

U. S. COMMISSION ON CIVIL RIGHTS

- - -
MEETING
- - -

Friday, April 17, 1998

The Commission met in Room 540, YWCA
Building, 624 9th Street, N. W., Washington, D. C.
20425, at 9:30 a.m., MARY FRANCES BERRY, Chairperson,
presiding.

PRESENT:

MARY FRANCES BERRY, CHAIRPERSON
CRUZ REYNOSO, VICE CHAIRPERSON
CARL A. ANDERSON, COMMISSIONER (Via Telephone)
ROBERT P. GEORGE, COMMISSIONER (Via Telephone)
A. LEON HIGGINBOTHAM, COMMISSIONER (Via Telephone)
CONSTANCE HORNER, COMMISSIONER
YVONNE Y. LEE, COMMISSIONER
RUSSELL G. REDENBAUGH, COMMISSIONER

RUBY MOY, STAFF DIRECTOR

STAFF PRESENT:

BARBARA BROOKS
KI-TAEK CHUN
JAMES S. CUNNINGHAM
LYNN DICKINSON
BOBBY DOCTOR (Via Telephone)
PAMELA DUNSTON
M. CATHERINE GATES
EMMA GONZALEZ-JOY
EDWARD HAILES, JR.
MYRNA HERNANDEZ

STAFF PRESENT: (Continued)

GEORGE M. HARBISON
CAROL-LEE HURLEY
FREDERICK ISLER
JACQUELINE L. JOHNSON
REGINALD MARTIN
STEPHANIE Y. MOORE, GENERAL COUNSEL
PETER REILLY
BERNICE RHODES
CHARLES RIVERA
MIGUEL SAPP, PARLIAMENTARIAN
MAXINE SHARPE
PATRICE STANLEY
CATHERINE WALLACE
AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

KAREN CENCE
ADERSON FRANCOIS
CHARLOTTE PONTICELLI
WILLIAM L. SAUNDERS, JR.
KRISHNA TOOLSIE
CYNTHIA VALENZUELA

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9:30 a.m.

CHAIRPERSON BERRY: The meeting will come to order.

The first item is the approval of the agenda. And let me point out that Item Number IX, which is the 1996 Los Angeles Racial and Ethnic Tensions Hearing Report has not been sent to you, will not be discussed, and the staff expects it to be sent to you in about two weeks.

Is that right, Ruby?

STAFF DIRECTOR MOY: Yes.

CHAIRPERSON BERRY: Okay. They had some final work to do on it and it's a big report. So that will be then on the agenda for next time.

You'll ask me to put it on for next time? Is that correct?

STAFF DIRECTOR MOY: Yes, I will.

CHAIRPERSON BERRY: Okay.

COMMISSIONER HORNER: Madam Chair?

CHAIRPERSON BERRY: Yes.

COMMISSIONER HORNER: Is there any reason why we should approve the Executive Summary separately?

CHAIRPERSON BERRY: Well, it's an entirely different hearing.

1 COMMISSIONER HORNER: Oh, okay.

2 CHAIRPERSON BERRY: The other item -- let's
3 see. What else.

4 We received a report from the taskforce on
5 SACs, and I want to thank the taskforce very much for
6 its work. But some Commissioners believe that, one,
7 they haven't really had time to analyze it; and two,
8 the last time we did a taskforce report, Commissioner
9 Redenbaugh, we asked the Regional Directors to give us
10 their comments before we actually approved it.

11 So, in light of the unreadiness of some folk,
12 I thought what I'd do is ask the Staff Director to ask
13 them again -- their comments -- and put it on the
14 agenda for next time, if you do not have any real
15 problems with that.

16 COMMISSIONER REDENBAUGH: None at all.

17 CHAIRPERSON BERRY: Okay.

18 And the other thing I would point out while
19 I'm at it is -- this is my error, I think. I did not
20 point out that Commissioner Lee had asked to be on the
21 taskforce. I forgot all about it, to tell you the
22 truth.

23 We discussed it at some meetings. That's all
24 right in terms of what has happened to date, according
25 to what Commissioner Lee has said to me.

1 Is that correct, Commissioner Lee?

2 COMMISSIONER LEE: Yes.

3 CHAIRPERSON BERRY: But she would like to be
4 included in any future efforts of that taskforce.

5 COMMISSIONER REDENBAUGH: It's certainly fine
6 with me.

7 CHAIRPERSON BERRY: Okay.

8 VICE CHAIRPERSON REYNOSO: We promise.

9 CHAIRPERSON BERRY: So with those comments, I
10 would ask for approval of the agenda, in light of the
11 comments that I've made.

12 VICE CHAIRPERSON REYNOSO: So moved.

13 CHAIRPERSON BERRY: A motion. I'm sorry. I
14 didn't even get a motion. I'm just still thinking about
15 Nashville. I'm from Nashville, as you know, so my
16 family and everybody -- nobody is injured but they're
17 having a lot of problems associated with the tornado.

18 In any case, could I get a motion for the
19 approval of the agenda?

20 VICE CHAIRPERSON REYNOSO: So moved.

21 COMMISSIONER HORNER: Seconded.

22 CHAIRPERSON BERRY: And how about a second?
23 Okay.

24 All those in favor, indicate by saying aye.

25 (Chorus of ayes.)

1 Okay.
2 Opposed?
3 (No response.)
4 Nobody said anything. So ordered.
5 How about the minutes of March 6, 1998.
6 Could I get a motion on the minutes, please?
7 VICE CHAIRPERSON REYNOSO: So moved.
8 COMMISSIONER LEE: Seconded.
9 CHAIRPERSON BERRY: Discussion?
10 Any changes anybody needs to -- would like to
11 have made?
12 (No response.)
13 If not, then all in favor, indicate by saying
14 aye.
15 (Chorus of ayes.)
16 Opposed?
17 (No response.)
18 So ordered.
19 Announcements?
20 Yes.
21 COMMISSIONER HORNER: Madam Chair, I don't
22 know what part of the agenda -- maybe it's Staff
23 Director's Report. I want to correct a typo in the
24 transcript. Should I do that now under minutes or
25 should that be done under Staff Director's Report?

1 CHAIRPERSON BERRY: Why don't you mention it
2 right at the beginning of the Staff Director's Report,
3 if you don't mind.

4 COMMISSIONER HORNER: Okay.

5 CHAIRPERSON BERRY: Announcements.

6 The first announcement is last time I
7 announced to you that Eddie Hailes was leaving the
8 Commission to go to another organization and how much
9 we regretted his leaving.

10 Well, he has now reconsidered and it is my
11 great pleasure to announce that he is going to stay on
12 for a while. I just wanted to let you know that he
13 will still be here as Deputy General Counsel for the
14 foreseeable future.

15 The other is that the Commissioners received
16 a memo from the Staff Director about the ADA hearing.

17 Ruby, would you tell us what that's about,
18 that item?

19 STAFF DIRECTOR MOY: Right. The ADA hearing
20 which we had scheduled for May 7th and 8th, we found
21 out that the President's Commission on the Americans
22 with Disabilities were going to have their Commission
23 meeting in New Orleans, starting on May 5th through the
24 8th of May.

25 So, assuming that some of the people that we

1 would want to have at our Commission meeting would be
2 going down to New Orleans, we felt it would be in the
3 best interests of the Commission that we postpone ours
4 to a later date, at which time we would like to conduct
5 a poll of the Commissioners to determine suitable
6 dates.

7 CHAIRPERSON BERRY: We have some experience
8 with this. Commissioners may remember there was some
9 other hearing that conflicted with something or other.
10 I've forgotten what it was. And we had all this
11 trouble trying to subpoena people who couldn't come.
12 And so I understand the point that you are making.

13 Have you polled us yet or you are polling us?

14 STAFF DIRECTOR MOY: No. We will poll you.

15 CHAIRPERSON BERRY: You will poll us. Okay.

16 All right.

17 And this has no impact on the report that
18 Fred is doing for the statutory report. Is that
19 correct?

20 STAFF DIRECTOR MOY: That is correct. That's
21 correct.

22 CHAIRPERSON BERRY: Okay. All right.

23 The other one is that, as you know, probably,
24 the Commission's reauthorization bill was passed in the
25 House on the suspension calendar, I think, on

1 March 18th, and we don't know what the plans are for
2 Senate action. But if they act, I guess they'll take
3 it up sometime after they come back from a recess.

4 Those are all the announcements I have.

5 Anybody else have any announcements?

6 (No response.)

7 Okay. Let's go to the Staff Director's
8 Report.

9 Commissioner Horner? Please.

10 COMMISSIONER HORNER: Yes, Madam Chair. On
11 the transcript for the Friday, March 6th, 1998 meeting,
12 page 77, five lines from the bottom, I'm recorded as
13 saying, "Madam Chair, he can even ask that of a private
14 citizen." It should read: "He can even ask that as a
15 private citizen."

16 CHAIRPERSON BERRY: Okay.

17 Will you see to it that that's corrected,
18 Staff Director?

19 STAFF DIRECTOR MOY: Yes, I will.

20 CHAIRPERSON BERRY: All right.

21 COMMISSIONER HORNER: Thank you.

22 And the other item I want to raise -- maybe I
23 should defer until after the Staff Director's made her
24 report -- has to do with the newsclips.

25 CHAIRPERSON BERRY: Okay.

1 Staff Director, what about this item on the
2 Asian Pacific Islander -- the briefing we had on -- you
3 sent us a memo about that, too. Isn't that right?

4 STAFF DIRECTOR MOY: Yes, I did. It was to
5 follow-up on --

6 CHAIRPERSON BERRY: Refresh my recollection.

7 STAFF DIRECTOR MOY: It was to follow-up on
8 the Asian Pacific American petition briefing that we
9 had last year. And there were a number of calls from
10 both the press and the participants trying to find out
11 what additional action the Commission would be doing.

12 I sent out a memo to the Commissioners to
13 find out what further action each of you would like to
14 consider and -- may I read them?

15 CHAIRPERSON BERRY: Sure, if you think that
16 will help us.

17 STAFF DIRECTOR MOY: The Commission may
18 either decide to publish a transcript of the briefing
19 or the Commission may decide to publish the transcript
20 along with an Executive Summary of the briefing, or the
21 Commissioners or their Special Assistants may decide to
22 write joint or separate statements expressing their
23 views of the briefing, or the Commission may choose to
24 select any combination of the above.

25 COMMISSIONER HORNER: Or none of the above.

1 VICE CHAIRPERSON REYNOSO: Or none of the
2 above.

3 CHAIRPERSON BERRY: Commissioner -- Vice
4 Chair, and then Commissioner Redenbaugh. I think you
5 had your hand up first.

6 VICE CHAIRPERSON REYNOSO: There's yet
7 another alternative. I was really struck by that
8 briefing and the testimony that we heard, so I was
9 pleased to get these recommendations from the Staff
10 Director. But it seems to me we might go a little bit
11 differently.

12 Seems to me that it would be a good idea to
13 publish the transcripts and Executive Summary because
14 that just makes it easier for folk to know what's
15 there. But then I think we should have a third
16 section, akin to findings and recommendations. We
17 might even call it observations, something that we
18 would all agree with.

19 If there's a problem with that, I think there
20 would be value to the first two, but it seems to me
21 that if we as a Commission have some observations about
22 what we heard and so on, that would be valuable.

23 So, maybe after some discussion, I'd like to
24 move that.

25 CHAIRPERSON BERRY: Okay.

1 Commissioner Redenbaugh?

2 COMMISSIONER REDENBAUGH: I just wanted to
3 clarify.

4 Staff Director, you said Commissioners or
5 their Assistants may write. You didn't -- did you mean
6 to imply that the Assistants may write?

7 CHAIRPERSON BERRY: Write what?

8 STAFF DIRECTOR MOY: Not the Assistants. I
9 think that they would be talking with you about any
10 statements or comments you may wish.

11 COMMISSIONER REDENBAUGH: On behalf of their
12 Commissioners?

13 STAFF DIRECTOR MOY: Commissioners. Correct.

14 COMMISSIONER REDENBAUGH: Okay. Yes. I just
15 wanted clarification.

16 (Crosstalk.)

17 There was once talk -- at one time that we
18 had a ninth Commissioners. I didn't want to expand the
19 total to 16 or 17.

20 VICE CHAIRPERSON REYNOSO: A statement by an
21 Assistant with a footnote thanking the Commissioner for
22 his thoughts.

23 (Laughter.)

24 CHAIRPERSON BERRY: Yes, Commissioner Horner?

25 COMMISSIONER HORNER: Just a couple of

1 thoughts. I don't have a firm conclusion on this and
2 want to hear what other Commissioners think, but a
3 couple of thoughts.

4 Typically we don't do anything after we've
5 had a briefing. I'm not aware of any time I've been on
6 the Commission when we've done anything other than have
7 the briefing. So this would represent a departure from
8 the norm. And I would ask the question of the Staff
9 Director as to what the cost of doing this would be.

10 And the reason I ask that is, as I mentioned,
11 I'm going to bring up the question of our receiving the
12 newsclips we've historically received. And I know that
13 even after many Commissioners last time suggested a
14 concern about the curtailment or even termination of
15 the newsclips, we were told that this was being done
16 because of severe budgetary constraints.

17 So my first question would be, given that we
18 have severe budgetary constraints, why should we depart
19 from our typical course of action in this case and
20 spend money to do something additional when we're
21 cutting back in places where we may not want to cut
22 back.

23 And secondly, I would observe that the
24 transcript of the hearing, I believe, is available to
25 any citizen who wishes to request it, so that it's not

1 a matter of our not making it available. It is
2 available under FOIA. It's a question of whether we
3 want to spend the money on this rather than something
4 else going forward.

5 CHAIRPERSON BERRY: Do you have any idea how
6 much it costs? Maybe you didn't know that you were
7 going to be asked.

8 STAFF DIRECTOR MOY: No, I don't at this
9 time.

10 CHAIRPERSON BERRY: If you don't know, you
11 can say you don't know.

12 STAFF DIRECTOR MOY: No. I'm sorry, but I
13 don't.

14 COMMISSIONER HORNER: Madam Chair, I think
15 we'd better start asking this question a lot.

16 (Laughter.)

17 CHAIRPERSON BERRY: Or if you think anybody
18 knows -- I don't know if George knows off the top of
19 his head just sitting there in the chair. If he
20 doesn't, he should say he doesn't.

21 STAFF DIRECTOR MOY: George, do you know how
22 much it would cost, off the top of your head?

23 COMMISSIONER HORNER: Which option are we
24 talking about here?

25 CHAIRPERSON BERRY: Commissioner Lee wanted

1 to say something.

2 COMMISSIONER LEE: I know that we have to be
3 concerned about the cost constraints and what have you,
4 but my recollection of the briefing was that was one of
5 the Commission activities that was very well received.
6 The information was very timely. And one of the
7 responsibilities of this Commission is to keep the
8 public informed of civil rights concerns and issues.

9 And the one comment that came out from all
10 the panels was that the APA community felt that they
11 were being scapegoated as foreigners. And even after
12 that briefing there were a lot of good suggestions from
13 the panels, which I thought -- I, myself -- would like
14 to see us look into further.

15 After that briefing, during the Olympics,
16 MSNBC had a headline saying "American beats Kwan for
17 the gold medal." Michelle Kwan, as you all know, is
18 native born, 100 percent American. So that, to me,
19 exacerbated the need for the country to really know
20 about APA's role in this country.

21 And also, the information that came out from
22 the briefing would be very good beneficial information
23 to share with the public.

24 So, I think that in spite of whatever cost
25 this may be, but that the ultimate benefit should, I

1 hope, fall away whatever fiscal concern that we have.

2 CHAIRPERSON BERRY: Commissioner Redenbaugh?

3 COMMISSIONER REDENBAUGH: I think I'd like to
4 say the obvious, which is that it isn't that we have a
5 fiscal concern. It is that anything we do implies and
6 ensures that there's something else that we then don't
7 do. And so I'm very happy to do this but only in the
8 understanding of what it would cost, and therefore,
9 then what would we not do.

10 So that we, as Commissioners be more
11 responsible than we have been up until now, when in the
12 past we have just said to the staff, "Do this, do this,
13 do this," and then complained when it wasn't done.

14 So, I again am going to take the position
15 that that's not responsible. And although this is a
16 small thing, it is an instance of -- an example of why
17 we have the 1993 report being published in '98.

18 So, the merit of the project isn't sufficient
19 argument for its acceptance. It has to be, in my view,
20 assessed against the other things which we then would,
21 as a group, choose to not do.

22 CHAIRPERSON BERRY: Vice Chair?

23 VICE CHAIRPERSON REYNOSO: Madam Chair, I
24 think those concerns are manifestly legitimate. It
25 will take some staff time presumably, certainly if we

1 do an Executive Summary, and it will take some cost for
2 printing.

3 And I think perhaps our decisions on whether
4 or not to publish a briefing might be an ad hoc
5 decision on whether or not we think that briefing is
6 worth publishing. But this one was somewhat different,
7 though.

8 Remember, we had a formal petition for a
9 hearing. Then we decided that maybe a briefing would
10 do, and we communicated with the petitioners and
11 apparently had an agreement that the briefing would be
12 a better way to proceed, which, of course, was cheaper
13 for us. It seemed to have satisfied them, at least at
14 that point. So this has been a little bit different.

15 And apparently we've had inquiries thereafter
16 in terms of what's happening; are we going to publish
17 something. It seemed to me that certainly I found --
18 after having heard the briefing, I found it really
19 compelling.

20 I had taken it from the fact that we got
21 these alternative suggestions from the Staff Director
22 that it was doable in terms of finances and all that.
23 But I think it certainly would be proper -- Russell
24 mentioned that we ask the staff to do this and that,
25 and we have, perhaps without deliberating enough what

1 that means that we won't do or won't do as quickly.
2 And maybe we can ask the Staff Director to give us that
3 -- more precisely what doing this would mean in light
4 of any delays for some other matters.

5 But I had assumed simply since we had the
6 report from the Staff Director saying these are some
7 alternatives that it was doable. Maybe she might want
8 to respond to that.

9 CHAIRPERSON BERRY: How about if we just
10 defer this and ask the Staff Director to find out how
11 much it would cost and say that we presumptively have
12 no objection in principle to the idea of some important
13 subject that we think is important being the subject of
14 an Executive Summary after a briefing and that this was
15 clearly an important subject, if I hear the comments of
16 those who commented, but that we will defer considering
17 -- and you didn't make a motion, so we don't have to
18 worry about that -- whether we would do it or not,
19 based on what kind of recommendation we get after
20 there's some analysis done of the dollar amounts and so
21 on.

22 Why don't we just do that?

23 Yes, Commissioner Horner?

24 COMMISSIONER HORNER: That would -- I agree
25 we should do that. I would like to see the transcript

1 or testimony. In other words, I would like to review
2 the product between now and our decision time so as to
3 refresh my memory as to the value of the hearing. How
4 timely it remains, for instance.

5 COMMISSIONER ANDERSON: Madam Chair?

6 CHAIRPERSON BERRY: Yes -- just a second,
7 Commissioner Anderson. Just one second, please. I'll
8 recognize you.

9 Is there a point of information?

10 COMMISSIONER ANDERSON: No.

11 CHAIRPERSON BERRY: There's a point of
12 information here, and I'll recognize you then.

13 MS. MOORE: Thank you, Madam Chair.

14 It would be useful for us in attempting to
15 assess cost figures to know which option is the
16 Commission's preference.

17 Also, we could do this in two ways. We could
18 do a printed report or we could also take the tactic
19 that was taken with the Church Fires publication.

20 So, if there's some preference, --

21 VICE CHAIRPERSON REYNOSO: Which was in-
22 house?

23 MS. MOORE: Which was in-house. Yes.

24 So if there's preference amongst the
25 Commissioners, that would help us, rather than coming

1 up with all kinds of options.

2 COMMISSIONER HORNER: Madam Chair, we can't
3 express a preference until we know the costs associated
4 with each option. So I suggest that we receive a cost
5 figure associated with each option so that the
6 Commissioners can make their decision based on full
7 information.

8 In other words, it's not for us to decide and
9 then you go cost it out. It's for you to cost out the
10 options and then for us to decide.

11 CHAIRPERSON BERRY: May I just say that with
12 those of you who are proposing that this be done, since
13 you proposed it, Vice Chair --

14 VICE CHAIRPERSON REYNOSO: Right.

15 CHAIRPERSON BERRY: -- in the sense of your
16 proposal, if it were to be approved, would you be
17 satisfied with the staff giving you the lowest possible
18 cost option, given our budget situation?

19 Would that satisfy your concern that
20 something be done since you're the guy who proposed it?

21 Others may have different views, but --

22 VICE CHAIRPERSON REYNOSO: Yes. I think so.

23 CHAIRPERSON BERRY: Okay. You don't know.

24 Okay. All right.

25 Okay.

1 So -- yes, Commissioner Lee?

2 COMMISSIONER LEE: I just have one question.
3 Is it normal practice that when we do the briefing, the
4 transcript is always available for anyone who wants it?

5 CHAIRPERSON BERRY: Yes.

6 COMMISSIONER LEE: That's already a cost?

7 CHAIRPERSON BERRY: Yes.

8 COMMISSIONER LEE: So right now, we're just
9 talking about making it more available, more widely --

10 COMMISSIONER HORNER: Printing and
11 disseminating.

12 MS. MOORE: And I would add that the Public
13 Affairs Office has already prepared an Executive
14 Summary.

15 VICE CHAIRPERSON REYNOSO: Oh.

16 CHAIRPERSON BERRY: Could we recognize
17 Charlie, Staff Director, so he can say whatever he
18 wants to say?

19 STAFF DIRECTOR MOY: Yes. Charles Rivera?

20 CHAIRPERSON BERRY: Charles Rivera. Sorry.
21 I'll get to you, Carl, in just a second.

22 MR. RIVERA: Thank you.

23 I just wanted to reiterate what Stephanie
24 just said our procedure has been all along. We have
25 prepared already an edited version of the transcript

1 and an Executive Summary. Those two things are ready.

2 The normal procedure is we make these
3 available through the library. They're done in-house.
4 And we also, through the grapevine, let people know who
5 -- certainly the people who attended and organizations
6 who had an interest in the briefing topic that the
7 transcript and Executive Summary is available. Indeed,
8 we send them out to those folks.

9 We can go further and in this case send
10 copies to a special list we have of Asian American
11 journalists. And that's fairly easy to do.

12 So in terms of immediacy or a quick response
13 and cost, we can address both keeping the cost low and,
14 I think, doing something that would be useful for
15 people who were interested in the topic to begin with.

16 I don't have a cost figure for printing in-
17 house, duplicating 100 copies or 200 copies. We can
18 get that pretty quickly.

19 CHAIRPERSON BERRY: Okay. All right. So
20 then we know what we're talking about, getting that
21 number, whatever that number is, and figuring it out.
22 And it is available already and there is a summary.

23 Commissioner Anderson?

24 COMMISSIONER ANDERSON: Thank you. Many of
25 my concerns have been addressed.

1 I would say that one of the biggest cost
2 factors is not just the dollar amount but staff hours
3 involved in putting something together. That's a very
4 important consideration. Although the budget dollar
5 amounts may fall, I don't know how much more burden we
6 want to put on staff.

7 Charles, if what you've already done in terms
8 of editing is editing which goes to grammar and
9 typographical kinds of things rather than deleting
10 paragraphs or sections even, it seems to me that
11 perhaps the most cost effective way to reproduce what
12 you have is to make 100-150 copies of that available.

13 I think something that is available to the
14 public and available for distribution now or in 30 days
15 is a much better response by the Commission than
16 waiting another two or three months for typesetting and
17 binding and that kind of a project.

18 So I think what I'd like to see, at least on
19 costs in terms of staff hours and budget, is how
20 quickly in a cost effective way we can produce the
21 transcript with a summary.

22 CHAIRPERSON BERRY: Okay. Thank you.

23 Yes, Vice Chair?

24 VICE CHAIRPERSON REYNOSO: Madam Chair,
25 apparently from what Charlie tells us, the folk that

1 are most immediately involved have already had access
2 to the work that Charlie and his department have done.
3 And I think that's very good in terms -- no, not yet?

4 MR. RIVERA: We haven't mailed any out.

5 VICE CHAIRPERSON REYNOSO: Oh, you haven't
6 mailed any out. Oh. But it's been done? That is, the
7 work has been -- so apparently what I had thought would
8 be Commission staff time apparently won't in fact be
9 involved in this situation since the work has been
10 largely done.

11 So we're really talking about the expense of
12 sending some in-house publication out to those people
13 most immediately involved, or we're talking about maybe
14 printing something or maybe doing both; sending
15 something out immediately to the people most involved
16 but then maybe printing it. That would take, I'm sure,
17 several months, as was suggested. But that might then
18 go to the library and so on.

19 So I personally would like to get figures on
20 both options.

21 CHAIRPERSON BERRY: But I would assume that
22 in the meantime Charlie would go ahead and do whatever
23 it is he normally does.

24 VICE CHAIRPERSON REYNOSO: Yes.

25 CHAIRPERSON BERRY: Because we're not making

1 any --

2 VICE CHAIRPERSON REYNOSO: Let the record
3 show that he's nodding.

4 COMMISSIONER ANDERSON: Madam Chair?

5 CHAIRPERSON BERRY: Yes, Commissioner
6 Anderson.

7 COMMISSIONER ANDERSON: Thank you.

8 Can Mr. Rivera answer my inquiry? The
9 editing he's done is summarizing of the transcript and
10 it's still a complete transcript? That is, it's
11 modifying the grammar and this kind --

12 MR. RIVERA: It's the latter. It's copy
13 editing for spelling, grammar, that kind of cleaning
14 up, without any condensing or any touching of
15 substance.

16 That really basically is all we ever do.

17 COMMISSIONER ANDERSON: So we're basically
18 ready to go if we wanted to produce a transcript of the
19 briefing?

20 MR. RIVERA: I'm sorry. I didn't quite hear
21 that.

22 COMMISSIONER ANDERSON: We're ready to go
23 then if we want to produce a transcript of the
24 briefing? We don't have to allot more staff time?

25 MR. RIVERA: No -- yes. The answer is yes.

1 We are ready to go.

2 In addition to that, we have an Executive
3 Summary, which by definition compresses everything. It
4 really makes a reference to each of the people who
5 contributed to the briefing and in one paragraph tries
6 to summarize a major point they made.

7 By definition, it's very selective.

8 CHAIRPERSON BERRY: Yes, Commissioner
9 Anderson?

10 COMMISSIONER ANDERSON: While we're getting
11 the cost estimates, maybe Charles can circulate or the
12 Staff Director could circulate the summary so we could
13 take a look at the Executive Summary while we wait for
14 the cost estimates.

15 MS. MOORE: Well, the Executive Summary is
16 presently under review by the OGC staff. Of course,
17 we've been working jointly and provided Charlie with
18 the verifications to the transcript, which are now
19 ready. And we're awaiting further word from the
20 Commission as to whether the Executive Summary was
21 warranted. So we have not put any time into reviewing
22 that at this point.

23 CHAIRPERSON BERRY: But the Executive
24 Summaries are given legal sufficiency review also?

25 MS. MOORE: Yes.

1 CHAIRPERSON BERRY: Everything in this agency
2 is given legal sufficiency review. No wonder we have
3 to have lawyers because -- it's true. Under our rules,
4 everything that comes out of here has to have legal
5 sufficiency, and we, as Commissioners, often forget
6 that.

7 Yes? Were you saying something Carl?

8 COMMISSIONER ANDERSON: I was going to ask
9 whether the General Counsel might have an estimate as
10 to -- the length of time in terms of end point.

11 MS. MOORE: Well, again, in light of your
12 concern, we certainly share it in terms of conserving
13 our human resources on matters that may end up being
14 unnecessary.

15 The Executive Summary is some -- maybe 30
16 pages, I think. It can be --

17 MR. RIVERA: It's shorter than that.

18 MS. MOORE: Is it shorter? It can be done in
19 a day. It's just whether we should expend the
20 resources to do so, if that's the Commission's desire.

21 CHAIRPERSON BERRY: I think this is taking
22 too much time and is too involved, so I would like some
23 closure and deferral on this matter. But I'll
24 recognize you, Commissioner Lee.

25 COMMISSIONER LEE: Can you clarify for me

1 when we talk about the Executive Summary, I thought we
2 were talking about the Executive Summary prepared by
3 the staff from the briefing.

4 MS. MOORE: That's correct.

5 COMMISSIONER LEE: Okay.

6 MS. MOORE: And one was done simply -- the
7 Public Affairs Office took the initiative to produce an
8 Executive Summary. It is done. It is produced. It
9 would take one day to review it because it's an
10 Executive Summary of a briefing. It is not a complex
11 task. So, that's what we have.

12 CHAIRPERSON BERRY: So let us not get in our
13 minds -- let us hope we do not get the Executive
14 Summary, briefings and all that into some process where
15 they have to go through some process of Commissioner
16 approval and all this kind of stuff.

17 But anyway, on this one, let us just say that
18 it will be sent to folks, Commissioners, and the Staff
19 Director will tell us how much more money it would cost
20 to do some of these things we're suggesting here. And
21 we'll just defer consideration of this until the next
22 time or until that is done and consider it again.

23 And in the meanwhile, the staff will do
24 whatever it is the staff normally does, whatever that
25 is, about these things.

1 Anybody else have any questions about
2 anything else on the Staff Director's Report?

3 Commissioner Horner?

4 COMMISSIONER HORNER: Yes, Madam Chair. Our
5 press reports have been -- press clips have been
6 dwindling down to four pages less frequently delivered.
7 They are obviously very much less comprehensive than
8 they were. And I seem to recall considerable
9 expression of Commissioner desire to continue to
10 receive the press clips at the last meeting.

11 I'm not sure whether we actually reached a
12 conclusion on that or not, but there seems to have been
13 a decision to curtail the clips. And I'm concerned
14 about that decision.

15 I know Commissioner Higginbotham isn't here
16 today, but I recall he raised this subject to begin
17 with and was quite vociferous on it. And I would
18 continue to want to see these clips.

19 I know we've already devoted staff time to
20 producing an Executive Summary of a briefing that the
21 Commission hasn't even decided it wishes to publish and
22 it seems to me that kind of staff time may be going on
23 that could be devoted to our press reports.

24 But I would like to hear what other
25 Commissioners think, if anything, on this.

1 CHAIRPERSON BERRY: First, let's ask the
2 Staff Director.

3 Has there been any change in the procedure
4 for doing press clips?

5 STAFF DIRECTOR MOY: No, Madam Chair. Based
6 on the discussion at the last meeting and asking for a
7 background check into the situation, plus cost versus
8 other things, it's the opinion that we are going to
9 continue with the press reports at this time.

10 But I want to point out the fact that in our
11 Public Affairs Unit, we have lost several people on
12 staff, and so you will be getting them, not timely
13 right now. And sometimes you'll see that the press
14 reports will come to you several days at once.

15 We're trying to come up with some sort of
16 solution. Possibly with the influx of summer interns
17 we might be able to get some to help out in that regard
18 until the Public Affairs Unit is up to speed again.

19 COMMISSIONER HORNER: Madam Chair, what's
20 missing is the very rich and informative collection of
21 news reports from localities around the nation.

22 Now, I think everybody on this Commission
23 reads The New York Times every day. And if I had to
24 choose between getting The New York Times and getting a
25 Greenwood, Mississippi newspaper, I would prefer the

1 latter. I don't have access to that. And what we're
2 getting is just The New York Times, The Wall Street
3 Journal, The Washington Post and maybe the Bureau of
4 National Affairs reports.

5 Those give you kind of predigested mainstream
6 reports. They don't give you insight into what's
7 troubling people around the country.

8 CHAIRPERSON BERRY: Well, Staff Director,
9 could you -- since the Commissioners did not decide to
10 change the way things were done, as I recall the
11 discussion, the discussion was to maintain the status
12 quo. Could you in your management of that unit with
13 Charles figure out a way to continue to produce what
14 they have been producing in the past, including the
15 regional reports, and make sure that they are
16 distributed to the Commission?

17 Since we made no decision to change it, we
18 would assume that it wouldn't be changed and that
19 whatever resource allocations you have to make to get
20 that done within the unit, that you and Charlie would
21 figure out some way to get that done. So, could you
22 please just do that?

23 STAFF DIRECTOR MOY: Yes.

24 COMMISSIONER HORNER: I think the missing
25 parts are Burrell's, which means paying someone to do

1 it rather than using staff.

2 CHAIRPERSON BERRY: News clippings.

3 STAFF DIRECTOR MOY: Well, we do have a
4 subscription, as Barbara Brooks explained to us at the
5 last Commission meeting.

6 Charlie looks like he's anxious to speak
7 again.

8 CHAIRPERSON BERRY: Charlie? Okay.

9 MR. RIVERA: Burrell's clippings arrive
10 approximately twice a month. There will be times when
11 you get a thin package because --

12 CHAIRPERSON BERRY: Good morning, Judge.

13 COMMISSIONER HIGGINBOTHAM: Good morning.

14 Sorry I'm a little late, but I'm here.

15 CHAIRPERSON BERRY: Okay. We're on the Staff
16 Director's Report.

17 COMMISSIONER HIGGINBOTHAM: Okay.

18 CHAIRPERSON BERRY: Go right ahead.

19 MR. RIVERA: We'll remain very cognizant of
20 the Commissioners' wishes to be thorough in our
21 clipping and we'll continue to do that and as soon as
22 Burrell's comes in. On occasion we will get also a
23 thick packet from one of the regions. Several of the
24 regions are very good at that but they may come in
25 about once every two or three weeks at most.

1 CHAIRPERSON BERRY: So could you please then
2 just without further ado make sure that it continues to
3 be done that way, unless the Commissioners decide to do
4 it differently, which we haven't done yet.

5 STAFF DIRECTOR MOY: So noted.

6 CHAIRPERSON BERRY: Thank you.

7 Is that all right with that, Commissioner
8 Horner?

9 COMMISSIONER HORNER: Yes. Thank you very
10 much.

11 CHAIRPERSON BERRY: Any other item under the
12 Staff Director's Report?

13 Commissioner Redenbaugh?

14 COMMISSIONER REDENBAUGH: Yes. I have a
15 question or a concern, I guess, and it goes to the
16 portion of the report dealing with the GAO and OPM --
17 it is OPM?

18 CHAIRPERSON BERRY: Yes.

19 COMMISSIONER REDENBAUGH: I get all these
20 initials mixed up.

21 One of the themes of those two reports was
22 that we don't know where our money went and don't know
23 where the time went in sufficient detail and aren't
24 able to accomplish as much as one thinks we should.

25 But in the Staff Director's Report on

1 compliance with those, all we really have here is a
2 report of effort being made but no report of progress
3 and no report of when those issues and changes will be
4 complete.

5 It seems that we're continuing in the
6 practices that were the complaint of two of those
7 investigations.

8 CHAIRPERSON BERRY: Could we then,
9 Commissioner Redenbaugh, in response to your point, ask
10 the Staff Director to give us in the Staff Director's
11 Report from now on not just simply a report on the fact
12 that progress is being made but time lines for when
13 these tasks are expected to be accomplished? Would
14 that satisfy your --

15 COMMISSIONER REDENBAUGH: It would.

16 CHAIRPERSON BERRY: Okay.

17 So, could you -- it's under the section on
18 the GAO, the AI's, the CFR, the -- I've forgotten what
19 the other thing is.

20 STAFF DIRECTOR MOY: Page 5.

21 CHAIRPERSON BERRY: MIS or something.
22 Whatever.

23 Could you -- like when you tell us that the
24 staff is working on it and so on, give us some
25 indication of timing on that; when you think we should

1 expect to receive whatever it is under the item? And
2 that that would be forward looking?

3 STAFF DIRECTOR MOY: Yes. So noted.

4 CHAIRPERSON BERRY: Does that satisfy your
5 concern, Commissioner Redenbaugh?

6 COMMISSIONER REDENBAUGH: It will be
7 definitely a start. Thank you.

8 (Laughter.)

9 CHAIRPERSON BERRY: Anything else under the
10 Staff Director's Report?

11 (No response.)

12 If there's nothing else under the Staff
13 Director's Report, let's go to Item Number V, which is
14 the SAC committee appointment for Texas.

15 Could I get a motion to approve, so we can
16 have some discussion?

17 VICE CHAIRPERSON REYNOSO: So moved.

18 CHAIRPERSON BERRY: Can I get a second?

19 COMMISSIONER LEE: Seconded.

20 CHAIRPERSON BERRY: Discussion.

21 COMMISSIONER HORNER: Madam Chair, I had said
22 at the last meeting that until we resolved the issues
23 surrounding SAC appointments and reports I wouldn't be
24 prepared to vote on any SAC appointments, so I'd just
25 note that.

1 CHAIRPERSON BERRY: Okay.

2 Anybody else have any comments on the package
3 of appointments -- appointment package for Texas?

4 Who's out there, anyway?

5 VICE CHAIRPERSON REYNOSO: Madam Chair, --

6 CHAIRPERSON BERRY: Is Commissioner --

7 Commissioner Anderson, are you there?

8 COMMISSIONER ANDERSON: Yes.

9 CHAIRPERSON BERRY: Commissioner George, are
10 you there?

11 COMMISSIONER GEORGE: Yes.

12 CHAIRPERSON BERRY: Judge Higginbotham, are
13 you there?

14 COMMISSIONER HIGGINBOTHAM: Yes.

15 CHAIRPERSON BERRY: I just wanted to make
16 sure you were there.

17 Yes, Vice Chair?

18 VICE CHAIRPERSON REYNOSO: Madam Chair, it
19 seems to me that we should proceed. While we were
20 asked to do some more thinking about our procedures, it
21 seems to me not inappropriate to proceed with this
22 recommendation under the procedures we have already
23 accepted. So, I'm prepared to vote in the affirmative.
24 But obviously if folk want to wait, why we can wait.

25 CHAIRPERSON BERRY: Any other comments?

1 COMMISSIONER GEORGE: Madam Chairman?

2 CHAIRPERSON BERRY: Yes.

3 COMMISSIONER GEORGE: Where do things stand
4 on the procedural reform question?

5 CHAIRPERSON BERRY: We said earlier that the
6 taskforce has made a -- sent us a memo and a report but
7 that some Commissioners were unready to discuss it at
8 this meeting.

9 And it also -- normally, we send that, or in
10 the past we did, send it to the Regional Directors for
11 their comment before we passed it. So that I suggested
12 -- and Commissioner Redenbaugh didn't seem to have any
13 problems with it -- that we discuss it at the next
14 meeting.

15 So the taskforce has reported. We're just
16 waiting for comments from the Regional Directors, to
17 see what they say, and to make sure that everybody's
18 had a chance to read and digest it.

19 So that's where that stands.

20 COMMISSIONER GEORGE: So did Commissioner
21 Redenbaugh -- does this mean that we can vote and
22 resolve the matter at the next meeting?

23 CHAIRPERSON BERRY: Commissioner Redenbaugh
24 would anticipate that, I think, because I'm telling the
25 Staff Director, on behalf of you Commissioners, to get

1 the comments from the Regional Directors and send them
2 to us so we would have those and be prepared.

3 And it will be on the agenda as an item for
4 the next meeting.

5 COMMISSIONER GEORGE: Okay.

6 CHAIRPERSON BERRY: Commissioner Redenbaugh,
7 do you want to comment on that?

8 COMMISSIONER REDENBAUGH: Yes. I agree with
9 that. And it is my belief, Robbie, that we can do that
10 at the next meeting.

11 COMMISSIONER GEORGE: Well, if that's the
12 case, then I would very much prefer to delay further
13 action on the SAC appointments until we have the vote
14 and get this resolved at the next meeting.

15 CHAIRPERSON BERRY: Okay. Would the maker of
16 the motion care to withdraw the motion and then we
17 simply defer this until next time?

18 VICE CHAIRPERSON REYNOSO: That's fine.

19 CHAIRPERSON BERRY: Does the seconder agree?

20 COMMISSIONER LEE: Yes.

21 CHAIRPERSON BERRY: All right. We will
22 simply defer the SAC appointment for Texas until next
23 time.

24 COMMISSIONER GEORGE: And any others, as
25 well?

1 CHAIRPERSON BERRY: We don't have -- I don't
2 think there is another. Let's see.

3 (Pause.)

4 STAFF DIRECTOR MOY: We have reports.

5 CHAIRPERSON BERRY: No. There isn't another
6 appointment.

7 COMMISSIONER GEORGE: Oh, I'm sorry. I'm
8 looking at the May -- I'm sorry. So we have coming up
9 in May, Hawaii, Montana and North Dakota, Utah and West
10 Virginia?

11 CHAIRPERSON BERRY: Right. Yes.

12 Okay. Item Number VI, State Advisory
13 Committee Reports: one from Kansas, "Race Relations in
14 Rural Western Kansas Towns; and one from Minnesota,
15 "Focus on Affirmative Action."

16 Could I get a motion from -- let's take these
17 one by one.

18 Could someone give me a motion on the Kansas
19 Report?

20 COMMISSIONER ANDERSON: So moved.

21 CHAIRPERSON BERRY: Any second?

22 VICE CHAIRPERSON REYNOSO: Seconded.

23 CHAIRPERSON BERRY: Second. Okay.

24 Any discussion?

25 Yes, Commissioner Redenbaugh?

1 COMMISSIONER REDENBAUGH: I'm actually -- let
2 me say this carefully. I support the passage of these
3 two SAC reports. However, there's an unresolved issue
4 for me that will impact how I vote on these, and it's
5 the following.

6 It's come to my attention and probably
7 everyone else's that some of the -- I believe the
8 Illinois SAC is going to publish a report the
9 Commission declined to accept.

10 Is that your understanding?

11 CHAIRPERSON BERRY: From press accounts,
12 which is the same accounts I guess you -- I don't know
13 whose source of information we have.

14 COMMISSIONER REDENBAUGH: I have only the
15 press account as the source.

16 CHAIRPERSON BERRY: I think it was Illinois
17 and there were two other states, Indiana and another
18 one. Michigan, I think, --

19 COMMISSIONER REDENBAUGH: Michigan, perhaps.

20 CHAIRPERSON BERRY: -- that indicated that
21 they were publishing their SAC reports privately.

22 COMMISSIONER REDENBAUGH: Right. Well, if
23 they have the right to do that, then there certainly is
24 no point in us as Commissioners voting to accept or not
25 accept these reports.

1 CHAIRPERSON BERRY: I don't see the --

2 COMMISSIONER REDENBAUGH: Connection?

3 CHAIRPERSON BERRY: Right. Because we can
4 decide that we either accept or reject something and
5 then it's a separate issue if we reject it, what
6 happens. But if we accept it, it means we wanted to
7 accept it, so we've given it -- that it at least has
8 that much of our imprimatur. We received it and we
9 accepted it and we therefore will print it as some
10 advice to us.

11 If we reject it, then it becomes an issue of
12 what happens to it then.

13 In other words, I don't think that it's
14 absolutely necessary for us to refuse to accept a
15 report we want to accept because somebody else might do
16 something.

17 Why would we do that to people who do -- you
18 know, play by the rules and submit a report to us and
19 we like it, and then we decide that we don't want to
20 accept it just because somebody else did something?

21 COMMISSIONER REDENBAUGH: I see our point, in
22 part. What are the rules?

23 CHAIRPERSON BERRY: That reports are
24 presented to us for our acceptance or rejection. You
25 were the guy who helped to write the rules, so I'm sure

1 you know that.

2 COMMISSIONER REDENBAUGH: Right.

3 (Crosstalk.)

4 What are the rules that govern the behavior -
5 - yes. Well, I do remember that part. But there's a -
6 -

7 COMMISSIONER GEORGE: Can I interrupt,
8 Russell?

9 COMMISSIONER REDENBAUGH: Certainly.

10 CHAIRPERSON BERRY: Russell, will you let him
11 interrupt you?

12 COMMISSIONER REDENBAUGH: Yes.

13 CHAIRPERSON BERRY: Okay.

14 Commissioner George?

15 COMMISSIONER REDENBAUGH: I'm used to that.

16 COMMISSIONER GEORGE: What we vote on is
17 about whether to publish the report, isn't it?

18 CHAIRPERSON BERRY: To accept it.

19 COMMISSIONER GEORGE: And this means that
20 it's for publication by the U.S. Commission on Civil
21 Rights.

22 CHAIRPERSON BERRY: Yes. We haven't actually
23 said for printing, but the assumption is we accept it
24 to be printed by the Commission. We accept it, yes.

25 COMMISSIONER GEORGE: For publication.

1 CHAIRPERSON BERRY: Right.

2 COMMISSIONER GEORGE: I think that means
3 Russell's got a good point here.

4 CHAIRPERSON BERRY: What?

5 COMMISSIONER GEORGE: Well, that if the
6 reports can be published by SACs independently of their
7 approval for publication by the Commission, then it
8 raises the question of what the force and effect is of
9 our voting on the reports.

10 I mean, I think that it would be a good idea
11 really to settle this question definitively, and I
12 don't know if we can do it, the Commission. It's a
13 somewhat complicated legal question, it seems to me.
14 We ought to get this issue settled as a matter of
15 principle.

16 Now, I don't want to hold -- these are two
17 pretty good reports, I think. In fact, the one I think
18 from Minnesota is quite good, an important example of
19 the SACs of the kind of thing that really should be
20 done. But on the other hand, I think Russell is right.
21 There's serious point of principle here which would
22 seem to make voting on reports a kind of redundant
23 unnecessary thing.

24 CHAIRPERSON BERRY: Would you like to --
25 Carol-Lee would like to say something. Carol-Lee

1 Hurley.

2 MS. HURLEY: The principal difference,
3 Commissioners, is that when you accept a report for
4 publication, the Commission then expends further
5 resources to publish it. When you reject it, the
6 Commission's involvement ends.

7 I don't know anything about the legal
8 position that the General Counsel or other people would
9 have to comment on. But from a practical matter, it's
10 a matter of whether we expend our resources further.

11 CHAIRPERSON BERRY: Commissioner --

12 COMMISSIONER ANDERSON: Madam Chair?

13 CHAIRPERSON BERRY: Yes, but I'll recognize
14 Commissioner Redenbaugh first. He had his hand up.

15 COMMISSIONER REDENBAUGH: Well, I want to go
16 to the legal question. So, Carl, if your question
17 takes us away from that, I'll defer.

18 COMMISSIONER ANDERSON: No. I was moving
19 toward a legal question myself. Let me rethink.

20 COMMISSIONER REDENBAUGH: Please proceed.

21 CHAIRPERSON BERRY: Well, is there anyone who
22 wants to say something about -- a question other than
23 the legal question?

24 (No response.)

25 No one does.

1 Okay. Go right ahead, Commissioner Anderson.

2 COMMISSIONER ANDERSON: Thank you.

3 It seems to me that they are State Advisory
4 Committees. Now, they are advisory committees to us.
5 So, our vote to accept a report entails publication of
6 the report and dissemination to the public and to
7 Congress. But I think the most important aspect of our
8 acceptance of the report is that we have made a
9 determination that we will accept the advice we are
10 receiving from the State Advisory Committee.

11 That's why they fall under the Federal
12 Advisory Committee Act.

13 And so, there is a very important principle
14 involved here; that is, primarily, their role and their
15 character as an advisory committee. And I think it's
16 inescapable that their first responsibility is to
17 advise us. And therefore, the vote that we take on
18 whether we accept their advice is a determinative one.

19 CHAIRPERSON BERRY: Staff Director, you said
20 you were getting a legal opinion, if I recall. You
21 sent us something or said something or you did get a
22 legal opinion, I'm sure. Or if it's a legal question,
23 what is the legal advice that we get from our own staff
24 concerning this matter?

25 STAFF DIRECTOR MOY: Madam Chair, may I defer

1 to our General Counsel?

2 CHAIRPERSON BERRY: Okay.

3 STAFF DIRECTOR MOY: Thank you.

4 CHAIRPERSON BERRY: Stephanie?

5 MS. MOORE: If the issue is whether State
6 Advisory Committees have -- are prohibited from
7 privately publishing reports rejected by the
8 Commission, that is an issue of first impression. It
9 is not resolved by the FACA and it is not prohibited by
10 the FACA.

11 Clearly, arguments can be made both ways, but
12 I would direct your attention to Section 10(b) of the
13 FACA which provides that the reports -- I'm sorry --
14 the records, reports, working papers, drafts, studies
15 or other documents which were made available to or
16 prepared for or by each advisory committee shall be
17 available for public inspection and copying at a single
18 location in the offices of the advisory committee or
19 the agency to which the advisory committee reports
20 until the advisory committee ceases to exist.

21 Our advisory committees are not
22 discretionary. They are mandated by statute.
23 Therefore, their working papers, drafts and studies are
24 mandated under the FACA to be provided for public
25 inspection at any rate.

1 The additional step of privately printing
2 those documents is not addressed in the FACA.

3 CHAIRPERSON BERRY: Okay. Further comment or
4 discussion?

5 Yes, Commissioner Redenbaugh.

6 COMMISSIONER REDENBAUGH: This question is
7 for the General Counsel, Stephanie, then.

8 Then I presume from that that there is no
9 copyright or intellectual property issue involved here?

10 MS. MOORE: With respect to what?

11 COMMISSIONER REDENBAUGH: Their reports.

12 MS. MOORE: I'm not sure I understand the
13 question. I mean, once printed is there a copyright
14 issue? I'm not --

15 COMMISSIONER REDENBAUGH: If a SAC writes a
16 report, who is the owner of the intellectual property
17 in that report?

18 MS. MOORE: Well, based on FACA, it appears
19 that the information must, again, be provided to the
20 public. Who actually owns it, the government or the
21 private entity, the SAC members as volunteers, again is
22 a question of first impression.

23 I have found no legal research -- no cases
24 that definitively resolve that. And obviously case law
25 is made on the basis of arguments on both sides of the

1 issue.

2 COMMISSIONER REDENBAUGH: Thank you.

3 CHAIRPERSON BERRY: Who out there is seeking
4 recognition?

5 COMMISSIONER ANDERSON: Commissioner
6 Anderson.

7 CHAIRPERSON BERRY: Commissioner Anderson.

8 COMMISSIONER ANDERSON: Thank you.

9 Does the Freedom of Information Act give the
10 public the right to copy the documents in addition to
11 the right to inspect the documents?

12 MS. MOORE: Well, FACA itself provides for
13 public inspection and copying at a single location.
14 The Freedom of Information Act, if applicable, would
15 provide further provision of distribution of that
16 document. But of course, under FOIA, you have the
17 circumstance where certain members of the public would
18 be able to obtain copies of documents otherwise
19 releasable at no cost.

20 For example, if they are educators or seeking
21 the material for public use -- public interest. I'm
22 sorry.

23 CHAIRPERSON BERRY: But -- just a moment,
24 Carl. Did you understand that answer, Carl?

25 COMMISSIONER ANDERSON: I believe I did.

1 CHAIRPERSON BERRY: I didn't understand the
2 first -- you said FACA itself provides for the copying?

3 MS. MOORE: Yes.

4 CHAIRPERSON BERRY: Oh, okay.

5 Yes, Commissioner Anderson?

6 COMMISSIONER ANDERSON: We could take the
7 position on principle that State Advisory Committees
8 are not empowered to print and release a report which
9 we have not approved. At the same time then a private
10 individual could come in under the Freedom of
11 Information Act, request a copy of the report, print it
12 and distribute it at their own expense.

13 MS. MOORE: Is that question for me?

14 Well, first of all, let me just be clear.
15 FACA -- and there is case law to the effect that
16 documents that are releasable under FACA, the agency
17 cannot force individuals to have to go through FOIA to
18 obtain those documents. So that's the first point.

19 Any record, report -- any of the documents
20 I've referred to in this provision are required by FACA
21 to be made available under public inspection.

22 Now, whether this Commission can make a
23 policy determination that the SAC should not publish is
24 again a difficult question and one of first impression.
25 The SACs are not prohibited under the statute that

1 permits their existence not to publish reports.
2 Therefore, it's again not a definitive legal
3 conclusion.

4 COMMISSIONER ANDERSON: Madam Chair?

5 CHAIRPERSON BERRY: Yes, Commissioner
6 Anderson.

7 COMMISSIONER ANDERSON: I'm just putting the
8 hypothetical that were we to conclude as a policy of
9 the Commission that State Advisory Committees were not
10 to publish and distribute a report we did not approve,
11 a member of the public could still come in, and because
12 of the Freedom of Information Act request the document,
13 and as the General Counsel -- I understand her to say,
14 does not have to go through the lengthy Freedom of
15 Information Act procedures but could just come in and
16 say this document has to go in public inspection and
17 produce the document, read the document, copy it and
18 then they're able to distribute the copies for
19 themselves.

20 So in a way, the public can get access to it
21 even if we held it back. And you may not on your own
22 do that.

23 CHAIRPERSON BERRY: Right.

24 COMMISSIONER ANDERSON: That's all I'm
25 asking.

1 MS. MOORE: That's right.

2 CHAIRPERSON BERRY: So if that's correct,
3 then anybody could get it, print it and disseminate it
4 themselves. Is that what you're saying, Carl?

5 COMMISSIONER ANDERSON: Correct. And those
6 of us who are concerned about principles here regarding
7 the relationship between the SACs and the Commission,
8 could establish that principle. Whether or not the
9 Commission wants to do that, is another thing.

10 CHAIRPERSON BERRY: Right. If we want to put
11 more constraints on volunteers who are SAC members who
12 choose to publish than on an ordinary person who is not
13 a member of the SAC, so that they could then get
14 somebody who's not a member of the SAC to go get the
15 document and print it and then publish it and then copy
16 it and publish it rather than doing it themselves.

17 I guess that's basically --

18 COMMISSIONER ANDERSON: That's one
19 characterization of it. Yes.

20 CHAIRPERSON BERRY: Okay.

21 Yes, Vice Chair?

22 VICE CHAIRPERSON REYNOSO: Then the next
23 legal issue would be can a SAC member in his or her
24 capacity as a private citizen do all that.

25 And I just raise that next legal issue

1 because I think we need to be reminded that in the
2 relationship of group to group in a democracy in terms
3 of the various departments of government, we've
4 succeeded in living and coexisting this long out of a
5 sense of deference and respect for other bodies that
6 may view life a little bit differently than we. And I
7 just would hope that we will accept this experience in
8 that light and live our lives.

9 CHAIRPERSON BERRY: There is a motion on the
10 floor to approve the "Race Relations in Rural Western
11 Kansas Towns" report, which is the motion we're
12 addressing.

13 Is there further discussion about any of
14 these matters?

15 Yes, Commissioner Horner?

16 COMMISSIONER HORNER: Yes, Madam Chair.

17 I'd like to ask the General Counsel to tell
18 me if anyone of the public can go into our library and
19 take any report that has been produced by the
20 Commission and reproduce it at will.

21 MS. MOORE: Published reports of the
22 Commission are copyrighted.

23 COMMISSIONER HORNER: Okay. So what we're
24 talking about is a distinction between not published
25 and published.

1 Is it permissible for someone to take a
2 document produced through appropriated funds, such as a
3 SAC report, and reproduce it and sell it?

4 MS. MOORE: I would think not, Commissioner
5 Horner. But again, it's --

6 COMMISSIONER HORNER: What would be the
7 distinction once the product is within their
8 possession? What is the law that would deter the sale
9 of such a product?

10 Could a SAC member use the sale of such a
11 document as a fundraiser for a local school, for
12 instance?

13 MS. MOORE: I'm sure it would be prohibited,
14 as would --

15 COMMISSIONER HORNER: Are you?

16 MS. MOORE: -- as would copying a Commission
17 report and selling it.

18 COMMISSIONER HORNER: No. But I mean a SAC
19 report not received by -- or not accepted by the
20 Commission.

21 MS. MOORE: You mean not published?

22 COMMISSIONER HORNER: Not published. Yes.
23 Would it be permissible to take that document produced
24 with appropriated funds, reproduce it and sell it? And
25 if not, why not?

1 MS. MOORE: Well, again, I don't really see
2 the distinction you're making between either published
3 or unpublished reports or accepted or rejected reports.

4 COMMISSIONER HORNER: Well, you said if it's
5 been published, it's copyrighted, or the Chair said
6 that. And therefore, I understand that. But we're not
7 dealing with a copyrighted product now. We're dealing
8 with a SAC report that has not yet been received.

9 MS. MOORE: Well, you're asking a number of
10 questions, Commissioner Horner, and whether it's
11 copyrighted or not the sale of that document by
12 unauthorized persons could indeed constitute an illegal
13 action.

14 COMMISSIONER HORNER: Under what law?

15 MS. MOORE: Under -- there are a gazillion
16 laws. I can't tell you --

17 CHAIRPERSON BERRY: Well, she's not
18 researched this.

19 General Counsel, what is the relevance of
20 this question to the facts that we have at hand?

21 MS. MOORE: I have no --

22 COMMISSIONER HORNER: I can explain, since I
23 asked the question.

24 MS. MOORE: Okay.

25 COMMISSIONER HORNER: What I'm trying to get

1 at is the control the United States Government has over
2 products produced with appropriated funds.

3 CHAIRPERSON BERRY: Oh, I see.

4 COMMISSIONER HORNER: And I would personally
5 feel a lot better if GAO would tell us, "No problem."
6 And I think I would be prepared to resume voting on SAC
7 reports when told that since, as the General Counsel
8 has said -- as she's said -- many times she has said
9 this morning it's not certain; there's not enough case
10 law. She's used an expression I've never heard before
11 called first impression.

12 CHAIRPERSON BERRY: A case of first
13 impression.

14 COMMISSIONER HORNER: Yes. I'm not a
15 legalise man. Therefore, I would like to have
16 something slightly more definitive.

17 MS. MOORE: But Commissioner Horner, the
18 point that I'm making, appropriated funds are used both
19 for copyrighted materials and non-copyrighted.

20 COMMISSIONER HORNER: Right.

21 MS. MOORE: The second step of selling that
22 is not covered under copyright law. It could very well
23 fall under criminal statutes. So there's an abundance
24 of ways that one could attack the illegal sale of
25 government property.

1 COMMISSIONER HORNER: Is it government
2 property once it's been reproduced by a private citizen
3 or is it the private citizen's property? Whose
4 property is it?

5 MS. MOORE: This goes back to Commissioner
6 Redenbaugh's question. And I cannot -- I do not know
7 the answer to that.

8 It appears that the FACA provides that the
9 documents, unpublished or not that are compiled by the
10 SAC are part of the public domain, simply by requiring
11 that they be inspected and copied.

12 And also, by the way, there's also a FACA
13 provision that provides that whether published or not,
14 the reports of SACs, State Advisory Committees, also be
15 transmitted to the Library of Congress. So people can
16 get them from the Library of Congress. They can get
17 them through the agency; that is, the mother agency to
18 the SAC committee.

19 CHAIRPERSON BERRY: Yes, Commissioner George?

20 COMMISSIONER GEORGE: There may be something
21 to the copyright question. I'm not sure. But it's
22 not the one that's my concern.

23 My concern, and maybe the interesting
24 question which Stephanie informs us is one of first
25 impressions, is the question of whether the SACs can

1 effect a sort of end run around the Commission's power
2 to authorize publication or decline to authorize
3 publication of these documents. And that I really
4 think we do need to resolve, although I want to find a
5 way not to hold these current reports that are before
6 us hostage to that.

7 I have a question. And again, it might be
8 appropriate for the General Counsel to answer, if she
9 knows the answer. I certainly don't know the answer.
10 And that is, what is the status as far as publication
11 and dissemination is concerned of reports that are
12 prepared by our staff as reports of the U.S. Commission
13 on Civil Rights, which then we decline to accept or to
14 put out as reports.

15 When we have rejected reports that have been
16 prepared by the staff and maybe we've attempted to
17 reach resolution or compromise or just failed and the
18 report goes down, would it be possible for say members
19 of the staff to raise funds and disseminate copies of
20 the rejected report?

21 MS. MOORE: No. In my opinion, clearly not.
22 That is a government produced document. The employees
23 of the Commission are government employees. The SAC
24 members are not. So I would -- it would be, in my
25 opinion, no, you could not do that.

1 CHAIRPERSON BERRY: Is it because of FACA,
2 because FACA specifically covers the advisory committee
3 reports, or is it some other --

4 MS. MOORE: No. FACA is relevant to the
5 State Advisory Committees and the releasability of
6 their reports and is silent on the question of
7 publication.

8 On the question of whether a government
9 employee on government time can produce a report that
10 is rejected by this Commission and then go out and
11 publish it, in my legal opinion, no, they could not.
12 That is government property.

13 COMMISSIONER HORNER: Madam Chair, don't our
14 staff -- our staff does write these reports.

15 CHAIRPERSON BERRY: Just a minute. Just a
16 minute. Hold on. Two people are talking at once.

17 Were you finished, Commissioner George?

18 COMMISSIONER GEORGE: No. I just wanted to
19 follow up. I can see the logic of what Stephanie said.
20 I'm not clear whether that's sufficient actually to
21 bear the weight of a legal distinction here. And I
22 guess she's not either because she says the SAC case is
23 a case of first impressions and we don't know the
24 answer.

25 I think it's very important to get the answer

1 to this. This really is an important question.

2 MS. MOORE: Well, the answer may only come
3 through litigation, Commissioner George. That's what
4 first impression means, that the issue has not been
5 addressed.

6 CHAIRPERSON BERRY: He knows that. He's a
7 lawyer.

8 COMMISSIONER GEORGE: Yes. I wonder, though,
9 if it would be possible for us -- excuse me for
10 thinking out loud here, but I think we need to find a
11 solution if we can, short of litigation.

12 Would it be possible for us to take expert
13 legal counsel on this to get an opinion that -- we
14 could at least -- so we would at least know where we
15 stood with respect to any further potential litigation
16 on this.

17 CHAIRPERSON BERRY: Commissioner George?

18 COMMISSIONER GEORGE: Yes?

19 CHAIRPERSON BERRY: Let me just say one
20 thing. I think the SAC members could just as easily
21 say we are making an end run around their advisory role
22 as we can say or you can say that they're trying to
23 make an end run around the power of the Commission.
24 Because they see themselves as having given us their
25 advice and then we don't like it or some people don't

1 like it, so they reject it.

2 They've given us their best advice, their time,
3 their energy -- and on a balanced SAC, because our
4 rules require that they're balanced -- and they give it
5 to us. We don't like it, so, therefore, we want to
6 deep six it so nobody can ever read it or see it or
7 know that they did the work.

8 And FACA, I will --

9 Just a second, please. I'll recognize you.

10 FACA permits them -- I'm giving you what I
11 perceive to be the SAC side of this argument, which
12 isn't being made here. That in fact they, having done
13 this work, and FACA protects them, that insofar as it
14 will be at least out there so the public can look at it
15 at a library at least and see that they did the work.

16 And so I am not prepared -- others may be on
17 this Commission, but I'm not prepared to seek any legal
18 opinion from anybody outside about any of this. And
19 I'm not prepared to support trying to be punitive
20 toward the SACs. And I'm not prepared to say anything
21 other than I'm happy that FACA permits them to have
22 their drafts available for inspection by the public.

23 It's the public's money that's been spent and
24 it's their volunteer service that did it. And if they
25 give us advice we don't like, then that's something

1 that happened.

2 Others maybe willing to vote to take all
3 kinds of legal steps and the like, but I'm not prepared
4 to do anything about the SACs. I'm just very grateful
5 for their work. And even when I don't agree with them,
6 I appreciate the work that they do. And I don't want
7 to demoralize the SACs any further by us being
8 contentious about it.

9 COMMISSIONER HIGGINBOTHAM: Madam Chair?

10 CHAIRPERSON BERRY: Yes. Now, who's seeking
11 recognition?

12 COMMISSIONER HIGGINBOTHAM: Leon
13 Higginbotham.

14 CHAIRPERSON BERRY: Yes, Judge. Yes, Judge
15 Higginbotham.

16 I didn't hear you. Yes, Judge?

17 COMMISSIONER HIGGINBOTHAM: It seems to me
18 that we are really degenerating I think to the smallest
19 common denominator of thought if we don't have
20 sufficient tolerance of letting the views go to the
21 public of people who dare to disagree with our coveted
22 positions.

23 It seems almost absolutely inconsistent with
24 the spirit of the concept of civil rights for the Civil
25 Rights Commission to object to a SAC publishing their

1 report about which we disagreed. And we should not try
2 to have that censorship role.

3 Who is hurt by this? Who is hurt in the
4 public by the public learning that someone dared
5 disagree with us, and therefore evaluate to the
6 marketplace of ideas the quality of our thought versus
7 the quality of theirs.

8 None of us has sufficient wisdom for the
9 ages. None of us are so omniscient that we should have
10 this reluctance or fear or concern about the public
11 learning that someone disagreed.

12 Whether the SAC comes out for affirmative
13 action or against affirmative action; whether it comes
14 out for any position which may be different than mine,
15 I have no objection to that report being known so that
16 it gets into the marketplace of ideas. And that's what
17 happened in the history of the change of civil rights
18 laws.

19 And why should we be the censors?

20 CHAIRPERSON BERRY: There's a motion on the
21 floor.

22 COMMISSIONER ANDERSON: Madam Chair?

23 CHAIRPERSON BERRY: Yes, Commissioner
24 Anderson?

25 COMMISSIONER ANDERSON: Thank you.

1 I would like to think that we are discussing
2 a problem that's not going to happen again. And I
3 would hope that as we review that procedure -- and
4 we'll be doing that next meeting and maybe the meeting
5 after that -- that some of the concerns raised in this
6 discussion will carry over into the whole question of
7 how can we have a procedure and a relationship with the
8 SACs that will prevent this sort of thing from
9 happening again.

10 I think that all of us can do a better job in
11 ensuring that we won't have the situation again.
12 That's where I would like to be; work to a situation in
13 which we don't have this problem again.

14 However, I do think it's an important
15 principle if we're going to say that our vote merits
16 issues such as this. If it doesn't matter, then let's
17 just disregard the Commissioners' voting on this and
18 the SAC submits their report and we print the report
19 and distribute it.

20 I, as well as anybody, am willing to engage
21 in the marketplace of ideas and take my chances, but I
22 do think if we're asked to vote substantively and we
23 have to apply standards, each of us hopefully have
24 objective standards and we have SACs with objectivity
25 but we come out in different ways. But as I see it,

1 that's the responsibility of the Commission.
2 Otherwise, let's forget about voting on any report and
3 just whatever the SAC produces, publish it.

4 But I would hope that we can move on and look
5 in the procedures to make sure that we don't have this
6 situation again.

7 CHAIRPERSON BERRY: Vice Chair?

8 VICE CHAIRPERSON REYNOSO: Madam Chair, our
9 procedures are not going to prevent this situation from
10 coming up again. I just want to say that I align my
11 own thoughts with Judge Higginbotham. I think this is
12 much ado about nothing. I think we should let them do
13 what they want to do if it's not prohibited, and we
14 should do what our own procedures and law require us to
15 do as Commissioners.

16 CHAIRPERSON BERRY: Yes, Commissioner
17 Redenbaugh?

18 COMMISSIONER REDENBAUGH: I hope this will be
19 the last. I'm going to vote for the motion, very
20 gladly, and for the other SAC reports that are before
21 us. But I want to thank my Commissioners because
22 although this has been time consuming and sometimes
23 tedious, it's been very instructive for me. It has
24 informed me a lot.

25 It's also proven to me that there is a kind

1 of Gresham's law that also works about talk as well as
2 money. And in the future I'll feel more willing to
3 vote against SAC reports now that I understand that I'm
4 not stifling free speech and not stifling the
5 marketplace of ideas.

6 COMMISSIONER GEORGE: Madam Chairman?

7 CHAIRPERSON BERRY: Yes.

8 COMMISSIONER REDENBAUGH: I'm ready to
9 proceed.

10 CHAIRPERSON BERRY: Thank you.

11 I'm going to call on one more person and I'm
12 going to call for the question on this because we have
13 to move on.

14 Yes, Commissioner George?

15 COMMISSIONER GEORGE: There is a serious
16 issue of legal principle here. Anybody ought to be
17 able to see it. It's absurd to believe that this has
18 anything to do with censorship or restrictions on the
19 marketplace of ideas.

20 There is an issue. Stephanie indicated it's
21 an issue of first impressions. It's an issue that is
22 very likely to come up again. We ought to resolve it
23 before we just carry on voting on SAC reports.

24 If the SAC takes the position that our
25 behavior is an end run around their rights, that should

1 be resolved, too. I didn't claim that there weren't
2 two sides to the issue. But there's a real issue here
3 with two sides that ought to be argued out.

4 So while I'm prepared to vote to support
5 these two SAC reports, I think we've got to think very
6 seriously in the future, prospectively, about what the
7 meaning of having votes on these SAC reports is, if we
8 don't settle the question of whether they can be
9 published without our vote to publish them.

10 CHAIRPERSON BERRY: Okay. I'm calling for
11 the question.

12 All in favor of the -- yes?

13 COMMISSIONER ANDERSON: May I ask for a roll
14 call since so many of us are on the telephone?

15 CHAIRPERSON BERRY: Okay.

16 Somebody keep track.

17 All those in favor of the "Race Relations in
18 Rural Western Kansas Towns" report, let me just go down
19 the list here.

20 Commissioner Anderson?

21 COMMISSIONER ANDERSON: Madam Chair, I'm
22 going to abstain on this report and others until we
23 resolve the issue.

24 CHAIRPERSON BERRY: Commissioner Anderson.
25 abstains.

1 Berry, yes.
2 George?
3 COMMISSIONER GEORGE: Yes.
4 CHAIRPERSON BERRY: Higginbotham?
5 COMMISSIONER HIGGINBOTHAM: Yes.
6 CHAIRPERSON BERRY: Horner?
7 COMMISSIONER HORNER: Abstain.
8 CHAIRPERSON BERRY: Lee?
9 COMMISSIONER LEE: Yes.
10 CHAIRPERSON BERRY: Commissioner Redenbaugh?
11 COMMISSIONER REDENBAUGH: Yes.
12 CHAIRPERSON BERRY: Vice Chair?
13 VICE CHAIRPERSON REYNOSO: Yes.
14 CHAIRPERSON BERRY: The report is passed by a
15 vote of 6 and two abstentions.
16 Could I have a motion on the "Focus on
17 Affirmative Action" report from Minnesota?
18 COMMISSIONER REDENBAUGH: So moved.
19 CHAIRPERSON BERRY: Can I get a second?
20 VICE CHAIRPERSON REYNOSO: Seconded.
21 CHAIRPERSON BERRY: All those -- any
22 discussion?
23 (No response.)
24 Okay.
25 COMMISSIONER LEE: Actually, I just want to

1 make one minor comment. On page 8, I think there was a
2 typo on "the median income for the whites is \$9,000."
3 I think it should be \$29,000. So if they could check
4 on that before they publish it.

5 CHAIRPERSON BERRY: So with the understanding
6 that they will check the accuracy of that one point,
7 all those in favor -- let me go down the list again.
8 This is a Minnesota report.

9 Commissioner Anderson?

10 COMMISSIONER ANDERSON: Abstain.

11 CHAIRPERSON BERRY: Berry, yes.

12 Commissioner George?

13 COMMISSIONER GEORGE: Yes.

14 CHAIRPERSON BERRY: Commissioner
15 Higginbotham?

16 COMMISSIONER HIGGINBOTHAM: Yes.

17 CHAIRPERSON BERRY: Commissioner Horner?

18 COMMISSIONER HORNER: Abstain.

19 CHAIRPERSON BERRY: Commissioner Lee?

20 COMMISSIONER LEE: Yes.

21 CHAIRPERSON BERRY: Commissioner Redenbaugh?

22 COMMISSIONER REDENBAUGH: Yes.

23 CHAIRPERSON BERRY: Vice Chair?

24 VICE CHAIRPERSON REYNOSO: Yes.

25 CHAIRPERSON BERRY: The report is approved by

1 a vote of 6, with two abstaining. Okay.

2 COMMISSIONER GEORGE: Madam Chairman?

3 CHAIRPERSON BERRY: Yes.

4 COMMISSIONER GEORGE: If we have finished
5 this, I would like to make a motion.

6 CHAIRPERSON BERRY: We've finished this
7 subject; yes.

8 COMMISSIONER GEORGE: I would like to move
9 that we request from the General Counsel an opinion
10 letter as to the legal permissible of SACs publishing
11 SAC reports that have been submitted to us and not been
12 approved for publication.

13 CHAIRPERSON BERRY: I mean, without
14 objection. Anybody have any objection to doing that?
15 It's our General Counsel.

16 COMMISSIONER HORNER: I second the motion.

17 VICE CHAIRPERSON REYNOSO: I thought we just
18 had a report.

19 CHAIRPERSON BERRY: We just had a report.

20 COMMISSIONER GEORGE: We had an oral report.
21 I don't know how much research it was based -- was that
22 based on -- has the question been researched?

23 MS. MOORE: I'm reading from the memo
24 submitted to the Staff Director.

25 CHAIRPERSON BERRY: Could you hear what she

1 said, Commissioner George?

2 COMMISSIONER GEORGE: Yes.

3 COMMISSIONER ANDERSON: Madam Chair?

4 CHAIRPERSON BERRY: So would you like to have
5 a copy of the memo?

6 COMMISSIONER GEORGE: Do we have a copy of
7 it? Was that in our materials?

8 STAFF DIRECTOR MOY: No.

9 CHAIRPERSON BERRY: No. It was not an issue
10 that we thought would be discussed, so, no.

11 COMMISSIONER GEORGE: Okay.

12 COMMISSIONER ANDERSON: Madam Chair?

13 CHAIRPERSON BERRY: Yes, Commissioner
14 Anderson?

15 COMMISSIONER GEORGE: Could I just answer the
16 Chairman's question. I would certainly like -- I think
17 a copy should be distributed to the Commissioners.

18 CHAIRPERSON BERRY: But is that what you want
19 or do you want to do something else?

20 COMMISSIONER GEORGE: Well, I have to look at
21 it to see whether I think it constitutes an opinion.

22 CHAIRPERSON BERRY: What kind of opinion do
23 you have in mind?

24 COMMISSIONER GEORGE: A researching of the
25 question which would tell us where things stand legally

1 as far as the permissibility of the publication of a
2 report by the SAC when it's been disapproved. Now, I
3 just have no idea of the comprehensiveness of the
4 research Stephanie's been able to do at this point. It
5 may be comprehensively researched. I don't know.

6 CHAIRPERSON BERRY: Maybe not. So why don't
7 we just do the following in the interest of time.
8 Agree -- and if you want to vote, you can -- that the
9 General Counsel will prepare a memorandum or have
10 prepared one on the subject, as you indicated, for
11 distribution to the Commissioners.

12 Is that what you want?

13 COMMISSIONER GEORGE: Yes. That's what I'd
14 like to have. I'd also like the subject to be put on
15 the agenda for discussion at the May meeting.

16 CHAIRPERSON BERRY: The subject of the memo?

17 COMMISSIONER GEORGE: The subject of the
18 issue that the memo addresses.

19 CHAIRPERSON BERRY: Okay. Yes. I'm fine
20 with that. I'll put it on the agenda.

21 Anything else? Do you want to vote on that?
22 You can. We've agreed.

23 COMMISSIONER GEORGE: I take it we're going
24 to get it, and that's fine.

25

1 CHAIRPERSON BERRY: Let's go to the next
2 item, Item Number VII.

3 You had the Executive Summary last time of
4 the Los Angeles Racial and Ethnic Tensions Report. You
5 were asked to make comments if you wished for changes
6 that you would like to see.

7 Some people did make comments. The office
8 worked on those comments. This is a short report, as
9 you know. It's just the Executive Summary of the 1993
10 report. So it's back on the agenda again.

11 Could I get a motion to approve it for
12 purposes of discussion?

13 COMMISSIONER REDENBAUGH: So moved.

14 CHAIRPERSON BERRY: Could I get a second?

15 VICE CHAIRPERSON REYNOSO: Seconded.

16 CHAIRPERSON BERRY: Okay. Discussion.

17 (No response.)

18 All of those then -- there's no discussion.

19 All those in favor of approving this summary,
20 indicate by saying aye?

21 Oh, no. We have to have roll call, right,
22 Commissioner Anderson?

23 All those in favor of the LA Summary, passage
24 of that, indicate by saying aye.

25 Commissioner Anderson?

1 COMMISSIONER ANDERSON: Aye.
2 CHAIRPERSON BERRY: Berry, yes.
3 Commissioner George?
4 COMMISSIONER GEORGE: Yes.
5 CHAIRPERSON BERRY: Commissioner
6 Higginbotham?
7 COMMISSIONER HIGGINBOTHAM: Yes.
8 CHAIRPERSON BERRY: Commissioner Horner?
9 COMMISSIONER HORNER: Yes.
10 CHAIRPERSON BERRY: Commissioner Lee?
11 COMMISSIONER LEE: Yes.
12 CHAIRPERSON BERRY: Commissioner Redenbaugh?
13 COMMISSIONER REDENBAUGH: Yes.
14 CHAIRPERSON BERRY: Vice Chair?
15 VICE CHAIRPERSON REYNOSO: Yes.
16 CHAIRPERSON BERRY: Okay. It is unanimous.
17 Now, let's move to the -- are there any
18 future agenda items aside from the one we just agreed
19 to have on the agenda that anyone would like to discuss
20 before we have the briefing?
21 (No response.)
22 If not, could the briefers please -- Staff
23 Director, could the briefers please come forward to
24 brief us on the Schools and Religion Project?
25 COMMISSIONER GEORGE: While that happens,

1 Madam Chairman, could I ask a question?

2 CHAIRPERSON BERRY: Yes.

3 COMMISSIONER GEORGE: Does Stephanie intend
4 to do any further research on the question we just
5 debated prior to our receiving the materials we're
6 going to receive or are we just going to receive a copy
7 of the memo that went to the Staff Director?

8 CHAIRPERSON BERRY: Well, I'll let her
9 answer, but the reason why I stated it the way I did,
10 Commissioner George, was so that she would be able to
11 do a comprehensive evaluation, as you suggested. And
12 if the memo was not comprehensive, then she could do it
13 in a comprehensive fashion.

14 COMMISSIONER GEORGE: Oh, okay. Good.
15 That's useful. If she does do further expansion of her
16 memo in order to be comprehensive, the one question
17 that I would ask that she include is addressing the
18 question which she addressed for me orally on the
19 status of reports prepared by our own staff and the
20 possibility of them being published without being
21 approved by the Commission.

22 She gave us her opinion on that. If she
23 could include that, unless she revises it -- either
24 way. Whether she revises it or whether it is exactly
25 the one that she's already indicated, I'd like that

1 question to be addressed in the comprehensive memo to
2 us.

3 CHAIRPERSON BERRY: General Counsel?

4 MS. MOORE: Commissioner George, with that
5 exception, it will be expanded. But the initial
6 question was precisely the question addressed
7 comprehensively in the memo.

8 COMMISSIONER GEORGE: Fine. Thank you.

9 COMMISSIONER ANDERSON: Madam Chair?

10 CHAIRPERSON BERRY: Yes, Commissioner
11 Anderson?

12 COMMISSIONER ANDERSON: Thank you. With my
13 apologies to the individuals you've provided to do the
14 briefing for us, I have to leave now.

15 CHAIRPERSON BERRY: These are our staff
16 members from the OGC and the Team Leader. They're
17 going to miss you very much, but we understand.

18 COMMISSIONER ANDERSON: Well, perhaps later
19 next week I can talk to one or two of them by myself
20 about the presentation.

21 CHAIRPERSON BERRY: Okay. All right.

22 Thank you.

23 We have here Deputy General Counsel Eddie
24 Hailes and Emma Monroig who is the Team Leader, I
25 understand, on this project, and some staff members.

1 Could you go ahead, Mr. Hailes?

2 MR. HAILES: Yes. Thank you very much, Madam
3 Chairperson and Mr. Vice Chairperson and Commissioners.

4 Again, I'm Edward A. Hailes, Jr., the
5 designated Project Director for the Schools and
6 Religion Project.

7 As you know, this project was approved by the
8 Commission to go forward in this fiscal year. As
9 initially proposed, the purpose of the project was at
10 least twofold. Number one, to determine whether school
11 districts are complying with the Equal Access Act and
12 the Court decisions allowing religious groups equal
13 access to school facilities; and two, to further
14 determine whether schools are maintaining a proper
15 separation between church and state, thereby remaining
16 in a nonsectarian neutral position and avoiding
17 entanglements in regard to teaching religious doctrine
18 or practice.

19 At present, we propose to examine the
20 following specific issues which will be more fully
21 discussed by the team members assembled here today.

22 The first issue -- and I'm just giving a very
23 cursory definition of these issues -- is equal access,
24 the issue being whether all individuals and groups are
25 given equal opportunities to use school facilities.

1 Government funding and religious school. And
2 that is the degree to which public funds can be
3 expended in connection with parochial schools.

4 Religious rights of teachers. Whether school
5 officials are adequately accommodating teachers'
6 religious beliefs and practices.

7 School prayer and discrimination against
8 students practicing so-called minority religious. And
9 that issue is whether schools are interfering with
10 individual students' rights under the First Amendment
11 by forcing them to pray or by interfering with their
12 right to engage in constitutionally protected voluntary
13 prayer.

14 And then curriculum. Whether some religions
15 are being favored over others, if at all, or whether
16 teachers are advocating or discouraging particular
17 religious beliefs.

18 Originally, the team was asked to research
19 school and religion issues in Portland, Oregon; Denver,
20 Colorado; and Philadelphia, Pennsylvania. In
21 conducting its research, the team utilized computer
22 resources; i.e., Lexis-Nexis, Internet, Web sites; et
23 cetera, and reviewed books, periodicals and newspapers.
24 The scope of the search was intended to be broad and
25 include factual scenarios, including student clubs,

1 individual student expression and worship, curriculum
2 content, government funding of religious schools,
3 religious rights of teachers and other disputes
4 concerning the proper role of religion in public
5 schools.

6 It was determined that the originally
7 proposed sites would not offer the number, complexity
8 and variety of disputes that would cover the entire
9 scope and purpose of the project. The team therefore
10 extended its research effort to potential sites other
11 than those originally suggested.

12 In conducting this research, the team faced
13 several difficulties in its attempt to identify a list
14 of suitable sites where the full range of the relevant
15 issues could be examined in a timely and comprehensive
16 manner. Specifically, the team attempted to identify
17 potential sites where all of the following
18 prerequisites could be met.

19 To select topics that met the Commission's
20 jurisdictional requirements; to identify disputes that
21 were not subject to ongoing litigation efforts; to
22 propose fact witnesses who were within the subpoena
23 range of a particular proposed site; to take into
24 account that the legitimate use of subpoena authority
25 could be a matter of great sensitivity with regard to

1 religious leaders and adolescents who may be the most
2 appropriate participants on certain issues; and to seek
3 inclusion of diverse discrimination claims involving
4 so-called minority faiths; and to meet all of these
5 conditions under clear time constraints.

6 We could find no site where each prerequisite
7 would be met, though some sort of Commission proceeding
8 in New York City; Troy, Alabama; and Washington, D. C.
9 would allow, according to the research conducted by the
10 team, the Commission to explore and examine the full
11 range of issues that the team members will now briefly
12 discuss.

13 I introduce to you at this time first our
14 Team Leader, Emma Gonzalez-Joy, who will discuss the
15 Equal Access issue, and she will be followed by Lynn
16 Dickinson, who will discuss school prayer and
17 discrimination against students practicing minority
18 religions. Then Peter Reilly will discuss curriculum
19 issues, followed by Maxine Sharpe, who will discuss
20 government funding and religious schools.

21 Following these presentations, we will of
22 course be prepared to respond to your questions.

23 Thank you.

24 CHAIRPERSON BERRY: Do you want to ask a
25 question now?

1 COMMISSIONER HORNER: I do, Madam Chair, just
2 because it's very short and simple and gets to Eddie
3 Hailes' statements.

4 You said that among the criteria for
5 selection of sites was that the people who would be
6 called from that area would not be participants or
7 there were not disputes subject to ongoing litigation.

8 I can think of dozens of disputes subject to
9 ongoing litigation that we've been involved in hearing
10 about during hearings by the lawyers supporting claims
11 in the New York Financial Services, for instance;
12 lawyers directly involved. So I wondered why you
13 considered a criterion that there not be ongoing
14 litigation efforts.

15 And my other question is why are we talking
16 about the rights of minority faiths? Why not the
17 rights also of majority faiths?

18 MR. HAILES: Well, let me try to answer the
19 last question first, because clearly we are. What we
20 said is that we want to have a full range of the issues
21 that may be distinctive involving minority faiths
22 versus majority faiths. Certainly in the curriculum
23 context we will have issues that would examine the
24 views of so-called majority faiths.

25 And then to go to the question of ongoing

1 litigation, we purposefully looked for disputes that
2 had been raised but had not been subject to litigation
3 because we believe there are those disputes out there.
4 What we have found in the last few years, according to
5 the research, is that once these matters are litigated
6 they seem to be easily resolved.

7 And so there must be some issues of first
8 impression that would be a -- would serve the
9 Commission better in focusing on those issues rather
10 than those that are being litigated and apparently will
11 be resolved.

12 In the schools and religion context, as you
13 know, there has been quite a bit of heated discussion
14 in the course of litigation and we simply believed it
15 was possible that bringing persons forward to speak at
16 a Commission while litigation was still ongoing could
17 prove problematic.

18 CHAIRPERSON BERRY: May I follow up just for
19 a minute because I'm not clear.

20 Do you mean bringing the people who are
21 actually the litigants --

22 MR. HAILES: As fact witnesses, as opposed
23 to --

24 CHAIRPERSON BERRY: -- in the cases forward?
25 Is that what you're saying?

1 MR. HAILES: We are looking for fact
2 witnesses. And what we believe is that those persons
3 who are in litigation at this time may not come forward
4 and testify before the Commission if they are to
5 testify in ongoing litigation on the same issue.

6 CHAIRPERSON BERRY: Okay. You're talking
7 about people in ongoing litigation.

8 MR. HAILES: Exactly.

9 COMMISSIONER HORNER: I would just say for
10 the record that when we held our hearing in New York on
11 discrimination in the financial services industry we
12 had lawyers who were actually representing people at
13 litigation, I believe, testify on the question of
14 arbitration as opposed to court systems.

15 I think that this may pose a problem that is
16 going to exclude from our hearing people who by virtue
17 of having impassioned feelings on the subject and spent
18 a lot of time researching in preparation for potential
19 litigation are indeed the best people to hear from.

20 I just say that for the record. And I think
21 as we see how this develops, we can raise this question
22 again if we need to.

23 COMMISSIONER GEORGE: Madam Chairman?

24 CHAIRPERSON BERRY: Just a second.

25 General Counsel?

1 MS. MOORE: Commissioner Horner, I'll just
2 say in my peripheral oversight of the project, we also
3 looked at a policy matter. And I went back through
4 extensive transcripts where the Commission has of late
5 in both the L.A. hearing and in the Sonoma, the
6 proposed Sonoma hearing, indicated its desire not to be
7 involved in calling witnesses and persons with
8 information where they were involved in ongoing
9 investigations and litigation.

10 COMMISSIONER HORNER: Yes. I thought I heard
11 Mr. Hailes say we excluded geographical areas where
12 litigation was going on.

13 MR. HAILES: Oh, no, no. Not at all.

14 COMMISSIONER HORNER: Okay.

15 MR. HAILES: If you understood that, that was
16 not my position.

17 COMMISSIONER HORNER: Okay. Good.

18 CHAIRPERSON BERRY: Commissioner George?

19 COMMISSIONER GEORGE: Yes. I don't think
20 that any of the three cities are cities that I had
21 initially suggested based on my own research into these
22 questions.

23 Now I do know that there are a lot of
24 important disputes in New York and in the Second
25 Circuit so that that seems to me quite sensible. I

1 don't know the situation in Troy, Alabama. I would
2 like to hear more about that.

3 CHAIRPERSON BERRY: We're going to if we let
4 them talk.

5 COMMISSIONER GEORGE: Oh, they're going to
6 address the cities issue?

7 CHAIRPERSON BERRY: They're going to talk
8 about -- aren't they going to talk about the --

9 (Crosstalk.)

10 MR. HAILES: - They will, I'm sure, in their
11 presentations.

12 CHAIRPERSON BERRY: Just a second, Robbie.
13 What did you say? Are you going to address -
14 -

15 MR. HAILES: During their discussions it will
16 become clear what the sites problem is.

17 CHAIRPERSON BERRY: Yes. They're going to
18 discuss that.

19 COMMISSIONER GEORGE: Okay.

20 CHAIRPERSON BERRY: You can ask again
21 afterwards if they don't. Okay?

22 COMMISSIONER GEORGE: All right.

23 CHAIRPERSON BERRY: Proceed, please.

24 MS. GONZALEZ-JOY: Good morning,
25 Commissioners. My name is Emma Gonzalez-Joy. I will

1 speak on the statement of principles on religious
2 expression and public schools issued by the Department
3 of Education and the right of equality of access of
4 religious groups to schools facilities under the First
5 Amendment of the Constitution and the Equal Access Act.

6 In 1985, religious leaders from different
7 points of view came together to agree on what are the
8 guiding principles behind the religious liberty
9 clauses. Based on this and at the direction of the
10 President, in August of 1995 the Department of
11 Education issued a Statement of Principles on Religious
12 Expression addressing the extent to which religious
13 expression and activity are permitted in public
14 schools.

15 The team working on this project will examine
16 the results of this effort at federal, state and local
17 levels. At the federal level, the team will examine
18 whether the Department of Education provides an
19 administrative mechanism to implement the principles of
20 religious expression. The project would also examine
21 if there are any Department of Education grants to
22 foster familiarity with these principles and the
23 project will examine whether the Department of Justice
24 has guidelines to intervene in cases involving schools
25 and religion issues. If they do so, what are they, and

1 what type of cases the Department has been involved
2 with.

3 At the state level, the team could examine
4 the results of efforts like the one in Tennessee where
5 the General Assembly found that there is a great deal
6 of confusion involving judicial decisions concerning
7 religion, free speech and public education. This
8 resulted in the recent approval of the Tennessee
9 Student Religious Liberty Act of 1997.

10 This law spells out each student's first
11 amendment right. It changes nothing in existing case
12 law. The team could examine implementation of this
13 act.

14 Second, the right of organized religious
15 groups of access to school facilities under the First
16 Amendment of the Constitution.

17 In 1981 the Supreme Court, in Whitmore v.
18 Swenson applied the public forum analysis of the Free
19 Speech Clause to the religious speech of college
20 students participating in extracurricular activities.
21 Under the free speech public forum doctrine, the scope
22 of permitted censorship is determined by whether the
23 forum has a public, non-public or limited public
24 nature.

25 A public forum includes places that have been

1 traditionally dedicated to free speech and assembly,
2 such as streets and parks. Any member of the public
3 may speak on any issue within the confines of neutral,
4 generally applicable regulations.

5 In a limited access public forum, the
6 government intentionally designates the type of speech
7 and assembly, allowing access only to part of the
8 public. In a non-public forum, the government can
9 restrict access as long as the restriction is
10 reasonable and viewpoint neutral.

11 One of the issues that could be examined is
12 the right of access of outside religious groups to
13 school facilities. And the issue is whether in those
14 situations that a limited forum is open to a wide range
15 of uses, can it still be kept closed for a narrow use;
16 namely, religious services.

17 The Supreme Court has held that a Long Island
18 public school district was engaged in viewpoint
19 discrimination in violation of the Free Speech Clause
20 when it barred a church from using a public school
21 building to show family life films with a religious
22 perspective. The film series dealt with a subject
23 matter otherwise permissible under the school
24 district's use rule, but was not allowed solely because
25 it dealt with the subject matter from a religious

1 perspective.

2 The Court said that access to a non-public
3 forum can be based on subject matter or speaker
4 identity as long as the distinctions were reasonable
5 and viewpoint neutral.

6 New York City has a policy of allowing
7 outside groups to use public school buildings after
8 school is over for the discussion of materials that
9 contain a religious viewpoint or for the distribution
10 of such material. However, it bans the use of the
11 buildings after school for religious services or
12 religious instruction.

13 An evangelical Christian church was denied
14 permission to use a public middle school in the Borough
15 of the Bronx for weekly religious worship. The Second
16 Circuit held the time, place and manner restrictions on
17 speech were reasonable and viewpoint neutral as
18 required in limited public forums and that the purpose
19 of avoiding the identification of the middle school
20 with a particular church was reasonable.

21 The same rule was also involved in another
22 federal district court of whether the site had been
23 used previously for religious services.

24 The project could examine the circumstances
25 of the application of this rule as well as why there is

1 such an unusually large number of cases with the same
2 problem in the New York area.

3 Secondly, the Equal Access Act.

4 This is a statute dealing with organized
5 religious expression. The purpose of the Equal Access
6 Act is to permit student groups to meet for student
7 initiated activities not directly related to the school
8 curriculum.

9 It says that any public secondary school
10 receiving federal financial assistance may not
11 discriminate against student groups on religious,
12 political, philosophical or other content based
13 grounds. The Act gives religious clubs equal
14 treatment, not preferred treatment.

15 The term "open" in the Act, rather than
16 "public" means that Congress intended to establish a
17 different standard from that used in free speech cases.
18 A limited open forum is triggered if a school simply
19 allows one or more non-curriculum related student
20 groups to meet.

21 Some of the issues concerning these acts are
22 extension of the Act to younger children. When the Act
23 was approved the constitutional Equal Access Doctrine
24 had generally been used in situations involving older
25 students. The Act was necessary to ensure equal access

1 for students at the secondary school level because the
2 Courts have considered that younger students lack the
3 necessary maturity to understand that these religious
4 activities were not sponsored by the public schools.

5 Currently there's litigation involving the
6 right of students younger than secondary school
7 students to form clubs. The project could consider
8 whether the Act could be extended to students in lower
9 grades.

10 Secondly, funding of university students'
11 religious publications.

12 The Act says that nothing in this saying
13 shall authorize or compel any state or political
14 subdivision to extend public funds beyond the initial
15 cost for providing the space for student initiated
16 meetings.

17 The Supreme Court has held that equal access
18 rights, constitutional equal access rights to
19 facilities of university student religious groups
20 includes the right to receive funding that is equal to
21 that received by other groups.

22 The Commission could examine whether the law
23 should be amended in this respect.

24 Third. Are the remedies provided by the Act
25 adequate?

1 The remedy available at present for a
2 violation of the Act is to file a case in the federal
3 district court. This is a complex and expensive remedy
4 for a high school student. Should the law provide for
5 administrative remedy at the federal, state or local
6 level? Should alternative dispute resolution
7 mechanisms exist and be required by the Act?

8 Fourth. Should discrimination be allowed?

9 Recently a Circuit Court upheld the Christian
10 only leader supervision of a student club, ruling that
11 the requirement is essential for the expressive content
12 of the club's meeting and therefore protected by the
13 Equal Access Act.

14 The Court reasoned that the club's religious
15 discrimination was not invidious. It was protected
16 from a constitutional challenge under the Equal
17 Protection Clause.

18 This project could examine the consequences
19 of this decision.

20 Thank you.

21 CHAIRPERSON BERRY: All right.

22 Do we go to Ms. Dickinson next?

23 MR. HAILES: Yes.

24 MS. DICKINSON: Thank you.

25 My name is Lynn Dickinson and I will address

1 individual student constitutionally protected rights --

2 CHAIRPERSON BERRY: Did someone say
3 something?

4 COMMISSIONER GEORGE: She needs to speak up.

5 CHAIRPERSON BERRY: You need to speak up, Ms.
6 Dickinson.

7 MS. DICKINSON: My name is Lynn Dickinson and
8 I will address individual students' constitutionally
9 protected rights of freedom of religions and freedom of
10 speech. These rights derive from the religion and
11 speech clauses of the First Amendment.

12 I will provide a brief discussion of the
13 legal background and current controversies involving
14 each issue.

15 I will begin with students' rights to freedom
16 of religions, which are implicated in public schools
17 when officials either prohibit students from engaging
18 in individual prayers or force students to engage in
19 prayer that offends their religious beliefs.

20 The constitutional right of freedom of
21 religion derives both from the Establishment Clause and
22 the Free Exercise Clause. The two religion clauses
23 impose different requirements which I will discuss
24 momentarily, that almost always are in tension with one
25 another.

1 It is through maintaining a proper balance
2 between the competing concerns addressed by each clause
3 that religious rights were sought to be protected in
4 the First Amendment. The Free Exercise Clause was
5 adopted to ensure that government would not unduly
6 burden the practice of any religious faith.

7 The freedom to exercise one's religions
8 has two components. The first is the freedom to
9 believe and the second is the freedom to act or to
10 engage in religious practices, such as prayer.

11 Because the freedom to engage in religious
12 practices is not absolute, the government may impose
13 some burdens on the ability of individuals to pray.
14 However, the government may not enact policies that
15 have a coercive effect on the ability of individuals to
16 freely exercise their religious beliefs. Thus, the
17 overriding principle that derives from the Free
18 Exercise Clause is one of accommodation.

19 The government may not unnecessarily curtail
20 or coerce religious practices. The Establishment
21 Clause was adopted to prevent the religious majority
22 from using the arm of the state to infringe upon the
23 religious beliefs of members of minority religions.
24 Thus, under the Establishment Clause, the government
25 must remain neutral and may not promote one religion

1 over others, religion over non-religion or non-religion
2 over religions.

3 The principle underlying the Establishment
4 Clause is therefore neutrality. The government may not
5 engage in discrimination based on religion.

6 Taken together, the two clauses require that
7 the government maintain a delicate balance between
8 accommodating individual religious beliefs and doing so
9 without promoting or advancing one belief over others.
10 This issue has formed the center of huge dispute in an
11 Alabama community where the vast majority of citizens
12 are Christians who seek the inclusion of prayer in
13 school ceremonies.

14 The Alabama controversy raises the question
15 whether the inclusion of prayer and Bible readings in
16 school events places the government in a position of
17 promoting Christianity and whether it violates non-
18 Christian students' rights to practice their religions.

19 In pursuing this issue, the Commission could
20 examine the manner in which schools are attempting to
21 balance their obligations to abide by both the Free
22 Exercise Clause and the Establishment Clause.

23 The controversies in Alabama also have raised
24 concerns regarding the proper roles of the federal and
25 state governments in deciding issues such as whether

1 prayer should be permitted in schools. Traditionally,
2 operation and maintenance of public schools has been
3 governed by state law, whereas civil rights issues set
4 forth in the U.S. Constitution are issues of federal
5 law.

6 Thus, a proceeding on the rights of students
7 to practice their religions at school could include a
8 discussion of the manner in which the federal and state
9 governments can best work together to achieve the
10 state's educational goals while protecting the civil
11 rights provided by federal law.

12 I will now address students' free speech
13 rights.

14 The rights of students to express their
15 religious beliefs are implicated in public schools
16 whenever students seek to discuss, express or otherwise
17 promote their particular religious beliefs at school.

18 The U.S. Supreme Court has stated that under
19 the Free Speech Clause a student may express his or her
20 beliefs, as long as the student's expressive conduct
21 does not materially and substantially interfere with
22 the requirements of appropriate discipline in the
23 operation of the school or interfere with the rights of
24 others.

25 Thus, for example, obscene speech which

1 conflicts with schools' basic educational mission may
2 be prohibited. This topic has been implicated
3 repeatedly, especially in Florida, as schools attempt
4 to find ways to control the school environment without
5 violating the constitutional rights of individual
6 students.

7 In one case a school argued that banning
8 distribution of religious materials was necessary to
9 avoid violating the Establishment Clause. The Court
10 held that individual student speech at school would not
11 violate the Establishment Clause in that, in fact, the
12 school policy prohibiting speech, based on its
13 religious content itself violated the Establishment
14 Clause because it disfavored religion.

15 I mention that case because it serves as an
16 example of the confusion that can arise when school
17 administrators attempt to abide by the various clauses
18 of the First Amendment. Thus, a Commission review of
19 this issue could include a discussion of schools'
20 combined obligations under the Free Speech Clause and
21 the Establishment Clause.

22 In summary, a proceeding on the religious
23 life of students could allow the Commission to examine
24 the root source of these disputes and determine whether
25 schools need specific guidance on who to manage their

1 multiple and often competing obligations under the
2 First Amendment.

3 That concludes my presentation.

4 CHAIRPERSON BERRY: Thank you very much, Ms.
5 Dickinson.

6 Mr. Reilly?

7 MR. REILLY: My name is Peter Reilly and I
8 will be addressing two topics. First, the religious
9 rights of public school teachers, and second, the role
10 of religion in public school curricula.

11 Federal law requires an employer to
12 reasonably accommodate an employee's religious
13 observances, practices and beliefs unless the employer
14 can show that accommodation would cause undue hardship,
15 meaning anything greater than a minimal cost to the
16 employer.

17 With respect to teachers, many of these
18 controversies are settled before they go to Court. For
19 example, a Florida high school principal attempted to
20 prohibit teachers from wearing T-shirts to school with
21 the slogan, "Champions in Christ." After negotiations,
22 the teachers were permitted to wear the T-shirts.

23 In another case on Long Island, a public
24 school teacher's union sought to enforce the right of
25 teachers to use personal days for observing religious

1 holidays. Several teachers were denied leave and filed
2 grievances. An arbitrator upheld the teachers' claims.

3 Regarding religious apparel, employers must
4 attempt to accommodate employees who maintain a
5 particular physical appearance or manner of dress in
6 keeping with the tenets of their religion.

7 Again, accommodation is possible if it can be
8 made without undue hardship to the employer and only
9 safety concerns constitute undue hardship.

10 Regarding harassment of teachers under Title
11 VII of the 1964 Civil Rights Act, an employer has an
12 affirmative obligation to maintain a work environment
13 free of harassment, intimidation and insult.

14 As Lynn just made clear, prayer in public
15 schools is unconstitutional except for personal student
16 prayer. But to what extent can teachers lead the
17 prayers or participate with students?

18 COMMISSIONER GEORGE: May I interrupt for a
19 second, Madam Chairman?

20 CHAIRPERSON BERRY: Yes, yes.

21 COMMISSIONER GEORGE: Just a point of
22 clarification there.

23 When you say personal -- prayer is prohibited
24 except for personal student prayer, you don't mean
25 prayer necessarily by an individual? It can be a whole

1 lot of people. It may be the entire school personally
2 praying together?

3 MS. DICKINSON: Yes. I think he meant to
4 distinguish school sponsored prayer, where like a
5 teacher or even a student lead prayer in a classroom;
6 where the teacher calls upon a student to lead the
7 class in prayer.

8 COMMISSIONER GEORGE: Right. I just wanted
9 to clarify that. Good.

10 CHAIRPERSON BERRY: Okay. Proceed, please.

11 MR. REILLY: Thank you, Lynn.

12 To what extent can teachers lead the prayers
13 or participate with students?

14 It is unconstitutional for a teacher, a coach
15 or other school official to initiate or lead a team a
16 prayer or ask a team member to pray at school sponsored
17 athletic events.

18 Second, teachers and other school personnel
19 may not deliver prayers at school assemblies.

20 Finally, it is unconstitutional to pray with
21 students during school hours.

22 To give you an idea of how matters are
23 resolved when they arise, last year in Florida, a high
24 school teacher delivered testimony in class, which is a
25 public declaration regarding a religious experience.

1 The teacher was admonished by district officials.

2 In another case last year in a different city
3 within the state of Florida, a high school principal
4 was praying and discussing scripture with students
5 during school hours. He was temporarily suspended from
6 his position and was later transferred.

7 Now I'd like to turn to the issue of public
8 school curriculum.

9 Although the Supreme Court has consistently
10 rejected efforts to teach religions in the public
11 schools, it has permitted teaching about religion.
12 While teaching religion amounts to illegal religious
13 indoctrination, teaching about religion, on the other
14 hand, is learning about religion in the historical,
15 cultural, economic and social development of the United
16 States and other nations.

17 This means that while the Bible may be
18 studied as literature, it cannot be studied as
19 religious doctrine. Clearly, Bible courses are being
20 taught throughout the country. The National Council on
21 Bible Curriculum in Public Schools says its Bible
22 instruction materials have been adopted by public
23 school districts in 22 states, but the Council will not
24 reveal the names of those districts because they fear
25 litigation.

1 In North Carolina, at least 20 school
2 districts now offer some sort of Bible instruction.
3 The state of Texas has 219 public school courses
4 throughout the state in Biblical history or literature
5 and nine counties in Florida offer Old or New Testament
6 history.

7 I now want to turn to the issue of public
8 school textbooks.

9 Two types of controversies usually develop
10 around textbooks. The first involves what they say.
11 The second involves what they fail to say or what they
12 leave out. In one example, five school board members
13 in Austin, Texas objected last year to a new biology
14 textbook because they said it failed to point out the
15 weaknesses in the theory of evolution. The book was
16 finally adopted on a vote of 9 to 5.

17 Given that this vote was part of a \$177
18 million textbook purchase by this school board, it
19 might be helpful for Commissioners to hear from
20 textbook publishers to see whether the anticipation of
21 a possibly very contentious school board approval
22 process can influence what they publish in their
23 textbooks. Some argue that the current process causes
24 potentially controversial information to be deleted or
25 watered down.

1 The case that I discussed is a Texas case.
2 It is well known in the industry that that state is one
3 of the largest textbook purchasers in the nation and
4 has a heavy influence on books marketed in other
5 states.

6 Now to the issue of what textbooks sometimes
7 leave out.

8 In a 1987 case in Alabama, a lawsuit alleged
9 that history books left out historical facts regarding
10 religion and failed to discuss the place of religion in
11 modern American society. The district court agreed,
12 finding that the history books, quote, "uniformly
13 ignored the religious aspect of most American culture."
14 End quote. However, the appellate court ruled that the
15 education officials had control over the curriculum and
16 had the discretion to continue using the books.

17 It was this same issue, the lack of religion
18 in school textbooks which led Dr. Charles Haynes of the
19 Freedom Forum in nearby Arlington, Virginia, to an
20 influential role in the area of schools and religion.
21 A recent article in the Wall Street Journal entitled
22 "How Religion Found Its Way Back to School," profiles
23 Dr. Haynes who currently runs a mediation and training
24 program that is reshaping the way religion is treated
25 in thousands of schools nationwide.

1 Since researching textbooks in 1986 and
2 discovering that religion was barely being dealt with,
3 Dr. Haynes, who formerly worked at Americans United for
4 Separation of Church and State, has teamed up with
5 Oliver Thomas, a part-time Baptist preacher, to design
6 religion policies for schools that could be endorsed by
7 people on both ends of the political spectrum. The
8 program they developed is appropriately called Finding
9 Common Ground, and the Commission may wish to consult
10 these two individuals regarding the Schools and
11 Religion proceedings.

12 Finally, I want to discuss the current
13 controversy involving the teaching of evolution. This
14 debate was made famous over 70 years ago in what some
15 call the Monkey Trial, which led to the conviction of
16 John Scopes for teaching evolution in a Tennessee
17 school.

18 The Supreme Court made clear 30 years ago
19 that it is unconstitutional to restrict the teaching of
20 evolution. And in 1987 the Supreme Court said it is
21 unconstitutional to require educators who teach
22 evolution to also teach creationism.

23 Despite the Supreme Court rulings, last week
24 the National Academy of Sciences issued a 140 page
25 document entitled "Teaching About Evolution and the

1 Nature of Science," which argues that many public
2 school students receive little or no exposure to the
3 theory of evolution. What they say is, quote, the most
4 important concept in understanding biology.

5 The National Academy says that teachers are
6 reluctant to teach evolution because of pressures from
7 special interest groups to downplay or eliminate it as
8 part of the science curriculum. However, the writers
9 say that the guide is not an attempt to abolish
10 discussion of creationism, pointing out that it focuses
11 only on how all forms of life have evolved over time,
12 not on the question of how the very first cell in the
13 process may have originated.

14 In some states it has been reported that
15 several school boards have ordered teachers to give
16 equal time to creationism, and lawmakers in a few
17 states want to remove the term "evolution" from their
18 science curricula altogether.

19 In the state of Alabama, biology textbooks
20 now include a disclaimer telling students that
21 evolution is only a controversial theory.

22 Like in other matters we have looked at,
23 controversies in this area are sometimes resolved
24 without court intervention. In the state of Colorado
25 recently a student objected to a videotape because it

1 depicted evolution as scientific fact rather than
2 theory. The school district formed a review committee
3 and decided the best course of action was to withdraw
4 the tape from the curriculum.

5 It is not yet clear how the National Academy
6 of Sciences report will be received by people who
7 determine school curricula. However, since these
8 matters are controlled locally, school districts are
9 not required to accept the advice in the report.

10 Thank you very much. This concludes my
11 presentation.

12 CHAIRPERSON BERRY: Okay. Thank you.

13 Now, Maxine?

14 MS. SHARPE: My name is Maxine Sharpe and I
15 will address government funding and religious schools.

16 The issue is to what extent can public funds
17 be used to provide services, instruction or to support
18 other education related activities that are provided in
19 or associated with parochial schools.

20 The recent Supreme Court decision in Agostini
21 v. Felton provides some answers. In that case, the
22 Court held that New York City public school teachers
23 may provide educational services on private or
24 parochial school premises during school hours under
25 particular circumstances without violating the

1 Establishment Clause of the First Amendment.

2 Specifically, publicly funded New York City
3 teachers may now provide Title I services in the cit's
4 private and parochial schools rather than continuing
5 the practice of providing such services in trailers
6 near the schools.

7 Title I refers to Title I of the Federal
8 Elementary and Secondary Education Act of 1965, which
9 provides federal funds to local school districts so
10 that they can provide remedial education and job
11 counseling to students living in low-income areas who
12 have difficulty achieving state student performance
13 standards.

14 The Supreme court stated that interaction
15 between church and state is inevitable and that some
16 level of involvement of the two has always been
17 tolerated. In this case, the Court found that the
18 nature of the involvement did not result in the
19 government becoming excessively involved in the
20 workings of the church institution and the interaction
21 was limited to a particular federal fund.

22 Agostini overruled an earlier Supreme Court
23 case, Aguilar v. Felton, which involved the same
24 parties. In that decision, the Court held that New
25 York City's Title I program did indeed result in

1 excessive church-state entanglement because it required
2 pervasive monitoring of instruction in parochial
3 schools.

4 Agostini also overruled in part Grand Rapids
5 School District v. Ball, which held that a similar
6 local program impermissibly advanced religion. Both
7 Aguilar and Ball were premised on the finding that
8 public employees on parochial school grounds represent
9 a union of church and state, require extensive
10 monitoring or eventually result in government sponsored
11 inculcation of religion.

12 Following Aguilar and Ball, however, the
13 Supreme Court retreated from this rationale in a 1993
14 case, Zobrest v. Catalina Foothills School District.
15 In Zobrest, the Court upheld the use of a publicly
16 funded sign language interpreter by a parochial school
17 student.

18 With these most recent cases, Zobrest and
19 Agostini, which permit the use of sign language
20 interpreters in the case of Zobrest and Title I
21 teachers in parochial schools in the case of Agostini,
22 the Supreme Court has added to the following previously
23 sanctioned types of permissible public funding
24 activities that can be connected to religious school.
25 And they are:

1 Number one. The payment of transportation
2 costs of students to parochial schools.

3 Two. Property tax exemptions to churches
4 sponsoring religious schools.

5 Three. Public schools lending textbooks to
6 parochial school students.

7 Four. Providing vocational tuition grants to
8 the blind; and

9 Five. Funding a religious publication from
10 student fees collected at a public, state-run
11 university.

12 But the question remains: What other
13 publicly funded services instruction or other education
14 relate activities could possibly be permitted without
15 violating the Establishment Clause?

16 The Commission could address this question as
17 well as other funding related topics which have arisen
18 in communities throughout the nation.

19 First, one possible topic involves the
20 guidelines of the U.S. Department of Education. These
21 guidelines were issued to ensure proper implementation
22 of the Agostini decision.

23 The guidelines can be summarized as:

24 One. Only public school employees can serve
25 as Title I instructors.

1 Two. Public schools must assign personnel to
2 private schools without regard to the employee's
3 religious affiliation.

4 Three. All religious symbols must be removed
5 from spaces used for Title I services.

6 Four. Public school teachers must limit
7 their consultations with parochial school personnel to
8 discussions of student education; and

9 Five. A public school field supervisor
10 should make an unannounced visit to each teacher's
11 classroom each month to ensure that the program does
12 not contain any religious aspects.

13 Now these guidelines are limited strictly to
14 the implementation of Agostini.

15 COMMISSIONER GEORGE: May I interrupt for a
16 second for a question?

17 MS. SHARPE: Yes.

18 COMMISSIONER GEORGE: Just to be clear, those
19 are the guidelines that are currently in place for the
20 DOE or are they under consideration?

21 MS. SHARPE: Those are in place.

22 COMMISSIONER GEORGE: In place.

23 MS. SHARPE: Yes.

24 COMMISSIONER GEORGE: Thank you.

25 MS. SHARPE: As of, I believe, July '97, I

1 believe. That's when they were implemented.

2 And in New York, these guidelines have been
3 criticized as not properly interpreting Agostini.
4 Among the concerns that have been raised by at least
5 one New York based group are that the guidelines say
6 religious symbols may be removed, but the group
7 contends that, according to Agostini, the symbols must
8 be removed. And also, the guidelines do not refer to
9 any enforcement mechanism to ensure their
10 implementation.

11 The Commission could examine the level of
12 compliance with the guidelines and determine whether
13 there is an effective enforcement mechanism. If there
14 is no effective enforcement mechanism in place, the
15 Commission could explore what types of mechanisms are
16 needed to ensure compliance with Agostini.

17 Another possible topic for the Commission is
18 whether publicly-funded vouchers may be used for
19 tuition in parochial schools without violating the
20 Establishment Clause. In the 1925 Supreme Court case
21 of Pierce v. Society of Sisters, the Court ruled that
22 parents may allege to send their children to a private
23 school rather than a public school. However, the
24 Supreme Court has never specifically answered the
25 question whether public funding may be used to assist

1 parents in exercising that right.

2 Many states and many local areas throughout
3 the nation have been grappling with this question in
4 recent years and continue to do so. Some of the
5 current ongoing controversies involving vouchers include
6 the following.

7 In March 1998, the Southeast Delco School
8 Board in Pennsylvania proposed vouchers for use at
9 private schools. However, the Pennsylvania
10 Constitution prohibits the use of public funds for
11 private and religious schools.

12 Also in Pennsylvania, statewide voucher
13 legislation has been pending since 1997.

14 Voucher initiatives have also been reported
15 in Washington, DC; California; Colorado; Illinois;
16 Minnesota and Texas and elsewhere. Wisconsin, Puerto
17 Rico and Ohio have passed some sort of voucher
18 measures.

19 Finally, an experimental voucher program is
20 in its second year in New York City. Initially, 100
21 low-income public school students received vouchers to
22 attend private or religious schools at a cost of about
23 \$6 million. However, the funds for their tuition came
24 from private donations, largely from foundations and
25 Wall Street corporations. Later this year, the program

1 will be enlarged by 1,000 students who will be selected
2 from the city's 14 school districts with the lowest
3 reading scores.

4 The program originated when the Mayor
5 accepted a long-standing challenge by the city's
6 Catholic archdiocese which had offered to accept some
7 of the lowest achieving public school students in part
8 to demonstrate that Catholic schools could provide them
9 with a better education.

10 Another funding topic is whether tax credits
11 may be given for tuition paid to parochial schools
12 without violating the Establishment Clause. Recent
13 controversies surrounding this issue have also arisen
14 in several locations across the country, including in
15 Oregon and Minnesota. In Oregon, a voter-led
16 initiative proposing a tax credit for private school
17 tuition failed at the polls. The proposal would have
18 provided for tax credit for either private school
19 tuition or expenses for educating a child at home.

20 The Minnesota tax credit program, however,
21 was passed. It gives parents a tax deduction of \$650
22 for children in kindergarten through 6th grade, and a
23 \$1,000 deduction for children in grades 7 through 12
24 for use toward any private school expenses except
25 religion classes -- not religious schools but religion

1 classes -- and for certain public school programs that
2 cost extra.

3 Another funding issue which recently arose in
4 New York State involves the constitutionality of using
5 public funds to establish a special school benefiting
6 one particular religious sect.

7 In August 1997 the Governor signed a bill
8 into law allowing a small Orange County village of
9 Hasidic Jews to create a special school district for
10 disabled children in their community.

11 The Courts, however, have ruled that this and
12 similar bills for the village, Kiryas Joel, violate the
13 constitutional separation of church and state.

14 In conclusion, there is a growing judicial
15 trend permitting the government to provide financial
16 assistance that is related to religious organizations,
17 so long as the organizations receive only an indirect
18 benefit and as long as the primary purpose of the
19 financial aid is secular.

20 Issues concerning the constitutionality of
21 particular types of financial assistance, based on our
22 research, are occurring throughout the country and can
23 be expected to continue for some time to come.

24 That concludes my presentation.

25 CHAIRPERSON BERRY: Okay. Thank you very

1 much.

2 Vice Chair?

3 VICE CHAIRPERSON REYNOSO: The issues are
4 pretty broad and I had a question for Eddie in terms of
5 how you suggest we proceed on that.

6 You mentioned that the staff from its own
7 research is recommending that we need DC and New York
8 and Troy, but the issues are so broad I wonder if we do
9 proceed with that, have the DC meeting first. And
10 instead of having it be a hearing, we could have
11 something like a briefing or something of that sort
12 with hopefully the folk around here that could talk and
13 help educate us in all these issues.

14 And then maybe have hearings in New York and
15 Troy on some of the specific issues that would come up
16 in that area.

17 I mean, what's your suggestion in terms of
18 how to proceed?

19 MR. HAILES: That's fairly consistent with
20 our thinking at this time; a Commission proceeding in
21 Washington, DC that would provide a basic overview of
22 the national -- the issues, religious issues that are
23 occurring throughout the nation.

24 As you heard, through the several
25 presentations, it's difficult to select a particular

1 site where you can get the variety of issues that are
2 currently rising up in different communities. And if
3 could bring experts and persons who are familiar with
4 these issues to come to DC and provide a basic
5 overview, we think that would be helpful. And that
6 should be the initial Commission proceeding to handle
7 that.

8 CHAIRPERSON BERRY: If I may say so, I heard
9 in the presentations, and took note of several of the
10 issues that exist here in DC if I heard the presenters
11 correctly. Somebody discussed the voucher issue in DC.
12 Then there was some discussion of what the Department
13 of Education was supposed to be doing, which came up in
14 two or three of the presentations.

15 And then there was the two experts in the
16 Wall Street Journal article who are trying to
17 conciliate and find ways, if I understood you
18 correctly, Peter, to positively deal with these issues
19 who seem to be over in Virginia somewhere.

20 MR. REILLY: At the Freedom Forum.

21 CHAIRPERSON BERRY: So that there were --
22 even if one wanted to discuss some of the issues or
23 some kind of overview, I would be very interested in
24 this sort of positive, for myself, this person who's
25 been able to resolve all these issues in one of the

1 school districts.

2 You said they were able to bring together
3 both ends of the political spectrum. I found that very
4 interesting, indeed.

5 But anyway, I don't want to hog the
6 discussion. I hear you, Vice Chair.

7 Do others have comments they'd like to make
8 about the briefing or about how we proceed or anything
9 else?

10 COMMISSIONER GEORGE: Madam Chair?

11 CHAIRPERSON BERRY: Yes, Commissioner George.

12 COMMISSIONER GEORGE: I have a couple of
13 points to make, but first I'd like to ask our last
14 presenter a question for my clarification.

15 CHAIRPERSON BERRY: Okay.

16 COMMISSIONER GEORGE: Is she still there?

17 CHAIRPERSON BERRY: Maxine Sharpe. Yes.

18 They're all sitting here.

19 MS. SHARPE: Yes, I'm here.

20 COMMISSIONER GEORGE: Oh, okay.

21 The DOEd guidelines. You referred to some
22 challenges. I don't know if they were litigation or
23 just complaints about the implementation of the
24 guidelines in the New York area.

25 MS. SHARPE: Yes.

1 COMMISSIONER GEORGE: Yes. And it sounded as
2 though those complaints were coming from people who
3 took the view that the DOEd guidelines are not being
4 enforced rigorously enough.

5 Did I hear that correctly?

6 MS. SHARPE: The information that we were
7 able to find concerned one particular advocacy group in
8 New York City. And to the best of our knowledge,
9 there's no litigation regarding their complaint.
10 They've simply sort of raised it, I think, in sort of a
11 public forum way that they have problems with these
12 particular guidelines because they don't believe that
13 they properly interpret Agostini.

14 COMMISSIONER GEORGE: Oh, okay. Now that
15 does clarify it.

16 The dispute there is not over whether the
17 guidelines are being implemented properly. It's about
18 whether the guidelines themselves are faithful to
19 Agostini.

20 MS. SHARPE: Correct. That's correct.

21 COMMISSIONER GEORGE: Okay. Now are there
22 any complaints? My understanding is that there were
23 coming from the other direction saying that the DOEd
24 guidelines are unfaithful to Agostini in that they
25 require too much by way of activities to ensure non-

1 entanglement. For example, covering the crucifixes in
2 Catholic school classrooms when the Title I teachers
3 come in and so forth.

4 MS. SHARPE: I understand your question and
5 I'm not aware of any. I don't know whether anyone else
6 on the team found any.

7 COMMISSIONER GEORGE: I could put you in
8 touch with the information. So I think there's
9 probably a debate going on here with the guidelines in
10 the middle and some people on one side criticizing them
11 and some people on the other side criticizing them.
12 There's a very important interesting issue there.

13 CHAIRPERSON BERRY: Yes.

14 COMMISSIONER GEORGE: I had some further
15 points, Mary, but I'm happy to defer to others.

16 CHAIRPERSON BERRY: Okay.

17 What is your view of this issue of whether --
18 that the Vice Chair was making the suggestion about
19 doing the first one.

20 COMMISSIONER GEORGE: I think the point of
21 having something in Washington, DC, the point of having
22 the first one be in Washington, I do not want it to be
23 merely a briefing or consultation or something like
24 that. I want it to be a hearing, and one of three
25 hearings, and the subpoena powers used and so forth.

1 And then I'm just reluctant for us not to
2 have some sort of hearing, one of the hearings, in the
3 Pacific Northwest. Although I do realize that choices
4 have to be made here. And given that we're down to
5 three hearings, we can't do everything.

6 Perhaps Eddie could just address the question
7 or defer it to one of the other presenters who would
8 just be more up to speed with the information on what
9 the case is against doing say a Portland hearing.

10 CHAIRPERSON BERRY: Before he answers that,
11 Robbie, since the Vice Chair has to leave for a very
12 important meeting, do I understand you to say that the
13 idea of having sort of an overview, so long as it's a
14 hearing in the first, which is the idea he had,
15 although he didn't say hearing, that that idea does not
16 offend you?

17 COMMISSIONER GEORGE: That's acceptable.

18 CHAIRPERSON BERRY: And you think that's
19 acceptable. I'll let him leave then.

20 COMMISSIONER GEORGE: The only thing is, it
21 would have to be in the context of trying to decide
22 whether these three sites are in fact the right three
23 cities.

24 CHAIRPERSON BERRY: Right. We can still talk
25 about the other cities and whatever, but I just wanted

1 to get that point nailed down before he left.

2 Okay?

3 COMMISSIONER GEORGE: Yes.

4 CHAIRPERSON BERRY: All right.

5 Proceed with your question. You asked Eddie
6 a question.

7 Go right ahead, Eddie. If you remember it,
8 answer it.

9 MR. HAILES: I believe the question is why
10 the team appears to have disfavored the --

11 COMMISSIONER GEORGE: I realize that you
12 can't do everything but my understanding is -- and I
13 think I've had a host of information too about it -- is
14 that you have a range of issues that we need to cover
15 in the Pacific Northwest. There's some interesting
16 twists on the issues there.

17 A good case can be made for the Pacific
18 Northwest. I've tried to make it before. And I wonder
19 what the case against is.

20 MR. HAILES: Well, based on the same facts
21 that I think we both are reviewing, it seemed on the
22 contrary that there were not enough cases in the
23 Northwest where you would have a particular site -- say
24 Portland -- where you could bring in fact witnesses
25 that could discuss the full range of issues that you

1 said we should review.

2 From Portland to Seattle, we're talking about
3 the limitations of our subpoena authority. The
4 research that was conducted by the team revealed that
5 some of these case that we believed were good issues to
6 explore were under litigation at the time. And those
7 were the principal reasons we disfavored the Northwest.

8 COMMISSIONER GEORGE: Well, the Troy -- then
9 the issues would be under litigation in Troy, as well;
10 right?

11 MR. HAILES: Well, when we mentioned Troy,
12 and we could get a fuller discussion by one of the team
13 members, we really were trying to find a location where
14 we would have a Commission proceeding that would not
15 involved a hearing because there's so many issues
16 throughout the state of Alabama and in Florida. At
17 least we would have a site where we could look at a
18 number of different issues in a place where we could
19 invite participants to come forward and talk about the
20 full range of issues.

21 So Troy was selected not because we knew we
22 could have a site where we would have the subpoena
23 range and authority to get all of our fact witnesses
24 but that it would be a convenient location to explore a
25 lot of issues in the Southern part of our nation.

1 COMMISSIONER GEORGE: But we're supposed to
2 have three hearings.

3 MR. HAILES: What we're saying is that
4 there's been a clear change since the proposal was
5 initially brought forward which in fact is revealed by
6 the research that's been done by the team.

7 I think when the concept or the proposal was
8 first presented you did not have the growing consensus
9 around the nation of how to resolve these issues. And
10 those places where the issues have not been resolved
11 are places where litigation is ongoing or we simply
12 can't reach the number of fact witnesses within the
13 limitations of our subpoena range.

14 CHAIRPERSON BERRY: I'm confused.
15 Commissioner George?

16 COMMISSIONER GEORGE: Yes.

17 CHAIRPERSON BERRY: I thought that they were
18 saying that Troy would be one of the places. So I
19 didn't understand.

20 I thought what staff was proposing, if I
21 heard them right, was that there would be three
22 hearings; one in Washington, one in Troy and one --
23 I've forgotten. New York City, wasn't it?

24 MR. HAILES: New York City, where there
25 clearly are a lot of issues.

1 CHAIRPERSON BERRY: There would be three
2 hearings. Then in response, I thought I understood --
3 Eddie, maybe I'm confused -- to say that the staff
4 thought that if you were in Troy where there are some
5 issues, and there are issues in Alabama, that the
6 subpoena range would go within 150 miles or something
7 and that there were people within that range where a
8 lot of these issues were being discussed.

9 But it was not a proposal to have less than
10 three hearings.

11 COMMISSIONER GEORGE: Is that right, Eddie?

12 MR. HAILES: Well, basically, what we're
13 saying, to have three Commission proceedings.

14 COMMISSIONER GEORGE: Wait a minute. That's
15 the issue.

16 MR. HAILES: Exactly. We're raising this as
17 an issue. And that's why I'm --

18 CHAIRPERSON BERRY: Oh, you're asking us.

19 MR. HAILES: I am asking the Commission,
20 given the difficulties the team is faced in finding a
21 suitable site that would give us the authority to
22 subpoena fact witnesses within 100 miles that could
23 come forward and help the Commission to examine the
24 full range of issues.

25 And I should just interject that a team

1 member has indicated to me that the matter in Troy,
2 Alabama is not currently under litigation.

3 COMMISSIONER GEORGE: That matter is?

4 MR. HAILES: Is not.

5 COMMISSIONER GEORGE: No, no. Tell me what's
6 that matter that's not under litigation. We have a
7 whole range of issues. Many of them are in Alabama.

8 MR. HAILES: Sure.

9 COMMISSIONER GEORGE: What is the matter that
10 is not under litigation to which she is referring?

11 MS. DICKINSON: Hi. This is Lynn Dickinson.
12 And I have presented the issues in Alabama.

13 The issue in Troy is that there are two main
14 controversies in Alabama and I'll start with Troy,
15 which is not in litigation because they are discussing
16 mediating the claims based on another controversy
17 elsewhere in Alabama.

18 And the issues are -- it relates to a Jewish
19 family that is I think the only Jewish family in the
20 community there.

21 COMMISSIONER GEORGE: I don't know what that
22 is. Do you hear a ringing? I hear a ringing.

23 CHAIRPERSON BERRY: Yes. Is that in your
24 office?

25 COMMISSIONER GEORGE: I don't believe so.

1 CHAIRPERSON BERRY: Okay.

2 MS. DICKINSON: Okay. So there's a Jewish
3 family that appears to be the only Jewish family in the
4 community and the parents sued, stating that their
5 children had been discriminated against in several
6 ways; one being the one child was being punished for
7 being disruptive in class, and the punishment was to
8 write an essay on, quote, "why Jesus loves me."
9 Unquote.

10 He also was, during a school led prayer
11 event, forced to bow his head in conformity with the
12 prayer practices that were ongoing.

13 Also, the student has been prohibited from
14 wearing a yarmulke and also, Star of David symbols on
15 their labels. And also it was alleged -- was
16 harassment by other students, such as drawing swastikas
17 on student lockers and things of that nature.

18 Now the reason why, or the articles report
19 that case -- they're discussing, mediating it because in
20 another place in Alabama which is in the northern part,
21 which is Valley Head in DeKalb County, there was a
22 lawsuit that was very broad in that it had many counts,
23 one alleging that a school prayer statute which is
24 statewide violated the constitution, and also alleging
25 specific incidents somewhat similar to the issues in

1 Troy.

2 COMMISSIONER GEORGE: No. That produced an
3 injunction by Judge Ira Dement. That's that case.

4 MS. DICKINSON: Yes. That's the case.

5 COMMISSIONER GEORGE: What I don't understand
6 is -- is this Maxine?

7 MS. DICKINSON: No, this is Lynn.

8 COMMISSIONER GEORGE: Lynn, what I don't
9 understand is I think what the Chairman and I were
10 trying to get clear on today is what you're proposing
11 going to Troy, not exercising our subpoena power, but
12 holding an inquiry into these two matters that are in
13 litigation?

14 MS. DICKINSON: Just to clarify, the dispute
15 in Troy is not in litigation.

16 COMMISSIONER GEORGE: My understanding was
17 that there was a lawsuit.

18 MS. DICKINSON: They're talking about
19 mediating the claims.

20 COMMISSIONER GEORGE: That's in the context
21 of litigation.

22 MS. DICKINSON: You're correct. I stand
23 corrected. However, --

24 COMMISSIONER GEORGE: And that matter is on
25 appeal.

1 MS. DICKINSON: No. The Troy matter is not
2 on appeal.

3 COMMISSIONER GEORGE: No. The Dement issue
4 in DeKalb County.

5 MS. DICKINSON: Right.

6 COMMISSIONER GEORGE: That's the so-called
7 prayer police case.

8 MS. DICKINSON: Right. That's what I believe
9 the Governor has described it as.

10 Yes, that case is on appeal. That's correct.

11 COMMISSIONER GEORGE: So you've got these two
12 matters in litigation. Does that count in favor of
13 going to Troy or against going to Troy?

14 MR. HAILES: Well, put in that perspective,
15 it would be against going to Troy for the purpose of
16 holding a hearing. And the reason why we mentioned
17 Troy is because of its closeness to the state of
18 Florida and the full range of issues in Alabama that we
19 could review.

20 For example, if those matters in Troy were
21 not under litigation but the Commission decided that
22 they were appropriate issues to examine, we still would
23 not be able to produce a full day of hearings.

24 What we're trying to do is to pull in the
25 curriculum, the several curricula issues throughout the

1 state of Florida and Alabama in one proceeding and to
2 do that in a Southern state; to have an overview here
3 in Washington, DC where we could get -- again, look at
4 a number of different issues.

5 And clearly in New York City we could
6 certainly deal with just about every single issue that
7 each team member briefed the Commission on this
8 morning: on the Equal Access, government funding,
9 rights of teachers and curriculum.

10 COMMISSIONER GEORGE: Madam Chairman?

11 CHAIRPERSON BERRY: Yes.

12 COMMISSIONER GEORGE: I have a proposal that
13 I hope will bring us along a little bit here. It seems
14 to me that we probably have a consensus about having a
15 hearing in Washington and maybe that's the first
16 hearing. And I would certainly be willing to join the
17 consensus to settle on New York as perhaps the place
18 for the second hearing for the very reasons that Eddie
19 articulated.

20 I think there's still more thinking to be
21 done really as between having a Pacific Northwest
22 hearing with the issues that would raise and having a
23 Southern, or Alabama hearing with the issues that that
24 would raise.

25 So I wonder if it might be useful just from

1 the procedural efficiency point of view if we would try
2 to just settle the first two, on which I think we'll
3 probably have consensus, and then perhaps if we could
4 get from Eddie or his staff a brief analysis of what we
5 could expect to learn if we did a Troy hearing as
6 opposed to what we could expect to learn if we did a
7 Portland hearing, and then maybe put into place some
8 procedure for us in relatively short order to make the
9 decision as between the two.

10 Is that reasonable?

11 CHAIRPERSON BERRY: Let me ask Eddie.

12 Eddie, is that --

13 MR. HAILES: We can do that. Could certainly
14 do that. I'm being told by our team that the equal
15 access issues in the Northwest are very similar to the
16 equal access issues in New York that I believe the
17 Commission would like to review. And we can handle
18 those in New York.

19 The Alabama and Florida cases are quite
20 unique, which is why the staff proposes going to
21 Alabama. But we certainly can do that in an analysis.

22 COMMISSIONER GEORGE: And it doesn't have to
23 be too lengthy, although I would like it to be
24 sufficiently comprehensive that we get a clear picture
25 of what we could expect to learn. I don't expect you

1 to provide all the details of what people might say,
2 but generally what we would be expected to learn with
3 the two possibilities.

4 And if the case can be made that the Pacific
5 Northwest would largely replicate what we would learn
6 in New York, then I'd be prepared to give in on that.
7 But I want to be able to make a judgment to satisfy
8 myself that in fact that's the case, or else propose a
9 counter position to the one that you're proposing here.

10 But I think perhaps the efficient thing to do
11 would be just to settle the first two and then look
12 forward to settling in an efficient manner the third
13 issue.

14 CHAIRPERSON BERRY: Is there anyone who, in
15 terms of -- let me let you respond and then I'll
16 recognize Commissioner Redenbaugh.

17 MR. HAILES: I would like to say that in
18 terms of New York, we still would face two issues that
19 we raised initially, and that is the extent to which
20 the Commission desires to use its legitimate subpoena
21 authority with regard to religious leaders and
22 adolescents.

23 CHAIRPERSON BERRY: Yes. We would have to
24 have understood by Commissioners that when we discover
25 that we have to subpoena religious leaders or

1 adolescents, there would not be Commissioners saying,
2 you know, that's insensitive. We shouldn't be
3 subpoenaing these people, if they are the people who
4 are the fact witnesses who have the best information
5 about whatever it is that's the issue.

6 So that would be a matter of sensitivity, not
7 a matter of the legality of doing so.

8 COMMISSIONER GEORGE: Right. Can I raise a
9 question there?

10 Eddie, would you anticipate any reason why we
11 would have to issue subpoenas duces tecum with respect
12 to religious leaders or adolescents or would we just
13 solicit oral testimony?

14 MR. HAILES: Let me ask our team leader.

15 MS. GONZALEZ-JOY: Well, the reality is,
16 since there has not been a decision as to the place, we
17 haven't really had a discussion in terms of documents
18 for subpoena duces tecum, so what has been discussed
19 was more testimony in terms of these individuals.

20 CHAIRPERSON BERRY: But if there will be
21 subpoena duces tecum, we would know that? We, the
22 Commissioners?

23 MR. HAILES: Yes.

24 COMMISSIONER GEORGE: Then I think we do
25 really have to be sensitive, particularly with

1 documents that are produced for internal purposes for a
2 religious organization. I'm less concerned, although I
3 think we should be careful and have a conversation to
4 make sure that we're carefully conducting our subpoenas
5 with respect to the two classes of persons that the
6 Chairman has identified.

7 CHAIRPERSON BERRY: Emma, did you --

8 MS. GONZALEZ-JOY: It's difficult to
9 visualize why we would need documents of internal
10 religious organizations. If we're dealing with the
11 Equal Access Act, what we'd need is whatever
12 documentation was submitted to the school.

13 COMMISSIONER GEORGE: That seems to be right,
14 as well as -- I want to ask the question is there any
15 reason why you would anticipate --

16 MS. GONZALEZ-JOY: At first blush, no.

17 CHAIRPERSON BERRY: So why don't we just
18 assume that and we'll be told if that's not correct.

19 COMMISSIONER GEORGE: Right.

20 CHAIRPERSON BERRY: Commissioner Redenbaugh?

21 COMMISSIONER REDENBAUGH: I just had a
22 question.

23 Robbie, are you satisfied with the event in
24 Alabama not being a hearing?

25 COMMISSIONER GEORGE: No. I'm not satisfied

1 with that at all. I think we should have three
2 hearings.

3 CHAIRPERSON BERRY: But we're not going to
4 decide that. The proposal before us is -- I think we
5 heard that and that's clear, Russell. He wants us to
6 have three hearings. But the proposal before us is to
7 see if there are any objections to proceeding by
8 having, by consensus, Washington, one, and then New
9 York. And then we will reserve judgment on where the
10 third one will be until we hear more about why one
11 place, as opposed to another place.

12 That's what's on the floor at the moment.

13 COMMISSIONER REDENBAUGH: Okay. I have no
14 further questions.

15 CHAIRPERSON BERRY: Commissioner Lee?

16 COMMISSIONER LEE: I have one question.
17 Several of you have mentioned that you had looked into
18 coverage during school hours. Have you looked into
19 activities held in school property after school hours
20 sponsored by a school district? If after school
21 activity that is held inside the school is also
22 sponsored by the district, are you going to look into
23 that area?

24 MS. GONZALEZ-JOY: Well, none of these
25 activities are sponsored by the school. It's just that

1 they're made available. They're made available. And
2 when you're talking about group access, you're talking
3 basically about access to a non-instructional time.

4 There is a difference, of course, between the
5 rights under the Constitution vis-a-vis some of the
6 legislation. Where you have school prayer within the
7 time that there is instruction, it is in terms of
8 individual rights to pray, individual student rights.
9 That's where you would come into the situation of
10 during instructional time, but not for groups.

11 CHAIRPERSON BERRY: Okay. Yes. I'm just
12 going to do it right now; see if there is any objection
13 to our proceeding by having Washington first and then
14 New York and reserving judgment on the other. Because
15 if there's no objection, I'll just say without
16 objection, so ordered.

17 Without objection, so ordered.

18 Okay. Thank you very much, Commissioner Lee.
19 Yes. I thank you for presenting this.
20 But -- I guess we have more questions.

21 COMMISSIONER REDENBAUGH: Yes.

22 CHAIRPERSON BERRY: Go ahead, Commissioner
23 Redenbaugh.

24 COMMISSIONER REDENBAUGH: Maxine, I just have
25 a clarification. In the Minnesota referendum, the

1 issue there is a tax deduction or a tax credit?

2 MS. SHARPE: I found that it was a tax
3 credit, Commissioner.

4 COMMISSIONER REDENBAUGH: Okay. It would be
5 a very substantially different matter.

6 Thanks.

7 CHAIRPERSON BERRY: Okay. Any other
8 questions for the panel?

9 Yes, Commissioner Horner?

10 COMMISSIONER HORNER: Just thank you very
11 much. I think it's going to be a terrific set of
12 hearings.

13 COMMISSIONER REDENBAUGH: I do, too.

14 CHAIRPERSON BERRY: It sounded quite
15 comprehensive.

16 Thank you for giving us all this information.

17 Thank you very much.

18 MR. HAILES: You're very welcome.

19 CHAIRPERSON BERRY: If we have no further
20 business, I'll entertain a motion to -- yes?

21 COMMISSIONER GEORGE: Madam Chairman, are we
22 going to be able to hold to the dates that we have or -
23 -

24 CHAIRPERSON BERRY: The first one will be --
25 what is it? May -- what date is it? The 19th and

1 20th.

2 COMMISSIONER GEORGE: I believe it's exactly
3 one month away.

4 CHAIRPERSON BERRY: The 19th and 20th. The
5 20th.

6 COMMISSIONER GEORGE: Is that going to be
7 possible?

8 CHAIRPERSON BERRY: Staff, are you prepared
9 to do this on the 20th?

10 MR. HAILES: Well, we have reserved the date
11 for a hearing and so we will work towards that end.

12 CHAIRPERSON BERRY: All right.

13 COMMISSIONER GEORGE: Is there just literally
14 time for proper notification?

15 CHAIRPERSON BERRY: Yes. It has to be in
16 today. We decided that, so it will be in today, I'm
17 told.

18 COMMISSIONER GEORGE: All right. Let's also
19 be clear that there is not already any potential future
20 conflict. Let's try to be clear on when we can expect
21 to have a witness list and how much time we have, given
22 the short time frame, to get recommendations for
23 witnesses in to Eddie's group.

24 CHAIRPERSON BERRY: You'll need
25 recommendations from the Commissioners in a week or --

1 no more than a week from today?

2 MR. HAILES: Our team leader is saying
3 Monday. But certainly a week, I think.

4 COMMISSIONER GEORGE: I've already submitted
5 a whole list of names of various people in various
6 regions. And I would just ask Eddie's staff to
7 consider those as recommendations now for the hearings
8 that we've decided on. Some of those are in fact in
9 the Washington area, but I will be submitting some
10 additional ones in view of the decision that we've made
11 about Washington and New York.

12 CHAIRPERSON BERRY: So if other Commissioners
13 have names, please get them in no later than the end of
14 next week.

15 COMMISSIONER GEORGE: Can I ask when we can
16 expect to get a list from the staff?

17 CHAIRPERSON BERRY: By April 30th, I'm told.

18 COMMISSIONER GEORGE: Good.

19 CHAIRPERSON BERRY: Okay. I don't know when
20 that is, but --

21 Okay. Thank you very much. And I'll
22 entertain a motion to adjourn, if there's no other
23 business to come before this body.

24 COMMISSIONER GEORGE: So moved.

25 CHAIRPERSON BERRY: It's nondebatable. We're

1 adjourned.

2 Thank you very much.

3 (Whereupon, the proceedings were concluded at

4 12:15 p.m.)

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