U.S. COMMISSION ON CIVIL RIGHTS

MEETING

FRIDAY, OCTOBER 16, 2009

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

PRESENT:

GERALD A. REYNOLDS, Chairman (via telephone)
ABIGAIL THERNSTROM, Vice Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
ARLAN D. MELENDEZ, Commissioner (via telephone)
ASHLEY L. TAYLOR, JR., Commissioner (via telephone)
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director
STAFF PRESENT:
DAVID BLACKWOOD, General Counsel, OGC
CHRISTOPHER BYRNES
DEMITRIA DEAS
PAMELA A. DUNSTON, Chief, ASCD
MAHA JWEIED
ROBERT LERNER, Asst. Staff Director for OCRE
EMMA MONROIG, Solicitor
LENORE OBSTROWSKY
KIMBERLY TOLHURST
AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:
TIM FAY
DOMINIQUE LUDVIGSON
JOHN MARTIN
ALISON SCHMAUCH
RICHARD SCHMECHEL
KIMBERLY SCHULD
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CHAIRMAN REYNOLDS: This is a meeting of
the U.S. Commission on Civil Rights.

It is 9:33 a.m., Eastern Standard Time, on
October 16, 2009.

The meeting is being held at 624 9th
Street, N.W., Room 540, in Washington, D.C.

Commissioners Thernstrom, Yaki, Heriot,
and Gaziano are present in person, with Commissioners
Melendez, Taylor, and myself participating by
telephone.

To assist the Court Reporter and
facilitate our discussion, I would ask that all
Commissioners participating by phone identify
themselves by name before they begin their comments.

I. APPROVAL OF AGENDA

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

STAFF DIRECTOR DANNENFELSER: Mr.
Chairman, I think you have to approve the agenda.

CHAIRMAN REYNOLDS: Oh, I'm sorry. I
meant to say "agenda." Is there a second to approve
the agenda?

CHAIRMAN REYNOLDS: Okay. I hope -- well, has Dominique distributed the proposed amendment?

STAFF DIRECTOR DANNENFELSER: She is just getting it together here.

VICE CHAIR THERNSTROM: Yes, and I have a proposed amendment to the agenda.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIR THERNSTROM: This is Commissioner Thernstrom.

CHAIRMAN REYNOLDS: Okay. I am going to walk through some proposed changes. I would like to move Program Planning as numeral -- Roman numeral two on the agenda, followed by the State Advisory Committee issues as Roman numeral three. Under this motion, we would have no announcements, and the Minutes and the Staff Director's report will appear as Items IV and V on the agenda -- on the agenda, respectively.

Under Program Planning, I would like to move discussion of the National Conference Subcommittee issues to the first bullet. I would also like to add a discussion of the Title IX project as the last bullet under Program -- under the Program
Planning section.

Is there a second? Pretty please.

COMMISSIONER HERIOT: Second.

COMMISSIONER GAZIANO: Second. But would you mind repeating -- oh, I'm sorry, Gail -- I suppose Gail beat me to the punch.

CHAIRMAN REYNOLDS: Not at all. Is Dominique in the process of distributing the proposed amendment?

COMMISSIONER GAZIANO: She's out of the room. I presume she is obtaining them --

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: -- to pass out.

CHAIRMAN REYNOLDS: All right. Well, let me walk you through it once again. The first change would entail moving Program Planning to Roman numeral two on the agenda. And it would be followed by the State Advisory Issues as Roman numeral three. We would scratch the Announcements, and the Minutes and the Staff Director's report would appear as Items IV and V on the agenda, respectively.

And under Program Planning, we would move the National Conference Subcommittee issues to the first bullet. And then, finally, we would add under Program Planning another bullet, and that would be for
So if you -- I mean, it would go Program Planning, and under Program Planning you would have -- the first bullet would be the National Conference Subcommittee issues, followed by an update on the status of the 2010 enforcement report, followed by approval of the first quarter 2010 briefing report topic, followed by an update on the status of briefing reports and approval of Commissioner deadline for consideration of briefing reports, followed by approval of the calendar for 2010 for Commission meetings, and then we've added a bullet, discussion of the Title IX project.

And then, the next Roman numeral, Roman numeral three, would be the State Advisory Committee issues. Then, the approval of the minutes, then the Staff Director's report, and then we go home.

COMMISSIONER GAZIANO: Sounds great.

CHAIRMAN REYNOLDS: Comments?

COMMISSIONER YAKI: I have a question.

This is Commissioner Yaki. Mr. Chair, I was just wondering, how does the Title IX topic relate to this agenda, insofar as we were ranking briefing report topics and -- in other words, why are we bringing this out separately?
COMMISSIONER GAZIANO: Title IX is the one we already approved for 2010.

VICE CHAIR THERNSTROM: Well, this is Commissioner Thernstrom. I have a question about that. I don't understand in the minutes where it says, "Commissioners approved a motion to approve both the New Black Panther Party proposal and the Title IX proposal for the enforcement report for this year." But we don't have two statutory reports; that implies that we do.

COMMISSIONER HERIOT: But we approved both.

VICE CHAIR THERNSTROM: Well, but only one is our statutory report.

COMMISSIONER GAZIANO: We can issue two.

COMMISSIONER HERIOT: Nothing in the statute says you can have only one enforcement report.

COMMISSIONER GAZIANO: But as the transcript reflects, Vice Chair Thernstrom, that gives us flexibility to designate one or the other, depending on how they turn out, as, you know, more like our traditional enforcement reports, but that means that we can continue one if it's not finished by September. But we can -- hopefully, we can complete
two this year.

COMMISSIONER YAKI: This is Commissioner Yaki. I am puzzled about that, given that we have -- so two potential national reports. At some point we are going to decide which one may be issued. We have a national conference coming up. I have no idea if we have -- how we discussed the budgetary impacts of all three going on at the same time, but I just wanted to raise that issue, because it -- as with Commissioner Thernstrom, I was somewhat surprised to see that you -- folks went ahead and did two.

So let's go on. That was my question.

CHAIRMAN REYNOLDS: Okay. Any other comments?

(No response.)

Okay. Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Commissioner Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: What --

STAFF DIRECTOR DANNENFELSER: On the agenda, amending the agenda.

VICE CHAIR THERNSTROM: Simply on the agenda, I -- fine.

CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: I'll abstain. I'm not current on this enforcement stuff.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Aye.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: And I vote in the affirmative. We have one abstention, Commissioner Melendez. Commissioner Yaki voted against the motion. The remaining Commissioners voted in favor of the motion. The motion passes.

Vice Chair Thernstrom, I understand that you have proposed an amendment to the agenda?

VICE CHAIR THERNSTROM: Well, I think, actually, my proposed amendments to the agenda were taken care of by your -- I was going to propose precisely what you already did, so that's not a problem. I will have a motion to amend the minutes, but that's down the road.

CHAIRMAN REYNOLDS: Okay. So looking at the revised agenda, the next item is the National Conference Subcommittee issues.

II. PROGRAM PLANNING
NATIONAL CONFERENCE SUBCOMMITTEE ISSUES

CHAIRMAN REYNOLDS: On September 4th, Commissioner Yaki indicated in a e-mail that he would like to offer two motions with respect to the --

VICE CHAIR THERNSTROM: Well, wait a minute. We --

CHAIRMAN REYNOLDS: -- National Conference Subcommittee. The first is a motion to add to the already-appointed subcommittee members to include Vice Chair Thernstrom. The second is to delegate to the subcommittee the authority to set the national conference date.

Commissioner Yaki, would you please offer your motions?

VICE CHAIR THERNSTROM: Excuse me, Mr. Chairman. Have we gone over the minutes?

STAFF DIRECTOR DANNENFELSER: They're coming later in the agenda.

VICE CHAIR THERNSTROM: Oh, you've now put them later in the agenda. I'm sorry. Okay. My apologies.

CHAIRMAN REYNOLDS: No apology necessary.

Commissioner Yaki?

COMMISSIONER YAKI: Whatever you said, I just move.
CHAIRMAN REYNOLDS: Okay. Discussion?

Oh, second. Discussion?

COMMISSIONER MELENDEZ: Do you second both motions?

COMMISSIONER HERIOT: What are the motions?

CHAIRMAN REYNOLDS: One is to add Vice Chair Thernstrom to the subcommittee, and the second is to delegate the authority to the subcommittee to select a date for the national conference.

COMMISSIONER YAKI: Well, I move -- let me clarify. I move to consolidate the two motions into one motion, and to nominate Vice Chair Thernstrom as the additional member of the committee. As you know, Vice Chair Thernstrom and myself have both expressed some concerns about the manner in which the --


COMMISSIONER YAKI: As you know, I think Commissioner Thernstrom and myself were -- along with Commissioner Melendez, were the most vociferous critics of the manner in which the prior version, National Conference 1.0, was put together.

I believe that in order to provide necessary balance, as well as to bring the experience
of Commissioner Thernstrom and her viewpoint and
experience to the fore, that it would be not just
useful but I think necessary that I have her as an
additional member of the committee. And that's why I
propose Commissioner Thernstrom.

VICE CHAIR THERNSTROM: You've got a
second part to your motion.

COMMISSIONER YAKI: Well, the second part
-- second part of my motion is simply that the -- this
committee not be tied down to whenever the Press Club
is or is not available, but can make a decision based
upon its progression and its discretion as to when the
national conference should occur.

I think that we should not be held to any
artificial deadlines imposed by a booking agent at any
particular facility, but rather use our own best
judgment based on what we believe the progress is of
sending setting such a conference together.

That's my motion. Is there a second?

COMMISSIONER MELENDEZ: Second.

Commissioner Melendez.

CHAIRMAN REYNOLDS: Okay. The --

COMMISSIONER YAKI: Discussion?

CHAIRMAN REYNOLDS: -- creation of a

subcommittee and the postponement of the conference
was the result of some tough negotiations between
Ashley and Pete on one hand, myself on the other. And
I -- we reached that compromise with the understanding
that we would not reopen these issues.

The subcommittee is free to work with any
Commissioner, or anyone else for that matter, in
putting together the recommendations. And as for the
date, the ultimate date I believe should -- well, the
ultimate decision should remain within the purview of
the entire Commission.

So I don't have any concerns about the
subcommittee making recommendations as for the date or
any other matter. But the ultimate decision I believe
should remain with the entire -- it should be
determined by a vote of the entire Commission.

COMMISSIONER YAKI: Mr. Chairman -- this
is Commissioner Yaki -- I would accept that as a
friendly amendment, that the subcommittee would
recommend for approval to the full body the date that
they suggest for it. I would like to respond to the
first point that you made, and that is while I applaud
and appreciate the negotiation, as you describe it,
between yourself, Commissioner Taylor, and
Commissioner Kirsanow, I was not a part of that
negotiation.
And because I was not a part of that negotiation, I am somewhat uncomfortable being the only member of that subcommittee who held dissenting views on the direction in which the conference was initially going. I believe that the addition of Commissioner Thernstrom will add the necessary balanced point of view and experience to that subcommittee.

I realize that all Commissioners will be able to consult and add their own experience. But to the extent that a subcommittee acts as a subcommittee, it does so according to the rules of parliamentary procedure. And I believe that having the addition of Commissioner Thernstrom adds a necessary balance in order that a full and fair exchange of views, compromised negotiation, what have you, will occur rather than in a committee where two of the three members have already had discussions with the chair about what exactly those negotiations were supposed to be about.

CHAIRMAN REYNOLDS: Any other comments?

COMMISSIONER GAZIANO: The right of the full Commission to affirm the date is important to me. Let me just make sure I understand that at least that has been taken care of by the friendly amendment. I
have other concerns with the motion, but I just want
to at least understand what that -- that portion of
it.

COMMISSIONER HERIOT: That means it's a
two-step process now. The subcommittee has to come to
a decision, and then to recommend it. That's likely
to be unwieldy.

COMMISSIONER GAZIANO: I -- you know, I
thought that pending -- one concern I have, of course,
is that four-member subcommittees present, you know, a
variety of quorum and other problems. But I am also
concerned that the subcommittee was supposed to report
back in November, so that we could keep this in track
-- on track. And opening up a new series of rules and
new members does give me some concern as well.

But where do we stand with the -- the
previous motion was that the Chairman -- barring some
change, the Chairman can pick the location, subject to
our advice and input, and the date of the national
conference. What is the status of the current motion
on those two issues?

COMMISSIONER YAKI: Are you asking me?

COMMISSIONER GAZIANO: Yes, it's your
motion.

COMMISSIONER YAKI: Well, thank you,
Commissioner Gaziano, for your questions. The answer to your question is, no, the Chairman would not have discretion to set the agenda and set the time of the meeting --

COMMISSIONER GAZIANO: I didn't --
COMMISSIONER YAKI: -- meeting place.
COMMISSIONER GAZIANO: We are going to collectively talk about the agenda after the subcommittee --

COMMISSIONER YAKI: Well, just the whole point, I believe, of the subcommittee was to empower a representative group of the Commission to make those decisions. And I accepted an amendment to make it subject to ratification.

CHAIRMAN REYNOLDS: Commissioner Yaki, I think we have a fundamental misunderstanding. The subcommittee was making -- was empowered to meet, discuss, and to formulate recommendations, but the decisions ultimately would be made by a vote of the entire Commission.

COMMISSIONER YAKI: Then, what is the point of the subcommittee? If just to talk and then come back -- come back and have talk about all over again. Commissioner Heriot said that --

CHAIRMAN REYNOLDS: I have no idea of --
COMMISSIONER YAKI: Mr. Chairman, may I finish? Commissioner Heriot just said that even picking a date by the subcommittee, subject to full ratification by the Commission, was unwieldy. I don't see how -- in that vein, why would we then spend time at the subcommittee level doing something that could be wholly overturned at the full committee?

That did not sound -- that certainly was not the objection that I raised at the -- throughout the spring and the summer regarding this -- regarding this particular conference in that it was not going forward in a truly bipartisan manner.

And to have -- and to add one more point to this, it just strikes me as odd that, if that is the case, why anyone who would object to the addition of Commissioner Thernstrom then is beyond me, because, then, if you are saying this subcommittee really has no power ultimately to make any decision on the composition, makeup, agenda, direction of this conference, then it is just window-dressing. And why anyone would object to Commissioner Thernstrom being on as window-dressing is beyond me.

I have my own objections to being used as a window-dressing, but that's for --
you are being used, it's because you -- this is the
vehicle that you -- I mean, you passionately argued
for the creation of a subcommittee. The subcommittee,
against my better judgment, was created. I don't
think -- well, I did not and do not support the
concept of a subcommittee.

And as for being a window-dressing, I
don't know how you get there. Ultimately, all
decisions at the Commission are made by a majority of
the Commissioners. I assume that the subcommittee
will work in a fashion to garner a majority of -- a
majority of votes by the full Commission. And if the
subcommittee fails to do that, then the majority of
the Commissioners will have to make amendments to
whatever is recommended -- recommended by the
subcommittee.

But this structure, this approach, the
postponement, the creation of a subcommittee, that was
what you asked for. The fact that -- the fact that
the subcommittee does not have the -- does not have
ultimate decision-making power, that was known from
the beginning. When the compromise was first
discussed on the record, it was perfectly clear that
the subcommittee was making recommendations.

COMMISSIONER YAKI: Mr. Chair, from what
you've just told me, the first discussions about the
subcommittee were discussed off the record with the
other two members of the proposed committee,
Commissioner Taylor and Commissioner Kirsanow.

I would -- when I talked about a
subcommittee, I talked about a body that would be
charged with creating and shaping the direction and
content of the Commission. I would think that you,
being -- given the contentious nature of this -- of
this item, given the fact that it has had collateral
consequences to the other items as we have gone
forward, would want to move forward in a way that
provided the best opportunity for there to be
consensus on this project as it goes forward.

I think it --

CHAIRMAN REYNOLDS: Commissioner Yaki, our
--

COMMISSIONER YAKI: Please. Mr. Chair?
Mr. Chair, would you just let me please -- allow me to
finish? I did not interrupt you, and I would like to
give you -- ask you to give me the same courtesy.

And I just want to restate that the
addition of Commissioner Thernstrom is, I believe, not
only desirous but necessary in order to help achieve
that consensus going forward. And if that is not the
case, then I question the entire point of the
subcommittee altogether.

CHAIRMAN REYNOLDS: Any other comments?
(No response.)
Commissioner Yaki, how do you vote?
COMMISSIONER YAKI: Aye.

CHAIRMAN REYNOLDS: Commissioner Thernstrom, how do you vote?
VICE CHAIR THERNSTROM: Aye.
CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: Aye.
CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Nay.
CHAIRMAN REYNOLDS: Commissioner Heriot?
COMMISSIONER HERIOT: Nay.
CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Nay.
CHAIRMAN REYNOLDS: Okay. With my vote, there are four votes against it. The motion does not carry.

COMMISSIONER YAKI: I hereby submit my resignation from the subcommittee.

COMMISSIONER MELENDEZ: Can I make a motion to add Abby Thernstrom to the Commission at least?
CHAIRMAN REYNOLDS: I'm not following.

COMMISSIONER MELENDEZ: I would like to add her to the subcommittee.

CHAIRMAN REYNOLDS: We just voted on that.

COMMISSIONER MELENDEZ: But that was a combined motion, and I was wondering whether or not if that motion was by itself it would -- it might have a chance of passing, without the other part of it, as we combined the two motions. That was my worry at the beginning.

CHAIRMAN REYNOLDS: Okay. Is there a second?

COMMISSIONER YAKI: Second.

COMMISSIONER GAZIANO: This isn't on the agenda. Is it out of order? I question whether it's out of order.

COMMISSIONER HERIOT: I'm not sure we can -- can we ask whether one can break down a motion into pieces like that --

COMMISSIONER YAKI: Sure.

COMMISSIONER HERIOT: -- if it isn't on the agenda? Can we get an opinion on that?

COMMISSIONER YAKI: All the chair has to do, technically, is to move to rescind the vote, and then -- and then move -- and then, I would move to
sever the vote to -- in two parts, to --

COMMISSIONER HERIOT: But we've already voted. We've already voted. It's out of order. You can't sever a motion after it has been defeated.

COMMISSIONER YAKI: You can sever a motion if you undo the original motion by reconsideration.

COMMISSIONER HERIOT: Well, then, you've got to move to do that.

COMMISSIONER YAKI: I just said --

COMMISSIONER HERIOT: Only someone who voted in favor of -- who voted in the majority can do that.

COMMISSIONER YAKI: I know. Obviously, you weren't listening to me.

COMMISSIONER HERIOT: So it's out of order.

COMMISSIONER YAKI: No. Obviously, you weren't listening to me, because I said if the chair did that. So if you listened to me a little bit, perhaps you would understand that I do know parliamentary procedure, and it is the chair's -- since I assume --

COMMISSIONER HERIOT: In other words --

COMMISSIONER YAKI: -- I assume neither one of the motions --
COMMISSIONER HERIOT: -- the motion on the floor --

COMMISSIONER YAKI: The motion is not out of order. Good Lord. Can we just --

CHAIRMAN REYNOLDS: Commissioner Yaki, are you saying that this depends on me?

COMMISSIONER YAKI: I'm saying -- I am saying, Mr. Chair, that it is obvious that the two people sitting across from me aren't going to move to reconsider to accommodate Commissioner Melendez. You could, as chair, for the purposes of comity, or comedy, depending on how these other two people decide to play it, to move to reconsider the motion.

I will vote in favor of that motion. That will leave the original motion back on the table. We can then move to sever it. Commissioner Melendez can then move to sever it to only address Commissioner Thernstrom's appointment, and we can move forward and get this thing done with in two minutes, rather than go into this out of order stuff that apparently the Commissioners across from me do not understand.

COMMISSIONER HERIOT: Jerry, someone who voted no on that motion can move to reconsider, so that we can sever it. But if no one who voted no on the motion does that, makes that motion, the motion
that is currently on the floor is out of order.

CHAIRMAN REYNOLDS: Okay. I'm not going
to support opening this up. I want to put this to
bed.

COMMISSIONER YAKI: Okay. Then,
Commissioner -- Mr. Chair, I am resigning from the
subcommittee as of now.

CHAIRMAN REYNOLDS: Commissioner Melendez,
will you serve?

COMMISSIONER MELENDEZ: I thought the
motion I presented to try to get -- I'm trying to --
just a simple thing, trying to get Abigail to serve on
that committee. That's what I'm trying to do, and
however we can do that. I mean, we can argue back and
forth about parliamentary procedure, but I think my
main issue was whether or not there was some
consideration by the rest of the group to take that
issue alone.

That's all I was trying to do. I wasn't
trying to get into a debate on parliamentary
procedure. I think we all have an understanding of
what we are trying to do here.

CHAIRMAN REYNOLDS: I understand.

COMMISSIONER MELENDEZ: And if you voted
against it, then I would understand that this wasn't
an issue that all parts of it were basically opposed, and that there was no chance of kind of subdividing it down to maybe just adding her to the committee.

That's all I'm trying to do. I'm not trying to get into this big debate on parliamentary procedure. I'm trying to kind of meet everybody halfway, if everybody wants to do that. If you don't, then we are just going to continue to be at an impasse.

CHAIRMAN REYNOLDS: Well, unfortunately, I think it is going to be the latter, or at least on this particular point. Commissioner Melendez, I appreciate the way you have always conducted yourself during our debates. And I -- the fact that you are making a request, it does resonate with me, and I do struggle with it. But ultimately, though, I am going to stand by my decision. It is unfortunate that this is the issue where you raise your hand and make this request.

After having said that, Commissioner Yaki has resigned from the subcommittee. One of the arguments, one of the primary arguments for the compromise was to respond to the claim that all views and political affiliations weren't a part of the process.
So it's -- if I accept the arguments that were made, it's important to have a Democrat to serve on the subcommittee. And since you're the remaining Democrat, I ask, will you serve on the subcommittee?

COMMISSIONER MELENDEZ: The only way I would serve is if Abigail Thernstrom serves also to broaden out our -- you know, our points of view on this whole issue. So that's just -- that's my position. Otherwise, I won't serve.

CHAIRMAN REYNOLDS: Okay. All right. So we don't have a subcommittee. And at the next meeting --

COMMISSIONER GAZIANO: We do have a subcommittee. If people choose not to serve, that's their choice.

COMMISSIONER HERIOT: But it exists.

COMMISSIONER GAZIANO: And they can no longer claim that their input was not received. I think if the subcommittee wants to conclude its business, or if we want to eliminate it we can, but we have one right now.

CHAIRMAN REYNOLDS: Okay. All right.

Well, I will -- this is a lot of wasted time.

In any event, we will -- this issue will be on the agenda for the next business meeting.
COMMISSIONER HERIOT: This issue? What is "this issue"?

CHAIRMAN REYNOLDS: Well, we were supposed to receive a report from the subcommittee.

COMMISSIONER HERIOT: Yes. I mean, I assume you are going to get the report from the subcommittee at our next meeting. There is nothing -- there has been no decision on the part of the Commission that this says anything to the contrary.

CHAIRMAN REYNOLDS: Okay. Next up is an update on the status of the 2010 enforcement report.

UPDATE ON STATUS OF 2010 ENFORCEMENT REPORT

CHAIRMAN REYNOLDS: Mr. Staff Director, would you or the General Counsel please provide the update on the status of our investigation of the New Black Panther voter intimidation case and its implications for future Voting Rights Act enforcement?

STAFF DIRECTOR DANNENFELSER: Thank you, Mr. Chairman. The General Counsel has been looking into these matters, and I would like him to make the presentation on this subject.

MR. BLACKWOOD: This is David Blackwood. First, this is to confirm, at least of this date, we haven't received a response from the Department of Justice to the Commission's letter requesting
information with regard to this issue. In the meantime, the Office of General Counsel has begun research with regard to hearing procedures and updating the existing hearing manual, which is severely out of date.

We have identified and attempted to locate relevant witnesses. We have collected and compiled video evidence of the incidents in question. We have compiled a log of all press reports on the incident. We have begun research on the legislative history of the Voting Rights Act with regard to the specific section, 11(b), as well as a review of prior enforcement of 11(b) cases by the Department of Justice.

We have also collected and reviewed past Commission reports on voting matters, which serve as background information. And we have begun drafting discovery requests that would be directed towards the Department of Justice.

There are two matters that I want to bring to your attention that I am not presenting as of this date, but hope to issue to the Commission shortly, which is a project outline and discovery plan. The concept paper of course has been approved, but a project outline with hard dates needs to be issued,
along with the discovery plan for the Commission's approval. And I hope to have that out relatively quickly.

At the same time, I want to point out one issue that I want to bring to your attention that would be included in the project outline, is that in my view the A.I. 1-6 would have to be modified with regard to the project outline. And I say "modified," "not done away with," but modified in that this is a different kind of enforcement report that was originally contemplated under -- when the AII-6 was drafted.

It would still include the Commission having more than enough time to review various drafts, but the dates -- I just want to indicate to you the dates of the project outline will probably be different than would be contemplated under AII-6 in its current form. Again, I hope to have that to you shortly.

CHAIRMAN REYNOLDS: Questions? Comments?
COMMISSIONER MELENDEZ: Yes, Commissioner Melendez. On the A.I. 1-6 Section 8, having to do with the discovery plan, are you saying that there is nothing in place right now? We are modifying this to expedite the situation? Or what are we saying?
MR. BLACKWOOD: No. Commissioner, I want to be clear, because I don't have something to show you. We are trying to follow A.I. 1-6 as much as we can, but this is in the nature almost of an investigation as opposed to, as we have called them before in the past, these battleship enforcement review reports that we have done the last several years.

So it is going to follow a different format. Under the concept plan as adopted, there are going to be two hearings. The report itself, I think it has been openly discussed, is unlikely to be the 200-page type of report that we have done before.

Therefore, the report or the time required to draft the report, as opposed to take evidence and hold hearings, needs to be adjusted. And we are working to try to come up with some realistic deadlines. I realize it has to be approved by you all first. In the meantime, though, we are trying to initiate and begin our investigation.

COMMISSIONER MELENDEZ: A question -- this is Commissioner Melendez. Are you saying that any modification to A.I. 1-6 Section 8 would be done by you sending that out to us and some type of teleconference? Or are you saying that we are going
to do this at the next meeting?

COMMISSIONER GAZIANO: If you wouldn't
mind me asking a question. What I understood you to
say is you are going to propose a discovery plan. And
if we adopt it, we will thereby be making slight
modifications for this particular year to A.I. 1-6.

MR. BLACKWOOD: That is correct,
Commissioner Gaziano. Commissioner Melendez, the idea
is that you all would see exactly what we are
proposing as far as the changes, and you all would
have to approve it. It is not a unilateral act by
OGC.

COMMISSIONER MELENDEZ: Thanks.

COMMISSIONER GAZIANO: Mr. Chairman, I
just wanted to ask about the first of the proposed
hearings under the concept paper. I wondered what you
have been able to discover so far, what you would be
able to tell us in the near future, or when you would
likely -- whether we might be able to make the
December 4 date for fact witnesses that were present
in Philadelphia on the last Presidential election.

I imagine that entails, you know,
interviewing the potential witnesses, or at least
contacting them, seeing -- I don't even know whether
Philadelphia is within 100 miles of our offices. And
if they are all willing to travel here, that's moot, or that doesn't matter. But what kind of factors would you need to determine before we know whether we can have that fact hearing in -- on December 4, and whether we need to have it in Philadelphia, or whether we can have it here in our offices?

VICE CHAIR THERNSTROM: Can I just ask a prior question? Since when have we arrived at a December 4 date as a -- or decided on a December 4th date or --

COMMISSIONER GAZIANO: It's in the concept paper that we approved.

VICE CHAIR THERNSTROM: The date, December 4, is in the concept paper?

COMMISSIONER GAZIANO: That there would be a December hearing. Since we are meeting on December 4, that seems like the best date for --

VICE CHAIR THERNSTROM: It would be a substitute for our regular meeting.

COMMISSIONER GAZIANO: We could have a business meeting afterwards, but we have briefings and hearings before a business meeting. And, obviously, if the majority of the Commission wants to add an extra hearing day, or an extra meeting day in December, other than December 4th, that just seems
logical to me.

And so I'm just asking the General Counsel what it would take for you to be able to confirm or whether you would be able to take the steps to see whether the relevant witnesses, or enough of the relevant witnesses to make it worthwhile would be willing to come to Washington.

And I would also like to hear from other Commissioners at this time whether they think we should go to Philadelphia anyway, whether they are willing to go to Philadelphia, and what the practicalities of that is, or whether we should suggest to the General Counsel to see if witnesses would be willing to come to Washington if it's beyond 100 -- does anyone know if Philadelphia is more than 100 miles?

STAFF DIRECTOR DANNENFELSER: It is about 100.

COMMISSIONER GAZIANO: Whether witnesses would be willing to come to Washington. So maybe that is a first step or -- is to check with the witnesses to see whether they are willing to come to Washington, assuming that's the preference of the Commissioners to -- it's certainly more convenient to staff and court reporters and whatever to have the hearing here.
COMMISSIONER YAKI: This is Commissioner Yaki. Mr. Chair, I just wanted to follow up on Commissioner Thernstrom's comment, which is we have scheduled on our calendar a business meeting on December 4th. If we are going to change that, modify it, what have you, to accommodate a hearing -- and I would note that the last hearing that we did a long -- I don't even know if it was called -- I guess it was a field hearing, the one in Omaha, lasted the better part of a day.

I think that is a -- these are threshold questions. If, indeed, it is the Commission as a whole that ratifies these decisions, which you seem to imply it does, that we should be discussing rather than asking the General Counsel to go about making inquiries about dates that he has no firm guidance from this body on whether we even want it to be in December, or why we even want it to be on December 4th, if we want it to be on a different day.

COMMISSIONER GAZIANO: When we approved --

COMMISSIONER YAKI: If we -- well, it's a concept paper, Commissioner Gaziano, if you would stop interrupting me. And the question is -- you know, the threshold question is whether we would want to substitute that hearing for our regular meeting date
on the 4th.

CHAIRMAN REYNOLDS: I think it's a legitimate point. Personally, I have no concerns about using the date that we have designated for a business meeting to have a hearing, either in Washington or Philadelphia. I don't know how other folks feel, but this is an opportunity to have a discussion, and, if necessary, we can make it official by having a vote or reaffirming what I thought was the plan.

COMMISSIONER GAZIANO: Mr. Chairman, just to be clear, I was just assuming that Commissioners would find that convenient. I was inviting Commissioners, like Commissioner Yaki, to express his view. Obviously, a majority of the Commission can change the concept in the concept paper. But I think that it's -- it seems doable to me. The General Counsel may have to confirm that.

But I would at least prefer that he try to see that we have the hearing as scheduled in the concept paper, and I see no reason why we should not at least try to do so.

VICE CHAIR THERNSTROM: Mr. Chairman, Commissioner Thernstrom here. Look, last I knew we were scheduling telephonic meetings because we
I couldn't get our business done at the regularly-scheduled business meetings. These -- obviously, these telephonic meetings are a problem from a number of points of view, which I -- you know, and I expressed that point when we first discussed the matter.

So now we are talking about crossing off a business meeting. We can't have a business meeting in Philadelphia in addition to the hearing, it doesn't seem to me. We are talking about crossing off a business meeting in order to have this hearing on that date.

And, frankly, I am just totally bewildered by the nature of this particular hearing that is what we are going to learn. I understand the question -- the question of finding out what happened in the Justice Department, but with respect to what happened at the polling place, anybody who wants to get on YouTube knows what happened at the polling place.

So, you know, I am concerned about missing a business meeting for what I don't see as a potentially very productive meeting in Philadelphia.

CHAIRMAN REYNOLDS: If it were productive, would you have any concerns about missing the business meeting?
VICE CHAIR THERNSTROM: Yes. I would say that if we are scheduling telephonic meetings because we can't get our business done here, which is the place we should get our business done, because it's the way to properly do it, I would have a concern about substituting that date, absolutely.

CHAIRMAN REYNOLDS: So you are saying that even if you believe we would have a productive --

VICE CHAIR THERNSTROM: I would say we would have to come up with a different date.

COMMISSIONER GAZIANO: Mr. Chairman?

COMMISSIONER YAKI: I would agree with that.

COMMISSIONER GAZIANO: Mr. Chairman, when we designate --

CHAIRMAN REYNOLDS: Okay. Well, how about this as a compromise?

COMMISSIONER GAZIANO: Mr. Chairman, can I --

CHAIRMAN REYNOLDS: Why don't we have the business meeting on the 3rd, and move forward with the hearing on the 4th, to address Vice Chair Thernstrom and Commissioner Yaki's concern.

COMMISSIONER GAZIANO: Mr. Chair, we would have the business meeting in Philadelphia or
Washington?

COMMISSIONER YAKI: Mr. Chair, I would --

out of respect, I have flown out of Philadelphia
before. I would actually -- I would actually urge
that you flip that, and that the -- Philadelphia be
the 3rd and the regular business meeting on the 4th be
here, for one very simple reason.

If there is any weather at all, the number
of flights that go out of Philadelphia to the West
Coast are extremely, extremely limited. The last time
there was a little bit of weather I ended up having to
take a train back to Dulles, back to D.C., to Union
Station, take a cab out to Dulles, because there is
frequently only one or less flights per day from
Philadelphia to the West Coast.

So I would say if you are going to do it,
I would do it 3rd/4th, with the 4th being the regular
business meeting here, or pick an entirely different
day not connected to the 4th entirely.

CHAIRMAN REYNOLDS: Well, I am just trying
to see if there is opposition or support for the idea
of having both a business meeting and the hearing.

COMMISSIONER MELENDEZ: This is
Commissioner Melendez. I think --

COMMISSIONER GAZIANO: Mr. Chairman, I
have been in line.

COMMISSIONER MELENDEZ: -- is going to be enough, in my opinion, let alone try to have a business meeting to coincide with it.

COMMISSIONER GAZIANO: Mr. Chairman?

CHAIRMAN REYNOLDS: Other comments?

COMMISSIONER GAZIANO: When we designated December 4th as a meeting time, we did not designate it as a business or briefing or hearing. That is what we decided about this time. I am fine if the rest of the Commission -- I am perfectly happy to have a separate business meeting on another day, if that proves necessary.

I don't think we need to make that decision yet. We have had, as I recall, briefings with as many as 11 witnesses followed by business meetings. I don't know how many witnesses we would necessarily get. There are disputed facts. We are the finder of fact, and it's important for us to determine them. But I don't imagine that a hearing would necessarily go longer than our 11-person briefings followed by business meetings.

That said, if the business portion is important, I am certainly comfortable with having it on a separate day than the proposed hearing.
COMMISSIONER YAKI: Point of order. Did we -- someone join, or did we lose someone on the phone?

CHAIRMAN REYNOLDS: I'm still here.

Ashley?

COMMISSIONER TAYLOR: I'm still here.

CHAIRMAN REYNOLDS: Arlan? Arlan?

(No response.)

COMMISSIONER HERIOT: Looks like we lost Arlan. Mr. Chairman?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER HERIOT: I have no problem with scheduling for both the 3rd and 4th. I can do that. It will require that I take the Red Eye out Wednesday night, because I've got a class that evening. But I can do it.

CHAIRMAN REYNOLDS: Okay. It seems to me that there is something close to a consensus. Well, people are open to the idea of having a business meeting in December, as well as the hearing. But at this point, there are a number of variables that need to be nailed down.

For example, will this meeting take -- will the hearing take place in Philadelphia or Washington? And that could have some bearing on when
we decide to have the business meeting. So --

MR. BLACKWOOD: Mr. Chairman, this is

David Blackwood. If I could, I will try to answer, or
at least identify some of the variables, because I do
not have a set answer for you at this stage. We have
not attempted, number one, to actually contact the
witnesses. We have been in the process of identifying
and trying to locate them. Approximately of those
individuals I notified in the concept plan, we have
identified a little over half. That is, we have a
verifiable address.

I can now begin the process of contacting
these individuals, even with or without a subpoena,
but hopefully everybody would cooperate, and find out
if they are available on December 4th.

There are two other variables that we
have, or that you should be aware of. One is that to
be in Philadelphia -- and my view is by definition we
are going to have to be in Philadelphia. About half
the witnesses are in the Philadelphia area. Some of
the witnesses are not in the Philadelphia area or
within 100 miles. These were campaign workers who
came to the city of Philadelphia to work for a
campaign and then return to their homes.

But it seems to me it would have to be in
Philadelphia, unless a large number of these individuals would voluntarily agree to show up in the District of Columbia. And it would have to be voluntary.

Next, we have the issue of renting space. In talking with staff about past experience, renting space as opposed to holding it in a government building makes the most sense, because we need to take over the building or the space, and courthouses have problems letting us do that. So most likely we will have to obtain hotel space.

If I have your authority, we will at least start trying to determine, is it available, and what kind of prices we can get for the 4th.

COMMISSIONER GAZIANO: There are no government -- I mean, I would suggest that you try to locate, whether it's a county building, court -- federal courthouse, federal -- other federal building.

MR. BLACKWOOD: We have -- the history of the Commission has been, at least originally, was using federal buildings. There are problems with getting federal buildings, in that especially the courthouses with current-day security you are in and out 9:00 to 5:00. Our staff needs to be in there longer to set up. If media is contemplated, that
becomes an issue for courthouse security as well. So we can look at those options, but I just want you to be aware of that.

VICE CHAIR THERNSTROM: Mr. Blackwood, I have a question as well. This is Commissioner Thernstrom. You just mentioned that witnesses would have to show up voluntarily if --

STAFF DIRECTOR DANNENFELSER: If it was here.

VICE CHAIR THERNSTROM: -- if it was here. Well, but witnesses have to show up voluntarily in Philadelphia as well.

MR. BLACKWOOD: No, they would be subpoenaed.

VICE CHAIR THERNSTROM: Well, wait a minute.

COMMISSIONER GAZIANO: They could be subpoenaed.

VICE CHAIR THERNSTROM: Well, wait a minute. Who enforces that subpoena?

MR. BLACKWOOD: The Department of Justice, in the event that someone doesn't comply with the subpoena.

VICE CHAIR THERNSTROM: Well, and you are assuming that the Department of Justice will enforce
MR. BLACKWOOD: I am assuming that the people will comply with the subpoena.

VICE CHAIR THERNSTROM: Well, I mean --

MR. BLACKWOOD: But the subpoena will even be effective if --

VICE CHAIR THERNSTROM: -- you are building this on a bunch of assumptions that I don't -- I don't think can be made with any kind of confidence.

COMMISSIONER GAZIANO: What's your basis for assuming that the witnesses we want wouldn't show up voluntarily or comply with the subpoena?

VICE CHAIR THERNSTROM: Well, I haven't seen the list of witnesses.

COMMISSIONER GAZIANO: It's in the concept paper we approved.

VICE CHAIR THERNSTROM: Well, wait a minute. Mr. Blackwood just said there were other witnesses.

COMMISSIONER GAZIANO: No. The ones we identified, some of them no longer live in Philadelphia, but they're identified in the concept paper.

VICE CHAIR THERNSTROM: The whole entire
list of witnesses? As I understood what he said, that
is not correct.

COMMISSIONER GAZIANO: Not by name. Not
by name, but the --

VICE CHAIR THERNSTROM: Well --

COMMISSIONER GAZIANO: -- the poll
workers --

VICE CHAIR THERNSTROM: -- unless you are
talking about witnesses that are -- only witnesses
that are friendly to our inquiry are on the list, then
you may have a problem with voluntary compliance.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom
is right. It is possible that we will not have folks
willing to voluntarily participate. But it is also
likely that everyone that we contact would be willing
to participate.

COMMISSIONER GAZIANO: Or comply with the
subpoena.

CHAIRMAN REYNOLDS: I can see a scenario
where some people would be eager to -- to clear the
record. So, yes, there are some variables out there,
but they are -- that's always the case.

MR. BLACKWOOD: This is one more item that
you should be aware of, Mr. Chairman, which is that
the Federal Register notice for a hearing, unlike a
briefing or a regular meeting, is 30 days. So it
is --

COMMISSIONER GAZIANO: Is that according
to our AIs, or some other statute?
MR. BLACKWOOD: That's under the statute.
COMMISSIONER GAZIANO: Okay.
MR. BLACKWOOD: So --
CHAIRMAN REYNOLDS: So when is the last
date?
MR. BLACKWOOD: I believe November 3rd for
December 4th. Now, you can always issue a notice and
then cancel it later on. But I would hope in the next
two weeks to get information to the Commission about
-- we have talked to individuals, we have X number of
people that can show up, we have tried to locate space
for the hearing, this has been our success. But we
would have to get that to you in the next two weeks.
VICE CHAIR THERNSTROM: And, Mr.
Blackwood, I understand from the experience of the
last statutory meeting that it was extremely useful to
have interim, as it were, briefings for the Special
Assistants. And I wonder if you would be willing to
do that in this case as well, so we don't have to --
so that there is a flow of information that --
MR. BLACKWOOD: I have no problem with
COMMISSIONER GAZIANO: General Counsel, Mr. Blackwood, we have a business call scheduled for October 30th, two weeks from today. So do you think you would be prepared to make a report? And if we needed to take any -- make a decision at that time we could?

MR. BLACKWOOD: I will be ready on October 3rd to tell you where we stand.

COMMISSIONER GAZIANO: October 30th.

MR. BLACKWOOD: 30th, where we stand.

COMMISSIONER GAZIANO: Okay.

VICE CHAIR THERNSTROM: I, for one, cannot -- will be in Portland, Oregon, on the 30th, and completely unable to join a call. I don't know what -- obviously, I am only one person.

COMMISSIONER YAKI: I have a question, Mr. Chairman. This is Commissioner Yaki.

CHAIRMAN REYNOLDS: Yes, Commissioner Yaki.

COMMISSIONER YAKI: Since concept papers are simply concept papers, and we have enumerated a class of individuals who we wish to contact, I think it important -- this was an issue that, as I have said before, was confined to a fairly narrow geographic
region, to put it mildly.

I am wondering to what extent we should, as part of our hearing process, if we are going to go forward with this, situate our hearing in such a way as to make it convenient for people from that area, particular area of Philadelphia, to attend if they so wish, and to, therefore, look for a location proximate to that polling area, if one is available, in order to make ourselves available to the neighborhood as a whole. I just want to put that forward.

Sometimes I think going -- going directly to that place on a very localized, specific, incident-specific issue, as we have here today, versus -- because as far as we know, it was not city-wide, it was not in mainline Philadelphia, it was in a certain portion of the city of Philadelphia, I think it would be very useful for us to show that, if we are going to go in there, we are going to go where this particular incident or incidents were purported to have occurred, and I would suggest that as a possibility.

Again, because this is not a -- as far as I can tell, a city-wide, a state-wide, as I have said before, I don't think it's a national issue, I think it's one simple, confined incident that we have chosen to devote a substantial amount of resources to for
purposes that I cannot fathom. But if we are going to do so, we might as well do it right and go directly to where it occurred.

And could I get another -- a quorum call on those on the phone? Because I keep on hearing beeps.

CHAIRMAN REYNOLDS: This is Gerry. I'm here. Ashley?

COMMISSIONER TAYLOR: I am here.

COMMISSIONER YAKI: Okay.

CHAIRMAN REYNOLDS: Arlan? Arlan?

(No response.)

We have lost Arlan.

COMMISSIONER YAKI: Okay.

CHAIRMAN REYNOLDS: Hello?

COMMISSIONER HERIOT: We're here.

MR. BLACKWOOD: I have nothing further to report.

CHAIRMAN REYNOLDS: Okay. Any other comments?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: All right. Thank you, David, for the update.

Next up is the approval of the first quarter 2010 briefing report topic.
APPROVAL OF FIRST QUARTER FY 2010

BRIEFING REPORT TOPIC

COMMISSIONER GAZIANO: Would the chair --
the Chairman wasn't clear where the discussion of the
Title IX project was.

COMMISSIONER HERIOT: Last.

COMMISSIONER GAZIANO: Was it last?

COMMISSIONER HERIOT: It's last under --

COMMISSIONER GAZIANO: Okay. Sorry.

Never mind.

CHAIRMAN REYNOLDS: Okay. On
October 14th, the Staff Director sent us a list of
potential 2010 briefing topics based on rankings that
were provided by Commissioners. All of the topics
receiving any votes were reflected in that document.

Mr. Staff Director, would you please
discuss the results of those rankings?

VICE CHAIR THERNSTROM: Mr. Chairman, just
a correction there. I mean, the votes were tallied
without -- without my amended proposal having been
circulated. So I understand we can, in this process,
reorder our priorities. But the fact is that votes
were taken on the basis of a list, one item --
important item, in my view -- which was missing.

CHAIRMAN REYNOLDS: So have you since
provided this information to the Staff Director?

VICE CHAIR THERNSTROM: Well, yes, and you should have had it yourself. Mr. Staff Director --

STAFF DIRECTOR DANNENFELSER: Yes, it was circulated yesterday to all Commissioners, with a copy of Vice Chair Thernstrom's more detailed explanation of her proposal.

CHAIRMAN REYNOLDS: Okay. And is the -- does the tally reflect Vice Chair Thernstrom's --

STAFF DIRECTOR DANNENFELSER: It was counted -- the tally that was distributed previously counted her proposal as her first choice under the area, "Do federal contracting statutes produce viable minority-owned businesses?" And it noted that there were -- that there was a Commissioner who ranked an amended version of -- what I described as an amended version of this topic, and then gave the title of that topic, so it was counted there. But it turns out that Vice Chair Thernstrom intended for that to be considered a new and separate topic --

VICE CHAIR THERNSTROM: Well --

STAFF DIRECTOR DANNENFELSER: -- which is described as regulatory and other barriers to entrepreneurship that impede minority business startups and her -- the more detailed explanation of
that proposal was distributed yesterday.

VICE CHAIR THERNSTROM: And that is a very
different topic, and I was substituting it for --
trying to get away from another vote on -- and another
briefing on an affirmative action issue, and trying to
move towards one that I think would be of equal
interest across partisan lines and, in fact, is more
important.

CHAIRMAN REYNOLDS: Mr. Staff Director,
would you like to --

STAFF DIRECTOR DANNENFELSER: Yes. The
topic that received the most votes -- and, again, this
was -- I guess you could question the vote count here.
It was combining the votes of people who voted for
racially-based incidents on U.S. colleges and
university campuses.

Several Commissioners proposed that -- I
believe four Commissioners proposed that that topic be
expanded to also include religiously-based incidents,
and then there were also three other Commissioners or
three -- I think there were some -- three of those
four Commissioners I believe who suggested that First
Amendment issues such as speech codes also be
considered as part of that overall examination about
racially-based and religiously-based incidents on
college campuses.

So it is not entirely clear whether the people who voted just for racially-based incidents would be supportive of the idea of expanding that topic, or if they would prefer to just keep it as racially-based incidents, but I suppose that would be part of the discussion that would take place here.

COMMISSIONER HERIOT: Mr. Staff Director,

when you say "the most votes," do you mean the weighted version of that?

STAFF DIRECTOR DANNENFELSER: I'm sorry.

Yes, this is based on weighted -- the point system here, if you will, was based on Commissioners submitting up to five of their top five choices. One Commissioner submitted three, and the other -- top three, and all of the other Commissioners submitted top five.

And the top choice of any Commissioner was given five points, their second choice four points, third choice three points, fourth choice two points, and fifth choice one point. So that is what went into the calculation of how many points.

In the case of racially-based incidents or religiously-based incidents, when you combine the two, there were seven Commissioners who voted for that
COMMISSIONER YAKI: What was the -- I'm sorry, just a question. What was the actual split in terms of people who just voted for it as is versus people who voted for it with amending it? And how would that have affected the overall ranking and score, if you just separated it out?

STAFF DIRECTOR DANNENFELSER: There were three who voted for it, and I'm not sure if it was their first choice. I'm not sure exactly how the points came out, but this was at least the first -- I believe the first or second choice of all of the people who voted for it.

But there were four Commissioners who I believe made it their first choice, if it was conditioned on the idea that it would be more expansive, that it would also include these religiously-based incidents as well as the racially-based incidents.

CHAIRMAN REYNOLDS: Marty, what are the -- what's the second-highest vote-getting topic?

STAFF DIRECTOR DANNENFELSER: The next topic, which got 16 points, was employment discrimination on the basis of age, in the context of...
the economic crisis. And then, after that, with 12 points, there was the role of race in the 2008 election results and analysis of racial attitudes.

Now, there were some caveats that people put when they voted for that as well. There were two Commissioners who ranked an amended version of the topic that addresses the roles of both race and gender in the election, and one of those Commissioners ranked an amended version that also addressed both the primary and general elections. But there were 12 points all together for some variation of that particular topic as described.

CHAIRMAN REYNOLDS: Okay. And --

STAFF DIRECTOR DANNENFELSER: And then, after that was minority youth -- well, there are two that got -- well, no, actually -- the next one would be minority youth in the juvenile justice system. That received nine points.

And the one about federal contracting statutes was listed here as nine points, but would actually be four points if Commissioner Thernstrom's first place vote is taken out from that and then -- and then added to just standing alone. But, as she said, it -- Commissioners did not have an opportunity to vote on that topic on its own because it had not
been circulated as a separate topic at that point.

Then, there were seven points for race-neutral alternatives to achieving diversity in higher education. That received seven points. Conflict between civil rights and religious liberty, five points. Racial bias in the media, five points. Police, fire, and municipal employment, in Title VII enforcement, that received four points.

Implementation of the Individuals with Disabilities in Education Act received four points. Funding, staffing, and workload levels of federal agencies, civil rights enforcement in 2010, received three points. The question of, "Does the implicit association test measure implicit racism" received three points.

Private employer racial and ethnic preferences in Title VII enforcement received three points, and that was a new topic. That was not on the list of topics that was circulated. That was a new topic that was proposed by a Commissioner.

Compliance with the Supreme Court's decision in the Seattle and Louisville cases received three points. School choice as a civil right received two points. The Commissioner who voted for this topic recommended an updated description and focus on the
Washington, D.C. School Choice Program.

There was federal and state enforcement of hate crime laws. That received two points. And denying minority residents in high-crime neighborhoods get fundamental Second Amendment rights received one point. And those were all the topics that received at least one point.

VICE CHAIR THERNSTROM: Mr. Staff Director, I perhaps should know this, but I don't, what is the maximum number of briefings we are talking about in 2010? So, you know, we've got a potentially long list here.

STAFF DIRECTOR DANNENFELSER: Well, there is the hope that we will at least pick out one. But I would say that probably the maximum, given the other things that the Commission will be doing, I assume would be three. That we would probably be talking about two or three in addition to the hearings that we may be doing in relation to -- possibly two in relation to the New Black Panthers issue. And then, there is also I think a potential hearing in relation to the Title IX issue as well.

COMMISSIONER GAZIANO: Mr. Chairman?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER GAZIANO: I would certainly
I propose that we have a discussion. And whether we select one or not, I don't mean to -- I will out myself as the Commissioner who suggested the new topic. I didn't necessarily need everyone else to see it in advance, because I understood we were just going to be discussing these.

But I suggest that we -- if we even commit to one, that we not commit to more than one, but that the general discussion of all of these topics would be useful for when we take it up again.

CHAIRMAN REYNOLDS: Well, I like the proposal made by Vice Chair Thernstrom looking at various entrepreneurships. In fact, the first time I appeared before the Civil Rights Commission, this is the topic that I -- that I discussed.

So I like it. I would ask that Vice Chair Thernstrom expand on the concept paper.

VICE CHAIR THERNSTROM: I would be glad to, and I think -- I don't have it in front of me, but we do have a written expansion -- but anyway, I would be glad to talk about it. Evidently, it was passed out. I don't have it in front of me, but I would be glad to talk about it, particularly -- it's less in two of the Sun Belt states, but particularly in the Rust Belt states, the northeast cities -- I'm sorry,
and northeastern cities, there is a regulatory maze
that would-be entrepreneurs need to navigate. And
that maze has been -- has been built up over decades
through one municipal administration and another.

And it has a particular impact on would-be
entrepreneurs in both the black and Hispanic
communities. Much less so in the Asian communities,
and for a reason I'll state in a minute. But -- well,
I'll state that right up front.

You've got -- the Asian communities have
an internal networking system which includes loans for
businesses, it's an inter-ethnic group support system,
as it were, for entrepreneurship. That does not exist
to the same degree, particularly in inner city black
communities. And it is a -- it is a real problem in
navigating, as I say, the regulatory maze that allows
would-be heads of -- those who would like to start up
businesses.

And I think that a discussion of the
difficulties that have a disparate impact on inner
city, black, and Hispanic residents with some
aspirations to start businesses would be an extremely
useful topic.

Now, having said that, I just in front of
me put my own proposal as it was written out now
several days ago, and all of the rest of you -- has this been circulated?

STAFF DIRECTOR DANNENFELSER: It was e-mailed.

VICE CHAIR THERNSTROM: It was e-mailed, okay. So all the rest of you have -- should have that as well. But I was just talking off the cuff just now.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, does this concept paper contemplate looking at things like bonding requirements?

VICE CHAIR THERNSTROM: Absolutely.

CHAIRMAN REYNOLDS: We have these licensing systems when it comes to women who -- well, and men, who braid hair.

VICE CHAIR THERNSTROM: Exactly.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIR THERNSTROM: Exactly. Where, you know, and the hair-braider case is a very famous one, in that there were hair braiders -- I can't even remember the exact location. It may have been here in Washington, D.C.

COMMISSIONER HERIOT: There was one in San Diego.

VICE CHAIR THERNSTROM: There was one in
San Diego. Where the -- they were told -- they started their business in their home. All they were doing was hair braiding. And they were told that they needed cosmetology licenses, 900 hours of training in bleaching hair and doing all of the things that people do in regular salons. And they said, "Wait a minute. We've got one skill, and we want to do one thing."

But there are lots of licensure and other requirements of this sort.

COMMISSIONER GAZIANO: Mr. Chairman?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER GAZIANO: I think this is a very good topic as well. There is an additional synergy I am aware of. Since I resigned from the Virginia SAC, as I pledged, I remain active as an ex officio member. And a very similar topic I think was tentatively accepted recently by the Virginia SAC. So when we can receive information and work with the SAC, I think that is one of our -- I think we call it -- what is it? Strategic goals. But I like this topic in general.

But Commissioner Yaki was very persuasive in his proposal on college discrimination. And I was one of those that ranked the discrimination high, but I wanted to explain why I qualified it -- that it
should include racial -- I mean religious.

It is very difficult to distinguish between some religious and ethnic discrimination when we are dealing with Jewish and Muslim students. And so I would hope if we pursue that topic that we -- they are also, obviously, motivated by the same sort of invidious animus between religious and ethnic and racial discrimination, that we clarify that it is racial, ethnic, and religious discrimination.

I was not one of those that, in casting my vote, specifically said it should include speech codes. But now that it has been brought to my attention that some other Commissioners do, I think that if we choose that topic we should include that as well.

And so I like having -- hearing the presentations of other Commissioners and reading their prior concept papers, these are the two that I think are the most doable for us. And I don't have a strong preference between them. I am certainly subject to other people's thoughts and comment.

VICE CHAIR THERNSTROM: This is Commissioner Thernstrom. Commissioner Gaziano, I wonder on the religious discrimination whether you would like to confine it to religious discrimination
when it overlaps with questions of ethnic --

COMMISSIONER GAZIANO: No. I think that it's hard to distinguish it. But, for example, discrimination against fundamentalist Christians isn't necessarily linked to race. It might be, I suppose, by some. But I still think it's part and parcel of the same type of invidious animus, and that those sort of discrimination and hostility, you know, shouldn't be excluded either.

VICE CHAIR THERNSTROM: I just wonder if the topic is not getting awfully broad.

COMMISSIONER YAKI: Well, I was going to -- Mr. Chair?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: This is Commissioner Yaki. I was going to say the same thing, which is that in our initial canvas of this issue, it is clear that there is a geographic breadth to this topic that I think needs to be fully explored. I don't think that having just one talking head talking about it gives it the same kind of gravity or importance that it deserves.

While I would be -- with regard to religious, we obviously have had some issues regarding that on -- with our national report via the year
without -- in the prison context of course. But we
have never really gone to, at the college campus level
-- and this is something where I think that if -- if
it gets -- if it starts getting added on to, will
become overbroad and will lose I think the singular
power that a focused -- a tightly-focused briefing can
bring to this issue.

I am not averse to the Commission in the
future addressing the other topics, and certainly we
have touched upon some of those when we had our
briefing on -- that led to our campaign on anti-
semitism on college campuses. But I am very concerned
with the rise of ethnic-targeted, racially-targeted
incidents, speech, and conduct, on college campuses.

I would like to keep the focus of it
tightly wound on that. And if in the future we have
-- we can have the resources and the time to -- to
expand the inquiry elsewhere, I would be glad to.
But I just think that this is such an important topic
from the point of view of what is happening nowadays
on college campuses that I would ask my colleagues to
try and keep it tightly focused to provide the most
important -- to give it the importance and the power
that a report arising from this would have.

VICE CHAIR THERNSTROM: Would you -- as
part of that topic, would you include some consideration of speech codes that certainly, you know, impact the whole atmosphere or -- I mean, they are part of the picture, it seems to me.

COMMISSIONER YAKI: I don't know, quite frankly. I mean, I -- I understand the issue. I just -- I think that, certainly, what we have found in a lot of our hearings, the followup hearing to that, that we draw issues out of it. That may be a -- that may be reference. That may be a part. I certainly don't think it needs to be a primary focus of the hearing.

VICE CHAIR THERNSTROM: I just think it's so integral to the whole question of the racial atmosphere on campuses, and the response of institutions of higher education to the whole problem.

COMMISSIONER YAKI: Well, I think that can be part of how we examine what institutions have done, but I don't want to go into a lengthy examination of how people feel about different speech codes and different campuses, when it's not related to a direct incident or assault or whatever that happens on college campus that originates in the racial -- in a racial context.

So I would agree -- I would agree that
that should be part of any response, or we should
elicit that and see what it does and have commentary
on that. But I don't want it to be like, "Now we're
going to do speech codes" --

VICE CHAIR THERNSTROM: No, I understand.
COMMISSIONER YAKI: -- as a separate that.
VICE CHAIR THERNSTROM: I understand.
COMMISSIONER YAKI: Okay.
CHAIRMAN REYNOLDS: This is Chairman
Reynolds. I like Commissioner Yaki's proposal. But I
would like to see that religious component remain as a
part of the topic. And I understand, Commissioner
Yaki, your desire to have it tightly focused, but I
think that we can include the religious aspect and do
it in a way that doesn't detract from the overall --
from your overall goal.

COMMISSIONER YAKI: Mr. Chairman, I mean,
I would be -- I understand. I would be willing -- I
just don't want it to get into -- become a three-
headed monster here. If we are going to do -- you
know, I could agree to the religious aspect and maybe
that would be Panel 2, but I would want at least one,
you know, separate complete panel on the race issue,
and then the second panel could perhaps be the
religious panel, and then we could just conclude from
there. Otherwise, this could be a hearing that would go on, you know, forever and --

CHAIRMAN REYNOLDS: No. I appreciate your concern.

COMMISSIONER YAKI: Okay.

CHAIRMAN REYNOLDS: But I --

COMMISSIONER YAKI: I would be willing -- I would be willing to do a two-panel where we do it that way. And if that would work with you, Mr. Chair, I would accede to that request.

CHAIRMAN REYNOLDS: The approach that you laid out I am comfortable with. I mean, we are not -- I don't believe we are going to vote. But if -- I don't believe we are going to vote today, but the approach that you just laid out I am comfortable with.

COMMISSIONER YAKI: Okay. Thank you.

VICE CHAIR THERNSTROM: Mr. Chairman, why aren't we voting today? I'm sorry.

CHAIRMAN REYNOLDS: It wasn't clear to me that we were intending to vote.

VICE CHAIR THERNSTROM: Okay.

COMMISSIONER GAZIANO: I would also prefer to have Commissioner Kirsanow's views. And if we are trying to have a hearing in December, it seems January is the earliest. It seems like this discussion has
been very helpful maybe to narrow down to two topics that we seem most interested in.

I want to -- you know, I will add that if the college campus topic is chosen, I think there are ways to accommodate Commissioner Yaki's concerns, but I think there are probably several of us who want to -- again, make sure the ethnic component is also included. And it is hard to distinguish what is on one panel or another.

But I agree with also Vice Chair Thernstrom that the speech codes issue relates to the race discrimination. But that is the kind of thing that maybe we can flesh out in e-mails before the next meeting, and we can vote in November.

COMMISSIONER YAKI: Mr. Chair, I would also just like to raise, on behalf of Commissioner Melendez, that he was very interested, from his own personal experience, of the impact of the economic freefall on job discrimination among older Americans. I think that certainly what you are seeing in places like Detroit and elsewhere is that a large percentage of people who are being laid off are people in their early to late fifties, towards sixties, a few years away from retirement age.

And while it may not rise to the level of
the Older Americans Act in terms of the age, certainly
it is on the borderline and their ability -- the
ability of these folks to find gainful employment in
this economy is extremely difficult.
I just wanted to raise that as a topic
that I also am interested in, as well as the topic
posed by Commissioner Thernstrom, because when I was
on the Board of Supervisors in San Francisco we often
dealt with the problem of how do you expand
entrepreneurship, and what are the barriers with
regard to bonding or with regard to insurance
requirements, how you formulate contracts in a way
that don't create -- that create basically an
advantage for those companies that have always been at
the till, but not the people who are just trying to
get there.

So I want to express my support for that
as well as for Commissioner Melendez's older Americans
economic impact briefing concept paper as well.

VICE CHAIR THERNSTROM: Mr. Chairman, I
like the older Americans as well. I had not -- I had
not thought about the layoff problem before. I like
that topic a lot.

CHAIRMAN REYNOLDS: Okay. Well, I -- the
age discrimination is an issue, and I also read a few
articles concerning the number -- well, the disproportionate number of males who are experiencing -- well, the allegations that males are being discriminated against -- during the layoff process.

But this topic -- I think that it is -- it is definitely timely, and it has the added advantage of being spearheaded by Commissioner Melendez. So the -- it seems that the -- that we have at least three topics that appear to have a significant amount of support.

So any further discussion on briefing topics?

COMMISSIONER HERIOT: Should we not vote on one of these now?

VICE CHAIR THERNSTROM: No. Why don't we just -- I agree. Let's just wait. We've got time.

COMMISSIONER HERIOT: Because I think we have a lot of consensus here.

CHAIRMAN REYNOLDS: We can wait, or we could agree that the -- that we are going to narrow our focus to the top three. My only concern was that approach in fact -- Commissioner Kirsanow is not on the line, and I would like to give him an opportunity -- if there is -- for example, the minority youth and juvenile justice issue. If he had an interest in
that, I would like to hear him out.

So my preference is to --

COMMISSIONER GAZIANO: I'd prefer to get
his input on -- you know, we've had our input on
modifying these topics, and that might influence our
final vote. So I would prefer if we -- you know, we
could focus on the top three, and then try to vote on
November.

VICE CHAIR THERNSTROM: Why don't we have
concept papers on those top three developed --

CHAIRMAN REYNOLDS: Yes. I think it would
be a good idea to have these ideas fleshed out some
more for the next meeting. And if there is -- if we
have no other comments, I would also like to rearrange
the schedule once again. I know that we are going to
start losing Commissioners, and I would like to deal
with the Hawaii SAC issue.

III. STATE ADVISORY COMMITTEE ISSUES

CHAIRMAN REYNOLDS: So I move that we
consider it right now. Is there a second?

COMMISSIONER GAZIANO: Second.

COMMISSIONER YAKI: Point of order.

Quorum call on the phone.

CHAIRMAN REYNOLDS: Okay. Commissioner
Taylor? Ashley?
(No response.)

Arlan?

COMMISSIONER MELENDEZ: Yes, I'm back on.

My phone -- I'm on cell phone in Palm Springs. I'm heading for the airport, but I'm going to be in and out. So do you want my vote?

CHAIRMAN REYNOLDS: Well, we haven't -- we're just making sure that we know who is on the line.

COMMISSIONER MELENDEZ: Okay. I'm back on, but I'm going to be off and on.

CHAIRMAN REYNOLDS: Okay. All right. Do we need to vote on this issue, moving this issue up?

(No response.)

Hearing no comment, at the September 3, 2009 meeting, Commissioner Gaziano brought a motion to sever consideration of Daphne Barbee-Wooten from the rest of the proposed members of the Hawaii State Advisory Committee. That was --

VICE CHAIR THERNSTROM: Mr. Chairman?

CHAIRMAN REYNOLDS: -- of racially offensive statements attributed to her. Commissioners voted to table consideration of Ms. Barbee-Wooten -- of Ms. Barbee-Wooten's nomination unless she could establish that the news accounts described by
Commissioner Gaziano were inaccurate, and that she did not say the things that have been attributed to her.

VICE CHAIR THERNSTROM: Mr. Chairman, can I just ask a question? When we left the last topic -- that is, these briefing reports -- have we agreed that there will be some fleshing out of the three top -- our three top choices before the next meeting? Is that --

CHAIRMAN REYNOLDS: We did not vote on it, but I walk away from our exchange with the understanding that right -- as of today, the three items that we spent the most time talking about are the three items that are the front runners, and that staff would flesh out each of those topics.

VICE CHAIR THERNSTROM: Okay. Thank you very much. I'm sorry to interrupt you.

COMMISSIONER HERIOT: Staff will do that, or the sponsors will do that?

CHAIRMAN REYNOLDS: I'm sorry?

VICE CHAIR THERNSTROM: Or some combination.

COMMISSIONER GAZIANO: Or some combination.

COMMISSIONER HERIOT: Yes. You know, that's -- okay. And those three topics are the campus
one, Abby's, and the age discrimination.

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER HERIOT: Okay.

CHAIRMAN REYNOLDS: Okay. Commissioners voted to place consideration of Ms. Barbee-Wooten's nomination on the October 2009 meeting agenda. The Acting Western Regional Director, Peter Minarik, called Ms. Barbee-Wooten to inform her of the Commission's action.

Ms. Barbee-Wooten sent a letter dated September 23, 2009, which is in your meeting materials. In the letter she admits that while she was a member of a Hawaii ACLU she called Justice Clarence Thomas an "Uncle Tom," but denies having been motivated by or making any derogatory comments regarding his interracial marriage.

Is there a motion to appoint Ms. Barbee-Wooten to the Hawaii SAC?

(No response.)

Will anyone support the motion?

(No response.)

COMMISSIONER HERIOT: I think we can go on.

CHAIRMAN REYNOLDS: Okay. At this point, we are going to jump back -- bear with me.
COMMISSIONER GAZIANO: Could I have a quorum call again, just to make sure I know who was on the phone, who did not support the motion?

CHAIRMAN REYNOLDS: Sure. Commissioner Melendez?

COMMISSIONER MELENDEZ: I'm here, but I thought the question was whether or not we were supposed to not have her on the SAC.

CHAIRMAN REYNOLDS: I was asking for a Commissioner to move to vote -- to have a vote on her --

COMMISSIONER HERIOT: Not to have a vote.

CHAIRMAN REYNOLDS: -- on the SAC.

COMMISSIONER GAZIANO: Does anyone --

COMMISSIONER HERIOT: It has to be -- if they are going to be placed on the SAC --

COMMISSIONER GAZIANO: Yes, we are -- we have tabled that. And if someone wants to move to put her on the SAC, they have got to make that motion.

Commissioner Melendez, are you interested in making -- in supporting that motion?

VICE CHAIR THERNSTROM: And, otherwise, she is not on the SAC.

COMMISSIONER HERIOT: Right.

COMMISSIONER MELENDEZ: Well, I'll make
the motion, so we can vote on it.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIR THERNSTROM: Commissioner Melendez, do you understand, nobody else has wanted to even make the motion to have a vote on this.

COMMISSIONER HERIOT: We don't need a vote on it.

VICE CHAIR THERNSTROM: We don't need a vote on it.

COMMISSIONER HERIOT: Unless you want it.

COMMISSIONER GAZIANO: It sounds like Commissioner Melendez wants a vote on it.

COMMISSIONER MELENDEZ: No. I don't really want a vote on it. I just want to move the meeting --

COMMISSIONER HERIOT: Let's just skip it.

VICE CHAIR THERNSTROM: Let's skip it.

COMMISSIONER HERIOT: Commissioner, we don't need to vote on it, unless you want us to.

COMMISSIONER GAZIANO: I just wanted clarity that you were still on the phone and whether you wanted -- really wanted to vote on this or not. That's it.

VICE CHAIR THERNSTROM: Well, nobody else has wanted to make that motion. Why don't we just
1 move on.
2             COMMISSIONER MELENDEZ: Okay. Let's move
3 on.
4             UPDATE ON STATUS OF BRIEFING REPORTS;
5             APPROVAL OF COMMISSIONER DEADLINES FOR
6             CONSIDERATION OF BRIEFING REPORTS
7             CHAIRMAN REYNOLDS: Okay. Next item is an
8 update by the Staff Director on the briefing reports
9 and the approval by Commissioners of deadlines for
10 Commissioners to review pending briefing reports,
11 three of which have been sent to Commissioners for
12 their consideration, and those items are the Multi-
13 Ethnic Placement Act briefing report, the illegal
14 immigration briefing report, and, finally, the STEM
15 briefing report.
16             Mr. Staff Director, please provide us with
17 an update on the items.
18             STAFF DIRECTOR DANNENFELSER: Thank you,
19 Mr. Chairman. I distributed a list last evening to
20 Commissioners that listed the briefing reports that
21 are still pending that have not yet been the subject
22 of a Commission vote. And they are listed
23 chronologically by the order in which the briefing
24 date occurred, the first one being May 5, 2006, and
25 then the most recent one being June 12, 2009, relating
to health disparities between minorities and non-minorities.

And, as you noted, Mr. Chairman, there are three that were recently sent out to Commissioners, during September that were sent out to Commissioners for consideration in terms of possibly scheduling one or more of those briefing reports. There is also the HBCU topic. There had been some sentiment for joining that with the STEM report when that is considered. And then, there is the -- covert wiretapping was on the agenda I guess back in May, and that then is up to your discretion to reschedule that at an appropriate time. We have --

CHAIRMAN REYNOLDS: Okay. Marty, please remember, let's discuss that issue next week.

STAFF DIRECTOR DANNENFELSER: Okay. And then --

VICE CHAIR THERNSTROM: Wait a minute. What discussion next week? Are we having a discussion next week?

CHAIRMAN REYNOLDS: I am going to have a discussion with the Staff Director next week about the covert wiretapping briefing report.

STAFF DIRECTOR DANNENFELSER: Okay. We have two other --
VICE CHAIR THERNSTROM: A covert discussion on a covert wiretapping briefing report.

(Laughter.)

COMMISSIONER YAKI: It's on a need-to-know basis, Commissioner Thernstrom.

STAFF DIRECTOR DANNENFELSER: We have two other briefing reports that are in the pipeline, so to speak. One is the School Choice Blaine Amendments and Anti-Catholicism briefing report. That is now in the Editorial Review Board and legal sufficiency review process.

The discrimination against Native Americans in border towns was sent in September for editorial review. We had three members of the Editorial Review Board, and it received their reviews. The third member had a death in the family, and her review will probably be in by the end of next week.

So that one is -- but we have begun the process of looking at those reviews that have come in so far. So I think that once we get that final review in we will be able to wrap that one up pretty soon, and make that one available for Commissioners to review and to factor into their consideration of how they would like to schedule these reports.

So, at this point, I would just be happy
to answer any questions that Commissioners may have on any specific topics. And, again, just hope that perhaps one or two reports can be decided upon today, that Commissioners may want to begin the review process and then submit their comments on how they think the report may be revised, and then we can go from there to perhaps have a vote, and the Commission's --

CHAIRMAN REYNOLDS: Okay.

STAFF DIRECTOR DANNENFELSER: --

statements and rebuttals, and so on.

CHAIRMAN REYNOLDS: Okay. I would suggest -- well, we have three -- we have three reports that we have to consider. I would suggest that we defer a discussion on when we select the dates for the STEM briefing report, and address the Multi-Ethnic Placement Act briefing report and the illegal immigration and its impact on wages and employment opportunities for black workers, that briefing report.

It is -- I have some proposed dates that I would like to throw out. I would appreciate it if we had some discipline and not start -- well, if I were there, you could throw things at me. But since I'm participating by phone, I may not have to worry about this. We soon will be into the holiday season; that's
In any event, I propose that the initial Commissioner edits be received by November 9th, that staff return the edited draft to Commissioners by November 13th, that Commissioners vote on the report at the November 20th teleconference, and that concurring and dissenting statements be due 30 days from the date of the teleconference.

COMMISSIONER HERIOT: You're talking about MEPA?

CHAIRMAN REYNOLDS: I'm sorry?

COMMISSIONER HERIOT: You're talking about the MEPA?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER HERIOT: Okay.

CHAIRMAN REYNOLDS: And, finally, rebuttals would be due on January 20th.

VICE CHAIR THERNSTROM: Mr. Chairman, I am a little bewildered by we are -- why we are still holding up the briefing report on the historically black colleges and universities. That was a briefing held in 2006, and I just think it's -- you know, in terms of the functioning of this Commission, we should not be holding reports up with -- for this length of time. I mean, you hold briefings and you get reports
1 out.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom,

2 I agree. We do have a problem with the backlog. I

3 think that Marty has -- Marty and the staff have shown

4 -- have demonstrated some progress in whittling down

5 the backlog, and --

6

VICE CHAIR THERNSTROM: But I don't think

7 that Marty and the staff are the reason why the

8 briefing -- the report on historically black colleges

9 and universities is being held up.

10

CHAIRMAN REYNOLDS: Vice Chair Thernstrom,

11 I didn't suggest -- I didn't go into who was at fault.

12 I was just making the comment that we have a problem

13 with a backlog, and that Marty and staff have -- they

14 have shown progress in terms of whittling that backlog

15 down.

16 I think that it would be more productive,

17 at least at this point -- we can do a forensic

18 analysis and determine who is at fault.

19

VICE CHAIR THERNSTROM: No, I don't want

20 to do that. I just want to get that topic -- a report

21 on that topic out. It is now more than three years

22 since we had the briefing.

23

COMMISSIONER HERIOT: Mr. Chairman, this

24 is -- it's Gail here. The historically black colleges

25
and universities report, I thought everyone understood
that some time ago I suggested -- I believe it was to
Ken Marcus -- that this would be a much -- have much
more impact if it were released in connection with the
STEM sort of issue. If people objected to that, they
should have made a motion.

COMMISSIONER GAZIANO: Well, not only
that, it was discussed since I came on the Commission,
and there seemed to be consensus that -- on that
point. So --

COMMISSIONER HERIOT: Yes. I thought
everyone knew. That's why --

COMMISSIONER GAZIANO: -- I thought we
discussed it.

COMMISSIONER HERIOT: I thought everyone
knew that's why the HBCU issue had been held back. If
that's something that people object to, make a motion.

VICE CHAIR THERNSTROM: Well --

COMMISSIONER HERIOT: I think votes would
be much more likely to impact public policy if they
come out together. If someone disagrees, make a
motion. But I think it has been made very clear in
many meetings that's why that particular report has
not come out.

VICE CHAIR THERNSTROM: Well, at the point
at which -- I mean, a lot of time has now passed. I don't think when we discussed --

COMMISSIONER HERIOT: Make a motion.

VICE CHAIR THERNSTROM: All right. I move that we get the report on the historically black colleges and universities out, and we do not wait further for a -- for whatever we are waiting for with respect to the STEM briefing.

COMMISSIONER YAKI: Second.

CHAIRMAN REYNOLDS: Do we need more discussion?

COMMISSIONER HERIOT: No, I don't think so.

COMMISSIONER YAKI: I would just add -- I would just add that, with regard to the proposed schedule that the chair had laid out before, that he is asking for comments at approximately the same time that the second round statements are due on the Title IX briefing report. There is a date -- a day's difference between them.

And I would -- I would say that regardless of what other reports are out there, I believe the HBCU report should be out there, because I certainly do not contemplate that this -- that it would be two years later that we would be waiting for this, because
it would -- but I'm saying at the time that -- at the
time that we allegedly agreed to even hold it with the
STEM thing, the fact is is that at the current rate
we're going that is not going to be produced until
early next year anyway.

Now, I think that while there may -- someolks may believe there is some synergy between the
two, the fact is a by then four year-old report is
extremely stale. And there has been lots of movement
and changes regarding the HBCUs during that period of
time. So I wholeheartedly second Commissioner
Thernstrom's motion.

CHAIRMAN REYNOLDS: Well, in terms of
prioritizing, I mean, one way to sort this is to do
the oldest reports first. But I think that -- and
that has a certain logic to it. But I also think that
we need to -- another factor to consider is whether,
like in this instance, there could be some beneficial
synergies by linking certain briefing reports or, in
other instances, moving a briefing report past an
older report because it is more timely.

So the first-in-time, first-in-rank rule,
while I understand it, I think that there are other
factors that come into play.

COMMISSIONER YAKI: Mr. Chair, it is
Commissioner Yaki. I would agree that there are always exigent circumstances that should be taken into account. But the fact is that the HBCU report sat on the shelf for an inordinately long period of time to begin with, without any regard to those exigent circumstances.

Then, it was brought up that perhaps it might have some relevance to the STEM report. But I would say at this point in time it is -- its relevance would be severely diminished given that we are talking about a moment in time, by the time this report will probably get out, of four years. And I think any relevance will quickly be dismissed as saying, "Well, that was a four-year-ago snapshot." Great they did it together, but -- just because they think that the two should be linked. But the data informed in that report is -- is pretty stale.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: Mr. Chairman, just to clarify one basis of my vote. The STEM report, I don't think it is going to be four years that the HBCU report would be -- between the briefing and the release. But whatever the period, the real question is whether the marginal extra time is worth it to link the two reports. How close are we on the STEM
briefing report? If we chose to put that one on
the --

STAFF DIRECTOR DANNENFELSER: It's out.

That was one of those that was submitted -- sent to
Commissioners, not with any timetable, but it was --
the illegal immigration and STEM were recently sent in
September to Commissioners. So it is one that could
be scheduled. The Chairman is proposing MEPA come
first, then illegal immigration.

COMMISSIONER GAZIANO: No, no, I
understand that. So there is no real reason now that
we can't in pretty close order marry the two together.

STAFF DIRECTOR DANNENFELSER: No. It's
just a matter of Commission scheduling.

COMMISSIONER GAZIANO: Okay. Thank you.

VICE CHAIR THERNSTROM: And just to
underscore this kind of general point about the lag of
time, I mean, when we are today talking about briefing
topics for 2010, I mean, we are voting on these on the
assumption that the reports will come out in a timely
way, because otherwise there really is no point to
having these briefings, which can end up, as I think
is a problem with the historically black colleges and
universities, with stale data, stale information. I
mean, we've got to get these things out with some --
expeditiously.

CHAIRMAN REYNOLDS: I share Vice Chair Thernstrom's concern. At the same time, I also acknowledge the efforts made by Marty and the rest of the staff to deal with the backlog. But at this point, we have Vice Chair Thernstrom's motion on the table. Commissioner Yaki, how do you vote?

COMMISSIONER HERIOT: Commissioner Yaki, you have been asked to vote.

COMMISSIONER YAKI: I'm sorry. I'm conferring. By the way, speaking of -- oops.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: I'm sorry. I was talking about a matter with my temporary Special Assistant, Mr. Schmechel. What was the -- what is the matter at hand? What is the vote on?

CHAIRMAN REYNOLDS: Correct me if I'm wrong, Vice Chair Thernstrom, you had moved to --

COMMISSIONER YAKI: Is this for Commissioner Thernstrom -- the motion I seconded?

Then, aye.

VICE CHAIR THERNSTROM: You seconded it, yes.

COMMISSIONER YAKI: Aye.

CHAIRMAN REYNOLDS: Okay. Vice Chair
Thernstrom?

VICE CHAIR THERNSTROM: Aye.

CHAIRMAN REYNOLDS: Vice Chair -- I'm sorry. Commissioner Melendez? Commissioner Melendez?

(No response.)

VICE CHAIR THERNSTROM: I think we lost --

CHAIRMAN REYNOLDS: Commissioner Taylor?

Commissioner Taylor?

(No response.)

Commissioner Heriot?

COMMISSIONER HERIOT: No.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: No, with the understanding that there is not going to be any time lost at this point in marrying the two together.

CHAIRMAN REYNOLDS: Okay. The vote is three to two. I vote against the motion.

Now, we can return to the dates that I had thrown out there. Do folks have alternate dates that they would like to discuss for the Multi-Ethnic Placement Act briefing report?

(No response.)

Is there concern about the fact that these dates will cover both the Thanksgiving season, the Hanukkah/Christmas season, and also the New Year?
VICE CHAIR THERNSTROM: Yes, I have some concern about that.

COMMISSIONER GAZIANO: Could you add five days to the comment periods to reflect Thanksgiving and other December holidays?

CHAIRMAN REYNOLDS: Okay. Help me out.

COMMISSIONER GAZIANO: So that would be November 25th for -- I'm sorry, we vote November 20th on Part A. And so what was your -- what were your two comment dates?

COMMISSIONER HERIOT: Let the record reflect that Commissioner Yaki has left the room and has taken his materials with him.

VICE CHAIR THERNSTROM: Well, but, I mean, you have no idea whether he is coming back or not.

COMMISSIONER HERIOT: I didn't say I had an idea.

VICE CHAIR THERNSTROM: Well, we don't need that. I mean, if I head for the women's room, do you need to put it in the record?

STAFF DIRECTOR DANNENFELSER: Well, there's a quorum issue.

COMMISSIONER HERIOT: Well, yes.

CHAIRMAN REYNOLDS: Hold on. We no longer have a quorum, and I assume that that's why the issue
VIC CHAIR THERNSTROM: I see. I'm sorry.

I wasn't counting.

CHAIRMAN REYNOLDS: Okay. Is Commissioner Yaki -- is his temporary Special Assistant still in the room?

COMMISSIONER HERIOT: No. He left the room with him. There is a bag sitting in a chair. I believe it is Mr. Schmechel's, but I might be wrong.

CHAIRMAN REYNOLDS: Well, could someone check?

VICE CHAIR THERNSTROM: I will go and check what is happening.

STAFF DIRECTOR DANNENFELSER: He did cast his vote before he left, but you can't complete the vote without him.

COMMISSIONER HERIOT: Why not? Yes, we can.

STAFF DIRECTOR DANNENFELSER: Well, you can, if you have a quorum.

COMMISSIONER HERIOT: We completed the vote.

CHAIRMAN REYNOLDS: No, we completed the vote.

STAFF DIRECTOR DANNENFELSER: Oh, we did
complete the vote. Okay. That's right. You're right, I'm sorry.

COMMISSIONER GAZIANO: We were just trying to set the date for MEPA, which I think that we can just have a --

COMMISSIONER HERIOT: We can do that without a vote.

COMMISSIONER GAZIANO: Yes, we can do that without a vote. We can do that just what -- what the intent is, and we can -- we can ratify any comment periods at our next meeting, since the comment periods won't even begin -- Commissioner statement comment periods -- until after the next meeting.

But I would suggest, Mr. Chair, that if you just add five days each to the two comment periods, that would -- that would allow the additional time for us to enjoy our holidays in peace.

STAFF DIRECTOR DANNENFELSER: And the vote would still occur on November 20th, but then under Commissioner Gaziano's proposal the -- the initial comment period and the rebuttal period would be extended by five days apiece?

COMMISSIONER GAZIANO: Correct.

CHAIRMAN REYNOLDS: So before I get into the mechanics, does that create any problems for
STAFF DIRECTOR DANNENFELSER: No, I don't think so. I think if the vote is still on November 20th, I think that moves the process along pretty well. And I don't think the addition of a few extra days on each comment period is a problem.

CHAIRMAN REYNOLDS: So if I understood -- if I understood you right, Todd, the concurring and dissenting statements would be due on Christmas.

(Laughter.)

COMMISSIONER GAZIANO: Sure.

COMMISSIONER HERIOT: We could have nice, festive statements.

CHAIRMAN REYNOLDS: Okay. So that's -- everyone is comfortable with that? We won't be able to vote on this, but just for discussion purposes --

COMMISSIONER GAZIANO: These are extra days.

COMMISSIONER HERIOT: Yes, we don't --

COMMISSIONER GAZIANO: So it doesn't make someone turn it in on Christmas.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: It just gives them five extra days.

CHAIRMAN REYNOLDS: All right.
COMMISSIONER GAZIANO: And that means the rebuttal periods have --

CHAIRMAN REYNOLDS: Everything gets pushed out five days.

STAFF DIRECTOR DANNENFELSER: We might have to push the rebuttal period out a few days if staff is not here to distribute. Well, actually, we can -- we can circulate the statements, nonetheless. Well, it probably --

COMMISSIONER GAZIANO: At the next meeting --

STAFF DIRECTOR DANNENFELSER: We'll work that out.

COMMISSIONER GAZIANO: At the next meeting, we can -- we can allow an extra day to circulate the --

(Laughter.)

VICE CHAIR THERNSTROM: Well, Commissioner Yaki is conferring with Richard Schmechel, and --

COMMISSIONER GAZIANO: Yes. Would you state that for the record? Gerry probably couldn't hear you.

COMMISSIONER HERIOT: Yes. You need your microphone to --

CHAIRMAN REYNOLDS: Do we have an update
on Commissioner Yaki?

COMMISSIONER HERIOT: We are about to get it.

STAFF DIRECTOR DANNENFELSER: The Vice Chair is going to give us an update.

VICE CHAIR THERNSTROM: Commissioner Yaki is conferring with -- with Special Assistant Richard Schmechel at the moment. And I don't have a sense of whether they --

CHAIRMAN REYNOLDS: So he knows that he is needed to maintain a quorum.

VICE CHAIR THERNSTROM: Well, as I understood it just now, my -- am I wrong that the vote that was just taken was completed? Are there more votes, Mr. Chairman?

CHAIRMAN REYNOLDS: Well --

COMMISSIONER GAZIANO: There always could be a motion.

COMMISSIONER HERIOT: Yes, people can --

CHAIRMAN REYNOLDS: I don't believe so. I --

VICE CHAIR THERNSTROM: I think we are finished.

COMMISSIONER GAZIANO: We are going to approve the calendar, so that's an item that we --
CHAIRMAN REYNOLDS: We should not have need for a vote, but I have been wrong in the past. I thought that we were just going to have a conversation and negotiation over dates for the various briefing reports, that we would have a conversation/negotiation over dates for the 2010 Commission meetings, and so on.

VICE CHAIR THERNSTROM: The Commission meeting --

COMMISSIONER HERIOT: Do we not need to vote on that?

VICE CHAIR THERNSTROM: The Commission meeting dates --

COMMISSIONER HERIOT: Do we not need to vote on the Commission meeting dates?

CHAIRMAN REYNOLDS: Well, I would hope not.

VICE CHAIR THERNSTROM: Yes, and they -- that can certainly wait, but I don't think we need a vote on that.

I mean, I do think, with all due respect, Mr. Chairman, that these -- that the pile-up of work around the holidays is -- it's a problem for me. Maybe it isn't for anybody else. And I certainly am only one person.
CHAIRMAN REYNOLDS: Well, it's a problem for all of us, and Commissioner Gaziano attempted to improve the burden, at least lighten the burden, by adding five days to certain milestones in the schedule.

So the concurring and dissenting statements, there will be an additional five days tacked on to it. Yes, it would be due on Christmas day. And then, subsequent milestone dates would be pushed out five days.

VICE CHAIR THERNSTROM: Well, I mean, look, there is something -- we have arrived at dates in the past which have not been honored, and I have a feeling that when we put -- place them at a time when people are traveling, you know, getting together with family, blah, blah, blah, I mean, the result is we are just -- that these dates are going to become somewhat meaningless.

CHAIRMAN REYNOLDS: Well, there are two important factors that we need to consider. These briefing reports, the Commissioners have had them for quite a bit of time.

VICE CHAIR THERNSTROM: I agree with that.

CHAIRMAN REYNOLDS: And, in addition to that, this time around each Commissioner, with the
exception of Pete and I, have their own Special Assistant. Pete and I still share.

So I would think that, you know, taking those two points into consideration, that the schedule shouldn't be so daunting.

VICE CHAIR THERNSTROM: I don't know whether that's true or not. Speaking --

CHAIRMAN REYNOLDS: For --

VICE CHAIR THERNSTROM: -- for myself, look, I have been for -- for more than a year now complaining about the postponement of these briefing reports. But speaking for myself, I have a superb Special Assistant. I am crazy about him. But, nevertheless, I have to go over the work, because --

(Laughter.)

-- I am -- at the end of the day, the buck stops on my desk, and I think that is probably true for everybody else.

COMMISSIONER GAZIANO: Ms. Vice Chair, I would suggest we first do have -- we are just talking about --

VICE CHAIR THERNSTROM: How did I get a "Ms." here?

(Laughter.)

COMMISSIONER GAZIANO: Mrs., Miss --
PARTICIPANT: Madam.

COMMISSIONER GAZIANO: -- Madam. Sorry.

(Laughter.)

VICE CHAIR THERNSTROM: The Honorable Vice Chair.

COMMISSIONER GAZIANO: The Honorable Vice Chair --

(Laughter.)

-- might I suggest that we are going to first have to vote on Part A. We can't vote on these targets right now unless a certain Commissioner comes back in the room, who likes to walk out to defeat quorum. And on November 20th, if you want to propose other dates, I would be open to it, but I agree with you that we should -- we should do so thoughtfully, and we should stick with them. But I don't know that we need to --

COMMISSIONER HERIOT: No, we --

COMMISSIONER GAZIANO: -- stuck to comment periods pretty much with -- usually the -- it is good to get them set -- have some idea ahead of time, but normally we -- we come closer to binding ourselves at the point we adopt Part A, and findings and recommendations. And so we can revisit that on November 20th.
CHAIRMAN REYNOLDS: Okay. I -- moving ahead, looking at the other two items, the other two briefing reports, I suggest that we not attempt to pick some dates at this point, but give some serious thought to coming up with a schedule for those reports.

VICE CHAIR THERNSTROM: Why doesn't the Staff Director circulate, via e-mail, proposals with respect to dates?

CHAIRMAN REYNOLDS: Yes. And, in fact, going forward, Staff Director should provide us with some recommended dates, and that would be the starting point for negotiations over the schedule.

STAFF DIRECTOR DANNENFELSER: I can do that, Mr. Chairman.

VICE CHAIR THERNSTROM: And maybe we can adjourn. No, I have the minutes, we have the minutes. I have a correction to the minutes.

COMMISSIONER HERIOT: We still have several things.

COMMISSIONER GAZIANO: We talked -- recommended --

COMMISSIONER HERIOT: We can't vote on that, but we can have our discussion.

VICE CHAIR THERNSTROM: All right. We'll
vote on it next time. It's all right. We can retroactively correct the minutes.

CHAIRMAN REYNOLDS: I'm sorry. What is being proposed?

VICE CHAIR THERNSTROM: I will have to wait until next time. I want a small correction in the minutes that I don't think anybody will object to.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIR THERNSTROM: I just have to wait until next time.

CHAIRMAN REYNOLDS: Have we concluded that Commissioner Yaki will not rejoin us?

COMMISSIONER HERIOT: We have not, but Mr. Schmechel is here and may be able to clarify that for us. Mr. Schmechel is just shaking his head and looking perplexed.

(Laughter.)

COMMISSIONER GAZIANO: Now he's smirking.

COMMISSIONER HERIOT: And he is not looking up to make eye contact. There he goes.

(Laughter.)

CHAIRMAN REYNOLDS: Mr. Schmechel, do you know if Yaki intends to return?

COMMISSIONER HERIOT: I think it may depend upon whether or not Commissioners Taylor,
Kirsanow, or Melendez comes here.

COMMISSIONER GAZIANO: That's speculation on your part, Commissioner, based on a long train of similar occurrences, I might add --

(Laughter.)

-- but it's still speculation, nevertheless.

COMMISSIONER HERIOT: Do I detect a sense of humor in Commissioner Gaziano's statement there?

(Laughter.)

CHAIRMAN REYNOLDS: I will wield the gavel to regain control over this mob.

VICE CHAIR THERNSTROM: Yes. And I object to talking about anybody as smirking. I just -- I think that's out of line.

CHAIRMAN REYNOLDS: I'm sorry, Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I object to any of us talking about any other member in the room as smirking. I think it's out of line.

CHAIRMAN REYNOLDS: Well, if we judge by historical standards, I mean, that -- that insult is not so bad.

(Laughter.)

COMMISSIONER GAZIANO: I would invite said
Special Assistant who was so accused of smirking to respond for the record, if he chose to, and I would apologize if he requested. He is shaking his head no.

CHAIRMAN REYNOLDS: All right. We need to make a decision. I am not there. I don't have a sense of -- did he remove his personal belongings?

COMMISSIONER HERIOT: No, I think that we can go on with the meeting, since we don't have any vote right now. And if Commissioner Yaki, Commissioner Taylor, Commissioner Kirsanow, or Commissioner Melendez don't show up, then we won't be able to vote. But there is nothing that prevents us from having an informational meeting.

CHAIRMAN REYNOLDS: Okay. That is true. Okay. So, well, the next item up would have been a discussion of the three sets of minutes. And in addition to Vice Chair Thernstrom's --

COMMISSIONER HERIOT: Wait. Did we have our Title IX discussion?

COMMISSIONER GAZIANO: No. No.

COMMISSIONER HERIOT: Or our calendar discussion?

COMMISSIONER GAZIANO: We didn't have our Title IX or calendar discussion.

CHAIRMAN REYNOLDS: Okay. All right.
Let's go to the calendar.

APPROVAL OF CALENDAR OF 2010

COMMISSION MEETINGS

CHAIRMAN REYNOLDS: I assume that everyone has a list of the proposed dates in front of them.

COMMISSIONER HERIOT: Yes. Mr. Chairman, I actually have a request on that for the March date. I would strongly prefer the 12th rather than the 19th.

CHAIRMAN REYNOLDS: Okay. Bear with me. The 12th. Any objections?

(No response.)

Okay. Okay. Any other changes?

STAFF DIRECTOR DANNENFELSER: Mr. Chairman, just as a point of information, on the January date, Commissioners should be aware that that is the Friday before Martin Luther King holiday. And we discussed that when we were developing this, and it is -- there was just concern about getting far enough away from the holidays and also not getting too far into the month.

So I just wanted to bring that to Commissioners' attention. And if that's problematic, then perhaps it could be moved a week in one direction or the other, but I just wanted to bring that to
Commissioners' attention.

COMMISSIONER GAZIANO: Thank you. If and when we ever vote on these, I think that it's good that we meet at around the time of Martin Luther King holiday. People can still enjoy three days. I would be open if someone had a -- wanted to take an even longer vacation, and wanted a different time. But otherwise, I think it is good for us to meet around that weekend.

COMMISSIONER HERIOT: That's actually a good date for me, too, for my teaching schedule.

COMMISSIONER GAZIANO: Okay.

COMMISSIONER HERIOT: That would be better than the other January dates.

CHAIRMAN REYNOLDS: Okay. Any other suggested changes?

COMMISSIONER GAZIANO: Should we -- we did meet in August this year. I know that the Commission didn't in the past. Do we want to put in a provisional day, with the thought that we might skip it, but that we might have to go with it?

CHAIRMAN REYNOLDS: Yes. Do you have a date in mind?

COMMISSIONER GAZIANO: Does August 6th make sense? I don't really -- between August 6th and
August 13th. I don't have a strong --

VICE CHAIR THERNSTROM: You know what? I would like to leave the question of an August meeting and its date until we all have holiday plans settled and --

COMMISSIONER HERIOT: Well, it's actually the other way around, isn't it? That if we have the date, then we can all coordinate. Otherwise, if people make plans --

VICE CHAIR THERNSTROM: No. I can't coordinate my holiday plans on --

COMMISSIONER HERIOT: -- there could be no dates.

VICE CHAIR THERNSTROM: -- the basis of a Commission meeting, but I can -- I can coordinate a Commission meeting with what I know -- when I know I am --

COMMISSIONER HERIOT: But there are eight of us. That's the thing.

VICE CHAIR THERNSTROM: Well, I assume that's true of other people, too. They just --

COMMISSIONER HERIOT: We'll all make plans for the long weekend, and there won't be any date that we have all left free, if we don't make the decision now.
COMMISSIONER GAZIANO: Yes. And we have to -- we have to -- if we are going to vote for these, we have to do so at a subsequent meeting. But do you have a -- right now, in the absence of anything else, do you have a preference for the 6th or the 13th?

VICE CHAIR THERNSTROM: I have a preference for no August meeting.

CHAIRMAN REYNOLDS: Okay. How about this? We're not voting on this apparently. The positions on this are staked out. Vice Chair Thernstrom has a -- I don't know if -- my characterization is you have a strong position, and Gail and/or Todd have a strong position, but we need to decide at this date. And maybe with the passage of a few weeks, either side may change their mind.

COMMISSIONER GAZIANO: It was helpful to have these dates supplied to us at this point, and to hear potential conflicts that Commissioners are aware of. So I'm glad you got this list to us when you did, Mr. Staff Director.

CHAIRMAN REYNOLDS: Okay. Will someone -- where are we on the agenda?

COMMISSIONER GAZIANO: Next is the discussion of our gender discrimination in colleges project.
DISCUSSION OF TITLE IX PROJECT

CHAIRMAN REYNOLDS: Okay. Marty, will you take the lead on that?

STAFF DIRECTOR DANNENFELSER: Well, I would like to ask Dr. Lerner to provide us with an update based on some of the research that he has done and some the logistics that he has looked into.

DR. LERNER: Right. Thank you.

STAFF DIRECTOR DANNENFELSER: Talk into the mic.

DR. LERNER: Okay. We have basically done some initial research on -- well, a couple of things. We have actually started to do some background research on the sex discrimination in liberal arts college admissions. Some of it has been --

CHAIRMAN REYNOLDS: Excuse me. Dr. Lerner, could you please speak into the microphone?

DR. LERNER: My apologies, yes. I'll see if I can -- all right. Let's try that again.

We have been doing some background research, initially to get a sense of what is out there, and that is comprised of several things. First, some review of the -- the court cases and whatever literature discussion there is. There is actually relatively little of that, at least so far
that we have been able to discover.

Second, what we have done is built a
database, and we have been looking at college and
universities that might potentially, including the
ones mentioned in the concept paper, but also
including others, both in the D.C. area and elsewhere,
we get a sense of some of the colleges and
universities that might be or might -- might be
discriminating against women in order to admit a
balanced -- "balanced" enrollment for men. So we
started to pull that together.

Third, I did some preliminary analysis of
the studies that I could find on sex discrimination in
undergraduate education. There are none, of course,
available, easily available, for private schools.

For public schools that I was able to
refer to reports done for the Center of Equal
Opportunity, which in fact it did include gender or
sex in their prediction equations, the best and most
direct way to study whether there is discrimination or
not is simply to treat it as a statistical problem and
seeing if in fact you can predict admissions as a
function of the background variables and the
prohibited status -- or not prohibited, but at least
the -- ones that seem discriminatory and see what
happens.

And when we did that, when I looked through the results that had been done by the Center for Equal Opportunity, they were very modest. It was unclear to me, initially at any rate, whether there was some -- perhaps no sex discrimination at all, or, if there was, it would be very difficult to detect. The results were very modest, let's put it that way. Or in some cases, it appeared as though there was discrimination against men, in other cases there would be discrimination against women.

However, we decided on another -- so that suggests in general that either it is not necessarily an issue, in other words we may not find anything, or it is hidden sufficiently that we have to do a lot more work to try to ferret it out. And I'm not sure we can do that.

So the second thing, as I had suggested, based on the concept paper, we came up with the idea was -- where is the obvious place to look for this, if we are going to find sex discrimination? And like the paper suggests, rightly I think, that it would be private, selective, co-ed liberal arts colleges that might do -- some of them might do that. Might, I say, because there is no direct proof of it at this point,
and the evidence that we have is sketchy.

So we are trying to put together a list of colleges and universities that would be -- well, we obtained the data, and that is one of the big issues also we have been debating and discussing. And we are going to need some guidance from everybody here.

Of course, public universities can -- will provide data in response to a FOIA request, but private ones, of course, are not covered by that. So, as it was suggested in the concept paper, we would have to have -- we would have to subpoena the data in a document subpoena. I forget the specific legal phrase that's used, but nonetheless there is a process for doing that.

Now, the Commission has done that before. In 1995, as part of a larger study, the Commission did that with respect to financial institutions in New York City. And they held a hearing, and they obtained data from 35 firms. They subpoenaed them, as it turns out, and they did get some information and they published it, I think it was four or five years later, as part of a larger report. So that definitely can be done. And, in fact, it -- to get the kind of data that's in the concept paper, we are going to have to do that.
So, basically, we have been doing a lot of preliminary research and trying to figure out what we could do -- what we could get and what we couldn't get, what we have to plan in effect to get. And in the process of doing that, we are in the middle of drafting the discovery plan and a chapter outline, even though this -- it was unclear -- we were unclear whether this is an actual statutory report or just a report anyway. It seemed to me that was a useful tactic to take regardless. And did this in consultation with the Staff Director.

So that is pretty much where it stands. We are basically exploring -- building this database, we are doing literature review, and we are putting together the plans for how we go about securing the data from private and/or public liberal arts colleges.

STAFF DIRECTOR DANNENFELSER: Okay. Are there any questions for Dr. Lerner?

COMMISSIONER GAZIANO: I suppose I have one sort of concern with what seems to be a slight departure from the concept. I think it's valuable to obtain data that shows particular types of institutions, are not discriminating on the basis of gender. And I thought that was, you know, one of the results we were -- we don't necessarily assume to know
what the data will show.

And we shouldn't necessarily target only

-- we should target institutions we think might have

-- that the literature or admissions by some of these

admissions officers -- I understand, for example,

certain institutions have admissions officers that

claim or admit that they are discriminating --

DR. LERNER: Excuse me, Commissioner.

COMMISSIONER GAZIANO: -- on the basis of

gender.

DR. LERNER: There's one that I know of.

COMMISSIONER GAZIANO: And that the

reasoning of that admissions officers suggested that

similar institutions that are in a similar admissions

situation might be doing the same thing. So that's

one key.

But I was hoping that we would be able to

-- to, you know, look at a variety of different types

of institutions, as Commissioner Heriot set out in the

proposed concept paper, and be able to say one way or

the other, "Well, it looks like the lead institutions,

private, public, do, don't."

So that's why I am interested in, you

know, as broad a request as we can, and certainly, you

know, consistent with civil litigation practices, us
sending subpoenas duces tecum is probably what we should do regardless -- that's my other comment -- regardless of what kind of institution it is.

FOIA, whether we proceed under state FOIA law -- and we shouldn't have to worry about that. We are a federal agency who Congress has given really a non-threatening power that every single private lawyer in America has and exercises, and that we should be uniform in how we request the data, with a nice, polite letter saying, "Here is your subpoena. Please submit the data, documents. We'll work with you to get it in the right form within 30 days." Or something like that.

VICE CHAIR THERNSTROM: Mr. Lerner -- Dr. Lerner, what would, in your mind, constitute reliable evidence of a negative, as it were, that an institution is not engaging in behavior that we might question? I mean, I can -- I understand finding evidence that they are, but finding evidence that is reliable, and that we would want to go with, that they are not, when -- that seems to me extremely problematic.

DR. LERNER: Well, yes, let me answer that. I think it is problematic for several reasons. In the first place -- well, there is the simple
statistical point that normally one tests the null hypothesis of no difference. You could in fact do the reverse, but it's statistically rather more complicated.

And, I mean, second of all, you could simply arbitrarily decide that such and such a result is equivalent to that. But, again, you would have to have some basis upon which to set that. My --

VICE CHAIR THERNSTROM: That certainly wouldn't satisfy me.

DR. LERNER: Well, I mean, that's the problem. I mean, what would be a satisfactory answer -- the problem is that I would think it would really lead to an indeterminate situation. You can't show it one way or the other. You can show that there would be some kind of differences or no differences, just the same way you can think of the raw admissions rates.

Let me just use an example that was one of the examples in the concept paper. You take a look at Johns Hopkins University's most recent data. The male acceptance rates are about 25 percent, as is the female acceptance rate. Can you conclude they are not discriminating on the basis of that? No. Can you conclude that they are discriminating based on that?
Not really. Because we don't know what else is in here.

And without knowing that, without having the other information, we are not going to be able to do it. And, even then, I don't know, my -- maybe it's just an aesthetic thing, I have always preferred to find something when I've done my research. We don't have to --

COMMISSIONER GAZIANO: Perhaps you will with every institution. But unless you ask, we won't know.

DR. LERNER: Well, I wasn't suggesting we shouldn't ask. Not at all. I mean, this calls for us -- this calls for us to in fact find out.

VICE CHAIR THERNSTROM: Well, what is the question you ask, then? I'm confused about it. How do you get reliable data here? What is the question?

DR. LERNER: Well, basically, I think whether you want to show that you are someone who is not discriminating -- it's sort of an unusual thing. Normally, as I said, in either legal or another context, you would be interested in showing that someone is discriminating or rebutting that presumption.

You would basically want to be able to
predict who is admitted on the basis of whatever the characteristics are, and that is the kind of data that, for example, the Center for Equal Opportunity has gotten. And it is the kind of data that ideally we would be able to get, too.

COMMISSIONER GAZIANO: Sure. And I don't want to, you know, suggest the appropriate term that you would give us, but it's fine to say, "There is strong evidence of gender discrimination at these institutions. There isn't a strong correlation at these institutions." You know, that's fine. That's something.

DR. LERNER: Well, that's right.

COMMISSIONER GAZIANO: And then, plenty of other scholars can look at it and, you know, potentially make their data available for others to tease out. But, you know, we don't -- just saying whether there is a strong correlation here, there is not a strong correlation there, that is a valuable starting point.

DR. LERNER: Well, that is basically what we have to do in any case, and that's what we would do in any case. I mean, it's not so much -- it's not so much that I would disregard other institutions, I mean necessarily it's some kind of prejudicial selection.
It's that the concept paper provides in effect a background, which I think at least initially is plausible.

Where might you find this sort of thing? The answer being -- I would quality this a little bit -- literal arts colleges that may be not the most prestigious, somewhere a little bit less prestigious perhaps than the very top ones, you might very well find something like that.

So at least it's a good place to look. It gives us a starting point. We are not adverse to looking all kinds of places, but this is the scope that we are working on at this point.

COMMISSIONER HERIOT: I would strongly second what Commissioner Gaziano has said here, and that is it is useful to be able to make that comparison. You know, with more elite liberal arts schools, state schools, you know, if we believe that this is more likely to be occurring in private liberal arts schools that are somewhat selective, but not intensely selective, that doesn't mean we are not interested in the other schools. In fact, we are very interested.

DR. LERNER: No, it's -- right. I'm not saying one shouldn't be, and I -- I would agree with
that. The only question is how many institutions --
the issue, which is not really resolved in the concept
proposal here, is, how many institutions should we
look at, and of what kinds?

Right now, there are approximately in the
greater -- on the assumption that this is going to be
a hearing, on the assumption that this 100-mile limit
applies, there are approximately -- we decided it was
130 institutions in this area that might qualify. And
of those, we wouldn't necessarily subpoena all of
them, although I suppose we could. But we would want
to -- we would want to send subpoenas to a fair number
of them, and then see what happens.

That's kind of how I viewed it, but as the
actual carrying out of the data part of this project,
because it -- to me that is the most difficult part of
it all, actually obtaining the information in a way we
can use. To me, that's by far the hardest part. Once
we have actually gotten the information, I'm not that
concerned about being able to analyze it properly.
But getting information is a hard thing, and that's
what I helped to do.

VICE CHAIR THERNSTROM: Well, I would just
like to stress here that I hope and I -- and you are
such a good social scientist that I -- I know this is
not necessary for me to say to you, but I just want to put it on the record. That you will really stress the limits of the information that the data provide, because I'm going to be impressed with that at the end of the day, I'm sure.

DR. LERNER: Well, there are going to be limitations. There are going to be -- we are going to have to -- what's going to be interesting is we are going to find out exactly what they will give us in response to our subpoena.

In principle, this is the way I see it. This is -- an institutional discrimination study is a study of decisionmaking essentially. This is my personal view -- what you want to know and what you want to get into your head here is the number of factors that enter into it.

In theory, if you could enter into the brains, the minds, of people making the decision, you could have a complete answer to a question. They may or may not -- but one is -- at least in the past, one has generally assumed that you don't have access to all of the information. Even in adversary proceedings, that is often not the case.

So the question is: what will we be able to conclude? Now, I will say this. We will be able
to conclude more from a study like this than pretty much any other kind of study we would do. So that's -- this is our best shot at being able to answer that question.

As far as drawing definite conclusions, it would have to depend on the strength of the evidence. If it looks like it is very strong, we draw conclusions. If it doesn't, this is what we found, and there are -- this is one way you could look at it, this is another way you could look at it. And the Commissioners then might decide to make their own interpretations. I think we have to leave it at that.

One of the things that did -- as I said, in my initial survey of these -- of these matters is that the correlations were very small with respect to gender or sex in admissions. And they seem to go -- they seem to bounce around. Sometimes they favored me; sometimes they favored women. All of that tends to lead me to the intuition that there is not necessarily very much here, at least in these places.

COMMISSIONER HERIOT: These are all state schools, is that correct?

DR. LERNER: They are all state schools, that's right.

COMMISSIONER HERIOT: Schools that would
be covered by Title IX.

DR. LERNER: That's right. That's right.

But I don't -- what I was not assuming there would be ruled out of consideration here.

COMMISSIONER HERIOT: Yes, I believe they should be included. Yes.

DR. LERNER: Well, no. Not only do I believe it, but the proposal -- the contact paper, as approved, is written -- specifically lists, for example, as an example George Mason. So I'm assuming that we will include them, unless instructed otherwise.

COMMISSIONER HERIOT: I had thought that you were going to make a proposal at our next meeting, which would be this meeting, about which schools you wanted to do. I take it you are not making that proposal.

DR. LERNER: Well, I am making kind of a tentative one, which is I want to get -- I don't have the specific schools, and I -- but I think we can come up with that fairly quickly. I would like to do a whole range of schools within the 100-mile radius.

COMMISSIONER GAZIANO: What's a reasonable number, I mean, or do you need a further discussion?

Since Commissioner Heriot was the sponsor of this, you
know, maybe she and you --

DR. LERNER: Yes.

COMMISSIONER GAZIANO: -- can talk about what --

DR. LERNER: That would be fine.

COMMISSIONER GAZIANO: -- what a reasonable number of schools are, so that it's manageable. We can, you know --

COMMISSIONER HERIOT: Well, let's have that conversation now. How many do you think would be manageable?

DR. LERNER: Well, let me think. The more you get the more -- assuming a constant rate of response. In other words, assuming that there is a certain set responding to the subpoena, we would obviously want more. And I think what you want to do is probably do something like you have here, which is to sort of stratify them kind of by categories.

And I think if we did that -- I don't have an exact number. I would actually have to sit down with a list. But I can probably come up with one.

STAFF DIRECTOR DANNENFELSER: Let me put another question that might be related. Would this get into the issue of OMB clearance? After the certain threshold, is this considered a survey in
effect? Are you surveying the college to get information? And is there a threshold of nine at which if you do the same kind of survey that once you get beyond nine, if you need to get OMB clearance, is that --

DR. LERNER: I would think not, but I'm not a lawyer.

COMMISSIONER GAZIANO: OMB clearance really is -- it's by executive branch agencies.

DR. LERNER: Well, not only that, that is a survey. This is a subpoena.

COMMISSIONER GAZIANO: Yes. I think there's probably three --

DR. LERNER: I would guess that probably doesn't apply. I would like a lawyer -- one of our legal people to clarify that. I think they can probably subpoena as many as they want. I'll come back to the example of what the Commission did in 1995. They subpoenaed 35 financial institutions in New York City. I believe they got full responses from 31 of them.

So I don't -- and there is no discussion in the report, having just recently reread it, that -- of any particular limitations. So I think we can just send them out.
The only issue would be our capacity to analyze them in a report in a timely fashion.

COMMISSIONER HERIOT: And what's your thought on that?

DR. LERNER: Well, at one level it is a fairly straightforward process to do. On another level, of course, it depends on what else we have to do. And, you know, we are sort of -- our OCRE staff is sort of shrinking, so -- we have not replaced one of our members who retired, so it would be -- oh, I would guess -- I don't see why we couldn't do 10, or maybe more. But I don't think necessarily it would be any more than that.

Again, the key here would be a kind of stratified sampling. It's not a stratified sample, but we would have -- we would get within a bunch of categories, our estimation of the prestige levels on the one hand, the control on the other hand, and, I mean, some of the examples -- we are not -- I mean, that you have included here, which I was assuming we were going to include all of them, could -- you know, we have an HBCU, we have Catholic University, and so on and so forth.

You know, I think in the area of 10 or 15 would probably be reasonable, and assuming we'd get
1 like 11. We've got -- this is just a guess. I have
2 no way of knowing.

COMMISSIONER HERIOT: That sounds about
3 right to me, that the target is about 15. I figure
4 that maybe some schools, for whatever reason, they are
5 not able to produce the data as quickly as we hope.
6 And so if it shrinks back to 12, it's not the end of
7 the world?
8 DR. LERNER: No. It won't be the end of
9 the world.

COMMISSIONER GAZIANO: If you have been
11 constructing your database, I assume you have been
12 preparing instructions on what form you want the data
13 to be received.
15 DR. LERNER: Yes.
16 COMMISSIONER GAZIANO: And how you will
17 work with the --
18 DR. LERNER: Yes.
19 COMMISSIONER GAZIANO: -- institutions --
20 DR. LERNER: Yes, yes, yes.
21 COMMISSIONER GAZIANO: -- to deliver
22 the --
23 DR. LERNER: Yes, because --
24 COMMISSIONER GAZIANO: -- the data.
25 DR. LERNER: Right. Because unlike just a
document subpoena, this would be a subpoena for a data set, database. And our thought is to ask for the most recent one.

I mean, granted, they simply -- they just completed doing the process, and they wouldn't have time to throw it right back in the archives. And we can just start with that, make it simple enough.

COMMISSIONER GAZIANO: That makes sense, but I assume you would -- or I recommend, if you hadn't thought about it, that you -- within whatever period you give them, you encourage them to contact you as soon as possible if there are any questions, and that you remain -- you express a willingness, an openness to be flexible, in, you know, data transfer issues and that you -- so that you get the information as soon as possible.

DR. LERNER: Right. We are -- COMMISSIONER GAZIANO: And that you do it with as little cost to the institution as possible.

DR. LERNER: Right. Well, that's another reason for insisting on the most recent, because we won't have to dig it out of archives. Yes, we can definitely put all of those caveats and qualifications in our letters. Absolutely.

CHAIRMAN REYNOLDS: Okay.
COMMISSIONER HERIOT: Can we hope to have
the list by the telephone conference?

DR. LERNER: Which is?

COMMISSIONER GAZIANO: The 30th.


Earlier would -- I would prefer earlier, but --

COMMISSIONER HERIOT: Yes, we would prefer
earlier, too. At least I would.

VICE CHAIR THERNSTROM: Just for the
record, it doesn't make any difference in terms of
your planning, but I want everybody to know there is
no possibility of my coming in from Oregon on the
telephone conference.

TIM FAY: You can pre-record it.

VICE CHAIR THERNSTROM: My assistant is
saying he can pre-record my comments.

CHAIRMAN REYNOLDS: Okay. At this point,

I propose that we adjourn.

(No response.)

Hearing no objection, folks, thank you.

Until we meet again.

(Whereupon, at 12:04 p.m., the proceedings in the
foregoing matter were adjourned.)
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