U.S. COMMISSION ON CIVIL RIGHTS
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COMMISSION MEETING
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FRIDAY, DECEMBER 4, 2009

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

PRESENT:

GERALD A. REYNOLDS, Chairman (via telephone)
ABIGAIL THERNSTROM, Vice Chairman (via telephone)
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner (via telephone)
PETER N. KIRSANOW, Commissioner (via telephone)
ARLAN D. MELENDEZ, Commissioner
ASHLEY L. TAYLOR, JR., Commissioner (via telephone)
MICHAEL YAKI, Commissioner
MARTIN DANNENFELSER, Staff Director
STAFF PRESENT:
DAVID BLACKWOOD, General Counsel, OGC
CHRISTOPHER BYRNES
PAMELA A. DUNSTON, Chief, ASCD
ROBERT LERNER, Asst. Deputy Staff Director
TINALOUSE MARTIN, Director, OM
EMMA MONROIG, Solicitor
MICHELE RAMEY-YORKMAN
LENORE OSTROWSKY
KIMBERLY TOLHURST
AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

ALEC DEULL
TIM FAY
DOMINIQUE LUDVIGSON
JOHN MARTIN
ALISON SCHMAUCH
KIMBERLY SCHULD

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VI. Adjourn
CHAIRMAN REYNOLDS: All right, we're going to start. Ashley will join us later.

Good morning, this is Chairman Gerald Reynolds. This meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. It's 9:32 Eastern Standard Time on December 4, 2009.

Commissioners Melendez, Yaki, and Gaziano are present at 624 9th Street, N.W., Room 540, Washington, D.C., where the meeting is being held. All other Commissioners with the exception of Commissioner Taylor, who I believe will be joining us later, are participating by phone.

To assist the Court Reporter, I'd like to remind everyone participating by phone that if they wish to make a statement, they should state their name first. Whenever it is necessary to take a vote, the following proceeding will be followed: I will call out the name of each Commissioner. The Commissioner should answer yes, no, or abstain. After the voting is concluded I will read out how each of you has voted in order to ensure that the tally is correct.

Approval of Agenda

CHAIRMAN REYNOLDS: The first item on the
agenda is the approval of the agenda. I move that we
approve the agenda. Actually, I move that we amend
the agenda by adding the third healthcare letter to
program planning.

Is there a second?

COMMISSIONER KIRSANOW: Kirsanow seconds.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER YAKI: I'd like to make

another -- this is Commissioner Yaki. I'd like to

make another amendment.

CHAIRMAN REYNOLDS: Related to this one?

COMMISSIONER YAKI: Related to the agenda.

COMMISSIONER HERIOT: You've got to go

through this amendment first.

CHAIRMAN REYNOLDS: So this is on a

friendly amendment?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Okay. Commissioner

Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: You'd like to discuss

this motion?

COMMISSIONER KIRSANOW: I'd simply like to

amend the agenda. I second amending the agenda to

place this consideration of the letter pertaining to
the Senate's healthcare bill on the first item of program planning.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: Is there any discussion or can we vote?

VICE CHAIR THERNSTROM: Mr. Chairman, I have a question to raise about this. And by the way when you stated who was at the Commission itself as opposed to phoning in, you didn't mention yourself, where are you?

CHAIRMAN REYNOLDS: Oh, very good. I'm in Kansas City.

VICE CHAIR THERNSTROM: Okay. I'm bothered as I have been so often by the facts that this letter came last night, I believe it was. I thought we had an agreement of a seven-day notice. I at least would have liked the time to really go over this and go over the actual legislative language and so forth. It just comes too late to do a responsible job. This is an old story. There's numerous instances of it. It really bothers me.

As I say, I think it's a matter of responsibility on the part of Commissioners to have the time to review the material properly.

CHAIRMAN REYNOLDS: I think your concern
is a legitimate one. Would anyone like to respond or add to it?

COMMISSIONER GAZIANO: I think when we get in the discussion that that's more relevant to the discussion of whether we should approve it, extend time to work with language, but I am certainly comfortable with putting it on the agenda. And I think we should put it on the agenda.

COMMISSIONER YAKI: This is Commissioner Yaki. I think that the point that Commissioner Thernstrom raises is a good one in that --

VICE CHAIR THERNSTROM: I can't hear people. You're going to have to speak up in some way.

COMMISSIONER YAKI: Commissioner Thernstrom, can you hear me now?

VICE CHAIR THERNSTROM: I can hear you now, but I couldn't hear anything you said before that.

COMMISSIONER YAKI: What I was saying is that I would like to agree with the statement that you made, Commissioner Thernstrom. I believe that to put it on the agenda in and of itself states that we are ready to discuss it and I think that the point that you made is that we are not yet in that position. The draft should have been circulated well in advance of
this meeting in order to qualify for the agenda. And therefore, I will support you in voting against having this being put on the agenda.

VICE CHAIR THERNSTROM: This is Commissioner Thernstrom again. I'm just not ready to discuss this letter at all. So putting it on the agenda, I agree, put it on the agenda as soon as we're ready to discuss it. I'm frankly just not ready. I don't think I could have been ready.

COMMISSIONER GAZIANO: Well, since it's very similar to the letter we previously approved --

VICE CHAIR THERNSTROM: It doesn't matter on the similarity. I mean I would have to look at the similarity and the differences and figure out, you know, I am not ready to discuss things on a dime on this Commission. These things require a courtesy of giving us time, but also I just don't want to do things in a sloppy way.

COMMISSIONER KIRSANOW: Mr. Chairman, this is Kirsanow. Since this is my motion, and my letter or at least generated by me, I think that those points are well taken. I do think these are not that complex. It is very similar to the previous letters Commissioner Gaziano just indicated. Nevertheless, I think the point is well taken that Commissioners
should have an appreciable period of time to at least consider this letter and I would be open to, if not discussing this right now, although I think we could have a discussion, I think there is some timeliness issue pertaining to this. I know that the healthcare debate is currently under way. I don't know when it will conclude. I think that it is important for us to weigh in otherwise it becomes moot.

So with that in consideration, I would be open to, for example, conducting may be a poll vote or a teleconference saying within a week or so from now, as opposed to having a vote today to give Commissioners sufficient time to take a look at the letter.

COMMISSIONER GAZIANO: I'm not sure how we could notice that, Commissioner Kirsanow. I thought that if we advanced it on our agenda we could discuss those kind of options when we actually discuss the letter.

COMMISSIONER HERIOT: This is Gail Heriot. From what I understand our plan is not to approve the letter, but rather to approve the contents of the letter today and then to have a few more days to negotiate the language and given the pressing nature of this issue, I would think we need to proceed.
CHAIRMAN REYNOLDS: We have two issues at play here. I think that Vice Chair Thernstrom is right on several levels and it is a matter of common courtesy and also if she believed that she needs a reasonable amount of time to review the letter and any related materials, I think that that is legitimate.

COMMISSIONER HERIOT: Well, sure it is.

CHAIRMAN REYNOLDS: But we have to balance that against the timeliness issue. I think that Commissioner Kirsanow offered up a way to balance the two issues.

COMMISSIONER HERIOT: But we'd have to notice that, wouldn't we? So that would be a 14-day delay. Is that going to be too much?

CHAIRMAN REYNOLDS: It would be 14 days? Is the General Counsel there?

STAFF DIRECTOR DANNENFELSER: Mr. Chairman, we have a telephonic meeting scheduled on December 16th, which is 12 days from now.

CHAIRMAN REYNOLDS: Okay, very good.

COMMISSIONER HERIOT: Is that going to be on time given the Senate debate process that's already underway there?

CHAIRMAN REYNOLDS: Okay, I'm sorry, let me jump in for a moment with a different issue.
Is Commissioner Taylor on the phone?

Okay. I have a message from him that he's on hold, so could someone contact the operator and see if they can get him in the right queue.

COMMISSIONER YAKI: Mr. Chair, we did hear a beep coming in. Did someone else other than a Commissioner join the line?

VICE CHAIR THERNSTROM: Right. I heard the beep as well.

CHAIRMAN REYNOLDS: Okay, who is the last person to join us?

VICE CHAIR THERNSTROM: I am, I think.

COMMISSIONER YAKI: But that was subsequent to your joining.

VICE CHAIR THERNSTROM: Right, but after that there was a beep.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: It could be someone leaving the line, too.

CHAIRMAN REYNOLDS: Do you think that's sufficient time? Do you think that would be too late if we wait until the scheduled teleconference to vote on this issue?

COMMISSIONER GAZIANO: This is Commissioner Gaziano. I think it might be too late
from what I hear, although if you want to have the whole discussion in the motion to put it on the agenda, I can explain why, but I just wonder why we can't discuss this once it's put on the agenda.

COMMISSIONER KIRSANOW: Mr. Chairman, this is Kirsanow. Two things: one is this is the motion to place it on the agenda. And then I think we could have a discussion as to whether or not it's too late, too early or whether we should defer this to December 16th, if in fact, the letter is place on the agenda at the time that we would consider that discrete item.

COMMISSIONER YAKI: This is Commissioner Yaki. I just wanted to state that the point that Commissioner Thernstrom was making is that she's not prepared to discuss it at all, which is why she objected to it going on the agenda.

CHAIRMAN REYNOLDS: No, she discussed discussing the merits.

VICE CHAIR THERNSTROM: This is Commissioner Thernstrom. There's no point to putting it on the agenda if we can't discuss it. I can't discuss it at this point.

CHAIRMAN REYNOLDS: Well, if we put it on the agenda, we can continue this conversation in an attempt to find a reasonable compromise. At least my
position is that we won't vote on this today.

COMMISSIONER KIRSANOW: I have a question.

CHAIRMAN REYNOLDS: I'm sorry?

COMMISSIONER KIRSANOW: I call the question.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: I'm going to vote no.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: No.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Commissioner Taylor, are you on the phone?

COMMISSIONER TAYLOR: I am, yes.

CHAIRMAN REYNOLDS: Have you been listening to this?

COMMISSIONER TAYLOR: No, I thought my
secretary was trying to get through. I apologize.

CHAIRMAN REYNOLDS: Okay, well, I vote in the affirmative. So Commissioners Thernstrom, Melendez and Yaki voted no. Commissioners Gaziano, Heriot, Kirsanow, and the chairman voted yes. Commissioner Taylor says he didn't hear the exchange, did not vote. The motion passes.

The next thing up is -- I have an additional change. Just to fix a typo under Roman numeral four, the section in the minutes. We are reviewing minutes for the October 16th, not the October 15th minutes, so I'd like to fix that typo. Do I have a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Do we need discussion? Okay.

COMMISSIONER YAKI: I have an amendment to the agenda.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.
CHAIRMAN REYNOLDS: Commissioner Kirsanow?
COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: I'm sorry, what was that?
COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: Okay, and I vote for it also, so it is unanimous.

VICE CHAIR THERNSTROM: You can probably do things like that without objection.

CHAIRMAN REYNOLDS: Well, at one point I thought that too, but sometimes I'm wrong.

(Laughter.)

CHAIRMAN REYNOLDS: Okay, yesterday, Commissioner Kirsanow circulated a draft --

COMMISSIONER YAKI: Commissioner Yaki has another amendment.

CHAIRMAN REYNOLDS: Yes, thank you.

Commissioner Yaki.

COMMISSIONER YAKI: Nor have we approved
the agenda, as amended, either.

I just wanted to ask that given the fact that briefing reports have kind of been shoved in lots of different binders that go back and forth across the country for me, I do not have my marked up copy of the briefing report on covert wiretapping with me and ask that it be pushed back to the next meeting in Washington, D.C. for review and approval.

CHAIRMAN REYNOLDS: I second that.

Discussion?

(No response.)

Okay, again, discussion, comments?

(No response.)

Okay, let's vote. Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Pass.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: I vote in favor of it also.

COMMISSIONER GAZIANO: And if no one else objects, I will not object.

CHAIRMAN REYNOLDS: Is that a yes?

COMMISSIONER GAZIANO: Yes, that’s a yes.

If no one is upset by the delay, I will go along.

CHAIRMAN REYNOLDS: Okay, all Commissioners, with the exception of Commissioner Kirsanow, voted in favor of the motion. Commissioner Kirsanow abstained. The motion passes.

I move that we accept the agenda as amended. Is there a second?

COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: Discussion?

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

Commissioner Kirsanow?
COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote in favor of it also. So we have abstentions from Commissioners Melendez and Yaki. The remaining Commissioners voted in favor. So the motion passes.

Yesterday, Commission Kirsanow circulated the draft letter to the Senate regarding racial preference provisions in H.R. 3590 for Commission approval. The email contained the draft letter. Our October 9, 2009 letter regarding a House version of a healthcare bill, along with the section of the bill referenced in the draft letter for Commission review.

Commissioner Kirsanow, I open up the floor.

COMMISSIONER KIRSANOW: I think I am going to address the issue that was raised by both Commissioners Yaki and Thernstrom which I think are important issues with respect to the timing of this. I concur with that. We need to give Commissioners
sufficient time to consider matters that are going to be voted on and especially letters that are going to go out to the public.

In fact, this was a pet peeve of both Vice Chair Thernstrom and mine years ago when we would be presented with a fait accompli, I am particularly sensitive to that issue.

This is something that has computer issues here though. The problem we were facing in terms of the timing of this is as follows: we have, although I haven't counted the pages, it's widely represented that it's a 2000-page Senate healthcare bill and I understand that all would like to read it despite the fact that many, I think are not going to.

What was presented to us just a short time ago and we considered it for purposes of doing our statutory duty in terms of the impact it may have on civil rights issues. I apologize for getting the letter out the day before a Commission meeting. Unfortunately, considerable time and effort went into the deliberation, drafting, reading the bill to ensure we found the appropriate provisions that we hit on and were placed in a different posture.

If we don't vote on this thing within the next few days, if we defer to December 16th, our
letter will become moot because the reports that we have are that the Senate would like to have passed this thing yesterday.

There's no indication to when it will pass. I understand a number of amendments would have been offered, but all of the reports that I see regarding the consideration of the Senate healthcare bill is this thing must pass immediately and I think some of the reasoning indicated that it will be done before Christmas.

So for that reason for us to have any kind of an impact other than simply engaging in scholarly pursuit that will have no bearing whatsoever and simply be relegated to a dustbin, I think we have to get this out with some degree of veracity and I don't know if we can wait until December 16th to do so.

This is an unusual circumstance. Normally, we're not placed in a position where we get a voluminous piece of -- a voluminous document that we've got to consider and then we only have a short period of time in which to weigh in on it, but in the Commission meeting the subject of the particular Commission meeting will be worked on or completed or voted on by the appropriate body.

So although I am perfectly willing to
defer voting on it today, although I'm prepared to do so, I think that this is something that can't wait until December 16th and I'd be open to suggestions as to whether or not we can conduct a quorum vote at some later point or if we can get a sense of how people stand now.

The way the motion is currently drafted is that we vote today with -- and if it passed, then amendments could be made where it would be tweaked or tempered just as we have in the past. I know that may not be acceptable to some, but unfortunately we are in the position where waiting until December 16th, the vote may have already been conducted on the entire bill on December 15th.

COMMISSIONER GAZIANO: Mr. Chairman?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER GAZIANO: Let me just ask our General Counsel or our Staff Director a question about a notational vote, whether that needs the same type of Federal Register notice and the same time period, if that is an option for us, because I will explain after that what I hear about the timing of the Senate bill.

MR. BLACKWOOD: This is David Blackwood. Unfortunately, I don't have my files relating to that topic. We do have an AI directly related. And I have
just sent one of the attorney advisors to go upstairs
to try to locate the information.

My recollection though is we can have what
is called an emergency notational vote. I believe
it's five days, but we need unanimity among the
Commission to agree to that. All this, by the way, is
subject to my actually pulling down the AI and
bringing it here.

We can also schedule a non-emergency
notational vote, but I can't recall how long that
takes. It's going to be close to the 16th though.

COMMISSIONER GAZIANO: Okay. Based on --
if before the end of our meeting we can revisit this
issue, there's some way that we can agree unanimously
to a notational vote on a date certain, you know, six
days away, then I think that might work. Other than
that, I would like to go with the motion as
Commissioner Kirsanow has described it which is
similar to what we've done with some other letters.

And I'll explain why and that is that we
agree to circulate our revisions to the draft letter,
that Commissioner Kirsanow then submits to all of us a
revised version that attempts to incorporate all of
our amendments, those of us who are inclined to join
the letter, and that we vote today, failing some other
provision that if that letter secures a majority of Commissioners, that it be sent as soon as possible to the relevant addressees.

From what I hear, Senator -- news reports are that Senator Reed is looking for 60 votes on any substantive provision. He only had that bare minimum on a motion to proceed, but as soon as his negotiations secure that, he will file cloture and that will ripen within two or three days and the Senate will adopt it. It could come before December 16th. It's anybody's guess and given that the provisions in the Senate bill are very similar to the House bill, that the letter that Commissioner Kirsanow has circulated is very similar, makes the same points as the previous letter, I think that we, within four or five days, a notice say Monday or Tuesday can get our comments back to Commissioner Kirsanow for inclusion in the letter and we can vote on that process today.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, how do you view this suggestion that we have a notational vote in four or five days?

VICE CHAIR THERNSTROM: I can go with that. I missed most of that conversation because a phone call came in that I had to get, I had to pick it
up. But I'll go along with that.

    CHAIRMAN REYNOLDS: Okay, if that's the case then I think that we need to determine right now whether we have unanimity because it's not an option if we don't. General Counsel indicated that he is sure that would require unanimity. He speculates that's the case, but may be we should hold off until we're certain and see what he provides.

    COMMISSIONER GAZIANO: Yes, perhaps we can postpone this to another portion of the agenda.

    Program Planning

    CHAIRMAN REYNOLDS: Okay, we'll do just that. If that's the case then we're going to move on to the update on the 2010 Enforcement Report. During the November 20th meeting Commissioners approved the discovery plan and project outlined for the 2010 Enforcement Report prepared by the General Counsel with some minor amendments by Commissioner Gaziano. The Commission has also approved a motion by Commissioner Gaziano governing the depositions in the enforcement investigation related to the New Black Panther Party. On November 25th, the General Counsel circulated a letter received from the Department of Justice pertaining to subpoenas issued to DOJ personnel.
Mr. Blackwood, please provide us with an update.

MR. BLACKWOOD: This David Blackwood. Per our rules, I won't mention any specific names of individuals, but I will fill you in with regard to where things stand.

The Department of Justice --

COMMISSIONER YAKI: Point of information, since Washington Times and other articles seem to be throwing people's names about, how does that relate to our rules?

VICE CHAIR THERNSTROM: I'm having trouble hearing Commissioner Yaki.

COMMISSIONER YAKI: I will put on my Commissioner Thernstrom voice. I was asking, Commissioner Thernstrom, given the fact that the Washington Times and other organizations seem to be bandying about names rather freely how that impacts our ability to say or not say anything during these discussions.

MR. BLACKWOOD: This is David Blackwood again. My view is our rules are our rules. Obviously, people have leaked specific names and for whatever reason have made that public. I don't believe anybody here has. If the Commission wishes to
use the names, I don't object.

COMMISSIONER GAZIANO: I appreciate the question, Commissioner Yaki, because I had the same sort of question. As I understand it from one reporter who called me and asked for a confirmation and I refused under our rules, we acknowledged that those deposed are free to speak to the press, or their attorneys are free to speak to the press, but that if we -- as I thought about it, if we make it a practice of confirming or not confirming, that creates a larger problem. Newspapers could then print stories speculating that we have subpoenaed X, Y, and Z and then they could call us for confirmation. And once we go down the road of confirming some, I'm not sure how we confirm some and deny others.

But those who we subpoena want to go public, then we shouldn't try to stop that.

MR. BLACKWOOD: The alternative would be that we go into executive to discuss the specific individuals. We could do that as well.

CHAIRMAN REYNOLDS: My preference is that we don't, but if someone has strong feelings, I'll defer.

(No response.)

Why don't we proceed and see where the
discussions take us. Just be mindful that once we get close to the line, then we have to revisit the issue of going into closed session.

MR. BLACKWOOD: With regard to, as per our rules, allowing discussion with regard to institutional entities, we are preparing discovery requests directed to the Department of Justice which per the prior vote will be accompanied by a subpoena and also a letter addressing some of the issues raised by the Department of Justice in other correspondence.

We will then -- the purpose of that letter, frankly, is to ask the Department of Justice to meet to discuss the discovery requests and review them so we can determine those items as to which there is no dispute.

Per the plan, those discovery requests are not limited to the specific incident of the New Black Panther Party, but also include past cases of voter intimidation and how those have been treated by the Department of Justice.

CHAIRMAN REYNOLDS: Mr. Blackwood, is that all?

MR. BLACKWOOD: That is all I have, yes.

CHAIRMAN REYNOLDS: Okay, does anyone have any questions or comments?
COMMISSIONER YAKI: Yes, I have some questions. In terms of the discovery that we may be propounding to the Department of Justice, I wonder what the procedure is for adding in certain incidents that I think did go to Justice and were not investigated and will be part of the discussion of the use or not use of this Act or other forms of judicial injunctive or declaratory relief on these issues.

MR. BLACKWOOD: I can only say the discovery requests include virtually anything that was reported to the Department of Justice, anything they investigated, anything they then decided to pursue relating to the statute that we were examining.

COMMISSIONER YAKI: True, but how about specific instances of, for example, in 2006, during the November 7th general election, attorneys witnessed individuals aggressively intimidating Latino voters at a polling place in Tucson, Arizona. One of these individuals wore dark clothing, had a badge-like emblem on his jacket and carried a handgun. In addition, they attempted to intervene to ask anyone who they deemed to be of Latino descent questions including writing down personal information and videotaping them and the license plates of their cars as they went to vote. This was brought to the
attention of the Department of Justice and I'd like to
know whether they considered this a kind of
intimidation worthy of investigation and whether the
statute was considered.

In addition, in Louisiana in 2006, in a
mayoral election which race was a significant issue, a
cross burning incident occurred on public property and
there were those who believe that this was a tool to
intimidate primarily African-American voters on that
election.

And finally, in the time period leading up
to the November 7, 2006 elections, a major party
congressional candidate in Orange County, California
mailed a letter to 14,000 registered Latino voters or
Hispanic-surname voters written in Spanish, stating
that immigrants may not vote, even though of course,
naturalized citizens who are immigrants may vote, that
-- who have registered to vote -- and that the letter
also stated there's no benefit to voting in U.S.
elections. This was again given to the Department of
Justice to investigate as an issue of voter
intimidation. And I'd like to know whether or not DOJ
at that time considered this case and whether or not
they considered the use of that statute for the
purposes of creating enforcement or an injunction
against such actions occurring in the future.

MR. BLACKWOOD: Those questions can certainly be added. We have no limitation on the number of questions. I do think those would be covered by what is already drafted, but we can certainly identify specific incidents and ask for their reaction.

COMMISSIONER YAKI: What is your deadline for sending these over?

MR. BLACKWOOD: We were planning to send them out actually today, but that said, we have no limitation and can add as we go along. I did not anticipate that frankly the initial discovery requests were going to be the end of the line.

COMMISSIONER YAKI: Well, I'd like this sent in the first packet if possible. If not, then immediately the following day and I will get this over to you for inclusion.

MR. BLACKWOOD: Okay.

CHAIRMAN REYNOLDS: Any other questions?

COMMISSIONER YAKI: I have another questions.

CHAIRMAN REYNOLDS: Yes, Commissioner Yaki.

COMMISSIONER YAKI: Where are we in terms
of identifying additional witnesses who reside in the voter jurisdiction or precinct at issue as well as the registrar of voters or superintendent of elections or whatever it is they call it in Pennsylvania, equivalent in terms of the possibility of having a hearing in Pennsylvania?

I again reiterate the fact that I believe that if we're going to have hearings on this issue, at least one of them should occur in Philadelphia approximate to the polling place at issue. I think it is a way in order to ensure that a broad cross section of individuals who may or may not have experienced the -- what has been alleged in the complaint and what has been alleged in this investigation will give them the ability to come forward, make their views known, as well as to use our subpoena power by having a hearing in that area to ensure that the appropriate election officials are invited as well.

MR. BLACKWOOD: This is David Blackwood again. We have, and I'm not going to identify any specific individuals, by reaching out to both political party organizations, we have identified additional poll watchers who were on the site. We've had difficulty actually talking with them, however. One of them does not have a phone, but we have sent
several letters and recently have confirmed by use of certified mail that they do reside there.

Our next step, and I do believe I will be visiting Philadelphia again is to try to talk to those individuals. In addition, we have identified Democratic poll watchers as well, but that was just recently and we need to confirm the address and phone number that we received.

COMMISSIONER YAKI: And what is the restriction on -- when you say you're visiting Philadelphia are you interviewing potential witnesses? Is that essentially what you're doing? And what are the restrictions on Commissioners attending those kinds of witness interviews?

MR. BLACKWOOD: At this time it would depend on the initial contact that we have. I don't see going to Philadelphia when I have not contacted somebody to say I will be there on such and such a date.

COMMISSIONER YAKI: Right.

MR. BLACKWOOD: If was going to be just in the nature of an interview, I have no problem identifying when the time and place is and making it so someone can accompany me or whatever alternative. But certainly the depositions as we discussed, the
Commissioners have an absolute right and we have taken steps to set up telephonically that those are available to you or access is available.

COMMISSIONER YAKI: I would just request as a courtesy that if you do identify individuals who you wish to go to Philadelphia to interview, that you inform the Commission or at least me in a timely manner because I would be probably interested in attending.

CHAIRMAN REYNOLDS: I'm sorry, Commissioner Yaki, please speak up.

COMMISSIONER GAZIANO: Use your Darth Vader voice.

COMMISSIONER YAKI: Chairman Reynolds, what I was asking, Mr. Chair, and this is very odd because the mic is about half a millimeter away from where I'm talking, what I was asking is that given the fact I would hope that the General Counsel, if he has identified individuals in the Philadelphia area and Philadelphia precinct that he is going to go and interview, that he provide the Commission or at least me with sufficient notice because I would be interested in attending any witness interviews at that point.

CHAIRMAN REYNOLDS: Okay, now is your
intent to participate in the questions or to observe?

COMMISSIONER YAKI: Well, I would say, I
would simply hark back to another moment in our
nation's history and just simply say I don't think I
would be there as a potted plant.

(Laughter.)

CHAIRMAN REYNOLDS: But maybe you need to
be there as a potted plant. I don't have any concerns
with your attending it, but I can see a scenario where
a Commissioner participating in this type of
information gathering sessions could disrupt the
process.

COMMISSIONER YAKI: How so?

CHAIRMAN REYNOLDS: By asking questions in
a way with the intent of leading a witness in a
particular direction.

VICE CHAIR THERNSTROM: Mr. Chairman, with
all due respect, and I'm not an attorney, this is
Commissioner Thernstrom, questions can be seen as
leading witnesses. Any questions can be seen
as leading witnesses, depending on your perspective.
You've got the picture of making mischief here, but
mischief is not a well defined term in this context.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom,
you've been witness to what has taken place at the
Commission for an extended period of time I think that we all can recognize mischief when it shows up. In fact, one of the issues that we're wrestling with now is certain behavior amongst Commissioners that impedes our ability to proceed in an efficient manner. So I don't think that this is an issue that is so vague that we need not be concerned about it.

COMMISSIONER YAKI: Commissioner Reynolds, this is Commissioner Yaki. Let me just state that one, I think that what you're saying is out of bounds in many respect.

CHAIRMAN REYNOLDS: How so?

COMMISSIONER YAKI: If you would -- perhaps if you'd like to go back and if you will, I will go through every single hearing that we've ever conducted and go through my line of questioning of each witness that's ever been conducted. And if you can then point out to me how -- in fact, I'll do it for every single person who has ever been on the Commission and we can figure out exactly what your definition of mischief is.

This is a witness interview. It is a serious and sober --

CHAIRMAN REYNOLDS: Commissioner Yaki --

COMMISSIONER YAKI: -- Commissioner
Reynolds, your obsession with this other issue and how it's bleeding over into things that have nothing whatsoever to do with it is just I think a little sad and attempts to impugn certain people's integrity when it comes to the very serious issue of how one goes about looking at witnesses, what our fact-finding mission is as chartered by the United States Congress. If it is your idea that we are not fact finders, we are simply recipients of fact finding by others, then I suggest we go back to the statute and take a very close look at -- and the history of this Commission to understand what it is that we have done, have or have not done in the past.

The idea that one would in a discovery process attempt to act frivolously is, of course, a sanctionable item under the canons of most professional conduct. So the idea that you think that any Commissioner may use that opportunity in order to make mischief, I think is extremely insulting and one that shows that your lack of boundaries when it comes to other issues at the Commission that have nothing whatsoever to do with it, are quite frankly a little troubling.

COMMISSIONER GAZIANO: Mr. Chairman.

CHAIRMAN REYNOLDS: Hold on, Commissioner
Gaziano. My concern is fueled not so much by speculation, but by Commissioner Yaki's conduct in Hawaii.

COMMISSIONER YAKI: Would you like to review the tapes in Hawaii, Mr. Chair? Mr. Chair, seriously. Before you make an insane accusation like that, I would suggest that you review --

CHAIRMAN REYNOLDS: Commissioner Yaki --

COMMISSIONER YAKI: -- you review the tapes in Hawaii very carefully, very carefully.

CHAIRMAN REYNOLDS: I've patiently listened to you.

COMMISSIONER YAKI: I'm not going to sit here and listen to some stupid accusation that you make based on hearsay from people who didn't even know what was going on.

CHAIRMAN REYNOLDS: Do you want to know what my concerns are? They're related to my lack of boundaries. I'd like to respond.

COMMISSIONER YAKI: You do have a serious lack of boundary. That's very clear. I think you've absolutely lost control of this Commission.

CHAIRMAN REYNOLDS: Commissioner Yaki, let me finish my conversation.

I received written complaints about how
you conducted yourself. The accusations were that --

COMMISSIONER YAKI: Have you shown them to me? Have I seen any single one of them? Did you bother to show any of them to me?

CHAIRMAN REYNOLDS: No, I did not.

COMMISSIONER YAKI: Well, you should have.

CHAIRMAN REYNOLDS: Commissioner Yaki, that is the background for my concern.

COMMISSIONER YAKI: If you had bothered to watch the videotape which I believe it was videotaped or read the transcript which I don't believe you have, you would find a far different answer than simply the people who were there who had a distinct objection to the fact that I was even present at that hearing. And if you were to ask the staff who was there, you might also get a different answer.

So the question is, Mr. Reynolds, are you just going to listen to written complaints that you did not investigate, that you did not ask me about, that you did not confirm with any staff members who were there, or perhaps a court reporter --

CHAIRMAN REYNOLDS: How do you know I didn't?

COMMISSIONER YAKI: Because I'm pretty sure you didn't.
CHAIRMAN REYNOLDS: You're pretty sure that I didn't?

COMMISSIONER YAKI: Yes. Would you like to bring the staff person up right now and ask? Let's do it, let's do it, Mr. Chair.

CHAIRMAN REYNOLDS: Commissioner Yaki --

COMMISSIONER YAKI: I am not going to be insulted in this manner and have innuendo about written complaints that is --

CHAIRMAN REYNOLDS: I'm not suggesting anything --

COMMISSIONER YAKI: -- not placed before me.

CHAIRMAN REYNOLDS: I am telling you that there were accusations --

COMMISSIONER YAKI: So the idea --

CHAIRMAN REYNOLDS: -- of misconduct.

COMMISSIONER YAKI: -- that in a legal proceeding where we are interviewing witnesses, it's just ridiculous Mr. Chairman. I take it as a very personal insult. And again it shows to me how your lack of personal boundaries on this issue has clouded your judgment in the running of this Commission. And I would simply say that it is a sad state for this Commission that in our fact finding mode as
Commissioners, which by the way we were not in in Hawaii, and that's irrelevant to this point, that you would make such scurrilous and unfounded statement as to what I may or may not do.

If you wish to accompany me, Mr. Chair, as a chaperon, you may do so. If you have an objection to what I would ask, you may do so. If you wish, I will whisper questions to Mr. Blackwood so as to not to quote unquote disrupt or what have you, but the mere fact that you would bring this up I think is extremely childish. I think it totally shows a lack of personal boundaries on this issue. And if you wish to discuss this further, I suggest you give me a phone call which as I said in the last meeting you consistently refuse to do from us.

CHAIRMAN REYNOLDS: Commissioner Yaki, when I have something to say to you, I have no reservations, I have no concerns about picking up the phone.

COMMISSIONER YAKI: And if you have nothing to say to me because you haven't called me up, then don't bring up issues three years in the past that you've never confronted me on or anything other than what you state.

CHAIRMAN REYNOLDS: Commissioner Yaki, you
invited this conversation.

COMMISSIONER GAZIANO: Mr. Chairman, I've been waiting to be recognized.

COMMISSIONER YAKI: How did I invite this conversation?

COMMISSIONER GAZIANO: Mr. Chair?

COMMISSIONER YAKI: I asked about attending an interview witness and then you went off on a little toot about whether or not anyone would make mischief. I chose, of course, not to identify anyone by name until you did, so please explain to me how I invited this, Mr. Chair. You were the one who made it personal. You're the one who has lost any sense of personal boundaries.

COMMISSIONER GAZIANO: Mr. Chair, if I could address the general question? I think there is a serious issue in your inquiry about this matter and I take issue with the idea that any time our General Counsel talks to a potential witness that that is a legal proceeding. I certainly think that when we have formal hearings, depositions, Commissioners of course should be able to attend and of course be able to ask questions. But we had, I think, an extreme and silly rule that staff members could not talk to Commissioners and Commissioners could not talk to
staff members. I think that was an extreme rule, but
the theory behind it was somehow that Commissioners
shouldn't be standing over the desks of our
professional staff members directing their every move
when they're going about their normal business.

I think there is a reasonable line to be
drawn there. My concern with Commissioners
necessarily wanting to be included in every single
conversation or every single step that the General
Counsel or someone in his office may take is just that
it ties things up and it does perhaps begin to
approach some line when we're talking about informal
efforts that the General Counsel and his staff makes.

Of course, we should review in a general
way anything that we want to be briefed on. But if
we're going down this road, we need to start drawing
lines as to when Commissioners can stand over the
shoulders of our professional staff and simultaneous
with their work potentially interfere with the
efficient operation of their work.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

VICE CHAIR THERNSTROM: Something happened
there.

Mr. Chairman, I'd like to say a few
things. I don't know what happened to the end of Commissioner Gaziano's statement there, but if he's finished I have a couple of thoughts I'd be glad to express, if that would be all right?

COMMISSIONER GAZIANO: Sure.

VICE CHAIR THERNSTROM: I would hope we could agree as a Commission that our primary concern here should be that we do not compromise our fact finding process and I don't think it is correct to say that what Commissioner Yaki is suggesting here is that anyone direct the General Counsel's every move, that we stand over his shoulder or -- I think all we're talking about here is a process that best gets at this full factual record. I am concerned that we're compromising or that there's been language here so far in the discussion that suggests a willingness to compromise that fact finding process.

And you used the word intimidation with respect -- I did not -- I never looked at that transcript. I don't know what happened in Hawaii, but intimidation is in the eye of the beholder. So I'd like to be a little careful about even using that word in an accusatory way. Again, not having any sense of the record of what went on in Hawaii, but if we err, in my view, in the direction of inclusion of
Commissioners, their input, a richer fact finding process possibly as a consequence, then we should err in that direction.

CHAIRMAN REYNOLDS: Okay, I don't know how to -- well, I am comfortable with Commissioners being there observing the process. My comfort is low with respect to Commissioners participating, but I would also like to hear from Mr. Blackwood.

MR. BLACKWOOD: This is Mr. Blackwood. To be honest, as I pondered all of this, the set up, the only type of situation other than the depositions we already have rules for, would be in the nature and as I understood what Commissioner Yaki was referring to was a formal interview that we would be using in lieu of a deposition. There are -- and I have no problem, frankly, with any of you all appearing for something of that kind because it would be in the nature of something scheduled and it would be in my mind completed as if it was the deposition or in compliance with our deposition rules, that is to say I ask all the questions I have and then however many Commissioners are there going around round robin and asking their questions.

It is not practical though to say that every Commissioner would be available for every single
conversation with every witness. The initial phone calls, tracking people down, sending letters, etcetera, I have already had several conversations with several witnesses, not multiple conversations with any one witness. But telephone conversations with individuals to say what did you say and in a general way are you a relevant witness. It was not for the purpose of taking their statement. It was just to identify whether they would be useful down the road, identifying who saw the most, things like that. There is no practical way, frankly, any Commissioner could participate to that degree.

That said, the issue of staying or being present for a formal statement or something that we have scheduled for formal statement, I do not see a problem with people attending.

CHAIRMAN REYNOLDS: Okay, attending and participating and asking questions?

MR. BLACKWOOD: That's correct, as along as we follow, in essence, the deposition rules of let me finish my questions with the witness. If someone wants to ask additional questions, I don't see that as a problem.

CHAIRMAN REYNOLDS: Okay. All right, all right. I will defer to Mr. Blackwood.
VICE CHAIR THERNSTROM: Mr. Chairman, I have a question for Mr. Blackwood.

Where exactly are we in getting any witnesses at all at this point?

MR. BLACKWOOD: Well, I'd have to get into more detail than I would prefer to avoid executive session. Yes, we've identified many witnesses.

VICE CHAIR THERNSTROM: I don't mean identifying, I mean actually witnesses who we expect to come forward and testify.

MR. BLACKWOOD: Well, when you say -- identify is the proper way to --

VICE CHAIR THERNSTROM: All right, all right.

MR. BLACKWOOD: -- identify them. We have numerous witnesses that are available, have indicated that they would be available. Of course, we have some that have made it clear that they aren't available. And as to those, the Commission has authorized the use of subpoenas and we are using them.

CHAIRMAN REYNOLDS: Any other comments or questions?

COMMISSIONER GAZIANO: The clarification that the General Counsel gave for formal witness interviews sort of satisfy some of my concerns, so
with that understanding I think that that's not unreasonable.

Chairman Reynolds: Okay, Mr. Blackwood, are we in a position to discuss the rules around a notational vote?

Mr. Blackwood: No, I haven't had a chance to step out of the room and check out the rules. If we're through this topic, I will go out and review that and come back and let you know what I found.

Chairman Reynolds: Okay, all right. Next, the Assistant Staff Director for Civil Rights Evaluation will provide with an update on our 2010 project on sex discrimination in higher education admission.

Dr. Lerner, please provide an update.

Dr. Lerner: Thank you, Mr. Chairman.

Vice Chair Ternstrom: Mr. Chairman, has gotten off or come on? There's been another one of these beeps.

Chairman Reynolds: Okay. Mr. Taylor?

Commissioner Taylor: Yes.

Chairman Reynolds: Commissioner Heriot?

Commissioner Heriot: I'm here.

Chairman Reynolds: Commissioner Kirsanow?

(No response.)
CHAIRMAN REYNOLDS: I believe Commissioner Kirsanow has -- is off of the call.

COMMISSIONER GAZIANO: At least momentarily. I have some indication Pete will be back on.

CHAIRMAN REYNOLDS: Dr. Lerner?

DR. LERNER: Yes, sir. I'm here. Thank you. Excuse me, Mr. Chairman, one of the issues that we can consider after last meeting was to what extent the Paperwork Reduction Act applies to our situation. And we consulted with the General Counsel and we believe --

CHAIRMAN REYNOLDS: I'm sorry, Dr. Lerner. You've cut out completely.

DR. LERNER: My apologies, Mr. Chairman. I'm having a little trouble with manipulating the microphone.

Essentially, we have selected a tentative sample of institutions to be subpoenaed --

COMMISSIONER HERIOT: Can you speak up?

DR. LERNER: Yes, I'll try to get this right. Sorry about that, Commissioners. I'll try to do a better job here.

We have selected a tentative sample of 19 institutions and the issue then is since that's larger
than 9, to what extent does the Paperwork Reduction Act apply and if it does apply, what should we do?

We have consulted extensively with the Office of General Counsel and we believe, in fact, that we can give the situation in any case, regardless of whether it applies or not, and we would do that on the assumption that it did apply by amending our request for information to take into account the different types of institutions we had sampled and asked somewhat different questions. And as it turns out that's actually a useful and convenient thing to do and that's what we're proposing to do. So that's where it stands at this point.

We are completing our tentative requests for information which we hope to send to the General Counsel next week and then we can prepare the four official documents which I hope will be ready for the Commissioners to vote. That's basically where it stands.

CHAIRMAN REYNOLDS: Okay, questions, comments?

COMMISSIONER HERIOT: So this means we don't need to take any action today, we're taking it on the telephone conference?

DR. LERNER: As far as I'm concerned, that
would be fine. It might be useful, for example, for me to send the Commissioners a list of the institutions that were tentatively selected so they could see them in advance and contemplate it and perhaps also for me to send the list -- we had sent these lists around previously, of course, but it might be a useful thing for me to send it around again. I would be glad to do that if the Commissioners so desire.

COMMISSIONER HERIOT: Since we've had it before we could just move today to do it.

DR. LERNER: I have no opinion. I thought that would be fine. But it's strictly the Commission's judgment, not mine.

CHAIRMAN REYNOLDS: Does anyone have any concern about voting on this today?

VICE CHAIR THERNSTROM: Have we voted on -- tell me again, voting on the list?

COMMISSIONER HERIOT: Yes, I've seen the list a couple of times.

COMMISSIONER GAZIANO: I have a slight preference to take care of this today if all parties concerned are ready.

VICE CHAIR THERNSTROM: Mr. Lerner, is there any additional information that would be coming
to us with respect to this list that might be useful in the vote?

    DR. LERNER: No. This is essentially the list that we had submitted several -- a meeting or two ago. There was one change we made actually. I do wish to report that. One of the institutions that we had originally sampled and selected, and I've already said this in previous meetings.

    VICE CHAIR THERNSTROM: You said that at the last meeting.

    DR. LERNER: Right, I did indeed. I just wanted to go over it. But other than that, as of the last meeting, it has not changed and we don't expect it to change, subject to Commissioner approval, of course.

    COMMISSIONER HERIOT: I move that we approve the list so that Dr. Lerner can proceed with all of this without further vote from the Commission.

    CHAIRMAN REYNOLDS: Is there a second?

    COMMISSIONER MELENDEZ: I have a question. This is Commissioner Melendez. I don't see it on the agenda of this action item. I see some updates that I have. I didn't even receive actually any information or a binder. Someone told me well, we're going to just use the 20th meeting and then the agenda came out
kind of late. So here we sit just expecting and
update and here we are voting on something that I have
information that -

COMMISSIONER HERIOT: You got it like two
months ago.

COMMISSIONER MELENDEZ: Usually, if we
have something agendized, we usually receive it, even
if they give it to us again for the packet. This
meeting -- I don't have anything but the agenda and
here we are voting on things that I would hope that we
could delay this and at least send me something and --
or least a synopsis that was in writing saying okay,
here is what we're voting on. This is the issue, and
now I'm a little bit confused and asked to vote right
now.

COMMISSIONER GAZIANO: What we're voting
on is just the list, as I understand it. We've
already approved sending the data request. It's just
the list of institutions which has been sent to us
before. We can read the list of institutions today.
Would you want further study on the list of
institutions, Commissioner Melendez?

COMMISSIONER MELENDEZ: My point is we're
really lax in how we're conducting these meetings as
far as having something in writing before us to make a
decision. It's kind of like don't you remember, we
gave it to you two months ago and I'm going to go
okay, sounds good, but I don't -- that's just the
problem I'm having with how we're conducting meetings
and making motions. So I would prefer that we table
this, send me something in an email. If you want to
vote on it in a conference call fine. I'm just not
ready to vote on anything right now.

VICE CHAIR THERNSTROM: I'm sorry, but I
wasn't at the last meeting. What is the reason there
wasn't a vote then, but there's now a vote? What new
information have we got?

COMMISSIONER HERIOT: I think it was a
mistake not to vote on it before. I think there were
questions.

CHAIRMAN REYNOLDS: Well, I think that
unlike the letter to the Senate, we don't have a hard
deadline in front of us, although I do have a
preference in giving Dr. Lerner the green light so
that he can move forward. But I think Commissioner
Melendez makes a good point if this information had
been distributed. But the argument that it would have
been acceptable that commissioners have an opportunity
to review the information and refresh their memory,
it's a fine one. Commissioner Melendez' argument is
similar to the one that Vice Chair Thernstrom made this morning.

So --

COMMISSIONER HERIOT: Well, then can I ask that this be put on the telephone conference agenda for two weeks from now? Because honestly, my original thought was all this stuff would be sent out in September. I did not realize that the Commission had to vote on this at all. And I'm still not convinced that we do, but there were a couple of statements last time to suggest that the Commission should approve the list. And so we really need to get moving on this. I would say that we are at this point three months behind in this project. And we need to get it on the road.

CHAIRMAN REYNOLDS: Mr. Staff Director, please make sure that it's on the agenda.

STAFF DIRECTOR DANNENFELSER: I'll put it on, Mr. Chairman.

VICE CHAIR THERNSTROM: And I have a question here for Dr. Lerner. I assume that you are not stopped in your tracks by a delay in this -- a bit of a delay in the vote, that is, you've got work to do on this project, I assume, still, so we're not holding this project up in any significant way?
DR. LERNER: We do have work to do, Commissioner Thernstrom. But on the other hand I would only say that the critical step, as far as I see, if collecting information, of course, to get the subpoenas --

VICE CHAIR THERNSTROM: Do it on the teleconference though. That's fine.

COMMISSIONER HERIOT: That's fine with me, but we've got to remember that these institutions are going to need some time to collect this data. Our part in organizing this is actually quite small compared to their getting the data to us.

CHAIRMAN REYNOLDS: Okay, if there are no more questions or comments. Next up is the discussion and with any luck, a vote on the MEPA briefing report. I move that the Commission approve for publication, along with the concurring and dissenting statements submitted by any Commissioner by January 13, 2010 and any rebuttal submitted by any Commissioner by February 14, 2010. Part A of the report produced by staff and reflecting Commissioner and panelists input on the briefing on the Commission, on the briefing the Commission held on September 21, 2007 on the Multi-Ethnic Placement Act on minority foster care and adoption, Part A, as distributed in draft form to
Commissioners. It contains a briefing -- a brief overview and summary of the issue and one of the Commissioners chose to conduct this briefing. A summary of the proceedings consisting of some synopses of the panelists' oral statements during the briefings and a synopsis of the question and answer session. And finally copies of the panelists' written statements. On this motion, if a majority of the Commissioners on the Commission vote to adopt Part A of the briefing report, the Commission will then open discussion on Part B. If Part A fails to obtain majority vote, discussion of Part B becomes moot.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Okay, discussion.

Okay.

COMMISSIONER MELENDEZ: Mr. Chairman, are we voting on Part A right then now? Is that what you're suggesting?

CHAIRMAN REYNOLDS: Right now, we're in the discussion phase.

COMMISSIONER GAZIANO: I though the motion was for Part A and --

CHAIRMAN REYNOLDS: Yes, that's right.

COMMISSIONER GAZIANO: And you set forward
the procedure that would follow.

CHAIRMAN REYNOLDS: We would vote on Part A.

Mr. Melendez, do you have a question or comment?

COMMISSIONER MELENDEZ: No, that's fine.

CHAIRMAN REYNOLDS: Anything else?

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

(No response.)

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes, on Part A.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote for it as well. The record should reflect the fact that Commissioner Kirsanow did not vote and that we have two abstentions, one from Commissioner Heriot and the
other from Commissioner Yaki. The other Commissioners voted in favor. The motion passes.

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

I understand that we'll have some motions regarding the findings and recommendations, but we'll wait --

COMMISSIONER GAZIANO: May I ask unanimous consent though that unless there are such motions that we go through them and approve them as if read, but don't go through the necessity of reading them into the record?

VICE CHAIR THERNSTROM: I think they should be read into the record.

CHAIRMAN REYNOLDS: All right, here we go.

Okay, I move that the Commission approve finding number one which reads as follows: The Multi-Ethnic Placement Act was broadly intended to remove and eliminate discrimination in child welfare, both
for the benefit of children who needed permanent
homes, and for the benefit of prospective parents who
wished to provide permanent homes. Additionally, the
passage of MEPA rendered child welfare policies and
law consistent with the principle of non-
discrimination by race.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion.

Any discussion?

COMMISSIONER MELENDEZ: Yes, Mr. Chairman,
this is Commissioner Melendez. Is this just basically
this first finding --

CHAIRMAN REYNOLDS: I'm sorry,
Commissioner Melendez, please speak up.

COMMISSIONER MELENDEZ: Is this first
finding basically just interpreting of what MEPA
actually does?

CHAIRMAN REYNOLDS: That's my
interpretation.

COMMISSIONER MELENDEZ: Does it actually
need it?

CHAIRMAN REYNOLDS: I'm sorry?

COMMISSIONER MELENDEZ: Is that finding
actually needed if it's just interpreting what the Act
actually does?

CHAIRMAN REYNOLDS: Well, this is consistent -- we've done this in the past, describing the main purpose of the statute. Is there any aspect of it that you're uncomfortable with? Do you think that it misinterpreted the statute?

COMMISSIONER MELENDEZ: No, I'm just saying that I didn't know if it was actually needed.

CHAIRMAN REYNOLDS: Okay. Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Wait a minute, I thought we already voted on finding one?

COMMISSIONER HERIOT: You did, but I don't think anybody else did.

VICE CHAIR THERNSTROM: I already said yes on finding one.

CHAIRMAN REYNOLDS: Okay, Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow, have you returned?

(No response.)

CHAIRMAN REYNOLDS: Mr. Melendez?
COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote for it.

Okay, Commissioners Yaki, Melendez, and Heriot abstained. Commissioner Kirsanow did not vote. Commissioners Thernstrom, Gaziano, Taylor and Reynolds voted in favor of the motion. The motion passes.

Okay, finding number two. I move that the Commission approve the following finding: By passing MEPA, Congress intended to remove barriers to trans-racial adoptions so as to reduce racial disparities. It was also intended to reduce the number of children remaining in non-permanent home care for long periods.

Is there a second? Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

VICE CHAIR THERNSTROM: Mr. Chairman, the wording could be better. By passing MEPA by enacting MEPA, I don't know. Anyway, instead of simply the cryptic racial disparity, something like to reduce the disproportionate number of minority children awaiting placement. So I would suggest some rewording of that
finding number two.

CHAIRMAN REYNOLDS: Okay, I'm trying to
write down what you just said.

COMMISSIONER GAZIANO: I think I was just
handed a version of what Vice Chair Thernstrom read.
Vice Chair Thernstrom, if you don't mind me trying to
read it back --

CHAIRMAN REYNOLDS: That's fine.

COMMISSIONER GAZIANO: By enacting MEPA,
enacting is the change in that first clause, Congress
intended to remove barriers to transracial adoptions
so as to reduce -- and the new phrase is the
disproportionate number of minority children awaiting
placement.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom,
is that an accurate -- did he accurately reflect your
intent?

CHAIRMAN REYNOLDS: I think those are my
exact words. I believe so, though maybe I can't -- I
think that's what I said.

CHAIRMAN REYNOLDS: Okay, I'll take that
as a friendly amendment.

Are we ready to vote? Okay, Vice Chair
Thernstrom?

VICE CHAIR THERNSTROM: Yes.
CHAIRMAN REYNOLDS: Okay, Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow, have you returned?

(No response.)

CHAIRMAN REYNOLDS: Mr. Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Which finding are we talking about?

CHAIRMAN REYNOLDS: Finding number two.

VICE CHAIR THERNSTROM: As amended.

COMMISSIONER YAKI: I have a comment as I'm voting. I'm voting to abstain simply because I find it odd that we cite a briefing transcript rather than the actual statute or in this case the language of the IEP itself in some -- in many of these findings. I understand it's nice shorthand to refer to what someone else says, but I always think it's part of our fact-finding mission being able to cite to the actual source document would be much more scholarly.
And I vote to abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: I'm going to abstain on this finding.

COMMISSIONER GAZIANO: I just want to respond to Commissioner Yaki, I certainly agree with your points. I think the references are just to us so that we can find who said it, but I certainly would second your thought that our staff should always try to show us the actual text of the statute, even if an expert supposedly testified to it, but that that won't go in the -- as I understand it, the references won't go into the final report. Is that correct?

STAFF DIRECTOR DANNENFELSER: That's correct.

VICE CHAIR THERNSTROM: It is a very good point and in the future I want the statutory record or I'm going to abstain as well. It's an excellent point.

CHAIRMAN REYNOLDS: Any other comments? I vote in favor of it. So we have one, two, three, four abstentions, three votes in the affirmative. Commissioner Kirsanow didn't vote. The motion passes.

COMMISSIONER GAZIANO: May I move to reopen finding number one in lieu that -- I'm very
sorry to do that, but it was just drawn to my
attention. I'd like to add after the Multi-Ethnic
Placement Act, MEPA, and this is the addition, as
amended by the removal of barriers to inter-ethnic
adoption provisions (IEP). I move to reopen finding
number one and amend it with that addition.

CHAIRMAN REYNOLDS: I second it.

Discussion?

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Okay, Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote in the
affirmative, so we have three abstentions, four in the
affirmative. The motion passes.

Okay, right now we're up to finding number
three. I move the Commission approve the following finding: The number of children in foster care has grown over the last generation. A disproportionate number of foster children are black. On average, black children remain in foster care longer than children of other racial and ethnic backgrounds. Some experts believe the causes of these disparities include, but are not limited to, historic discrimination, poverty, and the prevalence of single-parent families.

Is there a second?

COMMISSIONER GAZIANO: Second and I'd like to offer a friendly amendment that instead of the words "historic discrimination" that we substitute racial bias which is in some sense a broader term. I am uncomfortable even crediting experts as saying that historic discrimination at some time in the past is necessarily the reason why minority children were in foster care longer, but racial bias could potentially include that include other reasons.

CHAIRMAN REYNOLDS: Okay, I'll treat it as a friendly amendment. Comments, questions?

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: I am going to abstain for precisely the reason that Commissioner
Yaki just brought up. I don't remember this briefing. I haven't gone back to the transcript and that's it.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Yes.
CHAIRMAN REYNOLDS: Commissioner Heriot?
COMMISSIONER HERIOT: Abstain.
CHAIRMAN REYNOLDS: Pete, have you returned?
COMMISSIONER GAZIANO: I have an email that he will return shortly and wants to be on the line when we discuss the notational vote issue. It may be another five minutes before he returns.

CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: Abstain.
CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Abstain.
CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Yes.
CHAIRMAN REYNOLDS: And I vote yes also.

The motion passes.

Okay, finding number four.

COMMISSIONER GAZIANO: Mr. Chairman?
CHAIRMAN REYNOLDS: I move that it be adopted.

COMMISSIONER GAZIANO: Mr. Chairman?
CHAIRMAN REYNOLDS: The finding reads as follows: Since the amended MEPA became law in 1996, the adoption of black children by white couples has increased. From 2000 to 2004, the time black children spent in foster care had decreased by four months on average. Multiracial adoption has increased, as has adoption out of foster care.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER YAKI: I have a question. I'm going to abstain --

CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

COMMISSIONER YAKI: Hello. What is the background noise?

COMMISSIONER YAKI: Commissioner Yaki wants to be recognized.

CHAIRMAN REYNOLDS: Commissioner Yaki.

COMMISSIONER YAKI: Yes, one, does someone need to put their phone on mute because we're getting a lot of wind on the phone in the room.

CHAIRMAN REYNOLDS: I apologize. A big piece of earth moving piece of equipment just went by.

COMMISSIONER YAKI: So it's finally made it there.
(Laughter.)

COMMISSIONER YAKI: The question I had had to do with these particular statistics. One, the issue of adoption of black children by white couples has increased. I just wonder in terms of the intention of the IEP amendments to MEPA whether the number is significant in terms of whether it's white couples, white individuals, interracial couples, etcetera. And because we don't have any of that in this to sort of bolster or what have you, some of these conclusions I'm going to abstain.

CHAIRMAN REYNOLDS: Okay, Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: I vote yes as well. We have one, two, three, four abstentions and three votes in the affirmative. The motion passes.

Finding number five. I move that the Commission approve finding number five which reads:
Children are considered better off in permanent family settings than in foster care.

Is there a second?

COMMISSIONER GAZIANO: Yes, with an amendment and a discussion. This just reads very odd to me. Children are considered. It's just sort of out there. Better off. Either we should find and I'm not sure we're comfortable finding children -- children are better off in permanent family or we should ascribe this consideration or belief to someone. An alternative might be experts generally believe that children are better off in permanent family settings than in foster care.

I think we had some testimony to that effect. Or I'd be up for striking this. But I'm just a little uncomfortable with the way it's worded. If it's so well known, we don't necessarily need to have it as one of our findings.

Commissioner Taylor, you are one of the sponsors of this hearing, I understand, or this briefing. I was not on the Commission then. Do you have an opinion on that?

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: Do you have an opinion
on the comments made by Commissioner Gaziano?

COMMISSIONER TAYLOR: I don't think an amendment is necessary to the finding. I like the finding the way it is.

CHAIRMAN REYNOLDS: Okay. Commissioner Kirsanow, did you join us?

COMMISSIONER KIRSANOW: I did.

CHAIRMAN REYNOLDS: Very good.

COMMISSIONER GAZIANO: Commissioner Taylor, would you mind if we amend it to say experts generally believe that children are better off or would you prefer that we simply find children are better off?

COMMISSIONER TAYLOR: I like the express, undiluted finding that children are better in stable families.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER TAYLOR: And I don't like us hiding behind experts.

COMMISSIONER GAZIANO: Good. Well, then could we strike -- I don't care which way we go, but could we strike considered then?

CHAIRMAN REYNOLDS: Yes, I'll consider that a friendly amendment. Any other comments?

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: I'm abstaining.
CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I think I have to vote for this one, yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I wasn't part of the discussion, so I'll have to abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote yes as well. Four abstentions and four affirmative votes.

The motion passes.

We're up to finding number six. I move that the Commission approve this finding which reads:

Extensive research has shown that transracial adoption does not produce psychological or other social problems in adopted children, especially if parents are properly selected and prepared for raising children of a different race. Also, according to experts, transracial adoption does not seem to affect
children's racial or ethnic identity.

May I have a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER GAZIANO: Commissioner Taylor, you want to strike some of those experts or in this one are you comfortable with the experts being there?

COMMISSIONER TAYLOR: Yes, I don't think it's elusive in this one.

COMMISSIONER GAZIANO: Okay.

CHAIRMAN REYNOLDS: Any other comments? Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I still have the same problem which led me to vote abstaining. I mean, I don't have any doubts it's true. I will vote yes. I'm being harassed here I realize, I'm voting yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I will abstain on this one.

CHAIRMAN REYNOLDS: Do you believe you're right?

COMMISSIONER HERIOT: Others will have to
decide that.

(Laughter.)

CHAIRMAN REYNOLDS: No, Commissioner Heriot -

COMMISSIONER HERIOT: It's a statement about what experts say and the other one was not, so that would make a declaration in that one and this one does not.

CHAIRMAN REYNOLDS: Okay, Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: I vote yes as well.

We have three abstentions and five affirmative votes. It passes. We're up to finding number seven which I move that the Commission approve the following: MEPA encourages state and local entities to recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children. It does not discourage transracial placement, nor does it require a
preference for same-race placement. The fact that
black parents are adopting at the same rate as white
parents suggests that successful recruitment of black
parents is taking place.

Is there a second?
COMMISSIONER GAZIANO: Second.
CHAIRMAN REYNOLDS: Hello?
COMMISSIONER GAZIANO: Second.
CHAIRMAN REYNOLDS: Discussion?
Vice Chair Thernstrom?
VICE CHAIR THERNSTROM: I'm thinking. Get
back to me.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Yes.
CHAIRMAN REYNOLDS: Commissioner Heriot?
COMMISSIONER HERIOT: Abstain.
CHAIRMAN REYNOLDS: Commissioner Kirsanow?
COMMISSIONER KIRSANOW: Abstain.
CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: Abstain.
CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Abstain.
CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Yes.
CHAIRMAN REYNOLDS: And I vote for it
also. We have --

COMMISSIONER YAKI: Commissioner Ternstrom still needs to vote.

CHAIRMAN REYNOLDS: Vice Chair Ternstrom?

VICE CHAIR THERNSTROM: I'm going to vote yes.

CHAIRMAN REYNOLDS: Four abstentions and four affirmative votes. It passes.

We're up to finding number eight. I move that the Commission approve the following language:

MEPA's prohibition of racial discrimination in child placement does not prevent agencies from discussing with respect to adoptive and foster parents their feelings, capacities and preferences with respect to caring for a child of a particular race or ethnicity, nor does it prevent sensitizing parents to the problems that children might face after adoption by families of a different race or ethnicity than theirs.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion? Vice Chair Ternstrom?

VICE CHAIR THERNSTROM: I'm going to abstain on that.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Mr. Taylor?

COMMISSIONER TAYLOR: Am I going to be the only person to vote for this thing?

(Laughter.)

COMMISSIONER GAZIANO: I did, Commissioner Taylor.

COMMISSIONER TAYLOR: Everybody is abstaining. I'm voting for it.

CHAIRMAN REYNOLDS: So am I good.

COMMISSIONER TAYLOR: Good.

CHAIRMAN REYNOLDS: So we have three votes for it, the rest abstain.

Okay, finding number nine. I move that the following language be approved: Some agencies and personnel seek to circumvent MEPA's provision to give consideration of race and placement by engaging
consultants who the agencies and personnel expect to render an expert opinion that same-race parents are in the best interest of a child. MEPA makes it clear that requiring same-race placement should be the exception rather than the rule and that such cases are subject to strict scrutiny and must represent age and telling interest.

May I have a second?

COMMISSIONER GAZIANO: Second, with an amendment. I think the last sentence either confuses or is misleading, misstates possibly the strict scrutiny rule as if the exception rather than the rule is the equivalent of the strict scrutiny, so I would amend the last sentence to read "MEPA is in line with current equal protection law, which holds that governmental actions undertaken on the basis of race are subject to strict scrutiny and must -- let's see, I'm struggling with the last word -- "and must be justified by compelling government interest to withstand fourteenth amendment analysis."

VICE CHAIR THERNSTROM: I need you to read to that me again, I'm sorry.

COMMISSIONER GAZIANO: Sure. How about this slightly different version that one of our brilliant counsel just handed me that I adopt. Give
me just a minute to look it over.

(Pause.)

How about this: "MEPA permits exceptions to the general prohibition against race discrimination only in quote" -- forget the quote. "MEPA presents exceptions to the general prohibition against race discrimination only in circumstances where the child has a specific and demonstrable need for a same-race placement." New sentence. "Even in those exceptional cases, however, same-race placement would be subject to constitutional strict scrutiny and must be justified by compelling interest to withstand fourteenth amendment analysis."

COMMISSIONER YAKI: That's more complicated than the other one.

COMMISSIONER GAZIANO: It is.

CHAIRMAN REYNOLDS: Okay, I'll take that as a friendly amendment.

Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I'm sorry. I know I was involved in writing this. But I cannot remember at this point what the legitimate exceptions would be such that they would be justifiable under however it was stated strict scrutiny. In any cases, what would an exception look like? A child who what would need a
same race placement?

COMMISSIONER GAZIANO: I was trying to characterize the laws. I don't think -- I think strict scrutiny in this case, hopefully, would be fatal in fact. It's a very tough test. And I can't imagine a situation where it would be satisfied.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, I think that that type of determination would be made on a case-by-case basis. It will depend on the particular facts there at play. While I share Commissioner Gaziano's view, that is not to say there is a set of circumstances that can't meet the standard.

COMMISSIONER HERIOT: What about when the child desires a particular race? I would think that would be routinely granted.

CHAIRMAN REYNOLDS: Well, Judge Heriot, you'd have to get a majority vote.

VICE CHAIR THERNSTROM: It does, Mr. Chairman, kind of lead, it seems to me, unless Commissioner Gaziano is right that scrutiny would be fatal. It does leaves a loophole for arguments that have brought implications about or implicitly making judgments about where children belong, about color coding children and adoptive parents. It does seem to
me there's a hole there that potentially you can drive a truck through.

CHAIRMAN REYNOLDS: Well, if you're right that hole then resides in the Constitution. The strict scrutiny standard --

VICE CHAIR THERNSTROM: It's always strictly applied, as you know. What's called strict scrutiny is often not strict.

CHAIRMAN REYNOLDS: Well, I think that in certain categories of cases I would agree with you.

COMMISSIONER GAZIANO: Well, I may be wrong about whether judges, certain judges can't find a situation that satisfies strict scrutiny, but I wanted to be -- but I thought we should be clear that the strict scrutiny standard applies or if someone else will offer a different amendment for that last sentence, but that last sentence seems awkward to me and to be misleading.

CHAIRMAN REYNOLDS: Well, no. I think introducing the concept of ruling on the exception that that does muddy the waters a bit.

VICE CHAIR THERNSTROM: I agree with that. I agree with that. I'm just a little concerned about how it now reads as well.

COMMISSIONER GAZIANO: I could go back to
my earlier version if that's a little clearer.

CHAIRMEN REYNOLDS: If I understand what
is your concern, I'm not sure the concern is directed
at the wording as opposed to the leading concept.

COMMISSIONER HERIOT: Excuse me, strict
scrutiny, that's not in the statute, is it?

COMMISSIONER GAZIANO: No, it is not.

COMMISSIONER HERIOT: I don't think we
should be opining on that then. I'm going to be
abstaining so maybe my view doesn't count.

COMMISSIONER GAZIANO: Can you help us out
even if you are going to abstain? MEPA does come up
with a standard that I'm not sure I'm prepared to
articulate. It doesn't supplant strict scrutiny, but
it comes up with a pretty strong standard itself that
there --

VICE CHAIR THERNSTROM: Does anybody know
what the MEPA language is that makes it clear that
same race placement should be the exception rather
than the rule? What is the MEPA language there.

COMMISSIONER HERIOT: The language I have
in front of me says "prohibited conduct. A person or
government that is involved in adoption or foster care
placement may not (a) deny to any individual the
opportunity to become an adoptive or a foster parent
on the basis of race, color, or national origin of the individual or of the child involved; or (b) delay or deny the placement of a child for adoption or into foster on the basis of race, color, or national origin of the adoptive or foster parent or the child involved."

VICE CHAIR THERNSTROM: Where is the exception in that language?

That language does not suggest that there can be exceptions.

COMMISSIONER HERIOT: The previous version, the Howard-Metzenbaum version has exceptions with much looser language. But I don’t know of any.

VICE CHAIR THERNSTROM: I don’t want to say MEPA makes it clear that blah, blah, blah and refer to exceptions when MEPA doesn’t, from the language we just read --

COMMISSIONER GAZIANO: That’s why I was trying to say -- let me go back to my original amendment. There are some regulations issued under this that suggest the -- by the way the text that Commissioner Heriot read says that -- maybe you could read it again, but is it clear that absolutely no consideration can be given? It essentially says that can be read by various people in still mischievous
ways. So maybe one way I suppose I'd prefer to do this is to just make it clear that strict scrutiny still applies.

MEPA is in line with current equal protection law which holds that governmental actions undertaken on the basis of race are subject to strict scrutiny and must be justified by a compelling government interest.

CHAIRMAN REYNOLDS: Well, Todd, if I understood the language you just read, the statutory provision is stricter than the constitutional rule.

VICE CHAIR THERNSTROM: Exactly, and the statutory language does not refer to, as I understand it from what Commissioner Heriot just read, does not refer to permissible exceptions.

CHAIRMAN REYNOLDS: So while the Constitution may have room or provide room for a state to consider race under certain circumstances, the statute does not?

COMMISSIONER GAZIANO: If someone could read me the language or the statute again. It's a little unclear to me. The statute is a little unclear and HHS has interpreted it to allow it in certain circumstances so I thought we might want to -- if someone else can formulate a different last sentence
that would be fine. Maybe we can come back to it
while someone is working on it.

STAFF DIRECTOR DANNENFELSER: Should we
say MEPA's regulations make it clear?

COMMISSIONER HERIOT: Have we even looked
at the regulations?

VICE CHAIR THERNSTROM: I would need to
look at the regulations. I'm unhappy. I don't know
what I'm doing here because let's go on the basis of
what Commissioner Heriot read to us. There are no
exceptions in this statute itself.

COMMISSIONER HERIOT: I would reserve
judgment on whether or not exceptions should be read
into that.

VICE CHAIR THERNSTROM: Whatever, but I'm
in the dark here.

CHAIRMAN REYNOLDS: Okay, folks, do we
vote? Is there consensus on how we should handle it
or should we just have a vote?

COMMISSIONER GAZIANO: Is it possible that
we could take up this particular finding at another
meeting?

CHAIRMAN REYNOLDS: It's the equivalent of	
tabling it, because staff wouldn't be -- well, I guess
the answer is yes. But we wouldn't be able to publish
the document until this issue is resolved.

STAFF DIRECTOR DANNENFELSER: We still
would need Commissioners to have their comment period,
so we're going to have some time for that to take
place.

COMMISSIONER REYNOLDS: Okay, does anyone
have any objection to tabling finding number nine?

COMMISSIONER HERIOT: Well, the comment
period may require some comment on what number nine
eventually becomes.

VICE CHAIR THERNSTROM: I need to see the
regs and the MEPA stats.

COMMISSIONER HERIOT: Can I comment? The
reason I have been abstaining is that it did seem to
me that the report did not focus enough on the
language of the statute and the legislative history of
the statute. I don't think that we should simply
accept what we're told about a statute. The statute
should be in the report and this is not focused enough
on the language of the statute. It seems to me that
one of the witnesses suggested that we should take a
hard look at what the Department has issued as
regulations and given an opinion on whether or not
that's the appropriate interpretation of the statute.
I would have rather done a report on that.
VICE CHAIR THERNSTROM: I am in agreement with that, fortunately. I wish you had stated that up front.

CHAIRMAN REYNOLDS: Okay, we're going to table finding nine. Next up is finding number ten. I move that the Commission approve the following language: In a study of state adoption policies, the Government Accountability Office found that states consider provision of federal subsidies to parents who adopt a child with special needs to be helpful in reducing racial disparities in adoption. As used in adoption special needs is a term states use for children who have categories they believe make adoption more difficult, for example, being an only child having a disability or being a member of a minority group.

Is there a second?

COMMISSIONER GAZIANO: Second with one justification.

COMMISSIONER TAYLOR: I'm sorry, would you read that again, Gerry, I lost you there for a second.

COMMISSIONER GAZIANO: In a study of state adoption policies, the Government Accountability Office found that states consider provision of federal subsidies to parents who adopt a child with special
needs to be helpful in reducing racial disparities in adoption. As used in adoption special needs is a term states use for children who have characteristics they believe make adoption more difficult, for example, being an only child having a disability or being a member of a minority group.

COMMISSIONER TAYLOR: Thank you.

CHAIRMAN REYNOLDS: Is there a second?

COMMISSIONER GAZIANO: Second, but I have a question as well. Being a member of a minority group, it may be true, so it may fit this finding that states include that as a factor or as an example of a child with a special need, but then I think we have to use that term special needs very carefully and may need some amendments in the recommendation. But before we proceed to that, I just want to make sure those who drafted the report are comfortable. I think I'll have to abstain on this one seconding it for purposes of discussion only, that states really do identify children of minority -- minority children as those needing special needs or fitting the special needs category.

CHAIRMAN REYNOLDS: Other comments?

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: I'm abstaining.
CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Abstain.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Aye.

CHAIRMAN REYNOLDS: Give me a moment. I'm trying to figure out -- and Commissioner Yaki, this is an opportunity for you. I'm trying to figure out whether I'm being irrational now. I too have concerns about this label of special needs being applied to certain minority groups and -- I understand what they mean. They're basically saying that certain children, that the probability of certain children being adopted within a certain time frame is reduced because of certain characteristics. I get that.

All right --
COMMISSIONER TAYLOR: Mr. Chairman, can I make a comment?

CHAIRMAN REYNOLDS: Well, I made up my mind and I'm voting for it --

COMMISSIONER TAYLOR: Let me still make a comment. I think we need not shy away from the facts and reality. We may not like the label that people put on it, but in this context, in terms of a finding where we are recognizing the reality, but really helps place children, I don't think we should shy away from it. We don't have to embrace the label to acknowledge the facts and that's why I'm voting for it.

CHAIRMAN REYNOLDS: I had to do some thinking out loud, but I arrived at the same conclusion.

COMMISSIONER TAYLOR: And also in the interest of full disclosure, this also comes out of my experience of adopting my oldest son where this was a real issue since he is half Persian and half African American and it became a real issue in terms of a private adoption and it's something that we struggled with and so this is something that again I don't shy away from even though the label may not be something we all like.

CHAIRMAN REYNOLDS: Okay, now we're up to
recommendations.

STAFF DIRECTOR DANNENFELSER: Mr. Chairman?

CHAIRMAN REYNOLDS: Yes.

STAFF DIRECTOR DANNENFELSER: Just a clarification. Someone pointed out that they thought when you read the finding that you might have said reducing racial disparities whereas the test may have said disproportionality and I'm just wondering if you meant to say disparities or disproportionality in that instance?

CHAIRMAN REYNOLDS: I am aware that a different term was used and I purposely changed it. Now is there a distinction, am I losing something with the revision I made?

STAFF DIRECTOR DANNENFELSER: Well, we just want to be clear on what language to put in the --

CHAIRMAN REYNOLDS: Oh, I see.

STAFF DIRECTOR DANNENFELSER: -- put in the printed report.

CHAIRMAN REYNOLDS: This is a finding.

Yes. Okay, let's flip it back to what it originally was -- what was the term, disproportionality?

STAFF DIRECTOR DANNENFELSER:
Disproportionality.

CHAIRMAN REYNOLDS: Okay. And I did it one other place. I hope it's not in the findings or recommendations, but it very well may be. So please bring it to my attention if that turns out to be the case.

STAFF DIRECTOR DANNENFELSER: Okay.

CHAIRMAN REYNOLDS: Okay, I move that we approve recommendation one which reads as follows: It is in the best interest of a child to be placed in a safe and stable home.

Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Could you read that again?

CHAIRMAN REYNOLDS: It is in the best interest of a child to be placed in a safe and stable home?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I don't know.

That sounds pretty controversial to me.
(Laughter.)

COMMISSIONER KIRSANOW: I'll have to go with yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

(No response.)

CHAIRMAN REYNOLDS: Can anyone hear me?

COMMISSIONER HERIOT: I can.

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Did Commissioner Taylor respond?

COMMISSIONER HERIOT: No.

CHAIRMAN REYNOLDS: Okay, let's assume that he's off the line. I vote in the affirmative. So we have two abstentions. Commissioner Taylor did not vote and the remaining Commissioners voted in the affirmative. One down.

COMMISSIONER YAKI: I'll change my vote to a yes, Commissioner Yaki.

CHAIRMAN REYNOLDS: Let the record reflect that Commissioner Yaki voted in the affirmative.

COMMISSIONER YAKI: But my statement on
this is going to be on the definition of what a stable
home is.

CHAIRMAN REYNOLDS: Okay. I move that the
Commission approve recommendation number two which
reads as follows: The U.S. Department of Health and
Human Services should continue with its vigorous
enforcement of MEPA's anti-discrimination prohibition.

Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Well, is there
some question that HHS needs to be told to continue
with -- to enforce such an important statute? I'm
just trying to understand why we've got this here.

CHAIRMAN REYNOLDS: To demonstrate that we
have a firm grasp of the obvious.

COMMISSIONER GAZIANO: Well, I think the
word vigorous adds something. We think that they
ought to be vigorously enforcing this. You --

VICE CHAIR THERNSTROM: No, we say
continue --

COMMISSIONER GAZIANO: Right, we don't --
assuming that's been their posture, we don't want them
to slack off on this one.

COMMISSIONER HERIOT: I don't think this
is an obvious statement at all. I think some of the
enforcement actions by the Department of HHS has been
somewhat controversial.

CHAIRMAN REYNOLDS: So Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: All right, yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: Commissioner Taylor, have you returned?

COMMISSIONER TAYLOR: I have returned, yes.

CHAIRMAN REYNOLDS: And I vote for it also, we have two abstentions and the remaining Commissioners voted in favor of it. The motion passes.

Okay, rolling right along. Recommendation
number three. I move that the Commission approve it.

The language reads: HHS should investigate individuals, agencies and groups who seek to sidestep MEPA's strong restrictions on the use of race in placements when they use consultants whom the agencies expect to render an expert opinion that same-race placement is in the best interest of the child. HHS should impose sanctions as appropriate.

Is there a second?

COMMISSIONER YAKI: This is Commissioner Yaki. Doesn't this suffer from the same defect as finding number nine that we deferred since it's based on finding number nine?

CHAIRMAN REYNOLDS: Finding number nine. Commissioner Yaki, could you please --

COMMISSIONER YAKI: That was the whole long rewrite of the strict scrutiny standard that we did.

CHAIRMAN REYNOLDS: Well, this one does not, I don't believe this implicates the Constitution.

COMMISSIONER YAKI: Sure it does, because nine is based on --

COMMISSIONER GAZIANO: I agree they may be related. If we're going to postpone nine, maybe we should postpone three as well. Maybe there's a way to
improve it. I had a separate question about it myself and was going to abstain.

CHAIRMAN REYNOLDS: Okay, so --

COMMISSIONER GAZIANO: I don't know about HHS' sanction authority and the extent to which this is -- I'm just not familiar enough with this recommendation to vote for it. But I defer to others if they want to.

CHAIRMAN REYNOLDS: Okay, let's vote. Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I don't understand. I thought there was some motion here that if we're postponing nine, we're postponing this too.

COMMISSIONER YAKI: I so move. Commissioner Yaki.

CHAIRMAN REYNOLDS: Okay, no vote necessary.

Recommendation number four. The language reads as follows: HHS should increase its efforts to assist federal and state agencies in recruiting adoptive families for all children available for placement regardless of race or ethnicity with a goal to produce a broad spectrum of prospective families.

Is there a second? Is there a second?

COMMISSIONER GAZIANO: Second for purposes
of discussion.

CHAIRMAN REYNOLDS: Thank you, Commissioner Gaziano.

Discussion.

COMMISSIONER GAZIANO: The reason for my hesitancy on this one is "should increase its efforts." I'm just not having participated in the briefing, I'm a little unclear whether its efforts are good, bad, indifferent and this relates to another concern I had with another recommendation. Whenever we're telling agencies to spend more efforts, we're also telling them to potentially spend more money. So that just gives me a little bit of pause.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: I have exactly the same problem. Abstain.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Abstain.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.
CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Abstain.
CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: No.
CHAIRMAN REYNOLDS: So you're voting against the motion?
COMMISSIONER TAYLOR: Correct.
CHAIRMAN REYNOLDS: I'm curious. What's your rationale?
COMMISSIONER TAYLOR: Because I agree with the comment. That leads me to a no.
CHAIRMAN REYNOLDS: Okay. I'm going to abstain. Okay, the motion fails.

Recommendation number five. It reads: HHS should develop and support adoption policies and practices that will allow adoption agencies to have conversations with parents about the challenges of raising children whose race differs from their own without engaging in illegal racial discrimination.

Is there a second?
COMMISSIONER GAZIANO: Second.
CHAIRMAN REYNOLDS: Okay, I think it's somewhat redundant. I would like to offer a friendly amendment to strike the word "illegal." Someone was growling?
(Laughter.)

Do I take that as concern or opposition?

COMMISSIONER GAZIANO: I think it was something irrelevant. I think we can move on.

COMMISSIONER YAKI: Or it was someone's breakfast, one of the two.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I don't know what these conversations -- it's too vague for me. There are conversations I would not like that bureaucrats could engage in or develop guidelines for. I will abstain from that. It's too open ended for me.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: Was that a nyet or a
yes?

COMMISSIONER TAYLOR: No. I mean I agree with Andy's comments. This is one of those things I think it's one, vague. I think two, it's unnecessary. And I'm generally cautious about encouraging bureaucrats to have certain conversations.

CHAIRMAN REYNOLDS: Okay, I am going to vote for it. And --

VICE CHAIR THERNSTROM: I'm going to change my vote to a no. It goes against my convictions here. I don't like this.

CHAIRMAN REYNOLDS: Okay. We have two nos. We have two affirmative votes. It fails.

Recommendation number six: Federal subsidies to parents who adopt a child with special needs are helpful in moving minority race children from foster care to adoption and, therefore, should be maintained.

Is there a second?

COMMISSIONER KIRSANOW: One more time, Gerry?

CHAIRMAN REYNOLDS: Federal subsidies to parents who adopt a child with special needs are helpful in moving minority race children from foster care to adoption and, therefore, should be maintained.
COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Thank you.

Discussion?

Vice Chair Thernstrom, how do you vote?
VICE CHAIR THERNSTROM: I'm abstaining.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Abstain. I think the wording, the inclusion of special needs gives me some pause and the encouragement of federal monies. I'm just unclear how that works, whether there's a pot of money that's going to go to waste or something. So I'm just going to abstain.

CHAIRMAN REYNOLDS: Commissioner Heriot?
COMMISSIONER HERIOT: Abstain.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?
COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote for it also. We have three votes in favor. The rest are abstentions. It passes.
Recommendation number seven reads as follows: In order to increase the number of homes available for the permanent placement of African American and other special needs children, Congress should allow reimbursement for legal guardianship similar to that currently provided for adoption. Previously recommended by GAO.

Is there a second?

COMMISSIONER YAKI: Second.

CHAIRMAN REYNOLDS: Discussion?

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Well, wait a minute. I have a question here. What does legal guardianship mean here? I'm sorry.

CHAIRMAN REYNOLDS: Well, an individual could assume the responsibility for a child without the adoption of that child.

VICE CHAIR THERNSTROM: I'm sorry, somebody is at my door.

COMMISSIONER YAKI: Is that the milk man, Commissioner Thernstrom?

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Abstain.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Abstain.
CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

COMMISSIONER YAKI: Commissioner Yaki votes yes.

CHAIRMAN REYNOLDS: How did Commissioner Melendez vote?

COMMISSIONER YAKI: He abstained.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

VICE CHAIR THERNSTROM: I'm back. I'm sorry.

COMMISSIONER YAKI: Did they get the order right, Abby, did you get your large pepperoni?

(Laughter.)

VICE CHAIR THERNSTROM: The leaves are all over my lawn and the guy who takes care of it told us to come again and the property is a mess.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIR THERNSTROM: We should have a vote on that. Spend some money to get the leaves off my lawn. Go on.

CHAIRMAN REYNOLDS: The motion passes.

Recommendation number eight. I move that the
Commission approve the following language: The practice of actively recruiting same-race foster and adoptive parents must not result in discouraging trans-racial adoptions and placements and it must not result in diminished efforts to find qualified adoptive parents regardless of their race.

Do I hear a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I don't know that this was -- I wasn't involved in drafting this. I don't even understand it any more. The process is actively recruiting so and so such race for adopted parents.

Wait a minute. We've established that it shouldn't be taking place. We haven't established that it does take place and somebody else must understand this recommendation better than I do at this point.

COMMISSIONER GAZIANO: Why don't we say this? I think maybe this will help. Why don't we strike the "same race" modifier, so that eight would then read: "The practice of actively recruiting foster and adoptive parents must not result" yadda, yadda, yadda.
VICE CHAIR THERNSTROM: Haven't we already said that in effect?

COMMISSIONER GAZIANO: One of our special assistants says that the statute actually encourages finding same race parents. I yield to others then. We don't want to put it in a recommendation.

VICE CHAIR THERNSTROM: If we are tabling two others I'd like to table this because I want to see statutory language.

CHAIRMAN REYNOLDS: Okay. All right. Bear with me. I'm looking at my notes.

Management and Operations

CHAIRMAN REYNOLDS: Okay, next up, Management and Operations. During the November 20th meeting, Commissioners asked the Director of Management to create a job description for Special Assistant that would set the ceiling for the position at the GS-14 level that accurately reflects the time, level of responsibility and work involved with the position. They further instructed that all necessary action be taken to effectuate that change. Commissioners also asked the Staff Director to conduct a review of critical staff positions to assess whether similar actions have been taken or could have been taken by OSD with respect to those positions.
The Staff Director is prepared to report back to the Commission on both points.

Mr. Staff Director, please provide us with an update on these two personnel related topics.

STAFF DIRECTOR DANNENFELSER: Thank you, Mr. Chairman. A few days ago, I sent Commissioners a proposed position description at the GS-14 level that would apply to Commissioners' special assistants and the Director of Management is prepared to submit that to OPM for their approval unless Commissioners have some strong feelings about wanting to change it. So I would encourage feedback in the next few days from Commissioners on that, if they do have -- if they find any of the language in that position description troublesome or they feel that it should be enhanced in some way. But otherwise, I know that Commissioners were interested in trying to move this process forward as expeditiously as possible, so if we are prepared to do that, like I say, unless there is some feeling on the part of Commissioners that they'd like to see that proposal amended in some fashion.

I also sent a memo that I received from the Director of Management addressing the issue of the grade levels for the career staff and noted that over time certain changes have been made to the grade
levels and some of them fairly recently. I noted that, in particular, there were a few positions for which the grade levels had been changed fairly recently and she mentioned some examples of where they had been changed several years ago. Then explained what the rationale was for the grade levels and a number of other cases. So again, I did encourage Commissioners at that time if they had any further questions about that memo to either contact me or to contact the Director of Management and we would be able to provide some further explanation.

CHAIRMAN REYNOLDS: Questions, comments?

VICE CHAIR THERNSTROM: Yes, I've got questions. Hold on. My phone is about to die here. I'm looking for my cell phone so I can call back. The first question is budgetary. I'm sure all of us think our special assistants qualify for a higher pay, Commissioners have other needs. I'd like to hear the Staff Director address that question.

STAFF DIRECTOR DANNENFELSER: Well, there is money available within the Fiscal Year 2010 budget that could accommodate this change. The question is really beyond that is a policy question on the part of the Commissioners as to whether they feel this is a good use of those resources or would they rather see
those use of resources used in another area. But in
terms of a budget we have prepared --

VICE CHAIR THERNSTROM: I'm going to get
on this so you know, we're going to think in the next
fiscal year that was the best use of our resources as
well. Or you're going to have other priorities.

STAFF DIRECTOR DANNENFELSER: That is an
issue that Commissioners have to consider. We do have
some more uncertainty about the Fiscal Year 2011
budget. There was proposal that that either should be
at the flat line level or perhaps reduced by up to
five percent, so that is something that would require
more belt tightening if we wind up with a lower level.
But again, within -- certainly within Fiscal Year
2010, we could accommodate this change, based on the
budgetary proposals that have been adopted so far.

COMMISSIONER GAZIANO: Mr. Chairman, I
just want to say that this -- that issue, the
budgetary issue certainly is similar, if not in some
ways the same as when any of our permanent staff are
given promotions within the GS level that are
appropriate. That normally is not brought to the
Commission's vote. Just on first blush, I don't think
it necessarily should be brought to our attention on a
regular basis. And I think the vote we've taken now
or I don't know that a vote -- another vote is needed, but the step we're taking now is just saying that for retention purposes and to properly reflect our special assistants who - -that we should have that grade level also available for those who fit the requirements. So I don't see how the budget issue is really much different. It's one of fairness and properly reflecting the work that the job of our counsel and special assistants have become. I think some of their duties have expanded in the past year and that we should -- our compensation system should reflect that.

COMMISSIONER YAKI: Commissioner Yaki here.

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: Well, first of all, I just want to correct the previous speaker. They're not counsel. They're special assistants. There's a very distinct difference.

Number two, I don't believe that we are voting on any individuals. I assume, however, that the Staff Director has some estimate on the number of people who might qualify for the bump up and what the budgetary impact of that would be. And as Commissioner Thernstrom said, I don't think it can necessarily be seen as insignificant, given the fact
that there have been some clear signals being given
that FY 2011 and perhaps even FY 2010, 2010 may have a
recession. 2011 the signal has been level funding or a
5 to 15 percent cut, depending on the agencies in
question.

So I just think that we have to proceed
with caution. I am pleased, however, to find here
that this will be submitted to OMB. My understanding
is that not only must the position be submitted to
OMB, but that since these essentially qualify as a
promotion within the Schedule C grade that that also
has to go to OMB for approval on an individual basis
as well. At least that's my understanding.

Anyway, I just wanted to state that I
think that the budgetary impacts are not
insignificant, but I do want to commend Ms. Martin for
her speed in which she put this together for the
special assistants. As much as many of them are
lawyers, they are special assistants. They are not
counsel.

STAFF DIRECTOR DANNENFELSER: Just a
clarification, the Agency that this would go to would
be OPM, the Office of Personnel Management.

COMMISSIONER YAKI: I stand corrected.

COMMISSIONER GAZIANO: Commissioner Yaki
attempted to correct me. I don't take correction on any of those points. My special assistant is both a counsel and special assistant, but regardless of that, I do not think the legal authority is clear at all, that we are required to get permission from OPM on that. I'm willing to be convinced. I don't -- it may not make a big difference to inform them of the change, but we can discuss that off line and we should try to avoid accepting a view of what is legally required if we don't have to accept the view that it is legally required. But if we can work out something with OPM without admitting some legal requirement, then let's try to work that out.

CHAIRMAN REYNOLDS: Mr. Staff Director, any other comments?

VICE CHAIR THERNSTROM: I have more comments.

CHAIRMAN REYNOLDS: Yes, Vice Chair Thernstrom.

VICE CHAIR THERNSTROM: I mean I find the language here -- I'm not a lawyer. I'm not a federal bureaucrat so bear with me, I'm finding the language a little bit impenetrable. But would the promotion of special assistants from GS-13 to GS-14, would that be automatic if this job description is approved? Will
all qualified special assistants get promoted to GS-14 automatically?

STAFF DIRECTOR DANNENFELSER: Each Commissioner would have to make a request on behalf of their special assistant.

VICE CHAIR THERNSTROM: Every Commissioner is going to make a request.

COMMISSIONER GAZIANO: Vice Chair Thernstrom, I know you weren't present for the discussion, but some special assistants and counsels are not even at the 13 level right now. So no.

VICE CHAIR THERNSTROM: I'm talking about those who are at the 13 level.

COMMISSIONER GAZIANO: But that fact reflects the idea that our counsel and special assistants must necessarily fit reasonable criteria, that there are reasonable criteria that this Commission will consider. And that we need to be consistent with the principles that apply to our professional staff as well as the principles that apply to the Federal Government generally. And those will not automatically render all special assistants 14. Some just don't have the experience level or other qualifications to be currently even at the 13 level or immediately promoted to the 14 level.
VICE CHAIR THERNSTROM: I would also rather have -- did you say it was the Office of Personnel - Presidential.

STAFF DIRECTOR DANNENFELSER: Office of Personnel Management.

VICE CHAIR THERNSTROM: Personnel Management. Okay, I would also rather have an outside agency looking at the judgments that we're making with respect to the qualifications to move up as well.

CHAIRMAN REYNOLDS: Well, I would have to hear more about that, but we make our decisions. I don't seem to have -- I don't understand why you don't think that that's not something that's appropriately - a matter that's appropriately handled at the Commission.

VICE CHAIR THERNSTROM: I just think there's a lot of subjectivity and politics that can go into these decisions. I would prefer that they be reviewed by somebody not within the Agency.

CHAIRMAN REYNOLDS: Other comments?

COMMISSIONER MELENDEZ: Yes, Commissioner Melendez here. That's a good point as far as who would make the decision, for example, if I have a special assistant that I'm trying to fill since Richard Schmechel left, the question would be at what
level would this other person come in. If I looked at it and I said well, it looks like he should come in under the 14 and then all of a sudden the staff would say well, we think he ought to come in at a 12, and then on the other side, somebody would say well, I think my person ought to be a 14 and how is the fairness of -- because I can hear it already coming that some of us might be denied based on the politics and all those things. So how are we guaranteed that somebody rightly looks at the qualification and there's not politics, say on the Democrat side, we make that recommendation and all of a sudden it's put down because of whatever reason, so I think what Abigail is saying is how do we guarantee that somebody takes an honest look at it and that person really gets the merit of their qualifications that determine their pay scale and there really isn't any politics or anybody denies that person being a 14 if that's where we're going to go.

VICE CHAIR THERNSTROM: Mr. Chairman, it's politics, it's unstated agendas, it's whatever.

CHAIRMAN REYNOLDS: Isn't that possibility -- that's been in place from the beginning. And we've been making this type of determination since the beginning of the Agency. Whenever someone comes on
board there has to be a determination as to what grade
an individual will get.

Our staff people -- our staff people have
been making these determinations and if there's been
an agenda or politics, it has not come to my
attention.

COMMISSIONER GAZIANO: Right now we have --

CHAIRMAN REYNOLDS: -- a determination is
made by staff, but nothing has come to my attention
that anything that smacks of politics has gone on.

COMMISSIONER GAZIANO: Right now, the
options for special assistants/counsels are 11, 12 --

COMMISSIONER YAKI: Why do you keep on
calling the special assistants slash counsel when the
clear designation is special assistant? If you're
going to call -- if you're going to do that, then we
created a bifurcation in the designation of our
special assistants for those who may not be lawyers.
And I don't see why we're doing that. It is a special
assistant period. Not special assistant/counsel.
It's not counsel/special assistant. It is special
assistant. That is the Schedule C OPM designation.

I mean if you feel a need for whatever
reason to have a counsel next to you, that's fine, but
that is not the classification we're talking about. We're talking about a special assistant and they can only represent themselves as special assistants out into the world, unless of course, you want me to start having my special assistant because called chief counsel for the minority staff, blah, blah, blah, blah. We can make up all sorts of stuff. But it's not right.

COMMISSIONER GAZIANO: Commissioner Yaki, I didn't interrupt you and I really don't like how you scream and yell --

COMMISSIONER YAKI: I'm not screaming and yelling.

COMMISSIONER GAZIANO: I was still talking. You are so easily upset.

COMMISSIONER YAKI: I'm not easily upset.

COMMISSIONER GAZIANO: You must learn to restrain yourself.

(Laughter.)

COMMISSIONER GAZIANO: As I was saying before I was rudely interrupted, we currently have designations 11, 12, and 13 for our counsel and special assistants and all the motion we're -- we've already adopted the motion. The step I think we're taking is to include a fourth possible level which
reflects the kind of activities and job duties that some of our counsel and special assistants are performing for us and so I don't see how the fairness issue has changed much at all.

COMMISSIONER MELENDEZ: Commissioner Melendez here. Again, going back to the budget, I do have a concern as usual. If for some reason we have an idea and it almost sounds to me like because we have oversight over the budget that there's a certain amount, when we talk about promotions, that's kind of a -- I guess you must build in some type of 10 percent or something for promotions that happened every year. I'm not sure how it's done because we don't really, as a Commission, really approve promotions or whatever you call it, because there are some I saw that had been done that never came in front of the Commissioners. But if that's so, if you're saying that this move to a 14 would only affect a couple of people, then is that what you expect or are we saying that -- because it's a budget line item and affects a couple people, that would be one thing. If it affected four or five, you may end up with $50,000 or something like that. I'm guessing, because I have no idea what going from 13 to a 14 actually means when we're talking about money, as opposed to how many
people. So I would think that at some point I'd like to hear some ballpark figure as to what we think on a budget, if you're saying it's in the 10 percent that's kind of discretionary that you give promotions for people in general, fine, but if you think it's a big hit, then I'd like to know about that, if you think that's going to be a substantial increase or $50,000 or something like that for people that we expect to raise --

STAFF DIRECTOR DANNENFELSER: We do generally build in to the budget bonuses and promotions, so there is generally a line item in the budget for that that we anticipate certain and we also have the grade level increases, the within-grade increases that people are eligible for, either on an annual, semi-annual or once every three years, depending on where they are in the step within their grade. So we do build those things into the budget.

I believe there would be potentially, if we factor in your hiring of another person potentially six people that would be eligible for this increase.

VICE CHAIR THERNSTROM: Mr. Staff Director, there will be numerous special assistants coming on with new Commissioners 11 months from now. They will affect, depending on what level they come
in, they will affect the budget as well.

   Look, on the point of -- Mr. Chairman, on the point of well, we have always trusted the staff to do this in a professional way. Yes, that's true. I have, maybe naively, I have trusted the staff to determine what level people come in at in a very professional ways, but this whole proposal is, you know, it's driven by -- we've taken this out of recommendations by professional staff. Obviously, behind this proposal are various agendas, politics, personalities, etcetera.

   CHAIRMAN REYNOLDS: Could you be more specific? It seems like there's something on your mind.

   VICE CHAIR THERNSTROM: What's on my mind is that I think -- I can't be more specific without going back to the -- which I wasn't to add, I only have the transcript by going back to the executive session last time. But there are concerns about specific special assistants and whether they're getting proper pay and so forth. This is not simply a question of turning over to TinaLouise Martin a judgment as to where people belong and the whole thing just -- I don't have a good comfort level with it.

   CHAIRMAN REYNOLDS: Okay, we had a
conversation about the fairness of placing a limit on
the GS level that the majority of us thought was
artificially low. And we had a conversation about the
need to have the GS level reflect the skill set and
the value that special assistants bring to the table.

We also said that promotions would not
happen automatically, that everything that we do is
raise the level from a GS-13 and make it possible for
-- make it possible for people to be eligible for a
GS-14. Whether or not someone is eligible or not, the
system that has been in place will not be altered in
any way. The only thing that's going to change is
that the limit will be raised from a 13 to a 14.
Anything else, everything else related to the
promotional process remains the same.

COMMISSIONER GAZIANO: Mr. Chair, just in
case we're unclear if a vote is needed, I move that
the Staff Director be directed to move promptly to
seek approval for this change in possible grade levels
to include a GS-14 and that Commissioners are
encouraged to get any additions, corrections, or
suggestions to the proposed job description to the
Staff Director as soon as possible.

VICE CHAIR THERNSTROM: Let me say, Mr.
Chairman --
COMMISSIONER HERIOT: Is there a second to that motion?

COMMISSIONER KIRSANOW: Kirsanow seconds.

COMMISSIONER HERIOT: Okay.

VICE CHAIR THERNSTROM: As I read the transcript of the Executive Session, there was one remark saying well, if one of the special assistants would leave, if these promotions weren't done well -- that's what I mean by saying look, there's more to this than simply bureaucratic judgment here.

COMMISSIONER GAZIANO: If someone decides to leave, that's their prerogative.

MR. BLACKWOOD: This is David Blackwood. Before anyone goes any further, if we're going to talk about individuals, we will need to go into executive session. We do not need to as long as we talk about it in a general way.

COMMISSIONER GAZIANO: Yes, and as I recall, I think it was a hypothetical, but there were a couple of statements, but one was by me. I was just saying that I think that we should not put any of our special assistants in a position that's significantly different than their counterparts on professional staff and in other agencies where several of them have come from where they get to a level of experience with
us, where they have hit an artificial ceiling that
doesn't reflect their needs and they may
hypothetically be encouraged to go to another agency.
That was my point or if it wasn't, that's my
clarification now.

STAFF DIRECTOR DANNENFELSER: Just on this
point, there are objective criteria for how the grade
levels are determined and the Director of Management
has been, as our Chief Personnel Officer, has been the
main person who has made those evaluations. So it was
also noted earlier that there are some distinctions
between the existing special assistants in terms of
grade levels and those are based on those type of
objective criteria such as work experience, salary,
history, and so on.

COMMISSIONER MELENDEZ: Commissioner
Melendez. I'm still concerned about the budget impact
and I know you're not talking about this in this
motion unless we come up with another motion after
this. And what I'm talking about is it's one thing to
change a job description for say one person, like a HR
person or it could be a finance person, so you expect
an increase to that one person. If we do something
across the board that you're talking six people or
something like that, then I want to see what that --
if it goes up and above and it comes out of some discretionary money that wasn't actual budgeted for your normal promotions, you either have to tell us there's enough money in the normal promotions or because you're talking about six people it goes above that and we end up tapping money out of discretionary and that's where it comes in as what Ms. Thernstrom said about priorities, because then -- I've been one to always say that we don't even have a director in the Western Region. And so the question would be well, is this competing against those priorities also, if it's at a magnitude where it's not just one position, where you're giving another step and it's a minor hit, fine. If you're talking about six and we're talking about a substantial amount of money, I still would like to see that, either in another motion or something so I'm knowing that we're not going beyond priorities here. It's a minor hit to what you're talking about discretionary raises and those type things. If it's not, then I sure want to know we're going into discretionary funding that could be used somewhere else and I'm not sure what you're saying because nobody has really told me what the dollar amount is going to be as to what we anticipate and I think that's our responsibility as the budget in
a normal setting, but this appears to be going above
the normal minor raises here and there that you
anticipated in your budget. Sounds like this is going
to be some expansion to what you had predicted.

VICE CHAIR THERNSTROM: And I want to
reiterate, we have no idea -- it could be two new
special assistants and we've got two new Commissioners
who would be eligible for GS-14s.

COMMISSIONER REYNOLDS: And I think that
would be fine.

VICE CHAIR THERNSTROM: It may or may not
be depending on our budgetary priorities.

COMMISSIONER HERIOT: This is a really
good use of money to get good special assistants and I
think it's crucial to the future of the Commission.

CHAIRMAN REYNOLDS: Okay, any more
discussion? Okay, we're --

COMMISSIONER GAZIANO: Can we vote on the
motion?

CHAIRMAN REYNOLDS: The approval of the --

COMMISSIONER HERIOT: Aren't we going to
vote on the motion?

CHAIRMAN REYNOLDS: Oh, that's right.

Discussion?

Vice Chair Thernstrom?
COMMISSIONER MELENDEZ: Can you restate the motion, please?

COMMISSIONER GAZIANO: I'll try. I move that we direct the Staff Director to move promptly to whatever steps are necessary to get the grade level 14 added to the grade levels that our special assistants, can achieve, and that Commissioners are encouraged to provide any additions, suggested corrections to the proposed job description to the Staff Director who will pick a day, say a week from today.

Anything else, Mr. Staff Director, you want included in that motion?

STAFF DIRECTOR DANNENFELSER: Just a particular date would be helpful. As you just stated, a week from today would be find if that's something that the Commission feels is a reasonable time period.

VICE CHAIR THERNSTROM: I'd like to get off this for a minute. You're talking about comments on this from Commissioners coming in?

COMMISSIONER GAZIANO: Yes.

VICE CHAIR THERNSTROM: And then will it come back to the Commission, the comments that have been received and --

COMMISSIONER GAZIANO: No. My motion --

VICE CHAIR THERNSTROM: Will it come back
to the Commission for another vote?

COMMISSIONER GAZIANO: No, my motion is that he proceed expeditiously while he's awaiting our comments, but that our comments are just on the job description and that those are due in a week.

VICE CHAIR THERNSTROM: I would think we would need to see the final version and to vote on it once again.

COMMISSIONER HERIOT: We don't vote on everything. I think it's odd that we're voting --

CHAIRMAN REYNOLDS: Okay, but the special period has run and Vice Chair Ternstrom asked for a clarification which was provided. Vice Chair Ternstrom, how do you vote?

VICE CHAIR THERNSTROM: No.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: No.
CHAIRMAN REYNOLDS: I'm sorry?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote yes also.

Next up, approval of the minutes. I move to approve --

COMMISSIONER GAZIANO: Mr. Chair, would you mind -- we've postponed the healthcare letter, could we -- would you mind returning that to now. I think the General Counsel is ready to discuss that.

CHAIRMAN REYNOLDS: Okay, Mr. Blackwood?

MR. BLACKWOOD: Sir, this is David Blackwood. The applicable provision is AI 1-7. I don't know whether you all have received copies. I asked that my secretary PDF it and then email it to you.

But the short of it is here are the conditions of notational voting. One, it is strictly a vote. It's not a discussion. You all will be sent around a piece of paper and it will say yes or no. So I just wanted to emphasize it doesn't involve discussion. Two, it has to be a unanimous decision by the Commission to have a notational vote. If any one of you doesn't want to have a notational vote, it does
not occur. Three, as to the timing, the normal rule
under AI 1-7 is four days. That said, if it's
unanimous vote again, you all can shrink that. You
can do it -- decide today to do it in three days, five
days, whatever you choose. But if we do it under four
days, the chair has to say it's extremely urgent and
again, all Commissioners must agree.

COMMISSIONER GAZIANO: Mr. Chair, I don't
think that we need to reduce it under four days.

MR. BLACKWOOD: Four business days.

COMMISSIONER GAZIANO: Okay, even
necessarily under four business days. I would -- if
Commissioners are unanimous, then maybe we could get
comments to Commissioner Kirsanow by close of business
Tuesday, and we can agree to vote by notational vote
on Thursday. Would that satisfy the rule?

MR. BLACKWOOD: Yes.

COMMISSIONER GAZIANO: Failing that, I
would move to -- failing unanimous consent on that, I
would move that we adopt the procedure we have for
some other letters which is to vote on a draft that is
circulated under those similar circumstances where a
draft is circulated on Tuesday and if it secures a
majority vote by Commissioners that it be sent to the
Senate forthwith.
CHAIRMAN REYNOLDS: Okay, so do we have unanimous consent to have a notational vote?

Vice Chair Thernstrom?'

(No response.)

Hello? Can anyone else out there hear me?

COMMISSIONER HERIOT: I can hear you.

COMMISSIONER TAYLOR: I can hear you.

COMMISSIONER HERIOT: Just go on to the next person.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: I could consent to either.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I would consent.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: What are the two options again? One is a notational --

COMMISSIONER GAZIANO: One is that the draft would be -- we would -- Commissioner Kirsanow has -- I suppose if you're willing to take the lead, would we get comments by -- to Commissioner Kirsanow by close of business Tuesday. He would circulate a draft by Wednesday and we would take a notational vote
Thursday afternoon. And the other option is that we vote now whether to approve any letter that --

VICE CHAIR THERNSTROM: I'm back. I had to get off the phone a minute. I don't know what's happened, but I'm back.

CHAIRMAN REYNOLDS: Welcome back.

COMMISSIONER GAZIANO: That we vote to approve any letter that secures a majority vote of the Commission.

VICE CHAIR THERNSTROM: I'm sorry, explain the issue to me?

CHAIRMAN REYNOLDS: Well, Commissioner Melendez asked for a point to be clarified. I believe he asked for the two options to be described. One is a notational vote. If that doesn't happen, then we will proceed. I believe -- correct me if I'm wrong, Todd -- we would proceed with the vote.

COMMISSIONER HERIOT: We would vote on Wednesday, yes.

COMMISSIONER GAZIANO: That's correct. And is the process that I described -- by the way, we can always amend our AIs, but is the process that I described consistent with any applicable regulation or statute as you understand it?

MR. BLACKWOOD: This is David Blackwood
again. As long as no Commissioner objects, yes.

COMMISSIONER GAZIANO: As long as no Commissioner objects, it is okay if we circulate the final draft on Wednesday for a notational vote that we set today for Thursday.

COMMISSIONER GAZIANO: Yes.

COMMISSIONER MELENDEZ: I'll vote yes to receive the draft and look it over and vote on Thursday.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER HERIOT: Was that a yes to the notational vote?

COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki, was that a yes?

COMMISSIONER YAKI: No, that was a yes.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: That is a yes.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: We have unanimity.

Moving on. The approval of the minutes. I move that --

COMMISSIONER HERIOT: I just want one more clarification. David said that we would vote on
paper. I assume that means by email?

CHAIRMAN REYNOLDS: Yes, that's how we've done it in the past.

COMMISSIONER HERIOT: Okay.

Approval of Agendaa

CHAIRMAN REYNOLDS: I move to approve the minutes of the September 24, 2009 meeting. Is there a second?

COMMISSIONER GAZIANO: I'm sorry, just a clarification. Our parliamentarian said that our rule provides for either fax or email.

COMMISSIONER HERIOT: Okay.

COMMISSIONER GAZIANO: Are both required?

MR. BLACKWOOD: I can read directly from the AI. Commissioners must vote personally. Proxies are not permitted. Commissioners shall vote on the ballot and then send the ballot to the Staff Director during the required time limit.

COMMISSIONER HERIOT: Does that come in email form?

MR. BLACKWOOD: I don't think it matters whether it's in the format of an email or a fax.

COMMISSIONER HERIOT: I was curious when you said paper.
CHAIRMAN REYNOLDS: Okay, I move that we approve the minutes of the September 24, 2009 meeting. Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Okay, I have a change to the minutes. As to the first sentence in the section on approval of the agenda, I propose that we insert the following language: "Commissioner Yaki's line was open, but he did not respond."

In the paragraph under the approval of the agenda, strike everything after the word "program planning section" and replace with the following: "During a vote to approve the amended agenda, Vice Chair Thernstrom did not respond to the Chairman's call for her vote. The Staff Director indicated that she was on another call and her special assistant stated that she had a family medical emergency, but would be rejoining the teleconference shortly. She did not rejoin the call. In the absence of a quorum, the agenda could not be approved. The proceeding went off record at 11:46 a.m. in an attempt to get another Commissioner to participate for a quorum. The proceedings went back on the record at 12:28 p.m. with Commissioner Kirsanow on the line. Commissioner Yaki dialed back into the teleconference. At that point,
Commissioner Taylor was no longer on the phone. Commissioner Yaki left the line and the meeting could not continue due to a lack of a quorum."

Discussion?

VICE CHAIR THERNSTROM: It is unnecessary to have on the public record she had a family emergency. I had to get off the line.

CHAIRMAN REYNOLDS: I don't recall this agreement.

VICE CHAIR THERNSTROM: Mr. Staff Director, am I wrong in recalling that you were going to take the initiative and simply alter that language?

STAFF DIRECTOR DANNENFELSER: You did send in some recommended change to the language which I incorporated into what was sent out to the Commissioners, but this is a proposed change to that amended language.

VICE CHAIR THERNSTROM: What was the amended language that you sent in?

STAFF DIRECTOR DANNENFELSER: Essentially what you had requested when you proposed the change to the earlier version.

VICE CHAIR THERNSTROM: Do you remember exactly how I worded it?

STAFF DIRECTOR DANNENFELSER: I don't have
your language in front of me.

VICE CHAIR THERNSTROM: Maybe my special assistant remembers. I don't have it in front of me either.

(Pause.)

STAFF DIRECTOR DANNENFELSER: There was language in the minutes, the earlier version of the minutes that said -- it did mention that the Vice Chair had a medical emergency with a grandchild and had to leave. As a result there was a lack of a quorum to approve the agenda. Later on, it said Chairman Reynolds indicated that Vice Chair Thernstrom and Commissioner Yaki had joined the teleconference, but had to leave. Commissioner Kirsanow then joined the teleconference. Commissioner Yaki rejoined the teleconference. Finally, Commissioners Taylor and Yaki left the teleconference.

VICE CHAIR THERNSTROM: Okay, so that's a little different than what I was just -- my phone died, except the base phone, so I can't get the minutes to look at it, but that's a little different than what I just heard. Is that not correct?

STAFF DIRECTOR DANNENFELSER: Yes, there's a proposed change to the minutes that were circulated.

VICE CHAIR THERNSTROM: What you just read
to me seems preferable certainly from my point of view.

(Pause.)

CHAIRMAN REYNOLDS: Mr. Staff Director, please read that language again?

STAFF DIRECTOR DANNENFELSER: The language from the prior minutes said --

(Phone ringing.)

CHAIRMAN REYNOLDS: I don't know what that is.

STAFF DIRECTOR DANNENFELSER: Vice Chair Thernstrom had a medical emergency with a grandchild and had to leave. As a result there was a lack of a quorum to approve the agenda. The proceedings went off the record at 11:46 a.m. and went on the back on the record at 12:28 p.m. Chairman Reynolds indicated that Vice Chair Thernstrom and Commissioner Yaki had joined the teleconference, but had to leave. Commissioner Kirsanow then joined the teleconference. Commissioner Yaki rejoined the teleconference. Finally, Commissioners Taylor and Yaki left the teleconference.

VICE CHAIR THERNSTROM: With respect to nobody else having an elaborate explanation. I don't want an elaborate explanation with respect to me as
well. It doesn't need to be part of the record if it
is actually the case, two sick members of my family,
but that's not a necessary part of the record.

CHAIRMAN REYNOLDS: Any other comments?

Vice Chair Thernstrom how do you vote?

VICE CHAIR THERNSTROM: What am I voting
on? Am I voting on -- I'm suggested it be rewritten
simply to conform with the description of other
people, they left, they came back. I want language
used with respect to me.

CHAIRMAN REYNOLDS: We're voting on the
motion that I read into the record.

VICE CHAIR THERNSTROM: Which doesn't
include that change.

CHAIRMAN REYNOLDS: That's correct.

VICE CHAIR THERNSTROM: I'm voting against
it. I think out of courtesy, you have the same
description for me as you do for the others who came
and went. There is never an elaborate reason given in
the record. He comes and goes. Ashley comes and
goes. Michael Yaki comes and goes. We don't have
descriptions of why.

CHAIRMAN REYNOLDS: I only used the facts
that were available.

VICE CHAIR THERNSTROM: It can be changed
and it could be changed right now so that it conforms
to what you've done with respect to other
Commissioners. That's a simple courtesy to me.

CHAIRMAN REYNOLDS: My intransigence is --
would explain it as I believe there's been a concerted
effort to defeat quorum and I want the record to
reflect with precision what actually happened. So to
the extent I have detailed surrounding what happened
on the 24th, I just want to put it in the record.

VICE CHAIR THERNSTROM: Well, whether or
not I have a sick grandchild and a sick husband,
actually, is irrelevant to your scenario in which
there is a concerted, deliberate conspiratorial effort
to defeat quorum.

CHAIRMAN REYNOLDS: I'm thinking. Bear
with me, folks.

(Pause.)

Let's vote. Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain, I wasn't
here for that meeting.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: I was walking over to get a bite to eat and I was in the elevator and missed part of the discussion.

COMMISSIONER GAZIANO: You don't want it repeated.

CHAIRMAN REYNOLDS: Okay, it passes. Bear with me.

Okay, I move that we adopt the minutes of the October 8, 2009 meeting. Is there a second?

COMMISSIONER HERIOT: Second.

CHAIRMAN REYNOLDS: The change that I've proposed is that in the section titled approval of the agenda the first sentence should be revised to say "Chairman Reynolds moved to amend the agenda to table consideration of motions related to the National Civil Rights Conference until a later meeting when Commissioners Melendez and Yaki would be present."

Under the section titled program planning the first sentence after ACORN, insert the words "regarding voter registration fraud."

Discussion?
Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I abstain, I didn't have a chance to go through them carefully.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?
COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?
COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote for it also.

Next up is the October 16, 2009 minutes. I move that we adopt, but I also propose the following changes. Under the section titled "State Advisory Committee Issues" on page three, the first sentence should be changed to read "Chairman Reynolds ask if any Commissioners want to move to appoint Liz Barbee-Wooten to the Hawaii State Advisory Committee" --

COMMISSIONER GAZIANO: May I make a
friendly -- offer a friendly amendment to that sentence?

CHAIRMAN REYNOLDS: Sure.

COMMISSIONER GAZIANO: That even as amended doesn't reflect the fact that Commissioners reviewed correspondence from Ms. Barbee-Wooten. It also slightly inaccurately -- the following sentence says "No Commissioner so moved." Actually, Commissioner Melendez moved and then withdrew his motion, so I would like to substitute the following, I suppose two sentences or three sentences. That whole section under State Advisory Committee should read "After a brief summary of the correspondence from Ms. Barbee-Wooten, Chairman Reynolds asked if any Commissioners wished to offer a motion to appoint her to the Hawaii State Advisory Committee. Commissioner Gaziano asked and received confirmation that Commissioners Melendez and Taylor were still participating by phone. Ultimately, no Commissioner chose to advance a motion to appoint Ms. Barbee-Wooten."

CHAIRMAN REYNOLDS: The next proposed change under the section titled Program Planning on page four, the title of that section should read "Update on the FY 2010 project on the status of sex
discrimination in higher education admissions." And
then finally on the same page in paragraph three, that
same section, change "Dr. Lerner agreed to provide
Commissioners a list of 12 to 15 private colleges" to
"Dr. Lerner agreed to provide Commissioners a list of
12 to 15 public and private colleges."

Are there any other proposed changes?
COMMISSIONER YAKI: This is Commissioner
Yaki.

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: I think that
everything after the sentence on page three, "no
formal votes were taken thereafter, but the remaining
Commissioners proceeded with an informational meeting"
should be struck, given that there was no quorum. And
as was stated to me by the General Counsel, there can
have been no agreement to do anything, given the fact
that there was a lack of quorum. So I ask that the
minutes show that basically after quorum was lost,
there be nothing else other than adjournment should be
reflected to whatever that time was.

CHAIRMAN REYNOLDS: Okay, I'm sorry,
Commissioner Yaki, could you walk me through this.

COMMISSIONER YAKI: After the loss of
quorum, the General -- I asked the General Counsel
what is the impact on the workings of the Commission.

And while you can have an informal meeting and
discussion, you cannot actually do anything that can
be regarded as official business. The idea that Dr.
Lerner agreed to do anything during that is therefore
not allowed for under the situation where there is a
lack of quorum.

Working backwards since that basically is
the fruit of the discussion that starts with the
remaining Commissioners discuss a time table, blah,
blah, blah, blah, all that should be struck from the
minutes.

CHAIRMAN REYNOLDS: Okay. Can we get
confirmation that we lost a quorum at that point in
time?

COMMISSIONER YAKI: There is a paragraph
right above that where it says the Staff Director
advised the Commissioners of the loss of quorum.

CHAIRMAN REYNOLDS: Okay, I support
Commissioner Yaki's recommendation.

COMMISSIONER HERIOT: I guess I don't
quite understand here. At that point it becomes
minutes of the informal meeting. Is that a problem?
We can't decide anything?

CHAIRMAN REYNOLDS: Mr. Blackwood, please
MR. BLACKWOOD: This is David Blackwood. The question that was raised by Commissioner Yaki at the last meeting was after a quorum is lost can staff be directed to do anything. And the short answer is no. Whether the Commission chooses to have minutes of an informal meeting at which nothing, no executive action can be taken, I leave to you, but he is correct when he says that there can't be something in the minutes that say someone was directed to do something.

CHAIRMAN REYNOLDS: Okay, my view is -- my limited understanding of this issue, based on this short conversation is that we do have the authority to include informal conversations in our minutes. My preference is that we don't. I think it's a better practice -- the minutes should reflect official meetings. That's the basis for my support of Commissioner Yaki's proposal.

COMMISSIONER HERIOT: I'm sorry, what does it say that we did? I don't have it in front of me.

CHAIRMAN REYNOLDS: Commissioner Yaki, can you help out?

COMMISSIONER YAKI: Yes, in the last question, and the last page, there is discussion about the focus on which universities to be chosen,
etcetera, etcetera and the last sentence states that Dr. Lerner agreed to provide Commissioners a list of 12 to 15 private colleges, blah, blah, blah, blah, blah. And I think that --

COMMISSIONER HERIOT: But it doesn't say that we directed anything.

COMMISSIONER YAKI: We can split hairs about whether or not we wish to ask people who are in the room whether it seemed as if the Commission at that time was essentially asking Dr. Lerner to do that and whether asking or directing or what have you is whatever. This is exactly why the Chairman is correct because of the fact that we're actually going to be approving some of this stuff anyway later. Officially, having this in the minutes is unnecessarily confusing, given that it was essentially informal and not a formal part of what the Commission did or was empowered to do.

COMMISSIONER HERIOT: I don't agree that we can't have something in the minutes where members of the staff say they're going to do something.

CHAIRMAN REYNOLDS: And I agree with that point also. I think that we should just vote on the matter.

COMMISSIONER HERIOT: What are we voting
CHAIRMAN REYNOLDS: On the amendments that have been offered including -- I guess we need to do this one at a time.

STAFF DIRECTOR DANNENFELSER: Mr. Chair?

CHAIRMAN REYNOLDS: Yes.

STAFF DIRECTOR DANNENFELSER: Just a technical point on the change that you proposed earlier where you said under the section titled program planning page 4, just your special assistant and I have just gone over it and there's just a small grammatical point that we believe that it should say update on the status of the FY 2010 project on sex discrimination in higher education admissions.

CHAIRMAN REYNOLDS: Okay, so I left that status.

STAFF DIRECTOR DANNENFELSER: It's just putting it in a different place in that heading. It was moving it further up in that heading to make it more clear.

CHAIRMAN REYNOLDS: Okay. All right, so let's vote on the first two amendments and we'll vote on the third last.

Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I'm sorry. I
don't have these absolutely straight. I'm going to abstain from all three.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?
COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?
COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?
COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?
COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Commissioner Taylor?
COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote for it also.

Okay, next up we are voting for -- voting on the third revision. Basically, Yaki's proposal. Vice Chair Thernstrom has abstained.

CHAIRMAN REYNOLDS: Commissioner Gaziano?
COMMISSIONER GAZIANO: Can I pass? I just want to read -- the motion is to strike everything after the loss of quorum?

CHAIRMAN REYNOLDS: Yes.
COMMISSIONER GAZIANO: Okay. I'd like to
pass then.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I'm looking at the documents here now. Exactly where are we?

CHAIRMAN REYNOLDS: Page three, after the second --

COMMISSIONER HERIOT: I don't want to strike the whole thing. I might be willing to make some changes to it, but I'll vote no on the motion.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes.

COMMISSIONER KIRSANOW: Commissioner Reynolds, I was under the impression we were striking everything after Dr. Lerner agreed to provide Commissioners a list of 12 to 15 private colleagues. If we're striking everything after quorum was lost, then I would vote no.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes.

VICE CHAIR THERNSTROM: Mr. Chairman, I understand it now. I'm voting yes on striking the material after the quorum was lost, absolutely. I'm sorry. I've now paid sufficient attention.
CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes, strike it.

CHAIRMAN REYNOLDS: I vote to strike it also.

Commissioner Gaziano?

COMMISSIONER GAZIANO: No.

VICE CHAIR THERNSTROM: You've got me down as a yes on that, right?

CHAIRMAN REYNOLDS: Yes, I do.

VICE CHAIR THERNSTROM: Okay.

CHAIRMAN REYNOLDS: The motion passes.

We're up to the October 30, 2009 minutes. Here are the changes that I propose. Under the minutes section on page 3, first full paragraph, third sentence, number two, delete the word "the" as it appears before Daphne Barbee-Wooten and insert "that were" before the clause called to our attention by Commissioner Gaziano.

So the revised sentence should read "The Commissioners voted to table consideration of Daphne Barbee-Wooten indefinitely unless she can establish that the racially offensive remarks that she is reported in various news accounts to have made and that were called to our attention by Commissioner Gaziano are inaccurate."
Do I hear a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion? Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Point of clarification. Is this the only amendment you're seeking because this suffers from the same defect as the last minutes.

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: Then -- well, you didn't reflect that. I was waiting to make the statement that we lost quorum at the bottom of page three, so therefore, basically page four should be stricken in conformity with our previous vote.

CHAIRMAN REYNOLDS: Okay, I'm sorry,
please speak up.

COMMISSIONER YAKI: At the bottom of page three, it indicates we lose quorum. Therefore I would ask as a friendly amendment, given our previous vote that we remove page four from the minutes.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER HERIOT: We're halfway through the vote. We have a friendly amendment.

COMMISSIONER YAKI: We can do this separately after this, Mr. Chair.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: On this one I will abstain and then I will ask to make a motion on the minutes.

CHAIRMAN REYNOLDS: Okay. Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: If you're going to try to open this up again, I'm going to vote yes, despite the fact that I'm going to support Commissioner Yaki, at least I believe I am.

Okay, the motion passes.

Commissioner Yaki?

COMMISSIONER YAKI: I'd like to make a motion that the full paragraph entitled Update on FY
2010 Project blah, blah on page four ending with added to the list be stricken because of the lack of quorum.

CHAIRMAN REYNOLDS: I second it. Do we need to have a discussion?

Vice Chair Thernstrom?

CHAIRMAN REYNOLDS: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: No.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: For the same reason I gave before, I'd be happy to make changes, but not to strike the whole thing, so I vote no.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: No.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: No quorum was present, correct?

VICE CHAIR THERNSTROM: That's correct.

COMMISSIONER TAYLOR: Strike it.

CHAIRMAN REYNOLDS: So that's a yes.

VICE CHAIR THERNSTROM: Yes.
COMMISSIONER TAYLOR: That's a yes to strike.

CHAIRMAN REYNOLDS: Sorry, sorry. And I vote yes also.

Okay, the motion passes.

COMMISSIONER KIRSANOW: Mr. Chairman, this is Kirsanow, I need to leave the call.

CHAIRMAN REYNOLDS: Okay, I move to approve the minutes of the November 20, 2009 meeting. Is there a second?

COMMISSIONER GAZIANO: second.

CHAIRMAN REYNOLDS: Okay, Vice Chair Thernstrom?

VERSE CHAIR THERNSTROM: Yes.

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Yes.

CHAIRMAN REYNOLDS: And I vote for it
also. It passes.

Next up, Mr. Staff Director. Please give us your report.

STAFF DIRECTOR DANNENFELSER: Thank you, Mr. Chairman. During the period leading up to October 16, September 29th to October 16th, the Office of Civil Rights' evaluation received 95 written complaints, two congressional complaints, one walk-in complaint and 20 email complaints, two facsimile complaints and 131 telephone complaints of which 67 were repeat calls. In total, staff received and processed 251 complaints during that period.

We have received the comments from Commissioners regarding the briefing on Title IX Athletics. We had an error with the cover on that report, so we are working with GPO to get a new cover for that report and then we will be incorporating --

COMMISSIONER HERIOT: What was the error?

STAFF DIRECTOR DANNENFELSER: The original cover that was chosen just had women on the cover and since the findings and so on did reflect that this was really about men and women, we felt it was more appropriate to have a cover that would show men and women engaged in athletics as opposed to just women.

COMMISSIONER HERIOT: We're not paying
extra for this, are we?

STAFF DIRECTOR DANNENFELSER: I believe we will.

COMMISSIONER HERIOT: I'm happy to put rabbits on the cover.

CHAIRMAN REYNOLDS: Male or female?

COMMISSIONER HERIOT: Doesn't matter.

VICE CHAIR THERNSTROM: Let's vote on the rabbits.

STAFF DIRECTOR DANNENFELSER: And then the Chairman pointed out with regard to the MEPA report, I believe we're looking at, given our vote today, there was some earlier time lines that had been discussed, but I believe we'd be having concurring comments by January 13th and rebuttals by February 14th. The January 13th date would help accommodate the holidays, given Commissioners more than the normal 30-day period. That would be, I guess, about 10 extra days to accommodate the holidays.

COMMISSIONER GAZIANO: I'm sorry, I was momentarily distracted.

STAFF DIRECTOR DANNENFELSER: That would be on the MEPA briefing report. Although we may have to --

COMMISSIONER YAKI: Some Commissioners may
want to move the date.

STAFF DIRECTOR DANNENFELSER: We can possibly revisit that issue on December 16th since we'll be taking up I guess three different either findings or recommendations, potentially at that point in time.

We tabled some findings and recommendations. I think we might propose to put those on the schedule for December 16th.

COMMISSIONER YAKI: I'm sorry, I thought you said three other reports.

STAFF DIRECTOR DANNENFELSER: No, just the ones that were tabled during the meeting.

I would also like to propose that Commissioners provide initial comments on the illegal immigration report that was distributed earlier to provide those comments by January 3rd. Staff would then return drafts, send a draft with the edits incorporating Commissioners' comments back to Commissioners by January 8th in anticipation of the Commission voting on that report on January 15th and then subsequently February 15th would be concurring and dissenting views and March 17th Commissioners' rebuttal statements.

For the time being, I think we would hold
off on timetables relating to the STEM report until we get a better idea of where we are with some of the hearings and briefings that are being considered.

We did hire a new budget chief, John Ratcliffe, who is now on board. He started on November 9th and he joins us from the Military Sealift Command. He brings with him a wealth of experience in accounting, financial management, implementation of internal controls and contract administration. I hope you will all join me in welcoming John. He's been a very valuable addition to this staff in the short time he's been here.

CHAIRMAN REYNOLDS: Welcome aboard.

STAFF DIRECTOR DANNENFELSER: I did send out recently an update on the September statistics for the website. They were not available at the prior meeting, but they since have been made available to us, so we'll continue to provide that information to you on a regular basis.

COMMISSIONER GAZIANO: I don't have an electronic version, but always even if it's a few weeks late, if you would include them in the printed Staff Director's report as well.

Staff Director's Report

STAFF DIRECTOR DANNENFELSER: Okay.
Regarding the library. The library staff received 132 telephone inquiries. They completed 49 simple reference requests and performed 21 research projects of various sizes. An additional 83 research requests were completed utilizing automated search services. Regarding publications statistics, there were 248 requests and 160 email requests for publications that were received during this period; 289 publications were mailed; and 44 different publications were requested. "Getting Uncle Sam to Enforce Your Civil Rights" and a catalog of publications, once again were the most frequently requested publications and there were 55 requests for publications still in process at that point.

Also, I want to provide Commissioners with an update. We've been going through a process of the website redesign and the Office of the Staff Director and ASCD are currently working to finalize a suggested redesign in the pre-flight format that we will then send to Commissioners for input. So I do expect that within the next couple of weeks, we'll be able to send that to Commissioners to review and get your input so that we can then move to get that website redesigned up on the web.

Also, with regard to the clearinghouse
project, we did get subsequently from the Department of Education an agreement that they would send us the requested information. They did make a case that they don’t call it "Call Home." I believe I sent that out to Commissioners in an email, but they would provide basically the information that we had requested and they said they would begin to do that in December. They would ask for a 15-day lag time at the end of a month so presumably that would mean that we would expect something about December 15th from the Department of Education. We've also received a pretty good amount of information from the Department of Justice. We've received some information also from the Department of Labor. The EEOC has said that they regret that they are unable to comply with our request and they basically referred us to their website for information.

The National Technical Information Services is currently working on coding the website for placing that information up there. Our IT specialist is also working on a sample of the Justice Department materials that we've got to put that up there. There is a draft site that the IT specialist has put together and I can send that to Commissioners for your review. We do expect that National Technical
Information Services will have a working draft available for us in January from the various information that we are sending them. So we will then make that available to Commissioners for review as well.

That's my report at this time.

CHAIRMAN REYNOLDS: Questions?

COMMISSIONER HERIOT: I've got a question or comment. My understanding is we've had some problems with staff reports that contain sometimes -- at least once a serious error.

COMMISSIONER YAKI: Commissioners, I need to drop off for a few minutes.

COMMISSIONER HERIOT: You know --

VICE CHAIR THERNSTROM: I have to go myself.

COMMISSIONER HERIOT: The Commission makes errors on its own. I really don't want to have that blame for errors that are being made in the SAC report. So could we ask that the Staff Director to come up with a plan under which we can make it clear on our website that we are not responsible for the contents of the SAC reports.

CHAIRMAN REYNOLDS: In terms of content, they're independent.
COMMISSIONER HERIOT: Yes, they are sovereign on that and we are not. We need to have that on the website.

STAFF DIRECTOR DANNENFELSER: I believe SAC report does have a disclaimer on the cover.

COMMISSIONER HERIOT: It's important that it be made extremely clear and that the whole structure of the website be such to make that clear.

STAFF DIRECTOR DANNENFELSER: We'll work on something to make that more explicit.

CHAIRMAN REYNOLDS: Any other comments?

COMMISSIONER GAZIANO: Mr. Staff Director, thank you for drawing our attention again to the document, the routine regular document request. I don't want to necessarily take too much more time today except to say that I think I'd be interested in hearing what you and the General Counsel suggest for agencies that are insufficiently responsive and that we work with the Chairman to place that on the agenda and you work in advance of whenever that agenda item is so that we can take appropriate steps to see that agencies that should be providing us material aren't just referring us to their websites.

STAFF DIRECTOR DANNENFELSER: Okay, I will consult with the General Counsel and come up with a
proposed response for Commissioners to consider.

COMMISSIONER HERIOT: Yes, I very much agree with Commissioner Gaziano on this. We need to move on this.

STAFF DIRECTOR DANNENFELSER: Okay, any other questions?

CHAIRMAN REYNOLDS: All right, folks. Thank you very much. We're done.

(Whereupon, at 1:02 p.m., the meeting was concluded.)
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