The Commission convened in room 540 at 624 Ninth Street, N.W., Washington, D.C. at 9:30 a.m., GERALD A. REYNOLDS, Chairperson, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairperson
ABIGAIL THERNSTROM, Vice Chairperson
JENNIFER C. BRACERAS, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner
MICHAEL YAKI, Commissioner
KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

CHRISTOPHER BYRNES, Attorney Advisory to the Office of the Staff Director
DEBRA CARR, ESQ., Associate Deputy Staff Director
IVY DAVIS, Acting Director, Regional Programs Coordination Unit
TERRI DICKERSON, Assistant Staff Director
PAMELA A. DUNSTON, Chief, Administrative Services and Clearinghouse Division
BARBARA FONTANA
PATRICIA JACKSON, Chief, Budget and Finance Division
SETH JAFFE, Attorney Advisor
SOCK-FOON MACDOUGALL
EMMA MONROIG, Solicitor/Parliamentarian
AUDREY WRIGHT
MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS
LISA NEUDER
<table>
<thead>
<tr>
<th>AGENDA ITEM</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Approval of Agenda</td>
<td>4</td>
</tr>
<tr>
<td>II. Approval of Minutes of January 20, 2006 Meeting</td>
<td>5</td>
</tr>
<tr>
<td>III. Announcements</td>
<td>6</td>
</tr>
<tr>
<td>IV. Staff Director's Report</td>
<td>7</td>
</tr>
<tr>
<td>V. Briefing Reports</td>
<td>17</td>
</tr>
<tr>
<td>- Voting Rights Act Briefing Report</td>
<td>17</td>
</tr>
<tr>
<td>- Campus Anti-Semitism Briefing: Findings and Recommendations</td>
<td>28</td>
</tr>
<tr>
<td>VI. Management and Operations</td>
<td>65</td>
</tr>
<tr>
<td>- Working Group on the Budget</td>
<td>65</td>
</tr>
<tr>
<td>- January 31, 2006, Commission Report to Senate Appropriations</td>
<td>88</td>
</tr>
<tr>
<td>- Performance and Accountability Report</td>
<td>89</td>
</tr>
<tr>
<td>- Creation of Working Group on Strategic Planning</td>
<td>91</td>
</tr>
<tr>
<td>VII. State Advisory Committees</td>
<td>108</td>
</tr>
<tr>
<td>- Commission Consideration of SAC Reports</td>
<td>108</td>
</tr>
<tr>
<td>- SAC Chair Terms</td>
<td>120</td>
</tr>
<tr>
<td>- Arizona SAC Report</td>
<td>125</td>
</tr>
<tr>
<td>VIII. Future Briefings</td>
<td>127</td>
</tr>
<tr>
<td>- Schedule for Future Briefings</td>
<td>127</td>
</tr>
</tbody>
</table>
(9:37 a.m.)

CHAIRPERSON REYNOLDS: The meeting will come to order. This is a meeting with most of the commissioners participating in person here at Commission headquarters. Commissioner Taylor will not participate in this meeting.

I. APPROVAL OF AGENDA

CHAIRPERSON REYNOLDS: The first item on the agenda is the approval of the agenda. May I have a motion to amend the agenda so as to remove item IX from the agenda?

COMMISSIONER KIRSANOW: So moved.

CHAIRPERSON REYNOLDS: Discussion?

(No response.)

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: I guess I should put some flesh on that. This motion would remove item IX, which initially we had planned to have the staffers from the House of Representatives Committee on the Judiciary come and discuss various aspects of our strategic planning process.

We invited the staff to provide us with
some feedback and to provide some recommendations, but
they have decided not to address the Commission today.

Okay. May I have a motion to approve the
agenda as amended?

COMMISSIONER KIRSANOW: So moved.

CHAIRPERSON REYNOLDS: Discussion?

(No response.)

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Okay. The motion
carries unanimously.

II. APPROVAL OF MINUTES OF JANUARY 20, 2006 MEETING

CHAIRPERSON REYNOLDS: The second item on
the agenda is approval of the minutes of the January
20th, 2006 meeting. May I have a motion for approval
of these minutes?

VICE CHAIRPERSON THERNSTROM: So moved.

CHAIRPERSON REYNOLDS: Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRPERSON REYNOLDS: Any discussion?

(No response.)

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Anyone in
opposition?

(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?

(No response.)

CHAIRPERSON REYNOLDS: The motion passes unanimously.

III. ANNOUNCEMENTS

CHAIRPERSON REYNOLDS: At this point, we move to the announcements. I am saddened to announce that on January 31st, 2006, Coretta Scott King, one of the most prominent leaders of the civil rights movement for the past 50 years, passed away. She was 78 years old.

Among her many contributions, Mrs. King was the founding president, chair, and chief executive officer of the Dr. Martin Luther King Center for Nonviolent Social Change in Atlanta from 1968 to 1995, where tens of thousands of people were trained in Dr. King's philosophy and methods.

Although Coretta Scott King is no longer with us in body, her courage, dedication, and accomplishments will forever serve as beacons to others.

I am pleased to announce that February is

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Black History Month. During Black History Month, we honor the heritage accomplishments of black Americans and recognize their extraordinary contributions to the United States. I call upon public officials and all people of the United States to observe this month with appropriate programs and activities that highlight and honor the contributions black Americans have made to our nation.

Next up we have the staff director's report.

STAFF DIRECTOR MARCUS: Thank you, Mr. Chairman, Madam Vice Chair, commissioners.

IV. STAFF DIRECTOR'S REPORT

STAFF DIRECTOR MARCUS: I would like to say a few words about recent reports on reforms by the Commission. During the month of January, we issued the second of our reports to the Senate Appropriations Committee at their request. In addition, we issued our performance and accountability report.

These reports collectively demonstrate a wide range of operational and financial reforms that we have implemented over the course of the last year based on a decision by the commissioners to implement all GAO and OPM recommendations.
Just to mention a few of the reforms that are discussed in these recent reforms, they would include issuing formal travel guidance that is comprehensive and consistent with the federal travel regulation; creating procedures to ensure preparation of annual Commission performance and accountability reports; creating Anti-Deficiency Act or procedures to ensure compliance in the future; producing a procurement guide for use by procurement and budget personnel; establishing agency goals, principles, and financial controls consistent with OMB requirements; and, of course, bringing GSA fully on board as of October 1, 2005 as the agency's full-service accounting provider.

These are a few of the recent changes. They are cumulative with a wide range of changes that were implemented and discussed earlier in the year.

At the same time with our performance and accountability report, we issued the audit that we received for the last fiscal year by Williams Adley. It is not a surprise in that it documents a number of material weaknesses in the Commission that we have been aware of for quite some time because they are the weaknesses that were previously identified by the GAO.
For this reason, these weaknesses have been the subject of the reform efforts that have been underway. Many of them have been addressed by reform measures that were implemented during the last fiscal year but which will show up only during next year's audit. Others are underway currently.

In addition, I would like to mention the good news that the President's budget for 2007 provides an increase for this agency. If Congress should appropriate for us the amount requested by the President, it would be the first increase in quite some time. It would be an increase from this year's post-recission figure of $8,932,000 to an amount of $9,308,000.

The increase is intended both to reflect the increased cost of living, including the anticipated increased federal wages and benefits as well as additional funds for the specific purposes of hiring additional attorneys for the Office of General Counsel, issuing the public service announcements, and providing at least some modest funds for some state advisory committees to engage in travel during 2007.

We're very pleased by this request by the President, which we take as a vote of confidence in
the operational and financial management reforms that we have undertaken at the agency.

That is my report. I would be pleased to respond to any questions.

CHAIRPERSON REYNOLDS: Quiet bunch today.

Yes?

COMMISSIONER YAKI: I don't know if we're going to address this later on in the meeting or not, but what is the latest news in terms of this year's rescission or any new budget news just on the remainder of fiscal year '06 for the agency that has come up between the January meeting and today that might have a bearing on items before us today?

STAFF DIRECTOR MARCUS: For this fiscal year, the latest news is that we have a rescission and across-the-board one percent budget cut, which have reduced the amount of our appropriations for this fiscal year to the amount that I indicated a moment ago, which is to say approximately $8.9 million.

That amount is actually an absolute as well as a relative cut from last year. It's the lowest amount that we have had in quite some time. So the $8.9 million is a low amount for this year.

COMMISSIONER YAKI: Right.
STAFF DIRECTOR MARCUS: Now, what is enabling us to work successfully within that lower appropriations is that we had an amount of attrition late in the last fiscal year which was sufficient not only to avert the budget cuts we otherwise would have needed last year --

COMMISSIONER YAKI: Right.

STAFF DIRECTOR MARCUS: -- but also to put us in a pretty good position this year. During the long period of the continuing revolution, we were not in a hiring mode. We are now working to fill a critical positions.

We brought on, of course, a budget chief --

COMMISSIONER YAKI: Right.

STAFF DIRECTOR MARCUS: -- and will bring on a few other people. But, as a result of the attrition and the significant reduction in payroll this year, as opposed to last year, we're doing fine for this year.

COMMISSIONER YAKI: Okay.

STAFF DIRECTOR MARCUS: As for next year, the House Appropriations Committee has asked for a briefing from the staff on our 2007 budget request.
And we will provide that. I believe it's during the next week, middle of next week.

COMMISSIONER YAKI: Right.

STAFF DIRECTOR MARCUS: It's too soon to know whether we're likely to get the amount that the President has requested.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Ken, is the President's proposed budget, the additional $400,000 or so, earmarked for expenses related to the General Counsel's office, anything else that you mentioned?

STAFF DIRECTOR MARCUS: It was provided specifically in the budget for that purpose. I don't know whether "earmark" is the technical word since it's not a congressional earmark, but money was specifically provided for the purposes I identified as well as for an increase in the general payroll expenses.

Now, that amount does not reflect a rescission. And so we would anticipate that it's likely to be reduced by a rescission and a possible additional intergovernmental across-the-board cut. So we may get less than that. But it still is a --
COMMISSIONER YAKI: What they didn't tell you, Peter, is that from next year's budget, 400,000 was cut from the NLRB.

CHAIRPERSON REYNOLDS: Commissioner Thernstrom?

COMMISSIONER KIRSANOW: I'm sorry. I just had a follow-up.

VICE CHAIRPERSON THERNSTROM: No. Go ahead.

COMMISSIONER KIRSANOW: It's not a question, but it simply makes sense for us to probably try to talk with anyone we can up on the Hill in support of that increase.

STAFF DIRECTOR MARCUS: I certainly plan to support it in my conversations. And I think that it is an excellent idea for anyone who is able to to join in that.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: All right. I'm listening to this dreary picture drawn. I wonder if the staff director could give us with respect to 2007 under the best scenario, we have what. If we make the worst assumptions, what will be the impact?
STAFF DIRECTOR MARCUS: I'm sorry, Commissioner Thernstrom. Are you asking if we assume that we get the amount that the President has requested or if we make assumptions that we don't get that?

VICE CHAIRPERSON THERNSTROM: Well, if we make the most rosy assumption and with a much less rosy one, you know, how is this agency going to be -- I mean, it seems to me, you know, we've got to play here with the various possibilities in thinking what kind of money we can spend on what.

STAFF DIRECTOR MARCUS: Let me take a stab at answering that question. Please tell me if I haven't answered it properly. The President's budget provides for an increase in budget for next year, but it also specifies certain things that we are to do with the budget.

The new things that we are supposed to do are likely to cost a little bit more than the increase. In other words, when we actually hire the new attorneys, issue the public service announcements, and approve a level of SAC travel consistent with what they have specified, it will be somewhat in excess likely of the increase, which means that our budget
for all other purposes is slightly decreased from this year.

Now, this year would already be an extremely tight year. The reason that we're doing fine this year is that we had substantial attrition last year and we also don't have a full complement of either commissioners or commissioners' assistants next year.

We need to assume for budget purposes that by the end of this year we will have fully staffed up to what we're planning, which is to say we'll bring the critical people on. And we need to assume, of course, that we'll have eight commissioners.

Under those assumptions, I would expect that we will have very little money for discretionary spending again next year. So, in other words, it will be an extremely tight year next year, although we will have the ability to do a few things that we're not able to do this year.

And that is under a somewhat rosy assumption that we get the increase that the President requested. If we get less than the President requested or if we have other unanticipated expenditures, then we could be in a more difficult
position.

Of course, it's always possible also that we'll get more than the President requested.

CHAIRPERSON REYNOLDS: What's the likelihood of that happening?

STAFF DIRECTOR MARCUS: Well, experience says that it's very low. The experience of this agency over the last many years if that we seldom get more than the President requests and we often get less.

VICE CHAIRPERSON THERNSTROM: And if we get less than the President requested, I mean, it seems to me we don't have -- there aren't obvious cuts that can be made in our operating budget. Is that correct? Where are we going to --

STAFF DIRECTOR MARCUS: We do not have a lot of areas for cutting. We have a very small amount for awards, approximately $50,000, maybe slightly more than that. We have a small amount of money for training.

There are a few pots of money that are important for the agency but discretionary. But we don't have very much in the way of areas that could be cut.
CHAIRPERSON REYNOLDS: Any other comments or questions?

(No response.)

CHAIRPERSON REYNOLDS: Okay. I guess, actually, I have one. Just to push this a little further, if we don't get the amount of money requested by the administration, is there a possibility that there could be additional rescissions?

STAFF DIRECTOR MARCUS: I would expect that we will receive a rescission. So I would expect that the amount that we receive in our appropriations will be less than the amount that I specified.

Now, the amount of the rescission is hard to predict because it's varied from year to year. It could be 50,000, 70,000, 100,000.

CHAIRPERSON REYNOLDS: So there have been no indications from folks on the Hill or OMB? They don't have a number in mind? We just know that as a general concept, they're tightening the belt. This belt tightening, it will apply to most, if not all, agencies?

STAFF DIRECTOR MARCUS: That's right.

V. BRIEFING REPORTS

- VOTING RIGHTS ACT BRIEFING REPORT
CHAIRPERSON REYNOLDS: Okay. I want to read the next motion into the record, "I move that the Commission approve the report produced by staff on the briefing the Commission held on October 7th, 2005 on the reauthorization of the temporary provisions of the Voting Rights Act together with the written statements of Vice Chair Thernstrom and Commissioner Yaki. This report, distributed in draft form to commissioners on February 9th, 2006, incorporates revisions to an earlier draft distributed to the commissioners on January 12th of 2006."

Is there a second?

VICE CHAIRPERSON THERNSTROM: I second it.

CHAIRPERSON REYNOLDS: Discussion?

Commissioner Yaki?

COMMISSIONER YAKI: Yes. Thank you, Mr. Chair.

I have a problem with one clause of one paragraph on the second page of the report. In the third paragraph, actually the second full paragraph on the page, second sentence, it says, "Further" --

COMMISSIONER BRACERAS: I'm sorry. What page?

COMMISSIONER YAKI: Page two of the
summary.

COMMISSIONER BRACERAS: Okay.

COMMISSIONER YAKI: Second full paragraph, third line down or fifth line up from the bottom of the unfootnoted text, "Further, as noted above, Congress amended section 2 to provide that the plaintiff in a jurisdictional nature could establish a violation without having to prove discriminatory purpose, thus circumventing the legal standards of the Fourteenth Amendment, which previously applied."

I have some problems with the "thus circumventing the legal standards of the Fourteenth Amendment." I don't know where that conclusion comes from. If there is a case law out there, I would like to see it cited.

Absent that, Congress has been given, the Supreme Court has consistently held -- maybe not consistently because it's rather inconsistent in a lot of things. At least the Supreme Court has held that Congress has broad authority under section 5 of the Fourteenth Amendment to create and enforce powers and rights of action. And I'm not sure why we would, thus, put a conclusion that in 1982, they basically violated the Fourteenth Amendment.
CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: I don't think there is any suggestion here about violating the Fourteenth Amendment. This point is very, very simple.

The amendment of section 2 was in direct response -- and the legislative record makes this abundantly clear -- was in direct response to the court's decision in 1980 in Mobile versus Bolden, --

COMMISSIONER YAKI: Right.

VICE CHAIRPERSON THERNSTROM: -- in which the court said that voting rights cases brought under the Fourteenth Amendment must prove discriminatory intent. And the amendment of section 2 was, the point of amending section 2 was, to avoid in the future having to bring constitutional Fourteenth Amendment suits so that all suits that were previously brought under the Fourteenth Amendment could subsequently be brought under section 2, where there would not be the same intent requirement. That is the explicit reason for the results language in section 2.

So I think this is simply a statement of fact.
CHAIRPERSON REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I agree with the Vice Chair. However, I'm not sure that removing that language would undermine your point and if it would satisfy commissioner -- I mean, would you be satisfied if the sentence just ended with a period after "purpose" and there was no conclusion, one way or the other, drawn about it, no additional citations, just stop the sentence after "purpose"?

It seems to me that your objection to the language is really with the word "circumventing" because circumventing implies --

VICE CHAIRPERSON THERNSTROM: Or you can say "avoiding the necessity." Pardon me?

COMMISSIONER KIRSANOW: "Relieving plaintiff of their obligations to meet the legal standards of the Fourteenth Amendment."

COMMISSIONER YAKI: To me, let me just say if we had the -- and you'll have to forgive me that perhaps because I don't have an assistant, but that's my own fault, I didn't have time to go into the legislative history of section 2.

But the history of congressional actions
following Supreme Court decisions on matters such as this has been basically to specifically invoke section 5 of the Fourteenth Amendment to justify why they are essentially attempting to correct, in their words, the Supreme Court interpretation that had existed before they did that with the -- Congress did that with the Alaskan cannery case, which name now escapes me, they did that with --

COMMISSIONER BRACERAS: That's a Title VII case. That's not constitutional.

COMMISSIONER YAKI: Yes. But they did it with the religious freedom case, where the Supreme Court said they couldn't do it. But I just wanted to make sure that we're not -- to me it's just kind of a red flag whenever you say, "Well, they're trying to circumvent" this law or that law, especially when you're saying you're circumventing the Constitution because obviously if it's the Constitution, circumvention is not --

COMMISSIONER BRACERAS: Is a bad thing.

COMMISSIONER YAKI: Right.

COMMISSIONER BRACERAS: That's why I'm wondering. Would you be satisfied with ending the sentence after the word "purpose" because it seems to
me that that would eliminate the need to even have the debate?

VICE CHAIRPERSON THERNSTROM: I like Commissioner Kirsanow's suggestion better. Look, Bolden assumed that the Fourteenth Amendment required a showing of discriminatory purpose.

The witnesses from the civil rights community in the 1982 amendment said that suggests we need to come up with a smoking gun. That's ridiculous. And so let us change the statute so that suits do not have to be brought under the Fourteenth Amendment with its intent, built-in intent, standard.

I mean, that was --

COMMISSIONER BRACERAS: What language are you proposing?

COMMISSIONER KIRSANOW: Why don't for that purpose simply say "thereby relieving plaintiff of obligation to" --

COMMISSIONER BRACERAS: To plead their case under the Fourteenth Amendment?

COMMISSIONER KIRSANOW: Yes or meet the legal standards under the Fourteenth Amendment.

VICE CHAIRPERSON THERNSTROM: Yes. That's fine, too.
COMMISSIONER YAKI: If we're not 100 percent certain exactly what it is we're saying, why don't we just take it out?

COMMISSIONER KIRSANOW: I do think it's instructive to state the bases for which this was done.

COMMISSIONER YAKI: Well, then let's get the history of section 2 before we say that.

VICE CHAIRPERSON THERNSTROM: I know that history backwards and forwards, Michael.

CHAIRPERSON REYNOLDS: The bottom line is we have two legal standards: one constitutional and the other statutory. One requires a higher level of proof. The other, there is a lesser standard.

I think that Pete's friendly amendment addresses your concern that we're suggesting that Congress did something untoward while at the same time maintaining the information that is provided by having that clause in that sentence.

VICE CHAIRPERSON THERNSTROM: Yes. Nobody's suggesting Congress did anything it wasn't entitled to do. Again, I do think that Commissioner Kirsanow's suggested change addresses any implication to the contrary.
COMMISSIONER BRACERAS: So it would say that's eliminating the need for plaintiffs to plead their case under the Fourteenth Amendment?

VICE CHAIRPERSON THERNSTROM: Yes, exactly.

COMMISSIONER BRACERAS: I have no objection to the language.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: I have objections, but I won't object.

CHAIRPERSON REYNOLDS: Okay. Good enough.

Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes. A few months back, I had asked, you know, about the inclusion of commissioner statements in this. I think I sent a statement in to the Commission. Was it for this or was it for something else?

STAFF DIRECTOR MARCUS: Commissioner Melendez, you did ask about the standards. And you specifically indicated that you would like to send in a statement on this briefing report.

COMMISSIONER MELENDEZ: Right.

STAFF DIRECTOR MARCUS: But I don't believe we received it.
COMMISSIONER MELENDEZ: We sent it in. Virginia Davis actually sent it over to your office. She was working with me through National Congress of American Indians. And it really basically just gave some input as far as the languages on section 203 because of the Native Americans and their languages.

It's not even mentioned in this report. And I think it should be. And then also I think it was just a one-pager, I believe it was, but it covered, at least from the problems with franchise happening on Native American reservations and also the language, which is a very important issue.

CHAIRPERSON REYNOLDS: Well, is there an objection to including Commissioner Melendez's comments?

VICE CHAIRPERSON THERNSTROM: No, of course not. We want to include them. Obviously the staff director somehow didn't have them.

STAFF DIRECTOR MARCUS: Would you please ask Ms. Davis to resubmit?

COMMISSIONER MELENDEZ: I'll have her send them today.

STAFF DIRECTOR MARCUS: Thank you.

CHAIRPERSON REYNOLDS: Any other questions
or comments?

VICE CHAIRPERSON THERNSTROM: Do we have the new language for page 2 straight here?

CHAIRPERSON REYNOLDS: Okay. Who's taking notes on this one?

VICE CHAIRPERSON THERNSTROM: Okay.

Because I think Commissioner Braceras had the same thing as Commissioner Kirsanow, basically.

COMMISSIONER BRACERAS: Thus eliminating the need for plaintiffs to plead their case under the Fourteenth Amendment, period.

VICE CHAIRPERSON THERNSTROM: Yes, right.

CHAIRPERSON REYNOLDS: Okay. At this point we can vote. All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any objections?

(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?

(No response.)

CHAIRPERSON REYNOLDS: The motion passes unanimously.

Okay. I'll read the next --

VICE CHAIRPERSON THERNSTROM: I would like to make one further statement. I would like to just
say once again to those staff members who are in the room and who worked on this from beginning to end that I am extremely appreciative of the work that they did. Well, that is it, just expressing my appreciation once again.

STAFF DIRECTOR MARCUS: Thank you, Madam Vice Chair.

- CAMPUS ANTI-SEMITISM BRIEFING:

FINDINGS AND RECOMMENDATIONS

CHAIRPERSON REYNOLDS: Okay. The next motion reads, "I move that the Commission approve the revised finding, then recommendations resulting from the November 18th, 2005 briefing on campus anti-semitism. These revised findings and recommendations were circulated to commissioners on February 9th, 2006."

Is there a second? Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRPERSON REYNOLDS: Thank you.

Discussion? Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Yes. Well, this continues a conversation that we have started privately. I'm not happy with the deletions from or the additions from the changes that were made to the
original report.

And the Chair and I have been discussing the logic of them. And it really turns on an interpretation of Title VI, the current position of OCR, where there is a discrepancy between what OCR has on its Web site in terms of the coverage of anti-semitism versus what OCR's actual policy is and so forth.

And I do think we need to first perhaps hear from the Chair as to why he did the strike-outs, suggested the strike-outs that he did and the additions that he did. And I do not seem to have the strike-out.

CHAIRPERSON REYNOLDS: Okay. The changes that I made, the purpose behind the changes was to clarify the fact that jurisdiction rests on race, national origin, color. So to the extent anti-semitic conduct did not fall in one of those three buckets, OCR lacks jurisdiction.

That was the purpose for the changes. And so most of my changes had to do with just making sure that when we had a discussion of anti-semitism, it was clear that it had to be, the conduct had to be, based on race, national origin, or color.
That is my personal view. And I also believe -- there is somewhat of a dispute over this. I also believe that it is the position of OCR. I have had conversations with both staff and the assistant secretary. And they have voiced concerns about the original approach that we had taken.

VICE CHAIRPERSON THERNSTROM: Now, I would actually like to hear from the staff director on this since OCR was once his home.

STAFF DIRECTOR MARCUS: Certainly, Madam Vice Chair. The notion that anyone at OCR disagrees with the OCR policy is news to me. To the best of my knowledge, the OCR policy on this subject is precisely what the Department of Education says it is on their public Web site. If that's not the case, again, that's news to me.

The public Web site of the Department of Education indicates what their policy is. And it consists of two policy statements that I am familiar with by way of disclosure. They were issued under my name, and I wrote them.

And they indicate that anti-semitic harassment on either college campuses or in elementary or secondary schools is prohibited by Title VI and
that the Office for Civil Rights will pursue cases of anti-semitic harassment.

Now, this is a difficult issue, specifically for a reason that I think the Chairman had in mind, which is that Title VI of the Civil Rights Act of 1964 prohibits various categories of discrimination, including race and national origin, but does not prohibit discrimination on the basis of religion.

There were cases prior to 2004 in which the Office for Civil Rights declined to prosecute a case of anti-semitic harassment on the grounds that discrimination against Jews is religious and not either ethnic or racial.

In 2004, the Office for Civil Rights clarified the policy to indicate that while Jews are members of a religious group, they're also members of a group that has ethnic or racial characteristics.

In that policy, Office for Civil Rights also cites two Supreme Court cases, which under a different civil rights statute hold that Jews may be considered to be a race under civil rights purposes.

COMMISSIONER BRACERAS: And under which statute?
STAFF DIRECTOR MARCUS: That was, I believe, the 1866 Act. It was the post-Civil War civil rights act.

So the policy of the Office for Civil Rights as indicated on their public Web site remained the policy, indicating that anti-semitic harassment is prohibited by Title VI, regardless of the country that the Jewish student is from or their color or race. In other words, if it is anti-semitic, it is prohibited.

Now, it is still the case that there may be some forms of purely religious discrimination, which do not constitute anti-semitism under the stated policy; that is, cases in which there is some sort of discrimination based only on doctrinal views, but that is not something that appears to happen very often and certainly is not something that --

CHAIRPERSON REYNOLDS: Are you saying that if conduct is directed religion, that that is not anti-semitism?

COMMISSIONER BRACERAS: Well, it's anti-semitism. It just might not violate Title VI.

CHAIRPERSON REYNOLDS: That's exactly my point.

COMMISSIONER BRACERAS: Right?
STAFF DIRECTOR MARCUS: Well, I don't know that the quibbling over words matters. I suppose there is a question of whether you would consider anti-semitism to refer to purely religious, as opposed to racial, discrimination.

And I guess it could be theoretically argued either way in the sense that the term "Semite" is an ethnic or racial term, as opposed to a religious term. So one could take a narrow approach to the meaning of the word "anti-semitism," under which by definition it refers only to national origin or racial discrimination or one could read the word more broadly, as people tend to do in common discourse, as referring to discrimination against Jews, regardless of the specific nature.

Now, of course, where we see it typically, the bigots don't usually specify what they're talking about, but most of what one sees appears to be ethnic or racial, as opposed to purely doctrinal.

CHAIRPERSON REYNOLDS: Well, just a quick follow-up. There seems to be a dispute over what OCR's policy is. It seems to be that it would be instructive to submit the document, the original document, to OCR and ask them to weigh in on the
topic.

We do that in cases. We do that. For example, we are doing that with the Justice Department with respect to our statutory report. I think that it is not a good idea for us to characterize a policy position of an agency when the head of the agency has indicated that that, indeed, is not the position.

And also I think that the presumption, our approach, the approach that is being proposed proposes or it collapses the concept of ethnicity and anti-semitism. It equates the two when the way OCR operates, there is an investigation to gather the facts to see whether the conduct was directed toward religion, in which case OCR lacks jurisdiction or race or ethnicity. Our approach would basically do away with the need for an investigation whenever anti-semitism is involved.

Who had their hand up first?

VICE CHAIRPERSON THERNSTROM: Everybody's got their hands up, but I think Michael Yaki did first. Okay.

CHAIRPERSON REYNOLDS: That's all right.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: This is actually a
follow-up to what you said because I was thinking kind of along the same lines. I am unclear as to the policy on the Web site, whether that's an official OCR policy.

You know, at Chevron, we defer to the interpretation of the statute that governs the particular agency or their interpretation and whether or not OCR has interpreted Title VI as has been described in a formal fashion and maybe whether we could just solicit that interpretation from them.

COMMISSIONER BRACERAS: Wait. We don't have to defer to anything. We make recommendations.

VICE CHAIRPERSON THERNSTROM: Briefing reports are never --

COMMISSIONER KIRSANOW: This is not deferring to --

CHAIRPERSON REYNOLDS: This is not deferring. This is gathering information. Our decision will be made based on a vote of this Commission, but gathering data from the agency as to its interpretation of a statute it has jurisdiction over seems to me it could benefit our deliberations.

COMMISSIONER BRACERAS: It may benefit the deliberations. I don't deny that. But the whole
point is that, even if OCR didn't have this policy on its Web site, we would still be within our rights to recommend that they adopt this policy.

CHAIRPERSON REYNOLDS: I agree with that.

COMMISSIONER BRACERAS: And so we need to come to an independent conclusion as a Commission as to whether or not we think this is the direction that the law should take. And if so, we should feel free to issue these recommendations.

CHAIRPERSON REYNOLDS: Commissioner Braceras, I agree with everything that you just said, but I think that our independent decisions should be based on all the relevant facts. And that in my opinion would include finding out what OCR's interpretation of Title VI is.

I'm not saying that its determination will govern what we do here. And in this particular case, I don't think that anyone is suggesting that OCR change its interpretation. What we're doing here, I believe, is trying to resolve a dispute amongst the commissioners as to what the existing policy is.

COMMISSIONER BRACERAS: I don't think it matters what the existing policy is because we're making findings based on the testimony that we heard.
at our briefing and making recommendations to other
governmental agencies as to what they should do about
those findings.

CHAIRPERSON REYNOLDS: I feel differently.

I don't believe that we are advocating a change in
policy for OCR. That's not --

COMMISSIONER BRACERAS: It may not be a
change in policy, but we're simply making
recommendations as to -- whether it's a change in
policy or not, I just don't think it matters. I think
that the question is, what is our policy, what is the
Commission's policy on this matter.

And what the OCR's policy on the matter is
we're either recommending full enforcement or we're
recommending a change in policy. It doesn't matter.
We have to make our own decision.

CHAIRPERSON REYNOLDS: I think it does
matter. It matters to the extent that it's a matter
of getting our facts right. If we --

COMMISSIONER BRACERAS: Well, I agree with
that.

CHAIRPERSON REYNOLDS: If we're going to
characterize OCR's position, I think it's important,
especially in light of the fact that OCR has indicated
that our characterization is incorrect, that we, at a minimum --

COMMISSIONER BRACERAS: That's fine. But

their determination is not dispositive.

CHAIRPERSON REYNOLDS: I agree.

COMMISSIONER BRACERAS: We want to recommend it.

COMMISSIONER KIRSANOW: I think that's right. My suggestion was not that it be dispositive. It would really be informative if we've got a determination from the agency as to their interpretation of the governing statute.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Did you want to say something? He had his hand up before I did.

COMMISSIONER YAKI: Thank you very much. Just on a note of -- I don't know if I would call it sensitivity or what, but to me I would understand why -- I would hope that an agency in the lack of statutory authorization would attempt to or should attempt to extend the enforcement of Title VI with regard to this kind of behavior, but I just want to be very careful that the agency shouldn't and I
think neither should we fall into the trap that you can simply stretch and in order to define anti-semitic behavior as behavior that discriminates on the basis of a racial or national origin.

I think that it falls into to me a stereotype or trap that is very dangerous to use. It certainly was during the 1930s the rhetoric of Adolf Hitler was such that he sought to demean members of the Jewish community by creating stereotypes of physical characteristics and other types of things.

I think that certainly what he chose to do in the extermination of the Jews of Europe was not based on that. It was if you had any Jewish blood in you whatsoever, if you were a member of that religion, you were headed for Dachau or Auschwitz or any of the other places that he created.

I am very uncomfortable with taking an interpretation of anti-semitism and basing it solely on racial or national origin. I would think that, regardless of how we want to characterize what OCR does or does not have jurisdiction, I don't think we want to fall into that trap.

And I think that we should say very specifically and clearly that it is based upon
religious discrimination in this case because if a professor were to say to a class, "Anyone here who is Jewish, I don't want to hear from you," he's not going to try and look around and decide, you know, who is a Semite or who is not in terms of who he's going to call on or not or she is going to call on or not. I just would be very uncomfortable with that.

And I just want to put that on the record.

And if we need to modify the findings to include that one of the difficulties that exists is the current exclusion of religion from Title VI, then it's something that we believe the Congress should fully investigate and hold hearings on and that we should as well because it is not just about Israel. It's about the Jewish people. And I'm concerned that I don't want us to fall into that trap.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Okay. A couple of things. In terms of turning to OCR and getting response, we do that with a statutory report. We have never done that with briefing reports. And I don't think that that sets a good precedent here at all.
It is possible to describe what OCR's policy is based on the OCR Web site without, you know, getting involved in interagency disputes over at OCR.

Commissioner Yaki, I mean, Jews do think of themselves as an ethnic group if we don't live in Germany in the 1930s. I mean, I appreciate what you're saying, but I do think that the basis of our whole briefing was an assumption that these are matters covered by Title VI and Jews are an ethnic group. I think if we had started with your assumption, we wouldn't have this briefing.

Then, finally, there are deletions here that just don't even -- aren't related to the conversation we have been having.

CHAIRPERSON REYNOLDS: Oh, no, I didn't say -- I mean, that is the primary --

VICE CHAIRPERSON THERNSTROM: But there are mysterious deletions here. For instance, delete such propaganda should be distinguished from legitimate discourse regarding foreign policy. What is wrong with that statement? Many college students --

CHAIRPERSON REYNOLDS: Would you like to finish the first topic first? We can go on and
discuss each deletion one by one. I would think that it would be more orderly if we would just finish one topic before going on to the next.

COMMISSIONER YAKI: I just want to say one thing in response to Commissioner Thernstrom.

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER YAKI: I by no means was trying to exclude what we were trying to do. I'm just saying that I think that much of what the discourse centered upon was the satisfaction with what OCR was or was not doing with regard to enforcement of Title VI.

And while I applaud any effort to make Title VI cover anti-semitic, anti-Jewish behavior, I am all for that. What I am saying is that it would be a lot cleaner if it were done the other way.

I would be the first one to say and I am the first one to say, figure out some way to stretch it to cover this kind of stuff because we need to do something about it.

VICE CHAIRPERSON THERNSTROM: Okay. Can that be an additional point in the --

COMMISSIONER YAKI: Yes, yes, absolutely.

VICE CHAIRPERSON THERNSTROM: And the
briefing, right. Okay. We would like to see some
type of congressional discussion of amending Title VI
so that it covers as well religious discrimination,
purely religious discrimination. That's fine with me.

CHAIRPERSON REYNOLDS: I don't know if the
briefing we had focused on religious. So the factual
predicate for that recommendation would seem to be
thin.

And I would suggest that if we were going
to go down that road, that we would have another
briefing that focuses on this.

COMMISSIONER BRACERAS: I disagree because
the recommendation will be based on making sure that
there wasn't a loophole, right? I mean, if we decide
as a group to recommend to Congress that Title VI be
amended to prohibit discrimination on the basis of
religion, the factual predicate for that is that we
heard testimony of anti-semitic incidents on a variety
of campuses.

And we want to make sure that Title VI
covers those instances, whether you classify them as
racially based or religiously based. And we want to
close a loophole. So I don't think we need further
testimony. It's procedural.
VICE CHAIRPERSON THERNSTROM: I agree with that.

CHAIRPERSON REYNOLDS: Okay. Well, let me --

COMMISSIONER BRACERAS: And just with respect to the point as to whether or not Judaism is an ethnicity or not, I was raised Jewish. I'm half Puerto Rican, half Jewish. And I was always told growing up to define myself that way. When people said, you know, "Where do your ancestors come from?" I was specifically told by my parents not to say, "Russia and Poland" because we rejected that ethnicity and considered ourselves Jews from that side of our family.

I really have never met a Jewish person who doesn't define themselves ethnically as a Jew. Even friends of mine who were raised Jewish and converted to Christianity, they may say that their religion is Catholic or Episcopal or Unitarian, but they define themselves ethnically as Jews, even though their religion has changed.

So I know that my personal experience isn't scientific data, but I don't know of any Jews who would be offended by this construct.
CHAIRPERSON REYNOLDS: Well, if we can, in an attempt to bring this to some type of conclusion, again, I would suggest that we settle the jurisdictional issue as to -- well, just getting OCR's interpretation of the extent of its jurisdiction, it's an important question.

Anything that has not been authorized by Congress is illegal. And I think that that is an important issue. And it's of such an importance that it should not be decided by having research that consists of looking at a Web site, especially when we know that OCR has expressed concerns about the interpretation, the original recommendations and the original characterization of its jurisdiction.

VICE CHAIRPERSON THERNSTROM: OCR has not expressed. There are people you have talked to within OCR who have expressed some concern. That is an important distinction.

There is an OCR Web site statement. And, again, we are not in the habit and I don't want to begin the habit of sending briefing reports for affected agency review.

CHAIRPERSON REYNOLDS: My recommendation is not that all briefings go through that review...
process. What I am suggesting is that in this particular case, since there is a dispute here and since OCR, members of OCR, including the assistant secretary, the highest ranking person in that particular agency, has expressed concerns about our interpretation, it seems to me that under those circumstances, we would be remiss in our duties if we didn't investigate this.

And, finally, there is nothing wrong with getting more information. More information is a good thing. More information from the agency that interprets Title VI is a good thing.

Again, our determinations, what we finally do is not going to be governed by what OCR has to say one way or the other, but at least our decision will be informed by credible, solid information from the agency.

VICE CHAIRPERSON THERNSTROM: I'm sorry, Chair. I don't think that is what we are going to get. We are going to get from the agency a fact we already know, which is that there are different forces within the agency that are saying different things.

CHAIRPERSON REYNOLDS: No. We are asking them for the policy. We can --
COMMISSIONER BRACERAS: The policy is available online, right?

CHAIRPERSON REYNOLDS: As a matter of just being good lawyers, relying on a Web site is just a bad thing.

COMMISSIONER YAKI: I see Web sites all the time.

COMMISSIONER BRACERAS: Actually, that's good. I think as a matter of being good lawyers, we should look to the policy and not to the individuals. I mean, we're a nation of laws not men.

CHAIRPERSON REYNOLDS: No, no, no, no, no. I'm talking about getting the official position from OCR, asking them what their official position is.

VICE CHAIRPERSON THERNSTROM: It's on the Web site.

COMMISSIONER YAKI: But in terms of policy --

CHAIRPERSON REYNOLDS: Why is there such resistance? Why is there such resistance to gathering information?

VICE CHAIRPERSON THERNSTROM: It's not gathering information. You already know the information.
COMMISSIONER KIRSANOW: I want to disagree slightly with what you have to say, Michael. I think this has nothing to do in terms of what Gerry is saying, I think, with to whom we defer or anything. We can make all the recommendations in the world we want to, but to whom we make the recommendations.

First of all, the Web site policy is not a policy. And it is not going to hold up anywhere. The policy is a determination that is issued by the appropriate individual, whether it's the secretary or assistant secretary of the affected department or agency. Then we have a determination.

Whatever is on the Web site cannot be relied upon as policy under the law. It won't do. So the point is we can, as we have habitually done as the U.S. Civil Rights Commission -- I'm not suggesting we build this here over party to this. The Commission can expound and say all kinds of things that it wants to and get roundly ignored because it is just simply saying things.

If we don't ascertain what the policy is, then we are directing our recommendations perhaps to the wrong source. It should, rather, be directed to Congress to amend Title VI if, in fact, the official
determination coming from the assistant secretary is that it doesn't encompass religion, Title VI doesn't encompass religion.

Under the Chevron decision, the agency has the responsibility to whom everyone else defers in terms of what the interpretation of the governing statute is. That doesn't mean we've got to be complicit in that or that we have to defer to them, but it does go to to whom do we make the recommendations and how do we make them. Otherwise we're simply saying recommendations to someone for whom it is simply going to fall on deaf ears.

COMMISSIONER YAKI: Mr. Chair, in part, I agree with Commissioner Kirsanow in that you want to have integrity in whatever we issue because that certainly has importance to whether or not it is received properly.

You know, listening to this continue some more, you know, part of me thinks that if there is this kind of confusion -- and certainly the testimony that we received would conclude that there is no real set policy at OCR on this, that there are differing viewpoints on the enforcement of this.

I mean, we may not have to go as far as,
say, amend Title VI. We may only go as far as to say that we believe that anti-semitic behavior should be considered discrimination on national origin, not maybe but should be or is or that we recommend that it be classified as such if it is not already done and should be clarified and made into official interpretive policies and enforcement policies of OCR.

I just wonder if we need to tailor this firm up and try and work it all out. But I would rather not. I think I would like to go forward except we're tabling everything all the time. But on this one, I'm wondering if perhaps we need to be a little more careful with the language or more stronger or more assertive with the language if -- I sense from the Commission that there was a desire to be more assertive and stronger with the language in some instances but also some reluctance to do so by stating rather boldly whatever we believe the OCR policy to be.

CHAIRPERSON REYNOLDS: Well, I separate the two issues. For me, we can recommend anything we want. And I don't think that there is a debate around this table on that issue.

My focus is just getting the
jurisdictional question answered. That is basically OCR's interpretation. And if we want the official word, we could ask the assistant secretary to discuss this issue.

We could subpoena her if we feel that that is necessary, but I feel that it is extremely important that we get it right.

COMMISSIONER BRACERAS: Maybe I'm confused here, but my understanding is there is an official policy. It is posted on the Web. The current administration of OCR may disagree with it and may wish to change it, but they have not done so yet.

And as long as it is the official policy, it is what it is. And we can cite to it. Just because the people who currently staff the office may have a problem with what the prior regime did doesn't mean it's not the policy.

CHAIRPERSON REYNOLDS: Well, based on my conversations with staff and the assistant secretary, their position is that the policy -- basically the change occurred when these, I think at least two, letters were issued by the staff director. That is where the controversy centers.

What's on the Web site, what we have is a
battle over interpretations. They read their Web
site, and they interpret it in a way that differs from
what we're proposing.

STAFF DIRECTOR MARCUS: If I may clarify,
of course, I issued these policy statements as the
official statements of the Department of Education
Office for Civil Rights in my capacity as the person
delegated the authority of the assistant secretary.

At the time they were issued, they were
issued as the formal policy of the Office for Civil
Rights and the Department of Education. They were not
intended to be proposals or suggestions but, rather,
clarifications of the existing --

CHAIRPERSON REYNOLDS: That's right. When
those letters were issued, did you change the rules?

STAFF DIRECTOR MARCUS: Well --

CHAIRPERSON REYNOLDS: Is it a
clarification or is it a change?

STAFF DIRECTOR MARCUS: That's an
interesting question.

CHAIRPERSON REYNOLDS: It's a basic
question.

STAFF DIRECTOR MARCUS: They were viewed
as a clarification in the sense that previously the
Office for Civil Rights had not taken a formal policy decision on the topic.

There had been numerous analyses done that came out in slightly different ways. And there were decisions made at the level of regional offices on the issue. But there hadn't been a formal policy.

Now, it might have been a slightly different thinking than some staff members have had, but because there had not been a prior contrary policy, it was considered simply a clarification of the formal regulation on Title VI.

CHAIRPERSON REYNOLDS: Well, we have interpretations on top of interpretations. And we have no clarity. I think that the obvious thing to do is to ask OCR what this policy is. And then we just make our decision.

And this shouldn't take long. We can send the document over there and ask them, is this an accurate characterization of OCR's current policy. The answer will be yes, no, or maybe.

Then we can vote and make our recommendations, whether it's expanding the scope, the jurisdictional scope of Title VI, or something else.

Commissioner Yaki?
COMMISSIONER YAKI: I would not send over what we have. I would simply send over a letter and say, "We had a hearing on this issue. What is your policy," pure and simple, "on the application of Title VI to anti-semitic behavior on college campuses and universities," period.

CHAIRPERSON REYNOLDS: That'll do it.

COMMISSIONER YAKI: And then we don't want to give them a chance to riff off anything that we say. Well, you know what I mean, circumvent, water, whatever we say. We want them to just simply say it. And then we have it. And then we can say okay.

And maybe we can use that in part of the finding to reconcile it with the obvious frustration that some of the panelists felt with what is actually happening at OCR. I think that would actually be a very useful finding to make.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: I am confused about where in this report there are sentences that suggest it is important to get precisely what OCR's current policy is. We are suggesting on a number of occasions what we have
recommendations, like to the extent race, color, and national origin are involved. OCR should continue to protect college students from anti-semitic.

Do we need some kind of clarification because of that kind of statement? I mean, we are asking OCR should conduct a public education campaign to inform college students of the rights and jurisdictions afforded to them. I mean, does this kind of language require that we hear from OCR?

CHAIRPERSON REYNOLDS: The language, the issue, the concept that's on the table is the extent of its jurisdiction.

VICE CHAIRPERSON THERNSTROM: Well, but I do not see -- and maybe I'm missing the relevant pages here because I only got a limited one, but I do not see a statement that in our report on a briefing we held here, the briefing being based on the assumption that anti-semitism was indeed covered by Title VI.

I do not see any kind of statement that makes presumptions about what the official position of the OCR is when, in fact, we know that, you know, you've got differing positions and an unresolved issue at OCR.

CHAIRPERSON REYNOLDS: How about this? I
move that we send a letter, the Yaki letter, over to
OCR inquiring about their jurisdiction over this
issue. And once we get that information, we would
make our findings and recommendations, having the
benefit of knowing what the official position is.

VICE CHAIRPERSON THERNSTROM: I would like
to hear the staff director's response to that.

STAFF DIRECTOR MARCUS: I don't know that
in my capacity as staff director I have a response to
it. If the Commission were to issue such a letter, I
would want specificity as to whether we have a
response date to make sure that we have it in time for
future meetings.

There are policy arguments, either for
sending the letter or opposed to sending the letter,
but I don't have a procedural point to add to it.

VICE CHAIRPERSON THERNSTROM: And what
would we do with the response that we got? So you've
got somebody at OCR. I don't care whether the person
is assistant secretary. And if that opinion is in
conflict with the Web site, there is a question of
what, in fact, the policy is. What do we do with
whatever that letter says?

CHAIRPERSON REYNOLDS: I guess it depends
on what the response is. I don't know.

COMMISSIONER KIRSANOW: I actually think that one of the best things is to find out what the policy is. Maybe that's one of the best things that could happen from something like that.

COMMISSIONER BRACERAS: We know what the policy is.

COMMISSIONER KIRSANOW: Apparently not.

COMMISSIONER BRACERAS: Well, I think by sending a letter to them, we are pushing them to either affirm or rescind a policy that is already there. That is what sending the letter to them is doing.

COMMISSIONER KIRSANOW: I think it's --

COMMISSIONER BRACERAS: It's pushing them to think about it again and to either affirm it or rescind it.

CHAIRPERSON REYNOLDS: If they rescind it, then they are going to have to go through notice and comment.

COMMISSIONER KIRSANOW: Because apparently what we have heard in testimony is if it is their policy, it's a policy that they are not following.

So I think it's important to see the
agency that is charged with doing this actually
enunciate a policy that it is going to follow. I
think that has a salutatory effect.

    Second is I think when we get that
information, whatever the letter says, if it says
this, in fact, is our policy, that policy that was
issued by our current staff director, is, in fact, our
policy which we intend to enforce, then we can direct
our recommendations to them or they just say this is
our policy.

    Then we can direct our recommendations to
them saying, "Then enforce the thing" because our
testimony is that we have frustration among people who
are affected by its stakeholders that it's not being
enforced.

    If it is not their policy, then we send to
Congress the recommendation that Title VI be amended
so that, in fact, it is clear that anti-semitism falls
within the purview.

    Otherwise I think we're simply doing what
the Commission typically does and bloviates.

    CHAIRPERSON REYNOLDS:  Vice Chair
Thernstrom?

    VICE CHAIRPERSON THERNSTROM:  In the
Adarand briefing, we were not describing current policy. We were recommending making a series of recommendations that, indeed, if we had sent a letter over, we would not have gotten anybody to sign up.

We are in a very unusual position here of having the Chair, I mean -- and I don't say this in any negative way but just to point out that it's unusual of having had some private conversations with members of the OCR staff bringing information to us. I mean, it's not the way we usually operate.

CHAIRPERSON REYNOLDS: It's more than that. The chair is also the former assistant secretary, who enforced Title VI at OCR. This issue, it's a complicated issue. At the end of the day, if we have notice, if we are on notice, that the agency charged with enforcing the statute has a different position, I don't think that there is any harm in hearing what they have to say.

Our decision doesn't turn on anything that they have to say. But it is useful information that will help us make an informed decision.

VICE CHAIRPERSON THERNSTROM: About what?

CHAIRPERSON REYNOLDS: About whatever. We could decide to recommend that Title VI be expanded to
include religion. There is a whole host of things that we could do. But let's get the facts right.

Commissioner Yaki?

COMMISSIONER YAKI: Commissioners, Mr. Chair, Madam Vice Chair, I think that there is a lot of utility in having the agency that is being subject to questioning by members of the public to have it stake its position out there in the public for all to see.

I think that more than just saying whether or not you see something privileged or not, I think one of our recommendations might have been, in the first place, why don't you clarify what the heck it is you are doing because you are confusing the heck out of a lot of people out there as to whether or not what you say on your Web site and what you do in practice are one and the same thing.

I think I would not like this to be like a six-month, three-month, or even a two-month. I would like to see if we could get an answer using the good offices of the Chair to get an answer in time for the next meeting from the department.

And I think that if they can't do that after having expressed these private thoughts to the
Chairman, then I think that they are themselves bloviating. And then we should simply take action on our own without having to wait for them.

I think in this instance, with I think the integrity of the recommendations that we want to make being so important and also the fact that for the public and for the concerned individuals or organizations that came before us in the briefing, having those here enunciate what they believe their policy is today is important for us to fashion a recommendation and to be responsive, quite frankly, to the confusion out there in the community as to what OCR is or is not doing.

But I would second the motion to send a letter.

CHAIRPERSON REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I would agree that in a sense, we're of differing opinions here. And I think what we want to do is come as close to consensus as we can.

Whether or not we will, you know, I think if there are still some questions out there that we need more time, but I don't think we ought to go more
than the next meeting. So it's important for missing
the obvious that just to satisfy your concern on a
position from the department sounds all right to me.

CHAIRPERSON REYNOLDS: Any other comments?
(No response.)

CHAIRPERSON REYNOLDS: Okay. So do we
need to vote on this?

COMMISSIONER MELENDEZ: Yes.

CHAIRPERSON REYNOLDS: Well, the motion is
that we send a letter, the Yaki letter, a letter
basically asking the department to state its position,
its official position, on this issue.

What do you say we give them ten days to
turn this around?

COMMISSIONER KIRSANOW: That won't happen.
I think we have to make it realistic. I can't
imagine they will do it in ten days. But by the next
meeting, we can --

COMMISSIONER YAKI: Actually, as a point
of information, we have assured turnaround to the next
meeting, correct?

COMMISSIONER BRACERAS: March 10th, right?

COMMISSIONER YAKI: Yes. We're March
10th.
CHAIRPERSON REYNOLDS: Let's just give them ten days. And if they do it, fine. If not, then we just go ahead and --

COMMISSIONER YAKI: Move on.

CHAIRPERSON REYNOLDS: Yes. Okay. All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Objections?

VICE CHAIRPERSON THERNSTROM: I object.

COMMISSIONER BRACERAS: I'm opposed.

CHAIRPERSON REYNOLDS: Abstentions?

(No response.)

CHAIRPERSON REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I was for the motion.

CHAIRPERSON REYNOLDS: Let the record reflect that the motion passes with Commissioners Melendez, Yaki, Kirsanow and the Chairman voting in favor and Commissioners Braceras and the Vice Chair Thernstrom voting against.

COMMISSIONER YAKI: So we would postpone this item until the March 10th agenda?

CHAIRPERSON REYNOLDS: Yes.
COMMISSIONER YAKI: Okay.

VICE CHAIRPERSON THERNSTROM: There are other deletions. Do we want to save them for the March 10th meeting?

CHAIRPERSON REYNOLDS: I would prefer to save them. I would prefer to push them off.

VICE CHAIRPERSON THERNSTROM: That's fine. They make no sense to me whatsoever.

COMMISSIONER BRACERAS: Well, maybe we can resolve them privately.

COMMISSIONER YAKI: Actually, it would be helpful, I think, for me, Madam Vice Chair, if you could circulate some of those comments, objections prior to the March 10th meeting so that we can --

VICE CHAIRPERSON THERNSTROM: Why don't we stare at what has been deleted and try to figure out the logic of some of these seemingly innocuous statements?

COMMISSIONER YAKI: Okay.

COMMISSIONER BRACERAS: Right now?

VICE CHAIRPERSON THERNSTROM: No.

COMMISSIONER KIRSANOW: Can we start them now?

COMMISSIONER YAKI: We don't have a
redline with us at the moment.

CHAIRPERSON REYNOLDS: As long as we don't have to discuss it.

VI. MANAGEMENT AND OPERATIONS

- WORKING GROUP ON THE BUDGET

CHAIRPERSON REYNOLDS: I will read the following motion into the record, "The working group on the budget recommends that the Commission hire a special assistant for Commissioner Melendez and that the special assistant be hired at a grade no higher than a GS-12 level. I move that the Commission vote to accept this recommendation of the working group on the budget."

Is there a second?

COMMISSIONER YAKI: Second.

CHAIRPERSON REYNOLDS: Discussion?

VICE CHAIRPERSON THERNSTROM: Yes. Commissioner Melendez, I think you deserve a special assistant. That goes without saying.

I am a little concerned that the working group on the budget made this recommendation before the last information it received on the final condition of this agency. And I wonder if we need to postpone this decision or, you know, in what other way
we need to respond to the financial uncertainty, budgetary uncertainty.

CHAIRPERSON REYNOLDS: Commissioner Melendez, I, too, as I have expressed in the past, am sympathetic to your request. And I voted as a member of the working group for this. However, that vote took place before we got news that we were going to have approximately $100,000 taken out of the budget.

The way things look now, if we were to move forward and hire a special assistant, we would be in a position of having to -- well, just a combination of unpleasant measures, including possibly a reduction in force.

So I have grave concerns about our moving forward with the hiring of a special assistant until we get more information as to the scope of the rescission and also to see if we are going to get the amount of money recommended by the President, which apparently generally the President gets less than requested.

Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Can I say one more thing on the possible trade-offs here? I do not want to see the staff with members who deserve
bonuses to have to do without them. I don't want us to forego staff training that is essential to the functioning of the agency.

Again, you deserve a special assistant. This is not a pretty situation that we are in. And I do think, unfortunately, that this decision needs to be postponed.

CHAIRPERSON REYNOLDS: Other comments?

COMMISSIONER KIRSANOW: I would simply just encourage Commissioner Melendez and Commissioner Yaki to the extent they are comfortable doing so and to the extent that commissioners who have special assistants are willing to do so to avail themselves of the special assistants who currently are on the payroll.

I know that is a difficult proposition, but to the extent that can possibly be done, it might be a way of kind of alleviating some of the burden.

VICE CHAIRPERSON THERNSTROM: Absolutely. And my assistant already is doing that. And she is happy to do it for anybody else. I am sharing my assistant currently.

COMMISSIONER YAKI: Well, I think she just grimaced back there. I'm just teasing.
(Laughter.)

VICE CHAIRPERSON THERNSTROM: No. I know she didn't. I didn't have to look at her because I know that she does that.

COMMISSIONER BRACERAS: I think the problem with that, though, is that it's the two Democratic members who don't have assistants. And I think they want to be able to have a confidential research person.

VICE CHAIRPERSON THERNSTROM: I understand that. I understand that. And I think they deserve that kind of assistance. I just don't know how to provide it at this moment.

CHAIRPERSON REYNOLDS: Ken, do we have any -- I'm sorry. Commissioner Melendez?

COMMISSIONER MELENDEZ: Well, hopefully it could become part of the budget formulation. You know, I know that there are essential components to the Commission. It's not to say that every part of the budget isn't important, but I think that if you start at the top down and you look at the Commission -- and I even had a concern with eliminating regional offices because before I came, I heard that that was going to be part of someone's decision to do that.
The way I look at it is you look at the Commission as what are the essential components of it. Well, it's probably the eight members that make up the Commission. If you look at the top down, everything else probably, and then you look at the regional offices, if those are important to keep open, then you've kind of got to staff whatever the core elements of the Commission are.

I would hate to go into the year and then, all of a sudden, it's like any other budget issue that something that you have termed "essential" takes the place of so that we're not handicapped as commissioners, not only that because I know that a comment was made that we're all attorneys. Well, we're not all attorneys.

I think there are a couple of us on the Commission who are not attorneys who basically are probably in probably more need of assistance than maybe people who are attorneys, basically can fend for themselves on really doing analysis on the very thing that we just discussed. And so you can see that it's real important at some point.

I don't have a problem, but I would hate to see that, you know, we get into the budget again.
and, all of a sudden, you know, another general
counsel comes on board and then this assistant to
myself, which I think is a key element of what the
Commission is all about, making sure that the
commissioners, who basically make a lot of these
decisions, aren't handicapped and they can basically
fulfill their mission.

And I'm just saying I kind of look at a
top-down approach as to the essence of what makes up
this Commission. And you want to make sure that is
running right before you start talking about
everything else that is probably included in the
budget.

That's just my concern.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: I want to apologize,
Commissioner Melendez, because, of course, I'm the
idiot who proposed the hiring freeze to begin with on
commissioner assistants, but I would hope that we --
and I think that this actually may help us in the
budget discussions for next year, that one thing that,
of course, Congress is very sensitive to is resource
allocation between the parties.

I think that I would hope that one of the
points we can make in the discussion for next year's budget is the need to have a confidential staff for the democratic side of the Commission, not that there are any real differences between them, but that just in terms of how we pose the issue of resource allocation and fairness here I think is certainly the kind of thing that covers what I think you would be receptive to is a frustration for Commissioner Melendez because he is not an attorney.

I asked the question earlier about the budget and how it would affect future items, which was my kind of lead-in to the staff director to say, can we afford this position?

And I guess now what I am starting to hear is that maybe despite the fact that we are okay, we're okay as is. We're not okay as is plus. Is that basically the best way to describe it, Mr. Staff Director?

STAFF DIRECTOR MARCUS: I believe that based on the most recent information about 2006 expenditures, we have enough money to do what we have committed to do and hire a special assistant at the GS-12 level for 2006. And we would have no problems in 2006.
However, if we're hiring a permanent employee, we would have to ask the question, will we have enough money to continue the person on board in 2007? Two thousand seven looks tighter because, of course, we will have the people on board. We have the advantages in 2006 that we will not have in 2007.

To the extent that we get congressional appropriations that are identical to what the President has proposed, we could find a way possibly to hire a special assistant at the level of GS-12 who would continue through 2007.

But based on the expenditures we're committed to, the only way that we have been able to figure out of doing that would involve essentially eliminating the modest sum of money that is in the budget currently for awards as well as pretty much all the modest amount for training. And I think there was another pot I think that would come to mind that we would have to eliminate as well.

So the answer is that based on all of our projections and assumptions, we could get through 2007 with an additional GS-12 special assistant if we get the amount requested by the President and we make those cuts.
COMMISSIONER YAKI: Can I just focus on 2006 for a moment? If we were to hire a special assistant for Commissioner Melendez for the remainder of fiscal ’06, would that have an impact on any projected issues of staffing or bonuses for the remainder of the year?

Commissioner Melendez, I can't speak for you, obviously, but certainly there is a certain amount of start-up period that all commissioners require. And I'm just wondering if we could do it without adversely affecting other kinds of activities that we had planned for this year.

I do think this is a priority for Commissioner Melendez. If he could hire someone for the remaining seven months of ’06, to at least help the commissioner do whatever the commissioner needs to do in the initial part of his term, I don't see why we wouldn't want to at least give him that opportunity.

CHAIRPERSON REYNOLDS: Could we afford it?
I guess that is the first question.

COMMISSIONER YAKI: I heard the staff director say yes.

STAFF DIRECTOR MARCUS: I did say yes.
Now, I said yes to the question we could bring the
person on. I believe Commissioner Yaki added a
wrinkle to that in you have asked without affecting --

CHAIRPERSON REYNOLDS: Right.

STAFF DIRECTOR MARCUS: -- the bonuses or
anything of that sort.

I think the answer is -- and we have been
very modest in the amount we have been able to have in
bonuses. In fact, we have been able to have them the
last couple of years. I think the answer is still
going to be yes. I think that I would want to
double-check the numbers on that and get back to you.

But I think that the answer is going to be yes for
2006.

CHAIRPERSON REYNOLDS: Vice Chair
Thernstrom?

VICE CHAIRPERSON THERNSTROM: Okay. I
really want the answer to that question because,
again, I'm extremely sympathetic, Commissioner
Melendez, to your request here. But I am also very
concerned about staff morale and about, you know, the
availability of having at least modest awards for
excellent work and also about training.

COMMISSIONER YAKI: That's why I asked the
question.
VICE CHAIRPERSON THERNSTROM: Yes. And I, too, am impressed with Commissioner Yaki's political point here that going to Congress and saying, "Look, neither of the Democrats on the Commission have a special assistant. Don't you want to fix that?"

CHAIRPERSON REYNOLDS: They'll say, "Yes. Why don't you give them one of yours?" I think that is going to be the response if we --

VICE CHAIRPERSON THERNSTROM: Well, I mean, there are people who have been hired. I don't think the response is going to be "Fire the people you've got." I mean, I do think there is a possible political point that Commissioner Yaki has made.

Then, finally, as sympathetic as I am to Commissioner Melendez's point about there are lots of lawyers around the table, I don't happen to be one myself, in fact, luckily for both of us, very few discussions -- today is a perfect example in our whole discussion on the briefing report on anti-Semitism -- very few of our discussions, almost none, depend upon any legal expertise. It is a judgment call about -- you know, I'm not interested in what lawyers have to say on the --

(Laughter.)
VICE CHAIRPERSON THERNSTROM: It's not that I am putting down the legal profession.

COMMISSIONER YAKI: This has to be a violation of some --

VICE CHAIRPERSON THERNSTROM: The point is --

COMMISSIONER YAKI: You lost on the Constitution. That requires you to have a lawyer present.

VICE CHAIRPERSON THERNSTROM: The point is that they are not fundamentally legal questions. They're not legal questions, most of what we discuss.

CHAIRPERSON REYNOLDS: Well, I think that often we do wrestle with legal questions.

VICE CHAIRPERSON THERNSTROM: Well, look, again, I'm --

CHAIRPERSON REYNOLDS: But the bottom line is everyone is sympathetic. I think that there is unanimity on this issue that we all want to get Commissioner Melendez an assistant, but we have to also be good stewards. And we can't spend what we don't have. I think that Commissioner Yaki's recommendation is a good one, and I look forward to receiving the answer.
I would just also say that if the outlook, the budget outlook in '07, could be such that we are in a position where we're going to have to lose that assistant that we hired for '06 or at least one assistant going into '07 if we don't get the number that the President recommended.

And I know that once you get your assistant, assuming that we could do this for '06, that you are going to grow mighty accustomed to having one. And the prospect of in '07 not having one, well, that's another fight. And I guess we'll just punt that issue until we see what the '07 budget looks like.

VICE CHAIRPERSON THERNSTROM: I have a question on this. The process of hiring an assistant in the past has been rather lengthy. That is, you can't hire these assistants on a dime is my impression. Am I wrong?

COMMISSIONER KIRSANOW: Is there any possibility we could get one detailed?

VICE CHAIRPERSON THERNSTROM: Get one detailed. Okay.

CHAIRPERSON REYNOLDS: I guess that would turn on Commissioner Melendez agreeing to -- I mean,
this is a personal, confidential relationship in many cases. And if we could find someone who is already in the federal government that Commissioner Melendez finds acceptable, then I do believe that that would speed up the process.

STAFF DIRECTOR MARCUS: Of course, it would also answer the budgetary question since detailees are usually paid by the sending agency.

CHAIRPERSON REYNOLDS: Well, I want a detail if that's the case, then. That is interesting.

VICE CHAIRPERSON THERNSTROM: Yes. That is very interesting.

COMMISSIONER YAKI: Are you trying to get rid of somebody at the NLRB?

STAFF DIRECTOR MARCUS: Now, I have to say that there may be some HR legal questions about how we would have to do that because typically one cannot detail a career employee into a Schedule C non-career position.

CHAIRPERSON REYNOLDS: Okay.

STAFF DIRECTOR MARCUS: I don't know whether there is a clever way around that or whether there isn't.

COMMISSIONER BRACERAS: Well, in the
Schedule C, people in this administration are going to be Republicans, right? It doesn't solve the political problem of them wanting somebody who is politically simpatico with their views to perform research and help them analyze these issues from the democratic perspective.

COMMISSIONER KIRSANOW: Why don't we see if we can get someone on staff in the interim examine the possibility of getting detailees who may not have to satisfy Schedule C imperatives or SES, whatever it may be, because the if we can save on the budget and we can get somebody detailed quickly, we may be in better shape and Gerry, too. Commissioner Yaki, if we can get all kinds of detailees, we'll be in great shape. But maybe someone can just do that research, rather than us just speculating.

STAFF DIRECTOR MARCUS: Staff would be pleased to do that research if there's an interest from the Commission.

CHAIRPERSON REYNOLDS: Okay. Well, how about this as a motion? I move that we table this issue and wait for the staff director to see if it is feasible to hire a special assistant for Commissioner Yaki for the remainder of 2006.
VICE CHAIRPERSON THERNSTROM: No. It's Commissioner Melendez.

CHAIRPERSON REYNOLDS: Oh, I'm sorry. I'm sorry. Commissioner Melendez for the remainder of 2006. And also I guess a second motion would be that the staff director look into the possibility of having some folks detailed over to the Commission and also complying with all of the rules.

STAFF DIRECTOR MARCUS: That's fine. By way of clarification, I think, Mr. Chairman, in your motion, when you ask for consideration of feasibility, it's a question of legality and consistency with the rules and regulations.

Of course, there is another question about feasibility, which goes to whether there is another agency that is willing to do that or not, which would be a more difficult question.

CHAIRPERSON REYNOLDS: Is there a second?

VICE CHAIRPERSON THERNSTROM: I second that.

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any objections?

(No response.)
CHAIRPERSON REYNOLDS: Any abstentions?

COMMISSIONER MELENDEZ: Yes, I abstain.

CHAIRPERSON REYNOLDS: Let the record reflect that Commissioner Melendez abstains. All other commissioners voted in favor of the motion.

VICE CHAIRPERSON THERNSTROM: And, then, every commissioner is committed, if possible, to getting you the assistant you want.

CHAIRPERSON REYNOLDS: Okay. Next up, a related issue. The motion reads, "I move that the Commission continue to refrain from hiring commissioners, special assistants through fiscal year 2007 with the possible exception of hiring one special assistant for Commissioner Melendez."

Is there a second?

COMMISSIONER YAKI: Second.

CHAIRPERSON REYNOLDS: Discussion?

COMMISSIONER YAKI: I would like to add a semicolon after "Commissioner Melendez," "provided that the hiring of a special assistant for Commissioner Melendez is a budget priority for 2007."

CHAIRPERSON REYNOLDS: I'm sorry? Please --

COMMISSIONER YAKI: I would just like to
make it a budgetary priority for 2007.

CHAIRPERSON REYNOLDS: Okay. Budgetary priority. I guess my initial question is to the staff director. We made a commitment that some of the funds would be used to hire to fill a certain position. Is that correct?

STAFF DIRECTOR MARCUS: The way it worked is that we were given a certain amount of money initially by OMB, and we appealed. We made a special appeal asking for additional money for some other purposes.

The appeal was resolved. And the resolution was such that we got specific additional monies from OMB for the specific use of hiring attorneys, doing the PSA, and allowing the staff travel.

CHAIRPERSON REYNOLDS: Okay. So there is an understanding between the Commission and OMB that the certain portion of our funds would be used for specific purposes?

STAFF DIRECTOR MARCUS: I think it's a formal requirement, yes.

CHAIRPERSON REYNOLDS: Okay. Vice Chair Thernstrom?
VICE CHAIRPERSON THERNSTROM: I wonder if the language does not need to be slightly altered to read and that the Commission continue to refrain from hiring additional commissioner special assistants. And I do not say this on the basis of, you know, I don't know anything anybody else doesn't know, but suppose one of our special assistants were to leave.

CHAIRPERSON REYNOLDS: Then we would have a very interesting conversation.

VICE CHAIRPERSON THERNSTROM: No, no. The point is we would want to be able to replace that special assistant with another special assistant, not necessarily for the person.

CHAIRPERSON REYNOLDS: No. That's right.

VICE CHAIRPERSON THERNSTROM: But we would want to keep the same number of special assistant, total number. So I would just refrain from hiring additional commissioner special assistants so the number, total number, doesn't go down. That's my only point.

I'm not saying that any particular commissioner is entitled to a special assistant.

COMMISSIONER YAKI: I agree.

CHAIRPERSON REYNOLDS: Okay.
COMMISSIONER MELENDEZ: That was my concern, I think, when we were talking about the total budget. When I asked the question, I could have asked the question at the very beginning when you were talking about budget cuts and there were certain commissioners that had an assistant.

One of the questions I believe I asked Mr. Marcus, I said that with such a budget concern to the Commission, why wouldn't nobody actually have an assistant? Then it would have been fair across the board.

What my understanding was, because those people actually were hired for some reason, they were kind of locked in and there was no way to -- you know, that was one of the big issues why as far as the fairness that you went to eliminate everybody's special assistant and then everybody has kind of like got the same in the same situation. And even that would still be that you would still have attorneys who would probably fend for themselves on the issue.

So I asked that question early, but I believe the answer I got was that because those were already hired people on a permanent basis, really, you couldn't really do anything about that. You only
could do any cutting on the budget on the new commissioner that is coming in, the eighth person, or myself.

But then Ms. Thernstrom brings up a good point. What if somebody should leave specifically the assistant that she has? Does that mean that the question would be that if you bring up a person and you didn't want to lose that assistant as part of numbers, that assistant could actually shift over to Mr. Yaki and myself?

VICE CHAIRPERSON THERNSTROM: Sure.

CHAIRPERSON REYNOLDS: I think that there is a strong argument. And I will put my cards on the table. If a slot opens up, I am predisposed to voting that that slot go to one of the two Democrats.

VICE CHAIRPERSON THERNSTROM: Absolutely. So my suggestion was simply to clarify the fact that we now have three special assistants at least. Isn't that correct? That number three does not get reduced if one of the special assistants leaves. Nevertheless, my inclination as well would be to say if there is an opening.

And yes, I have no idea whether there is going to be an opening. This is pure speculation.
CHAIRPERSON REYNOLDS: Now, my predisposition, it hinges on support from the Democrats when we have enough money that you would support me when I go for a special assistant. That's a joke. It's a bad joke. It's a bad joke. I'll stick with my day job.

In any event, do we have --

VICE CHAIRPERSON THERNSTROM: So I'm proposing the word "additional."

CHAIRPERSON REYNOLDS: Any objections to this friendly amendment?

(No response.)

CHAIRPERSON REYNOLDS: I think that with the clarification, I don't believe there are any objections. Okay. I'll accept silence as acquiescence.

Okay. There was an amendment by Commissioner Yaki. And it's not clear to me. I don't know if we resolved that issue, the last clause that you wanted to add.

COMMISSIONER YAKI: I proposed it. Do you want to second it?

(Laughter.)

COMMISSIONER MELENDEZ: Basically, what he
was saying is what I brought up, that it becomes a priority at some point. And I guess it solidifies it a little by including it in the motion that it's just like any budget. Some other important thing cumbers up. And then my assistant or Michael's assistant kind of gets pushed off as the things keep becoming priorities.

And I think he is saying to all of us, it would be in the motion as a priority to --

CHAIRPERSON REYNOLDS: I guess my only concern was that we have priorities that are baked into the budget currently. And we have made certain commitments. I just wanted to make sure that we all understood that this would not reorder the current set of budget priorities, that this would be prospective.

If that's the understanding, then --

COMMISSIONER YAKI: Yes.

CHAIRPERSON REYNOLDS: Okay. All right.

All in favor of the motion as amended by Commissioner Yaki?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: All in opposition?

(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?
(No response.)

CHAIRPERSON REYNOLDS: The motion carries unanimously.

- JANUARY 31, 2006, COMMISSION REPORT TO SENATE APPROPRIATIONS

CHAIRPERSON REYNOLDS: Okay. Next up is the Commission report to the Senate. In the Senate report 109-88 for fiscal year 2006, the Senate Committee on Appropriations directed the U.S. Commission on Civil Rights to produce two written reports outlining in detail the implementation of agency reforms as adopted by a vote of the Commission in April 2005.

The Commission submitted its first report on September 30th, 2005. On January 31st, 2006, the Commission sent the second of two requested reports on the structural and management reforms at the Commission that will lead to more efficient and effective management.

The motion reads, "I move that the Commission's January 31, 2006 written follow-up report to the Senate Appropriations Committee outlining the implementation of GAO and OPM recommendations from the past several years be posted on the Commission's Web
site at the earliest practical time."

Is there a second?

VICE CHAIRPERSON THERNSTROM: I second it.

CHAIRPERSON REYNOLDS: Discussion?

(No response.)

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any objections?

(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?

(No response.)

CHAIRPERSON REYNOLDS: Let the record reflect that Commissioners Kirsanow, Braceras, Melendez; Vice Chair Thernstrom; and the Chairman voted in favor. Commissioner Melendez has left the room for this vote.

VICE CHAIRPERSON THERNSTROM: It's Yaki.

CHAIRPERSON REYNOLDS: I'm sorry. I'm sorry. I'm sorry.

VICE CHAIRPERSON THERNSTROM: You think all --

CHAIRPERSON REYNOLDS: It's tough. It's like a song that gets stuck in your head.

- PERFORMANCE AND ACCOUNTABILITY REPORT
CHAIRPERSON REYNOLDS: Okay. Next up is the performance and accountability report. The Commission has submitted its first performance and accountability report.

It presents a comprehensive view of the Commission's program and financial performance during fiscal year '05. The report identifies the management weaknesses faced by the Commission and the corrective actions taken during fiscal year '05.

This was a productive year that strengthened the agency's operations and financial situation. The report also includes the additional corrective measures planned for fiscal year '06.

I move that the Commission's January 30th, 2006 submission to Congress of our performance and accountability report, including the fiscal year 2005 audit report of Williams, Adley, and Company be posted on the Commission's Web site at the earliest practicable time.

Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRPERSON REYNOLDS: Discussion?

(No response.)

CHAIRPERSON REYNOLDS: All in favor?
(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any objections?

(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?

(No response.)

CHAIRPERSON REYNOLDS: Okay. The motion passes unanimously.

- CREATION OF WORKING GROUP ON STRATEGIC PLANNING

CHAIRPERSON REYNOLDS: Next I would like the staff directors to bring us up to date on the Commission's strategic planning process.

STAFF DIRECTOR MARCUS: I would be pleased to, Mr. Chairman. The Commission last updated the strategic plan in 1997, as the commissioners may be aware, and was required under law to revise it in 2000 and 2003 but did not do so. To try to get the Commission under private leadership to revise and update the strategic plan in a timely manner was cited in several GAO reports, most recently in its April 6th, 2005 report, where it noted that without revisiting its strategic goals, the Commission does not have a firm basis on which to develop its annual goals.

Since the arrival of the new
administration, the Commission has recognized and acknowledged the problems that arise when we do not have a strategic plan. And we have prioritized implementation of a new strategic plan as a part of the initiative to implement all GAO and OPM recommendations.

We have been working closely with the Congress and, in particular, with the Judiciary Committee regarding our strategic plan. We have received various correspondence from them which had been distributed and have had various meetings, the most recent of which has been described for commissioners.

Based on the most recent recommendations from the House Judiciary Committee, if we are to follow them, it will require that we engage in further stakeholder communications as well as additional analysis and rewriting.

That is where we are now. Now, during our conversations with the congressional staff, we discussed the fact that in order to do all of this would require a considerable amount of additional time. This time, of course, will postpone not only the completion of the strategic plan but also of the
documents that are required to be tied to the strategic plan, most importantly our human capital plan.

So we are now in a position that we have a draft strategic plan, but based on input from Congress and also from GAO, we are contemplating additional stakeholder outreach as well as additional analysis and rethinking of our strategic goals and strategic plans.

CHAIRPERSON REYNOLDS: Okay. Questions?

(No response.)

CHAIRPERSON REYNOLDS: Okay. I have one.

The strategic plan that we had in place has been criticized by the folks on the Hill and also from GAO. I get the impression that the revisions that they're looking for are not merely increasing stakeholder participation but they're looking for a fundamental review of our mission here at the Commission. Is that accurate?

STAFF DIRECTOR MARCUS: That is accurate, yes. Now, the stakeholder review is considered to be a part of a process which is intended to involve a rethinking of the strategic goals of the Commission.

So the concern is not just with the
process but also with the question as to what the main priorities of the Commission are, what the strategic goals are, what our objectives are, and how we can measure attainment of those objectives in an objective manner.

CHAIRPERSON REYNOLDS: Oh, so this is not, then, revisiting the Commission's mission?

STAFF DIRECTOR MARCUS: Well, the mission statement is recommended to be a part of the strategic goal. So, at a minimum, there is a question as to whether we should reconsider the mission statement.

In addition, congressional staff did suggest that since we are facing reauthorization, if commissioners have a view of the mission or how the mission can best be achieved, which requires further congressional action, then that's something we should consider as well.

So I would say that the input that we have received from Congress and the GAO involves big picture issues about a mission and goals as well as more technical issues about objectives and measures.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Mr. Chairman,
based on what the staff director said, I think this provides us with a unique opportunity because we have been in existence for nearly 50 years and have been operating on a certain model that may have exhausted itself or become obsolete or at least semi-obsolete.

And if we have commissioners involved in maybe visiting what the mission of the Commission is, I think we might be able to position ourselves to be more responsive to civil rights paths understood in 2006 going forward.

CHAIRPERSON REYNOLDS: Okay. I think that it is a good opportunity, but my only concern -- and it's a minor concern -- is that this is a significant undertaking. And it is going to require, at least in my opinion, a significant amount of time.

If we are going to revisit what we do and how we do it in the Twenty-First Century, that is going to require a lot of time on the part of both staff and the commissioners.

And so to the extent we have reform efforts that are contingent upon the completion of our strategic plan, I think that we should decouple those reform if that is possible.

COMMISSIONER BRACERAS: I'm a little
confused because the strategic plan isn't supposed to speak towards legislative reform, is it? It's just supposed to talk about given the current statutory mandate that we have, how are we going to operate? And what are our goals within the current strategic plan?

But it seemed to me based on what we were told about some of the meetings that you had on the Hill, that they were asking for larger suggestions about restructuring, which seems like a completely separate process.

STAFF DIRECTOR MARCUS: Yes. I don't know if it's about restructuring. And I regret that we can't have them here. So I'll do my best to try and paraphrase.

I think that they are interested in a strategic plan. And the strategic plan involves strategic thinking that follows the model that you described, Commissioner.

I think that their comment reflected the view that as we engage in that strategic thinking, it may occur to us that there are ideas about how we can best achieve our mission that may require additional legislation and that to the extent that that is true,
that they would like to hear those recommendations from us. And those recommendations may be outside the scope of the strategic plan.

COMMISSIONER BRACERAS: I think they would all be outside the scope of the strategic plan, right? I mean, if we're making recommendations for statutory change, that is not going to be part of our strategic plan because the strategic plan has to operate within the current framework. No?

STAFF DIRECTOR MARCUS: I would have to give that some thought. And I don't know whether it's an academic question or if we really do have ideas of that sort.

COMMISSIONER BRACERAS: I mean, I guess it is a shame that the members, the staff members, of the committee aren't here to more fully delineate what it is they had in mind because, as commissioners who didn't meet with them directly, I think several of us are very confused as to what exactly it is they have in mind. And I'm not sure how we can give you guidance without knowing exactly what it was they were alluding to.

STAFF DIRECTOR MARCUS: I think that there are some things that are clear in their
recommendations. One is that they would like to see the commissioners engaged in serious thinking or reconsideration of what our most pressing strategic goals are over the next five years and hope that that thinking will be done at a commissioner level and preferably in a bipartisan manner. That is something that was expressed.

COMMISSIONER YAKI: Why don't we just tell them to give us more money?

CHAIRPERSON REYNOLDS: We've tried that. And we'll continue to ask.

STAFF DIRECTOR MARCUS: And they also --

VICE CHAIRPERSON THERNSTROM: Part of our strategic plan.

STAFF DIRECTOR MARCUS: -- made a recommendation about the nature of the process that we use, including stakeholder outreach, and the nature of the objectives and measures that we have.

So it may be that there are some further questions that we may have for them, but I think that some of the comments that they have are things that we can implement.

COMMISSIONER BRACERAS: Who are the stakeholders that they think we should be reaching out
to?

STAFF DIRECTOR MARCUS: Well, they didn't specify the stakeholders. And typically it's the agency itself, which identifies who the stakeholders are.

COMMISSIONER BRACERAS: So they didn't express any opinion as to who those should be?

STAFF DIRECTOR MARCUS: No.

COMMISSIONER BRACERAS: I find it hard to believe that they don't have such a view. I mean, it seems from the minutes of the meeting that they certainly view themselves as a live stakeholder.

CHAIRPERSON REYNOLDS: And that's one reason why we invited the staffers today to have a --

COMMISSIONER BRACERAS: Correct.

CHAIRPERSON REYNOLDS: -- greater input, although we do communicate with them and exchange information on a regular basis.

STAFF DIRECTOR MARCUS: And I should say that we have viewed them as stakeholders and consistently treated them as stakeholders in our action and that this is not just a determination we made. It's something that's part of the requirements under the gipper statute.
COMMISSIONER BRACERAS: Right. I guess what I'm trying to get at, though, is what I am trying to understand is how much more involvement do they want in the processes of the U.S. Commission on Civil Rights?

I mean, it seems to me -- and, again, I wasn't in the room, but it seems to me from my understanding of what transpired at some of the meetings that they are looking for greater input and a greater role in not just our strategic plan but our specific agenda, the early agenda. Am I mistaken? I guess I would have to ask them.

STAFF DIRECTOR MARCUS: They certainly hope to have a greater degree of communication on the topics that we're undertaking and how they connect up with legislative priorities.

CHAIRPERSON REYNOLDS: We must consult with the folks on the Hill.

COMMISSIONER BRACERAS: Oh, of course.

CHAIRPERSON REYNOLDS: No. I'm not suggesting that they --

COMMISSIONER BRACERAS: But we're not their research arm.

CHAIRPERSON REYNOLDS: Exactly. There is
a line. And I guess I believe where you're going is that more information would be helpful so that we can see how close we are to the line because the day-to-day operations of this agency reside with the staff director and the commissioners, as opposed to the --

COMMISSIONER BRACERAS: Yes. I mean, I would be interested in hearing more about what the folks on the Hill have in mind because, although I fully support us working with the folks in the other branches of government so that we can remain relevant and so that the topics we address are issues of concern to the political branches of government, I in no way would like to see us become a research arm of the United States Congress or a research arm of the Executive Branch.

We are supposed to be independent. And we're not just supposed to do fact-finding. We are supposed to make recommendations to them.

CHAIRPERSON REYNOLDS: And criticize them.

COMMISSIONER BRACERAS: And criticize them and evaluate them. And so it seems like some of what they are looking for is not just a closer partnership with us but -- well, I'm not sure exactly what they
want. And so I would like to hear from them directly about it, but they're not here to do that.

CHAIRPERSON REYNOLDS: I guess the next question is, what is the most effective way of getting more information from folks on the Hill to find out what they want. I mean, they have sent us a letter, but there are some areas where there is still a fair amount of ambiguity.

What do you think of sending a letter asking them to -- well, first identifying the areas where there is ambiguity and where we need more clarity and then just reducing it to a letter and sending it to them or having the staff director sit down with them and discuss this issue a little more so we can --

COMMISSIONER BRACERAS: I mean, I think the staff director has sat down with them. I'm just not sure that they have been clear. It seems as if the staff director has jumped through a lot of hoops to try to satisfy the folks on the Hill that we are reforming ourselves and that we are taking our mission seriously. And, yet, they seem still to be unsatisfied.

And so I'm not sure what it is they're
asking for because it seems to me that the staff
director has gone above and beyond in trying to assure
them that we are reforming and that we are thinking
strategically about our mission and that we are doing
all the things we're supposed to be doing. And, yet,
they remain displeased, it seems. And so I'm not sure
what they want.

CHAIRPERSON REYNOLDS: Go ahead.

STAFF DIRECTOR MARCUS: If I may, I would
just like to add a couple of things to that. One is
that in the most recent correspondence from the House
subcommittee, the chairman and ranking member
expressed their view that we were cooperating with the
committee. And they expressed some favorable things
about the way that we were approaching strategic
planning.

That is something we hadn't seen in the
past. And I think it was a valuable recognition of
the good work that we are doing. And private meetings
with congressional staff, they have also recognized
the good work that we have done in terms of operations
and finance.

Their concerns now have to do primarily
with the process in which we do strategic planning. I
think that there is merit to at least many of their comments and concerns.

I think that there are ways of doing strategic planning to include. I think that I would look at what we have done so far in strategic planning in the context in which it was undertaken.

We had a vote several months ago to try to implement all GAO recommendations by mid January. This strategic plan was prepared in draft form in a way that would meet that deadline. It was a somewhat streamlined document that was done in a way that could be done in that timetable. And we had a document that we would have been able to finish at that time.

The input from Congress is that while we have done a document that was within that timetable, they now think that it would be better for us to do the report in a more considered, thoughtful way with a more complete process, even if it means taking a little bit more time.

I'm not sure that they would have done it differently if they had the same timetable we had, nor am I sure that we would have done it the same way if we had been thinking on a longer timetable.

I think in general, their concern is that
we take a little bit more time and use a more complete process. That is something that we can do. And certainly at a staff level, we have a number of ideas about how the strategic plan could be rethought, expanded, developed, and made a more useful document if we have a greater period of time.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Well, this is just a matter of having a record clear here. I heard before that the congressional staff would like greater communication with this Commission.

And I personally looked forward to hearing from that staff today and would have found their views very informative, but it was their decision to decline the opportunity to clarify for the entire Commission their views, to clarify precisely their views, on strategic planning and any other matters of concern to them.

So, again, for the record, I want to express our openness to hearing from them and my unhappiness that they did not come today.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow?
COMMISSIONER KIRSANOW: Mr. Chair, I would just note that the agenda item says, "Creation of Working Group on Strategic Planning." Are we going to create a working group on strategic planning that would --

CHAIRPERSON REYNOLDS: That's the next issue. Actually, we can fold it in. I mean, basically the logical progression leads us right there.

So let me read the motion. It is "I move that the Chairman appoint a working group on strategic planning. The charge of this working group will be to recommend a proposed final strategic plan to the Commission working closely with the staff director and staff. The working group should also consider the input of Commission stakeholders, including the pertinent executive agencies and congressional committees."

Is there a second?

VICE CHAIRPERSON THERNSTROM: I second it. And I propose that Commissioner Kirsanow probably has no time whatsoever to be chair of that group.

COMMISSIONER KIRSANOW: Oh, thanks a lot. I've taken a pay cut. Now I've got to do this, too?
CHAIRPERSON REYNOLDS: Discussion? So we have one volunteer on this side. Is there a preference amongst the two Democrats?

(Laughter.)

VICE CHAIRPERSON THERNSTROM: You've been conscripted, Michael.

CHAIRPERSON REYNOLDS: Well, in all fairness, Michael has been involved in, I believe, all of the working groups.

COMMISSIONER YAKI: We're going to give Commissioner Melendez the right of first refusal, but if he doesn't, feels uncomfortable doing it, I'll be glad to do it.

COMMISSIONER MELENDEZ: What does it entail as far as meetings? Is it over the phone?

CHAIRPERSON REYNOLDS: Yes. It's teleconferences.

COMMISSIONER MELENDEZ: Okay.

CHAIRPERSON REYNOLDS: Okay. The fact that you volunteered Commissioner Kirsanow suggests that you don't want to be involved.

COMMISSIONER BRACERAS: Volunteer Commissioner Taylor since he's not here.

(Laughter.)
CHAIRPERSON REYNOLDS: Right, exactly. So let's see. Commissioner Kirsanow, Commissioner Melendez, Commissioner Taylor. One, two, three. And I'll round out the bunch.

VICE CHAIRPERSON THERNSTROM: Good.

CHAIRPERSON REYNOLDS: That was a very good suggestion.

COMMISSIONER BRACERAS: Thank you.

CHAIRPERSON REYNOLDS: Okay. Next up.

VICE CHAIRPERSON THERNSTROM: If Commissioner Taylor cannot do it, one of us will do it.

COMMISSIONER BRACERAS: Yes. I'll do it if he doesn't want to do it.

CHAIRPERSON REYNOLDS: Right. I do believe, though, that this approach is a fine incentive to encourage commissioners to attend all meetings.

(Laughter.)

VII. STATE ADVISORY COMMITTEES

- COMMISSION CONSIDERATION OF SAC REPORTS

CHAIRPERSON REYNOLDS: Okay. Next up, let's see. We have a motion to deal with our policy on the acceptance of state advisory committee reports.
Let's see.

I move that the Commission adopt the following policy regarding reports submitted to us, by state advisory committees. This new policy will supersede the policy adopted on November 18th, 2005 and all other previous policies.

The new policy reads, the first paragraph reads, "The Commission will print all SAC reports that have satisfied the procedural and legal criteria for such reports to the satisfaction of the staff director or his designee. Commission members will not be asked to vote to accept or reject SAC reports."

Second paragraph, "The cover of all SAC reports will include a disclaimer in 14-point font stating, 'This report is the work of the'" blank. And the blank will be filled in by the name of the state "'advisory committee to the U.S. Commission on Civil Rights. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the state advisory committee and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the United States government.'"
Third paragraph, "The document may state that it is published by the U.S. Commission on Civil Rights, but it will not contain the names of commissioners, nor a narrative description of the Commission and its work."

"It may contain a narrative description of the SAC and the names of the SAC members. The report must indicate the number and the names of the SAC members who voted to approve the report as well as those who voted against the report. Dissenting SAC members must be given the opportunity to submit a short statement, no more than one page, as to why they voted against the report."

Fourth paragraph, "All SAC reports will be posted on the Commission Web site as a .pdf file under a heading for SAC reports. The Web page that lists the SAC reports will also include a disclaimer to the effect that the findings and recommendations contained in these reports are the views of a majority of the members of the state advisory committees that produced them and do not necessarily represent the views of the Commission, its individual members, nor the policies of the United States government."

Fifth paragraph, "Staff may assist SACs in
distributing copies of the report."

Sixth paragraph, "Staff may assist SACs in drafting and distributing press releases announcing SAC reports provided that such press releases do not bear the seal of the U.S. Commission on Civil Rights and, instead, are issued solely under the name of the state advisory committee that produced the report."

Is there a second?

COMMISSIONER YAKI: Second.

CHAIRPERSON REYNOLDS: Discussion?

Commissioner Braceras?

COMMISSIONER BRACERAS: I just wanted to speak to it since I was the person who drafted this proposed policy. As many of you know, I have been continuously frustrated with the way we handle SAC reports and have gone back and forth with many of you about the best way to deal with these documents.

And ultimately I decided that I am most comfortable with publishing them all, letting the SACs have their independence, and not involving ourselves with the content or the substance of their report but at the same time washing our hands of any responsibility for them and just allowing them to be in the public domain without necessarily associating
this Commission with them except insofar as their reports are received by us and we are the publishing house for the reports.

So I wanted to come down on the side of the free flow of information and allowing people access to the work of the SACs, allowing the public access to the work of the SACs, without necessarily conveying the impression that the Commission endorses SAC findings or that SAC findings are the view of the U.S. government.

I think that this policy strikes that balance. And that is why I proposed that if you compare it to the policy adopted a few months ago, I think that the policy that is on the table has much more clarity to it. And the policy we adopted a few months ago is very convoluted and confusing to people outside of this room. And so I think this is the better course.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Yes. I like this a lot. I would just for clarification -- this may not be necessary, but in the first recommendation, "The Commission will print all SAC reports," et
cetera, I wonder if in the last sentence we should have a reference to the fact that the reports will be presented to the commissioners but they will not be asked to vote to accept or reject those reports.

COMMISSIONER BRACERAS: In other words, we'll still receive them?

VICE CHAIRPERSON THERNSTROM: Yes, simply to make it clear that we will receive them, we will have had a chance. You know, they will be in our hands, but we will not vote on them.

COMMISSIONER BRACERAS: But will they be presented at meetings? I don't think there should be any discussion of the reports.

VICE CHAIRPERSON THERNSTROM: No, there should be no discussion of the reports, but --

COMMISSIONER BRACERAS: I mean, I don't think it's our place to, on the one hand, say, "This is wonderful work, and I agree with the findings" --

VICE CHAIRPERSON THERNSTROM: No, no, no, no, no.

COMMISSIONER BRACERAS: -- or the opposite, "I think it's terrible work."

VICE CHAIRPERSON THERNSTROM: Yes. No. It's a matter of simple courtesy.
COMMISSIONER BRACERAS: Yes, to read them.

VICE CHAIRPERSON THERNSTROM: They should be sent to us.

COMMISSIONER KIRSANOW: I agree with the Vice Chair. In addition to that, in addition to being a matter of courtesy, I think that -- I may be mistaken about this, but either pursuant to our statute or regulations, I think we have to have -- we can't be completely untethered from at least the ministerial act of receiving the reports --

VICE CHAIRPERSON THERNSTROM: Exactly. Yes.

COMMISSIONER KIRSANOW: -- from the SACs, which goes -- and this is a whole separate discussion, but I suppose we are going to have to have a discussion with respect to SACs and the province of the SACs. And that might be part of the strategic planning. I don't know.

VICE CHAIRPERSON THERNSTROM: Okay. Then I have -- go on.

COMMISSIONER BRACERAS: So if I may just tinker with the language here, the last sentence would then read, "Commissioners will receive all SAC reports but will not be asked to vote to accept or reject such
SAC reports."

COMMISSIONER YAKI: I thought Peter was saying we need to formally receive it.

COMMISSIONER KIRSANOW: I don't know about formally receive it.

COMMISSIONER YAKI: Okay.

COMMISSIONER KIRSANOW: I think Commissioner Braceras' language is fine.

COMMISSIONER BRACERAS: All right. So "Commissioners will receive all SAC reports but will not be asked to vote to accept or reject them," period.

VICE CHAIRPERSON THERNSTROM: Period. And I have one other possible suggested amendment. Under 3, "The document may state that it is published by the U.S. Commission on Civil Rights, but it will not contain." Would there be a point of putting a clause in there mentioning what the Commission does -- again, this is just for clarification purposes -- or is that unnecessary?

COMMISSIONER BRACERAS: What we currently do is we insert our boilerplate paragraph on who the Commission is. I think that conveys a seal of approval. I think we publish it. That's all we do.
We received it, and we published it.

VICE CHAIRPERSON THERNSTROM: That's fine.

That's fine.

COMMISSIONER BRACERAS: I mean, that's all we do with respect to these organizations. I want to give them autonomy. I just don't want to endorse what they do, one way or the other.

VICE CHAIRPERSON THERNSTROM: Right.

That's fine. That's fine.

CHAIRPERSON REYNOLDS: I think that this is a significant improvement over what we did back in November. I support it wholeheartedly. And we have been wrestling with coming up with something that does not in any way impinge upon content while at the same time not creating the impression that we own what is said. And this does it, at least in my view.

COMMISSIONER BRACERAS: I would just like to make a slight edit to paragraph 2 to make the language more similar to the language in paragraph 4. I guess I didn't proofread my document quite as carefully as I should have.

So the statement on the front cover of these documents would say, "This report is the work of the" blank "advisory committee to the U.S. Commission for..."
on Civil Rights." That sentence remains the same.

"The views expressed in this report and the findings and recommendations contained herein are those of a majority of the members of the state advisory committee and do not necessarily represent the views of the Commission, its individual members, or the policies of the United States government," period.

I think that's a little bit clearer. And it's the same language in paragraph 4 for the Web site.

VICE CHAIRPERSON THERNSTROM: Good.

CHAIRPERSON REYNOLDS: Additional comments?

(No response.)

CHAIRPERSON REYNOLDS: Okay. All in favor, please say "Aye."

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any objections?

(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?

(No response.)

CHAIRPERSON REYNOLDS: The motion passes unanimously.
COMMISSIONER BRACERAS: May I raise an issue?

CHAIRPERSON REYNOLDS: Sure.

COMMISSIONER BRACERAS: Just to make clear, we already had a working group on SACs. And I think Commissioner Kirsanow just mentioned something about maybe we need to discuss this more in the working group on strategic planning. So I just want to make sure that the jurisdiction of those two working groups is clear and we're not working at cross purposes.

CHAIRPERSON REYNOLDS: Okay. Are you referring to the --

COMMISSIONER BRACERAS: I'm not referring to anything in our materials. I'm only referring to the fact that we just authorized a new working group. And I want to make clear that the parameters of that working group are separate from the parameters of the working group on SACs and that all SAC issues will continue to go through the working group on SACs.

And to the extent that the folks on the strategic planning committee have SAC issues, we should make sure that we put our heads together or they confer with us first to see where we may be
going.

CHAIRPERSON REYNOLDS: Right, right. There is the potential for overlap. And to the extent there is, we will make sure that we come up with an arrangement that satisfies I hope all of us. But that is a good point.

COMMISSIONER BRACERAS: So SAC issues stay with the SAC working group?

CHAIRPERSON REYNOLDS: As a general proposition, yes. And I put that clarification in there only because it's possible that there could be issues that are dealt with by the other working group. It's a possibility. I don't know whether that will happen or not.

COMMISSIONER BRACERAS: Well, presumably the staff director will be involved in both.

CHAIRPERSON REYNOLDS: Yes.

COMMISSIONER BRACERAS: And so if an issues arises in one, he can convey it to members of the other.

STAFF DIRECTOR MARCUS: I would be happy to. I just want to make sure we're on the same page. It seems to me that inevitably to do serious strategic thinking about the agency as a whole, the
strategic planning group will deal with SAC issues, but I will help to facilitate the communications of that.

Those issues were also considered by the SAC working group.

COMMISSIONER BRACERAS: Right. Otherwise there's no need for a SAC working group and we can dissolve it.

- SAC CHAIR TERMS

CHAIRPERSON REYNOLDS: Okay. Here is the next motion. I move that the term of a state advisory committee chair as chair be limited to a duration of two years, notwithstanding whether Congress should at the recommendation of the Commission increase the length of the committee's charter to a longer period.

A SAC chair may be reappointed for no more than two consecutive terms as chair by a vote of the Commission. This term limitation will not affect the terms of the state advisory committee chair as a state advisory committee member.

Is there a second?

COMMISSIONER YAKI: Second.

CHAIRPERSON REYNOLDS: Discussion?

COMMISSIONER BRACERAS: So is this
Commissioner Yaki's motion? Can you --

COMMISSIONER YAKI: Explain it?

COMMISSIONER BRACERAS: -- elaborate on your rationale, please?

COMMISSIONER YAKI: I just think that two years is a good enough time for someone to establish whether or not they have the ability to run a SAC. And if they prove that ability, they then have the option of asking for a second two-year term.

But to the extent that a SAC may get someone who is not as good an administrator or facilitator or team leader I don't want the SAC stuck with that person for four years.

COMMISSIONER BRACERAS: And absent passing this motion, the term is four years, the term as chair?

COMMISSIONER YAKI: Well, the way it works --

STAFF DIRECTOR MARCUS: We could deal with it in different ways. This motion is one way of meeting Commissioner Yaki's interest.

COMMISSIONER YAKI: Well, the reason it came about is that originally it was a four-year term.

COMMISSIONER BRACERAS: Right.
COMMISSIONER YAKI: I understand right now the current policy is two years.

STAFF DIRECTOR MARCUS: Currently the policy is two years. And the formal policy requires that chairs may not serve more than two consecutive terms.

COMMISSIONER YAKI: Why don't we just keep the policy?

STAFF DIRECTOR MARCUS: I take it that is the intent of your motion.

COMMISSIONER YAKI: Right.

COMMISSIONER BRACERAS: No because didn't we just --

STAFF DIRECTOR MARCUS: And just for clarification, the reason why there has to be a motion to continue to do what we are still doing is that we recently had a motion to recommend that Congress in its reauthorization extend the period of the SAC term to four years. And a letter was recently sent to Congress embodying that recommendation.

COMMISSIONER BRACERAS: Right. So the question is if their terms are going to be four years, should the chairmanship be contiguous with --

COMMISSIONER YAKI: And I say no.
COMMISSIONER BRACERAS: -- with the term?

COMMISSIONER YAKI: I say that four years is a long time for -- I mean, let me put it as bluntly as I possibly can. These are individuals who are citizens who volunteer their time. And I think that two years is sufficient for them, for everyone to determine whether or not being a chair versus being a member, if they're up to the task or not. I don't want the SAC to be stuck with a bad chair for four years.

COMMISSIONER BRACERAS: I don't feel strongly one way or the other to be honest with you, although I thought we had heard from some of the SAC people that they prefer to have four-year terms for the chairman. Is that --

COMMISSIONER YAKI: That absolutely is true. And my response to that is so what, seriously. I mean, I have served, a lot of us have served in a number of different positions, volunteer, elected, what have you.

Two-year terms are everywhere in this country. And I just don't see in a situation where you have individuals who may or may not have had this kind of experience in running something that they
should just be given the benefit of the full four years. If they are doing well, they can get reappointed. And that will probably come as a matter of course, but I don't want a SAC to be stuck with dead weight for four years.

CHAIRPERSON REYNOLDS: Yes. Like Commissioner Braceras, I don't feel strongly about this. You make a good point, although I foresee the possibility of a SAC chair disagreeing with the Commission's assessment of his or her performance because basically at the end of the two-year period, we're going to judge them. We're going to judge their performance.

COMMISSIONER YAKI: I think that's a good thing.

CHAIRPERSON REYNOLDS: Okay. I just wanted to put it out there. Additional comments?

(No response.)

CHAIRPERSON REYNOLDS: Okay. All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any objections?

COMMISSIONER BRACERAS: I abstain.

COMMISSIONER MELENDEZ: I abstain, too.
CHAIRPERSON REYNOLDS: Okay.

COMMISSIONER BRACERAS: I don't have a dog in that fight.

VICE CHAIRPERSON THERNSTROM: I don't have a dog in that fight either. I might as well go along.

CHAIRPERSON REYNOLDS: Okay. So before anyone changes their mind, let the record reflect that Commissioners Kirsanow, Yaki, and Vice Chair Thernstrom and the Chair vote in favor of the motion and that Commissioners Braceras and Melendez abstain.

VICE CHAIRPERSON THERNSTROM: I've just been informed by my assistant that it is consistent with the SAC handbook as well. Is that what I understood? Yes.

STAFF DIRECTOR MARCUS: That's true.

CHAIRPERSON REYNOLDS: The next motion.

- ARIZONA SAC REPORT

COMMISSIONER BRACERAS: The next motion is moot. We don't need to vote on the Arizona SAC reports.

CHAIRPERSON REYNOLDS: No, no, no. I'm reading. I skipped it.

VICE CHAIRPERSON THERNSTROM: It was crossed out from the agenda.
COMMISSIONER BRACERAS: Oh, okay. It's still on mine.

CHAIRPERSON REYNOLDS: Okay. I move that the Commission conduct its annual project planning meeting at the Commission meeting scheduled for March 10th, 2006.

Furthermore, as discussions of proposed briefings and projects would make it difficult to conduct a briefing during this meeting, I also move that the previously approved briefing on racial categorization in the census scheduled for March 10th, 2006 Commission meeting be postponed until April 7th of 2006.

Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRPERSON REYNOLDS: Discussion?

VICE CHAIRPERSON THERNSTROM: Did we have people lined up for that briefing? And do we know that they can make it in April?

STAFF DIRECTOR MARCUS: We do not yet have people lined up. This will give us a little more time to line people up and will prevent a situation in which we have an overloaded schedule in March.

VICE CHAIRPERSON THERNSTROM: Okay.
CHAIRPERSON REYNOLDS: Additional comments?

(No response.)

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes").

CHAIRPERSON REYNOLDS: Abstentions?

(No response.)

CHAIRPERSON REYNOLDS: Objections?

(No response.)

CHAIRPERSON REYNOLDS: The motion passes unanimously.

VIII. FUTURE BRIEFINGS

- SCHEDULE FOR FUTURE BRIEFINGS

CHAIRPERSON REYNOLDS: Next up, I move that the Commission hold the previously approved briefings on the following dates: May 5th, 2006, voting rights in the U.S. territories; July 28th, 2006, voter fraud and voter intimidation; September 15th, 2006, effectiveness of historically black colleges and universities; November 17th, 2006, school choice, the Blaine amendments, and anti-Catholicism; December 14th, 2006, religious discrimination in the workplace; January of 2007, minorities in special education; February 2007, minority children in state
foster care and adoption.

Is there a second?

VICE CHAIRPERSON THERNSTROM: I second that.

CHAIRPERSON REYNOLDS: Discussion?

VICE CHAIRPERSON THERNSTROM: Yes. On the February '07, minority children in state foster care and adoption, are we as well covering the question of states that have race-based adoption policies; that is, that have policies in place that insist on an aggressive effort to match the race or ethnicity of the children with the adoptive parents?

CHAIRPERSON REYNOLDS: I think it's a good idea. I don't know the answer to the question, though.

Do we have a concept paper?

STAFF DIRECTOR MARCUS: We do have. I believe we have an approved concept paper. And I think that it is fairly covered within the scope of that concept paper, but I have to confess that it has been so long since I have looked at that concept paper that I would have to -- we can see if we can locate one now.

COMMISSIONER YAKI: We've got a year.
VICE CHAIRPERSON THERNSTROM: Okay. It's just a question that concerns me.

What is the date of the concept paper? I'm sorry. I don't remember it.

STAFF DIRECTOR MARCUS: Well, this actually was a concept paper that was initially approved as a national project during our project planning a year ago. And then it was converted to a briefing when we changed from a model heavy on reports to one heavy on briefings. The initial concept paper would have been from last spring.

We will locate the document. And if it appears that that issue is not fairly within the scope, then we can raise that as an issue for the next meeting.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes. A couple of things. One is although I agree to the postponement of the Patriot Act briefing, I see it gone from the schedule for the remainder of the year, number one.

And, number two, I take it that even though this is the briefing schedule, if other things of other priority come about, that can be changed. Is that correct?
CHAIRPERSON REYNOLDS: Sure. Upon a vote of the Commission, we can reorder the schedule.

COMMISSIONER YAKI: Okay.

CHAIRPERSON REYNOLDS: Additional questions? Comments?

COMMISSIONER BRACERAS: I do have one, but so what is the answer to the issue of the Patriot Act briefing?

CHAIRPERSON REYNOLDS: Well, it's we have to see if we can reconstitute a panel that has credentials that are similar to the original panel that we had put together back in September. And if I'm correct, we're still working on that issue.

COMMISSIONER BRACERAS: All right.

STAFF DIRECTOR MARCUS: We made the determination about a week ago and people pulled out we were not able to have one today.

COMMISSIONER BRACERAS: Right.

STAFF DIRECTOR MARCUS: That was the determination. We would not be able to have it today. Now, I suppose there is a question about whether we want to have one still at a later date or whether it is feasible to do so. And if there is a desire, we would have to figure out when to try to do it for.
CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Well, at this point I wonder if Commissioner Yaki would agree with this. At this point it seems to me, having delayed it as we have, that it would make more sense to have a briefing on the Patriot Act when we have a record of implementation; that is, when we see exactly how that act is being enforced, and can hold a briefing on the questions that are being raised by the enforcement of the act.

COMMISSIONER YAKI: You mean Patriot Act 2 versus Patriot Act 1?

VICE CHAIRPERSON THERNSTROM: Correct.

COMMISSIONER YAKI: Because much of the controversy over the provisions in the current cord don't go to the objections raised by the American Islam or Arab American community that were going to be the primary focus of much of the testimony.

VICE CHAIRPERSON THERNSTROM: But we are going to be late now in weighing in on that conversation. Don't you agree?

COMMISSIONER YAKI: Sure, we're going to be late in doing so. It doesn't meant that the
projection of these kinds of facts and evidence would not weigh on future deliberations of this.

I would say at this point let's not waste time on this discussion now. I think we can discussion it later.

VICE CHAIRPERSON THERNSTROM: All right. Let's do that.

CHAIRPERSON REYNOLDS: Any other?

COMMISSIONER BRACERAS: Yes.

CHAIRPERSON REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I would propose doing the voting rights in the U.S. territories briefing at a later time, primarily because I am not sure if I am going to be able to attend the May 5th meeting and that topic is of particular interest to me.

But if we do that, that may create an opening for Commissioner Yaki's Patriot Act briefing.

CHAIRPERSON REYNOLDS: So you're talking about just a replacement of the May 5th briefing?

COMMISSIONER BRACERAS: Well, I think we should still do the U.S. territories briefing. I just would request that it be held on a different date, a
later date.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: I'm sorry to be so ignorant, but what is the current schedule with respect to, congressional schedule with respect to, the Patriot Act?

COMMISSIONER YAKI: Last I heard they reached semi-accord, partial accord, full accord in the Senate depending on who you talk to. Then it will be moving to the House.

VICE CHAIRPERSON THERNSTROM: And the House schedule looks like it will be?

COMMISSIONER YAKI: They may disagree with the amendment. It just may come over, be taken up on the floor and voted up and down that way because basically the House already passed a version the Senate didn't like and the Senate transcended. So it would just be sending it back in a conference, I think.

VICE CHAIRPERSON THERNSTROM: But the latest is likely to be a floor vote is what?

COMMISSIONER YAKI: I don't know. I mean, they keep on giving 60-day extensions, 30-day
extensions. This one currently runs out I think at the end of this month. If they haven't reached full accord, they will just do another extension.

Let me just say this. I am open to reformatting exactly what this would look like in a broader context, mainly because I have some other things I want to talk about for possible future briefings of the Commission that may have an impact on the schedule.

VICE CHAIRPERSON THERNSTROM: All right. That's fine. I mean, I just think, you know, we want to keep the relevance of the briefing in relation to congressional action in mind.

COMMISSIONER YAKI: Right. I am fully aware of that.

VICE CHAIRPERSON THERNSTROM: Yes.

COMMISSIONER YAKI: And that is why I am saying that there are other issues that I would like to toss out to the Commission.

VICE CHAIRPERSON THERNSTROM: We would be all delighted to hear them.

CHAIRPERSON REYNOLDS: Okay. Commissioner Braceras, would moving the September 15th briefing to the May 5th briefing take care of your --
COMMISSIONER BRACERAS: Switch May and September?

VICE CHAIRPERSON THERNSTROM: Switching May and September? Is that what you are saying?

CHAIRPERSON REYNOLDS: Yes.

COMMISSIONER BRACERAS: Fine, great.

CHAIRPERSON REYNOLDS: Or just it could read basically just put September at the top and then the briefing on voting rights in the U.S. territories would take place in July.

COMMISSIONER BRACERAS: I would prefer it in September. I would prefer switching them.

CHAIRPERSON REYNOLDS: Okay. That works.

Any concerns by any of the other commissioners?

COMMISSIONER YAKI: No.

COMMISSIONER BRACERAS: Thank you.

CHAIRPERSON REYNOLDS: Okay. Any other discussion?

(No response.)

CHAIRPERSON REYNOLDS: On that note, let's vote. All in favor of the revised briefing schedule please say aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any in opposition?
(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?
(No response.)

CHAIRPERSON REYNOLDS: Let the record reflect that Commissioner Kirsanow has stepped out of the hearing room but all other commissioners voted in favor of the revised briefing schedule.

Folks, we are done. We're not done. Commissioner Yaki?

COMMISSIONER YAKI: Yes. I think that we should have a formal thing on the agenda for -- I don't know -- potential new business or something like that because we currently don't and there is no sort of formal process to sort of bring stuff up.

CHAIRPERSON REYNOLDS: Sure, sure.

COMMISSIONER YAKI: I would like to take a point of personal privilege and just say that there are two things that I think I would like the Commission to consider taking a look at.

One is the, at minimum, perhaps sending a letter to the Department of Justice regarding the state of church burnings in the South that occurred in the first week of February.

At least five primarily African American
congregation churches were burned down in the span of two to three days. I think most of them are Baptists. And there is a question of whether it's anti-Baptist, whether it's anti-African American.

I think that I would like to express the Commission's concern about that and urge the Justice Department to investigate these issues to the full scope of their power and ability.

The second one is something that has really been concerning me for the past month. I believe that under certainly the administration of justice is one that I would hope the Commission would consider taking a look at. I would prefer through a hearing because I think that only through a hearing and the issuance and the usage of the subpoena power are we going to be able to get any information or compel people to appear.

I am deeply concerned about the domestic surveillance issue in terms of the unauthorized use of domestic eavesdropping on Americans by the administration.

You know, some may consider this a partisan issue. I don't. I think that we are in our charter the watchdog for civil rights in this country.
And I believe that it would be a good thing for this Commission to do to take a look at what is probably one of the most relevant and I think important issues concerning personal civil rights, personal civil liberties in this country in recent memory.

And I just would like to put that out there. I will try and bring a formal motion for the agenda in March, but I just wanted to raise that issue.

CHAIRPERSON REYNOLDS: Well, next month will be when we will be planning.

VICE CHAIRPERSON THERNSTROM: The planning meeting, yes.

CHAIRPERSON REYNOLDS: Yes. Wouldn't it be appropriate to flush out the idea, discuss it at next month's meeting?

COMMISSIONER YAKI: Yes.

CHAIRPERSON REYNOLDS: Okay. But before we go on, though, as for the first request, I wholeheartedly support it. I think ten churches have been --

COMMISSIONER YAKI: I thought it was ten, yes.

CHAIRPERSON REYNOLDS: Yes, five black,
five white, all Baptist, I believe. So do we need a
vote for this type of issue?

COMMISSIONER BRACERAS: Yes.

CHAIRPERSON REYNOLDS: Do we have a
 consensus on it?

VICE CHAIRPERSON THERNSTROM: Well, I've
got a question on it.

CHAIRPERSON REYNOLDS: Vice Chair
Thernstrom?

VICE CHAIRPERSON THERNSTROM: Before we
send a letter, I would like to know what the Justice
-- you know, I am not in disagreement with you, but I
would like to know what the Justice Department is
already doing so that we don't send a letter to tell
them to do, you know, a slightly insulting letter to
--

COMMISSIONER YAKI: Well, I mean, I would
ask that the staff director, you know, ascertain from
reports or whatever he can what it is that they are
doing and just I think that we ought to express our
concern, at the very minimum, for this and --

VICE CHAIRPERSON THERNSTROM: Well, that's
fine. Sure.

COMMISSIONER YAKI: And in our hope that
we use all resources at our disposal.

VICE CHAIRPERSON THERNSTROM: That's fine. And then I have another question for you, Michael, on the domestic surveillance question. You, as it were, corrected yourself at one point and said you had said civil rights and then you said, "Well, civil liberties," if I was hearing correctly.

It does seem to me a civil liberties issues. This is not a civil liberties organization. So I'm got a little bit of concern about whether this is an appropriate issue for us, as appreciative as I am of the --

COMMISSIONER BRACERAS: I think the jurisdictional hook is administration of justice, right? Is that --

VICE CHAIRPERSON THERNSTROM: I'm sorry?

COMMISSIONER BRACERAS: The jurisdictional hook would be our power to review --

VICE CHAIRPERSON THERNSTROM: I see.

COMMISSIONER BRACERAS: -- questions of the administration of justice.

VICE CHAIRPERSON THERNSTROM: I see. Okay. All right. All right.

COMMISSIONER BRACERAS: And insofar as
there may be equal protection issues in the
administration of justice --

VICE CHAIRPERSON THERNSTROM: Okay.
COMMISSIONER BRACERAS: -- that would
certainly be within our jurisdiction.

VICE CHAIRPERSON THERNSTROM: Fine.
COMMISSIONER BRACERAS: But, more broadly,
we could look more broadly at administration of
justice issues, I think.

VICE CHAIRPERSON THERNSTROM: Okay.
CHAIRPERSON REYNOLDS: No. I think that
it is not difficult to imagine a set of facts that
would bring that broad issue within the purview of the
Commission.

COMMISSIONER YAKI: I'll work with the
staff director to flesh it out for consideration.

STAFF DIRECTOR MARCUS: I would be pleased
to do that.

CHAIRPERSON REYNOLDS: Commissioner
Braceras?

COMMISSIONER BRACERAS: On the issue of
the letter, I believe that one of the reforms that we
initially passed, the working group on reform, was
that text of letters would be circulated --
CHAIRPERSON REYNOLDS: Yes.

COMMISSIONER BRACERAS: -- and commissioners would have an opportunity to sign on or not to sign on. I fully support the idea of drafting a letter. And hopefully we can come up with some language that we would all agree with. I can't imagine that we won't.

I just want to make sure that the process that we put in place is followed and that a letter just doesn't go out on behalf of the full Commission the commissioners haven't had a chance to review.

VICE CHAIRPERSON THERNSTROM: Good.

COMMISSIONER YAKI: I didn't mention certainly, but I wanted to commend Commissioner Braceras for the SAC report also. She is doing excellent work on the process and finishing.

CHAIRPERSON REYNOLDS: Agreed.

COMMISSIONER BRACERAS: Do we need to vote on authorizing the drafting of the letter or --

CHAIRPERSON REYNOLDS: If we want to go through the motions.

COMMISSIONER BRACERAS: Why don't we just formalize it?

CHAIRPERSON REYNOLDS: Okay.
COMMISSIONER YAKI: So moved.

VICE CHAIRPERSON THERNSTROM: I second it.

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any objections?

(No response.)

CHAIRPERSON REYNOLDS: Abstentions?

(No response.)

CHAIRPERSON REYNOLDS: Passes unanimously.

Unless there are other questions, comments, concerns, we are finished for the day.

(Whereupon, the foregoing matter was concluded at 12:20 p.m.)