The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 8:45 a.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner (via telephone)
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director
STAFF PRESENT:

DAVID BLACKWOOD, Esquire, General Counsel, OGC
DEMETRIA DEAS
LILLIAN DUNLAP
ALFREDA GREENE
TINALOUISE MARTIN, Director, Office of Management
LENORE OSTROWSKY
JOHN RATCLIFFE, Chief, Budget and Finance
EILEEN RUDERT
DAVID SNYDER
KIMBERLY TOLHURST
VANESSA WILLIAMSON
AUDREY WRIGHT
MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COULTEN
ALEC DEULL
TIM FAY
DOMINIQUE LUDVIGSON
JOHN MARTIN
ALISON SCHMAUCH
KIMBERLY SCHULD
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CHAIRMAN REYNOLDS: The meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. It's 8:45 a.m. Eastern Standard Time on November 19th, 2010. I wanted to start on time before my term was up, and I have managed to do so.

In any event, commissioners are present at 624 9th Street, Northwest, room 540, Washington, D.C. The meeting is -- that is where the meeting is being held.

Commissioner Melendez, are you on the line?

(No response.)

CHAIRMAN REYNOLDS: With the exception of Commissioner Melendez and Vice Chair Thernstrom and Commissioner Kirsanow, all other members are present. Commissioner Kirsanow will be here shortly.

I. APPROVAL OF AGENDA

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

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes?
CHAIRMAN REYNOLDS: Welcome. Okay.

Commissioner Melendez has joined us.

COMMISSIONER MELENDEZ: Good morning.

CHAIRMAN REYNOLDS: Discussion.

(No response.)

CHAIRMAN REYNOLDS: Okay. All in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Any votes against the motion?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain. I didn't hear the motion.

CHAIRMAN REYNOLDS: It's a motion to approve the agenda.

COMMISSIONER MELENDEZ: I'll abstain.

CHAIRMAN REYNOLDS: All right. We have one abstention. The remaining commissioners voted in favor of the motion.

II. PROGRAM PLANNING

- APPROVAL OF NEW BLACK PANTHER PARTY ENFORCEMENT REPORT

CHAIRMAN REYNOLDS: Next up is the approval of the New Black Panther Party enforcement
report. Before we vote on the report, I would like Mr. Blackwood to provide the commissioners with an update of recent weeks' events.

As the commissioners should be aware, the Department this past week refused to allow for its employees to appear before the Commission to give deposition testimony.

Mr. Blackwood, please fill us in on the particulars.

MR. BLACKWOOD: Well, as you just mentioned, Chair, there was an exchange of letters over the last couple of days with the Department of Justice with regard to four individuals from the Department that the Commission has subpoenaed: Loretta King, Steve Rosenbaum, Julie Fernandes, and Sam Hirsh.

On Friday, we were notified that the Department was putting conditions on the appearance of those individuals, including to vote on the report.

We noted an objection on Monday. And on Monday afternoon, early evening, the Department indicated that the depositions were called off unless the parties can come to some agreement in the future.

So those depositions have not occurred. And we have not yet had an opportunity to talk with
the Department about what it is that they are considering is reasonable.

At the same time, we also have some additional pending matter that the Commission is aware of with Malik Zulu Shabazz. We have to get a ruling from the magistrate in regard to his deposition.

CHAIRMAN REYNOLDS: Okay. Thank you.

Any questions from commissioners?

Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes. I just want to maybe elaborate and explain that the further disappointment to the Department of Justice continues to obstruct our investigations by not providing the witness, by insisting on unreasonable conditions that it has no right to ask for, that really is an attempt to delay our approval of the interim report.

So let me just explain. First of all, the Justice Department refused in the same types of communications, the same time period, that it would provide most of the documents that we indicated that the Commission needed in order to effectively oppose the witnesses.

For example, the Department specifically refused to supply the e-mails that Sam Hirsch and the Associate Attorney General's office sent back and
forth to both the Civil Rights Division and others in
more senior offices in the Justice Department.

Recently the Judicial Watch, which is in
litigation with the Department of Justice, indicated
that those e-mails are particularly relevant not only
to its investigation but particularly to ours.

The grounds on which the Justice
Department is refusing to provide both Judicial Watch
and this Commission those e-mails is that they are
deliberative. And, yet, how could Sam Hirsch have
been involved in deliberations over the dismissal over
the New Black Panther lawsuit if, in fact, the
Department claims no one higher up than the civil
rights acting officials in the Civil Rights Division
was involved in that decision to dismiss the suit.

So the refusal of the Department to
provide that information, the Department also
specifically refused to provide the April 26th and May
10 memos from Adams and Coates that we not only have
reason to believe exist but we have reason to believe
are highly relevant to the Department's knowledge
before Perez testified to the Commission.

The second condition that the Department
wanted if it offered these witnesses without documents
that would have made their interviews effective was
that we had to postpone vote on the report that we're
going to vote on today.

But, again, they knew or should have known
that in three prior meetings, this Commission has
limited the information in the report we're going to
issue today. It certainly referred to it as an
interim report because the only findings and
recommendations in that report are that the Department
has essentially stonewalled, covered up, obstructed
our investigation.

And, as a result, we urge Congress to
consider giving us some other tools or at least
consciously making a decision not to give us those
additional tools on going forward when the Department
has a conflict of interest like it has and like the
Department -- and when the Department refuses to
cooperate fully, as our statute indicates.

The Department, of course, knows that the
existing report which was leaked, which it has already
commented on, is not a final report. The Department
knew full well that in September, we made a motion
only to delay it until the beginning of October, that
we have been ready to vote on it since early October.
And, yet, the Department pretends somehow that if we
postpone this report, that it would begin to
I cooperate.

So, for all of those reasons, I hope the Department does begin its sincere cooperation. I hope it follows our statute, which requires all federal agencies to cooperate fully with the Commission. But obviously that is unrelated to the report we are going to vote on today. But I do hope the Commission continues its investigation and the Department begins sincere cooperation.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Thank you very much, Mr. Chair. I was going to not comment on this until the previous speaker.

I think it is very misleading to say that the requests of the Department of Justice were unreasonable. When given the fact that some of those requests were as simple as the ability to look at and revise transcripts -- which is something, by the way, that is a courtesy afforded to most people who testified before the afore bodies.

When I testify before Congress, I am sent the transcript. I am given a chance to correct errors made in the record. It is something that is done. It doesn't mean that it cannot be noted. It doesn't mean that it cannot be noted for the record or used in a
later proceeding. But, nevertheless, it is still a common courtesy in most hearing proceedings and certainly in a lot of the litigation that I have experienced during my time as a lawyer.

The second item that just sort of I thought was a little bit off the mark was the -- first of all, there's so many being described, but one of them has to do with the idea that, all of a sudden, in the span of two weeks, this report, which is our 2010 enforcement report, which is now badly overdue, is now, all of a sudden, being referred to as an interim report, that somehow we never have voted on the word "interim" ascribed to this.

We haven't discussed it amongst ourselves. It simply is something that seemed to come forth full sprung from the previous speaker and from the General Counsel when they talk about the fact that -- and it is important to know the dates we are talking about here for these. We're talking about a set of subpoenas that were noticed for deposition this week.

And so the question one has to ask, which is a question that DOJ rightfully asks, is, what is the utility of depositions noticed for the same week that we are voting on the report if those depositions are not to be used in our deliberations and in our
discussions regarding this?

    And I think it is wholly within their right to question what we are — what exactly we are engaging them if we have noticed depositions for the same week that we are supposed to be taking — and, remember, these depositions were noticed for this time period after several meetings had or had not been scheduled and rescheduled, what have you.

    I mean, from any fairness perspective, the idea that someone being asked to testify about something for a report that is going to be voted on that we will probably never have the time to incorporate in that report is ridiculous and goes to the question of relevance. And I think it is something that needs to be said.

    I mean, these subpoenas were issued quite after the fact. They were noticed for depositions for this particular week. And the idea that there is any reason why they cannot question what kind of fishing expedition we're on when we’re supposed to be voting on this report, whatever it is going to be called, interim, final, never-ending, is something that I think they had a right to object to.

    CHAIRMAN REYNOLDS: Commissioner Kirsanow?

    COMMISSIONER KIRSANOW: Thank you, Mr.
Chair.

The designation "interim report" is a reflection of the fact that, despite our best efforts in the course of a year and a half, we have been repeatedly stonewalled. And we have had some incredible resistance in terms of our statutory right to obtain certain evidence in the course of our annual investigatory report.

But for the resistance we received over the course of a year and a half, this report would have, should have been concluded in a timely fashion. By that I mean sometime in September, which traditionally is the time when our annual enforcement report issues.

Despite the fact that we began a year and a half ago with very reasonable requests for information, for witnesses, and engaging in good faith negotiations with Department of Justice to produce evidence that would satisfy our need to get information to complete this report, we are consistently rebuffed or there were bogus privileges interposed or asserted by the Department of Justice to preclude us from getting the information to which we are rightfully entitled.

The interim nature of this report is
simply a reflection of the fact that we have a paucity
of data that we believe is still out there based on
other avenues of information, such as the Judicial
Watch lawsuit. And we cannot in good faith come up
with a comprehensive report.

Does this mean there is going to be a
continuing investigation? Probably not. We suspect
or -- at least I will speak for myself. I suspect
that one of the reasons why we have not been getting
this information is because the very fact of the
matter is in a couple of weeks, the composition of
this Commission is going to change. At that point,
there is a fairly good likelihood that this
investigation would cease anyway, it is not going to
go any further.

So it's simply a reflection of the reality
that we don't have all the information necessary to
complete the report the way we would like to complete
the report.

Nonetheless, based on the evidence
available to us, we can fashion a report that takes
into consideration a number of things related to what
the original scope of the investigation was; that is,
the dismissal of the New Black Panther lawsuit, and
then the somewhat expanded scope, which was also a
reflection of the fact that certain fairly sterling
evidence was presented by a couple of whistle-blowers
as to a policy within the Department of Justice that
the New Black Panther dismissal was merely a
manifestation of.

So we are going to be voting on a report
today. I believe it's a good report. The fact that
it is designated "interim" has nothing to do with what
we originally meant to accomplish but is simply a
reflection of the reality that, despite a statutory
obligation to cooperate with a U.S. Civil Rights
investigation, the Department of Justice rebuffed us
at numerous turns.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes. I don't know
that we have officially changed the name of it to an
"interim report," but perhaps we should do so. But at
the August 13, September 24, and October 29 meetings,
we referred to it as such. And the reason we did so
is because it is an interim report, that if you --
there was a version that was leaked.

I was hoping when we get to the adoption
of the report, that we would consider whether to make
an official copy public. When that official copy is
made public, whether we call it an "interim report" or

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not, they will see that that is what it is.

Just a quote from the September 24, 2010 meeting notes, I moved "to postpone adoption of the interim report" because that is what we had been calling it "and allow the General Counsel essentially ten days to incorporate the new material from today to October." The motion passed unanimously. No one previously has objected to calling it what it is.

But I do want to address one of the other points that Commissioner Yaki mentioned. I do hope if and when the Department starts cooperating and they provide witnesses after they produce the relevant documents that would allow us to interview those witnesses, that we would allow them to correct their transcripts. That is not the condition I think any of us found problematic.

That is probably our practice, but I certainly would support allowing the deposition witnesses an opportunity to look over -- there are mistakes in our transcripts, and I am sure there might be mistakes in the deposition transcripts.

The objection was that the Department is still stonewalling us on the documents, is still -- given even if the President had invoked executive privilege, which we know the President has not done so
because the Department has told us that, and even if they had a normal right to withhold deliberative materials, as U.S. v. Nixon, the Supreme Court indicated where there is a credible allegation of wrongdoing that goes to the heart of the information the investigative body is looking into, the executive privilege must yield that we somewhat, to the investigative body, who has a right to determine whether the wrongdoing was going on.

In this case, the heart of our investigation is what was the reason the New Black Panther case was dismissed. They claim their motives were pure. We've got two whistle-blowers who emphatically say that the reason the case was dismissed was because of hostility to the race-neutral enforcement of the civil rights laws; in other words, hostility to bringing a voting rights claim against defendants who happen to be black.

Given that fact, the Department really needs to provide same purchase e-mails, all of the e-mails, all of the memos. And then we can interview the appropriate officials. Until that time, we just need to make the record as clear as we have in the report we're about to vote on and let other people be the judge.
CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: I didn't know we were going to be starting to get into the merits of the discussion. And I am not going to other than to say that I find it humorous that the previous speaker would enunciate the U.S. v. Nixon standard because I think the clear word for the purposes of examination has to do with the word "incredible."

And we will go into that in the body of discussion of the report, but I will just simply say that I think that there is certainly a distinct -- as much as they may believe there is a credibility issue on the part of Department of Justice, I would say there are equally and if not stronger issues of credibility regarding the allegations made against the Department of Justice, seeing as they are based upon two people's observations that are contravened by what has actually been produced in the record.

So I would just state that it is not that easy. And I would just simply say that were I -- and I am not -- in their shoes, I think that this investigation has gone on far too long. As was noted by Commissioner Kirsanow, it changed course in midstream, mainly because I think there was really nothing to the first, original scope of the
investigation.

   It was only until two people came up with their wild allegations about what was or was not happening that we went on an even broader and wilder fishing expedition than is currently going on.

   And the fact is that if the fact is that if they were to produce people who might produce testimony that they believe could be -- and I'm not saying any notion of what they would or would not say, but if they had people who came in to give testimony that would already be substantially different from what the Commission believes is going on and that testimony was not going to be included in our deliberations or in our report, I would sympathize with them in terms of why should they participate in essentially a foregone conclusion where that anything that they would say would not have any weight or merit in any discussion that we are going to have today?

   CHAIRMAN REYNOLDS: Any other comments?

   (No response.)

   CHAIRMAN REYNOLDS: Okay. On November 12th, the General Counsel distributed a revised draft of the 2010 enforcement report that includes additional details relating to internal Department deliberations contained in DOJ's most recent pleading
in the Judicial Watch lawsuit.

I move that the Commission approve for publication along with any concurring and dissenting statement submitted by any commissioner by December 19th, 2010 and any rebuttal by January 19th, 2011 part A of the draft enforcement report produced by staff and reflecting Commission input on enforcing prohibitions against voter intimidation, DOJ, and New Black Panther Party litigation.

Part A, as distributed in draft form to commissioners, consists of parts 1 through 5 of the report that is everything but the draft findings and recommendations.

Under this motion, if a majority of the Commission votes to adopt part A of the briefing report, the Commission will then open discussion on part B. If it fails to obtain a majority of votes, discussion of part B becomes moot.

In light of the fact that an earlier confidential draft of this report was improperly leaked and posted on a blog, I further move that parts A and B of this report, if adopted, be immediately posted to the Commission's website, as amended by our discussion today, within three business days of this vote.
Under this motion, commissioner statements and rebuttals should be added to the posted version as they come due. Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER HERIOT: I have a procedural question.

CHAIRMAN REYNOLDS: Yes?

COMMISSIONER HERIOT: I am going to have a motion, too. And I guess procedurally that could be a motion to amend your motion. And I believe that Commissioner Gaziano has a couple of small changes that he is interested in as well. How would you like to proceed on that?

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: I thought the motion included potential amendments to it as you read it.

CHAIRMAN REYNOLDS: It did, but let's proceed as planned. And we will fold in these amendments as we move along.

COMMISSIONER HERIOT: So you want to have a discussion first and then --

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER HERIOT: But I amend your
CHAIRMAN REYNOLDS: Yes.

COMMISSIONER HERIOT: Okay. Just let me know when you want to hear it.

CHAIRMAN REYNOLDS: Okay. Who would like to go first? Commissioner Gaziano?

COMMISSIONER GAZIANO: First I just want to ask you to ask the General Counsel to correct an error on page 88 or 89 of the -- depending on whether it's the redlined or non-redlined copy, there is a reference -- I don't even know you need to do it right now -- to former Bush appointees. And then there is a list.

Some of them I know are not Bush appointees but career attorneys. For example, Hans von Spakovsky is a career attorney. So if you would just correct former career attorneys and Bush appointees, something like that. I don't think that requires a vote.

Second, I would like to move if there is no objection -- if not, I will ask for a vote -- that part 5, which is a discussion of the 11(b) and the cases, be moved to the appendix. Are other commissioners agreeable to that change?

CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: I have a question about Mr. von Spakovsky. When you say he was "career," was he embedded in Justice prior to the Bush administration taking office in the Justice Department?

COMMISSIONER GAZIANO: Was he? I'm pretty sure that he was hired during the Bush administration as a career employee.

COMMISSIONER YAKI: Who hired him?

COMMISSIONER GAZIANO: I don't know specifically.

COMMISSIONER YAKI: Bradley Schlozmann?

COMMISSIONER GAZIANO: I don't know, but I don't believe so.

COMMISSIONER YAKI: You don't believe so. He was hired during the Bush administration?

COMMISSIONER GAZIANO: Yes.

COMMISSIONER YAKI: He was not a career attorney who was there who was present before the Bush administration?

COMMISSIONER GAZIANO: Yes because --

COMMISSIONER YAKI: Thank you.

By the way, you know, while we're on the subject of Mr. von Spakovsky, I think you did note for the record that a copy was leaked. I did note the
other day that there was a blog posted by Mr. von Spakovsky citing this report here today well before anyone else had any information about it. So I would just like to note that for the record as well.

COMMISSIONER GAZIANO: I don't believe that was true. I don't believe a blog by Mr. von Spakovsky about the report appeared until yesterday, almost three weeks until others had been reporting on it.

CHAIRMAN REYNOLDS: Any other comments?

(No response.)

CHAIRMAN REYNOLDS: Commissioner Heriot, let's take up the issues that you identified earlier.

COMMISSIONER HERIOT: I would like to amend the title of the report. This is actually a title that I suggested earlier on. I don't know why it wasn't incorporated. I would like to amend the report to be titled "Race-Neutral Enforcement of the Law? DOJ and the New Black Panther Party Investigation."

STAFF DIRECTOR DANNENFELSER: Redlined.

COMMISSIONER HERIOT: "Interim Report." I would like to add that unless interested -- I thought of that just a moment ago to what I had written here because Commissioner Yaki seemed to be
concerned that we hadn't designated this as an interim report. So the title would read "Race-Neutral Enforcement of the Law? DOJ and the New Black Panther Party Investigation, an Interim Report."

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: I take that as a friendly amendment. Anything else?

COMMISSIONER HERIOT: That's all that I have.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER YAKI: It's not friendly. I mean, I am not for that.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: Are we discussing that?

COMMISSIONER HERIOT: You don't have to be.

CHAIRMAN REYNOLDS: Would you like to --

COMMISSIONER HERIOT: It's friendly to the person who made the motion.

CHAIRMAN REYNOLDS: I would prefer not to waste time and not vote on it.

COMMISSIONER YAKI: Well, may I state my objection to it?
CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: Again, I would just simply say that it assumes a fact not in evidence, which I will discuss later when we discuss the body of the report.

CHAIRMAN REYNOLDS: Okay. This is the time to discuss the body of the report. Commissioner Yaki?

COMMISSIONER YAKI: I’m not ready yet.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: I asked my staff assistant to get something for me.

CHAIRMAN REYNOLDS: All right. Does anyone else have anything to say?

COMMISSIONER YAKI: On the body of the report? If no one is going to go, then I will go. Okay. Let me go. Amazing.

We have been discussing this. I see an article that I have here from October 21st, 2009, where I had predicted that this was going to be a partisan kangaroo court. And nothing in the year and some since then has done anything to change my mind about this.

I think what is very important to note about this report is that the bias that is present in
it, the omission of key facts, the suppression of key facts, the diminution of key facts is quite astonishing.

I think it starts off from the very beginning, which is that the entire foundation of the piece to this report rests on the actions of two African American men in a single overwhelming black voter precinct, where no allegations of any actions by the men intimidating a single voter exist.

And let me underscore that. Nowhere in the testimony can anyone claim that these men approached, spoke with, or made threatening gestures to a single voter.

Why is this important? Well, it is true under 11(b) that you don't require actual intimidation. And they're right. It doesn't require a voter to be intimidated. And they're right.

But it also means that this media hoopla that is milling around out there actively intimidating voters is 100 percent false. I personally think they're idiots. I think they're racists. I think their ideology is deplorable.

But I also must not forget that the one person who had the billy club was brought under charges, does have an injunction against him, and is
prohibited from interfering in elections in
Philadelphia.

But we need to remember how we scale this
issue in comparison to others. What other cases of
actual voter intimidation do we have out there? Well,
we heard testimony in Arizona that members of the
Minutemen, at least one, had a holstered gun by his
side as they were videotaping and approaching Latino
voters. We have sworn testimony about armed agents of
the State of Mississippi basically invading people's
homes, African American elderly folks, and questioning
them who they voted for.

We have well-documented in the record
about mailers addressed to people in the thousands,
addressed to African American households. There isn't
even any criminal prosecution, even though if they
exercised their right to vote.

Another fact that was not addressed at all
in the report, how this complaint came to be. The
undisputed fact is that, in sharp contrast to
everything else the Department has ever done with
regard to voter intimidation cases, this case stands
alone in the exceptional case which was put together.

We have e-mails where one of the star
witnesses for the other side, the majority, J.
Christian Adams, bemoans the fact that not a single voter complaint was lodged and that two weeks before he prepared the memo, the J-memo, the important memo that justifies why Justice should go forward with this case, he didn't have a single fact to his name. In fact, he was e-mailing people all over the place trying to find something including the videotapes.

Yet, we have testimony, sworn testimony, that in other alleged acts of voter intimidation, reports of egregious acts of intimidation, that it took months, in fact, even years to develop. Yet, despite all of that, the Panther case was filed in 45 days, a week before President Obama was sworn in, a week before the head of the Voting Rights Section at the time, Mr. Coates, testified that he began to see his duties and powers diminish, which, of course, should have been expected during that time, mainly because, as he admitted during the sworn testimony, he was the "true member of the team" referenced in the Office of Inspector General report that Brad Schlozmann referred to as "Well, he was a former ACLU attorney, but don't hold it against him. He's a true member of our team."

Another fact -- and this is something that probably is beating a dead horse, but at the same
time, I think it is important to point out. We have seen the tape showing the confrontation between the two African American men and the poll monitors for the Republican party in the McCain for President campaign. That is all we see. We do see that.

It is not pretty. It is not something that you want to see. But we don't see them intimidating people. We see people walking by them going into the polls. When a cop car shows up, we see a woman in the background saying to the police "They're not bothering anyone."

We never subpoenaed the person who made the tape. Why is that? Is there more tape that we didn't see? We kept on asking that question. In the very beginning, there is reference to the fact that more tape existed, but we never seem to get it.

We don't have the tape, the part of the tape that shows that the one with the baton left the area peacefully after the police intervened. We don't have any time stamp that shows that this was all done in the morning, by 11:00 o'clock in the morning. That precinct didn't have anyone else around it at that time.

We do see the argumentative behavior between them and the McCain poll monitors. And
somehow that gets conflated into a giant image of angry black men trying to intimidate white people. And that is simply a different story than saying they're out there intimidating white voters.

One person compared that YouTube image in its importance to that of Bull Connor hosing down demonstrators. My thing, I just wanted to say this for the record, that is a disgrace to the memory of the people in Selma, an example of overblown hype and hysteria generated by this report.

Here is another fact. Despite the fact that we have throughout the declamations of the majority in the report that Coates and Adams were brave souls and courageous souls for coming forth to testify about what he saw was wrongdoing in the report, neither, neither of them, seem to see fit during their years as true members of the Schlozmann team to come to Congress and complain that minority voting was not being protected.

Again, we had sworn testimony that Coates believed that the Mississippi armed agents who went into people's homes were committing egregious acts of voter intimidation. And Schlozmann killed it.

But did you see him up here before this body? Did you see him appear before Congress? No.
Well, why not? We can all guess. Was it the recommendation for an immigration judge that Schlozman gave them? I don't know. But those are the kinds of things that have to be taken into account in terms of the credibility of these two witnesses.

When they talked about what happened in Pima, Arizona, they said they had photographs of someone with a gun. They said they had photographs of someone who was carrying a gun but that somehow because it was holstered, it was okay.

I'm wondering if the majority would have thought the same thing if that African American entering the poll precinct had his baton by his side. Would that have made a difference? I doubt it.

And I doubt it should have made a difference and certainly surely shouldn't have made a difference in the case in Arizona. In that case, despite years of investigation, all that happened was that two years later, no 11(b) charge, no criminal or civil prosecution. They just sent some monitors in to see if they were going to come out and do it again.

Fact, Christian Adams -- those were his words, and I've gotten into a dispute with one of the commissioners before, but it's right there in the record -- that Justice would do nothing in response to
the Ike Brown filing in Noxubee. Sworn testimony, he
thought -- he said that Justice would take a pass and
that would be proof, proof of the inability to be
race-neutral in the enforcement of the law.

Well, he lost that bet. There is no
proof. There is ample testimony by Perez and even
better documentation in the record that Justice did
intervene in July 15th of this year and went above and
beyond the scope of what they could have done to
essentially take Ike Brown out of the equation in his
continued attempts to suppress white voting in
Noxubee, Mississippi.

What is really fascinating about this
report is that Noxubee just kind of disappears, that
one immutable fact, the one proof, the one action that
you can point to that shows that Justice is, in fact,
enforcing the laws in a race-neutral fashion basically
takes a dive in this report. It just vanishes in
terms of its importance.

I could go on and on. There are so many
instances where the sworn statements of others, the
people who Schlozmann was trying to get rid of, who
Coates referred to as left wing in the statements --
he referred to them as left wing. Again, that's
critical to understanding the bias of that witness.
He referred to them as left wing, "those left wing lawyers."

Despite the fact that we have sworn testimony rebutting much of the statements made by Coates, by Adams, by a sworn declaration by Hans von Spakovsky, which I think is pretty much irrelevant in this entire proceeding, despite that, all that is relegated to little tiny footnotes, "Someone said this. Someone said that," they even give an unsworn statement by someone more credibility than a sworn statement on the record by some of these ex-Justice former lawyers, Joe Rich and Bob King. What rule of evidence allows you to give more credibility to an unsworn statement, to a news article than a sworn statement into the record?

I'm saying it only because when it comes to the sworn statements of Christian Adams and Coates in his immaculate words coming out on high, there is nothing that can be challenged about that. But when it comes to others, they're put in a footnote, disregarded, pretty much ignored.

In the end, this -- for the past year, we have spent hundreds of thousands of dollars. I know that we have 173 in hard costs, but we know the costs are much greater than that for a case that is
essentially something that only people inside the Beltway make their living off of, which is playing gotcha back and forth with new administrators.

I would be the first one to admit that that same game of gotcha was played during the Bush administration with Gonzalez, but I will also say that the investigators at the time for that, which was the House Judiciary Committee and the Senate Judiciary Committee waited for the OIG report and the OPR report to come out before they actually passed any serious judgment on what actually was happening because we can talk stonewalling all we want, we can talk whatever.

You know, we all know this is a Beltway game. And by that, I mean this Commission has completely lost its focus. Our job is not to sit around and play gotcha with the Department of Justice. There are people on the Hill who have plenty of time, resources, and money to do that. We have been sitting here for a year navel gazing on this while we have been ignoring what has been happening in the real world.

Young gay men and women are being bullied to death because of their sexual orientation. There is still violence going on against people of color, no matter what they look like, how they speak.
When we had our meeting of the State Advisory Committees, which is made up of Democrats, Republicans, Independents, they said to us that the thing they saw out there the most that was disturbing to them was how immigration was affecting perceptions of people of color, especially in the Latino community. And we have been sitting here buzzing around, you know, back and forth between here and main Justice, throwing bombs back and forth while this has been going by the wayside.

I'm not saying that there's ever a time this wouldn't be legitimate. I am saying that I sincerely believe that this particular inquiry is not legitimate.

All I can say is that when we were doing this, because of the hysteria whipped up about this in the mid-term elections, there were groups out there citing the Black Panthers as a giant conspiracy to commit voter fraud in this country. And there are people going out there intimidating Latinos and African American thinking, "We could protect our side." That is wrong.

The fact that the Commission is being used by people engaged in active voter intimidation is just wrong. That has been the result of what we have been
doing for the past year.

This report to me has been and continues to be far blown out of proportion, a waste of Commission resources, much worse in the end. It's not even an indictment of the New Black Panthers. It really reads like a bad script for a Men in Black sequel. That's conspiracy theory, sinister forces at work, tampering with witnesses, innuendo and rumor, but nothing except the one proof that's out there, Noxubee, which they refuse to admit.

This has been an irresponsible exercise by this Commission. It's reckless. It's been used for contemptible purposes.

I cannot aid and abet this travesty of justice. I will be voting no on this report.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Just a couple of points. I would simply say for anyone who has the time to please read the report, the characterizations of the report that you may receive from either any of the commissioners here, myself, Commissioner Yaki, or any opponents. Simply read the report. And I urge you to come to your own conclusions.

I would also like to -- just a couple of brief points. One has to do with the cost of this
particular investigation, $173,000. That is not notably different from the cost of other enforcement reports during the course of the years.

And you have to ask yourself, where do we cap the expenditures as to an investigation of whether the Department of Justice is enforcing the law in a race-neutral fashion?

Either you believe that is something that is important or you don't. If you do, $173,000 is a lot of money, but I think it is sufficient to say that that is not an ungodly amount of money to determine whether or not the lives of the people in the United States are being protected by its Department of Justice, especially when there is uncontroverted, sworn testimony from two whistle-blowers who, at jeopardy to their own careers, came forward and said two very startling things: one, section 8 of the Voting Rights Act is not being enforced by this administration; two, the Department of Justice is not enforcing the Voting Rights Act on behalf of white citizens nor bringing cases against black defendants. Either that is important or it is not. Either that is something to expend $173,000 to discern whether or not that is, in fact, true or it is not.

In terms of evidence about intimidation of
the witnesses, we had testimony of individuals sitting right here, including Mr. Bartle Bull that, in fact, there was some intimidation going on. Now, perhaps those words didn't say, "I was intimidated," but we had testimony that voters turned away upon seeing those individuals standing before the polling station. We have testimony that, in fact, there was a black poll watcher who expressed the fact that he was petrified by what he saw.

New Black Panther case standing along may not be the most important thing in the world. It may not capture the attention of all the media, but, as I said earlier, what drew the attention of this particular Commission was it appeared to be and has now been confirmed by these two witnesses to be a manifestation of a policy and practice engaged in by the Department of Justice.

We are seeing sworn testimony by the head of the Civil Rights Division that, in fact, no political minutia was involved in the dismissal of the New Black Panther case.

During the course of the last year and a half, we have sought and I think done so very reasonably to adduce as much evidence as we possibly could to either confirm or refute that fact, that bit
of testimony.

Upon reasonable requests, we received no documentation from the Department of Justice on that specific issue. It took the Judicial Watch lawsuit and the order of a federal judge to reveal that, in fact, there were numerous e-mails about this particular small little case, tiny little case that shouldn't preoccupy the attentions of the vast Department of Justice for any degree of time, but top-level individuals at the very top of the Department of Justice were heavily engaged in whether or not this particular lawsuit was going to be dismissed or not.

We have received at least 50 e-mails. And, again, you have to understand that these e-mails were redacted because they were part of a privilege where the Department of Justice asserted what is known as the deliberative process privilege, which we have testimony that -- well, I'll let you decide whether or not that, in fact, is a legitimate privilege. But in that privilege log, we have a list of e-mails going back and forth between the top three individuals at Department of Justice or at least three of the top four individuals at Department of Justice about this tiny little lawsuit that shouldn't merit the
investigation of the Civil Rights Commission or merit the expenditure of $173,000. But they were engaged in determining whether or not this needed to be dismissed.

I will reserve speaking about Noxubee and the testimony of Christian Adams as to what the Department of Justice would or would not have done except to say that Christian Adams if you read the transcript of the testimony didn't say the Department of Justice would do nothing. He gave two to three, actually three, different scenarios as to what the Department of Justice might do. And those reflect the fact that they are not serious about the Noxubee case.

Thank you, Mr. Chairman.

CHAIRMAN REYNOLDS: Okay. Before we go on, I would just like to point out that last year's enforcement report cost us $211,000, as compared to 173 for the current enforcement report. And, also, it's important to note, it's important to note, that the bulk of these costs are fixed costs. They're the salaries of the employees here at the Commission.

Commissioner Gaziano?

COMMISSIONER GAZIANO: I might not have addressed some of the kind of misleading comments that Commissioner Yaki made. It sounded very much like a
defense attorney for a client trying to raise slight irrelevancies to convince a jury that although his client, there might be evidence of guilt, if the evidence of guilt wasn't beyond a reasonable doubt. But since he called into question -- he said the Commission's investigation was irresponsible, I at least want to correct a few of them.

First, he said I think that the two thugs at the polls who were intimidating people, there's no testimony that they actually spoke to voters. Well, I think that might be true, but people who have crossed burned in their yard, people in an earlier era who saw Ku Klux Klan members in white sheets didn't need to have a verbal exchange with them to be frightened.

The testimony we had before this Commission was by Bartle Bull, Mike Mauro, and Chris Hill. Two of them, I believe it was Chris Hill and Mike Mauro -- I'm sorry -- Chris Hill and Bartle Bull my able special assistant has reminded me, that they saw voters turn away.

And they spoke to the voters. They spoke to the voters. And the voters indicated that they were intimidated because of the presence of the thugs in paramilitary uniforms.
COMMISSIONER YAKI: That is such a lie.

COMMISSIONER GAZIANO: Commissioner Yaki,

I did not --

COMMISSIONER YAKI: Give me the transcript. Give me the transcript. Give me the transcript.

CHAIRMAN REYNOLDS: Commissioner Yaki.

COMMISSIONER YAKI: Give me the transcript.

CHAIRMAN REYNOLDS: We listened to you respectfully. Try to do the same.

COMMISSIONER YAKI: You know, come on.

CHAIRMAN REYNOLDS: Commissioner Yaki, you may have said things that people disagreed with, but you were not interrupted.

COMMISSIONER YAKI: That's a bald-faced lie.

COMMISSIONER GAZIANO: It is not. People who want to go on our website and look at Hill's testimony will see that what I have said is exactly true, that the witnesses said that they would come back at a later time maybe. And we know maybe they did. Maybe they didn't. But at the time they were sufficiently intimidated by the presence of these thugs that they left.
We also know that poll watchers other than those on tape were intimidated. But we also know, more importantly, that Bartle Bull testified that it was the worst case of voter intimidation he had ever witnessed.

And this is a person with sterling civil rights credentials who marched in the South, who worked for Robert F. Kennedy's election, who published, former publisher of the Village Voice.

So the scene that the Department of Justice was acting on and the scene that this Commission was looking into was not based on snippets of videotape.

I don't remember any commissioner objecting to the amount of information that we had that we were proceeding on, but I know the General Counsel and the General Counsel's staff have been very diligent in requesting every millimeter of tape that's available as this investigation goes forward. I would join any other commissioner who wants more information, as I always have.

As Commissioner Kirsanow has certainly mentioned, I do urge everyone to read the entire report. But what Christian Adams actually said the Department might do and would not do prove to be 100
percent accurate. What Christian Adams said the Department would not do is interpose a section 5 objection, which it could have done unilaterally to the county and the request in question, that it has done unilaterally in almost any other case. He said they would not interpose a unilateral section 5 objection, that they would go to court and that if they did that, we would know they weren't serious. And, in fact, they did.

But what is serious? What is serious are the following facts. This is what we know about Noxubee that Commissioner Yaki did not mention. Several attorneys refused to work on the Ike Brown case according to our two sworn whistle-blowers. At least one attorney stated, "I am not going to work on the case because I didn't join the Voting Section to sue black people." The Department has not confirmed or denied whether that happened.

Robert Kengel, Deputy of the Voting Section, allegedly states to Mr. Coates during a trip to investigate the Ike Brown case, "Can you believe we are being sent to Mississippi to help a bunch of white people?"
The Department hasn't said whether he said that, but Mr. Kengel has admitted in writing that he
made that outrageous statement. He attempts to interpose some lame excuse, which has been refuted.

Attorneys in the Civil Rights Division allegedly told Adams, "Until blacks and whites achieve economy parity in Mississippi, we have no business bringing that case."

A similar comment was made by a different career attorney to Mr. Coates. So these were the excuses that were given. A non-lawyer minority employee at the Department was "relentlessly harassed" by Voting Section staff for his willingness as a minority to work on the United States versus Ike Brown case. That was the testimony from Adams.

Coates further testified that this minority non-lawyer's mother was harassed and intimidated because her son was willing to work on that case, which the Department won and which the Fifth Circuit affirmed and praised the Department.

And we also know that there were acts of fraud involved with supervisors in that case trying to prevent the political leadership from bringing that case.

So that's the relevant facts from the Noxubee case that the Department refuses to comment on, admit, deny, with letters to us. And that is why
this investigation is now about a lot more than just
why they dismissed a lawsuit.

   The evidence, unrefuted, sworn evidence,
by the whistle-blowers is that it was dismissed
because of hostility to bringing cases against black
defendants.

   And we don't have any serious evidence to
dispute that. But the really troubling anecdotes that
the Department refuses to respond to were what is
making this matter especially significant at this
point.

   CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Thank you, Mr.
Chair.

   I am going to vote in favor of this report
for a number of important reasons. First, I want to
support what one of my fellow commissioners has
already said this morning. Read the report for
yourself and note what the report says and what it
does; that is, it gathers information very consistent
with our statutory responsibility to provide
information to the public and to serve as a watchdog
function. And you should not in my view take anyone's
word for what the transcripts say. Read the
transcripts for yourself and read all of the
information for yourself.

I certainly don't believe that anything has been suppressed by this body. In fact, we all have a right as commissioners to bring all of this information into the public domain. And we are doing so by way of this report. And we are certainly free to do so as individual commissioners. And I am sure we will.

One fact, though, that cannot be refuted is that the complaint was filed. And the complaint included four counts: an allegation of actual intimidation against voters, a claim of attempted intimidation against voters, a claim of actual intimidation against poll watchers, and a claim of attempted intimidation against poll watchers.

And those were the claims in the complaint. Those were the claims that received a default by way of the court. And those were the claims for which the court said, "File your motion for a default judgment."

And no one has suggested, at least to my knowledge, no one has suggested, that the claims made in that original complaint were brought forward fraudulently or in violation of rule 11; that is, an obligation of an officer of the court to present the
court with only credible allegations.

As far as I know, no one has ever questioned that. So, as we sit here today, there appears to be no suggestion from anyone that the individuals who brought the complaint forward did so in violation of rule 11, which means there were actual allegations of voter intimidation and actual allegations of intimidation of poll watchers. And at the end of the day, that should trouble everyone. And everyone should be asking the question why the case was not pursued vigorously.

Thank you.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I just have a couple of minor points to make here. I think a lot of the points that I wanted to make have already been made by some of my fellow commissioners.

I do intend to vote in favor of this report. But I wanted to comment a little bit about why the New Black Panther case was particularly important to me.

There have been allegations in the past that the Voting Section of the Civil Rights Division, that some of the attorneys there were hostile to bringing voter intimidation cases against African
American defendants hostile to the notion of race-neutral application of the law in this area.

But allegations like that -- and they were mainly made in connection with the Noxubee case. Allegations like that are very hard to investigate. It's always possible for any particular case that there was some reason the Department thought that it would be inappropriate to bring the case.

Now, sometimes facts are unclear. Sometimes witnesses are unavailable. Sometimes simply the resources of the Department are stretched thin. And, as a result -- but I'll bring a case that otherwise might be meritorious.

The New Black Panther case was different because it was brought and it was in default. Because it was in default, it was an easy case. There's no reason to block a case that's in default because of lack of resources.

The easiest thing to do in that situation is just go forward and get your judgment. It's really very little work. It's actually more work to dismiss the case. And that's why I thought the New Black Panther case merited our investigation because there were really very few responses the Department could give to why they would drop such a case other than a
hostility to race-neutral enforcement of the law.

And so that is why I thought it was important to look at the case. That is why I thought and continue to think that it's a kind of case that doesn't come up very often. It really allows you to get some insight into the thinking of the Department that you otherwise wouldn't get. In those cases, you're just not going to get this nice, clean essentially free case to deal with.

The other point I wanted to make was to respond to Commissioner Yaki's point that we should be investigating bullying instead. There are lots of issues I think the Commission should look into, but I just want to point out that investigating the Department of Justice is not an unusual thing for the Commission to do. It's actually dead center of what we do.

We are required by our statute to do at least one report on the enforcement of civil rights laws. So that means looking at how federal agencies and other enforcement institutions are enforcing the laws.

So, rather than being a strange thing for us to investigate, this is something we're actually mandated by Congress to happen.
CHAIRMAN REYNOLDS: Okay. Commissioner Yaki?

COMMISSIONER YAKI: Two things. One -- and let's not get into too much technicalities, but I think we have to. Section 5 of the law requires that the Department interpose its objection unilaterally to the appropriate submitting party.

Not to get into too much fine detail here, but the consent decree or the injunction in Noxubee removed power from Ike Brown and his invested, the power to submit plans according to section 5 to I believe a voter registrar of the county.

What the Department of Justice did in its intervention on the 15th was to say, "Hey, not only was Ike Brown not the proper party even to raise a section 5 amendment. So why would you interpose a section 5 objection when they can bring it anyway?"

They went further and instructed the appropriate party, the voter registrar, through a court order to not even consider anything he ever gave to them as proper for the purposes of any section 5 submittal. That would be done.

That is important because it goes beyond simply saying that this person has no right to do it. They went beyond it and said, and, furthermore, in
perpetuity, if this guy shows up, don't give him the
time of day because he is easily trying to intimidate,
continuous pattern and practice of too many white
voters. And they extended the injunction as well.

So the technicality of the section 5
unilateral imposition simply was not something
procedurally that was available because there had been
no submittal by the voter registrar at that time.

And then I just want to point out that I
do have the transcripts. And I am reading the
transcripts. And there is nothing in there that says
anything about that those two people were engaged in
anything other than getting into a fracas with the
McCain and Republican poll watchers.

And that, if you read the record seems to
be the only thing that might have deterred one or two
or three people from voting and saying they would come
back and vote at another time, mainly because one of
the people involved said to the voters, "Oh. Well,
there are Black Panthers here." And God knows what he
actually really said to them.

We have no other video evidence beyond the
fracas. One of them even admitted that his "Irish was
up" quotations. So this was not some sort of peaceful
sort of "I'm filming you because I think you're an
intimidated voter" kind of thing. There is an active confrontation going on between the Republican poll monitors and McCain poll monitors and the two individuals there.

That had a spillover effect to some voters. That is unfortunate and something that both parties also share some blame equally. And I would just state, one for my distinguished colleague over here, that let's not forget that the person carrying the nightstick did have a civil case brought against him, did have an injunction placed against him. And that continually seems to be overlooked in the discussions on this.

CHAIRMAN REYNOLDS: Commissioner Melendez, do you have any comments?

COMMISSIONER MELENDEZ: Yes. I thank you. First of all, I just hope -- can you hear me?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER MELENDEZ: Okay. I hope that we can put closure to this. This has gone on a long time. Hopefully now we have all of the witnesses and everything. You know, if we don't have the subpoenas and testimony, hopefully -- and I didn't understand either what "interim" meant, meaning that this report
becomes an open-ended report that as you get more testimony or subpoenas and people bring forth, that we add up to this report.

I'm not sure what we were saying there as far as the "interim," but on the merits of the case, I remember I was asking at one point whether or not the individual citizen who was the voter, if we ever had testimony that a person would come forth. And at that time I believe the answer that I was given was that the person lived in a neighborhood where the thugs were all around and the person was reluctant to testify.

So in civil rights, it's really against the individual person, but I never really heard anybody come forward. It's really looking from the outside in on videos and everything else. So I hope that we could have put more effort to bring somebody forward that was an actual citizen that was intimidated.

Also, you know, the degree of punishment, I know that, you know, the main person with a nightstick was actually sanctioned or whatever. So it wasn't as if the primary person wasn't prosecuted.

It's like anything else in the judicial system. Everybody disagrees with the maximum amount
of punishment that a person receives for the infraction. So, you know, no matter who is in the administration there, nobody is going to ever be happy with whatever punishment is actually given to the person.

My main concern is that with the time given of the Commission, that will change hopefully at the end of this year. Maybe there is one more meeting left for some of us, but we put closure on this. And there is an end to this report.

You take the witnesses that you have. And you go with it today. And we vote on this but not to keep on going over and over with this vicious attack against the Justice Department and administration. I am just wondering when it will end.

That is just my comment. I will submit my statements later to go along with this report, but I just want to thank you for the opportunity to speak this morning.

CHAIRMAN REYNOLDS: Okay. At this point I call the question. All in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: Opposed.
CHAIRMAN REYNOLDS: Abstentions?

(No response.)

CHAIRMAN REYNOLDS: Okay. Please let the record reflect that Commissioners Yaki and Melendez voted against the motion. The motion passes.

Okay. Part B, as distributed in draft form to commissioners, it contains commissioners' interim findings and recommendations. Under this motion, the Commission will vote individually on each finding and recommendation. Those findings and recommendations receiving the majority vote will be included in the report with a vote tally, a sentence noting any votes in opposition to that item.

I move that the Commission approve interim finding 1A, which we just followed. The Commission's organic statute authorizes it to subpoena witnesses and the production of written material in aid of its mission. And it authorizes the Attorney General to enforce the Commission's subpoenas in federal court if any person or entity refuses to comply. It is unclear, however, whether the Commission has legal recourse if the Attorney General refuses to enforce a subpoena directed at the Department of Justice or its employees.

The Commission's statute also requires
that "All federal agencies shall cooperate fully with
the Commission to the end that it may effectively
carry out its functions and duties."

But it is equally unclear whether the
Commission has recourse to seek judicial enforcement
of this command absent representation from the
Department of Justice.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in -- Commissioner
Yaki?

COMMISSIONER YAKI: All I can say is that
this one, I think that this is an attempt to arrogate
to ourselves power exceeding that of Congress and
other agencies. It is very unprecedented, number one.
And, number two, this goes into the old adage of be
careful what you wish for.

CHAIRMAN REYNOLDS: Any other comments?

(No response.)

CHAIRMAN REYNOLDS: All in favor please
say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?
COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: Opposed.

CHAIRMAN REYNOLDS: Abstentions?

(No response.)

CHAIRMAN REYNOLDS: Let the record reflect that Commissioners Yaki and Melendez voted against the motion. The motion passes.

Next I move that the Commission approve interim finding 1B, which reads as follows, "Although the U.S. Department of Justice has cooperated with many previous Commission investigations and requests. DOJ has an inherent conflict of interest when it would prefer not to cooperate fully with the Commission's investigations of DOJ's actions.

"In the New Black Panther Party investigation that is the subject of this report, the Department of Justice refused to comply with certain Commission requests for information concerning DOJ's enforcement actions. And it instructed its employees not to comply with the Commission's subpoenas for testimony.

Moreover, the Department's denial of the Commission's requests for the appointment of a special counsel to help resolve the discovery disputes in federal court was communicated by a career attorney
without addressing or acknowledging the Department's conflict of interest and without any indication the Commission's request was ever brought to the attention of the Attorney General.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER YAKI: Hang on a second.

(Pause.)

COMMISSIONER YAKI: Same objections I made before.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: Call the question.

CHAIRMAN REYNOLDS: One moment.

(Pause.)

CHAIRMAN REYNOLDS: All in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Any other abstentions?

(No response.)

CHAIRMAN REYNOLDS: Okay. We have one
abstention, by Commissioner Melendez. Commissioner Yaki opposes the motion. The remaining commissioners vote in favor of the motion. The motion passes.

I move that the Commission approve the interim recommendation, which reads as follows,

"Congress should consider amendments to the Commission's statute to address investigations in which the Attorney General and/or the Department of Justice has a conflict of interest in complying fully with the Commission's request for information.

"Options to address a potential conflict of interest might include the following: enactment of a statutory procedure by which the Commission may request the Attorney General to appoint a special counsel with authority to represent it in federal court, which request the Attorney General must personally respond to in writing within the specified period of time.

"Another option would be the enactment of a statutory provision to clarify that the Commission may hire its own counsel and proceed independently in federal court if the Attorney General refuses to enforce a subpoena or other lawful request, especially those directed at the Department of Justice or its officer or its employees."
"And a third option would be a conscious decision not to alter the Commission's statute or statutory confirmation that the Attorney General and the Department of Justice can act against the Commission's interests without any particular explanation."

Is there a second?

COMMISSIONER GAZIANO:  Second.

CHAIRMAN REYNOLDS:  Discussion?

Commissioner Yaki?

COMMISSIONER YAKI:  I would just like to point out that, again, we are seeking powers that belong to another agency. In fact, in some ways it exceeds the amount of the Congress' authority in terms of its authority to oversight an investigation over the Executive Branch.

The second thing was just a matter of practicality, which, you know, I just raise, not for this but for anything that exists in the future. And that is we are an agency with very limited means.

When the Chairman spoke about the relative costs of the project, he did acknowledge that it was high costs in terms of staff work. It did not include the costs of the time that have spent and the number of meetings that we have spent dedicated solely to
this endeavor today. It does not account for commissioner time that was spent solely to this endeavor today.

Those costs do add up. And in terms of any future commission looking at any special counsel, outside of the fact that I think it is never going to happen, I think the realities are that it would be a very difficult procedure to engage in simply because of our current budgetary constraints in addition to the other duties that we are supposed to be filling at this time.

CHAIRMAN REYNOLDS: Commissioner Heriot?
COMMISSIONER HERIOT: I am just baffled by Commissioner Yaki’s belief that we are attempting to arrogate power from ourselves. Actually, the recommendation makes no particular request for power. It simply lays out the options.

And one of the options is a conscious decision on the part of Congress here not to alter the statute. What we're asking for is for Congress to decide what to do about this problem. And we're certainly not recommending any particular court of action. That's just silly.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Thank you,
Commissioner Heriot, for making the first of the two points I wanted to make in respectful disagreement with Commissioner Yaki's suggestion that we were seeking power that exceeded that even of Congress.

The first obviously that you just made is that we are simply asking Congress to consider a variety of options, including doing nothing. And if that is their choice, we are just drawing the matter to their attention.

Secondly, even if they chose, if Congress in its wisdom chose, the option that would seem to give us the future Commission, not us but a future Commission, a greater degree of independence would be the option to allow the Commission to go to court if the Attorney General refused to enforce our subpoenas.

It is not a power that exceeds Congress', far less than Congress. We are an independent agency. We have commissioners appointed by Congress. Congress itself -- in some ways Congress has asked us to do some of this legislative oversight work by reporting to Congress on civil rights statutes and their enforcement.

Congress can go independently to court, but Congress can do a lot of things in addition to this Commission, even if Congress were to grant us
this Commission, the extreme power, it can hold executive officials in contempt. It can withhold money from departments. It can enforce its subpoenas independently.

So the suggestion that Congress might give us independent litigation authority, which, by the way, it does give even some Executive Branch agencies, that that somehow would be unusual or extraordinary. And especially that it would exceed Congress' own authority is clearly wrong.

CHAIRMAN REYNOLDS: Okay. All in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: Opposed.

CHAIRMAN REYNOLDS: Abstentions?

(No response.)

CHAIRMAN REYNOLDS: Okay. Commissioners Melendez and Yaki voted against the motion. The remaining commissioners voted in favor of the motion. The motion passes.

CHAIRMAN REYNOLDS: Okay. Next up is the discussion of the health disparities report.

Commissioner Taylor has indicated to me that he has --
how do you folks feel about it? Okay. Let's take a five-minute break.

COMMISSIONER GAZIANO: Can you really keep it in five minutes?

CHAIRMAN REYNOLDS: It is doubtful.

(Laughter.)

(Whereupon, the foregoing matter went off the record at 10:10 a.m. and resumed at 10:19 a.m.)

- MOTION REGARDING HEALTHCARE DISPARITIES REPORT

COMMISSIONER STATEMENTS & REBUTTALS

CHAIRMAN REYNOLDS: Commissioner Taylor has indicated that he has a motion with respect to finalizing the healthcare disparities report. Commissioners approve for publication part A of the draft briefing report on healthcare disparities on May 28th, 2010.

Commissioner Taylor?

COMMISSIONER TAYLOR: I do. May I present the motion?

CHAIRMAN REYNOLDS: Yes, indeed.

COMMISSIONER TAYLOR: I move that the healthcare disparities report move forward without any Commission-approved findings and recommendations. The report would consist of part A, which has already been approved; individual commissioner statements; and any
rebuttal statements.

COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: Okay. Discussion?

Actually, do you want to discuss the timetable?

COMMISSIONER TAYLOR: The recommendation is going to be that we have commissioner statements due 30 days after the due date for the statements on the New Black Panther report, which would be January 19th. And rebuttals would be due 30 days thereafter, February 19th of 2011.

CHAIRMAN REYNOLDS: Comments? Concerns?

COMMISSIONER GAZIANO: I was going to --

COMMISSIONER KIRSANOW: Move approval.

CHAIRMAN REYNOLDS: I'm sorry?

COMMISSIONER KIRSANOW: Move approval.

COMMISSIONER GAZIANO: I was just going to raise the question. And I would like to hear Commissioner Melendez's quick thoughts that whether it's possible to --

CHAIRMAN REYNOLDS: Mr. Yaki, is that you?

Continue.

COMMISSIONER GAZIANO: -- whether commissioners, unanimously or otherwise, want to allow commissioners whose terms may expire to submit statements, even after their term has expired, for
reports in which commissioner statements are pending.

I understand from at least a couple of commissioners in this room whose terms may expire, they don't need that additional time that they will get their -- they intend to get their comments in prior to their term ending.

But since that applies to Commissioner Melendez, I just wanted to raise the issue and see if you had any particular request with regard to that.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: No, I don't think we can.

My question, though, on this healthcare, the one we're voting on now or considering, we had postponed this for what reason again?

CHAIRMAN REYNOLDS: I believe that we were trying to fashion some recommendations. Is that right?

COMMISSIONER TAYLOR: That is correct. And, Commissioner Melendez, from my perspective, recommendations, findings and recommendations, would not be reason to hold up this report.

First of all, you know, there's no federal policy or pending legislation right now for us to comment on. And, in reviewing the transcript, it is
clear that the experts are continuing to develop information and research in this area.

And so in many ways, I don't want to try to fix recommendations right now when I suspect we will have better research on this issue in 2011, in which case I would like this to be an opportunity for someone to come back, someone on the Commission to come back, and reference the new research.

So I just don't think this is a good vehicle right now for findings and recommendations for those reasons.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: I am going to say something that Commissioner Taylor is not going to like, which is I commend him for his leadership on this issue.

COMMISSIONER TAYLOR: I'd love to have that stricken from the --

(Laughter.)

COMMISSIONER TAYLOR: I cannot stand for that.

COMMISSIONER YAKI: -- and thank him for, the course, he is charging on this particular report. The only point I would make -- and this actually goes to -- is a legal point. I think that we
should just limit it to commissioner statements simply because the ability for Commissioner Taylor, Reynolds, or Melendez to do a rebuttal would be completely eliminated by this by one simple fact. I believe it is that part of the statute that says that it prohibits us accepting volunteer services.

So I think that we should simply enter the Commission statements because they would not be afforded the chance to do any rebuttal.

CHAIRMAN REYNOLDS: Well, my view is maybe simplistic. When our term ends, our term ends.

COMMISSIONER YAKI: Right.

CHAIRMAN REYNOLDS: And our ability to act in the capacity as a commissioner ends on that day. I think that we would be free to submit anything we wanted to provided the statement was open in our capacity as just -- well, as a non-commissioner.

COMMISSIONER YAKI: But I guess I question whether it could be published as a rebuttal of a commissioner, --

CHAIRMAN REYNOLDS: No.

COMMISSIONER YAKI: -- in which case --

CHAIRMAN REYNOLDS: No. I don't believe --

COMMISSIONER YAKI: -- are we using
Commission -- and I'm not trying to stop it. I am just trying to think this through because it is something that has come up before. Okay. If the General Counsel thinks it's okay, I don't care.

CHAIRMAN REYNOLDS: I don't believe that that is his position, but -- 

(Laughter.)

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I don't have anything definitive to say about how this should be interpreted. I note that we actually have witnesses who are volunteers. We have, you know, public comment.

I don't think there's anything wrong with a commissioner, a former commissioner, submitting a statement. There may be, you know, ways in which we want to limit that.

I actually think it would be a good practice if those members of the Commission who are rotating off voted on part A and part B of the report. It would be good to give them the opportunity to do both a statement and a rebuttal.

How it has to be fashioned I think we could debate. It doesn't seem to be very important right now because nobody is asking for that period to
be extended to allow them to do that. But one way to do it is to simply have a practice that a former commissioner who voted on the report would always be permitted to submit a special statement and rebuttal as a member of the public just like a member of the public. You always accept it from someone who is a former commissioner.

And I don't think the volunteer thing is really at issue here at all. I think the volunteer issue if it's meant to be that kind of a rule would exclude us from having witnesses, and it doesn't.

CHAIRMAN REYNOLDS: Okay. On that note, all in favor?

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I'm in favor.

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: We have a unanimous vote.

CONSIDERATION OF FINDINGS AND RECOMMENDATIONS FOR BRIEFING REPORT ON ENGLISH-ONLY IN THE WORKPLACE

CHAIRMAN REYNOLDS: Next up is a discussion of the findings and recommendations for the
English-only in the workplace briefing report.

At the October 8th, 2010 business meeting, commissioners approved for publication part A of the draft briefing report on English-only in the workplace.

We will now take up as part of B the findings and recommendations proposed by Commissioner Heriot, first distributed in draft form to commissioners on October 22nd via e-mail -- that was sent by her special assistant -- and included in your meeting materials for today.

Under this motion, the Commission will vote individually on each finding and recommendation. Those findings and recommendations receiving a majority of the vote will be included in the report with a vote tally and a sentence explaining any opposition vote for that item.

Pursuant to this motion and in light of the commissioner statement and rebuttal deadlines for our enforcement report and the health disparities report, commissioner statements will be due by February 1, 2011. And rebuttals will be due by March 3rd, 2011.

Is there a second?

COMMISSIONER TAYLOR: Second.
CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please -- okay. Here we go. I move that the Commission approve finding 1, which reads as follows, "Title VII prohibits employers from discriminating against employees on the basis of national origin as well as race, color, religion, and sex. At the same time, however, it is clear that in passing Title VII, Congress did not intend to disturb the right of employers to control workplace practices except insofar as their activities constituted discrimination based on race, color, religion, sex, or national origin."

As Representative William McCullough put it, "Management prerogatives and the union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practice."

That is the motion. Is there a second?

COMMISSIONER GAZIANO: Second.

COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: Discussion?
(No response.)

CHAIRMAN REYNOLDS: All in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All in opposition?

COMMISSIONER MELENDEZ: Opposed.

COMMISSIONER YAKI: I oppose.

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: Commissioners Melendez and Yaki oppose the motion. The remaining commissioners voted in favor. The motion passes.

I move that the Commission approve finding number 2, which reads as follows, "Although Congress consciously withheld the power to issue substantive regulations in connection with Title VII when it created the EEOC, the EEOC has for decades nevertheless issued guidelines that effectively bind those employers that are not in a position to risk litigation."

One of these is section 1606.7, which governs what the EEOC refers to as "Speak English only rules." Under that section of the guidelines, the EEOC asserts that it will presume that an English-only rule that applies all the time violates Title VII and
closely scrutinizes.

An English-only rule that applies only at certain times is permissible under that provision only if it is justified by a business necessity.

Is there a second?

COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All those in opposition?

COMMISSIONER YAKI: I oppose.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: Commissioners Yaki and Melendez voted against the motion. The remaining commissioners voted in favor. The motion passes.

I move that the Commission approve finding number 3, which reads as follows, "Section 1606.7 does not apply to Spanish only, Japanese only, or other exclusive language rules."

Is there a second?
COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All of those in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER MELENDEZ: No.

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Abstentions?

(No response.)

CHAIRMAN REYNOLDS: Once again Commissioners Yaki and Melendez voted against the motion. The remaining commissioners voted in favor. It passes.

I move that the Commission approve finding number 4, which reads as follows, "Several courts have explicitly rejected the EEOC guidelines on speak English-only rules. The case -- well, the cases include Garcia v, Spun Steak, Kania v. Archdiocese of Philadelphia, Long versus First Union. Two other courts have deferred to the EEOC in connection with section 1606.7. These cases are EEOC versus Synchro-Start Products and EEOC versus Premier Operator Services."
Is there a second?

COMMISSIONER TAYLOR: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER HERIOT: I assume the official version is what is written here with --

CHAIRMAN REYNOLDS: Yes, yes. Any other comments?

(No response.)

CHAIRMAN REYNOLDS: All in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Those in opposition?

COMMISSIONER YAKI: Nay.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Any abstentions?

(No response.)

CHAIRMAN REYNOLDS: The motion passes with Commissioners Melendez and Yaki voting against the motion.

I move that the Commission approve finding number 5, which reads as follows, "There are many good reasons for an employer to adopt an English-only in the workplace policy. Among those good reasons are the need for safety, the need to supervise employees effectively, and generally ensure that they are
following the policies, and the need to provide
customers and other employees with a friendly and
courteous atmosphere in which they need not worry
about the possibility that they are being spoken of in
a discourteous manner.

"While most employers may have no need for
such a policy, a significant number do. Section
1606.7 operates to chill employers who have a good
reason for adopting English-only rules in the
workplace."

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: Okay. The section
that talks about making employees and customers feel
comfortable concerns me. In fact, I don't feel
comfortable with that portion of the motion. So I am
going to vote for the motion, but please note I am not
supporting that particular portion of the motion.

If there are no other comments, all those
in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER MELENDEZ: No.
CHAIRMAN REYNOLDS: Abstentions?
(No response.)
CHAIRMAN REYNOLDS: Once again --
COMMISSIONER HERIOT: The majority vote
voted for the part that you were not comfortable with?
CHAIRMAN REYNOLDS: That is correct. And
the motion passes with Commissioners Melendez and Yaki
voting against it. And I voted against that portion
that I referred to earlier.

I move that we approve finding number 6,
which reads as follows, "On the other hand, those
employers who wish to adopt English-only rules just
for the purpose of harassing or embarrassing employees
on account of their national origin are relatively
few. I'm withdrawing section 1606.7. And, instead,
advising employers and employees that English-only
policies are prohibited only when the employer adopted
the policy for the purpose of harassing or
embarrassing employees on account of their national
origin would improve the guidelines and make them more
consistent with the intent of Congress."

Is there a second?
COMMISSIONER GAZIANO: Second.
CHAIRMAN REYNOLDS: Discussion?
COMMISSIONER YAKI: Isn't that written
more like a recommendation somehow?

    CHAIRMAN REYNOLDS: That argument has force.

    COMMISSIONER HERIOT: Do you want to strike the last sentence?

    COMMISSIONER YAKI: I am going to vote against the whole thing anyway.

    CHAIRMAN REYNOLDS: All right.

    COMMISSIONER YAKI: I just wanted to point it out.

    CHAIRMAN REYNOLDS: All in favor please say "Aye."

        (Chorus of ayes.)

    CHAIRMAN REYNOLDS: Objections?

    COMMISSIONER MELENDEZ: No

    COMMISSIONER REYNOLDS: Abstentions?

    COMMISSIONER KIRSANOW: Abstain

    CHAIRMAN REYNOLDS: I'm curious.

    COMMISSIONER KIRSANOW: Wonder all you want.

        (Laughter.)

    CHAIRMAN REYNOLDS: Okay. We have one abstention, Commissioner Kirsanow; two objections, Commissioners Melendez and Yaki. The remaining commissioners voted for it. It passes.
Will you tell me afterwards? I had a concern with it myself. And I wanted to see if we're on the same wavelength.

COMMISSIONER KIRSANOW: What is the vote on that one?

CHAIRMAN REYNOLDS: That was four in favor, one abstention, two objections.

Okay. Now we move on to the recommendations. I move that recommendation number one be approved, and it reads as follows, "The EEOC should withdraw section 1606.7. Instead, employers and employees should be informed that English-only policies are prohibited only when it can be shown by a preponderance of evidence that the policy was adopted for the purpose of harassing or embarrassing employees on account of their national origin."

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: Let's let Commissioner Yaki go first this time. Those in opposition?

COMMISSIONER YAKI: Me.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Those in favor?
(Chorus of ayes.)

CHAIRMAN REYNOLDS: Abstentions?

(No response.)

COMMISSIONER KIRSANOW: Mr. Chairman, I just wanted it noted that my questions will be to us including the language "for the purpose of discriminating" in addition to "harassing or embarrassing."

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER HERIOT: Let's include that, then.

COMMISSIONER GAZIANO: Yes, let's. Would you like to reconsider? Why don't we amend and say, "was adopted for the purpose of" -- are you proposing --

COMMISSIONER KIRSANOW: Just insert the word "discriminating."

COMMISSIONER GAZIANO: "For the purpose of discriminating."

COMMISSIONER HERIOT: "Harassing or embarrassing."

COMMISSIONER KIRSANOW: "Discriminating, harassing, or embarrassing."

COMMISSIONER GAZIANO: We need the exact language to put in,
COMMISSIONER KIRSANOW: "For the purpose of discriminating against, harassing or embarrassing."

CHAIRMAN REYNOLDS: Mr. General Counsel, do we need to vote again?

COMMISSIONER GAZIANO: Let's go ahead.

MR. BLACKWOOD: It would be better.

CHAIRMAN REYNOLDS: Commissioner Yaki, you get to vote against it twice. All those in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Those in opposition?

COMMISSIONER MELENDEZ: No.

COMMISSIONER YAKI: Do you think just twice? No.

CHAIRMAN REYNOLDS: Okay. The motion passes. We have two votes, Commissioners Yaki and Melendez, against the motion. The motion passes.

Second recommendation reads as follows, "Congress should amend Title VII to clarify the meaning of discrimination on the basis of national origin. At minimum, that clarification should make it clear that an English-only policy is prohibited only when it can be shown by a preponderance of the evidence that the policy was adopted for the purpose of harassing or embarrassing employees on account of
their national origin."

I would like Commissioner Kirsanow to make a friendly amendment.

COMMISSIONER KIRSANOW: I would encourage the same amendment; that is, insert the "discriminating against" before "harassing or embarrassing."

CHAIRMAN REYNOLDS: Okay. With that modification, is there a second?

COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: Discussion? Commissioner Yaki?

COMMISSIONER YAKI: Actually, my comments go toward the entirety of the findings and recommendations. As I stated before, I believe that this briefing was extremely unbalanced, but due to perceptions of the Commission that people who would have been extremely valuable to testify chose not to. I hope that will be rectified in the future.

I believe that these recommendations are wrong. They do not take into account the reality of what is really going on there, I think, right now with regard to discrimination against people, especially in the Latino community with regard to their ability to communicate and work effectively in their environment.
While I am certainly a proponent for the literacy in English for this country and, as anyone is, I think that we have to be very careful in attempting to change those things which were set up to protect many immigrants coming here and not just newcomers from this generation but from generations past from kind of subjugation and discrimination that they suffer.

So that's why I opposed all the findings and recommendations in this report and why I oppose the report in its entirety.

CHAIRMAN REYNOLDS: Commissioner Yaki, would you feel comfortable if a publisher were to discriminate against all applicants who could not speak and write standard English?

COMMISSIONER YAKI: I'm not going to get into hypotheticals here.

CHAIRMAN REYNOLDS: That's fine.

COMMISSIONER YAKI: So the question -- I mean, the point is that there are reasons why some of these were put together. And I don't think it was an adequate basis of information upon which to act.

CHAIRMAN REYNOLDS: Okay. I will address the same question to Commissioner Kirsanow.

COMMISSIONER KIRSANOW: I think there is
a rational basis for doing just that. There is a
rational business purpose for a publisher to want --
people who are able to write and who speak standard
English well.

I think the language of findings and
recommendations is fairly specific. And that is why
I encouraged including "discriminate against" in the
language so that we're not asserting that this should
be a blanket authorization or privilege on the part of
employers to enclose these provisions if, in fact,
they discriminate against or they harass or embarrass
individuals who don't necessarily have English as a
primary language.

I mean, I wouldn't engage in
hypotheticals. I mean, if OSHA or some of these types
of English-only requirements have a safety component.
My father was a steelworker. And, as Commissioner
Yaki indicated, in the Cleveland area, there were a
number of people who spoke a number of different
languages in an environment like that.

This is pre-OSHA. And there were at least
a couple of occasions in which there were serious
injuries and deaths that resulted from a failure of
people to understand, no fault of their own, what was
going on in the workplace.
Now, does something like this cure that?
No, absolutely not. But to the degree with which we perpetuate an environment in which there isn't the common language requirement, that is reasonable. And, again, with those exceptions in mind, I think we harm the very individuals that we believe that are purported beneficiaries of the rule that says you can't impose English-only requirement.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes. Just for the record, I would like to remind fellow commissioners and others that the EEOC was ably represented in this particular hearing. And since the briefing was primarily focused on the EEOC policies, I think that they were certainly adequate to defend their own policies.

I certainly would have been happy for others to testify besides those other citizens that we had, but I certainly think that it is not accurate to say that this was not a briefing where the issues were fully discussed and debated by able witnesses.

CHAIRMAN REYNOLDS: Commissioner Heriot, did you have something to say? Did you have something else?

COMMISSIONER HERIOT: No, not at this
time.

CHAIRMAN REYNOLDS: All right. All those in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER YAKI: Object.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Abstentions?

(No response.)

CHAIRMAN REYNOLDS: Commissioners Yaki and Melendez voted against the motion. The motion, however, is supported by the remaining commissioners. The motion passes.

UPDATE ON FY 2011 CY PRES ENFORCEMENT REPORT & CONSIDERATION OF PROJECT OUTLINE AND DISCOVERY PLAN

CHAIRMAN REYNOLDS: Okay. Next up, discussion of the Cy Pres enforcement report. Included in our meeting materials was a draft project outline and discovery plan on how to proceed on Cy Pres enforcement report project for fiscal year 2011.

Do the members of the Subcommittee or any other commissioners care to comment on that draft?

COMMISSIONER HERIOT: I think there are
two things that should be done to expand the project. We talked about it at our last attempted meeting, where we didn't have a quorum, about bringing in private class actions given that private class actions are an important enforcement mechanism here.

I think that our Cy Pres project should include private class actions in the civil rights area. And it should also include class actions brought by the federal agencies other than the Department of Justice.

I believe that the EEOC has been involved in this area as well. I don't know whether other federal agencies might have been, but I think it's probably a good idea to look at all of them, rather than just the Department of Justice.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER HERIOT: So I would make a motion on that.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER HERIOT: I move that the Cy Pres project be expanded to include private class actions that involve Cy Pres and also actions brought by other federal agencies that involve civil rights cases and Cy Pres.

CHAIRMAN REYNOLDS: Second. Discussion?
(No response.)

CHAIRMAN REYNOLDS: All those in favor by saying "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER MELENDEZ: Opposed.

COMMISSIONER YAKI: Opposed. But, then again, it's only two weeks' work.

(Laughter.)

CHAIRMAN REYNOLDS: So did Commissioner Yaki's statement warm your heart?

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER HERIOT: One other area, the Subcommittee has not yet had a chance to meet on this. So we did not have it into the plan. So the Subcommittee -- I guess I should stop calling it a Subcommittee, shouldn't I? They are committees because we are not a committee. So there has to be a committee before it can have a subcommittee.

COMMISSIONER YAKI: Call it a sub-Commission.

COMMISSIONER HERIOT: Not a sub-Commission. Anyway, we had been working with Chris Byrnes earlier in the Office of Staff Director
on developing the concept paper. And I know that -- anyway, we need a staff person that is our contact person. And it makes sense for it to be Mr. Byrnes only because then, you know, commit this to the Office of Staff Director or whatever, but we have to be able to know who we are working with.

CHAIRMAN REYNOLDS: Okay. Who is running this? I mean, who is responsible? Which component within the organization is responsible?

COMMISSIONER HERIOT: I think that is something that we get to decide.

CHAIRMAN REYNOLDS: So at this point it's not decided? Okay.

Commissioner Yaki?

COMMISSIONER YAKI: No. I was just going to say that if you need somebody to serve on the Subcommittee, I might be willing to do so.

CHAIRMAN REYNOLDS: Okay. All right. Why don't you guys make these determinations after December?

COMMISSIONER HERIOT: Fine with me. But what we need to do is be able to move it forward. If you want me to make a motion, I will.

CHAIRMAN REYNOLDS: I don't believe it's necessary.
MR. BLACKWOOD: It would be useful to note who is on the Subcommittee.

COMMISSIONER HERIOT: Okay.

MR. BLACKWOOD: Is Commissioner Yaki not on it or --

COMMISSIONER HERIOT: There are only two on the Subcommittee as of the time we appointed them.

CHAIRMAN REYNOLDS: Well, we generally have three. And we generally include --

COMMISSIONER HERIOT: We couldn't get one of them to do it before. But if he wants to do it now, that's peachy.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes?

CHAIRMAN REYNOLDS: In those -- I don't know -- 15 seconds that have gone by, is there interest in serving under the sub-Commission, the Subcommittee, the --

COMMISSIONER HERIOT: Committee.

Committee.

CHAIRMAN REYNOLDS: -- Committee? Is it still there?

COMMISSIONER YAKI: I like short-term assignments. So yes.

CHAIRMAN REYNOLDS: Okay. Very well. So
you will participate as a full-fledged member of the
whatever for as long as you would like.

MR. BLACKWOOD: Who are the other members?

CHAIRMAN REYNOLDS: The other members
would be Commissioner Kirsanow --

COMMISSIONER HERIOT: Same ones we had
before.

CHAIRMAN REYNOLDS: -- and Commissioner
Heriot.

COMMISSIONER HERIOT: And we're working
with Chris? We're working with him. I move that we
commit this to the Office of the Staff Director.

CHAIRMAN REYNOLDS: So you want to make
the determination now?

COMMISSIONER HERIOT: Yes because we need
to be able to --

CHAIRMAN REYNOLDS: Okay. I asked you
that a little earlier. And you said that you would
make that determination. At least you suggested that
you would make it sometime in the future.

COMMISSIONER HERIOT: I thought that we
were talking about something different.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER HERIOT: What I want to know
is who I am working with. Chris worked on the concept
paper.

CHAIRMEN REYNOLDS: Okay. And the wrinkle -- well, Chris would have to work closely with the -- well, to the extent the use of subpoenas are needed, you will have to work closely with the Office of General Counsel.

COMMISSIONER HERIOT: That's fine.

CHAIRMEN REYNOLDS: All those in favor please say "Aye."

(Chorus of ayes.)

COMMISSIONER HERIOT: What are we voting on now?

CHAIRMEN REYNOLDS: Your motion.

COMMISSIONER HERIOT: Did anybody second it? Did you second it?

CHAIRMEN REYNOLDS: Yes.


CHAIRMEN REYNOLDS: Objections?

COMMISSIONER YAKI: I am voting no.

COMMISSIONER MELENDEZ: No.

CHAIRMEN REYNOLDS: But you still are going to serve?

COMMISSIONER YAKI: Yes.

CHAIRMEN REYNOLDS: Okay. All right. The motion passes. We have two objections. The remaining
commissioners voted in favor of it.

- CONSIDERATION OF POLICY ON COMMISSIONER STATEMENTS AND REBUTTALS

CHAIRMAN REYNOLDS: Next up we are going to discuss a policy on statements and rebuttals. On October 14th and again on November 10th, the Office of Staff Director distributed a proposal by Commissioner Heriot or a policy for commissioner statements and rebuttals for reports.

Commissioner Heriot, would you like to discuss your proposal?

COMMISSIONER HERIOT: Hold on. I'd forgotten about it until now.

COMMISSIONER YAKI: Can we table this?

COMMISSIONER HERIOT: I don't think so.

COMMISSIONER YAKI: I think we should because I think that the new commissioners should have some input on this.

COMMISSIONER HERIOT: They can bring it up themselves.

COMMISSIONER YAKI: No? Then we will.

COMMISSIONER HERIOT: Okay.

COMMISSIONER YAKI: This is wasting our time. Go ahead.

COMMISSIONER HERIOT: I think it's fairly
self-explanatory here. What I think is important is
that we have a written policy on statements and
rebuttals, I think following pretty much, although not
with the same level of detail that we see here, making
sure that everyone has an opportunity to file a
statement and a rebuttal.

What this adds is a procedure in case of
the need for surrebuttal, which I think will be the
exception and not the rule.

We can not do surrebuttals and have it
simply because we haven't had the statements
circulated, the rebuttal statements circulated. So
sometimes people don't find out whether there would
have been a need of surrebuttal until they get --
well, actually until never since we don't actually get
the reports distributed to us either.

So I think it is important to have such a
policy. There are a lot of ways to do it. Here is
one way to do it. And I would be happy to modify it
if someone thinks there is some way it can be made
better.

CHAIRMAN REYNOLDS: Commissioner Yaki,
does that suggest you have something to say?

COMMISSIONER YAKI: I do have something to
say. I really think this is ridiculous.
CHAIRMAN REYNOLDS: Why don't --

COMMISSIONER YAKI: I think the idea that there are rebuttals in the first place is ridiculous, but surrebuttals that require three members of the Commission to be valid and on the process is just ridiculous.

The fact is that commissioner statements are meant to express a point of view and bring out issues that they wish to use separate in a manual report. The idea of rebuttals is simply to give people a chance to deal.

I mean, the fact is that if this were the case, the Supreme Court would never get any opinion out because they would have like 15 rounds of sur-sur-surrerebuttals. We don't have that kind of time. We don't have that kind of money.

It delays these reports getting out. It has delayed these reports getting out. It continues to delay these reports going out. And I think this will delay it even further. And I hope that the new Commission will reconsider this entire process from the very get-go.

CHAIRMAN REYNOLDS: Commissioner Yaki raises a good point. When does it end?

COMMISSIONER HERIOT: I don't think we've
had that problem. You know, we have been doing fine.

I think Commissioner Yaki's real point is that he
likes to put the defamatory matters -- he likes to put
false things in the statement.

CHAIRMAN REYNOLDS: Okay. Let's forget
about Commissioner --

COMMISSIONER HERIOT: Of course, he
doesn't want a rebuttal.

CHAIRMAN REYNOLDS: Let's forget about
Commissioner Yaki, and let's forgot about what has
gone on in the past. As it is structured, the
potential to have --

COMMISSIONER YAKI: I am sorry. I have to
respond to that. I mean, she just accused me of
putting defamatory materials in my rebuttals.

Let me just say this. Nothing I put in
rebuttal I would not put in a commissioner statement
but for the fact that we came up with this crazy
system to begin with.

I would simply say go back to the original
system. Make it streamlined. Get it done. Anything
I put in, which is not defamatory, by the way, but
perhaps a little on the polemical side, only because
sometimes I am frustrated by the processes with which
we engage here. No doubt others may voice that same
point of view in about six months or so.

So I think that, you know, there are a lot of words I would use for this, but I cannot say them in this arena. But I would just simply put it's a lot of wasted time, a lot of wasted resources.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: As I said, I think, when this was brought up at an earlier meeting, any rule we come up with can be abused. And so any rule we come up with really should be followed with the good faith of all commissioners.

But given where we have, I think these are a good set of rules to go by that resolve certain open questions. And so that's why I think we ought to proceed with them.

And if there are future improvements by a future Commission, then I'm happy to hear it. But whatever we adopt today or in the future, I think it's incumbent upon all of us to try to exercise our own good faith and restraint to prevent delays and future problems.

But I think we should adopt this today until some future Commission comes up with something better.

CHAIRMAN REYNOLDS: Okay. All in favor?
(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER YAKI: No.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Abstentions?

(No response.)

CHAIRMAN REYNOLDS: Two objections. The remaining commissioners voted in favor of it. And I voted in favor of it, despite my concerns that this structure lends itself to abuse.

COMMISSIONER TAYLOR: May I make one comment, Mr. Chair? I am voting in favor of this because I'm reading into it an element of good faith by all people involved in the process.

CHAIRMAN REYNOLDS: What is it about your experience with --

(Laughter.)


COMMISSIONER TAYLOR: I recognize what you were saying.

COMMISSIONER YAKI: He is trying to butter me up so I won't say nice things about him anymore.

COMMISSIONER TAYLOR: That's true. That's true.
1 CHAIRMAN REYNOLDS: Okay.

2 COMMISSIONER YAKI: Another excellent proposal, Mr. Taylor.

3 COMMISSIONER TAYLOR: Oh, gosh.

4 COMMISSIONER YAKI: Another excellent one. On the record I will say it was an excellent proposal.

5 DISCUSSION OF POSSIBLE BRIEFING TOPICS FOR FY 2011

6 CHAIRMAN REYNOLDS: Okay. Next up is a discussion of briefing topics, possible briefing topics, for 2011. On Wednesday afternoon Commissioners Heriot and Gaziano circulated a concept paper for a Commission briefing on the alleged wage gap disparity among genders.

7 Commissioner Heriot, should that be sex, I mean, gender/sex.

8 COMMISSIONER HERIOT: Sex and gender are used interchangeably here.

9 CHAIRMAN REYNOLDS: But that's not grammatically correct, is that? Never mind. We'll talk about it later on.

10 Commissioners Heriot and Gaziano, would you like to speak to your proposal?

11 COMMISSIONER GAZIANO: Commissioner Heriot?

12 COMMISSIONER HERIOT: My concern here is
that there may be a hiatus during which we don't have a quorum. And it's important to have something to do in January and February just in case the appointments are not made in time, something on the agenda.

We have already approved a concept paper for the school discipline topic that I have been worried that it is not just going to be one month that we're down for, maybe three. And it would be good to have some topics in place that we can at least hold a briefing, even if we don't have a quorum.

I think the gender gap in wages is an easy briefing to put together. There are experts on this one who would be willing to testify. And it's an interesting topic. And I think that it definitely deserves more discussion than it has gotten -- there has been pending Congress the Paycheck Fairness Act. Is that right, Paycheck Fairness?

It was voted down on a procedural matter. I think it was yesterday or the day before. But probably the issue is going to come up again. And during the discussion of that proposal, the wage gap issue came up a lot.

And I think that it's our role to enter into that discussion, go down a little deeper than the members of Congress are going down. And I think it
would make an excellent topic for a briefing.

I would like to vote on it today because I think that it is easier to put together this briefing than it is the school discipline briefing, that if we vote on it today, then we'll have two topics and staff will have some flexibility depending which one they schedule first, you know, which one goes in the January slot, which one goes in the February slot.

CHAIRMAN REYNOLDS: Okay. I'll treat that as a motion. And seconded?

COMMISSIONER GAZIANO: Sure. I just wanted to speak. I think this is an excellent topic that any future Commission ought to be equally interested in, too. So I think it's a good idea to put some things on our agenda in case there is a hiatus, but I am not saying that I necessarily expect one.

I think that given the activity in Congress and given the interest in this subject generally, that any future Commission should welcome qualified witnesses from every perspective to address.

So that's why I support the briefing, but I hope that this is something you think could be -- I suppose we can get a briefing later on where we are in
the other briefing, but I would hope that this one if we adopt it would be scheduled sometime early in the next year.

CHAIRMAN REYNOLDS: All those in favor please say "Aye."

COMMISSIONER YAKI: Discussion? Hello?

CHAIRMAN REYNOLDS: Generally you get my attention.

COMMISSIONER YAKI: I don't raise paper.

CHAIRMAN REYNOLDS: You raise paper.

COMMISSIONER YAKI: Sometimes I do raise paper.

Mr. Chair?

CHAIRMAN REYNOLDS: Yes?

COMMISSIONER YAKI: Once again, I would like to point out that while it is admirable that my colleague wishes to constantly participate in filling gaps in time in regard to the restoration of appointment of two other commissioners to this body, I think that, one, I think that it's premature to schedule briefings when others have not had any -- but, number two, from a practical perspective, even if this briefing were to go forward, I would request -- and, as a matter of practice, I think it will have to be this way -- how this goes forward is going to be
much different from the way briefings have gone forward in the past.

The Commission is going to be essentially a four/four split in terms of appointees, in terms of past appointees and present appointees. I think that my objections to briefings in the past and a lot of briefings that have occurred have been the imbalance of witnesses how have been called to testify on this.

And I would just simply say if there is any suggestion or semblance of any similar imbalance going forward in January, I think that will be changed or canceled or substantially altered, which is why, again, I think it is premature for us to go forward and attempt to do something.

When we do have additional commissioners, they are going to want the benefit of it being able to weigh in on this as well. And they will be doing so with only the badge of hindsight, rather than being able to directly hear the testimony of someone.

And maybe they would rather choose to focus on something else or it could be that, as was the case when I was first appointed, there was in some ways a more organizational type meeting.

You had just come on maybe a month or so before I had. And I think it's one of the first
things that we actually got together, to talk about how we are going to proceed going forward.

And that, in and of itself, is very useful because for the Board at that time, it helped set a lot of the ground rules on how we work together as a Board. And I think that is something that we should think about not preempting by trying to schedule something in January that there may be substantial disagreement going forward about who they decide and how they may proceed anyway, with or without the additional commissioners and notwithstanding whether or not Commissioners Melendez and myself are reappointed.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I just wanted to point out that when I came on the Commission, all sorts of things were already scheduled; in fact, had been going on for years. We had already picked up the topic for the enforcement report for year one. And then year two, we had done the same thing. And then year three, yet again the same thing. It's actually very common to schedule these things ahead of time.

CHAIRMAN REYNOLDS: If I recall, you expressed your displeasure --

COMMISSIONER HERIOT: I sure did. After
year three, it was getting a little tedious. But I think that, actually, we're doing a good thing by making sure there is some program going on during a period when we may not have commissioners, particularly January, when there is no way in the world we could put together a briefing in 30 seconds. And this way we will have something.

On the issue of imbalance, I hope that at this point we will take the opportunity to reorganize the way we do briefings. I have long advocated relying more on commissioners in getting witnesses to briefings.

You know, we have the unfortunate procedure now where we rely upon the staff to balance these briefings and hearings. And what happens is some people actually discourage witnesses from coming. And, as a result, the people, like Commissioner Yaki, who says sometimes that he is happy that witnesses are not here --

COMMISSIONER YAKI: I have.

COMMISSIONER HERIOT: Yes, you said that on the record.

COMMISSIONER YAKI: Yes. I have.

COMMISSIONER HERIOT: And --

COMMISSIONER YAKI: Because they would be
the only one versus a --

COMMISSIONER HERIOT: That is why I would like it to be the responsibility of commissioners to make sure that if they think some viewpoint is not being represented, they come up with a witness.

Note that other institutions that hold briefings, -- take the Congress -- they don't have a so-called neutral staff that comes up with witnesses. They have staff for the majority, staff for the minority. And they come up with their witnesses that way. And that way they get their witnesses, everybody is happy.

I think that works a lot better than putting staff members on the spot and having them try to come up with this just so they can be shot at when they are unsuccessful or even when they are successful. Even when the panels are very balanced, somebody is going to say they're not.

I think that Mr. Yaki should be in charge of naming the people that he wants to come.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Not trying to beat a dead horse, we are not Congress. We are an independent investigative body, appointed by both bodies. We are not here to -- I have to say this with
as straight a face as possible. We are not here supposedly to engage in quite the kind of partisan activity that Congress is, by its very nature is engaged in. And that reflects itself in the witness selection and information-gathering process. That is why we have a professional staff. That is why we have the professional Staff Director.

And I would just say that the fact of the matter is that, with all due respect to when you came on, Commissioner Heriot, -- and I understand your frustrations -- this is going to be a little bit different. You came on at a time when you were replacing someone that did not really change the dynamics of how the Commission was going to work.

That is going to be different with the addition of the two new members. It will change the dynamics of how the Commission works. I think it is incumbent upon us to figure out how we can all try and work together in a way going forward because I do not think that we have done as well in the past.

And that is why I do not want to preempt the January meeting for whoever the new Chair is, if there is a Chair appointed by that time, what have you, because we need to -- I think that there are serious questions that need to go forward from a
procedural and an organizational standpoint as to how we move forward given that the way the composition is going to in some ways affect the way the Commission does work. I am just trying to be practical.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: What happens if we don't adopt anything and the appointments have not been made?

COMMISSIONER YAKI: Well, then we --

COMMISSIONER TAYLOR: What happens?

COMMISSIONER HERIOT: There is no meeting because we don't have a quorum. You can't conduct business.

COMMISSIONER TAYLOR: So everything grinds to a halt?

COMMISSIONER HERIOT: It seems like a waste.

COMMISSIONER YAKI: I don't think it would grind to a halt. And the fact of the matter is that -- I mean, let's put it this way. I don't think that simply scheduling a briefing to fill the time to make sure we have a January meeting is sufficient in and of itself to go forward.

COMMISSIONER TAYLOR: To continue the work of the Commission?
COMMISSIONER YAKI: To process this and certainly not in the way that it has gone forward in the past. That's what I'm saying. If it were going to go forward, it has to be done much differently than it has been in the past. And if there is no commitment to doing it that way, then I see no reason we should have a briefing.

COMMISSIONER TAYLOR: Actually, I thought that you were very much open to changing the way it was done.

COMMISSIONER GAZIANO: I am certainly open to Commissioner Heriot's suggestion of making commissioners more responsible for supplying the witnesses if they believe the viewpoint isn't being represented, but I do think that that is possibly for another day. The issue before us now is whether to have the staff committed to doing the research and putting together this briefing.

And I suggest that since we all have confidence that Commissioner Yaki is going to seek and be reappointed, that he could provide the input that he thinks is necessary for the appropriate witnesses as the staff goes forward with this if we approve it.

And whether it's January 19 or February or whatever, I think the staff ought to be working on...
this project and ought to be free to schedule it at
one of our regularly scheduled meetings or early next
year.

CHAIRMAN REYNOLDS: Okay. One other
matter that we need to address or at least we should.
And that is, who is doing the work?

COMMISSIONER HERIOT: I think that we
ought to have a committee for all of these things. I
move that we have a committee.

CHAIRMAN REYNOLDS: OCRE or Staff
Director. That's what I have in mind.

STAFF DIRECTOR DANNENFELSER: OCRE.

CHAIRMAN REYNOLDS: Thank you.

COMMISSIONER YAKI: This is an OCRE thing.

CHAIRMAN REYNOLDS: Well, it could be the
Office of General Counsel as well.

COMMISSIONER HERIOT: I think that is
right that this is an OCRE kind of thing. And this is
numbers. This is quantitative.

COMMISSIONER YAKI: We agree. Make it so.

CHAIRMAN REYNOLDS: Okay. All right. It
makes sense. Although there is a concern, we have to
make sure that we find work for the Office of General
Counsel projects.

COMMISSIONER GAZIANO: I think they have
a role in many of these other things, in the Cy Pres, in the --

MR. BLACKWOOD: We have no role in Cy Pres.

CHAIRMAN REYNOLDS: That is not much work.

COMMISSIONER GAZIANO: There is a lot of legal research relating to -- we got a memo yesterday I think on authorities, which I haven't had a chance to read yet, but I think that is an important part of the Cy Pres project.

MR. BLACKWOOD: We will forward it to Mr. Byrnes.

COMMISSIONER HERIOT: Ready to vote?

CHAIRMAN REYNOLDS: And, Commissioner Yaki, are you going to vote from over there?

COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: Okay. All those in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Commissioners Yaki and Melendez?

COMMISSIONER YAKI: Abstain.

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Okay. Commissioner Yaki abstains. Commissioner Melendez abstains. I
support it, although I think that -- never mind. I support it.

COMMISSIONER MELENDEZ: I voted no.

CHAIRMAN REYNOLDS: That is correct.

UPDATE ON STATUS OF BRIEFING ON DISPARATE IMPACT IN SCHOOL DISCIPLINE POLICIES

CHAIRMAN REYNOLDS: Okay. At this point the Staff Director will provide us with an update on the briefing on disparate impact in school discipline policies.

STAFF DIRECTOR DANNENFELSER: Thank you, Mr. Chairman.

We sent letters to 28 school districts now requesting information relating to school discipline. And these are from the best we can determine the school districts that have been contacted by the Department of Education. We are also in the process of trying to identify teachers and other potential witnesses that could participate in such a briefing.

CHAIRMAN REYNOLDS: Once again, who owns this?

STAFF DIRECTOR DANNENFELSER: This is in the Office of the Staff Director.

CHAIRMAN REYNOLDS: Okay. Questions?

Commissioner Heriot?
COMMISSIONER HERIOT: Are we at a point where we are talking about discovery here? Because I have learned that the Department of Justice, their Educational Opportunities Office -- I'm not that certain of what that is; I would assume that is part of the Civil Rights Division -- also is bringing cases related to school disciplines. So I think in our discovery request, we need to have something of the Department of Justice as well.

CHAIRMAN REYNOLDS: Other comments? Questions?

COMMISSIONER GAZIANO: I'm not saying we shouldn't do discovery in aid of our briefing, but, as a matter of fact, it's usually very helpful, but at some point for a briefing we haven't necessarily wanted to exhaust every opportunity.

When do you think the staff would be ready on a --

STAFF DIRECTOR DANNENFELSER: Well, based on the current format, we were anticipating probably in February.

COMMISSIONER GAZIANO: Okay.

- UPDATE ON SEX DISCRIMINATION IN LIBERAL ARTS COLLEGE ADMISSIONS

CHAIRMAN REYNOLDS: Okay. If there are no
other comments or questions, Mr. Staff Director, next up is an update on the sex discrimination in liberal arts college admissions project.

STAFF DIRECTOR DANNENFELSER: There was a memo sent around by Mr. Byrnes earlier in the week that provided an update on this topic. So I believe that is probably about the most updated information. There was a conference call, I believe, also on November 12th with one of the colleges involved.

CHAIRMAN REYNOLDS: Comments? Questions?

(No response.)

CHAIRMAN REYNOLDS: Okay. At this point I guess we will have to close the meeting. Mr. Byrnes recommended that the discussion be held in closed session pursuant --

COMMISSIONER GAZIANO: Is Mr. Byrnes here?

CHAIRMAN REYNOLDS: No, he is not.

COMMISSIONER HERIOT: I don't think we need to. I don't think there is anything there.

CHAIRMAN REYNOLDS: Okay. Good, good, good. This goes faster.

- UPDATE ON CLEARINGHOUSE PROJECT

CHAIRMAN REYNOLDS: Next is an update on the clearinghouse project.

STAFF DIRECTOR DANNENFELSER: Thank you,
Mr. Chairman.

At one of the previous meetings, there was concern expressed about the Justice Department has not been responsive to our requests for clearinghouse project information since about January.

So a letter went in your name to the Department of Justice reminding them of their mandate to cooperate with the Commission in its work. And we have not received a response to that letter from them.

And I have asked the General Counsel if he could follow up with the Department in that he has established a liaison with the Department and if he could work through channels to see if we can try to get a response from the Department to that letter and hopefully perhaps a meeting with the appropriate staff at the Justice Department to determine how they can cooperate with this request.

CHAIRMAN REYNOLDS: Questions? Comments?

(No response.)

III. STATE ADVISORY COMMITTEE ISSUES

- KENTUCKY SAC

CHAIRMAN REYNOLDS: Okay. Next up is the State Advisory Committee issues. The meeting binder distributed by the Staff Director on October 14th and again on November 10th contained a recommended list of
candidates for the Kentucky State Advisory Committee. I move that the Commission recharter the Kentucky State Advisory Committee. Under this motion, the Commission appoints the following individuals to that committee based on recommendations of the Staff Director.

COMMISSIONER YAKI: We're discussing the sentences.

CHAIRMAN REYNOLDS: That's fine. Why don't you discuss it in the hallway?

Under this motion, the Commission appoints the following individuals to that committee based on recommendations of the Staff Director: Rosa Alvarado, Charles Badger, Juliet Banks, Richard Clay, Patrick Delahanty, Betty Griffin, J. Blaine Hudson, Vickie Maley, Linda McCray, Osi Onyekwuluje, William Summers, Christopher Thacker, Eugenia Toma, and Jim Waters.

Pursuant to this motion, the Commission reappoints J. Blaine Hudson as Chair of the rechartered Kentucky Advisory Committee. These members will serve as uncompensated government employees. Under the motion, the Commission authorizes the Staff Director to execute the appropriate paperwork.

Is there a second?
COMMISSIONER GAZIANO: Second.

COMMISSIONER TAYLOR: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All those in favor please say "Aye."

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Objections?

COMMISSIONER YAKI: I object.

CHAIRMAN REYNOLDS: Abstentions?

COMMISSIONER MELENDEZ: One.

CHAIRMAN REYNOLDS: Okay. We have three abstentions. I'm sorry. Commissioner Yaki, you abstained?

COMMISSIONER KIRSANOW: No. He objected.

COMMISSIONER YAKI: I voted no.

CHAIRMAN REYNOLDS: Okay. So we have two abstentions.

COMMISSIONER KIRSANOW: Mr. Chair, I just wanted to note for the record that my abstention is only due to the fact that I neglected to examine the biographical information to any of the individuals on any of these SACs that we will be voting on today due to my schedule. I apologize for that. So my abstention is not a reflection on the merits or
demerits of any particular candidate for appointment to the SAC.

CHAIRMAN REYNOLDS: Okay. We have one vote against this slate of candidates. Commissioner Yaki voted against the slate of candidates. Commissioners Melendez and Kirsanow abstained. The remaining commissioners voted in favor of the motion. The motion passes.

- MARYLAND SAC

CHAIRMAN REYNOLDS: Next up is the great State of Maryland. The binder that was distributed by the Staff Director on October 14th contained a recommended list of candidates for the Maryland State Advisory Committee.

I move that the Commission recharter the Maryland State Advisory Committee. Under the motion, the Commission appoints the following individuals to that committee based on recommendations of the Staff Director: Nicolee Ambrose, Jan Berlage, Leonard Haynes, Michael Krauss, George LaNoue, familiar names, Sock-Foon MacDougall --

COMMISSIONER YAKI: That's our Sock-Foon.

CHAIRMAN REYNOLDS: Yes. Thomas Mackall, Ken Masugi, Pace McConkie, Grace Gonzalez Mooney, Susannah Prucka, Paul Rensted, Tiffany Robinson, Gary
Rodwell, Genevieve Segura, Arnold Trebach, and Eric Washington.

Pursuant to this motion, the Commission reappoints Thomas Mackall as the Chair of this newly rechartered Maryland Advisory Committee. These members will serve as uncompensated government employees. Under the motion, the Commission authorizes the Staff Director to execute the appropriate paperwork.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor.

(Chorus of ayes.)

CHAIRMAN REYNOLDS: Abstentions?

COMMISSIONER YAKI: I abstain.

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: How about those who oppose?

COMMISSIONER MELENDEZ: Opposed.

CHAIRMAN REYNOLDS: Okay. Commissioner Melendez opposed the motion. Commissioners Kirsanow and Yaki abstained. The remaining commissioners voted in favor of the motion. The motion passes.
CHAIRMAN REYNOLDS: Next up is the Vermont State Advisory Committee. The meeting binder was distributed by the Staff Director on October 14th and November 10th. The binders contained a recommended list of candidates for the Vermont State Advisory Committee.

I move that the Commission recharter the Vermont State Advisory Committee. Under the motion, the Commission appoints the following individuals to that committee based on recommendations of the Staff Director: Francine Bazlule, John Bloomer, Luther Brown, Ann Cardinal, Ellen Fallon, Leslie Holman, Gary Kowalski, Terrance Martin, Marion Milne, Cheryl Mitchell, Tara O'Brien, Curtiss Reed, Eric Sakai, Stefanie Sidortsova, Diane Snelling, Tracey Tsugawa, and the Rt. Rev. R. Steward Wood.

Pursuant to the -- well, actually, we have a little controversy. Apparently there were some statements made by one of the candidates, Curtiss Reed, that has caused concern with several commissioners.

It is my recommendation that we provide Mr. Reed with an opportunity to respond to any concerns that the commissioners have. That is what we
have done in the past when we have had issues with candidates. I suggest that we use that same approach.

COMMISSIONER HERIOT: So you are saying we should table this until --

COMMISSIONER GAZIANO: We should just postpone if the Chairman is --

COMMISSIONER HERIOT: "Table" is the wrong word. Yes.

COMMISSIONER YAKI: I would move to postpone. I just got a letter from the SACs unanimously recommending Mr. Reed. So I want to read what is going on.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: Yes. And --

COMMISSIONER YAKI: It was from the entire SAC until --

CHAIRMAN REYNOLDS: Yes, but in the meantime --

COMMISSIONER GAZIANO: I agree with that, but, just to be clear, I would ask someone on the staff to direct to Mr. Reed's attention two matters at least that have been brought to my attention: an op. ed. that he wrote titled "Pure Vermont: Is Pure Invalidation?"

And then the other is a Vermont Public
Radio interview that I have seen a transcript of for April 29, 2008.

And just ask him if he has anything to explain. But I would ask the staff to help and send him an excerpt of that Vermont Public Radio. Maybe he thinks it is taken out of context, and I would like to hear from him on that.

CHAIRMAN REYNOLDS: Would it be more helpful if specific concerns were forwarded so that -- I mean, he knows or should know what he said.

COMMISSIONER GAZIANO: I don't know that he knows what he said. I'd rather not in a public meeting.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: If he has an opportunity to --

CHAIRMAN REYNOLDS: But you can voice --

COMMISSIONER GAZIANO: Sure. We'll supply the information.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: But I would like this scheduled for a vote at the next meeting.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: That means that we need to request him to respond, I believe, we have our
COMMISSIONER GAZIANO: The Monday before our next meeting.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: The Monday before our next meeting.

CHAIRMAN REYNOLDS: Yes. This individual will have approximately a month.

COMMISSIONER GAZIANO: No, not -- the meeting is in early December.

COMMISSIONER HERIOT: The meeting is in early December.


- WISCONSIN SAC

CHAIRMAN REYNOLDS: In any event, next up is Wisconsin. Yes?

COMMISSIONER YAKI: I think that Wisconsin probably deserves the same treatment as Vermont. I will forward. Without getting into naming names or what have you, there are some concerns about statements and activities of one of the members that may actually have triggered by this time an investigation.

So I would like to without revealing the
person's name postpone it. I will communicate it to the Staff Director. And they can research what this person might have done.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: Will you share that?

COMMISSIONER YAKI: Sure. Yes, yes.

- UPDATE ON STATUS OF REMAINING SACS TO RECHARTER

CHAIRMAN REYNOLDS: Okay. In that case, we're going to receive an update on the status of remaining SACs that need to be rechartered. Several months ago the Staff Director distributed a helpful spreadsheet that listed the status of all of our SAC recharterings.

I would ask that the Staff Director provide an update of that list, focusing on the remaining SACs to be rechartered, the last rechartering date of those SACs, and when the Staff Director expects to receive the proposed rechartering packages for review from regional offices.

STAFF DIRECTOR DANNENFELSER: Thank you, Mr. Chairman.

I have received packages for several of these. Right now we have received Alaska, proposed package for Alaska. Proposed package just came in
yesterday for North Dakota. I believe it was the day before yesterday. And also Minnesota and Illinois and North Carolina.

So those are packages that are being reviewed within the Office of the Staff Director. We have actually reviewed Alaska and North Carolina. At this point we are beginning to review North Dakota, Minnesota, and Illinois.

We are also anticipating very shortly the Idaho package.

CHAIRMAN REYNOLDS: Okay. You three now since the party has been expanded, pass notes or migrate to the hallway.

COMMISSIONER YAKI: But then you might lose the quorum.

CHAIRMAN REYNOLDS: Then stand at the edge of the room.

(Laughter.)

CHAIRMAN REYNOLDS: I'm sorry.

STAFF DIRECTOR DANNENFELSER: Okay. Let's see where we were here. I do anticipating receiving Idaho within the next few days. And there's also the Eastern Regional Office is working on Rhode Island and Delaware. So I expect to receive those also perhaps within the next few days.
New York and West Virginia will take a little bit longer. And probably one of those will come in, I anticipate receiving one of those, in January. That would potentially make it available for the February meeting and another one in March. That would potentially make it available for an April meeting.

I do anticipate receiving Montana earlier than that date, although I don't have a precise timeline on when we might receive Montana. And I would expect that would probably be within the next month.

CHAIRMAN REYNOLDS: Is that it?

STAFF DIRECTOR DANNENFELSER: Yes.

CHAIRMAN REYNOLDS: Okay. Questions for the Staff Director?

(No response.)

CHAIRMAN REYNOLDS: Okay. Well, next up --

COMMISSIONER KIRSANOW: Mr. Chair, before we move on, can I talk about the agenda?

CHAIRMAN REYNOLDS: That is correct.

COMMISSIONER KIRSANOW: This is a little bit out of order, but it relates back to the approval of the findings and recommendations for the
English-only in the workplace rules.

It's come to my attention that a few days ago the EEOC had announced that it was planning to issue guidance on the English-only in the workplace rules.

So I think it might be a good idea for us to transmit to the EEOC our findings and recommendations so that they have that before them in their deliberations prior to issuance of any guidance. And I would move that we do that as expeditiously as possible.

CHAIRMAN REYNOLDS: Okay. I second it.

Discussion?

(No response.)

CHAIRMAN REYNOLDS: All those in favor?

(Chorus of ayes.)

CHAIRMAN REYNOLDS: The obligatory no?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Commissioner --

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Okay. We have one abstention from Commissioner Yaki, one -- I'm sorry -- Commissioner Melendez, one objection from Commissioner Yaki. The remaining commissioners support the motion. It passes.
IV. MANAGEMENT & OPERATIONS

- EXPIRATION OF COMMISSIONER TERMS

CHAIRMAN REYNOLDS: Next up is a discussion of the expiration of commissioner terms. Mr. General Counsel, will you please provide us with an update and discussion of that memo that you prepared?

MR. BLACKWOOD: There is no real update, but I would like to remind people of the various termination dates. For presidential appointees --

CHAIRMAN REYNOLDS: Expiration.

MR. BLACKWOOD: Expiration dates. Sorry.

COMMISSIONER HERIOT: It's all right.

MR. BLACKWOOD: For presidential appointees, it's December 5th. For Senate appointees, it's December 12th. For House appointees, it's December 15th. I'll be glad to address any questions, but that is really the bottom line.

COMMISSIONER HERIOT: I have a feeling, Mr. Chairman, we can properly term it emancipation date.

CHAIRMAN REYNOLDS: Any questions for the General Counsel?

COMMISSIONER TAYLOR: Is there a rebuttal procedure for when the terms expire?
CHAIRMAN REYNOLDS: No.

COMMISSIONER TAYLOR: Okay.

COMMISSIONER GAZIANO: I take it your application is pending with President Obama?

COMMISSIONER TAYLOR: It is. And I am seeking recommendations from all current members.

V. APPROVAL OF MINUTES OF OCTOBER 8 MEETING

CHAIRMAN REYNOLDS: Next and, with any luck, the last item. Okay, folks. Let's keep it together. We're almost done.

The next item on the agenda is the approval of the October 8th, 2010 minutes. These minutes were distributed by the Staff Director on October 14th, 2010 and again on November 10th.

I move that these minutes be approved. Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER TAYLOR: I just wanted to clarify that Kim was not on the line at that meeting. It indicates that she was.

CHAIRMAN REYNOLDS: Okay. So, with that correction, let's vote. All those in favor please say "Aye."

(Chorus of ayes.)
CHAIRMAN REYNOLDS: Objections?
(No response.)

CHAIRMAN REYNOLDS: Abstentions?
COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Okay. We have one abstention: Commissioner Kirsanow. The motion passes.

Folks, we are adjourned.

(Whereupon, the foregoing matter was concluded at 11:35 a.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Meeting

Before: US Commission on Civil Rights

Date: 11-19-10

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]

Court Reporter