTROM: It doesn't make any sense.

COMMISSIONER HERIOT: Yeah, it doesn't.

COMMISSIONER GAZIANO: Oh, I see, and inmates who practice Native American faiths.

COMMISSIONER HERIOT: Male inmates, there's too many words here.

COMMISSIONER GAZIANO: Well, do we need the male? I moved inmates before. Muslim, Jewish, I don't know. Inmates -- well, okay, "Inmates", sorry to do this on the fly, "Inmates who practice Muslim, Jewish, and Native American faiths".

COMMISSIONER HERIOT: Fine, I'll vote for
that.

COMMISSIONER GAZIANO: All right.

STAFF DIRECTOR DANNENFELSER: Do you want to keep male inmates or just --

VICE CHAIR THERNSTROM: Well, if that's accurate.

STAFF DIRECTOR DANNENFELSER: Yes, it is.

COMMISSIONER GAZIANO: Okay, I'll keep --

VICE CHAIR THERNSTROM: It has to be to in there then.

COMMISSIONER HERIOT: Yeah, although one of the things that the original draft of the report failed to do was point out, of course, that overwhelmingly inmates are male.

VICE CHAIR THERNSTROM: Right, we've only got the data for males. That should be included.

COMMISSIONER GAZIANO: I suppose except does it imply that female inmates of these --

VICE CHAIR THERNSTROM: No, it just implies in my view at least, simply that that is a generalization we can make on the basis of the data we have which solely concerns male inmates.

COMMISSIONER GAZIANO: I don't feel strongly unless a few others do. I have one other slight suggestion to ask you about. Instead of "make
claims", I mean, that's rather vague. Aren't we
talking about file complaints or registered
complaints?

VICE CHAIR THERNSTROM: Yes, we are.

COMMISSIONER GAZIANO: Thank you. I would
include those two changes.

VICE CHAIR THERNSTROM: Okay, so
Commissioner Gaziano has moved that we make two
changes. Instead of make claims, you've got -- tell
me again the exact words.

COMMISSIONER GAZIANO: I believe file
complaints.

VICE CHAIR THERNSTROM: File complaints
and then give me again the exact wording the second
change.

COMMISSIONER GAZIANO: If we want to
include males, it would be, "Male inmates practicing
Muslim, Jewish and Native American faiths, acting pro
se, initiated the largest number of RLUIPA cases
studied by the Commission".

VICE CHAIR THERNSTROM: Right, okay, can
we have a -- any further discussion of this and if
not, can we have a vote on those suggested changes?
Okay, hearing no further discussion, have we got any
abstentions or nay votes on this.
COMMISSIONER YAKI: Abstained.

VICE CHAIR THERNSTROM: Commissioner Yaki abstains and five commissioners approve unless I hear differently from any of the other commissioners. The finding is approved.

Okay.

COMMISSIONER HERIOT: We approved both the amendment and Number 4? Is that what we did?

VICE CHAIR THERNSTROM: Yes, I believe so. I believe that that's what we just did. Anybody think we didn't just do that? I think that's the way I worded it.

COMMISSIONER HERIOT: Okay.

VICE CHAIR THERNSTROM: Finding 5, I move that the Commission approve Finding 5 which reads as follows: "Both state and federal correctional institutions identified prison inmates' security and lack of resources as the key reasons for any burdens they may have to impose" -- I'm sorry -- "they may impose on inmates' free exercise. While federal prisons acknowledge that national security considerations have been relevant in how they regulate the religious activities of inmates post-9/11. The prisoner advocacy groups unanimously agree state correctional institutions almost uniformly deny
restricting prisoners' religious activities based on national security concerns". That sentence to me is a little garbled, but we'll go on.

COMMISSIONER GAZIANO: I will move to strike it when you're finished.

VICE CHAIR THERNSTROM: Okay. "Federal prisons admit to increasing supervision of inmate led programs and vetting of religious volunteers and materials entering the prison. Where resource limitations prevent supervision, regularly scheduled services have been reduced. The federal prisons surveyed appeared to have spread the burden of reduction in religious programming across all faith groups". So I move that this be approved. Is there a second and we will obviously go on to discussion.

COMMISSIONER GAZIANO: Second.

VICE CHAIR THERNSTROM: Okay, any changes, discussion, questions?

COMMISSIONER GAZIANO: I would like to strike the second sentence. I'm going to make a similar recommendation in the first recommendation. And I would change the third to make the recommendation make some sense at the end of the sentence to say, "After 9/11".

VICE CHAIR THERNSTROM: All right.
STAFF DIRECTOR DANNENFELSER: So are you changing post to after? Is that the change?

COMMISSIONER GAZIANO: I'm just taking that one phrase, "after 9/11", adding it to the end of the current third sentence and striking the second sentence.

VICE CHAIR THERNSTROM: Right. I would think with the post 9/11 up further in the sentence -- no, that's fine, that's fine.

COMMISSIONER GAZIANO: If you want to make it at the front of the sentence, fine.

VICE CHAIR THERNSTROM: Instead of post 9/11 can we have "subsequent to 9/11"?

COMMISSIONER GAZIANO: "Subsequent to 9/11" is fine, but I just want that second sentence --

VICE CHAIR THERNSTROM: Right, okay. I agree with actually striking that second, quite garbled sentence. Any discussion of Commissioner Gaziano's two changes here? Hearing none, let's have a vote. Any nay votes?

COMMISSIONER GAZIANO: Let the record reflect, I just thought the way that that second sentence was -- it implied that they're doing something duplicitous. That they're being dishonest and I don't thing the record supports that at all.
VICE CHAIR THERNSTROM: Right, I didn't like that sentence either. Let's just have a vote on your two suggested changes, the striking of that second sentence and the third sentence ends now, "subsequent to 9/11"? Any abstentions or nay votes on this?

COMMISSIONER YAKI: I abstain.

VICE CHAIR THERNSTROM: Commissioner Yaki abstains. There are, I assume then, five votes supporting those changes. We now need to vote on -- to approve Finding 5 as amended. I will move the approval. Is there a second?

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: Okay, again, any abstentions or nay votes?

COMMISSIONER YAKI: I abstain.

VICE CHAIR THERNSTROM: Commissioner Yaki abstains and five Commissioners approve. The motion obviously passes.

Finding 6, can I have a motion that the Commission approve Finding 6, which reads as follows: "There has been a dramatic increase in the number of religious discrimination complaints received by the Justice Department Special Litigation Section since RLUIPA's passage. In 2001 SPL received only 23
complaints. By 2006 that number had increased to 417 complaints. SPL investigated a very small percentage of the complaints during this period, half of one percent."

Can I have a motion to approve Finding 6 and again, we will go on to the question of any amendments in the discussion period, but --

COMMISSIONER TAYLOR: So moved.

VICE CHAIR THERNSTROM: And I will second it. All in favor?

COMMISSIONER YAKI: I abstain.

VICE CHAIR THERNSTROM: You abstain, okay.

So the --

COMMISSIONER GAZIANO: I'm sorry, I had mute on. This is Gaziano. Can I amend first?

VICE CHAIR THERNSTROM: Well, I thought we were going on. I'm sorry.

COMMISSIONER GAZIANO: Can we amend 6?

VICE CHAIR THERNSTROM: I'm sorry, we need a discussion at this point. I'm terribly sorry. I got distracted here. Discussion, questions.

COMMISSIONER GAZIANO: Gaziano here. I would like to amend the last sentence. As it's currently written, it strongly implies that there is no vetting process at the Justice Department and the
following sentence, I think, would clarify the point.
"SPL" I would add the following words so it would just be -- "determined that only a very small percentage of complaints merited investigation during this period, half of one percent".

VICE CHAIR THERNSTROM: And --

COMMISSIONER GAZIANO: It's my understanding that they do, in fact, look at them and make a first blush, so it's helpful to say that they think --

COMMISSIONER HERIOT: Yeah, I agree.

COMMISSIONER GAZIANO: -- only one percent merited investigation but it's not because they're lazy and don't do anything.

VICE CHAIR THERNSTROM: Yeah, but do we have that in the body? I can't remember now at this point. Do we have that in the body of the report that, in fact, that is the case, that they look at all of them and make merit judgements?

COMMISSIONER GAZIANO: I don't know from their interrogatory responses, but I know that that is their practice, so I would object to the sentence as is. So either I'm going to move to strike the sentence, which I don't want to do or the --

VICE CHAIR THERNSTROM: Well, we can't
have a finding that's not based on anything in the report.

COMMISSIONER GAZIANO: We can base our knowledge on how the Department of Justice works. We have expertise in that regard. Does anyone have any reason to doubt my understanding of how the Department works?

VICE CHAIR THERNSTROM: Well, could the Staff Director come in on this? I mean, it is my understanding that these findings have to be based on what is in the report. I don't want to have a finding that reads in a way that adds information that we have -- that is simply based on the understanding of Commissioners of how the Justice Department works but which is based on nothing in the report or in the -- well, is based on nothing in the report. Mr. Staff Director.

STAFF DIRECTOR DANNENFELSER: One moment. It's been suggested that the staff could read the interrogatory to see if there's anything in there that would enable them to say that.

VICE CHAIR THERNSTROM: Yeah, I mean, I don't care what the reality as you know it, Commissioner Gaziano or Commissioner Gaziano and Heriot is. I am concerned that we stick with our
rules that nothing in the findings --

COMMISSIONER HERIOT:  I agree with you too, Abby, but I also agree with Todd that the way it reads it sounds like an accusation. So if it turns out there is nothing in the report, we might just want to strike it. We don't have to have a finding on an issue, especially if Todd has information that they do conduct some sort of preliminary investigation which they almost certainly do. I mean, sort of by definition. They're not randomly picking these cases to investigate.

COMMISSIONER GAZIANO: Yeah, that would be my position. I'd prefer we could amend it. I suspect the interrogatories would support that.

VICE CHAIR THERNSTROM: Why don't you make a motion that the staff look at the substance of the interrogatories to see whether it -- the -- your proposed amendment is justified?

COMMISSIONER GAZIANO: Okay, that would be fine but what I would move is --

COMMISSIONER HERIOT: But if we want closure, we could just strike it.

COMMISSIONER GAZIANO: Yeah, I would move that we either strike it or if there's support in the record, that we amend it as I suggest, because I think
it's helpful if there is the support in the record that I think there is. If e-mails or communications or other -- DOJ, you know, filed some substantial responses. I bet that would, you know, be the implication of what they sent us.

VICE CHAIR THERNSTROM: What would you like to do at this point? We can --

COMMISSIONER GAZIANO: I can move to either strike the sentence or if there is support in the Department of Justice's communications to us, to amend the sentence to read as follows, "SPL determined that only a very small percentage of the complaints merited investigation during this period, half of one percent". I would suggest that we delegate to the staff which of those two, if they're supporting the --

COMMISSIONER HERIOT: I mean, the sentence may be true regardless of what's in the record. I mean, nobody claims that they are randomly picking which ones to do. We may -- we don't have to endorse how good a job they did in determining which ones to investigate to acknowledge that of course, they do and they have some procedure to do that.

COMMISSIONER GAZIANO: Unless someone believes that the one percent that they left, the one percent they got to was just the first one off the
pile and that's the only one they did. That makes perfect sense.

STAFF DIRECTOR DANNENFELSER: I think you could make a case that it's a -- that it's a semantic change, that Commissioner Gaziano is pushing, is promoting here. Although, you know, there is that one other possibility that you said, that someone might say the only alternative is they just randomly, you know, like you go through the first 500 names in the Manhattan Phone Book type of argument.

COMMISSIONER GAZIANO: I just --

STAFF DIRECTOR DANNENFELSER: I don't think anyone thinks that's the case here. So given that, I think we could assume that this is essentially a semantic change unless staff finds something --

COMMISSIONER GAZIANO: Well, how about this as an argument, the Justice Department is required by law to look at these and we must presume unless the staff has contrary evidence, that they did follow the law, but that's also the logical inference of what we've written as well.

VICE CHAIR THERNSTROM: Where are we on this? Do you want to put a motion, do you want to frame your motion, leaving this in the hands of the staff?
COMMISSIONER HERIOT: I would much prefer closure on this.

COMMISSIONER GAZIANO: Okay, if my motion, my first motion to amend fails, then I'll move to strike but I hope, Commissioners have enough experience with how DOJ operates that a majority will feel comfortable amending the sentences I have -- as I've done.

COMMISSIONER HERIOT: I have an alternative that I think fudges it a little better. It's less of an accusation but less of a statement. If we just were to say "SPL selects a very small percentage of the complaints for investigation, half of one percent".

VICE CHAIR THERNSTROM: That, it seems to me solves the problem.

COMMISSIONER GAZIANO: Does that imply that the selection is random. That they have --

COMMISSIONER GAZIANO: No, it leaves open the possibility that it's random but I don't think it implies it at all.

VICE CHAIR THERNSTROM: No, I don't think it implies it. It seems to me that solves the problem here.

COMMISSIONER GAZIANO: Okay.
COMMISSIONER YAKI: But from the way I view the way the Justice Department has worked for the past eight years, I do believe that there's a fair amount of selectivity and other activities that I would not be pleased about. So however way you word this, I'm voting against it.

VICE CHAIR THERNSTROM: Well, what if we strike the sentence, Commissioner Yaki, the last sentence? Can you go along with this finding then?

COMMISSIONER YAKI: No.

VICE CHAIR THERNSTROM: I'm happy to strike that last sentence.

COMMISSIONER YAKI: No, because I think that -- I think that anything the Justice Department has done in the past eight years is something that needs scrutiny anyway. So, no.

VICE CHAIR THERNSTROM: Well, but wait a minute. Then the finding would be reduced to simply to the numbers, the number of complaints increased to 417, period, end of finding. Could you support it then? All we're doing is reporting the numbers, the number of complaints.

COMMISSIONER YAKI: I will abstain but I won't vote no.
Commissioner Gaziano wish to strike that last sentence or would he prefer to amend it?

COMMISSIONER GAZIANO: I'd prefer to amend it as Commissioner Heriot has suggested.

COMMISSIONER HERIOT: "SPL selects a very small percentage of the complaints".

STAFF DIRECTOR DANNENFELSER: It should be selected, right?

COMMISSIONER HERIOT: Selected, "selected a very small percentage".

VICE CHAIR THERNSTROM: Right, yeah, that, Commissioner Yaki, does not exclude the possibility that they've selected that percentage, small percentage, of complaints for investigation on grounds that -- on objectionable grounds. It doesn't exclude that possibility.

STAFF DIRECTOR DANNENFELSER: Is it clear what it did? Now it says now that they've selected them, what does that --

COMMISSIONER HERIOT: Selected them for investigation.

COMMISSIONER GAZIANO: During this period, half of one percent.

VICE CHAIR THERNSTROM: Selected for investigation, a very small percentage, that does not
say --

COMMISSIONER HERIOT: Yeah, it doesn't accuse but it doesn't exclude the possibility that we wouldn't approve.

STAFF DIRECTOR DANNENFELSER: Okay, so, "SPL selected for investigation a very small percentage of the complaints during this period, half of one percent".

VICE CHAIR THERNSTROM: Right, now that does not exclude the possibility that Yaki believes to be the case that their process of selection was corrupt. It simply states what they have done.

COMMISSIONER GAZIANO: Okay.

VICE CHAIR THERNSTROM: Okay, so we need to vote on that amendment which simply revises that last sentence that Commissioner Gaziano suggested wording, "selects for investigation" and that last sentence.

STAFF DIRECTOR DANNENFELSER: "Selected for investigation" because you're talking about a particular period that --

VICE CHAIR THERNSTROM: Yes, okay. I'm sorry, wait a minute. "By 2006, that number has increased to 417 complaints." Then how do you want the last sentence to read?
STAFF DIRECTOR DANNENFELSER: Okay, I'm sorry Commissioner Heriot?

COMMISSIONER HERIOT: Yes, "SPL selected for investigation a very small percentage of the complaints during this period".

VICE CHAIR THERNSTROM: Of course, yes, I'm sorry. I missed what the Staff Director was saying there. Okay, let's have a vote on that motion of Commissioner Gaziano's. Let's start with abstentions and nay votes. Commissioner Yaki? Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

VICE CHAIR THERNSTROM: You are abstaining. Commissioner Yaki abstains. Hearing no other abstentions, five votes yea. Commissioner Yaki abstains. The motion is approved.

Finding 7. I have a motion that the Commission approve Finding 7 which reads as follows: "The number of RLUIPA cases has grown annually, increasing from only four cases in 2001 to 27 cases in 2004 and 135 cases in 2006. The total number of RLUIPA cases when compared to the total number of prisoners in state prisons is small, 0.2 percent. The Prison Litigation Reform Act, PLRA, has been a key factor in maintaining manageable levels of prisoner..."
free exercise litigation. The Department of Justice has not evidenced the high level of activity on behalf of plaintiffs' claims in RLUIPA cases other than to defend the constitutionality of the statute”.

I will move to approve it. Can I have a second? Second, people? Hey, wake up, I need a second.

COMMISSIONER GAZIANO: Second.

COMMISSIONER HERIOT: Second, but this one is going to have a lot of amendments, I think.

VICE CHAIR THERNSTROM: I understand, okay. We can go on now to changes, discussions, questions, regarding the motion.

COMMISSIONER HERIOT: Could I go?

VICE CHAIR THERNSTROM: Yeah.

COMMISSIONER HERIOT: Okay, first, I would move to add the word "reported" in front of the word "RLUIPA" in the first line. Second, in the second sentence, you know, I think that the evidence that we have of there not being, you know, a lot of litigation doesn't really come from Chapter 4 and our Lexus study. It comes from the fact that the witnesses didn't report that they had an unmanageable level of litigation. So I would add after the first sentence, "Nevertheless, judging from the witness testimony as
well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time, period".

VICE CHAIR THERNSTROM: All right, "Nevertheless, judging from", go on.

COMMISSIONER HERIOT: "The witness testimony as well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time". Then in the third sentence, I would -- what will be the third sentence, but is currently the second sentence, I would again add the word "reported" I front of RLUIPA. And then when we get to that number, first of all, it's a typo. It should be 0.02 and second, it's not really the right figure in the first place because unless I'm mistaken, RLUIPA applied to county jails as well, and therefore, the denominator ought to include the number of prisoners in county jails as well, which is going to be much higher and we're going to drive that number into something even smaller.

COMMISSIONER GAZIANO: I'm sorry, on that point, could we just say "smaller", "somewhat smaller than", rather than eliminating the figure all together?

COMMISSIONER HERIOT: I'd rather recompute
it because, you know, I'd like to show that the number is very small. Actually 0.2 percent wouldn't be all that small.

COMMISSIONER GAZIANO: I could live with that. I'd like to include a number if our staff can do that.

COMMISSIONER HERIOT: I propose that we use the same number that we used earlier. In Finding Number 1 we said that there are two million people, roughly two million people incarcerated and 93 percent of them are in state and local correctional facilities. So take 93 percent of two million and have that be our denominator and add approximately because it will be only approximate at that point.

COMMISSIONER GAZIANO: That sounds good.

COMMISSIONER HERIOT: So that's something staff can do without further intervention from us.

VICE CHAIR THERNSTROM: So what you're saying is substitute whatever number the staff comes up with and put an approximately before it.

COMMISSIONER HERIOT: Right.

STAFF DIRECTOR DANNENFELSER: I'm told that the staff did not find any county RLUIPA cases.

COMMISSIONER HERIOT: Yeah, but it doesn't matter whether there were any. What matters is there
could have been and there weren't. So that's just --
it doesn't matter. When we're talking about whether
the litigation is out of control, what matters is they
could have filed a case and they didn't so they go in
the denominator, just like Joe Schmoo a particular
prisoner at a state prison could have filed one but
didn't and he went into the denominator.

COMMISSIONER YAKI: Point of information,
this is Commissioner Yaki for the Staff Director.
When we start talking about the denominator and what's
in a denominator, this is a discussion that -- point
that I raised early on I think the first time we
debated this thing. Commissioner Thernstrom and I
both voiced some reservations about this in our
statutory report. To what extent does this data
include prisoners who are in for-profit private
correctional institutions?

STAFF DIRECTOR DANNENFELSER: I'm going to
ask the General Counsel to respond to that since he
did much of the research in this area.

MR. BLACKWOOD: This is David Blackwood.
The answer to your question, Commissioner Yaki, it
depends on what section of the court you're looking
at. Finding Number 7 basically, comes out of Chapter
4, which is the survey of electric database that OGC
conducted. As a matter of results, we simply didn't find, as the Staff Director mentioned, any jails in that.

You asked about for profit, I don't believe we broke it down.

COMMISSIONER YAKI: No, what I mean is the private correctional centers that are operated by you know, Correctional Corporation of America, Wackenhut, those things that are not owned by the state. They're not operated by the state. They are operated by private entities.

COMMISSIONER HERIOT: But they're still subject to the statute, aren't they?

COMMISSIONER YAKI: Well, there's an interesting question on a lot of that stuff because -- but I just want to know whether or not that section of the population was included in the statistics for the study.

VICE CHAIR THERNSTROM: I can't hear whoever is talking.

STAFF DIRECTOR DANNENFELSER: I believe we are just taking what was reported by the states, so if the states would have reported those numbers, they would have been included, but --

COMMISSIONER YAKI: But we don't know.
Arizona, for example --

STAFF DIRECTOR DANNENFELSER: I'm not sure that we know with certainty whether the states included them in the numbers they reported.

COMMISSIONER HERIOT: I believe when you say the two million figure that they do include that sort of thing.

VICE CHAIR THERNSTROM: I want a footnote to this.

MR. BLACKWOOD: They're working on behalf of the states though.

VICE CHAIR THERNSTROM: I --

COMMISSIONER YAKI: But there are some facilities that are mixed federal and state. There are facilities that hold ICE detainees. There are facilities that hold federal detainees, and there are facilities -- and that same facility can also hold state prisoners as well. I mean, I've visited many of them and there are some significant ones in Arizona, in Texas, what have you, and I don't know if necessarily, they are included within the state counts of anything.

Some states export their prisoners to other states as well. So you know, when a state says, "I have X number of people," are they talking about
just within their state or are they including the
number that are residing in Oklahoma or in Texas? I
just think we need some clarity on that. And this is
a point I raised at the very, very beginning.

VICE CHAIR THERNSTROM: It is. I remember
this very well. I'm very sympathetic to this point as
Commissioner Yaki has said.

MR. BLACKWOOD: This is David Blackwood
again. Commissioner Yaki, you know at some point
there is a footnote where we identify the population
prisoners and it's over a million something. I'll try
to look into that footnote and if I can, I'll try to
determine what it included in that figure.

COMMISSIONER YAKI: Okay.

VICE CHAIR THERNSTROM: Right, and if
there isn't a footnote, there should be.

MR. BLACKWOOD: I'm fairly certain that
it's in there as we identify the population of prisons
in state -- I'm sorry, prisoners in state prisons.

COMMISSIONER YAKI: Well, these are not
state prisons. They are privately operated prisons.
They contract with states to place state prisoners but
they are not state prisons. And frequently many of
these contract with multiple states for the same
institution.
MR. BLACKWOOD: Actually, I can identify for you what I was referring to in Chapter 4, Footnote 8, we have the following language and, "The Commission found that 250 RCLUIPA cases handed down in September 30, 2006, the adult male population in state prisons was 1,114,506. The American Correctional Association in their 2007 directory: the Adult and Juvenile Correction Department, institutions, agencies and probation and parole authorities" --

THE REPORTER: Your current discussion is not getting on the record. I'm not getting these people recorded clear.

MR. BLACKWOOD: This is David Blackwood.

VICE CHAIR THERNSTROM: Yeah, David, you need to do something. I had to stop listening myself because somebody was at my front door, so I missed a little bit of this.

COMMISSIONER GAZIANO: Can you borrow a mike, David.

VICE CHAIR THERNSTROM: But you need to repeat this in any case for the Court Reporter. You're coming in, in general very weakly.

STAFF DIRECTOR DANNENFELSER: Can you borrow a mike, David?

MR. BLACKWOOD: I thought mine was working
but I'll find another one. This is David Blackwood again. There is a figure that we use in Chapter 4, the footnote says --

COMMISSIONER YAKI: That's not any better.

Borrow Marty's microphone.

STAFF DIRECTOR DANNENFELSER: He's going to borrow my mike.

MR. BLACKWOOD: The reference I made, this is David Blackwood again, in Chapter 4, Footnote 6 is we do use a figure of 1,114,506 as --

COMMISSIONER HERIOT: What page is that on?

MR. BLACKWOOD: It's on page 80, representing that adult male population in state prisons. Then we give a cite to the American Correctional Association, 2007 directory. I do not know whether that figure, although we can find out whether that would include private prisoners.

COMMISSIONER HERIOT: Again, it doesn't include state jails, county jails, which is a problem. And we turn around and in our finding we say there is about two million prisons, 93 percent of whom are located in state and local corrections facilities. That I think is the figure that we're looking for to use here, or we should be looking for because that
would be the population of people who are subject to RLUIPA.

COMMISSIONER KIRSANOW: Kirsanow here. I've got to jump off for a moment, I'll be back a little bit later.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER YAKI: When are you going to jump back on, Peter, because I've got to leave in about 30 minutes?

COMMISSIONER KIRSANOW: I'll be back before then.

COMMISSIONER YAKI: Okay.

VICE CHAIR THERNSTROM: All right, anybody got any further discussion on this and what would people like to do? Somebody make a proposal.

COMMISSIONER HERIOT: I'm lost.

COMMISSIONER YAKI: Madam Chair, while they're doing whatever they are with their microphones, you know, I just want to point out that this is where I begin to have severe issues with the report. There was reliance on the Prison Litigation Reform Act. I received a fair amount of correspondence from religious organizations, faith-based organizations, that are just really seeking to amend PLRA because of the high threshold and abuses of
interpretation in enforcement that are ongoing, that
the idea that the physical injury requirement is an
extremely high bar for people to bring claims.

The exhaustion of administrative remedies
often means that they have to go through a complaint
system that goes before the very guards and folks who
are denying them their rights in the first place.
There are onerous restrictions on attorney's fees so
many attorneys won't take the cases and you'll find
and you'll find in my defense people from the National
Association of Evangelicals to Sojourners, the
Presbyterian Church, the United Methodist Church all
have serious concerns about the fact that we can make
-- we can make conclusions that say that there's now a
manageable level of litigation because of PLRA, but
the cost is at the -- the cost is at the -- is the
constitutional rights of the people that we seek to
protect and starting with 7, where we make the
statement that a key factor in maintaining manageable
levels through the remainder of the findings that talk
about standards of litigation and why there are so few
laws, et cetera, I think that PLRA is the -- is one of
the major culprits behind it and deserved a more
thorough investigation and discussion in the report
than it currently does.
And I say this now because I will have to be leaving pretty soon and one, if not the major concern I have about this report is not examining in more detail the impact that PLRA has had on the issue of religious exercise and religious rights of prisoners in this country.

VICE CHAIR THERNSTROM: Well, I think that's an extremely interesting comment because you say -- we say in maintaining manageable -- hello, hello. Am I back? I was -- I had a ringing. Am I on?

COMMISSIONER HERIOT: So did we, I hear you.

VICE CHAIR THERNSTROM: Okay, because we say in maintaining manageable levels of prisoner free exercise to litigation. Now, of course, you know, whatever you're talking about, if you're talking about, let's say crime, if you arrest people in violation of their constitutional rights, you can get the arrest level down to that which is manageable. I mean, it is a loaded word, in other words, and I think that Commissioner Yaki's comment is extremely interesting and I don't know what to do in response to it. I wouldn't know what to do in response to it because it's a comment that goes, as he would
COMMISSIONER HERIOT: Is it a loaded term or just the opposite? I mean, by manageable, we're not making a value judgment of whether or not this is good. It's simply manageable.

VICE CHAIR THERNSTROM: Well, yeah, I --

COMMISSIONER GAZIANO: Can we think of a synonym? I don't object to it. I think it's helpful but if you can think of a synonym that pleases us better, I like the sentence.

COMMISSIONER HERIOT: Yeah, I think manageable or unmanageable, those are the least loaded terms you can come up with. Otherwise, it sounds like you really are endorsing or not endorsing and I think the nice thing about manageable is it doesn't say anything about it except for it's administrative feasibility.

VICE CHAIR THERNSTROM: Well, no it says that --

COMMISSIONER YAKI: But I guess the question I would -- this is Commissioner Yaki. The question I would pose back is since when does redress for constitutional rights rest on a manageability standard?

COMMISSIONER HERIOT: Nobody is saying
that it does here. They're just saying it's manageable.

COMMISSIONER YAKI: Who's saying it's manageable?

VICE CHAIR THERNSTROM: It is a loaded term because exactly for the reason Commissioner Yaki just pointed out. I mean, we're accepting as a constitutional standard that you want is a good thing, that you want but --

COMMISSIONER GAZIANO: Well, it's a positive factor. It can cut the other way. You do want a system that allows people to raise claims to be manageable, so the courts actually pay attention to meritorious claims. It is a factor. It's not the be all and end all but it's a positive factor. If you say it's unmanageable then the courts can't sift because the dross and the crap and they may dismiss them all.

VICE CHAIR THERNSTROM: Yes, but if you are making -- if you are reducing the load, a load of whatever to manageable levels, and compromising rights in the process of doing so, then you know, manageable is not a good thing. I do agree that it has connotations here that are slightly troubling. I don't know what to do about it, however, because...
you're really talking about something, Commissioner Yaki, you're really talking about something very fundamental for the whole report.

COMMISSIONER YAKI: Right, which is why I'm --

COMMISSIONER GAZIANO: Maybe what we could do then is break up different amendments to it. I was going to try to strike the last sentence when it was my turn and maybe we can just see which commissioners on the call and we may have to wait till hopefully Pete comes back before Michael has to go off and we can just see which parts of things -- by the way, the math that my consultant acting as special assistant has e-mailed to me is 256 RLUIPA plaintiffs out of 93 percent of two million is 0.0 --

COMMISSIONER HERIOT: 250, not 256, isn't it?

COMMISSIONER GAZIANO: Pardon?

COMMISSIONER HERIOT: Where does 256 come from? I thought it was 250?

COMMISSIONER GAZIANO: Well, I can try to redo the math, but it comes to less than either -- so less than 0.014, so we could say less than 0.014 and be accurate.

COMMISSIONER HERIOT: So that's working
with 93 percent of two million as the denominator.

COMMISSIONER GAZIANO: Correct.

COMMISSIONER HERIOT: Okay.

VICE CHAIR THERNSTROM: You know, you could change the -- getting rid of manageable, you could substitute "has been a key factor in creating the level of free exercise litigation that we find".

COMMISSIONER HERIOT: That would be fine.

You could leave in, then, my sentence where it says it's not unmanageable. You know, that doesn't cut against Yaki's point at all. You know, it just says, you know, we haven't reached unmanageable levels. And you know, therefore -- that cuts in his direction and then change the "maintaining manageable" as you've said. That works for me.

VICE CHAIR THERNSTROM: Commissioner Yaki, have you got that?

COMMISSIONER YAKI: No.

VICE CHAIR THERNSTROM: No? Okay, what I'm suggesting here is changing that sentence, "The Prison Litigation Reform Act has been a key factor in maintaining manageable levels", I'm suggesting changing it to, "The Prison Litigation Reform Act has been a key factor in creating the level of free exercise litigation that we find". So it's not -- it
gets rid of the manageable.

COMMISSIONER HERIOT: Oh, by the way, I had intended to add a probably to that sentence, just to say --

VICE CHAIR THERNSTROM: All right, well, probably or may have been a key factor, whatever. So it's simply saying, yeah, I like that "has been a likely factor," get away from "key", "has been a likely factor in creating the level of free exercise litigation", we find it's less -- you can read less into that.

COMMISSIONER YAKI: Well, I know you can read less into it but to me, the fact that this is -- imbues so much of the report and the findings, I mean, even -- you put lipstick on it and it still isn't going to make it any more attractive.

COMMISSIONER GAZIANO: Well, at some point, that's -- we -- the record is not clear but we should still vote on these various changes. I don't want to introduce my last one about that last sentence if we're not done with these, but let's -- can we vote on some of these individually?

VICE CHAIR THERNSTROM: Yeah, let's vote on them individually. I've got them here. The first sentence, "The number of reported RLUIPA cases",
putting in "reported" before RLUIPA. Can I have a vote on that? Any abstentions, objections to that? Okay, that has been unanimously accepted.

Then the second sentence that was proposed by, I don't know who by this time, "Nevertheless, judging from the witness testimony as well as our inventory of reported cases", the total number --

COMMISSIONER HERIOT: "The overall volume of litigation".

VICE CHAIR THERNSTROM: "The overall volume of litigation", thank you.

COMMISSIONER HERIOT: "Is not unmanageable at this time".

VICE CHAIR THERNSTROM: No, no, no, no, we've got -- we're into the sentence which is --

COMMISSIONER HERIOT: No, putting it this way is actually a pro Yaki way to put it.

VICE CHAIR THERNSTROM: I know but we're in the sentence before that.

COMMISSIONER HERIOT: No, no.

COMMISSIONER GAZIANO: I think she's proposing a different way of doing it.

VICE CHAIR THERNSTROM: All right, so -- okay, after the date of 2006, you're proposing what, Gail?
COMMISSIONER HERIOT: "Nevertheless," --

VICE CHAIR THERNSTROM: Yeah, "Judging from the"

COMMISSIONER HERIOT: -- "judging from the witness testimony, as well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time".

VICE CHAIR THERNSTROM: Now wait a minute. So you've got -- so you're now bringing the unmanageable. I thought we were --

COMMISSIONER HERIOT: This is manageable. What I'm saying is it's not a problem now. So somebody who thinks that's not important --

VICE CHAIR THERNSTROM: Now wait a minute.

COMMISSIONER HERIOT: -- should be happy. Their opposition is conceding that it's not a problem at this point.

VICE CHAIR THERNSTROM: I thought the rest of that sentence would now read, "The total number of cases when compared to the total number of prisoners in state prisons is small, approximate X percent".

COMMISSIONER HERIOT: No, we don't know that, remember? We don't know how many cases.

VICE CHAIR THERNSTROM: We get an adjusted number.
COMMISSIONER HERIOT: Pardon? We have no idea what the total number is.

COMMISSIONER GAZIANO: Are we going to add another sentence talking about the number of claims compared to the total prison population? We do have that figure but maybe that's a third sentence.

COMMISSIONER HERIOT: We don't know reported claims.

COMMISSIONER GAZIANO: Pardon?

COMMISSIONER HERIOT: We don't have any idea how many cases there are. We only know how many reported cases.

COMMISSIONER GAZIANO: I understand. With that change, with that change are we going to not point out the --

COMMISSIONER HERIOT: Oh, I think we still can. We could just put reported, it's small and have the number.

COMMISSIONER GAZIANO: Sure, okay.

COMMISSIONER HERIOT: It's not very important but there is it, you know, somebody went to the trouble of writing Chapter 4.

VICE CHAIR THERNSTROM: But then Gail, as I understand it, you're suggesting, "Nevertheless, judging from the witness testimony as well as our
inventory of reported cases, the total number of cases
when compared to the total number of prisons and state
prisons is small," period.

COMMISSIONER HERIOT: I don't know that.
All I know is it's not unmanageable. They didn't say
it was small. They said they didn't complain about it
being unmanageable and they would have. I'm not
relying on Chapter 4 which I don't think gives us any
valuable information given that it's confined to
reported cases. Although it's helpful in the sense
that it supports the fact that these guys would have
and were basically asked to complain about this, and
they didn't really complain all that much. That's
what I'm judging from. I am not judging from --

VICE CHAIR THERNSTROM: Well, we're back
to -- when I tried to get rid of it in the next
sentence, we're back to the word "manageable".

COMMISSIONER HERIOT: Yeah, but here we're
saying it in a way that shouldn't bother somebody who
is concerned that that not be the standard because
basically we're saying, whether that's the standard or
not, that's not a problem here, so we can forget about
it at this time.

VICE CHAIR THERNSTROM: Commissioner Yaki?

COMMISSIONER YAKI: Yes?
VICE CHAIR THERNSTROM: You got any further input on this?

COMMISSIONER YAKI: Not really. I mean, I appreciate what you're trying to do. My point goes to the fact that this underlying statute, to me, completely infects the data on this since its enactment, and to me the data itself is tainted by virtue of the way that the statute has been interpreted and enforced. And that's why --

VICE CHAIR THERNSTROM: Yes, I understand.

COMMISSIONER YAKI: Okay, so I don't want to belabor that point.

COMMISSIONER GAZIANO: Yes. With respect, I think that the finding by setting forth the two allows you to -- anyone to argue that point, and you have effectively argued that point on our record. People can interpret it in a different way.

COMMISSIONER HERIOT: Yes. I really think this is a finding -- putting it this way allows people to take that as a starting point for arguments in both directions.

VICE CHAIR THERNSTROM: Okay. So I now -- hold on, let me just write this down. I have now got on that sentence, "Nevertheless, judging from the witness testimony, as well as our inventory of
reported cases, the total number of" -- we don't need to have reported once again, "of RLUIPA of cases when compared to the total number of" --

COMMISSIONER HERIOT: Wait, wait, wait, wait, wait. What happened to the sentence? Are you proposing an alternative to mine that gets rid of that part?

VICE CHAIR THERNSTROM: No. I thought I was with your's.

COMMISSIONER HERIOT: No. No, mine, again is, "Nevertheless" --

VICE CHAIR THERNSTROM: "Nevertheless, judging from the" --

COMMISSIONER HERIOT: -- "judging from the witness testimony, as well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time."

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER GAZIANO: I'm going to suggest another sentence in a minute, but that's fine to stop there.

COMMISSIONER HERIOT: And then we go on to the sentence about the total number of, again, reported RLUIPA cases. We really want to be very careful never to suggest that that number applies to
all RLUIPA cases. We do not need that word "reported" there, because the middle sentence, the one I suggested is not talking about just reported cases, it's talking about the overall volume of litigation.

COMMISSIONER GAZIANO: Well, I --

VICE CHAIR THERNSTROM: But wait a minute.

COMMISSIONER GAZIANO: We're just reporting -- we're reporting slightly different facts there, both of which are helpful.

COMMISSIONER HERIOT: Yes.

VICE CHAIR THERNSTROM: Gail, wait a minute.

COMMISSIONER HERIOT: Sentence number one deals with reported RLUIPA cases.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER HERIOT: And my added sentence deals with overall litigation, so that's very different.

VICE CHAIR THERNSTROM: Yes. And then sentence number two has the word "reported" in it, as you read it. "Nevertheless, judging from the witness testimony, as well as our inventory of reported cases".

COMMISSIONER HERIOT: Right. That's right. I'm saying the reason I am judging overall
litigation is that, number one, the witnesses who are in a position to claim that they were being overwhelmed, they wrote that they were basically asked, are you being overwhelmed, and they weren't being overwhelmed. And, also, as evidence, but only as evidence of the overall litigation, we have the reported litigation.

VICE CHAIR THERNSTROM: Okay. The sentence as I understand it reads, "Nevertheless, judging from the witness testimony, as well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time."

COMMISSIONER HERIOT: Right. And then the next sentence would again have to focus in on reported RLUIPA cases, so we have to add "reported."

VICE CHAIR THERNSTROM: I've got that. And the next sentence goes, "The total number of reported RLUIPA cases" -- hold on, let me just correct my text here -- "when compared to the total number of prisoners", you want to finish that? We don't want to say -- you want to say not unmanageable again?

COMMISSIONER GAZIANO: No, no.

COMMISSIONER HERIOT: I want to say total number of prisoners in state correctional facilities instead of prison, so that we include jails.
VICE CHAIR THERNSTROM: Correctional facilities --

COMMISSIONER HERIOT: Is --

COMMISSIONER GAZIANO: Very small, quite small, and then the figure is dash, dash less than 0.14. It's actually .0134, but that gives a false sense of accuracy, since we're using 93 percent of 2 million.

COMMISSIONER HERIOT: Right. It's probably also worth pointing out we're not talking about per year, we're talking about over the period of what, seven years that this covers?

COMMISSIONER GAZIANO: Yes, if you want to begin the sentence that way.

COMMISSIONER HERIOT: We could put it next to the number, 0.014 percent over the course of how many ever years it is.

COMMISSIONER GAZIANO: I would put that at the beginning of the sentence, "Over the course of" --

VICE CHAIR THERNSTROM: No, I think it belongs at the end of it.

COMMISSIONER GAZIANO: Okay. Fine.

VICE CHAIR THERNSTROM: We can get rid of a comma that way. How many years is it?

COMMISSIONER HERIOT: I don't know.
VICE CHAIR THERNSTROM: All right. The sentence now reads, "The total number of reported RLUIPA cases when compared to the total number of prisoners in state correctional facilities is very small -- less than 0.014 over the course of X years."

COMMISSIONER GAZIANO: It looks like four -- isn't it 2004, 2005, 2006? Can David Blackwood or someone clarify?

COMMISSIONER HERIOT: So 2001 it starts.

COMMISSIONER GAZIANO: What?

COMMISSIONER HERIOT: It's 2001, and it goes up -- I don't know whether it goes into 2007 at all, or whether it just cuts off at the end of 2006.

COMMISSIONER GAZIANO: What chart are we referring to? I'm sorry.

VICE CHAIR THERNSTROM: If we take the number of years out, which is going to be complicated because it's not going to be --

STAFF DIRECTOR DANNENFELSER: It only goes up to 2006. This is the Staff Director. It goes from 2001 through 2006.

COMMISSIONER HERIOT: So it's six years.

STAFF DIRECTOR DANNENFELSER: Yes.

COMMISSIONER GAZIANO: Okay. Let's just make it six.
COMMISSIONER HERIOT: Each of those six years, yes.

VICE CHAIR THERNSTROM: Okay. Got it. All right. Anything more on this finding?

COMMISSIONER GAZIANO: Yes, but do you want to vote on that sentence?

VICE CHAIR THERNSTROM: Yes.

"Nevertheless, judging from the witness testimony, as well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time. The total number of reported RLUIPA cases, when compared to the total number of prisoners in state correctional facilities is very small -- less than 0.014 over the course of six years."

COMMISSIONER HERIOT: Percent.

VICE CHAIR THERNSTROM: Pardon me?

COMMISSIONER HERIOT: Percent.

VICE CHAIR THERNSTROM: I'm sorry, percent.

COMMISSIONER HERIOT: "Over the course of six years."

VICE CHAIR THERNSTROM: Yes. All right. Can we have a vote on that sentence?

COMMISSIONER GAZIANO: I move to strike everything after that sentence, too. Do you want to
do that separately?

VICE CHAIR THERNSTROM: No.

COMMISSIONER HERIOT: No. We haven't voted on these yet.

COMMISSIONER GAZIANO: Okay.

VICE CHAIR THERNSTROM: Yes, let's vote on that sentence. All opposed or abstaining?

COMMISSIONER YAKI: I abstain; oppose, I mean.

VICE CHAIR THERNSTROM: Commissioner Yaki is opposed. Got anybody else abstaining?

COMMISSIONER HERIOT: Does that mean we have to do a roll call?

VICE CHAIR THERNSTROM: No.

COMMISSIONER YAKI: No, I opposed. I didn't abstain.

COMMISSIONER GAZIANO: Okay. Go ahead.

Roll call.

VICE CHAIR THERNSTROM: All right. Commissioner Gaziano.

COMMISSIONER GAZIANO: Aye.


COMMISSIONER HERIOT: Aye.

VICE CHAIR THERNSTROM: Yaki is opposed,
and Taylor?

COMMISSIONER TAYLOR: Present. Here. I vote aye.

VICE CHAIR THERNSTROM: Aye.

COMMISSIONER TAYLOR: Yes.

VICE CHAIR THERNSTROM: Okay. So we have got one, two, three, four ayes, and one nay.

COMMISSIONER HERIOT: By that you mean you're an aye, as well?

VICE CHAIR THERNSTROM: I'm an aye, as well. Yes, but we don't have Kirsanow, so it's four.

COMMISSIONER HERIOT: Okay.

COMMISSIONER GAZIANO: Okay. Unless I'm stepping on anyone's toes, I think we've incorporated what was the second to last sentence now into a previous sentence. I think the last sentence I'd also like to strike for the reasons that I struck --

COMMISSIONER HERIOT: We haven't done the Prison Litigation Reform Act sentence.

COMMISSIONER GAZIANO: Oh, I'm sorry. I thought you incorporated that earlier in your earlier sentence. Go ahead with that.

COMMISSIONER HERIOT: I wanted to add the word "probably", and I thought that Abby had some --

VICE CHAIR THERNSTROM: I had "likely",

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but it doesn't matter. "It's been a likely factor in creating the level" -- I propose "creating the level of free exercise litigation that we find." I got rid of unmanageable.

COMMISSIONER HERIOT: That's fine with me.

COMMISSIONER GAZIANO: Fine with me.

VICE CHAIR THERNSTROM: Okay. So that sentence now reads, "The Prison Litigation Reform Act (PLRA) has been a likely factor in creating the level of free exercise litigation that we find."

STAFF DIRECTOR DANNENFELSER: The level of, should say "prisoner free exercise litigation". Right?

VICE CHAIR THERNSTROM: Yes. Good. Thank you. All right. Let's have a vote on that, that sentence. Any nays or abstentions on that?

COMMISSIONER YAKI: I vote no.

VICE CHAIR THERNSTROM: Okay. Roll call.

Commissioner Gaziano.

COMMISSIONER GAZIANO: Aye.

VICE CHAIR THERNSTROM: Kirsanow is still not here. Heriot?

COMMISSIONER HERIOT: Aye.

COMMISSIONER KIRSANOW: Kirsanow here, but I just got back, so I'm not prepared to vote on
whatever it is we're voting on.

VICE CHAIR THERNSTROM: Okay.

Commissioner Taylor?

COMMISSIONER TAYLOR: I vote aye.

VICE CHAIR THERNSTROM: And I vote aye, so it's four ayes, one nay.

COMMISSIONER TAYLOR: This is Ashley. I need to drop off now.

VICE CHAIR THERNSTROM: We're going to lose our quorum.

COMMISSIONER HERIOT: No, we're not, are we?

COMMISSIONER KIRSANOW: Pete's back.

VICE CHAIR THERNSTROM: Pete's back, but Commissioner Yaki is going to be leaving very soon. Isn't that correct?

COMMISSIONER YAKI: Yes.

VICE CHAIR THERNSTROM: Yes, so at that point we're going to lose our quorum.

COMMISSIONER HERIOT: Where's Jerry?

VICE CHAIR THERNSTROM: He can't make it.

There's no way of making --

COMMISSIONER HERIOT: Okay. Let's do eight. No, we've got to finish seven. I'm sorry.

COMMISSIONER GAZIANO: Jerry can't be
located under the circumstances for a half --

VICE CHAIR THERNSTROM: No, he cannot. I talked to him at length this morning. He cannot.

COMMISSIONER GAZIANO: Okay. Well, I move --

COMMISSIONER YAKI: How much longer can Ashley stay on, or Ashley's gone?

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER YAKI: Because it's 10:30, and I've got to jump on this other thing. I mean, I pushed it back as far as I could.

VICE CHAIR THERNSTROM: Yes. No, I understand. I was delighted you were able to make it today. I didn't expect you to be able to make it.

COMMISSIONER YAKI: This is why I worry about these teleconferences, because of the quorum issue.

VICE CHAIR THERNSTROM: I hate these teleconference meetings. I hate them. I think --

COMMISSIONER HERIOT: Well, can we get Ashley on the phone and see if there's some chance of getting him back after a break?

VICE CHAIR THERNSTROM: It didn't sound it.

COMMISSIONER HERIOT: But we need to
verify that. It's too important, given that the law requires us to get this report out, it's too important to just assume that he can't do it.

VICE CHAIR THERNSTROM: You do realize the report is not going out today.

COMMISSIONER HERIOT: I don't realize that, no, but --

VICE CHAIR THERNSTROM: It's not going out.

COMMISSIONER HERIOT: Yes, but nevertheless, it is much better to have a report today rather than later. So if there's any chance of getting Ashley back on the phone, even for just enough time to get these recommendations passed, then we need to --

COMMISSIONER YAKI: It will be a lot easier when I get off the phone, because then I won't be interrupting you all the time. You can just simply say let's adopt it all, cheerio, go.

VICE CHAIR THERNSTROM: Michael?

COMMISSIONER YAKI: Yes?

VICE CHAIR THERNSTROM: I thought you were a process person, too.

COMMISSIONER YAKI: I am a process person, but I'm just trying to explain a better process for
you as soon as I jump off, which is going to be in about --

COMMISSIONER GAZIANO: Do we have a volunteer on the --

COMMISSIONER HERIOT: Yes, let's finish.

VICE CHAIR THERNSTROM: That process is not acceptable to me.

COMMISSIONER GAZIANO: Can we have a volunteer on the Commission Staff for special assistance to try to reach Ashley?

CHAIRMAN REYNOLDS: This is Chairman Reynolds. I'm on the line.

COMMISSIONER GAZIANO: Oh.

COMMISSIONER HERIOT: Okay.

VICE CHAIR THERNSTROM: Oh, fantastic.

COMMISSIONER KIRSANOW: All right. We're okay then.

VICE CHAIR THERNSTROM: Okay. Let's keep going.

COMMISSIONER GAZIANO: I move to strike the last sentence. The reason that I move to strike it in the --

VICE CHAIR THERNSTROM: Where are you now?

COMMISSIONER GAZIANO: Finding Seven, the last sentence. We struck "the factual predicate for

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this" earlier in Part A. I don't think it's necessary. If someone could try to convince me otherwise, but it implies somehow that the Department of Justice is derelict --

VICE CHAIR THERNSTROM: I want to --

COMMISSIONER GAZIANO: -- intervening.

VICE CHAIR THERNSTROM: I want to strike it, too. I second that.

COMMISSIONER GAZIANO: Okay.

VICE CHAIR THERNSTROM: Any discussion? Hearing none, let's have a vote on striking that last sentence. Do I need to read it again? "The Department of Justice (DOJ) has not evidenced a high level of activity on behalf of plaintiff's claims in RLUIPA cases other than to defend the constitution" -- we are striking that sentence entirely. Can I have a vote on that? Commissioner Yaki, are you still here?

COMMISSIONER YAKI: Yes. After you finish, I'd just like to ask one question, make one statement before I take off.

VICE CHAIR THERNSTROM: Okay. Well, let's just vote on this. How are you voting on the striking of this sentence?

COMMISSIONER YAKI: I abstain.

VICE CHAIR THERNSTROM: You abstain.
Anybody else abstaining or voting nay? Hearing no nay votes on this, it's Yaki abstaining, Gaziano, Kirsanow, Heriot, Taylor and myself -- oh, no, Taylor is gone. I'm sorry. Gaziano, Kirsanow, Heriot, and myself voting --

COMMISSIONER GAZIANO: And Reynolds.

VICE CHAIR THERNSTROM: Well, Jerry, can you vote on that? Okay. Fine.

CHAIRMAN REYNOLDS: Yes.

VICE CHAIR THERNSTROM: Okay. And Reynolds voting aye on this.

COMMISSIONER YAKI: May I have a point of personal privilege here?

VICE CHAIR THERNSTROM: Yes, sure.

COMMISSIONER YAKI: Now the Chair is back, Mr. Chair.

VICE CHAIR THERNSTROM: Yes, Jerry, you want to take this over entirely?

COMMISSIONER GAZIANO: No, Abby will hold onto the gavel. She'll finish.

VICE CHAIR THERNSTROM: Okay. Go on.

COMMISSIONER YAKI: Two questions. One, I just wanted to get a firm date on when these things are due. Is it going to be the 14th, is that what is being contemplated?
VICE CHAIR THERNSTROM: Staff Director, you need to answer this.

STAFF DIRECTOR DANNENFELSER: Yes, October 14th.

COMMISSIONER YAKI: Okay. Number one. And number two, I just wanted to state just another general concern, in the Finding section, the Recommendation section that I won't be around for. I have some deep concerns about the word, the term, the usage, and the implications of the radicalization with regard to religion, and specifically, I think it goes without saying that that standard is being applied to followers of the practice of Islam. I think we should be very careful about what we say with regard to that, that we should not take at face value some of these national security issues. We should be concerned about the fact that where you have -- in two countries where they have different takes on how you deal with the practice of Islam in prisons, that the country that has a much more hard line national security radicalization, anti-radicalization standard friend has much more problem with radicalization inside their prisons than does a country with a much more lenient free exercise approach, such as Great Britain. That, coupled with, as I said before, the problems with the
PRLA that I will enunciate in my dissent is why, if I were here for the entire portion, I would be voting against the final report.

So thank you very much, and I'll talk to you guys -- I'll see you folks in a few weeks.

VICE CHAIR THERNSTROM: Thank you very much for making the time to come, Michael.

COMMISSIONER YAKI: Thank you.

VICE CHAIR THERNSTROM: Okay. We have voted on -- we need to vote on Finding Seven as a whole, as amended. Can I have a motion to do so?

COMMISSIONER HERIOT: So moved.

VICE CHAIR THERNSTROM: I'll second it.

All in favor, or have we got a unanimous vote at this point with Commissioner Yaki having gone. If I don't hear any nay votes or any abstentions, that motion has been approved.

So we go on to Finding Eight. Can I have a motion that the Commission approve Finding Eight, which reads as follows: "Prisoners prevailed in a very small percentage of the 250 RLUIPA cases studied by the Commission, indicating that religious discrimination against prisoners as defined by RLUIPA is not a serious or substantial problem, and that the majority of complaints are considered to be either
without merit by the courts, or that state prison authorities have a compelling interest in not accommodating a particular religious request. Plaintiffs may not be well served by representing themselves in the majority of cases, rather than seeking legal assistance from experienced professionals. The court decisions also show that no one's religion is more or less successful in pursuing RLUIPA litigation."

Can I have a motion to approve that?

CHAIRMAN REYNOLDS: So moved.

VICE CHAIR THERNSTROM: And I'll second it, so let's go on to discussion.

COMMISSIONER HERIOT: Yes, I've got deep problems with this one.

COMMISSIONER GAZIANO: So do I.

COMMISSIONER HERIOT: Yes. I think that first sentence, "Prisoners prevailed in only a small percentage of the 250 RLUIPA cases studied by the Commission", that's literally true. But as I've put in the footnote to the report, there's a huge bias in that database. You would expect to find an extremely large number of cases in which the defendant prevails, and very few where the plaintiff prevails. And it has absolutely no implications for the population of cases
generally. So although the statement is literally true, I think it has -- it's very misleading, and I would strike it entirely.

The second sentence I think is also, "Plaintiffs may not be well served by" blah, blah, blah, blah, blah. The causation may go entirely the other way around. Attorneys are willing to represent prisoners when they have valid claims, and when a prisoner is pro se, it's because no attorney working for a faith-based organization or a prisoner's rights organization was willing to undertake the case on their behalf. So that may be why the pro se cases seldom succeed, although I don't know for a fact that they do seldom succeed, because, again, we don't know based on the database that we have in front of us.

VICE CHAIR THERNSTROM: Commissioner Heriot, if we put your two objections together, I think there's a very clear conclusion here, strike Finding Eight.

COMMISSIONER HERIOT: Except for that last sentence, which I wanted to make a separate finding, since it's very different, if we had anything on Eight. But that last sentence, if we put, "The reported court decisions seem to indicate that no one religion is more or less successful in pursuing RLUIPA
litigation”. I have -- you know, there's no systematic bias in the database on that issue, so that may well be something that we could generalize about, as long as we are careful not to say that it's certainly true. And the way it's written now, it only says it seems to indicate.

COMMISSIONER GAZIANO: Commissioner Heriot, see if you would accept a friendly amendment. I agree with all that, but I sort of studied your thoughts on the bias. I certainly know that bias exists, but if we had more time, I'd try to persuade you that maybe it doesn't go quite as far in one direction as you think, that the biases may go the other way.

I wouldn't object too much if we just have the last sentence, and your improvement in it is certainly something I would have suggested. But is it all right if we just -- whether it's a separate finding, or the same finding, just have something rather plain, that says, "Prisoners prevailed in only a small percentage of the 250 RLUIPA cases studied in the Lexis database", and then add some qualifier, acknowledging that that database may not be representative of all cases.

COMMISSIONER HERIOT: Well, it's not just
that it may not be. I don't believe that it is.

VICE CHAIR THERNSTROM: It isn't. Yes.

You know, Gail --

COMMISSIONER GAZIANO: Again, I don't want to -- okay. Then with that -- there's nothing like that that you all are comfortable -- I'd be comfortable with striking it all before the last sentence, as you have amended it.

VICE CHAIR THERNSTROM: Commissioner Heriot, this brings up a point I should have raised earlier when we were discussing Part A. You've got the question of data bias, you've got that point in a footnote. It really belongs in the text of Part A. It is an extremely important point.

COMMISSIONER GAZIANO: Well, anyone who, I think, wants to cite it, ought to be careful enough to read the footnote, so at this point, I'd slightly prefer we not reopen Part A.

VICE CHAIR THERNSTROM: All right. Okay. I am sorry not to have it in the text, and I should have raised that question. I didn't have it. I had it in my notes, but not -- but I'm staring at the script instead.

Okay. So then the suggestion here is that Finding Eight gets reduced to one sentence? Is that
one sentence worth an entire separate finding?

COMMISSIONER GAZIANO: I think it's helpful, but I would just elaborate maybe if we're striking the first sentence, which I thought completely, say something, "The court decisions studied by the Commission, or the RLUIPA -- the reported RLUIPA cases studied by the Commission seem to indicate that no one religion is more or less successful in pursuing RLUIPA litigation."

COMMISSIONER HERIOT: Fine with me.

VICE CHAIR THERNSTROM: Okay. So Finding Eight gets reduced to one sentence, "The reported RLUIPA cases studied by the Commission seem to show that no one religion is more or less successful in pursuing", well, you don't want again RLUIPA. So take out the first one. "The reported cases studied by the Commission seem to show that no one religion is more or less successful in pursuing RLUIPA litigation."

COMMISSIONER HERIOT: Why not just get rid of "in pursuing". Successful, it's a --

VICE CHAIR THERNSTROM: Tell me again what you're proposing.

COMMISSIONER HERIOT: It seems odd to say that a court decision seems to -- that in pursuing RLUIPA litigation, that seems to self-referential
there.

VICE CHAIR THERNSTROM: Right. Okay.

COMMISSIONER GAZIANO: But RLUIPA back in
the first part, and end the sentence at "successful".

COMMISSIONER HERIOT: Yes. "The reported"
-- I don't know. I give up.

COMMISSIONER GAZIANO: "The RLUIPA
decisions -- the reported RLUIPA decisions studied by
the Commission seem to indicate that no one religion
is more or less successful."

VICE CHAIR THERNSTROM: No, you need
something more.

COMMISSIONER HERIOT: No, we do need
something. We just don't --

STAFF DIRECTOR DANNENFELSER: In RLUIPA,
just take out "pursuing". "In RLUIPA litigation."

Does that work?

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER GAZIANO: That's fine.

VICE CHAIR THERNSTROM: That's fine. I
don't want RLUIPA twice.

COMMISSIONER GAZIANO: Okay.

COMMISSIONER HERIOT: What --

VICE CHAIR THERNSTROM: I'm sorry. People
are talking at once. Somebody -- whoever was talking
just now, one of you say -- Gail, what did you just say?

COMMISSIONER HERIOT: I don't have an opinion at this point.

VICE CHAIR THERNSTROM: I don't understand why -- what's wrong with "pursuing", and get rid of the second RLUIPA.

COMMISSIONER HERIOT: That's fine with me.

That's fine.

VICE CHAIR THERNSTROM: So it now reads -- we're down to one sentence as Finding Eight. "The reported RLUIPA cases studied by the Commission seem to show that no one religion is more or less successful in pursuing litigation." That's the entire Finding Eight now.

Can we vote on that? Let's have a vote, the amended Finding Eight. Anybody voting -- abstaining or voting nay on that? Hearing none, Finding Eight is approved, as amended, which reduces the entire finding down to one sentence. I don't think we need a separate vote, we've just had a vote on that.

Okay. We're on to the recommendations. Can I have a motion that the Commission approve Recommendation One, which reads as follows: "Given
that the vast majority of incarcerated persons in the United States reside in state prisons, radicalization poses a greater potential threat in such prisons than in federal ones. State prison authorities should take national security considerations into account, carefully, even-handedly, and without relying on ethnic or religious stereotypes in reviewing all requests for religious accommodations. They should also factor these considerations into their vetting of religious contractors and volunteers, in general. Both prison security and national security interests would be better served if states were to adopt uniform vetting procedures for their religious contractors and volunteers. To the extent that prisons, either state or federal, experience severe shortages in chaplains of specific religions, e.g., Islam, prison officials should engage in vigorous efforts to try to alleviate such shortfalls without diminishing qualification requirements."

I will make a motion to adopt that. Anybody second it?

COMMISSIONER GAZIANO: Second.

VICE CHAIR THERNSTROM: Okay. Let's go on to discussion. Let me raise the first question here. On this last sentence, "Prison officials should engage
in vigorous efforts", are we suggesting that they don't? "Prison officials should engage in vigorous efforts to try to alleviate such shortfalls."

COMMISSIONER GAZIANO: I think that's a fair point. And probably if it would be read that way, that should be amended.

VICE CHAIR THERNSTROM: I think it seems gratuitously insulting.

COMMISSIONER GAZIANO: May I begin with a modification that may partially serve Commissioner Yaki's concerns before he got off the call?

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER GAZIANO: I think I'd like to substitute for the first sentence a few slight changes, one of which is that radicalization isn't defined. But, more importantly, it doesn't -- that first sentence doesn't logically follow. Just because the vast majority of prisoners are in state prisons doesn't mean that radicalization is more of a threat in those kind of prisons than in federal prisons.

VICE CHAIR THERNSTROM: Yes. That's right.

COMMISSIONER GAZIANO: In number, but moreover, radicalization may pose more or less of a threat in state or federal prisons depending on the
type of crimes, and prison populations, and any number of factors. So this is my substitution, and then a few other changes will follow.

"Radicalization of prisoners in both state and federal prisons poses a serious concern", rather than threat, "poses a serious concern to fellow prisoners, prison officials, and others in the general population." So that would be my first sentence.

VICE CHAIR THERNSTROM: I'm sorry. Let me go over this again. "Radicalization of prisoners in both state and federal prisons", you want prisoners and prisons?

COMMISSIONER GAZIANO: Okay. "Radicalization of inmates", we'll say, if you prefer.

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER GAZIANO: I was doing this on the fly while we were working on the last finding.

VICE CHAIR THERNSTROM: Okay. "Both state and federal prisons poses", go on. I've got the rest written down.

COMMISSIONER GAZIANO: "A serious concern to fellow prisoners, prison officials, and others in the general population." And I would assume that in both England and France, it at least poses concerns.

And then in the next sentence I would
strike "state" since we've made it applicable to both state and federal prisons. "Prison authorities" --


COMMISSIONER GAZIANO: Okay. That's all the change I'd make on that one. Two sentences later, "In general, both prison security and national security interests would be better served if prisons were to adopt uniform vetting procedures." I mean, to the extent that this finding is worth making, I think it's worth making as to both --

VICE CHAIR THERNSTROM: I'm sorry, Commissioner Gaziano. We've got the sentence here now. "Prison authorities should take national security considerations into account carefully" -- blah, blah, blah -- "in reviewing all requests for religious accommodations." Then the sentence after that you are saying --

COMMISSIONER GAZIANO: I'm saying, the next sentence after that, that begins, "In general".

VICE CHAIR THERNSTROM: Yes. Okay.

COMMISSIONER GAZIANO: I just want to apply it to all prisons, rather than just the state. And then I would --
VICE CHAIR THERNSTROM: Wait a minute. It is all prisons here. It's, "In general, both prison security and national security interests will be better served."

COMMISSIONER GAZIANO: I don't know -- I'm going to talk about whether others feel that we really need uniform standards.

VICE CHAIR THERNSTROM: But --

COMMISSIONER HERIOT: Let's wait for that. Let's go through your's, because I've got that on my list.

COMMISSIONER GAZIANO: All right.

VICE CHAIR THERNSTROM: Yes, but I'm sorry, I'm missing your change to the sentence, "In general, both prison" --

COMMISSIONER GAZIANO: Do you see it says somewhere in the middle, it says, "states".

COMMISSIONER HERIOT: Instead of "states", mid-sentence.

VICE CHAIR THERNSTROM: "Would be better served if states were to adopt uniform vetting" --

COMMISSIONER HERIOT: That would have to include the feds, as well, so prison authorities were to adopt.

COMMISSIONER GAZIANO: Yes. Cross out
"states", and make it "prison authorities."

VICE CHAIR THERNSTROM: Okay. "Will adopt
uniform vetting procedures for their religious
contractors and volunteers."

Commissioner Heriot, you had something
about that sentence.

COMMISSIONER HERIOT: You want to go to
mine now? I just --

VICE CHAIR THERNSTROM: Only if it's on
that sentence.

COMMISSIONER HERIOT: We can't -- mine is
inconsistent with Todd's, so I think we should go
through Todd's.

VICE CHAIR THERNSTROM: All right. Let's
just go on through this with Todd.

COMMISSIONER GAZIANO: Well, that's all I
wanted to raise, except I think I support your's,
Madam Vice Chair, but I might yield to a friendly
amendment from Gail. Maybe I missed --

VICE CHAIR THERNSTROM: No, I want to
simply delete the last sentence. As I said, I think
it's gratuitously insulting. Of course, if they've
got severe shortages, we have to assume that they're
engaging in efforts to alleviate those shortages.

STAFF DIRECTOR DANNENFELSER: This is the
Staff Director, if I could just point something out, why there was a distinction between federal and state in that recommendation. The report on pages 36 and 37 made a distinction that the Bureau of Prisons has taken several significant steps to limit the threat of radicalization, including increasing supervision within the federal system. And then it says on page 37, "By contrast, all the state prisons surveyed responded that national security conditions had not been a factor in, or had no known impact on how they regulate the religious activities of inmates." So there was a distinction, in general, about how the federal prisons were dealing with national security considerations and the state prisons.

COMMISSIONER GAZIANO: I understand that, and the report is a little more precise in that. I'm fine to leave that as it is, but the finding, as written -- first of all, the first sentence is just illogical as written, but I think it's best for us in these recommendations that people are going to be paying attention to, regardless of whether one has done a better job or the other, saying they both ought to take this into account, and they ought to do so even-handedly, yadda ya.

COMMISSIONER HERIOT: Yes, I agree with
that. There's no reason that we have to put in our recommendations the difference in their response --

COMMISSIONER GAZIANO: Also, we know there's some evidence in this. I don't know in a recommendation I'm prepared to say that everything the federal government has done is peachy, and that our information collecting on the states has been so severe, or so authoritative that we know no state has done that. I'd rather -- if we have some hunch of that, and we have it in the body of the report, fine. But maybe some state has done so. There's some -- actually, there was something in the findings that suggests that states sort of take it into account, but they -- so the evidence is a little bit mixed on this. This is just a little bit more neutral.

COMMISSIONER HERIOT: Yes. Can I suggest that we adopt or not adopt Todd's recommendations to modify number one, and then go on to mine, because mine -- I would support Todd's if mine isn't adopted, and so we sort of need to do these one at a time.

VICE CHAIR THERNSTROM: That's fine. Let me read it now, then. Recommendation One would read, "Radicalization of the inmates in both state and federal prisons poses a serious concern to fellow prisoners, prison officials, and others in the general
population. Prison authorities should take national security considerations into account carefully, even-handedly, and without relying on ethnic or religious stereotypes in reviewing all requests for religious accommodations. They should also factor these considerations into their vetting of religious contractors and volunteers. In general, both prison security and national security interests would be better served if prison authorities were to adopt uniform vetting procedures for their religious contractors and volunteers."

And, Commissioner Gaziano, I suggest that we end there, cut the last sentence. If you will accept that --

COMMISSIONER GAZIANO: I accept. I accept.

VICE CHAIR THERNSTROM: Okay. So then I have just read the Recommendation One, as amended, as Commission Gaziano proposes to amend. Let's have a vote on that, and then we will go on to Commissioner Heriot's further thoughts.

Can I have a motion to accept Commissioner Gaziano's proposed amendments?

COMMISSIONER GAZIANO: So moved.

VICE CHAIR THERNSTROM: And I will second
it. So let's have a vote on that. Any abstentions, any opposition? Hearing none, those proposed amendments were unanimously accepted.

Now, Commissioner Heriot, you have a separate one.

COMMISSIONER HERIOT: Yes. I have one that I'm not really certain how I feel about this, but I get really uncomfortable with all the recommendations that Commissions all over the country, in every little corner of the country, about adopting uniform standards. I don't really have any belief that there ought to be uniform standards, as opposed to non-uniform standards, so I really don't endorse that part of it.

COMMISSIONER GAZIANO: Would Commissioner Heriot mind just dropping the word "uniform"? I kind of agree with that. That was sort of odd, but how about we just urge them to adopt vetting procedures?

COMMISSIONER HERIOT: That's fine. That would work fine. Let's just drop the word "uniform". That's my motion.

VICE CHAIR THERNSTROM: Second? No, wait a minute. Go back with me. Where are you --

COMMISSIONER HERIOT: I don't know how the sentence reads now, but that word "uniform" appears in
there.

COMMISSIONER GAZIANO: This would be now the last sentence after we've dropped --

VICE CHAIR THERNSTROM: Yes. "In general, both prison security and national security interests would be better served if prison authorities were to adopt vetting procedures for their religious contractors and volunteers." If you take "uniform" out of it, it doesn't mean anything. I'm sure they have vetting procedures.

COMMISSIONER GAZIANO: Are you sure? I'm not. Why don't you say "vetting procedures to address these issues."

VICE CHAIR THERNSTROM: I'm sure they have vetting procedures.

COMMISSIONER GAZIANO: I'm not sure.

VICE CHAIR THERNSTROM: I can't believe they don't have vetting procedures. What do you think, they do it randomly?

COMMISSIONER GAZIANO: They may not vet for these issues.

COMMISSIONER HERIOT: It might not specifically include --

COMMISSIONER GAZIANO: Or whether they are certified Odinists, but they may not vet for whether
the certified Odinists are enemies, radical enemies of the United States.

VICE CHAIR THERNSTROM: They have no procedures for -- no standards when they look at religious contractors and --

COMMISSIONER GAZIANO: On their checklist they may not be checking for whether these people are radicalizers. And we're just suggesting they ought to take their -- put that on their checklist. Maybe the Odinists, by the way, aren't the violent types, but it seemed to me in history the Norse, the historic Norse were, and so there's an Odinist guy, instead of just building long ships to row to Valhalla, they preach something else, I want to know.

VICE CHAIR THERNSTROM: I'm sorry. The point makes no sense to me.

COMMISSIONER HERIOT: I agree with that beyond this, this is not working. If we are going to suggest that they adopt standards, then we have to at least have some deferential language, just in case they haven't, then they should.

VICE CHAIR THERNSTROM: But, of course, they have, they've got some standards for deciding what contractors and volunteers are acceptable, and which ones are not.
COMMISSIONER GAZIANO: You know, I wouldn't cry too much if we struck the sentence, but I think that it's helpful to just say that this ought to be one of the factors. I'm not confident that they're not just making sure that someone is a certified Odinist.

VICE CHAIR THERNSTROM: I want to strike the sentence, if we don't have "uniform" in there. So it was simply, "And they should also factor these considerations into their vetting of religious contractors and volunteers." End of recommendation.

COMMISSIONER GAZIANO: I would say -- if we're going to vote on it, I'm sorry. Are you moving to strike, or are we voting on your --

VICE CHAIR THERNSTROM: I'm moving to strike that sentence now. Otherwise, I don't see the point of the sentence.


VICE CHAIR THERNSTROM: All right. So I move that we strike that sentence. Somebody got --

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: You've seconded, in effect. Can we have a vote on it? Anybody opposed or abstaining? I don't hear any opposition or
abstention, and, therefore, the recommendation now
ends with the sentence, "They should also factor these
considerations into their vetting or religious
contractors and volunteers." And do I need a motion
to now -- do we need to move to accept Recommendation
One, as amended? I guess so.

COMMISSIONER HERIOT: So moved.

VICE CHAIR THERNSTROM: And I second it.

All in favor?

COMMISSIONER HERIOT: Aye.

VICE CHAIR THERNSTROM: I'll do it the
other way. I think there's a -- any abstentions or
nay votes here? Hearing none, it is adopted. I'm
sorry. I'm just staring at where we're going here.
It is adopted, as amended.

Okay. Recommendation Two. Can I have a
motion that the Commission approve Recommendation Two,
which reads as follows: "Data regarding prisoners' claims of non-accommodation of their religious belief
should be collected and categorized by DOJ in a more
detailed and consistent manner. For example, although
religious grievances will likely remain small in
comparison to the total number of grievances filed in
federal facilities, BOP should collect grievance data
related to denials of religious items/literature and
religious rulings/head-cover to provide a more thorough and accurate picture of the nature of the grievances filed in prisons."

By the way, I didn't object earlier because I thought I have to come up with some other language if I object, but I hate these slashes. I mean, it's bad writing, in my view.

Anyway, can I have a motion to -- well, I move that we accept Recommendation Two. Can I have a second? Second, anybody?

COMMISSIONER HERIOT: I'm against it.

VICE CHAIR THERNSTROM: You're against it.

Does anybody --

COMMISSIONER GAZIANO: Okay. I'll second it. Let's discuss it.

COMMISSIONER HERIOT: Okay.

VICE CHAIR THERNSTROM: Okay. Let's have a discussion.

COMMISSIONER HERIOT: I just feel like we make recommendations like this as if collecting data is free, and it's not. It's a lot of effort to collect data. And I think one of our -- the basic feeling I get from this whole report is that we've covered this area, not perfectly, but we've discovered that things don't seem to be massively amiss, so I'm
not certain that this is an area that I would want DOJ to assign somebody to work on. It's a lot of work to be in charge of that.

VICE CHAIR THERNSTROM: Anybody got a response to that? Don't all speak up at once. Are you moving that we simply strike Recommendation Two, Commissioner Heriot?

COMMISSIONER HERIOT: We could just go with a motion now and defeat it.

VICE CHAIR THERNSTROM: We could. Any further discussion? We'll take a vote on it.

COMMISSIONER HERIOT: Oh, by the way, if this doesn't get defeated, I will change my vote to abstain.

VICE CHAIR THERNSTROM: Well, I'm going to abstain on this.

COMMISSIONER HERIOT: Well, let's see what happens if people vote their conscience here, and then we can change votes.

VICE CHAIR THERNSTROM: You know, I don't -- I mean, I like data collected, categorized.

COMMISSIONER HERIOT: But you know that it's not free.

VICE CHAIR THERNSTROM: It's not free, but they collect a lot of data. They can collect some
more. I think this is probably useful data.

COMMISSIONER HERIOT: Vote your conscience and let's see how it comes out. It's not like this is a --

VICE CHAIR THERNSTROM: All right. Okay. We have a motion on the table to accept Recommendation Two. All in favor?

COMMISSIONER HERIOT: You need to do a roll call.

VICE CHAIR THERNSTROM: I'll do a roll call, I was going to say. Commissioner Gaziano.

COMMISSIONER GAZIANO: Abstain.

VICE CHAIR THERNSTROM: You're abstaining. Okay. Commissioner Kirsanow, are you back?

COMMISSIONER GAZIANO: My first abstention, I think.

VICE CHAIR THERNSTROM: Pardon me?

COMMISSIONER GAZIANO: Maybe my first abstention on the Commission.

VICE CHAIR THERNSTROM: Yes. Okay. I can't remember. Commissioner Kirsanow, are you back or gone?

COMMISSIONER KIRSANOW: I'm back. Aye.

VICE CHAIR THERNSTROM: You're an aye. Commissioner Heriot?
COMMISSIONER HERIOT: No.

VICE CHAIR THERNSTROM: Nay. Commissioner Yaki is gone. Commissioner Reynolds?

CHAIRMAN REYNOLDS: No.

VICE CHAIR THERNSTROM: Nay. And I'm a nay, too. No, wait a minute. Wait a minute here.

COMMISSIONER HERIOT: Or are you an aye?

VICE CHAIR THERNSTROM: I'm an aye. I'm sorry. Not thinking. I'm an aye.

COMMISSIONER HERIOT: We tied.

COMMISSIONER GAZIANO: Okay. What's the result of a tie?

COMMISSIONER HERIOT: Todd, would you like to weigh in, because you can control this vote.

COMMISSIONER GAZIANO: I don't want to. That's the point. I suppose I'll vote against the recommendation. I might vote for it if I knew what the cost was, but I -- in the absence of not knowing why that isn't collected, and not knowing the cost, I think I'd rather not make the recommendation. We can still argue it. Anyone can argue it based on a report that says DOJ doesn't collect this.

COMMISSIONER HERIOT: See, the things is, with a tie, it doesn't pass, so that means that the nos win. But you could swing it Todd, if you want to
swing it.

COMMISSIONER GAZIANO: Well, what I say, I want to strike this. I forget what the posture of the motion is.

VICE CHAIR THERNSTROM: The motion is to accept it.

COMMISSIONER GAZIANO: Okay. Well, then I want to strike it, because I don't know enough to be recommending. I think that anyone else who cares about this can note in our Part A that DOJ doesn't collect this. I just --

COMMISSIONER HERIOT: Yes, but there's no motion to strike. You have to vote yes, or no, or abstain.

VICE CHAIR THERNSTROM: Yes. And we're --

COMMISSIONER HERIOT: And they're the same, whether it's a motion to strike or a motion to accept, but the motion is to accept it. So if you want to strike it --

COMMISSIONER GAZIANO: Then I vote no.

CHAIRMAN REYNOLDS: So that's 3-2 against the motion.

COMMISSIONER HERIOT: It's gone.

VICE CHAIR THERNSTROM: Right. So, in effect, we have eliminated -- not in effect. We have
-- Recommendation Two is gone.

COMMISSIONER HERIOT: Yes.

VICE CHAIR THERNSTROM: Now, Commissioner Gaziano, if you were suggesting that what you want is this -- a discussion of this point in Part A, that's not going to happen.

COMMISSIONER GAZIANO: It is in Part A already.

VICE CHAIR THERNSTROM: All right.

COMMISSIONER GAZIANO: What is in Part A, and this is what tipped my mind after listening to the debate, it lists in Part A that DOJ doesn't collect this. Now, based on that, anyone else can then hammer away at DOJ, and say why not? And they might say well, that would cost $6 billion and the financial crisis would occur that we're all trying to avert. I just don't think we need to recommend they do --

VICE CHAIR THERNSTROM: That's going to tip the balance.

COMMISSIONER HERIOT: Okay. Then we've taken care of it.

VICE CHAIR THERNSTROM: We had a vote. We're going on.

Recommendation Three. Can I have a motion that the Commission approve Recommendation --
(Off the record.)

COURT REPORTER: Hello, this is the court reporter.

VICE CHAIR THERNSTROM: Yes?

COURT REPORTER: I need to interrupt. I got disconnected when the beginning of Recommendation Three started at 2:11:40, which I've got as exactly two minutes ago.

VICE CHAIR THERNSTROM: Okay. We are voting now on a amendment by Commissioner Gaziano that substitutes the last two hyphenated words, "even-handedly", substitutes for those words "in a fair and reasonable manner, so such burden should be spread across all faith groups in a fair and reasonable manner." And that is what we are -- that is the amendment we are now voting on. Any nay votes, any abstentions on that? Hearing none, that amendment is accepted.

Now, Commissioner Heriot?

COMMISSIONER HERIOT: My motion would be to make this the first recommendation rather than the second, because it's more representative of the general report, which really didn't have that much to do with national security, and so I think it looks better to have what is currently listed as number
three as number one, and then have what is currently number one become number two, and then four becomes three, and so on.

VICE CHAIR THERNSTROM: Okay. I second that. Any discussion? Changing the order of the recommendations, so this becomes Recommendation One.

COMMISSIONER GAZIANO: I suggest unanimous consent for that.

VICE CHAIR THERNSTROM: Unanimous consent on this, if I hear no objections. All right. That is adopted. Any further discussion of Recommendation Three? Hearing none, we have to -- we need a motion to adopt Recommendation Three, as amended. I so move.

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: Unanimous consent on that. Anybody abstaining or objecting to that? We have unanimous on adopting what is now Recommendation One. I'm sorry.

Okay. Recommendation Three, can I have a motion that the Commission approve Recommendation Three, which reads as follows: "State prisons would benefit from looking at the measures federal prisons have enacted in trying to balance national security concerns with prisoners' free exercise rights. To that end, better communication and knowledge sharing
between state, federal, and local correctional institutions would enhance such jurisdiction's efforts."

I move the adoption. Have I got a second?

COMMISSIONER GAZIANO: Second.

VICE CHAIR THERNSTROM: Okay. Discussion?

COMMISSIONER HERIOT: I think the "measures federal prisons have enacted", prisons don't enact. We're talking about policies federal prisons have adopted, I believe.

VICE CHAIR THERNSTROM: All right. Yes, we are, indeed.

COMMISSIONER HERIOT: I'm a little worried that I don't know exactly what those policies are.

VICE CHAIR THERNSTROM: Yes, I'm bothered by that, too.

COMMISSIONER HERIOT: Yes, I'm a lot worried about it. I don't know what they are.

COMMISSIONER GAZIANO: Sorry. We had testimony on it, but I found -- and I think there's some support in Part A, that -- I'm sorry. Which -- I had a momentary -- are you talking about the first sentence, or the second sentence?

VICE CHAIR THERNSTROM: We're now on the first sentence for recommendation, what's become
Recommendation Three.

COMMISSIONER GAZIANO: Yes. Right. In the first sentence, I think there was some testimony that the federal officials have spent a lot of time, in part looking at how DOD -- first studying how DOD has done it in the kind of Iraqi War situation, how they've applied that. And there was some evidence that suggests they haven't done it.

I didn't want in another recommendation to be too heavy-handed in it, but I'm not sure that it hurts to say that they would benefit in looking at the measures.

COMMISSIONER HERIOT: Yes, I agree with that. Maybe I'm going overboard. I wasn't really focusing on the fact that it doesn't say adopt them, it just says look at them.

COMMISSIONER GAZIANO: Yes. I think --

COMMISSIONER HERIOT: Gail Heriot would benefit from looking at them, too, but I haven't.

COMMISSIONER GAZIANO: Yes. And I think there's some evidence that the federal government has just put a lot more effort into that, and I may be wrong, but some evidence --

COMMISSIONER HERIOT: There's definitely testimony on that.
COMMISSIONER GAZIANO: The state is a little worried they hadn't.

VICE CHAIR THERNSTROM: Okay. So the Recommendation Three would now read, "State prisons would benefit from looking at policies federal prisons have adopted in trying to balance national security concerns with prisoners' free exercise rights", and nothing else would change.

COMMISSIONER GAZIANO: Except taking out the space there between rights and the period.

VICE CHAIR THERNSTROM: Yes. Okay. They're going to catch that kind of thing.

COMMISSIONER GAZIANO: I'm trying to be humorous at this point.

VICE CHAIR THERNSTROM: Pardon me?

COMMISSIONER GAZIANO: Nothing. Sorry.

VICE CHAIR THERNSTROM: Look, we're relying on the staff to --

COMMISSIONER GAZIANO: I know, I was joking, joking.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER GAZIANO: Move on.

VICE CHAIR THERNSTROM: Okay. Can I have -- we've got a motion to amend it. I don't even know whose amendment that is. Oh, it's Heriot's.
COMMISSIONER HERIOT: That was mine, yes.

VICE CHAIR THERNSTROM: Yes. To amend it, so that it reads as I just read. Can we have unanimous consent on that, or have I got any objections, or any abstentions? Hearing none, we have unanimous consent. And do I need a separate motion to now approve Recommendation Three? I don't think so. We just had unanimous consent in adopting these changes. I'm moving on.

Recommendation Five. Can I have a motion that the Commission approve, it's now Recommendation Four, I'm sorry, Four, which reads as follows: "Though the number of meritorious cases will likely remain small, DOJ should assess whether more of its resources can be allocated to investigating the religious discrimination complaints it receives for possible RLUIPA violations, particularly in light of its vigorous enforcement of the statutes for land use provisions."

COMMISSIONER HERIOT: That's not what I have in front of me. I didn't hear the part about small. I thought that was taken out. If not, I'm in favor of taking it out. I'm basically against this one.

VICE CHAIR THERNSTROM: Wait a minute. We
have got to have a vote. I move that we adopt this. I need a second on it. We'll get to discussion in a minute. Have I got a second on adopting this recommendation?

COMMISSIONER GAZIANO: Second, so that I can vote against in the end.

VICE CHAIR THERNSTROM: Four. Okay. Now, discussion. Commissioner Heriot?

COMMISSIONER HERIOT: What you -- I have a version that like is day later than that, that doesn't have anything --

VICE CHAIR THERNSTROM: I'm reading the script sent to me this morning.

COMMISSIONER HERIOT: Oh, okay. Well, at any rate, anything that says that there are a small number of cases has to come out, because that is not proven. What I think we can only say is that it's not an overwhelming number of cases, as I said before, not an unmanageable number, so that stuff should come out. But, moreover --

VICE CHAIR THERNSTROM: Why do we need that first phrase all together? Why can't we simply start with, "DOJ should assess whether" --

COMMISSIONER HERIOT: Yes, that's the version that I have in front of me, starts with, "DOJ
should assess."

VICE CHAIR THERNSTROM: Fine.

COMMISSIONER HERIOT: And I'm not for it, because I don't think there's any real evidence that DOJ has not allocated its resources appropriately already. We probably should have inquired more closely into what they're doing for the land use cases, and why, in order to be able to come to an assessment as to whether or not they're overdoing the land use cases relative to the religion cases. But since the -- relative to the prison cases. But since the prison cases don't -- there doesn't seem to be anything gravely wrong here, I don't see why we should be recommending any reassessment on their part at all.

It just seems like --

COMMISSIONER GAZIANO: That was my assessment. I don't think the connection logically fits, and there may be some evidence that some member of our staff thought existed for this, but we have to vote on it. And I don't remember it in the report itself, and that's what's going to be delivered to Congress. So I just think without more, I'm not comfortable joining this recommendation.

VICE CHAIR THERNSTROM: Well, not only that, we just eliminated the whole recommendation on
the collection of data on prisoners' claims. If
you're going to collect data, it's the more important
one. Sorry.

Commissioner Heriot, make a --

COMMISSIONER HERIOT: We could defeat the
motion. Let's just defeat the motion.

VICE CHAIR THERNSTROM: Let's just defeat
the motion. Any other discussion on this motion for
Recommendation Four? Okay. All in favor of
approving, that is how the motion reads, all in favor
of approving Recommendation Four?

COMMISSIONER HERIOT: Roll call.

VICE CHAIR THERNSTROM: Doing a roll call.

Yes. Gaziano.

COMMISSIONER GAZIANO: No.

VICE CHAIR THERNSTROM: Kirsanow, you
came. All right. You still here? You're here.

COMMISSIONER KIRSANOW: Abstain.

VICE CHAIR THERNSTROM: You're abstaining.

Heriot is a no.

COMMISSIONER HERIOT: Wait. I'm allowed
to vote. No.

VICE CHAIR THERNSTROM: Reynolds?

CHAIRMAN REYNOLDS: No.

VICE CHAIR THERNSTROM: No. And I'm a no.
It is four nos, and one abstention, Kirsanow has an abstention. The Recommendation Five fails. If somebody is speaking and I'm supposed to hear, I can't hear. Okay. Did I just say Five? It's Four now, Recommendation Four fails.

So now we've just gotten rid of two recommendations, and Recommendation Six becomes Four. Can I have a motion that the Commission approve Recommendation Four, which reads as follows: "The PLRA helps maintain a balance between prisoners' rights and the interest of prison officials, and the courts, and minimize the number of frivolous lawsuits. Its provisions relating to exhaustion, the limitation on monetary awards absent physical injury and attorney fees" -- there should be a comma there, anyway -- "should be preserved in their original form."

I move to accept this. I need a second, and then we'll have a discussion. Second?

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: Okay. Discussion.

COMMISSIONER HERIOT: I would add the word "probably" in the first sentence, just because I hate making assertions that don't have fudge words like that. You can't be absolutely sure, but I think --

VICE CHAIR THERNSTROM: That probably
helped.

COMMISSIONER HERIOT: Yes. Now, I would have figured that -- well, I don't want to suggest amendments for you, Abby, but I would think that you'd be kind of concerned about this one, too, for the same reasons as before, as we were doing the unmanageable issue.

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER HERIOT: "PRLA has probably helped maintain the level of litigation we see today."

Isn't that what you did in the previous?

VICE CHAIR THERNSTROM: Yes. That is what I did in the previous one.

COMMISSIONER GAZIANO: But we can certainly vote for it, unless someone wants to -- vote for or against. I think I'm inclined to vote for it.

COMMISSIONER HERIOT: For it the way it is?

COMMISSIONER GAZIANO: Yes, unless someone wants to suggest an amendment that will get more folks on board. I'm -- we did have testimony on this, and I considered it both ways, and the arguments to change weren't persuasive to me. This is --

VICE CHAIR THERNSTROM: Commissioner Heriot, if you would put that -- just vote it up or
down, but put that, instead of my having to make a separate motion, put that as part of your motion, will you be comfortable doing that? "The PLRA probably helps maintain the level of litigation we see today."

COMMISSIONER HERIOT: Yes, I'd be happy to leave it the way it is. I'm more concerned about making -- in the second sentence, instead of wording the way it is, just pointing out that there's no reason to provide religious liberty claims with a special exemption from the provisions of the Prison Litigation Reform Act.

COMMISSIONER GAZIANO: Why don't you scrawl out a sentence and read it to us, so that we can incorporate it.

COMMISSIONER HERIOT: For sentence one, or sentence two?

COMMISSIONER GAZIANO: Two.

COMMISSIONER HERIOT: "We see no reason to provide religious liberty claims with a special exception from its provisions relating to exhausting the limitation of monetary awards, absent a physical injury and attorneys fees."

VICE CHAIR THERNSTROM: All right. I'll have to write this out. "We see no reason" --

COMMISSIONER HERIOT: This is in my email
message.

VICE CHAIR THERNSTROM: I don't have it in front of me.

COMMISSIONER HERIOT: Okay. Here it comes. "We see no reason to provide religious liberty claims with a special exemption from its provisions relating to exhaustion the limitation on monetary awards absent a physical injury and attorneys fees."

VICE CHAIR THERNSTROM: I'm just writing here.

COMMISSIONER HERIOT: Those would be my two proposals, add the word "probably", and change the second sentence. I won't propose the other thing. We can do that in a separate motion, if we want to, but I think I prefer it the way it is.

VICE CHAIR THERNSTROM: I'm sorry. So your second sentence goes, "We see no reason to provide religious liberty claims with a special exemption from" - and where do you go from there?

COMMISSIONER HERIOT: "Its", its refers back to the Prison Litigation Reform Act. "Its provision relating to exhaustion, the limitation on monetary award, absent" --

VICE CHAIR THERNSTROM: The rest is unchanged.
COMMISSIONER HERIOT: Yes, that's right, except for the part, "or should be preserved in their present form". That's unneeded.

VICE CHAIR THERNSTROM: Right.

COMMISSIONER HERIOT: It just cuts off at the word "fees".

VICE CHAIR THERNSTROM: Right. Yes. Correct.

STAFF DIRECTOR DANNENFELSER: You have an apostrophe after attorneys, I believe.

COMMISSIONER HERIOT: Right. So it's plural possessive.

VICE CHAIR THERNSTROM: Right. Okay. So, Commissioner Heriot, I'm willing to give up -- to keep the beginning as written.

COMMISSIONER HERIOT: So we just add the word "probably" to the first sentence, plus you keep my second sentence.

VICE CHAIR THERNSTROM: Yes, yes, yes, yes. Well, "a balance". How about "the balance we see today"? Does anybody have a problem with that? Because you're suggesting here that there's some kind of correct balance.

COMMISSIONER HERIOT: I don't have any objection to that.
VICE CHAIR THERNSTROM: Can you make it part of your motion then?

COMMISSIONER HERIOT: Yes. My point is simply that there's no reason to -- I'm not making -- I don't have an opinion on the Prison Litigation Reform Act, specifically, but there's no reason to treat this area of the law differently from other areas of prison litigation.

VICE CHAIR THERNSTROM: I should take the --

COMMISSIONER HERIOT: So, "the balance we see today", is that what we're asking for?

VICE CHAIR THERNSTROM: Yes. "The PLRA has probably helped maintain the balance we see today between prisoners' rights and the interest of prison officials, and the courts in minimizing frivolous lawsuits." So we're not implying the balance is right or wrong, but it's --

COMMISSIONER HERIOT: But it's not special to this kind of case.

VICE CHAIR THERNSTROM: Yes, I know. Nevertheless, the former -- previous formulation suggests the balance -- we like the balance. I'm trying to make it more neutral.

COMMISSIONER HERIOT: That's fine.
VICE CHAIR THERNSTROM: Then it goes on to say, "We see no reason to provide religious liberty claims with a special exemption from its provisions relating to exhaustion, a limitation on monetary awards absent physical injury, and attorneys fees."
And I think we need a comma before absent, am I wrong there? Anybody got an opinion?

COMMISSIONER HERIOT: No, you are wrong. "Limitation on monetary awards absent physical injury."

VICE CHAIR THERNSTROM: You're right. You're right.

COMMISSIONER HERIOT: That's a concept by itself. We could put a comma after "injury", so that we make a list there.

VICE CHAIR THERNSTROM: Right. Yes.

COMMISSIONER HERIOT: Actually, no, it's a limitation --

VICE CHAIR THERNSTROM: No, you can't.

COMMISSIONER HERIOT: No, you can't.

VICE CHAIR THERNSTROM: You can't.

COMMISSIONER HERIOT: You can't. No comma there. It's right the way it is.

VICE CHAIR THERNSTROM: Okay. It's right the way it is. Okay. Are we prepared --
COMMISSIONER HERIOT: Wait. No, let's go back, because then we need -- it should be "provisions relating to exhaustion and the limitations on monetary awards".

VICE CHAIR THERNSTROM: Yes, of course it should. Yes.

COMMISSIONER HERIOT: Okay. So delete that comma after exhaustion.

VICE CHAIR THERNSTROM: Yes, I just did.

COMMISSIONER HERIOT: Insert "and".

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER HERIOT: And then make "limitations" plural.

VICE CHAIR THERNSTROM: Yes. Yes, I just did. I'm going to go back and read the whole thing once again. "The PLRA has probably helped maintain the balance we see today between prisoners' rights and the interest of prison officials, and the courts in minimizing the number of frivolous lawsuits. We see no reason to provide religious liberty to claims with special exemption from its provisions relating to exhaustion and the limitations on monetary awards absent physical injury and attorneys fees."

Any further discussion on this recommendation, which is now Recommendation Four?
Hearing none, do we have unanimous consent, or are there any nays or abstentions on this? Hearing none, we have unanimous consent, and we don't need a separate motion, it seems to me once again. Accepting Recommendation Four, we just had one.

Recommendation Seven. Could I have a motion that the Commission approves Recommendation Seven, which reads as follows: "Prisoners' Rights Advocacy Organizations should undertake efforts to enhance the availability of professional legal representation perhaps through facilitating pro bono arrangements with attorneys at local firms for prisoners who believe their religious rights have been inappropriately infringed."

I move that we accept that. Have I got a second?

COMMISSIONER GAZIANO: Second.

VICE CHAIR THERNSTROM: Okay. So, discussion?

COMMISSIONER GAZIANO: Vote.

COMMISSIONER HERIOT: I'd like to add --

COMMISSIONER GAZIANO: Sorry.

COMMISSIONER HERIOT: Yes, I'd like to add at the very beginning, "Prison ministry and prisoners' rights advocacy organizations." Then if there are a
lot of prison ministry organizations that would be
happy to find a lawyer, they might not have lawyers on
staff.

VICE CHAIR THERNSTROM: Yes, but aren't
they, in effect, prisoners --

COMMISSIONER HERIOT: I don't think they
would call themselves that, no.

VICE CHAIR THERNSTROM: Anybody else got
any thought about that? I don't --

COMMISSIONER GAZIANO: Well, I actually do
like the distinction, and I think that it certainly
doesn't detract.

VICE CHAIR THERNSTROM: Okay. So we're
now, I'm sorry. "Prison ministry" -- how did you word
it?

COMMISSIONER HERIOT: I just have, "Prison
ministry and prisoners' rights advocacy organizations
should undertake", blah, blah, blah, blah, blah.

VICE CHAIR THERNSTROM: Yes. Yes. Okay.

Commissioner Heriot has got the following amendment,
the start of Recommendation Five becomes, "Prison
ministry and prisoners" -- well, it's mouthful here
now, Gail.

COMMISSIONER HERIOT: Yes, it's not
pretty.
VICE CHAIR THERNSTROM: Yes, it's not pretty. "And prisoners' rights advocacy organizations should undertake efforts to enhance the availability of professional legal representation, perhaps through facilitating pro bono arrangements with attorneys at local firms for prisoners who believe their religious rights have been inappropriately infringed."

Can we have a vote on --

COMMISSIONER HERIOT: Can we strike "inappropriately"? If it's infringed, it's inappropriate.

VICE CHAIR THERNSTROM: You are perfectly right. So in addition to the -- Commissioner Heriot's amendment is striking the word "inappropriately". So, "who believe their religious rights have been infringed." Can we have a vote on Commissioner Heriot's amended version of Recommendation Five? Any abstentions, any nay votes? We have unanimous consent, and by implication we have unanimous consent in adopting Recommendation Five.

Recommendation Six. Can I have a motion the Commission approve Recommendation Six, which reads as follows -- this is obviously renumbered as Six. "DOJ and State Departments of Correction should seek to develop more uniform categories for describing the
religious affiliation of prisoners and should collect this data", it's got to be "these data more consistently across institutions. This will allow for more accurate review of efforts to accommodate the religious rights of prisoners. Additionally, collecting data on the entering and exiting" -- I'm sorry. This is also badly written. "Collecting data on the entering and exiting for professed faiths of inmates in both federal and state prisons will assist experts in assessing trends that have been -- that may have national security implications."

Whoever wants to amend this in any way, please include the change of "this data" to "these data". So, in any case, I move the adoption. Have I got a second?

COMMISSIONER KIRSANOW: Second.

VICE CHAIR THERNSTROM: And a vote.

COMMISSIONER HERIOT: Are we going to have a discussion?

VICE CHAIR THERNSTROM: Yes, right away. Have unanimous consent on that motion, and now we move on to discussion.

COMMISSIONER HERIOT: No, it's not unanimous consent. I'm against it.

VICE CHAIR THERNSTROM: You're against.
COMMISSIONER HERIOT: I would vote no, but we haven't voted on it really. We just made the motion and seconded it. And now I want to argue --

VICE CHAIR THERNSTROM: No, we -- this is a question of simply -- I mean, our practice so far, Commissioner Heriot, has been to vote for it and then have a discussion.

COMMISSIONER HERIOT: No, that hasn't been our practice, and that wouldn't be --

VICE CHAIR THERNSTROM: All right. All right.

COMMISSIONER HERIOT: -- permitted.

VICE CHAIR THERNSTROM: Okay. All right.

COMMISSIONER HERIOT: All you've got is a motion to adopt this. I want to argue against it. It's hard for me as a full employment theology grad student, how is anybody ever going to really go about this task of categorizing religions? That's really tricky stuff. And I think the better part of valor here is to like not do it.

VICE CHAIR THERNSTROM: Well, it goes to my disclaimer at the very beginning of the report that has been adopted.

COMMISSIONER HERIOT: Yes, but this is -- I don't think this can be done, so I don't think that
anybody should try it. Imagine being the poor sot who's given the assignment of categorizing religion.

VICE CHAIR THERNSTROM: I'm in agreement with that. I'm going to vote no against the adoption. Further discussion on this? Are we ready to vote on whether to --

COMMISSIONER KIRSANOW: Yes.

VICE CHAIR THERNSTROM: Yes. Okay. So the motion is to approve Recommendation Six. Let me do a roll call. Gaziano.

COMMISSIONER GAZIANO: No.

VICE CHAIR THERNSTROM: Kirsanow.

COMMISSIONER GAZIANO: Not on the -- oh, I'm sorry. I thought he got off.

VICE CHAIR THERNSTROM: Are you there? Seems to be not. Heriot?

COMMISSIONER HERIOT: No.

VICE CHAIR THERNSTROM: No. Reynolds?

CHAIRMAN REYNOLDS: No.

VICE CHAIR THERNSTROM: No. And I'm a no on this, too. With unanimous, in a unanimous voice this has been defeated. So Recommendation Eight is defeated.

COMMISSIONER GAZIANO: I move that we adopt all the Findings and Recommendations, if that is
still necessary, as the previous vote corrected, and we do all the things we need to do to move this to the next stage.

VICE CHAIR THERNSTROM: Let's have a motion whether or not it's necessary.

STAFF DIRECTOR DANNENFELSER: Is Commissioner Kirsanow on the phone there?

VICE CHAIR THERNSTROM: No.

COMMISSIONER KIRSANOW: I'm back. I just was on another line.

VICE CHAIR THERNSTROM: Oh, okay.

COMMISSIONER HERIOT: Let's have him vote on this, because otherwise we don't have a quorum.

VICE CHAIR THERNSTROM: Everybody has voted no in accepting --

COMMISSIONER KIRSANOW: I vote no on Six.

STAFF DIRECTOR DANNENFELSER: Okay.

Unanimous.

COMMISSIONER HERIOT: Swell.

VICE CHAIR THERNSTROM: Unanimous.

COMMISSIONER GAZIANO: Other motions, unanimous consent motion, so that the absence of an objection will prevail in case someone has to get off momentarily.

VICE CHAIR THERNSTROM: Okay. Anyway,
somebody make a motion on adopting the package as it exists.

COMMISSIONER GAZIANO: I move that we adopt the package, Part A and B, as amended, and that we do all those nice things that are necessary to move it to the next stage.

COMMISSIONER HERIOT: Second.

VICE CHAIR THERNSTROM: Any discussion?

All right. I'll do a roll call once again. Gaziano.

COMMISSIONER GAZIANO: Aye.

VICE CHAIR THERNSTROM: Kirsanow?

COMMISSIONER KIRSANOW: Aye.

VICE CHAIR THERNSTROM: Heriot?

COMMISSIONER HERIOT: Aye.

VICE CHAIR THERNSTROM: Reynolds?

CHAIRMAN REYNOLDS: Aye.

VICE CHAIR THERNSTROM: And I vote aye, so we have unanimous consent.

COMMISSIONER HERIOT: Can I ask a question?

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER HERIOT: Is there any way that we can have this conveyed even in this form today to Congress and the White House, so that we will have fulfilled our obligations under the law? Something
that says the Commissioner statements are to follow.

COMMISSIONER GAZIANO: Commissioner Kirsanow's email that quoted the statute suggested to me that -- I don't read that as necessary. It's that we have to adopt, it doesn't say we have to transmit it by year end.

COMMISSIONER HERIOT: Is that right? When did that message come in? Can I --

COMMISSIONER GAZIANO: Pete just -- do you have that handy, what our staff --

VICE CHAIR THERNSTROM: Well, wait a minute. Let's just get -- the Staff Director has to have something to say on this. We don't need to start searching for emails here.

COMMISSIONER GAZIANO: Well, if we could just read the statute, we could interpret it ourselves.

VICE CHAIR THERNSTROM: Well --

COMMISSIONER HERIOT: Yes, I would prefer it.

VICE CHAIR THERNSTROM: Commissioners?

STAFF DIRECTOR DANNENFLESER: The statute says, "Annual report, the Commission shall submit to the President and Congress at least one report annually that monitors federal civil rights
enforcement efforts in the United States."

COMMISSIONER HERIOT: Okay. The word is "submit".

STAFF DIRECTOR DANNENFELSER: Oh, I --

COMMISSIONER HERIOT: And the word "annually." What counts as annually?

COMMISSIONER GAZIANO: Right. I was going to say, does it say from fiscal year to fiscal year?

COMMISSIONER KIRSANOW: No, it does not say that, neither does the CFR.

COMMISSIONER HERIOT: Okay. Then we're fine.

COMMISSIONER KIRSANOW: But it has been taken in the past to mean the fiscal year. That's been the practice.

COMMISSIONER GAZIANO: Exactly. And that's a great practice, and we will substantially comply with that practice.

COMMISSIONER HERIOT: Yes. We're fine. We're fine. I withdraw my question.

VICE CHAIR THERNSTROM: Okay. We are going on to the 2009 briefing --

COMMISSIONER GAZIANO: Could I just get clarification, since I tuned out an earlier unpleasant discussion. When -- two things. First of all, when
is our ability to provide a defense and concurrences.

VICE CHAIR THERNSTROM: The report --

COMMISSIONER GAZIANO: And I move at this point that we be given an opportunity to view other Commissioners' dissents and concurrences, and be given an opportunity --

COMMISSIONER HERIOT: And to respond.

COMMISSIONER GAZIANO: -- to disagree, very briefly though it may be.

COMMISSIONER HERIOT: Yes, I think that's really crucial to the fairness of this procedure. We have to be able to respond to each other.

VICE CHAIR THERNSTROM: That is a -- if the Staff Director would come in on this, I would appreciate it.

COMMISSIONER GAZIANO: We have a Commissioner who has told us he's going to file a dissent.

VICE CHAIR THERNSTROM: I understand that.

Commissioner --

COMMISSIONER GAZIANO: Just keeping the Chairman up-to-date.

VICE CHAIR THERNSTROM: Yes. Chairman Reynolds, will you come on this? It seems to me this requires -- this would be a change in our procedures,
that it would have to be a motion that requires discussion.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, I just walked into the room. Could you briefly --

COMMISSIONER GAZIANO: I moved, just to bring up -- there's one -- Commissioner Yaki promised us he would file a dissent. I move that all Commissioners have an opportunity to look at each other's Commissions in defense, and have a brief period of maybe five days to comment on -- to either try to persuade the Commissioners to change their concurrences or dissents, or comment themselves on it.

COMMISSIONER HERIOT: Seven days. You've got to have a weekend in there. These are part-time jobs.

COMMISSIONER GAZIANO: That's fine. Seven days then. And if that requires us to amend the AI later to reflect our vote, so be it, but I want to vote on my motion today.

COMMISSIONER HERIOT: I second that. I think fundamental fairness requires that we have to have --

VICE CHAIR THERNSTROM: Let's have a discussion of this. The first place, I don't want a retroactive AI. I mean, this is not --
COMMISSIONER HERIOT: It's not retroactive. It's for this one.

VICE CHAIR THERNSTROM: Well, wait a minute. This is a substantial change in existing --

COMMISSIONER HERIOT: No, nobody is going to be able to make a fairness argument saying that I deserve the opportunity to make accusations that are not responded to.

VICE CHAIR THERNSTROM: We have never --

COMMISSIONER HERIOT: You know, that's absurd.

VICE CHAIR THERNSTROM: -- had a process in place whereby people saw dissents or concurrences, and had an opportunity to respond to them.

COMMISSIONER HERIOT: Every other organization of our type does.

VICE CHAIR THERNSTROM: I don't care what every other organization --

COMMISSIONER HERIOT: Because it's unfair not to.

VICE CHAIR THERNSTROM: I want the Chair to come in on this.

CHAIRMAN REYNOLDS: This appears to be a deviation from what we've done in the past.

VICE CHAIR THERNSTROM: Yes.
CHAIRMAN REYNOLDS: I know that at least one Commissioner, probably more than one Commissioner, has suggested that we need to amend the process so that --

COMMISSIONER HERIOT: Actually, it's not a deviation from what we did in the law school class, Jerry.

CHAIRMAN REYNOLDS: The law school class?

COMMISSIONER HERIOT: The law school affirmative action report. This is what we did with that. Remember, he was libeling Ken Marcus. And on an ad hoc basis we allowed a period for reply.

COMMISSIONER GAZIANO: He also raised some other very strange questions about our process, and I just want an opportunity, so that he -- that every Commissioner knows that other Commissioners will have an opportunity to respond. That may restrain certain Commissioners from trying to sandbag other said Commissioners, or gives us a chance to respond. But this is -- whatever the position of the Commission before, if it deviates from what I'm asking, I think we should change that.

VICE CHAIR THERNSTROM: Look, that is a discussion about altering our AIs. There is nothing unique about this report that requires --
COMMISSIONER GAZIANO: Right now I'm saying I want it for this statutory report. If that is a modification of AI, it's only a modification for this report. I will then re-urge that we have that discussion further. I just want to clarify that I think that this is appropriate, whether or not it is a modification of an AI, or not.

CHAIRMAN REYNOLDS: And I think that's the heart of a disagreement. In terms of past practice, I think that Abby is right.

COMMISSIONER HERIOT: I guarantee you, I responded.

VICE CHAIR THERNSTROM: I'm sorry. We have had in the past a vote on this.

CHAIRMAN REYNOLDS: Gail, assuming that you're right, I still believe that past practice, looking at how we've operated in the past, taking into account the exception that you just put on the table, I think that we have not allowed folks to respond to dissent. And it's not -- I don't think that the issue has never -- I don't believe the issue has ever been squarely joined.

COMMISSIONER HERIOT: I think it violates fundamental fairness, particularly to, in the case of Commissioners who make quite outrageous accusations.
CHAIRMAN REYNOLDS: I agree with you, Gail. However, we do have some procedural issues to deal with. Right now, Yaki and Melendez are not on the line, and it seems to me that if we're going to do something like this, procedural fairness would require a full discussion of all the Commissioners.

VICE CHAIR THERNSTROM: Absolutely. I really feel very strongly about that.

COMMISSIONER GAZIANO: Well --

COMMISSIONER HERIOT: I feel very strongly in the other direction.

COMMISSIONER GAZIANO: That's right. And I'm just wondering if we can hold the permanent changeover for another time, but it is not -- we didn't keep Commissioner Melendez from joining the call. And I don't see on what grounds --

VICE CHAIR THERNSTROM: It's irrelevant. It's irrelevant. The fact is that if we do that, then Yaki is going to come back, number one.

COMMISSIONER HERIOT: And say nobody should be allowed to respond to me? I mean, that's just silly.

VICE CHAIR THERNSTROM: Wait a minute. Hold a minute. Commissioner Yaki is, one, going to complain about procedure. But, two, he's going to say
fine, I want to respond to their response. This is a
major procedural change that we need to discuss as a
change in our AIs, and we need to discuss it with the
two Democratic appointees with us.

COMMISSIONER HERIOT: Well, we're not
talking about changing the AIs at this point, just
this particular one.

VICE CHAIR THERNSTROM: You can't make
exceptions.

COMMISSIONER HERIOT: We did already.

VICE CHAIR THERNSTROM: Gail, I'm not sure
you're correct in your description of that. But, in
any case, as the Chair just said -- I mean, there's
nothing special about this report that suddenly when
we know Yaki is going to write a dissent, as he has
done with past reports, we should suddenly say all
right, if you're going to write a dissent, we have to
have a chance to respond.

COMMISSIONER GAZIANO: I will quote my
hero, "Trust, but verify." We ought to amend for this
report. We can discuss it later.

VICE CHAIR THERNSTROM: You can't just
amend it. It is a procedural travesty.

CHAIRMAN REYNOLDS: The issue was not
placed on the agenda, no one had notice that we were
going down this road, at least not officially. And
the issue doesn't turn on whether Yaki and Melendez
are present, it seems in the final analysis it turns
on whether we notice this issue up properly.

COMMISSIONER GAZIANO: I don't -- Mr.
Chairman, I think it's certainly subsumed in approving
the report. If you really don't want to vote for it,
I understand, for the reasons you stated, but I think
it is not fair to us to say that it's not subsumed in
approving a report of this type.

VICE CHAIR THERNSTROM: But it has never
been a part of the approval process. I mean, we have
no Democrat on the phone, and it does -- it is a
substantial change in our very longstanding procedure.
And, as a matter of fact, this whole issue was
discussed when I was on the Commission in the early
years, and it was decided by the Commission we could
not have an endless going around and around --

COMMISSIONER HERIOT: That's not the --

COMMISSIONER GAZIANO: But I don't really
want to delay this, but can we keep things open until
our next meeting?

COMMISSIONER HERIOT: Yes. In that case,
I would ask that the --

VICE CHAIR THERNSTROM: No, we can't.
This report has to go in.

CHAIRMAN REYNOLDS: We have to vote on the report.

VICE CHAIR THERNSTROM: We have to vote on the report.

COMMISSIONER GAZIANO: We voted on the report.

COMMISSIONER HERIOT: We did vote.

COMMISSIONER GAZIANO: Can we keep open at this time, we are voting to keep open the period of time to file dissents and concurrences, or the - we're keeping open the opportunity to respond to each other's concurrences or dissents until after our next meeting.

VICE CHAIR THERNSTROM: By the way, I will not be at the next meeting. No, we can't do that. This report has got to be out the door. Hold on.

COMMISSIONER HERIOT: Well, then I would call the question on the motion.

VICE CHAIR THERNSTROM: I'm going to call the question on this.

COMMISSIONER HERIOT: This is not the end of this issue.

COMMISSIONER GAZIANO: Just one question, again, why -- Mr. Chairman, why can't we at least keep
this response to -- what is the date that concurrences and dissents are going to be allowed?

VICE CHAIR THERNSTROM: Until the 14th of October.

COMMISSIONER GAZIANO: Okay. Can we keep open until October 17 whether we can respond to each other's? We might then pass on whether we really need to respond, but at least note in our record today that we're keeping that open as a possibility.

VICE CHAIR THERNSTROM: All right. Commissioner Gaziano, we know there is going to be a dissent coming in.

COMMISSIONER GAZIANO: Exactly. We're leaving open the possibility we might be able to respond to it.

CHAIRMAN REYNOLDS: So, essentially, this vote that we're about to take, you want to postpone.

COMMISSIONER GAZIANO: No. I want there to be a -- if you will agree, I will pose a different motion. The motion is, if you will agree, that we leave open the possibility, no one can say laches to me, we leave open the possibility that we might be able to respond to each other's concurrences and dissents until after we debate this issue at our next meeting.
CHAIRMAN REYNOLDS: Okay. And depending on the --

COMMISSIONER GAZIANO: Depending on the dissents and concurrences, it may be moot.

VICE CHAIR THERNSTROM: Well, wait. If we are holding this report --

CHAIRMAN REYNOLDS: And you would ask that the new rule, assuming that it passes, be applied retroactively.

COMMISSIONER GAZIANO: I'm saying that it won't be retroactive, because we have held this issue open with regard to this report.

COMMISSIONER HERIOT: I note there is no rule that says we don't do this. The rule just doesn't address it.

VICE CHAIR THERNSTROM: I'm sorry. There was, before you got on the Commission, a vote on this matter. There was a decision not to allow responses to dissents --

COMMISSIONER GAZIANO: It's unclear to me whether that was just a discussion and a vote, but if it's not in our AI, we ought to --

CHAIRMAN REYNOLDS: Hold on. How about this? We have a dispute over the fact, let's take the time between now and the next time we meet to -- our
next business meeting to nail down the facts, what
does the AI say, what have we voted on in the past?

COMMISSIONER HERIOT: Okay.

CHAIRMAN REYNOLDS: Just hold the issue in
abeyance until then.

COMMISSIONER HERIOT: Yes. Todd could
withdraw his motion until then.

COMMISSIONER GAZIANO: But will it --
we're going to hold open the concurrences and
dissents -- by the way, even if the AIs are clear that
this is now verboten, I still want to move that we be
able to comment on each other's dissents and
concurrences for this report.

VICE CHAIR THERNSTROM: I don't understand
why we had a teleconference meeting today, which
nobody wants to come to these teleconference meetings.
We want to discuss in person these reports, why we did
this, except for the fact that we needed to get this
report out the door. Now you're suggesting this
report is not going to go out the door until after the
next Commission meeting. And, by the way, this is an
issue I care about a lot, and I will not be at the
next Commission meeting. That aside, you're now
holding the report --

CHAIRMAN REYNOLDS: Abby, the report can't
be circulated until we get the dissents and concurrences.

VICE CHAIR THERNSTROM: Well, that's October 14th.

CHAIRMAN REYNOLDS: Right. The only thing that we intended to do was to vote on the report today with the understanding that the document wouldn't be circulated until after we receive dissents and concurrences.

COMMISSIONER GAZIANO: Actually, that's slowing things up by maybe three days, but only three days. And three days for, I think, an important reason. If you really want to rush things along, then I hope you would support my motion to allow seven days to look at each other's concurrences and dissents.

VICE CHAIR THERNSTROM: It's not three days, because at the point at which they come in, which is supposed to be the 14th, then people need time to read them, and write responses, if indeed responses are going to be allowed.

CHAIRMAN REYNOLDS: Okay, folks, I'm going to have to get off the phone.

COMMISSIONER HERIOT: We need a quorum, Jerry. We need to vote in --

CHAIRMAN REYNOLDS: I understand.
COMMISSIONER HERIOT: We need the other motion on the agenda. Let's just go to that really quickly, to adopt the concept paper.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIR THERNSTROM: I have a proposal on the concept, on the topic. I have a preference.

STAFF DIRECTOR DANNENFELSER: Have we completed the Statutory Report, the final vote on it?

VICE CHAIR THERNSTROM: Yes, we've completed it.

COMMISSIONER HERIOT: Yes, we're going on to English Language.

VICE CHAIR THERNSTROM: We're going on to English Language.

II. PROGRAM PLANNING

FY 2009 BRIEFING TOPIC; EMPLOYERS' RIGHTS TO SPECIFY ENGLISH AS THE LANGUAGE OF THE WORKPLACE

VICE CHAIR THERNSTROM: We could avoid a whole debate on the English language concept paper if we -- if anybody else was interested in doing what I would like to do, which is given the financial crisis we're living in, to substitute the Community Reinvestment Act as the topic instead for the next briefing.

COMMISSIONER GAZIANO: With respect, I've
been sort of leading part of the research on that, and I don't think we're quite there yet to vote on it. I don't know if other people -- that wasn't on the agenda either, and I don't think other people have even looked at the draft concept paper. But the draft, as amended by Staff, actually took out some things that I wanted to propose to the rest of you, so there are two problems, I would suggest, with that.

COMMISSIONER HERIOT: I haven't even seen that.

VICE CHAIR THERNSTROM: No, I'm just suggesting in principle that we postpone the English as the language of the workplace topic, and try instead to go for the Community Reinvestment Act as the next topic.

COMMISSIONER HERIOT: That was the issue we decided last month, to go ahead with the briefing topic. The issue now is just whether to adopt the concept paper. I move we adopt the concept paper.

COMMISSIONER KIRSANOW: I second it.

VICE CHAIR THERNSTROM: Is the Chair still with us?

CHAIRMAN REYNOLDS: Yes.

VICE CHAIR THERNSTROM: Yes. Okay. Do you want to come in in any way on this?
CHAIRMAN REYNOLDS: Well, you're suggesting that we take the concept paper -- you're suggesting that we replace English in the workplace with --

COMMISSIONER HERIOT: No, the motion is to adopt the concept paper.

COMMISSIONER GAZIANO: We have a motion on the table to adopt the English-only concept paper.

COMMISSIONER HERIOT: There's no motion about anything else.

COMMISSIONER GAZIANO: So that's the discussion.

CHAIRMAN REYNOLDS: Okay. Abby proposed something else.

VICE CHAIR THERNSTROM: Yes. No, what I'm saying is we could avoid the whole discussion of this briefing topic, if there was enthusiasm for substituting the Community Reinvestment Act. We would get a huge CSPAN audience on that, given the financial crisis at the moment, which is not going to disappear tomorrow.

COMMISSIONER HERIOT: My guess is we can't put together something like that in November or December, and we would be upstaged by a thousand other events.
COMMISSIONER GAZIANO: Yes, and it's more important when we have to get it right. We might have a very important contribution to make.

VICE CHAIR THERNSTROM: All right. Okay. I will drop that suggestion, and we are on to the question of approving the briefing topic as -- the concept paper as circulated, Employers' Rights to Specify English as the Language of the Workplace. Can I have a motion --

COMMISSIONER HERIOT: Already did.

COMMISSIONER KIRSANOW: We had a motion and a second.

VICE CHAIR THERNSTROM: We already did.

COMMISSIONER HERIOT: Call the question.

VICE CHAIR THERNSTROM: Call the question. Okay. Any nays, any abstentions? Hearing none, we have unanimous consent here to adopt it.

CHAIRMAN REYNOLDS: I've got to get off the phone, folks.

VICE CHAIR THERNSTROM: Okay. And the next item is Future Agenda Items.

III. FUTURE AGENDA ITEMS

VICE CHAIR THERNSTROM: Does anybody --

CHAIRMAN REYNOLDS: Well, we've lost the quorum.
VICE CHAIR THERNSTROM: We've lost the quorum. Okay. We haven't lost the quorum to adjourn.

IV. ADJOURN

VICE CHAIR THERNSTROM: We're adjourned.

COMMISSIONER KIRSANOW: Okay.


COMMISSIONER GAZIANO: Bye now.

(Whereupon, the proceedings went off the record at 3:03:59 p.m.)