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The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C. at 9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner (via telephone)

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner (via telephone)

PETER N. KIRSANOW, Commissioner

DAVID KLADEY, Commissioner

MICHAEL YAKI, Commissioner (via telephone)

MARLENE SALLO, Staff Director

JENNIFER CRON HEPLER, Parliamentarian
STAFF PRESENT:
MARGARET BUTLER, Acting Chief, OCRE
IVY L. DAVIS, Director, ERO
BARBARA DELAVIEZ, ERO
PAMELA DUNSTON, Chief, ASCD
ALFREDA GREENE
LENORE OSTROWSKY, Acting Chief, PAU
JOHN RATCLIFFE, Chief, Budget and Finance
MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:
ALEC DEULL (via telephone)
TIM FAY
KENESHIA GRANT
JOHN MARTIN
CARISSA MULDER
JUANA SILVERIO
ALISON SOMIN
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(9:33 a.m.)

CHAIRMAN CASTRO: This meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. It is currently 9:33 on August 16, 2013. Our meeting is taking place at the Commission's Offices at 1331 Pennsylvania Avenue, Northwest in Washington, D.C. and I'm Chairman Marty Castro.

The Commissioners who are present with us in the meeting are myself, Vice Chair Thernstrom, Commissioner Klandney, and Commissioner Gaziano. Commissioners who are participating by phone are Commissioner Kirsanow, Commissioner Achtenberg, Commissioner Yaki. And is Commissioner Heriot participating?

COMMISSIONER HERIOT: Yes, I am here.

CHAIRMAN CASTRO: Okay, great. So a quorum of the commissioners is present.

Is the person the Staff Director present?

MS. SALLO: Present.

CHAIRMAN CASTRO: Okay, is the court reporter present?

COURT REPORTER: Present, Mr. Chair.
CHAIRMAN CASTRO: And that is a response. Great.

VICE CHAIR THERNSTROM: Did you announce that I was here at the beginning?

CHAIRMAN CASTRO: Yes, I did.

VICE CHAIR THERNSTROM: Okay, good.

CHAIRMAN CASTRO: I did, yes.

So the first item is to approve the agenda.

I. APPROVAL OF AGENDA

CHAIRMAN CASTRO: So I move that we approve the agenda. Is there a second?

VICE CHAIR THERNSTROM: Second.

CHAIRMAN CASTRO: Okay, are there any amendments? Any amendments?

COMMISSIONER ACHTENBERG: Mr. Chairman?

CHAIRMAN CASTRO: The Chair recognizes Commissioner Achtenberg. Go ahead.

COMMISSIONER ACHTENBERG: I would like to propose that we amend the Washington State SAC and the Mississippi State SAC to the Staff Director for additional work.

CHAIRMAN CASTRO: Okay, is there a second to that motion?

COMMISSIONER HERIOT: I second the
motion. Sorry, this is Gail.

CHAIRMAN CASTRO: That was Commissioner Heriot. Yes, those on the phone, if you could introduce yourself or mention your name before you speak so the Court Reporter can keep an accurate record, that would be great.

COMMISSIONER GAZIANO: Mr. Chair?

CHAIRMAN CASTRO: Yes, Commissioner Gaziano.

COMMISSIONER GAZIANO: Can I just ask a question about the nature of the amendment? Is the amendment to the agenda to take them off at this point or are we going to discuss that?

CHAIRMAN CASTRO: No, to take them off and then to bring them back next month.

COMMISSIONER ACHTENBERG: Bring them back in September.

COMMISSIONER GAZIANO: Well I would like a discussion as to why we should recommit those. Those were about the only two that I thought looked balanced. So why are we taking the only two that look balanced off?

I'm sorry, Washington State and what other State?

CHAIRMAN CASTRO: Mississippi.
COMMISSIONER GAZIANO: Yes, those are the only two that are worthy of approving. So is that why we want to get rid of them?

CHAIRMAN CASTRO: No.

VICE CHAIR THERNSTROM: No, but I had the same reaction. This is Commission Thernstrom, Vice Chair.

COMMISSIONER GAZIANO: What is the issue that you want recommitted? There are too balanced?

COMMISSIONER ACHTENBERG: Each has some problematic numbers that we would like some additional information on. And assuming the additional information is acceptable, they will be moved forward.

I mean if you want to go into a detailed discussion, which we were hoping to avoid having to spend the time doing, we can do that. But it is not about whether or not they are balanced. That has nothing to do with it.

COMMISSIONER GAZIANO: This is Commissioner Gaziano. Thank you for the clarification, Commissioner Achtenberg. If that is the basis of your motion, I won't oppose it and I will vote with you. I will support your request for more information.
But I want to register if we are taking them off that I think other slates aren't and these are balanced. So if in the process of looking into other people, I hope we don't unbalance those slates.

CHAIRMAN CASTRO: Madam Vice Chair?

VICE CHAIR THERNSTROM: More information about what, precisely? And then we are back to the balance and balance question. I mean -- well, my question stands. More information about what? What don't you know?

CHAIRMAN CASTRO: I will let the Staff Director, did you want to respond to that?

MS. SALLO: Not directly.

CHAIRMAN CASTRO: Okay.

MS. SALLO: I would just request that any information as to any particular concern not be put on the record or the names of any potential appointees. I would be more than happy to disseminate any information or any concerns but at this point in time, I would prefer not to put that information out there.

VICE CHAIR THERNSTROM: Well, I mean it is very hard for me to vote on this when I don't understand it. I need to know what is it. Is it
about people's history? Is it about people's
political leanings? Is it about whatever? It is
too vague for me.

CHAIRMAN CASTRO: Okay. Any other
discussion? If not, this is on the motion to amend
the agenda, all those in favor say aye.

(Chorus of aye.)

CHAIRMAN CASTRO: Any opposed?

VICE CHAIR THERNSTROM: Yes, I am
opposed.

CHAIRMAN CASTRO: Okay, any abstentions?

(No audible response.)

CHAIRMAN CASTRO: In the opinions of the
Chair, the amendment passes.

So now if there are no further
amendments, let's vote to approve the agenda. All
those in favor say aye.

(Chorus of aye.)

CHAIRMAN CASTRO: Any opposed?

(No audible response.)

CHAIRMAN CASTRO: Any abstentions?

(No audible response.)

CHAIRMAN CASTRO: That passes.

Prior to moving into the formal agenda,
I do want to acknowledge a few folks. We are
actually very fortunate to have with us a member of our Texas State Advisory Committee with us today, Professor Josh Blackman who happens to be here on the hill and thought he would come by. So I wanted to acknowledge you and thank you for being here.

Thank you also for your service at the Texas State Advisory Committee. We really appreciate all our SAC members and we especially appreciate you being here today. So thank you.

I also want to welcome two new members to the Commission team. My special assistant, Juana Silverio is back here and Commissioner Dave Kladney's new special assistant, Keneshia Grant, who is over here. So we now have a full team back behind us and we want to welcome them to the team.

Also, prior to moving into the agenda, when we meet once a month we have important milestones in civil rights that occur either before our meetings or shortly after our meetings. And there are two that I think is important for this Commission to acknowledge; one that occurred a couple of weeks ago on July 26, 2013, which was the 23rd anniversary of the Americans With Disabilities Act.

This Commission has played an important
role in the ADA and in monitoring its enforcement.

We have been doing reports on disability issues since the mid-'80s. And even today some of the reports we have done in the last couple of years like the bullying report, we looked at students who are disabled and we determined that those are the students that tend to be the most vulnerable for bullying.

We also recently in our military -- rights of military returning servicemembers focused on issues of disability, particularly our returning servicemembers who are coming back with profound disabilities.

So there have been many strides in the last almost quarter century with the ADA. Yet, there remains many obstacles that exist, particularly in the area of employment, housing, income. And so while work has been done, much remains to be done. It is my hope, and I will recommend at some point in the not too distant future that for the 25th anniversary of the ADA, that this Commission take on a project that highlights not only our historic involvement in that issue but also in the status of the issue and what else needs to be done. So there will be more on
And then in a couple of weeks on August 28th, we are going to be celebrating the 50th anniversary of the March on Washington, an historic event where we all know Dr. King set forth his "I have a dream" speech. And clearly we have, in these last 50 years made tremendous strides. But as with the issue of ADA, there is much to do.

So I am hopeful that as many of us as possible can observe and participate in the 50th anniversary, not only commemorating it but doing everything that we can do to ensure that that dream continues to move forward and becomes a reality.

So I just thought it was important to acknowledge those two historic milestones. So now we will move on to the formal agenda.

VICE CHAIR THERNSTROM: I have a question.

CHAIRMAN CASTRO: Yes, Madam Vice Chair?

VICE CHAIR THERNSTROM: So when you talk about participation in the --

CHAIRMAN CASTRO: I mean individually. I don't mean as a Commission, unless we wanted to do something formally.

VICE CHAIR THERNSTROM: Right. And do
CHAIRMAN CASTRO: I believe there are some events on the 28th or the 24th on The Mall.

MS. SALLO: The 24th. It's a Saturday.

CHAIRMAN CASTRO: Yes, it is open to the public.

MS. SALLO: It is at 8:00 in the morning and I have the information. And I will be more than happy to disseminate it to the Commissioners.

VICE CHAIR THERNSTROM: Yes, please do.

MS. SALLO: Okay.

CHAIRMAN CASTRO: Thank you. And so now we have various agenda items under Program Planning.

II. PROGRAM PLANNING

VOTE TO APPROVE AND ADOPT THE FINAL DRAFT OF THE "CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE" REPORT

CHAIRMAN CASTRO: The first is the consideration of the approval of the final draft of Part A of the Civil Rights Implications of Eminent Domain Abuse Report. This does not include findings and recs. Rather, it is just limited to Part A of the report, the substantive contents of the Executive Summary, the summary of proceedings and panelists' written statements and biographies.
It is my understanding, from talking to the Staff Director, that Part Bs will be considered at our September meeting.

MS. SALLO: Or we can discuss it if anyone has any objection.

CHAIRMAN CASTRO: Okay. So having said that, do any commissioners wish to offer any amendments to the draft report on Civil Rights Implications of Eminent Domain Abuse?

Madam Vice Chair.

VICE CHAIR THERNSTROM: I don't have any amendments. I want to just mention that I thought that was a very well written, very clean, very straightforward summary. And so, you know, thanks to those who worked, I am sure, very hard to get that in the shape that it is because I was impressed.

CHAIRMAN CASTRO: Thank you. Well we will consider that a motion to approve and I will second it. And then we can have further discussion, which is probably what we should do anyway.

So any other comments or questions or changes for the report Part A?

(No audible response.)

CHAIRMAN CASTRO: If not, then we will
call the question. I will ask for a roll call vote.

Madam Vice Chair, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN CASTRO: Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes and with my commendation for the staff that worked on it. I agree with Vice Chair Thernstrom. Both reports that we are voting on today are very well done.

CHAIRMAN CASTRO: Thank you. Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLASNAY: Yes.

CHAIRMAN CASTRO: And I vote yes. So
the report passes unanimously. Great, thank you.

VOTE TO APPROVE AND ADOPT THE FINAL DRAFT OF THE "ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY" REPORT.

CHAIRMAN CASTRO: Next we have a consideration of the report on "Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy" Report.

Again, this vote is limited to Part A of the report, the substantive content of the summary, the introduction and background, and panelists' written statements and biography.

So do I have a motion on that proposal?

COMMISSIONER KLADNEY: I will make a motion, Mr. Chair. I do have some comments and amendments I would like --

CHAIRMAN CASTRO: Right. We will do the motion for purposes of discussion. Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN CASTRO: Okay, the Chair recognizes Commissioner Kladney.

COMMISSIONER KLADNEY: I believe the
The report is well written and presented well. There are three changes I would like to make.

And if I can direct the Commission's attention to page five of the report, after the words "identified as a best practice." The words after that speak about public comments of people and only present one position on the comments that were submitted. And the second sentence really has nothing to do with the rest of the paragraph.

VICE CHAIR THERNSTROM: I'm sorry. Where are you looking? Where should I be looking?

MS. SALLO: Top of page five.

VICE CHAIR THERNSTROM: Yes?

MS. SALLO: Second line, after the footnote.

VICE CHAIR THERNSTROM: Right, okay. I get it.

COMMISSIONER GAZIANO: I'm sorry. Commissioner Kladney, would you mind repeating your proposal?

COMMISSIONER KLADEY: Yes. I would like to strike after the footnote to the end of the paragraph.

COMMISSIONER GAZIANO: Which footnote, 11?
COMMISSIONER KLADNEY: Footnote 11.

COMMISSIONER GAZIANO: Okay.

COMMISSIONER KLADNEY: And the reason is it talks about some members of the public. And then it also talks about other public comments. I think those that are in the record stand for themselves because there were public comments the other way as well.

COMMISSIONER HERIOT: I'm sorry. I'm having trouble finding my copy of the report here.

COMMISSIONER KLADNEY: Do you want me to read it, Commissioner?

COMMISSIONER HERIOT: Yes, could you?

COMMISSIONER KLADNEY: Okay. Well the paragraph is a long paragraph. Let me start with this part of the sentence at the bottom of page four, the beginning of the last sentence.

"The EEOC does not prohibit or restrict employers from asking for or obtaining background histories. Although eliminating the question from the face of an application is identified as a best practice."

The question would be, have you been convicted or have you ever been arrested. That is the box that they are talking about eliminating.
And then the sentence goes on to read, "And some members of the public who submitted comments appear to believe that it is still considering doing so." And then it goes on to say "Many of the comments sent to the EEOC concerning its new guidance objected strongly to any restriction or prohibition against obtaining background checks."

There is comments the other way as well as the fact that some members of the public who submitted comments believe that it is still considering doing so. Doing so what? It is not cogent, especially to the rest of the paragraph.

VICE CHAIR THERNSTROM: Isn't the doing so eliminating the question from the face of an application?

COMMISSIONER KLADNEY: Doing so eliminated what, Madam Vice Chair?

VICE CHAIR THERNSTROM: I am just looking at the top of page five and I thought the doing so referred to eliminating the question from the face of an application.

COMMISSIONER KLADNEY: Well I actually thought it was talking about eliminating background checks but I am not sure.
VICE CHAIR THERNSTROM: Oh, I didn't read it that way.

COMMISSIONER GAZIANO: Could I ask a question, perhaps, of staff? If staff who drafted this could come to the table.

I have less concern about eliminating the part of the sentence after footnote 11. But the next sentence seems to me to be a little bit more relevant. If a great number of the public comments expressed strong reservations regarding the prohibition against obtaining background checks, I think that is a perfectly relevant point to include.

MS. SALLO: And what would be the question for staff?

COMMISSIONER GAZIANO: The staff would be, did you review -- the footnote says there were 300 comments that the EEOC made available to us. I would like to speak to the staff about the nature of those -- how closely this sentence fits the 300 comments, whether the 300 comments were kind of all read.

MS. SALLO: The problem -- we don't have a microphone up there.

COMMISSIONER GAZIANO: Someone can
borrow mine.

MS. OSTROWSKY: My name is Lenore Ostrowsky.

The purpose of that sentence, the Vice Chair is correct, it refers to eliminating the question. The point was that quite a few members of the public mistakenly believed that the point -- one of the elements of the EEOC guidance was to eliminate the question and it was not. And the EEOC was very clear that it was not.

Nonetheless, quite a few people who wrote in appeared to believe that that was what was going on. And that is why that sentence that you objected to, Commissioner Kladney, many of the public comments under the EEOC concerning his new guidance objected strongly. It is just to flesh out the nature of the reaction, that mistaken impression, if you see what I mean.

COMMISSIONER KLADNEY: So it would be, although eliminating the question, that would be the arrest of the question, from the face of the applications identified as a best practice, it does not require such and even though some members of the public thought that was the purpose.

So why don't we say something like
contrary to public belief, the EEOC does not want to get rid of the question.

VICE CHAIR THERNSTROM: At least on some members of the public. It is not the whole public. We don't know what the public's belief is.

COMMISSIONER KLADNEY: Well that is why I'm saying -- that is actually one of the reasons why I want to strike the part, I mean, to begin with. But I understand what Ms. Ostrowsky is saying. So there might be a way to amend the sentence just to say contrary to -- how did she put it -- the strong belief of the public that is not their purpose to get rid of the box.

MS. OSTROWSKY: I could say many of the public comments sent to the EEOC concerning its new guidance mistakenly objected to the removal.

VICE CHAIR THERNSTROM: Good, I like that.

COMMISSIONER KLADNEY: That would be fine but strike -- well and after maybe the rest of that sentence after footnote 11 to the period. I don't know.

MS. OSTROWSKY: If I could read the sentence as amended, maybe you can tell me if you like it.
COMMISSIONER KLADNEY: Yes.

MS. OSTROWSKY: Many of the public comments sent to the EEOC concerning its new guidance mistakenly objected to any restriction or prohibition -- mistakenly objected to prohibiting any use of background checks -- mistakenly objected to the EEOC's practice of requiring background checks.

VICE CHAIR THERNSTROM: No, that doesn't quite do it.

CHAIRMAN CASTRO: Give it another shot.

MS. OSTROWSKY: Mistakenly objected to the perceived restriction --

VICE CHAIR THERNSTROM: Perceived restriction is right.

MS. OSTROWSKY: -- perceived restriction --

VICE CHAIR THERNSTROM: Yes.

MS. OSTROWSKY: -- against obtaining background checks. Is that okay?

COMMISSIONER KLADNEY: If it's fine with everybody else.

CHAIRMAN CASTRO: That sounds like a motion.

COMMISSIONER KLADNEY: But what about
the rest of the sentence after -- there is the "and"
after footnote 11. I think that becomes superfluous
at that point.

VICE CHAIR THERNSTROM: I'm sorry,
Commissioner Kladney, what are you looking at now?

COMMISSIONER Kladney: The rest of the
sentence after "best practice."

VICE CHAIR THERNSTROM: Oh, I see.
Okay, yes.

MS. SALLO: And the motion would be to?

COMMISSIONER KLADNEY: To eliminate that
to the end of that sentence. So to the word so,
period.

MS. OSTROWSKY: The problem is that I
think it is important to let people know that many
of the public comments, which will be available were
mistaken that the public comments going to
eliminating the background check box.

COMMISSIONER KLADNEY: Okay, so maybe a
period after the footnote and saying many public
comments were mistakenly just almost like --

VICE CHAIR THERNSTROM: Mistakenly
believed.

COMMISSIONER KLADNEY: -- mistakenly
believed that the EEOC wanted to get -- was going to
strike the box from applications or something like that.

MS. OSTROWSKY: I could combine. I would put a period after "best practice." And then I could combine the sentence, some members of the public who submitted comments appear to believe that it is still doing so. I could combine that with the new sentence, "Many of the public comments sent to the EEOC concerning its new guidance mistakenly objected to the perceived restriction --"

COMMISSIONER KLANDNEY: Of blank and blank.

MS. OSTROWSKY: -- against obtaining background checks.

VICE CHAIR THERNSTROM: Yes, now that sounds good to me.

COMMISSIONER KLANDNEY: Okay, so you are striking --

MS. OSTROWSKY: I'm not striking it. The point --

COMMISSIONER KLANDNEY: You are putting a period after "best practice."

MS. OSTROWSKY: Yes. But the point about people, many people making a big mistake about what the EEOC did I think is important to include.
COMMISSIONER KLADNEY: Yes.

VICE CHAIR THERNSTROM: I agree with that.

COMMISSIONER KLADNEY: So after the period it reads -- the period is after "best practice." And then it reads --

MS. OSTROWSKY: I would just leave it.

"Some members of the public who submitted comments appear to believe that it is still considering doing so. Many of these public comments mistakenly objected to the perceived restriction or prohibition against obtaining background checks."

COMMISSIONER KLADNEY: Okay, how about some members of the public who submitted comments, also mistakenly appeared to believe that it was considering striking the --

MS. OSTROWSKY: The two groups are the same.

COMMISSIONER KLADNEY: Oh, okay.

MS. OSTROWSKY: And it was not just a few. It was lots.

COMMISSIONER KLADNEY: Okay.

MS. SALLO: This is Marlene Sallo. I believe that what he was honing in on was the "doing so." So if perhaps we can identify what doing so
means within the sentence, then I think it might clarify the matter.

MS. OSTROWSKY: Okay, take out doing so and put in the elimination.

MS. SALLO: So eliminating the box or --

MS. OSTROWSKY: No, considering the elimination.

MS. SALLO: Okay.

COMMISSIONER KLADNEY: My green light keeps going out. Is it on a timer or is someone trying to tell me something?

CHAIRMAN CASTRO: I do have the ability to control your microphone but I am not doing it, Commissioner Kladney.

VICE CHAIR THERNSTROM: Why aren't you doing it?

CHAIRMAN CASTRO: Because I like what I am hearing.

COMMISSIONER KLADNEY: Okay and then if I may move on to page five of the report.

CHAIRMAN CASTRO: Do you want to do these as individual motions to amend these?

COMMISSIONER KLADNEY: Oh, okay. We can move on them individually.

CHAIRMAN CASTRO: Okay, so we have a
motion as has just been stated to adopt the changes that have just been wordsmithed. Do we have a second?

VICE CHAIR THERNSTROM: Second.

CHAIRMAN CASTRO: Okay, all those in favor -- well, you know maybe I should do a voice -- I mean a roll call vote, just to be safe.

Vice Chair, how do you vote on that?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN CASTRO: Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney,
how do you vote?

COMMISSIONER KLADNEY: Yes.

CHAIRMAN CASTRO: And I vote yes. So that change passes unanimously.

Okay, your next one?

COMMISSIONER KLADNEY: The next change is on page five. The paragraph begins at the bottom of the page. I believe that is unclear and will confuse the reader. It draws an opinion and a conclusion at the end of the paragraph that has not been endorsed or found by the Commission to be a fact. Rather, it is really still at issue.

VICE CHAIR THERNSTROM: Wait a minute. This is the paragraph that starts, "Still in force?"

COMMISSIONER KLADNEY: Yes, ma'am.

VICE CHAIR THERNSTROM: And tell me which words exactly concern you.

COMMISSIONER KLADNEY: Well, the whole paragraph, I believe, is confusing. But at the end of the paragraph on page six, it says taken as a whole, it emphasizes the judgment of the EEOC over that of employers in the selection or retention of employees with criminal histories. I mean, we haven't done that.
that again? I'm afraid I did find my document but I can't find that.

COMMISSIONER KLADNEY: Okay, let me start. The last sentence. I mean I think the first part of the paragraph is confusing and the last sentence says although the 2012 guidance acknowledges as a legitimate selection concern the physical or other security risks to customers or other employees inherent in hiring an employee. Taken as a whole, it emphasizes the judgment of the EEOC over that of employers in the selection or retention of employees with criminal histories.

COMMISSIONER HERIOT: That is true.

COMMISSIONER KLADNEY: It is not true.

COMMISSIONER HERIOT: But we didn't make any such finding. I don't believe that is true.

CHAIRMAN CASTRO: It's a statement of opinion.

COMMISSIONER KLADNEY: It is an opinion and that is for us to vote on.

COMMISSIONER HERIOT: On the memo to what the guidance is. That is why they call it a guidance.

COMMISSIONER KLADNEY: No, a report is supposed to be objective from what our testimony was
and the documented we received and all the information we received. It doesn't draw an opinion.

VICE CHAIR THERNSTROM: Well does the 2012 guidance acknowledge, as it says here, as a legitimate selection concerning the physical and other security risk to customers and other employees. Is that a factually accurate statement?

COMMISSIONER KLADNEY: That is factually accurate.

VICE CHAIR THERNSTROM: Okay, so then your problem is simply --

CHAIRMAN CASTRO: Taking off that last clause then. So ending it at hiring any employee. Right?

COMMISSIONER KLADNEY: Right. Taken as a whole.

CHAIRMAN CASTRO: Yes, so from taken as a whole to histories, you want that stricken.

COMMISSIONER KLADNEY: I would like the whole paragraph stricken, if you are only going to give me the last part, I will take what I can get.

VICE CHAIR THERNSTROM: Well, taken as a whole, it emphasizes the judgment of the EEOC. Is that factually accurate if you look at the 2012
COMMISSIONER KLADNEY: I believe no.

VICE CHAIR THERNSTROM: Guidance, I mean.

It doesn't emphasize the judgment of the EEOC over that of the employer?

COMMISSIONER KLADNEY: No. That's an opinion, Madam Vice Chair.

VICE CHAIR THERNSTROM: Well, I am not sure it is an opinion. If you can come up with a quotation from the guidance that substantiates that as a legitimate reading of what the guidance says.

COMMISSIONER HERIOT: The whole point of the guidance is that employers come up with their own judgment on when they get information about the criminal background of an employee. They are limited. They are limited by what? By the judgment of the EEOC. I mean, that is inherent.

COMMISSIONER KLADNEY: That is not true. The entire --

COMMISSIONER HERIOT: I am telling you an employer can give --

CHAIRMAN CASTRO: One at a time. Commissioner Kladney has the floor and then Commissioner Heriot.
COMMISSIONER Kladney: Go ahead, Commissioner Heriot.

Chairman Castro: All right, continue Commissioner Heriot until you are finished.

Commissioner Heriot: Are you telling me that an employer is completely free, under this guidance, to check into a criminal background and draw its own judgment, if its judgment includes, of course, we don't hire people with criminal backgrounds?

Commissioner Kladney: Actually, --

Commissioner Heriot: That is many employers' judgment. They just don't hire people with criminal backgrounds. Are you telling me that they still can do whatever they want?

Commissioner Kladney: Actually there are many positions, tens of thousands of positions that prohibit ex-offenders from taking those positions in the law.

Commissioner Heriot: That is not an answer to the question. Does the employer have more discretion, less discretion, or the same amount of discretion they had before after the EEOC has spoken?

Commissioner Kladney: Actually, yes.
COMMISSIONER HERIOT: It is more sensible to give an obvious answer. Let's curtail employer discretion, period.

COMMISSIONER Kladney: May I have the floor?

CHAIRMAN CASTRO: Yes, you may.

COMMISSIONER Kladney: Thank you. Clearly, for the last 25 years, all this guidance is restate what the employers have had for the last 25 years.

COMMISSIONER HERIOT: But if it -- lacking full discretion it is because the EEOC has said so.

COMMISSIONER GAZIANO: Mr. Chair, may I be recognized?

COMMISSIONER Kladney: Mr. Chair --

CHAIRMAN CASTRO: Hold on.

COMMISSIONER Kladney: -- it's obvious I can't complete any sentence that I want to make, so Commissioner Heriot, you can have the floor for the rest of the meeting.

CHAIRMAN CASTRO: No, wait.

Commissioner Heriot, please let Commissioner Kladney finish and then you will speak. And then Commissioner Gaziano.
Commissioner Kladney, please proceed.

COMMISSIONER KLANDNEY: Basically, it doesn't emphasize the judgment of the EEOC over that of employers. What it does is sets out guidance for employers to look at and it restates the guidance that has been there for 25 years. It doesn't limit employers.

What it does is it asks them to take certain things into effect. They cannot have a rule, absent a law supporting them, to strike and not consider ex-offenders completely. In other words, 100 percent. But that has been the guidance for 25 years. This guidance does not change that.

CHAIRMAN CASTRO: Commissioner Heriot?

COMMISSIONER HERIOT: It is so contradictory there. If there is something that they can't do, if they can't exercise their own discretion on this issue, then common law give them that right. Title VII itself doesn't say a word about any of this. The word comes from the EEOC. The EEOC has reviewed this report top to bottom. They have looked at it and they approved it. They obviously agree.

CHAIRMAN CASTRO: Commission Gaziano?

COMMISSIONER GAZIANO: That was actually
going to be the question I posed. Did the EEOC object to this actual characterization?

MS. OSTROWSKY: This sentence was reworked at the suggestion of the EEOC. In the guidance, there is but one statement acknowledging security risks and other sorts of risk. The guidance as a whole, which is very long, concerns the EEOC's recommendations, suggestions for how to consider the histories of applicants.

This particular sentence, this phrase you are objecting to, the EEOC did not see. So you are correct that the EEOC -- well, people who are saying the EEOC approved this, they didn't. They didn't see the sentence because I reworked the paragraph at their suggestion.

So, let's get that -- you know I don't think they would have approved this sentence.

Here is the reason that this was put in there is that if you just read the guidance, as opposed to the earlier guidance, there is a new part to it. It isn't just the Green factors. Individual consideration has been added.

So the question -- and those are subjective factors, which means that there will be much more scope for an individual applicant who has
been rejected or an employee who has had an adverse action taken against them. There will be much more scope for them to bring a suit against an employer for failure, for instance, to do this individual check.

So it was an attempt. I am happy to rework it, of course, to indicate the weight of the guidance taken as a whole. That's all. The sentence, of course, you can rework it. But the EEOC did not see it.

COMMISSIONER KLADNEY: Well why don't we -- you said -- excuse me.

COMMISSIONER KIRSANOW: I can't hear you.

COMMISSIONER KLADNEY: Yes, I'm sorry Commissioner Kirsanow.

So what you are saying basically is that it doesn't emphasize the judgment of the EEOC but rather it added the fact that individual assessments should be made.

MS. OSTROWSKY: Actually I am saying that it emphasizes the judgment of the EEOC because individual consideration is inherently a subjective judgment. And there is nothing in the guidance to indicate what the rules are for making such a
judgment. That means, if it is open to question, it is going to be much easier for any enforcement body or an individual applicant to bring a case. That's all.

So there is a change in the --

COMMISSIONER HERIOT: -- that they do bring a case to the EEOC.

COMMISSIONER KLADNEY: So why if that is what the guidance says, it doesn't say it is easier to bring a case but it says that individual assessments are to be made.

MS. OSTROWSKY: Virtually, yes, that is what it says.

COMMISSIONER KLADNEY: And then you added what else after that?

MS. OSTROWSKY: I was trying to make a summary statement that indicated the effect of the overall change and why it is now the case that the guidance is much more subjective.

COMMISSIONER KLADNEY: So perhaps if you said something along the lines of the new guidance requires individual assessments, however, the guidance does not give clear guidelines, that would be much more acceptable as to how those assessments are to be resolved.
MS. OSTROWSKY: Right. I do say that but it is later.

COMMISSIONER KLADNEY: That may be in my next paragraph.

MS. OSTROWSKY: I would be happy to clarify that sentence.

COMMISSIONER KLADNEY: Yes. Well, I mean what bothers me is that it says that the EEOC is making the judgment, rather than the employer. And the employer makes the judgment.

Now, whether in fact a suit or a complaint or something revolves from that, that is to be seen. Don't you think?

MS. OSTROWSKY: Well, like I say --

COMMISSIONER KLADNEY: I mean if it makes it easier.

MS. OSTROWSKY: -- I don't -- I think that there has been a change. And the change has been in the direction of subjectiveness. And whenever the law is made more objective, it means that --

COMMISSIONER HERIOT: I can't hear you.

MS. OSTROWSKY: Whenever a law is made -

COMMISSIONER HERIOT: Can't hear you.
MS. OSTROWSKY: Whenever a law is made more subjective, it means that there is more room for an enforcement agency to bring an action to start an investigation based on their interpretation, as opposed to what a clear guidance or law would state.

COMMISSIONER Kladney: Right but I still --

COMMISSIONER Heriot: And that is an important point. That is inherent in this kind of regulation and it is a point that needs to be made.

COMMISSIONER Kladney: Well then the Commission should make that point, not in the report.

COMMISSIONER Gaziano: Mr. Chair, the Commission is making it through our staff.

COMMISSIONER Kladney: Well, my --

MS. Ostrowsky: I would be happy to rework it.

COMMISSIONER Kladney: I would --

COMMISSIONER Heriot: I would be very unhappy if you reworked it.

CHAIRMAN Castro: So what is the exact motion, Commissioner Kladney?

COMMISSIONER Kladney: Well my initial
motion was to strike the whole paragraph because the paragraph was not clear.

CHAIRMAN CASTRO: Right.

COMMISSIONER Kladney: But I would amend my motion to have this sentence reworked to state factually what the guidance says and not speculate as to whether it brings more lawsuits or not.

COMMISSIONER Gaziano: Mr. Chair?

CHAIRMAN CASTRO: Yes, Commissioner Gaziano?

COMMISSIONER Gaziano: I think that misses the important point that is in the staff draft that the kind of subjective -- as our counsel has suggested that the addition of these additional factors weighs heavily in granting EEOC discretion that used to be the employer's discretion. And so I would oppose taking out that very important point.

CHAIRMAN CASTRO: How would you rework that if you were to --

VICE CHAIR THERNSTROM: Well wait a minute. Let's see how many people want this reworked at all.

CHAIRMAN CASTRO: So we have a motion. Let's get a second on the motion. I will second your motion.
COMMISSIONER HERIOT: Second.

CHAIRMAN CASTRO: Okay. So, we will vote on removing that section taken as a whole. We will see where we are and then come back and see if we can reword it. Okay? So that way we have an idea of who is -- will that give you your answer as to who is in favor of changing this?

COMMISSIONER GAZIANO: Yes, if the motion fails, we will just keep it in and move on.

CHAIRMAN CASTRO: We will then move on to another motion that we will try to rework it. So I am going to take a vote on the motion to take out from "taken" to "history." So that last clause. I am going to do a roll call vote here.

So Madam Vice Chair, how do you vote?

VICE CHAIR THERNSTROM: No.

CHAIRMAN CASTRO: Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: No.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: No.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?
COMMISSIONER GAZIANO: No.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLADNEY: Yes.

CHAIRMAN CASTRO: And I vote yes. So the motion fails four to four. Do you have a motion to reword that clause, Commissioner Kladney?

COMMISSIONER KLADNEY: Yes, I would like to make a motion to have the staff rework it by taking the verbiage out, "Taken as a whole it emphasizes the judgment of the EEOC over that of employers in the selection or retention of employees with criminal histories."

That could be worded even as the opponents of the last motion wish to state. It could also be stated that the individual assessments just address them, the individual assessments made by employers can be reviewed by the EEOC or something along those lines.
MS. OSTROWSKY: How about leave them open to actions by the EEOC, the disagreements by the EEOC. Leave them open. It is actually --

COMMISSIONER KLADNEY: Pardon me?

MS. OSTROWSKY: Leave them open. It isn't that the EEOC sits in judgment over every employment decision.

CHAIRMAN CASTRO: It exposes them to.

MS. OSTROWSKY: It exposes them, yes.

It exposes them to interference.

CHAIRMAN CASTRO: So why don't we try to reword that right now and then see if we can get language that everyone is comfortable with to make the point that you are trying to make?

MS. OSTROWSKY: It leaves employers -- I'm just writing this down so I have it -- open or susceptible -- did you say susceptible? I'm sorry -- exposed to --

CHAIRMAN CASTRO: Exposes them to.

MS. OSTROWSKY: -- to the subjective judgment of the EEOC as to individual hiring decisions.

CHAIRMAN CASTRO: Okay. So could you read that, please?

MS. OSTROWSKY: All right may I read
CHAIRMAN CASTRO: Yes, please.

MS. OSTROWSKY: All right. Taken as a whole, it leaves employers exposed to the subjective judgment of the EEOC as to individual hiring decisions.

COMMISSIONER HERIOT: No. Subjective judgment. I mean you have to have subjective in there?

CHAIRMAN CASTRO: Could you take out subjective?

MS. OSTROWSKY: Well that is the problem. It is subjective. It is not clear. That what employers --

VICE CHAIR THERNSTROM: It is a redundancy, however. It is judgment. It is going to be subjective.

COMMISSIONER HERIOT: Yes, I agree with that.

CHAIRMAN CASTRO: So if you could take out --

MS. OSTROWSKY: If I may quarrel with that.

CHAIRMAN CASTRO: Sure, you may.

MS. OSTROWSKY: If there is a rule --
let's say there were a rule promulgated that said you may not summarily reject or refuse to hire anyone who had a criminal history going back over seven years. The EEOC could exercise its judgment, its discretionary judgment in bringing a suit, even in the case of someone refusing to hire someone whose criminal history went back. However, subjective judgment is different from a prosecutorial judgment made in response to a clear regulation or rule.

COMMISSIONER HERIOT: Yes, and I don't think that in law the word judgment, subjective judgment is a redundancy. We are talking about a body that is quasi-adjudicatory. So they render judgments. That is what they do. It is a subjective judgment and that matters.

CHAIRMAN CASTRO: Yes, in the sentence that the Democratic Caucus objected to, the word judgment is there and it is not modified by subjective. So, I would ask that --

COMMISSIONER GAZIANO: I don't understand.

COMMISSIONER HERIOT: It's not always significant.

COMMISSIONER GAZIANO: Yes, I don't -- I
understand your point in that. I agree, too, that in this case it is important to have subjective. And I would support the sentence as is or as our counsel has reworded it.

CHAIRMAN CASTRO: Commissioner Kladney?

COMMISSIONER KLADNEY: I don't know if subjective is that important. I think if they make a judgment that it is contrary to the employer's thought and bring and action, that is what they are doing. And now subjective means that they can say oh, no, one year after conviction is enough or this or that. I actually believe it is going to be a matter of proof and subjective gives the idea it is a willy-nilly kind of judgment.

COMMISSIONER KIRSANOW: Mr. Chair, we had witnesses that testified that the guidance was somewhat clear that it could be left to the individual judgments of whoever was sitting in adjudication of that particular policy. It didn't know if one year in a particular case would work or and if a certain type of crime or conviction would necessarily burn someone, it was the latitude of that person sitting in judgment was so expansive that no one had a real idea of what was expected of them.
COMMISSIONER KLADNEY: Actually we also had testimony -- excuse me. Madam Vice Chair, did you want to say something?

VICE CHAIR THERNSTROM: I am just going to withdraw my objection to the term subjective. I have now been convinced that --

COMMISSIONER KLADNEY: Well you haven't heard my argument, Madam Vice Chair.

VICE CHAIR THERNSTROM: Well that is true. Are you going to change my mind? Why don't you make it?

COMMISSIONER KLADNEY: We had testimony as well saying that a matrix could be drawn up that would be able to -- by employers to assist them in making these kinds of judgments. And I think that the word subjective is pretty strong.

I think judgment -- I can agree with judgment. Subjective, I have a problem with.

VICE CHAIR THERNSTROM: Well I withdrew my objection to subjective.

CHAIRMAN CASTRO: Okay, so --

MS. OSTROWSKY: Would anyone like subjective decision better? Would judgment that is bothering you because it sounds so formal?

COMMISSIONER KLADNEY: No, no --
COMMISSIONER HERIOT: Well your motions have the word subjective. Why not just go for it?

CHAIRMAN CASTRO: Would you read that back again one more time, Ms. Ostrowsky?

MS. OSTROWSKY: After the comma and footnote 19 -- I will read the whole sentence.

"Although the 2012 guidance acknowledges as a legitimate selection concern, the physical or other security risks to customers or other employees inherent in hiring any employee, it leaves employers exposed to the subjective judgment of the EEOC as to individual hiring decisions."

COMMISSIONER HERIOT: Subjective is the offending word there, in my opinion. I'm not going to vote for anything that says it. It is argumentative and unnecessary.

COMMISSIONER KLANDNEY: Judgment is sufficient.

COMMISSIONER HERIOT: So I am not going to vote for it. Judgment is sufficient.

VICE CHAIR THERNSTROM: Why did I withdraw it? I am convinced.

MS. OSTROWSKY: If we can put in something --

CHAIRMAN CASTRO: How about the
individual judgment of the EEOC? Would that --

VICE CHAIR THERNSTROM: Well wait a
minute. EEOC is not an individual.

CHAIRMAN CASTRO: I'm trying to find
some synonyms here.

MS. OSTROWSKY: The word subjective
refers to this individual consideration. So that
sentence is telescoping --

COMMISSIONER HERIOT: I understand. But
that is objective in the statutory interpretation.
I understand what you are trying to get at.

Unfortunately, subjective suggests
things that I am not interested in seeing our
Commission report reflect. So I am not interested
in interjecting --

CHAIRMAN CASTRO: How about
discretionary? Would discretionary work?

COMMISSIONER HERIOT: Read the sentence.

COMMISSIONER Kladney: How about
considered?

MS. OSTROWSKY: I like discretionary
better.

(Laughter.)

CHAIRMAN CASTRO: Let's try
discretionary. Would you read it back with
discretionary?

MS. OSTROWSKY: Sure.

"Although the 2012 guidance acknowledges as a legitimate selection concern, the physical or other security risks to customers or other employees inherent in hiring any employee, it leaves employers exposed to the discretionary judgment of the EEOC as to individual hiring decisions."

COMMISSIONER HERIOT: What was wrong with the first formulation, then, the very first?

CHAIRMAN CASTRO: Yes. I'm just trying to find a happy medium here, folks. If not, we could just put it to a vote and see what happens.

COMMISSIONER KLADNEY: Okay, can we pass on this for a second? Well, no, no, no. What you are saying here is what you are actually repeating that I am objecting to in my next motion. So if we say it here, do we have to say it again or would that be a redundancy?

CHAIRMAN CASTRO: I don't know what you next motion is.

COMMISSIONER KLADNEY: Let me say okay, if I accept subjective judgment, if we turn to page eight, the last paragraph of that page -- I am kind of moving along now -- that says the exact same
CHAIRMAN CASTRO: Oh yes, subjective individualized assessment?

MS. OSTROWSKY: Yes, the point --

COMMISSIONER Kladney: So why is it said twice in the report?

MS. OSTROWSKY: Because that is the big change. And it differs from the characterization that the EEOC placed on the guidance as a whole.

My understanding, after reading it, is that the reason that they changed this was that they wanted employer to be more careful about coming up with rules that disqualified a great number of people. And it is reasonable for them to want employers to look at each individual, if you look at it just from their point of view.

From the employers' point of view, especially employers who hire a great many people, it makes their lives not only more difficult administratively, but in fact it leaves them open, which is what we were saying before, to an investigation by the EEOC, if the EEOC disagrees with their individual judgment that has been made pretty much on their own because there is no real set of instructions in that guidance as to how to
make an individual assessment.

COMMISSIONER Kladney: That is the same presentation you just made on the last paragraph.

Ms. Ostrowsky: Right.

COMMISSIONER Kladney: So what I am saying is, if I accept that sentence in that paragraph, I would like to strike this one because it says the same thing. And actually, this third paragraph is even more speculative because it doesn't give the other -- I'm sorry my microphone is off -- it doesn't give the other perspective. This only draws one conclusion, this third paragraph.

Ms. Ostrowsky: I understand what you are saying about the text itself drawing conclusions because that is a function of the Commission. What I was attempting to do was to give a fair reaping of how this would strike an employer or in fact anyone, even someone who was working, what it gives them that the earlier guidance did not give them.

COMMISSIONER Kladney: I understand that but I also understand that if you say it in one place --

COMMISSIONER Kirsanow: Can't hear.

COMMISSIONER Kladney: Pardon?

CHAIRMAN Castro: He's back.
COMMISSIONER KIRSANOW: Can't hear.

CHAIRMAN CASTRO: Oh, he can't hear.

COMMISSIONER KLASNEY: Okay. We are saying it in one place and we are saying it again. We are overemphasizing the point. I mean if we are going to make the point, we make the point and move on. This is like --

COMMISSIONER HERIOT: Can't hear.

VICE CHAIR THERNSTROM: I don't understand what the harm is in saying it twice. What is the harm? Why are we talking about whether it is once or twice? You said it once. There is no harm in saying it twice.

COMMISSIONER KLASNEY: Well sure it is. It is overemphasis. I mean and you are drawing it -- you are making an opinion.

COMMISSIONER HERIOT: It's the core of the report.

COMMISSIONER KLASNEY: You are making an opinion and you think it is the core of the report. See, I think the core of the report is different. So -- what are you laughing at?

CHAIRMAN CASTRO: Good-natured camaraderie, that's all.

COMMISSIONER KLASNEY: So I would be
more than willing to accept subjective -- the word subjective in the first paragraph, as long as we strike the second paragraph, which is repetitive.

CHAIRMAN CASTRO: That is a motion. Do we have a second? I'll second it for you.

VICE CHAIR THERNSTROM: What is the motion now?

CHAIRMAN CASTRO: So the motion is to read the initial revision that included subjective judgment on the paragraph at the top of page six. Ms. Ostrowsky, could you read that part again, please?

MS. OSTROWSKY: I'm sorry, page six?

CHAIRMAN CASTRO: Yes, using the subjective judgment rewrite that you used earlier.

MS. OSTROWSKY: "Although the 2012 guidance acknowledges as a --

COMMISSIONER HERIOT: Can't hear.

COMMISSIONER ACHTENBERG: Can't hear.

MS. OSTROWSKY: "Although the 2012 guidance acknowledges as a legitimate selection concern, the physical or other security risks to customers or other employees inherent in hiring any employee, it leaves employers exposed to the discretionary or subjective judgment of the EEOC as
to individual hiring decisions."

CHAIRMAN CASTRO: And so you were using subjective. And then Commissioner Kladney, your suggestion --

VICE CHAIR THERNSTROM: Or discretionary she said.

MS. OSTROWSKY: Or discretionary.

CHAIRMAN CASTRO: Oh, she is using both.

MS. OSTROWSKY: I am happy to use either. Discretionary is fine.

COMMISSIONER KLASTNEY: And I am happy to let you all choose which one you want or both.

However, I do with --

CHAIRMAN CASTRO: Let's go with discretionary.

COMMISSIONER ACHTENBERG: Let's go with discretionary.

COMMISSIONER HERIOT: Let's go with subjective.

CHAIRMAN CASTRO: The motion is with discretionary. Right? And so the second part of your motion is to delete paragraph -- or do you just want to deal with these individually right now?

COMMISSIONER KLASTNEY: No, might as well just --
COMMISSIONER HERIOT: No.

CHAIRMAN CASTRO: Okay, let's do it all.

COMMISSIONER Kladney: To delete the repetitive paragraph that begins at page eight, which begins as a result of to unfair reading because it doesn't -- and to eliminate the paragraph that begins at page eight that says as a result one fair reading which is opinionated and restates what we just said, without giving any other opinions. I want to --

COMMISSIONER HERIOT: Could you read that?

MS. OSTROWSKY: May I say something first?

CHAIRMAN CASTRO: Yes.

MS. OSTROWSKY: This is something the EEOC did not object to.

CHAIRMAN CASTRO: Okay.

COMMISSIONER HERIOT: Could you read the paragraph you are talking about deleting?

MS. OSTROWSKY: On page eight, the EEOC did not object to that characterization.

CHAIRMAN CASTRO: And that paragraphs reads -- and that is because you don't have access to your report. Is that right, Commissioner Heriot?
COMMISSIONER HERIOT: It won't download, I'm afraid. It's spinning around and spinning around.

CHAIRMAN CASTRO: I will read it for you. "As a result one fair reading of the 2012 guidance suggests strongly that employers use a two-pronged approach, the first being the objective Green factors and the second a more subjective individualized assessment. The EEOC's instruction to perform and individualize, assessment may render employers more open to disparate treatment lawsuits, however.

For example, an applicant might view the conclusions of an individualized assessment differently from that of an employer, particularly as to risk of future offenses or the relation of the past offense to the job, or the employer's judgment as to its business necessity.

The net result is that employers may be more likely to be sued under the new guidance whether or not they perform individualized assessments."

So the motion is to make the revision to the end of paragraph six, as previously read and to delete the paragraph that begins on paragraph eight.
and continues to the top of paragraph nine.

We have a second on that motion. WE have discussed it thoroughly. So I am going to take a roll call vote on that.

Madam Vice Chair, how do you vote?

VICE CHAIR THERNSTROM: I'm going to pass at the moment.


Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: No.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: No.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: No.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Reluctantly, yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?
COMMISSIONER KLADNEY: Yes.

CHAIRMAN CASTRO: I vote yes.

Madam Vice Chair?

VICE CHAIR THERNSTROM: And I'm voting no on this. I'm just staring at it here again.

CHAIRMAN CASTRO: Well the motion fails four to four.

Okay, any other motions to amend the report?

Actually let me -- may I make one suggestion? Let us go back to the taken and just make a -- I would make a motion that we just deal with that revision with the language discretionary judgment as you previously sent.

So do I have a second on that motion?

COMMISSIONER KLADNEY: Second.

CHAIRMAN CASTRO: And I know we have discussed that pretty thoroughly. So I am just going to go ahead and take a roll call on that.

Madam Vice Chair, how do you vote on that one?

VICE CHAIR THERNSTROM: So what you are suggesting is --

CHAIRMAN CASTRO: Just changing this last one and not taking out the other paragraph.
So could you read how I have suggested?

MS. OSTROWSKY: Sure. This is back on page six.

VICE CHAIR THERNSTROM: Yes.

MS. OSTROWSKY: The sentence that starts, "although."

VICE CHAIR THERNSTROM: Yes, I understand.

MS. OSTROWSKY: Okay. After footnote 19 it says, "It leaves employers exposed to the discretionary judgment --

VICE CHAIR THERNSTROM: And the discretionary is the point you are making, right?

Yes, go on. I'm sorry.

MS. OSTROWSKY: "It leaves employers exposed to the discretionary judgment of the EEOC as to individual --

COMMISSIONER KIRSANOW: Can't hear.

COMMISSIONER ACHTENBERG: Now I really can't hear.

COMMISSIONER KIRSANOW: I apologize. I really wasn't yelling.

CHAIRMAN CASTRO: Everybody, you know what? I withdraw my motion. We are going to just leave it like it is in the original draft.
COMMISSIONER HERIOT: Why?

CHAIRMAN CASTRO: Well I just consulted with Commissioner Kladney.

COMMISSIONER KLADNEY: It's fine with me. Let's just move on and approve the report.

VICE CHAIR THERNSTROM: And did we say that you substituted the word discretionary?

CHAIRMAN CASTRO: No, no. We are not going to do that. We are just leaving it the way is. Okay?

COMMISSIONER HERIOT: Are you sure? I think it makes it quite a bit better, actually.

CHAIRMAN CASTRO: You do?

COMMISSIONER HERIOT: I do.

CHAIRMAN CASTRO: Okay, well then I am going to ask Ms. Ostrowsky to reread that one more time, please with the discretionary in it.

MS. OSTROWSKY: Okay. "Although the 2012 guidance acknowledges as a legitimate selection concern, the physical or other security risks to customers or other employees inherent in hiring any employee, it leaves employers exposed to the discretionary judgment of the EEOC as to individual hiring decisions."

CHAIRMAN CASTRO: Okay, so that will be
my motion. Do I have a second?

VICE CHAIR THERNSTROM: Second.

CHAIRMAN CASTRO: Okay, we will take a roll call vote on that, since we have debated that question earlier.

Madam Vice Chair, how do you vote?

VICE CHAIR THERNSTROM: And so just to clarify this, the only issue is the word discretionary, right?

CHAIRMAN CASTRO: Well, it rewords it a little bit. I think it makes it clearer as to what Ms. Ostrowsky was getting at, compared to the original in terms of opening up potential liability to the employers.

VICE CHAIR THERNSTROM: All right, I will vote yes on that.

CHAIRMAN CASTRO: All right.

Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: I will vote yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: I did prefer the earlier wording but I will vote yes on it.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?
COMMISSIONER GAZIANO: I will yield on this one and vote yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: I was going to vote yes, Mr. Chairman, but now that all my foes have voted yes, I am reconsidering. I am going to pass.

COMMISSIONER GAZIANO: I really prefer the original, if it makes you feel any better, Commissioner Achtenberg. But how did you characterize us? All your foes? Are we your foes?

COMMISSIONER ACHTENBERG: My faux foes.

COMMISSIONER GAZIANO: Oh, okay.

COMMISSIONER ACHTENBERG: My F-A-U-X F-O-E-S.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote? Commissioner Yaki?

COMMISSIONER YAKI: I am under the same dilemma as Commissioner Achtenberg. So I am going to pass.

CHAIRMAN CASTRO: You are going to pass. Commissioner Kladney, how do you vote?

COMMISSIONER KLANDNEY: No.
CHAIRMAN CASTRO: I will vote yes because I think it is better than the original version. So I am going to come back to Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Yes, I will vote yes.

CHAIRMAN CASTRO: Okay. Commissioner Yaki?

COMMISSIONER YAKI: I pass again.

CHAIRMAN CASTRO: So you abstain? You are the last one we are waiting for.

COMMISSIONER YAKI: Well I am going to defer to Commissioner Kladney's vote.

CHAIRMAN CASTRO: So you are going to say no because that is how he voted?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: Okay. So the motion passes, one, two, three, four, five, six yeses to two nos.

Okay. Any other changes on the report or the draft report?

Hearing none, do I have a motion to approve Part A of this report as amended? Do I have a motion? Anybody?
COMMISSIONER GAZIANO: I move to approve the report.

CHAIRMAN CASTRO: Is there a second?

VICE CHAIR THERNSTROM: Second.

CHAIRMAN CASTRO: Okay. I don't know that there is any --

COMMISSIONER GAZIANO: Naturally, the report as recently amended.

CHAIRMAN CASTRO: That is exactly how, yes.

So I am going to take a roll call vote here.

COMMISSIONER YAKI: I just have a question about it for clarification.

CHAIRMAN CASTRO: Yes, Commissioner Yaki, go ahead.

COMMISSIONER YAKI: If this report does not get a majority at this time, can we table it for future consideration?

CHAIRMAN CASTRO: I don't know.

COMMISSIONER HERIOT: We need to approve it today in order to have the schedule for rotating off commissioners.

CHAIRMAN CASTRO: But what you are saying, Commissioner Yaki, is if it fails today,
could we at some point in the future bring this report back for further consideration?

COMMISSIONER YAKI: Yes.

VICE CHAIR THERNSTROM: I don't think so.

CHAIRMAN CASTRO: You don't think so?

You do think so.

COMMISSIONER GAZIANO: In parliamentary procedure, there is probably a way of doing that but I hope, I certainly hope we get that approved. There was an understanding that we had with fellow commissioners that --

COMMISSIONER YAKI: I was not party to that understanding, Commissioner Gaziano, so --

COMMISSIONER GAZIANO: That may be but I am still talking --

CHAIRMAN CASTRO: Gentlemen, order! Commissioner Yaki, let Commissioner Gaziano finish and then you will have the floor, please. Commissioner Gaziano.

COMMISSIONER GAZIANO: I am still allowed to talk to other commissioners about the understanding that at least some of us have that we would approve last year's statutory report with an understanding that certain other reports would be
released so that those of us whose terms were expiring could participate in comment.

So that was certainly an important understanding --

COMMISSIONER YAKI: Mr. Chairman, this is Commissioner Yaki.

CHAIRMAN CASTRO: Yes, Commissioner, go ahead.

COMMISSIONER YAKI: I was not part of that understanding because if I recall correctly, that deal was made during a time when my nomination was being held up so these kinds of deals could be made.

And I am not going to agree to that. And I am not happy with the way this report is being viewed as is, as being reshaped in any way shape or form. And I strongly urge my colleagues to vote no and take another crack at it.

And if Commissioner Gaziano is concerned about time, well we can bring it back in an expedited fashion and perhaps truncate some of our deadlines in order to accommodate his need to vent his spleen at the appropriate opportunities for this report.

COMMISSIONER GAZIANO: The understanding
that was reached --

COMMISSIONER HERIOT: Can't hear.

COMMISSIONER GAZIANO: The understanding that was reached was well after you were back on the Commission, Commissioner Yaki. It was about last August or September but the exact month I don't remember for sure.

You may not have agreed to it. I don't really remember, nor right now, given your insults, do I care. But there were other Commissioners who reached that understanding with us.

COMMISSIONER HERIOT: Well that would not be a truncated period to write statements. I mean, that is the whole point.

CHAIRMAN CASTRO: Commissioner Kladney,

you have the floor.

COMMISSIONER KLADNEY: Thank you. Quite honestly, I am inclined to go along with Commissioner Yaki that we have independent consideration of whether the report as a whole should pass.

We did agree to a time line in terms of getting reports done. We didn't agree to approving them all. And approval depends on the consideration of each individual commissioner.
For instance, I was just defeated on two of my motions. So maybe I am unhappy with the report and I don't want to pass the report. An agreement to pass the report was never made. A time line is to get the report completed by the staff was.

So I think we should have clarity on that point and that each commissioner can, in their considered judgment vote as they wish on this report. And I believe that we have the power under the rules of the Commission to bring it up later after -- at a later time as to whether we wish to pass it or not.

CHAIRMAN CASTRO: Okay, so I am going to move forward on a vote on Part A of the EEOC report, as amended.

Vice Chair Thernstrom, how do you vote?

VICE CHAIR THERNSTROM: This is just to accept Part A, right?

CHAIRMAN CASTRO: Yes.

VICE CHAIR THERNSTROM: Yes. I vote yes.

CHAIRMAN CASTRO: As amended.

VICE CHAIR THERNSTROM: As amended.

CHAIRMAN CASTRO: Commissioner Kirsanow,
how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot,

how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano,

how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: I'm going to pass, Mr. Chair.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: No.

CHAIRMAN CASTRO: Commissioner Kladney,

how do you vote?

COMMISSIONER KLADNEY: No.

CHAIRMAN CASTRO: I am passing for the moment.

Madam Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: I will vote no.

CHAIRMAN CASTRO: Okay. And I will vote no.
So we have four nos and four yeses. The motion fails.

Okay, next then we move on to determine for planning purposes the discussion of a 2014 --

COMMISSIONER GAZIANO: Mr. Chair, I think we need to continue on this topic for a little longer, given the understandings we have had about not just whether we would have a vote but getting this out in time so that Commissioners cycling off could participate and file their statements.

So what is the proposal of those people who defeated this report?

COMMISSIONER KLADNEY: Commissioner Gaziano, if I may, I would like to see if we can adjourn for ten minutes and maybe caucus on this issue.

CHAIRMAN CASTRO: Okay. We will take a ten-minute caucus adjournment.

(Whereupon, the above-entitled matter went off the record at 10:43 a.m. and resumed at 11:05 a.m.)

CHAIRMAN CASTRO: We are back on the record. We just took a recess. It is 11:05 a.m. Can we get order?

We are still on the topic of the EEOC
report and I believe we have a motion. Commissioner
Kladney, would you like to make the motion or shall
I?

COMMISSIONER KLADNEY: You can, Mr.
Chair.

CHAIRMAN CASTRO: Okay. I would move
that we accept the EEOC criminal background check
report with the following changes. Is Ms. Ostrowsky
here? If I could ask her to read paragraph -- the
end of paragraph six -- I'm sorry -- the end of the
paragraph at page six, as previously suggested to be
revised using the discretionary language.

MS. OSTROWSKY: It starts, "Although the
2012 guidance acknowledges as a legitimate selection
concern, the physical or other security risks to
customers or other employees inherent in hiring any
employee, it leaves employers exposed to the
discretionary judgment of the EEOC as to individual
hiring decisions."

CHAIRMAN CASTRO: Okay. And then we
will, included in this motion is to delete the
paragraph that begins on page eight, which starts
"as a result" and ends on page nine with the words
"individualized assessments." That would be deleted
from the report.
So that is the motion. Is there a second?

COMMISSIONER KLASNEY: Second.

COMMISSIONER HERIOT: Second.

CHAIRMAN CASTRO: Okay, we are going to take a roll call vote on this.

Madam Vice Chair, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN CASTRO: Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes, but very much under protest.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN CASTRO: Did you say yes?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN CASTRO: Okay. Commissioner Achtenberg, how do you vote?

Achtenberg: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?
COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER Kladney: Yes.

CHAIRMAN CASTRO: And I vote yes. So the report passes. Part A passes unanimously.

DISCUSSION AND VOTE ON 2014 USCCR BUSINESS MEETING CALENDAR

CHAIRMAN CASTRO: Okay, now we move on to the next item on the agenda, which is the consideration of the 2014 business meeting calendar that was circulated yesterday by Ms. Silverio. And I hope folks have had a chance to look at it. And let's discuss what works and what doesn't. Anybody have any issues?

COMMISSIONER Kladney: Mr. Chairman?

CHAIRMAN CASTRO: Yes.

COMMISSIONER Kladney: I just haven't checked with my wife on this.

CHAIRMAN CASTRO: You just did or you haven't?

COMMISSIONER Kladney: No, I haven't had the opportunity.

CHAIRMAN CASTRO: Okay.
COMMISSIONER Kladney: So I will abstain on the calendar and if there is an issue, I will bring it up later.

Chairman Castro: Okay.

Commissioner Achtenberg: Mr. Chairman?

Chairman Castro: Yes, Commissioner Achtenberg?

Commissioner Achtenberg: I will be out of the country on March 28th. So I would like to ask for reconsideration of that date.

Chairman Castro: Okay.

Commissioner Achtenberg: And I have a problem with July 18th as well. I have an occasion that is already planned on that date. So I would like it if the Commission would reconsider that date as well.

Chairman Castro: Okay, let's stick with March for the moment. And I believe, Commissioner Heriot, you have something on the 21st. Is that right?

Commissioner Heriot: I don't have my faculty list in front of me right now. It is not crucial that I make every one of those.

Chairman Castro: Okay.

Commissioner Heriot: But I prefer to
not hit the 21st if we don't have to.

CHAIRMAN CASTRO: How about the 14th of March? It's not my preferred date but I can work with that.

MS. SALLO: March 14th would only give us two weeks from the February date if we adopt the February date.

CHAIRMAN CASTRO: Okay. And what was the conflict? You just have a conflict on the 28th? Is that it, Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Yes, I am going to be in Israel.

CHAIRMAN CASTRO: Okay and Commissioner Heriot, you do have a staff meeting on the 21st.

COMMISSIONER HERIOT: Okay.

CHAIRMAN CASTRO: Do we want to move this to a Monday like the 31st?

COMMISSIONER HERIOT: No.

CHAIRMAN CASTRO: No? Well, then I guess it is going to be the 7th -- I'm sorry, the 14th. How does the 14th look?

COMMISSIONER HERIOT: The 14th is fine with me. Okay, so then we will move it to the 14th of March.

Commissioner Achtenberg, you also
mentioned July. So let's go to July. You had a problem with the 18th?

COMMISSIONER ACHTENBERG: Yes, I am out that whole week beginning on the 12th through the 19th.

CHAIRMAN CASTRO: Okay, how about July 25th? How does that work for folks?

COMMISSIONER ACHTENBERG: That works for me.

CHAIRMAN CASTRO: July 25th?

COMMISSIONER ACHTENBERG: Works for me.

CHAIRMAN CASTRO: Okay, so let's move it to July 25th.

Okay, any other dates that are conflicts for commissioners?

Hearing none, then with those two changes, I will move to adopt the calendar as circulated. Is there a second?

VICE CHAIR THERNSTROM: As amended?

CHAIRMAN CASTRO: Pardon me?

VICE CHAIR THERNSTROM: As amended?

CHAIRMAN CASTRO: As amended, yes.

COMMISSIONER HERIOT: Second.

CHAIRMAN CASTRO: Okay, all those in favor, say aye.
(Chorus of aye.)

CHAIRMAN CASTRO: Any opposed?

(No audible response.)

CHAIRMAN CASTRO: Any abstentions?

Okay, that is our calendar for 2014 for the moment.

COMMISSIONER GAZIANO: For the record, I will just --

CHAIRMAN CASTRO: Abstain?

COMMISSIONER GAZIANO: -- record my abstention.

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: And could someone send it out, I mean recirculate it with the new dates?

CHAIRMAN CASTRO: Yes.

MS. SALLO: I will send it out, Commissioner Yaki.

CHAIRMAN CASTRO: The Staff Director will do that.

COMMISSIONER YAKI: Thank you.

MS. SALLO: You're welcome.

CHAIRMAN CASTRO: Next we have a motion -- I'm sorry -- next we have to discuss the action on Commissioner Kladney's -- or on the Action on 2014 Statutory Enforcement Report topic.
DISCUSSION AND VOTE ON 2014 STATUTORY ENFORCEMENT REPORT TOPIC

CHAIRMAN CASTRO: As you know, there was some -- there has been an issue raised as to whether or not the version that we passed previously falls within our jurisdiction or not. And in order to avoid that open question on our part, we wanted to propose an alternative, which I believe Commissioner Kladney's assistant distributed last night to the commissioners.

Commissioner Kladney, would you like to speak to that issue?

COMMISSIONER KLADNEY: I think that what we distributed says what I am interested in. I was just trying to take the second half of the report -- of the concept paper that was originally adopted and go with alternative sentencing using the federal -- in the federal government the alternative sentencing that the federal government uses as compared to the states and the kinds of things that they do versus what the DOJ does and how that affects the different rights of prisoners in the different systems.

CHAIRMAN CASTRO: Okay.

COMMISSIONER KLADNEY: Do my colleagues on the other side of the table --
COMMISSIONER GAZIANO: I have a couple
of questions. And I think it is an appropriate
focus but I have to concerns with narrowing it at
this point. It is always -- first of all I think
certainly we should focus on it and the staff can
pay extra attention to anything that we want them to
pay attention to. But my understanding of this
area, and I spent some time in it in my prior job is
that there are so many connections and that if you
narrow what you are looking at too much, then you
are not really understanding the problem.

There is so much sentencing discretion,
for example, that if you were to look -- let's just
say one focus that has gotten a lot of attention in
the press is mandatory minimums. And let's say we
eliminated every one. I'm not saying that is even a
great idea but -- these microphones are really bad
for those on the phone.

There are some that are problematic.

Even if we were to eliminate them, that wouldn't
necessarily eliminate the problem because
prosecutors may choose the mandatory minimums
because they are easy to get pleas on but they would
charge at a much higher rate. There may be
unintended consequences.
So I would just want to keep -- suggest -- my bias at least at this point is until the staff does the literature review, until the staff comes up with a -- I'm trying to think of the next step -- the plan that we remain somewhat open and that we carefully review the literature because one small angle that we focus on -- it may be more important that we talk about the whole criminal sentencing structure as a whole, rather than trying prematurely to eliminate one area.

COMMISSIONER KLADNEY: So your proposal is?

COMMISSIONER GAZIANO: To keep it as it is and ask the staff to focus particularly on this issue that you have concerns about in the literature review but to also give us a broader picture as well. And then we can kind of revisit this in a few months. And one alternative is that we just make it a special emphasis in our larger focus. Some of us may be more concerned about other aspects of this.

Another option is, at that time, we have a little bit more confidence that if we narrow it, we are narrowing it to something that we can properly report on, without looking at these other pieces.
MS. SALLO: Mr. Chair?

CHAIRMAN CASTRO: Madam Staff Director.

MS. SALLO: The original paper, as it was written, what it requested was that we look into the monitoring devices that are in place by state and local law enforcement, which is outside the scope of what we are supposed to be looking at. And so that is why they are coming back with the more revised version of their proposal because the way it was written, it was to look at state and local law enforcement and that doesn't fall under our mission at this point in time.

COMMISSIONER KLADNEY: Mr. Chairman?

CHAIRMAN CASTRO: Yes, Mr. Gaziano.

Excuse me.

COMMISSIONER KLADNEY: I guess what I am trying to say here in this little blurb is that we take the Department of Corrections DOJ and look at what they are doing in terms of what they do with prisoners and sentencing and see if there are other alternatives that they can be using.

You are saying --

COMMISSIONER GAZIANO: Maybe I misunderstood your proposal then. Because I have gotten a few things over the email the last few days
as to what proposed -- if -- I thought we were looking at sentencing.

If we want to just focus on federal sentencing, that is okay with me. By the way and I take the Staff Director's point in the Enforcement Report we are supposed to look at.

But the federal government claims all kinds of power to look at state sentencing under various strained civil rights theories. So I am not saying it wouldn't be within our power to look at state sentencing through the federal enforcement lens but I am willing to.

There were some -- I haven't read your latest blurb. So if you have it for me -- or maybe I haven't read your latest blurb.

John, my special assistant is telling me that it is in the book that he gave me this morning. I'm sure he sent it to me, too.

VICE CHAIR THERNSTROM: And nothing that goes to my USCCR address gets to me.

COMMISSIONER GAZIANO: Give me 45 seconds to regroup.

CHAIRMAN CASTRO: Let's recess.

COMMISSIONER GAZIANO: No, 45 seconds.

We can go on.
COMMISSIONER GAZIANO: I still think is a lot more narrow than the proposal that we adopted a few months ago. So I am willing, at this point, to narrow it to federal sentences. So maybe we can do that by agreement. But what I have just seen still seems to limit it a little too much for my comfort zone.

COMMISSIONER KLANDNEY: Well I would be willing to accept changes as we go along if we adopt this.

I mean the only reason I wrote this up yesterday afternoon, it wasn't my choice to have to narrow it, Commissioner Gaziano, I was told to narrow it. So that is what I did.

CHAIRMAN CASTRO: In fact, I would like Counsel Hepler to please come forward and explain the opinion that she provided with regard to the original concept that everyone understands why we are --

MS. HEPLER: I don't have it in front of me. But I researched the legislative history of our statutory report provision. And what it is, it is monitor federal civil rights enforcement. And it is specified in the Congressional Record Executive
Branch. When I saw the original paper concept, it had state and local, which was not within that mandate.

COMMISSIONER GAZIANO: Thank you for that. And I think that I am certainly willing, I hope other commissioners are, to just look at federal sentencing. But it still is within federal enforcement.

Federal enforcement looks all the time at how state law enforcement operate. And so if we were to look at how DOJ, Executive Branch enforces those laws as applied, but there is a way to sometimes to look at and we have done that.

But the Section 5 that we just completed is a perfect example of that. The federal government Civil Rights Authority is being used to second guess state decisions.

But anyway --

VICE CHAIR THERNSTROM: And local.

COMMISSIONER GAZIANO: Yes, and local.

But anyway, I think that we have, it sounds like a friendly agreement to at least limit the topic to federal sentencing and maybe we can further narrow it at a later time. But I just want to do so after we have had a chance to consider it
and read some of the literature in the area that suggests that fixing mandatory minimums was part of your suggestion, I know that is not all of it, but that there are bigger drivers in sentencing. And if we were to change mandatory minimums, I am not sure that they would have the effect that some people think they have.

COMMISSIONER KLASMENY: Very well, then, I would like to make a motion that we approve my proposal for the 2014 statutory report.

CHAIRMAN CASTRO: Do we have a second?

VICE CHAIR THERNSTROM: Now wait a minute. I don't understand. We have got --

CHAIRMAN CASTRO: This will replace it. See that blurb?

VICE CHAIR THERNSTROM: Commissioner Gaziano, --

COMMISSIONER GAZIANO: Well I don't like this language. Why don't we just -- my counter is why don't we stick with the original but eliminate any examination of state and local?

MS. HEPLER: Well the original one focused on state and local. I don't have the blurb so I don't know what the revised one says.

CHAIRMAN CASTRO: It did not include
federal is what you are saying?

MS. HEPLER: Well, it was mainly focusing on state and local and that was the issue.

I don't have what you have in front of you so I don't know what it says.

COMMISSIONER KLANDNEY: My proposal says we look at the federal sentencing, not just minimum mandatory and guidelines but we look at all kinds of alternative sentencing federal courts do and then examine what other kinds of alternative sentencings are done say in the states. And it would be available or made available to the federal government, Department of Corrections and judiciary.

COMMISSIONER GAZIANO: Your focus though, as it is written, is on alternative sentencing. And I think that is a little narrow. So maybe what we should do is just pass on this until we could work together on something that maybe is -- you know I don't know that we should change our enforcement report based on a blurb with a few sentences without having an opportunity to talk to each other a little bit more and developing a concept paper. And I suspect we could come to an agreement on that.

CHAIRMAN CASTRO: Madam Staff Director,
where does that put you and your staff in terms of the timing for this to meet our annual deadline?

MS. SALLO: Time is of the essence, simply because we would need to start the legwork to prepare for the briefing by early next year.

So I would propose that staff work on possibly amending the concept paper and then the Staff Director's Office would disseminate it to the commissioners to see if we have been able to capture the desire of both parties.

COMMISSIONER KLANDNEY: I would just note that our next meeting is not until the last week in September.

COMMISSIONER ACHTENBERG: Yes, we don't want to wait until the last meeting. I mean that is not fair to the staff. And if we are close, we will just try to get there.

CHAIRMAN CASTRO: Madam Vice Chair?

VICE CHAIR THERNSTROM: What I think Commissioner Gaziano is saying, but he should correct me if I am wrong, he is saying look, the staff should begin to work. And when we see what they start to come up with and look at what the literature says, we can then, after we have a further grasp of the landscape, as it were, we can
then talk about ways in which we want to now or not now I guess. Is that correct?

COMMISSIONER GAZIANO: That's correct.

And I think that if we are telling our staff we are going to choose something broadly in federal sentencing, federal sentencing reform, that they would not be losing a lot of time. We have been late in choosing statutory reports before and our excellent has come --

But I don't think that time would necessarily be wasted with that kind of literature. It may be much better that we think about things in a thoughtful manner. But I am also open to if we reach consensus, an occasional vote, or telephone, brief telephone meeting before September if our Staff Director and others think that we should settle on it sooner.

COMMISSIONER Kladney: Commissioner Gaziano, so I understand your point about not just having alternative sentencing. You are also speaking about looking at minimum mandatories, their effect, and things like that. Is that what I am hearing?

COMMISSIONER GAZIANO: I am certainly open to all of those things. There is a -- I want
to make sure that we don't pick something that A) is we don't know what we are picking. And today without this being fleshed out, I don't know what we are picking.

Secondly, I want to allow us to have some confidence that we have picked something that we can concretely study. And we haven't picked something too broad or too narrow.

VICE CHAIR THERNSTROM: And can I just add to that? Look, he said not necessarily wasting time. I had changed that to we will not be wasting staff's time if they start now on a literature review and so forth and giving us a firmer foundation on which to decide the scope of this study.

COMMISSIONER ACHTENBERG: Well, I'm persuaded.

CHAIRMAN CASTRO: Commissioner Kladney?

COMMISSIONER KLANDNEY: I missed that comment.

CHAIRMAN CASTRO: Commissioner Achtenberg is persuaded.

COMMISSIONER KLANDNEY: If Commissioner Achtenberg is persuaded, I guess I am persuaded.

CHAIRMAN CASTRO: Okay.
COMMISSIONER ACHTENBERG: Well, Madam Vice Chair, might they be in a position to report back any progress that they have made at the September meeting so that if we can --

VICE CHAIR THERNSTROM: I would think that we could be notified by emails and through our assistants of exactly what the literature picture looks like, for instance, that would be helpful.

CHAIRMAN CASTRO: And ideally, if we could have a revised concept paper that includes some of that by the September meeting, that would be the best.

MS. SALLO: That would be the plan.

VICE CHAIR THERNSTROM: Yes, okay. That would be fine.

COMMISSIONER ACHTENBERG: And if Commission Gaziano and Kladney might put their ample brains together and agree on something, that certainly would make it easier for the rest of us to have confidence that we have chosen correctly.

CHAIRMAN CASTRO: Indeed.

COMMISSIONER KLADENEY: I would be a delight.

COMMISSIONER GAZIANO: It would absolutely be a delight.
CHAIRMAN CASTRO: Well it sounds like we have a plan then. I don't think we need to vote on that. We have consensus here. So we will proceed in that manner.

DISCUSSION ON SUBMISSION OF STATEMENTS AND REBUTTALS FOR COMMISSION REPORTS

CHAIRMAN CASTRO: The next item on our agenda for Program Planning is to set timing for the Part B of both the Eminent Domain and EEOC Background Check Reports, as well as submissions of statements and rebuttals for the reports.

Madam Staff Director?

MS. SALLO: Yes. First, I would like to remind everyone that your rebuttals for the sexual assault in the military are due Tuesday, September 3rd by midnight. So once I receive those, I will disseminate them the following morning.

I also wanted to move forward in scheduling when we would like to submit Part B for both reports that were adopted today and then take a look further into 2013 as to when the statements and rebuttals will be submitted, keeping in mind that at the present time I have three reports on my desk that I have to review for any potential edits prior to dissemination to the commissioners. And that
would be the Entrepreneurship Report, the Sex Trafficking Report, along with the Engagement of Arab and Muslim Americans. And most likely by the end of September, I will also have the NVRA Report, along with the Peaceful Coexistence Report.

So we have a lot of reports in the pipeline. Obviously, to get everyone to submit statements, rebuttals, and to complete Part B of every single report before the end of this calendar year will be most difficult. But at the very minimum, I would like for us today to set the dates for the Part B for the two reports adopted today and also for the statements and rebuttals to follow.

CHAIRMAN CASTRO: So should we say Part B should be voted on at our September meeting?

MS. SALLO: That would be best, unless anyone was amenable to a sooner vote via notation or telephonic.

VICE CHAIR THERNSTROM: I think it is best to meet in person to vote on these things because then there is a decent discussion. There is not a decent discussion on a telephonic meeting, which is why I have boycotted all telephonic meetings with the previous Staff Director.

MS. SALLO: Yes, ma'am.
CHAIRMAN CASTRO: Okay. So Part B is at
the September meeting.

COMMISSIONER GAZIANO: What is -- I'm
sorry. I was momentarily distracted. What would be
-- I suppose that works if we think we are likely to
get a Part B. We have had a problem with Part Bs
recently. But as long as -- I just don't want a
futile effort and then further delay in statements.

But if my calendar counting is roughly accurate, we
still have time to have statements and rebuttals in
the normal course. Do we not, before early
December?

MS. SALLO: Yes.

COMMISSIONER GAZIANO: Okay, then --

COMMISSIONER HERIOT: That's surrebuttal
time that won't be.

CHAIRMAN CASTRO: Correct.

COMMISSIONER GAZIANO: Unless we
compress it slightly, I suppose. But we have had
good operation with that. We haven't had
essentially surrebuttals.

COMMISSIONER HERIOT: That's true.

COMMISSIONER GAZIANO: So our early
prediction that that would be unlikely to be used
has proven correct.
So let's just keep that schedule in mind and factor in, I think, sometime early December to get this done, or to at least have all commissioner statements finalized.

CHAIRMAN CASTRO: Does that work for everyone?

COMMISSIONER HERIOT: I don't quite know what we have just agreed.

COMMISSIONER GAZIANO: We are going to try to do Part B in late September.

COMMISSIONER HERIOT: And that is the 27th. Is that correct?

CHAIRMAN CASTRO: That is correct. That is our meeting.

COMMISSIONER GAZIANO: We haven't been successful with a lot of Part Bs but our colleagues are really optimistic.

MS. SALLO: So if we were to move forward with what was just discussed, September 27th we would vote on the Part B for the two reports that were adopted today, which would then, counting moving forward 30 days ahead, the statements would be due by Sunday, October 27th and the rebuttals would be due by Tuesday November 26th. Please keep in mind that that is also Thanksgiving week.
COMMISSIONER HERIOT: And that is for two reports. Correct?

CHAIRMAN CASTRO: Correct.

MS. SALLO: Yes.

COMMISSIONER HERIOT: Okay. And we will actually have a few days for surrebuttal if it was necessary. And again, I have no reason to believe it would be.

MS. SALLO: Correct.

CHAIRMAN CASTRO: Correct.

COMMISSIONER HERIOT: I'm okay with that.

MS. SALLO: So I will repeat the dates again. September 27th is when we would vote on the findings and recommendations for the two reports adopted today, the Civil Rights Implications of Eminent Domain, as well as the Assessing the Impact of Criminal Background Checks.

Then the statements from commissioners would be due by midnight on Sunday, October 27th.

COMMISSIONER GAZIANO: Pacific time.

COMMISSIONER KLANDNEY: Hey, hey, no! I am not going to give you three extra hours.

COMMISSIONER HERIOT: Pacific time?

COMMISSIONER GAZIANO: That's been the
prior rule, in deference to those of our colleagues who do live in the west, if you want to live by our -- never mind. Let's not reopen up the

COMMISSIONER KLDNEY: Old wounds.

COMMISSIONER HERIOT: Old wounds.

MS. SALLO: Okay, so everybody's in agreement with that. All right.

So then the rebuttals would be due on Tuesday, November 26th --

CHAIRMAN CASTRO: Correct.

MS. SALLO: -- for both reports that were adopted today.

CHAIRMAN CASTRO: Correct.

VICE CHAIR THERNSTROM: And will you send out an email reminding --

MS. SALLO: Absolutely.

VICE CHAIR THERNSTROM: -- us of these dates?

MS. SALLO: Yes, ma'am.

VICE CHAIR THERNSTROM: Thank you very much.

MS. SALLO: However, I would request that if we are going to vote on the findings and recommendations on Friday, September 27th, that we provide the findings and recommendations by
Wednesday, September 18th, which would give commissioners slightly over a week to review them and possibly have discussions prior to adoption.

COMMISSIONER KLADNEY: I'll make that a motion.

CHAIRMAN CASTRO: Yes. Do we need to make this in the form of a motion or do you have the discretion to do this, Madam Staff Director?

MS. SALLO: I have the discretion.

CHAIRMAN CASTRO: Okay, so we don't need a motion.

Okay, I think that works for everyone.

MS. SALLO: So then while we are on the 2013 calendar, as you know I have three reports on my desk and another two coming through the pipeline. I don't want to inundate the commissioners' inbox with reports but at the same time, I don't want to sit on them.

So, I am proposing to send out the first draft of the three reports that are currently on my desk, the Entrepreneurship Report, the Sex Trafficking, and Engagement in September. The question to the commissioners that I would pose is, would you like for me to stagger the dissemination, do one every week, or do you want all three at the
same time? Because once I give them to you, then I am going to give a deadline to do the edits.

CHAIRMAN CASTRO: Stagger them, then.

COMMISSIONER HERIOT: Yes.

MS. SALLO: Okay. And I will try to stagger so that it falls in-between the submission of statements and rebuttals as well.

CHAIRMAN CASTRO: Okay.

MS. SALLO: But I really would like to at least get the Entrepreneurship Report underway as soon as possible. So I will send that first.

CHAIRMAN CASTRO: Okay, great. Anything else on this topic?

MS. SALLO: No.

CHAIRMAN CASTRO: Okay, great. Thank you.

So now we will move on to management operations.

MANAGEMENT OPERATIONS

STAFF DIRECTOR'S REPORT

CHAIRMAN CASTRO: Staff Director, your monthly report?

MS. SALLO: Yes, I disseminated the monthly report and I am sorry that it did not come
all in bulk. I was traveling. I was visiting our Rocky Mountain Office as well as our Western Office during the week that I was sending out the updates for this meeting. And the meetings went very well. I was able to meet with staff at both locations. I also met with civil rights representatives from both federal agencies, as well as local non-profits on the ground in Denver, as well as in LA.

I received some very positive feedback from the work that is being done on the ground, especially in LA. And I had the opportunity to also speak with the chairs that are currently, that have been appointed through both the Western Office and the Rocky Mountain Office. And they had some great ideas and great suggestions as to how they can have access to more information of the work that we are currently doing here at headquarters and how they would love to be able to participate more or at least open up more lines of communications with headquarters.

So if the material came through in pieces rather than in bulk for today's meeting, I apologize but that was the reason behind it.

I also wanted to take an opportunity to
remind everyone that we are quickly coming to the end of fiscal 2013 so as a result, if you have any outstanding travel vouchers or any outstanding timesheets, I would appreciate it if everyone can get those to us by the end of this month. Obviously, in September it will have to come due when it is due.

But we are trying to reconcile our accounts and then to see what, if any, money we have available in the different sections. So the faster that you can get that in for us, that would be phenomenal.

I also wanted to advise everyone that based on the removal of the two SACs from our agenda today, we now have 20 SACs that have expired and that still require appointments. And we also have five other SACs that are coming up for reappointment before the end of 2013.

So I would like for the commissioners to keep that in mind to please look at the SAC status appointment status report and take a look at what states are outstanding. If you have any questions, concerns, or recommendations, please get those to me as soon as possible so that we can try to address any concerns that may take place prior to any
meeting that we have scheduled for acceptance of any SAC appointment package.

That would be all.

CHAIRMAN CASTRO: Okay, any questions for the Staff Director?

Hearing none, then we will move on to the consideration of the SACs that do remain on the agenda.

IV. APPROVAL OF STATE ADVISORY COMMITTEE APPOINTMENT SLATES

MAINE

CHAIRMAN CASTRO: So the first one is let's see here -- I am going to make a motion that the Commission appoint the following individuals to the Maine Committee, based upon the recommendation of our Staff Director. Rachel Talbot-Ross, William D. Baker, Daniel -- I'm sorry -- Diane A. Khiel, Donna M. Loring, Phillipe J. Nadeau, Jennifer A. Bailey, Edith F. Flores, Maurice R. Gilbert, Akiva A. Herzfeld, Judith D. Jones, Stephen J. Meardon, Eric M. Mehnert, Michael R. Montgomery, Joseph R. Reisert, Paul S. Robinson, Carl M. Toney, and William Wettlauffer.

Pursuant to this motion, the Commission appoints Rachel Talbot-Ross as Chair of the Maine
State Advisory Committee. These members will serve as uncompensated government employees. Under this motion, the Commission authorizes the Staff Director to execute the appropriate paperwork for the appointments. Is there a second?

Do I have a second?

COMMISSIONER KLANDNEY: Second.

CHAIRMAN CASTRO: Okay. Madam Vice Chair, how do you vote? I'm assuming there is no discussion on this.

Madam Vice Chair, how do you vote?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN CASTRO: Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: No.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how
do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney,

how do you vote?

COMMISSIONER Kladney: Yes.

CHAIRMAN CASTRO: And I vote yes. It

passes seven to one.

RHODE ISLAND

I am now going to make a motion that the Commission appoint the following individuals to the Rhode Island State Advisory Committee, based upon the recommendation of our Staff Director. Norman G. Orondenker, Ann A. Clanton, Jodi L. Glass, Patrick A. Guida, Ann C. Keefe, Jonathan D. Orent, Donald C. Anderson, Farid Ansari, Julio C. Aragon, Charles A. Berkley, Junior, Langdon D. Clough, Bob Cooper, Mark C. DeBinder, Nicanor Figueroa, Ernest A. Greco, and Gertrude F. Jones.

Pursuant to this motion, the Commission appoints Norman G. Orondenker as chair of Rhode Island State Advisory Committee. These members will serve as uncompensated government employees. Upon this motion, the Commission authorizes the Staff Director to execute the appropriate paperwork for the appointments.
Do I have a second?

COMMISSIONER KLADNEY: Second.

CHAIRMAN CASTRO: Second, Commissioner Kladney.

Madam Vice Chair, how do you vote? Is she here?

MS. SALLO: She's gone.

CHAIRMAN CASTRO: Okay. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: No.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLADNEY: Yes.
CHAIRMAN CASTRO: And I vote yes. The motion passes six yeses and a no, and there was one absent.

TENNESEE

CHAIRMAN CASTRO: Okay, I am now moving on to make a motion that the Commission appoint the following individuals to the Tennessee State Advisory Committee, based upon the recommendation of our Staff Director. Diane Di Ianni, Tiffany Baker Cox, Brian T. Fitzpatrick, Joseph Gregory Grisham, John Harris, Mary Jean Howard-Hill, Nika Jackson, Jason A. Johnson, Bernie Miller, Christopher K. Sanders, Gail S. Seavey, and Eliud Gonzalez Trevino.

Pursuant to this motion, the Commission appoints Diane Di Ianni as chair of Tennessee State Advisory Committee. These members will serve as uncompensated government employees. Under this motion, the Commission authorizes the Staff Director to execute the appropriate paperwork for the appointments.

Is there a second?

COMMISSIONER KLADNEY: Second.

CHAIRMAN CASTRO: Okay, Madam Vice Chair is not here yet?

MS. SALLO: No, she's gone.
CHAIRMAN CASTRO: She's gone from the meeting? All right.

Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: No.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER Kladney: Yes.

CHAIRMAN CASTRO: And I vote yes. So the motion passes with six yeses, one no, and an absent.

WEST VIRGINIA

CHAIRMAN CASTRO: Okay, I am now going to make a motion that the Commission appoint the

Pursuant to this motion, the Commission appoints Phyllis H. Carter as chair of West Virginia State Advisory Committee. These members will serve as uncompensated government employees. Under this motion, the Commission authorizes the Staff Director to execute the appropriate paperwork for the appointments.

Do I have a second?

COMMISSIONER KLASSEY: Second.

CHAIRMAN CASTRO: Thank you.

Madam Vice Chair is absent.

Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano,
how do you vote?

COMMISSIONER GAZIANO: No.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLABDNEY: Yes.

CHAIRMAN CASTRO: I vote yes. So the motion passes with six yeses, one no, and an absent.

V. ADJOURN MEETING

CHAIRMAN CASTRO: My final and most important motion for the day is a motion to adjourn. Do I have a second?

COMMISSIONER KLABDNEY: Second.

CHAIRMAN CASTRO: All those in favor, aye.

(Chorus of aye.)

CHAIRMAN CASTRO: Any opposed? Any abstentions? All right. The meeting is now adjourned at 11:46 Eastern Time. Thank you.

(Whereupon, at 11:46 a.m., the above-entitled matter
was adjourned.)