

U. S. COMMISSION ON CIVIL RIGHTS

- - -  
MEETING  
- - -

Friday, March 6, 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  
ROBERT P. GEORGE, COMMISSIONER  
A. LEON HIGGINBOTHAM, COMMISSIONER  
CONSTANCE HORNER, COMMISSIONER  
YVONNE Y. LEE, COMMISSIONER  
RUSSELL G. REDENBAUGH, COMMISSIONER

RUBY MOY, STAFF DIRECTOR

STAFF PRESENT:

MICHELLE AVERY  
MARLISSA BRIGGETT  
BARBARA BROOKS  
ERIK BROWN  
MARGARET BUTLER  
DAVID CHAMBERS  
KI-TAËK CHUN  
JAMES S. CUNNINGHAM  
CONSTANCE DAVIS (Via Telephone)  
LYNN DICKINSON

## STAFF PRESENT: (Continued)

BOBBY DOCTOR (Via Telephone)  
PAMELA DUNSTON  
EDWARD HAILES, JR., DEPUTY GENERAL COUNSEL  
GEORGE M. HARBISON  
CAROL-LEE HURLEY  
FREDERICK ISLER  
JACQUELINE L. JOHNSON  
WANDA JOHNSON  
REGINALD MARTIN  
LILLIAN MOYANO, YOB  
PETER REILLY  
REBECCA KRAUS  
EILEEN E. RUDERT  
MIGUEL SAPP, PARLIAMENTARIAN  
PATRICE STANLEY  
ILONA TURNER  
MARCIA TYLER  
CATHERINE WALLACE  
AUDREY WRIGHT  
NADJA ZALOKAR

## COMMISSIONER ASSISTANTS PRESENT:

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

## A G E N D A

	<u>Page</u>
I. Approval of Agenda	4
II. Approval of the Minutes of February 6, 1998 Meeting	5
III. Announcements	5
IV. Staff Director's Report	27
V. State Advisory Committee Appointments for Maine, North Carolina and Texas	28
VI. Los Angeles Hearing Report	78
VII. ADA Briefing	100
VI. Future Agenda Items	

## 1 P R O C E E D I N G S

2 9:30 a.m.

3 CHAIRPERSON BERRY: The meeting come to  
4 order.5 The first item is the approval of the agenda.  
6 Could I get a motion to approve the agenda?

7 VICE CHAIRMAN REYNOSO: So move.

8 CHAIRPERSON BERRY: Second?

9 COMMISSIONER REDENBAUGH: Second.

10 CHAIRPERSON BERRY: All in favor, indicate by  
11 saying aye.

12 (Chorus of ayes.)

13 Opposed?

14 (No response.)

15 So ordered.

16 The second item is the approval of the  
17 minutes of February 6, 1998. Could I have a motion,  
18 please?

19 COMMISSIONER HORNER: So move.

20 COMMISSIONER ANDERSON: Second.

21 CHAIRPERSON BERRY: Discussion?

22 (No response.)

23 All in favor, indicate by saying aye.

24 (Chorus of ayes.)

25 Opposed?

1 (No response.)

2 So ordered.

3 Announcements. I have a couple.

4 On Wednesday, the House Judiciary Committee  
5 marked up a bill, H.R. 3117, the Commission's  
6 reauthorization, which will go to the House floor for  
7 consideration. The only amendment which passed was one  
8 by Representative Scott. Commissioners' terms will be  
9 five years instead of four years, as in the bill;  
10 instead of six years, as currently in the statute.

11 Would you like to comment on that, Staff  
12 Director?

13 STAFF DIRECTOR MOY: Yes.

14 H.R. 3117 will impact the Commission's  
15 administrative and programmatic workload and resource  
16 demands in four areas. First, the GAO recommendations  
17 in some projects must be done earlier than scheduled.  
18 Second; the Commission's annual financial statement  
19 must be audited by an independent external auditor.  
20 Three, two new projects will be added to our fiscal  
21 year '99 already approved programs. Four, SACs will be  
22 required to conduct fact-finding, devoting more  
23 resources per project than already projected.

24 Our current fiscal '98 program cannot be  
25 completed as scheduled with existing resources. Our

1 small staff is already overburdened. In case you  
2 hadn't noticed, we only have one chief or director of a  
3 unit; no deputies. Most of these section heads, in  
4 addition to their multi responsibilities, are also  
5 being tasked to do the GAO recommendations and there  
6 are six Regional Directors overseeing 50 states and the  
7 District of Columbia and roughly 600 SAC members.

8 Staff cannot, with the limited resources and  
9 low technology, be asked to meet deadlines that are  
10 unrealistic and not conforming to timelines.  
11 Adjustments will have to be made at all levels.  
12 Resources must be applied efficiently for the sake of  
13 staff's morale in order to do the work of the  
14 Commission.

15 The bill, if passed, will put this agency in  
16 such a position that, given the lack of resources, it  
17 seems Congress wants us to fail. I mentioned to the  
18 staff earlier that my vision was to bring the  
19 Commission more credibility and positive visibility,  
20 and I want to thank the staff who share this same  
21 vision.

22 Lastly, it is with pride that I serve this  
23 Commission and I hope that each of you feel the same,  
24 to make it a stronger agency.

25 Thank you, Chair.

1           CHAIRPERSON BERRY: All right, Staff  
2 Director.

3           I would also say that I am aware that four  
4 Commissioners, Republican appointees to this  
5 Commission, wrote a letter to the House supporting  
6 these provisions in the legislation and are in complete  
7 support, according to them, of the deadlines.

8           This letter, they did not share with any of  
9 us, and they did not apprise us of this fact at the  
10 last meeting when I asked whether there was any  
11 discussion of the reauthorization bill. I just thought  
12 that the rest of you should know that in terms of your  
13 awareness of fair dealing and collegiality which has so  
14 dominated in the past before the last four years the  
15 way this Commission has operated.

16           So I assume that those four Commissioners  
17 have some ideas about how the staff can do all this  
18 work within the time available and will give us details  
19 of their suggestions for how it can all be done in  
20 conformity.

21           You will also note that the General Counsel's  
22 memo explains that some of the provisions are plainly,  
23 technically, impractical. That there are certain  
24 Administrative Procedure Act requirements for what you  
25 do when you propose regulations and when you submit

1 them, and these are timelines that apply to the whole  
2 government, not just this agency. And that if anyone  
3 had bothered to sit down to count before they put the  
4 provision in, they would realize that it was  
5 technically and practically impossible to come up with  
6 such a date.

7 I would also point out that there's one  
8 provision in the statute, the proposed bill -- two  
9 inconsistent provisions. One says that we are to abide  
10 by the Federal Advisory Committee Act, which we do  
11 abide by already. And the other requires us to do  
12 something which is inconsistent with the Federal  
13 Advisory Committee Act; namely, to worry about  
14 balancing the viewpoints that people express when they  
15 are on State Advisory Committees, which is totally  
16 inconsistent with the Federal Advisory Committee Act.

17 Had our colleagues bothered to explore this  
18 matter before they supported that part of the  
19 legislation, they might have noted that there was some  
20 inconsistency. But perhaps they can also advise us,  
21 since they're in support of it, in some detail how we  
22 are to go about, in their view, complying with these  
23 provisions should they become law. They have not  
24 become law yet. They have been passed by the Committee  
25 and I would assume that they will be passed in the



1 House.

2 I have one other announcement. As a result  
3 of a poll conducted by the Office of the Staff  
4 Director, the Schools and Religion hearing dates are  
5 May 19 and 20th, June 11th-12th and June 22nd-23rd.  
6 May 19-20; June 11-12; and June 22nd-23rd. The  
7 hearings will consist of two one-day full hearings, and  
8 a one-day mini-hearing.

9 The Office of General Counsel is working on  
10 all the matters they have to work on before we have  
11 hearings, according to our hearing manual, and we will  
12 know those details later. But those are the dates that  
13 are there.

14 Commissioner George asked if he could meet  
15 with the Staff Director and some of the staff to  
16 discuss this project and I agreed that this made sense.  
17 It's consistent with our policy, which is if a  
18 Commissioner wants to discuss something, they ask the  
19 Staff Director and the staff will come in and they can  
20 discuss it. And he did so on February 24th.

21 If any of the rest of you want to discuss  
22 these matters, you of course can avail yourself of the  
23 same procedure.

24 The last announcement is on February 27th,  
25 Edward Hailes, Mr. Hailes, Steady Eddie, announced to

1 Commission staff that he's accepted a new position at  
2 the Equal Employment Opportunities Commission to work  
3 with Paul Igasaki who is the Chair of the EEOC. And so  
4 his last day with our Commission will be March 20th.

5           And on behalf of the Commissioners and staff,  
6 I want to thank you, Eddie, for your efforts,  
7 everything you did, even when we didn't have a staff  
8 director, working with Stephanie in the Office of  
9 General Counsel and everything you've done; your  
10 manner, your demeanor, your valuable counsel during  
11 your time here. And I know you'll have a great time at  
12 the EEOC, particularly since we have hopes, now that  
13 its budget will be increased as this Commission has  
14 been recommending and as I urged upon the President,  
15 along with other people who urged it upon the  
16 President. In other words, beat him over the head  
17 about it. Now it's being proposed and I see by  
18 yesterday's paper that the Speaker indicated that he  
19 thought it was something.

20           So you may have happier times financially  
21 over at the EEOC. And thank you very much for your  
22 service here.

23           VICE CHAIRMAN REYNOSO: Hear, hear.

24           STAFF DIRECTOR MOY: May I say something?

25           CHAIRPERSON BERRY: Yes.

1 STAFF DIRECTOR MOY: Thank you, Madam Chair.

2 I would also like to thank Eddie Hailes for  
3 being the EEO director, and also for his Herculean  
4 work and important work on the AI's to help us to  
5 conclude that.

6 Thank you.

7 CHAIRPERSON BERRY: Does any other  
8 Commissioner have an announcement?

9 COMMISSIONER HORNER: Madam Chair, just to  
10 correct for the record. You referred to the four  
11 Republicans who signed the letter.

12 CHAIRPERSON BERRY: I said Republican  
13 appointees.

14 COMMISSIONER HORNER: That's ambiguous. Just  
15 for the record, it's two independents, two Republicans  
16 anointed by --

17 CHAIRPERSON BERRY: Appointees. I said  
18 appointees, A-P-P-O-I-N-T-E-E-S.

19 COMMISSIONER HORNER: Thank you, Madam Chair.  
20 As a former English teacher, I'm just  
21 clarifying.

22 CHAIRPERSON BERRY: Yes, Commissioner  
23 Anderson?

24 COMMISSIONER ANDERSON: On the matter of the  
25 legislation for reauthorization of the Commission, I

1 would just simply like to say that for a good part of  
2 this year there was serious concern among members of  
3 the House Subcommittee whether this Commission would  
4 even be reauthorized. And in fact, there was a  
5 proposal brought to the Subcommittee not to reauthorize  
6 the Commission.

7           So, speaking for myself, it seemed to me to  
8 be a step forward when a bipartisan bill sponsored by  
9 the Chairman of the Subcommittee, Congressman Canady  
10 and a ranking Democrat, Congressman Scott, proposed  
11 H.R. 3117. And I was happy to support that bipartisan  
12 proposal.

13           I would also say for the record that the  
14 Chair's February 24th letter to Chairman Canady was not  
15 shared with this Commissioner and with no other  
16 Commissioners that I know of before it went to the  
17 Chairman of the Subcommittee. So, I would say that for  
18 the record.

19           And finally, I would say that if the  
20 Subcommittee version, the Canady-Scott reauthorization,  
21 is enacted, I would be happy to meet with any member of  
22 the Commission and with the Staff Director to determine  
23 how we go about meeting the deadlines specified in that  
24 legislation. And I think that should the legislation  
25 be enacted into law, our -- immediately following

1 Commission meeting ought to be devoted to implementing  
2 the provisions of that legislation on a timely basis.

3 CHAIRPERSON BERRY: I would assume that part  
4 of your recommendation would be to repeal the  
5 Administrative Procedure Act and to repeal the Federal  
6 Advisory Committee Act.

7 Secondly, the letter that I sent came after  
8 the letter you sent which you shared with no one. And  
9 you have copies of my letter. I know you do, because  
10 Commissioner Redenbaugh told me he had a copy. We  
11 don't have a copy of yours. I have yet to see it. So  
12 that's my answer to that.

13 We will take up what we will do about the  
14 legislation, if it should pass. But the Staff Director  
15 already sent a letter to the Committee explaining the  
16 details about why some of those provisions were  
17 impossible to meet. She did that in advance of the  
18 legislation. And as far as it being bipartisan, to be  
19 sure I know that Mr. Scott, having no other alternative  
20 since he doesn't have the votes to propose his own  
21 reauthorization bill, is in support of reauthorization,  
22 and therefore, of this bill.

23 The threat to not reauthorize -- we've not  
24 been reauthorized in the past. This would not have  
25 been the first time. We weren't reauthorized last

1 year, unless my memory fails me.

2           So my only point is Commissioners have a  
3 right to send letters to whomever they please. I'm not  
4 complaining about that. I just feel that last month we  
5 talked about reauthorization. You can see in the  
6 minutes a whole section in which I asked if anyone  
7 wanted to discuss it; what did people think about the  
8 terms. I wanted us to have a discussion. And all we  
9 got from your side was silence. And then later on I  
10 find that a letter has been sent up expressing a  
11 position.

12           So I just didn't understand why the position  
13 couldn't have been shared and we couldn't have just  
14 been told. We've already expressed our opinion. This  
15 is what we think and we're sorry. And then we would  
16 have moved on and not taken up the time of the  
17 Commission.

18           I don't want to take up any more time, so  
19 I'll move on.

20           The next item is the Staff Director's Report.  
21 And before the Staff Director's Report is actually  
22 discussed, we need some clarification.

23           The first item on the clarification is  
24 Commissioner Redenbaugh asked that Commissioners --  
25 that he, he said, and then others, somebody else, other

1 Commissioners, said they want transcripts earlier, and  
2 he wanted his on disk, as I recall. And everybody sort  
3 of said, yes, yes. There wasn't any vote taken but  
4 there was some discussion.

5           The staff took that to mean that you would  
6 get the transcripts after they had been received and  
7 edited and not that you would get them before they were  
8 edited and as soon as they came out in whatever fashion  
9 they came back from the Court Reporter.

10           I just want to make clear that that's the  
11 staff's understanding and that's my understanding.  
12 We've never given out transcripts to people that hadn't  
13 even been edited.

14           So you will get them 10 days after the staff  
15 gets them so that they have a chance to edit them. But  
16 that's their interpretation of the 10-day deadline.  
17 That was the first point.

18           The second is minutes. Someone asked for  
19 minutes, amended minutes. In the past we've never  
20 given out amended minutes. Commissioners have assumed  
21 that when the staff says something will be amended or  
22 we agreed to, that they will do it. If any of you have  
23 individual requests for amended minutes, you will of  
24 course be given them. But we don't have a routine  
25 practice of handing out minutes.

1           The other is that someone asked for -- oh.  
2 Commissioner Redenbaugh, you said last meeting that you  
3 wanted forward looking promises from the staff. I  
4 think it was when we were discussing the MIS. Forward  
5 looking as opposed to backward looking, I think you  
6 said, or something like that.

7           COMMISSIONER REDENBAUGH: Yes.

8           CHAIRPERSON BERRY: The Staff Director and  
9 the staff would like to know what you are talking  
10 about. They didn't understand what you meant. So if  
11 you want to tell us now or if you'd like to meet with  
12 the staff and the Staff Director to explain it -- I'd  
13 like to know, too, what did you mean. I assumed you  
14 meant forward planning.

15           COMMISSIONER REDENBAUGH: I think I was  
16 referring -- if I could respond very briefly, Madam  
17 Chair.

18           Thank you.

19           I believe I'm referring to the Staff  
20 Director's report or a document prepared by the Staff  
21 Director last time which had a lot of explanation on  
22 what hadn't happened and why but was silent as to the  
23 more interesting part, which I would say is therefore,  
24 we now expect or anticipate this to happen by this new  
25 date. That's what I mean by forward looking.



1           CHAIRPERSON BERRY: Is that -- do you  
2 understand that, Ruby?

3           STAFF DIRECTOR MOY: I think we'll probably  
4 have to talk with him after the Commission meeting.

5           CHAIRPERSON BERRY: Okay. Maybe you could  
6 have a discussion with Ruby and the staff at some  
7 point. I think I now understand what you mean -- so  
8 they can get a more detailed explanation. And then  
9 they can -- whatever they bring back to us, they can  
10 discuss it with us.

11           The other is that you receive newsclips,  
12 stacks of newsclippings, about the Commission. And due  
13 to budgetary constraints, the Staff Director would like  
14 to discontinue the production and distribution of these  
15 press reports effective immediately.

16           Commissioners and staff would be able to  
17 access the Internet to obtain daily civil rights  
18 information. And if any of you preferred hard copy,  
19 you could have your Assistant access the Internet and  
20 make a hard copy for you. But it's taking up much of  
21 one staff member's time just to sit there clipping news  
22 reports all the time about the Commission. And that  
23 appeared to be one area in which, given computerization  
24 and the Internet and all that, there would be some  
25 efficiency in that regard.

1 Yes, Judge Higginbotham?

2 COMMISSIONER HIGGINBOTHAM: I would be very  
3 disappointed if we discontinued that because I don't  
4 have the time to read what is said in the Denver  
5 newspaper or Miami newspaper. There's just no way in  
6 the world that I get a picture of what's happening.

7 But I read these and they're very helpful.  
8 And sometimes when writing an article, I say, oh, there  
9 was something in it. I think that it's the only  
10 contact I have with the staff which gives me what's  
11 happening currently in the country.

12 Now, I don't think the Internet is a  
13 substitute at all because you have to know what you  
14 want and I don't have that much time. But I get these  
15 reports; I thumb through them. I'm very much  
16 interested, as an example, in affirmative action. So I  
17 just tear them out. And I think our Assistants are  
18 about as good as any but I want to use them for more  
19 important things than their going on the network and  
20 having to convey it to me.

21 VICE CHAIRMAN REYNOSO: There is a lot of  
22 repetition sometimes. I find them helpful also, but I  
23 find that they are repetitive. It may be that when  
24 there's a wire story, rather than duplicating every  
25 article, just duplicate one of them and indicate that

1 the same wire story was carried in 20 other newspapers  
2 or whatever, because there seem to be a lot of  
3 duplication in the reports.

4 But I agree that it's a way to sort of keep  
5 up. For example, I assume that all the Commissioners  
6 will see some news accounts about what happened in  
7 Santa Rosa or what happened in Florida with respect to  
8 your visit there some time back. And we sort of get a  
9 sense of what's happening overall in terms of the  
10 Commission activity.

11 CHAIRPERSON BERRY: Commissioner George?

12 COMMISSIONER GEORGE: I agree with Judge  
13 Higginbotham. I think they are extremely valuable.  
14 Often I'll spend most of a day in a week or two week  
15 period going through those.

16 Some of the things that I've brought before  
17 the Commission follow from things that I've picked up  
18 out of those readings. Sometimes I'll make phone calls  
19 and try to find out more information about a particular  
20 incident or event.

21 I don't think there's really a good way to  
22 substitute for that. And this way there is one member  
23 of the staff, I take it, who is providing this service  
24 for all eight Commissioners and others at the  
25 Commission who are involved and who read those things.

1 So I would hate to lose this.

2 I agree with the Vice Chairman that if  
3 there's a way to make it more efficient -- there is a  
4 certain amount of repetition. No doubt about that.  
5 But I wouldn't want to cut back on the substance. This  
6 is a valuable thing.

7 CHAIRPERSON BERRY: Commissioner Anderson?

8 COMMISSIONER ANDERSON: I seem to recall that  
9 a number of the clips have a little identification on  
10 the corner that they've been gotten for us by a  
11 clipping service. Do we have a clipping service doing  
12 that? And if so, are we continuing that? Are we not  
13 continuing it?

14 It would seem that that would take a lot of  
15 the staff time.

16 CHAIRPERSON BERRY: Barbara, do you know the  
17 answer to that question?

18 MS. BROOKS: We do both. We have a clipping  
19 service, Burrell's, that provides us with all the news  
20 articles that mention the Commission, a Commissioner, a  
21 SAC member, a staff member, any activity. Then we, or  
22 one person in our office is responsible for reading  
23 every day six newspapers; cutting, mounting,  
24 duplicating. Which takes about five to six hours. We  
25 have one support person in the office with that

1 responsibility.

2           We also check the Internet to supplement what  
3 the newsclip service does not provide because they're  
4 usually a week or two behind the actual publication  
5 date. So we're using all sources; newsclips, the  
6 service, and what we get in every day.

7           CHAIRPERSON BERRY: Yes, Commissioner  
8 Higginbotham?

9           COMMISSIONER HIGGINBOTHAM: It's intriguing  
10 for me to look at newspaper coverage. I have had an  
11 article published and then, say maybe like New York  
12 Times syndicates it. And what is excerpted in the  
13 Chattanooga, Tennessee newspaper, a fine newspaper, one  
14 of the great newspapers in the country, and what is in  
15 another newspaper, are very, very revealing. And if  
16 you look at either one only, you would not get the  
17 others.

18           I think that we are an informational entity  
19 at least, and it pains me to think that we are going to  
20 act without the maximum amount of information. And I  
21 would really want to debate with my usual conservative  
22 style, as to whether that is the best allocation of  
23 resources to cut that off.

24           CHAIRPERSON BERRY: Yes, Barbara?

25           MS. BROOKS: To reassure you, we will -- we

1 continue to provide all newsclips that mention the  
2 Commission or Commissioners. I think the concern is  
3 the other newsclips that we have to -- the other  
4 articles that we have to cut that don't mention the  
5 Commission or an activity but an area that the  
6 Commission might be interested in.

7           COMMISSIONER HIGGINBOTHAM: I'm willing to  
8 take a bet here if it's Diet Pepsi versus a bottle of  
9 Diet Coke. But if you looked at church burnings, as an  
10 example, you would see a vast amount of commentary  
11 which our Commission isn't even involved in. And you  
12 don't even know where they are. To be precluded that,  
13 I think, is a devastating loss.

14           CHAIRPERSON BERRY: Staff Director?

15           STAFF DIRECTOR MOY: Well, I thank all the  
16 Commissioners for their viewpoint. This is one way to  
17 find out of it's being read. So, thank you.

18           (Laughter.)

19           CHAIRPERSON BERRY: I think there's another  
20 solution to the problem, and that is to do a Lexis  
21 search and simply -- because that's what I do. You can  
22 collect all the newspapers. I get all the same  
23 categories, all the same citations, and then I just  
24 download them, if I want to. So, maybe they could do a  
25 Lexis search because I think in OGC they have Lexis.

1 And maybe it will be faster in terms of staff time.

2 We wouldn't have the pictures, but I don't  
3 know. The pictures don't look that good to me anyway.  
4 But they'd have the newspaper articles.

5 COMMISSIONER GEORGE: You mean Lexis-Nexis?  
6 This just isn't this the legal?

7 CHAIRPERSON BERRY: No, no. You can get all  
8 those things. I get them all the time. That's how I  
9 read my stuff.

10 Yes?

11 STAFF DIRECTOR MOY: We still have a problem  
12 with the cost on Lexis-Nexis, because as I understand  
13 it, we're already way over our Lexis-Nexis budget. But  
14 what I was trying to refer to is that the duplication  
15 of these press reports -- we do about 40 of them -- are  
16 sent out. So if we could consolidate, maybe if we  
17 could just do the Commissioners, since Carolita has to  
18 cut and paste anyway for a set, we could take care of  
19 the Commissioners.

20 CHAIRPERSON BERRY: I think you should  
21 consider further what to do and you should balance off  
22 how much it costs to do one Nexus -- we're only talking  
23 about doing one set of Nexus, not a Nexus search for  
24 each person. You just sit there and do all the  
25 categories. It doesn't take that long. And whether

1 you get the same results as you would get from somebody  
2 clipping, and then how much does that cost.

3 I don't think it will cost as much as a whole  
4 person, but how much that would cost and how much time  
5 it would take compared to something else, and then come  
6 back.

7 We will defer this for the time being. And  
8 the information has been very useful.

9 I would also ask, just to ask to see what the  
10 answer is. I would ask my colleagues if they would  
11 mind giving the Commissioners a copy of the letter they  
12 sent to the Hill concerning the Commission's  
13 reauthorization, since none of us have a copy or have  
14 seen it.

15 I'll leave it at that, if you don't want to.

16 COMMISSIONER GEORGE: Let me just ask. Can  
17 we establish some understanding about what  
18 Commissioners should share with other Commissioners so  
19 that both sides completely understand in advance what  
20 is to be shared and what need not necessarily be when  
21 we're acting in our individual capacities or joining  
22 together in our individual capacities in the political  
23 sphere?

24 I'd be very happy to have some agreed upon  
25 understanding.



1           CHAIRPERSON BERRY: I thought the answer was  
2 obvious. I didn't know there was confusion. I thought  
3 the answer was obvious that if you're going to comment  
4 in writing on a matter that concerns the entire  
5 Commission, such as its reauthorization. And I'm only  
6 asking you. You may write whatever you want. And I  
7 don't even think we need any guidelines for that. I'm  
8 only asking the question because we discussed it here  
9 and you didn't share it in the discussion. So I'm just  
10 curious about what your reasons were for wanting those  
11 items in. And since you've never told us, I'd just be  
12 interested in knowing, as part of the reauthorization  
13 discussion, so that I can see what animated your belief  
14 that all of these things were great things since you've  
15 never told any of us. That's all.

16           I don't really need the letter if you'll just  
17 tell me why you thought these were great provisions.

18           Yes?

19           COMMISSIONER HIGGINBOTHAM: Madam Chair, it  
20 seems to me that when I'm at home stretched out in my  
21 study on the phone listening to the meetings I get a  
22 different vibe than when I'm here. I would be  
23 delighted if -- I don't want to use the word "sides"  
24 but if the Commissioners could agree on what they think  
25 is a rational guideline. And I know there'll be

1 twilight zones where you don't. But if I had to make a  
2 judgment, any time an individual Commissioner gives a  
3 speech or comments on a substantive area and does not  
4 imply that it's the Commission's view, I don't have to  
5 have it. If they want to share with me, fine. But if  
6 you correspond, suggesting that a substantial number of  
7 the Commissioners take this position on issue X that a  
8 copy of it should go to the other Commissioners just so  
9 you don't get booby-trapped in a reporter calling you  
10 up and you not knowing what others have done.

11 So that without talking in terms of sides, I  
12 see no reason why we couldn't draft a one paragraph  
13 guideline. I mean, it has no binding -- no one will be  
14 impeached if they don't comply with it. But a  
15 guideline.

16 CHAIRPERSON BERRY: I'm actually opposed to  
17 that. Maybe I've been on this Commission too long.  
18 But having had this same discussion at least 15 times  
19 since I've been on this Commission, I know what a swamp  
20 it is. You get people arguing about who said what and  
21 this and that, and the nuance. Which is why I said I  
22 am only asking. I expect people to behave in a  
23 collegial fashion and to use their own discretion. I  
24 will do that. I think you should do that. But I am  
25 only asking about this particular letter because the

1 topic was discussed here in a meeting and we were never  
2 told answers to why people were supporting the  
3 provisions. And I simply want to know why you are  
4 supporting.

5 I would never even mention it if we hadn't  
6 raised the discussion here in the meeting and nothing  
7 was forthcoming in the discussion about why you were  
8 supporting all these provisions. In fact, there was  
9 silence when I tried several times to get people to  
10 discuss it.

11 And so I'm just at a loss and I thought maybe  
12 you might tell us so the other Commissioners would know  
13 why you thought all these were great provisions when to  
14 us they seemed to be things that we're going to have  
15 problems meeting.

16 But I don't want to take up any more time of  
17 the Commission. And I do think it's a swamp, Leon.  
18 But if you and Commissioner George want to get together  
19 and try to draft something, please do and we will  
20 discuss it. But I do know. I've been involved in  
21 this, as I say, many, many times. And it does get to  
22 be a swamp with people trying to figure out what  
23 somebody said. So I leave it to people's discretion  
24 normally.

25 The Staff Director's Report. Does anybody

1 have a question on the Staff Director's Report? Or a  
2 comment or anything else to the Staff Director's  
3 Report?

4 (No response.)

5 If not, then we go to the next item, which is  
6 the State Advisory Committee appointments for Maine,  
7 North Carolina and Texas.

8 Can I get a motion on these? This Item  
9 Number V.

10 VICE CHAIRMAN REYNOSO: Do you want a motion  
11 individually or as to all of them?

12 CHAIRPERSON BERRY: However you want to do  
13 it.

14 VICE CHAIRMAN REYNOSO: Well, I've gone  
15 through them. I move acceptance of all three.

16 CHAIRPERSON BERRY: Can I get a second?

17 COMMISSIONER REDENBAUGH: I'll second for  
18 purposes of discussion.

19 CHAIRPERSON BERRY: Okay. Discussion.

20 COMMISSIONER REDENBAUGH: I have minor  
21 procedural concerns on each of these three which I  
22 believe can be easily remedied. And therefore, I'm  
23 going to vote against the motion but with the  
24 understanding that we can remedy these procedural  
25 issues and pass these at the next meeting.

1           And the concern specifically that I speak to  
2 is the process for managing the appointment package  
3 when sitting members are not reappointed. This was a  
4 process adopted in '93 and reconfirmed in '96. And I  
5 think it's a small thing but I think it's a good thing  
6 to adhere to.

7           CHAIRPERSON BERRY: Can someone explain to me  
8 what this issue is and what the problem is?

9           COMMISSIONER REDENBAUGH: Oh, I'm sorry. It  
10 has to do with -- and it's the case in each of these  
11 three. What we agreed to do was when there are people  
12 who are not reappointed, that we be told that, the  
13 reason for their non-reappointment be given. And that  
14 if they choose to, they may contest that and that be  
15 reflected to us in the packet.

16           So I think it's a small thing to correct in  
17 these three cases but I would like to make sure that we  
18 either amend that procedure or follow it.

19           CHAIRPERSON BERRY: Is that your  
20 understanding, Carol-Lee, of what the procedure is?

21           MS. HURLEY: That is my understanding and I  
22 don't know where we have failed to follow it,  
23 Commissioner. If you would tell me -- I'm sorry. I  
24 thought we were doing that. We've been trying very  
25 faithfully to follow that.

1           The only thing we do is put -- and this is  
2 for reasons of protecting reputations of individuals.  
3 If we are not recommending that a member be reappointed  
4 because that member failed to attend any meetings, I  
5 don't see any reason to put that person's name in the  
6 memorandum to you and say we don't think he should be  
7 reappointed because he didn't attend any meetings.

8           I'd be happy to try to correct what it is  
9 we're doing wrong, but I don't know what it is.

10           COMMISSIONER REDENBAUGH: Do you have the  
11 '96? Can you read that?

12           CHAIRPERSON BERRY: Carol-Lee, tell us  
13 exactly how you went about doing this in terms of the  
14 issue that Commissioner Redenbaugh raised if there were  
15 people who were not reappointed.

16           MS. HURLEY: It's carried out at the regional  
17 level and we double check it when the package comes in  
18 here. The process is very simply that the regional  
19 staff sends to sitting members a letter asking are they  
20 interested in continuing on the committee. When they  
21 see the results from that and the look at the overall  
22 members remaining or interest in remaining, subtracting  
23 those who have moved away or say they don't want to  
24 continue.

25           Then they consider the areas they need to

1 fill, whether it's for a geographic part of the state,  
2 whether it's race or ethnicity or political to maintain  
3 the 50/50 Democrats/Republicans/gender. That sort of  
4 thing. And they send out recruitment areas trying to  
5 target to areas where we will get recommendations that  
6 will fill the gaps.

7           If a committee has been relatively  
8 unproductive, as occasionally happens, the regional  
9 director might do a broader recruitment in an attempt  
10 to revitalize the committee.

11           We've had more sitting members not  
12 reappointed I'd say in the last couple of years because  
13 of the attempt to get younger people on the committee.  
14 So it's not one thing in every single case.

15           CHAIRPERSON BERRY: But I was asking about  
16 procedures, which was his point. After the slates come  
17 to you and there are those who are not being  
18 reappointed, what happens?

19           MS. HURLEY: The regional office sends out a  
20 letter to those who are not being reappointed informing  
21 the individual that they are not being recommended for  
22 reappointment and advising the individual of their  
23 right to appeal to the Staff Director. If such a  
24 letter comes in, our policy is to include it with the  
25 package that is sent to you.

1 CHAIRPERSON BERRY: Is that what you did?

2 MS. HURLEY: Yes.

3 CHAIRPERSON BERRY: So what part of it is  
4 remiss?

5 MS. HURLEY: I don't know. Probably  
6 something but I don't know what it is.

7 COMMISSIONER ANDERSON: Madam Chair, I think  
8 my question maybe is similar to Commissioner  
9 Redenbaugh's and perhaps ought to be directed to the  
10 Staff Director. But in the memorandum for the  
11 Commissioners from the Staff Director, January 23rd, on  
12 page 2 it says, "Two members not recommended for  
13 reappointment were sent letters notifying them of their  
14 opportunity to appeal that decision to the Commission.  
15 No response has been received to date." And I think  
16 that's clearly wrong.

17 MS. HURLEY: Which set is this?

18 COMMISSIONER ANDERSON: It's Texas, the Texas  
19 SAC reappointment.

20 MS. HURLEY: Oh. Then that clearly is wrong.

21 COMMISSIONER ANDERSON: It clearly is wrong.

22 And so I think maybe that's the concern that  
23 Commissioner Redenbaugh has. It certainly is a concern  
24 that I have.

25 MS. HURLEY: That's my mistake in drafting



1 the memorandum. I'm sorry. But we did include the  
2 response we received from one of the members. Only one  
3 of the members sent a letter to the Staff Director and  
4 we did include that in the package.

5 It was just a mistake on my part in drafting  
6 the letter -- the memo for the Staff Director.

7 COMMISSIONER ANDERSON: So it's clear that  
8 his letter appealing the decision was taken into  
9 consideration in this, even though it's not reflected  
10 in the memorandum to us.

11 MS. HURLEY: Right. The memorandum is sent  
12 to the Staff Director primarily as an address.  
13 Generally when the Staff Director sends the package to  
14 you, she or he has decided that that's what she's going  
15 to recommend and the decision on the appeal is yours.

16 CHAIRPERSON BERRY: So we did get a letter?

17 MS. HURLEY: Yes.

18 CHAIRPERSON BERRY: Does anybody else have a  
19 question?

20 (No response.)

21 Does that answer your procedural question,  
22 Commissioner Redenbaugh?

23 COMMISSIONER REDENBAUGH: Well, it identifies  
24 it. I have the same question with respect to North  
25 Carolina, in which -- now, this may be the case that

1 Carol-Lee was speaking about. But I think the reason  
2 for non-reappointment I think was not specified in  
3 North Carolina or it's given as diversity.

4 Now, I wonder what that means or if there's  
5 anything behind that. And I should say that one of the  
6 things we agreed in '93 is that there should not be a  
7 presumption of automatic reappointment. So I want to  
8 make clear I'm not modifying the decision that we made  
9 at that time and that I continue to agree with. I  
10 think there should not be a presumption of automatic  
11 reappointment. And one of the things we have tried to  
12 do is increase the membership of younger people on the  
13 SACs.

14 I think there are lots of reasons for change.  
15 The concern arises when people contest not being  
16 reappointed. Then I think it needs to come to our  
17 attention.

18 But, Carol-Lee, do you have something about  
19 North Carolina that you can say that goes beyond what's  
20 in the packet?

21 MS. HURLEY: Perhaps, Mr. Doctor could speak  
22 to that. I just don't remember at this point. And  
23 he's on the telephone.

24 CHAIRPERSON BERRY: Bobby?

25 MR. DOCTOR: Yes.

1 CHAIRPERSON BERRY: Could you speak to North  
2 Carolina, the query. Did you hear the conversation?

3 MR. DOCTOR: Yes, I did.

4 CHAIRPERSON BERRY: Carol-Lee says she  
5 doesn't quite recall the facts concerning North  
6 Carolina and whoever was not reappointed and was not  
7 heard from or something. In putting the package  
8 together do you recall anything you can tell us to add  
9 to what we have?

10 MR. DOCTOR: Well, I thought we followed all  
11 of the procedures. It could be more specific in terms  
12 of his concern. I think it would help in my being able  
13 to respond.

14 I only had the Chair, for example, who --

15 CHAIRPERSON BERRY: Who resigned.

16 MR. DOCTOR: Yes. Who resigned and made it  
17 very clear that he didn't want to be reappointed. Is  
18 he the person in question, Commissioner Redenbaugh?

19 COMMISSIONER REDENBAUGH: I don't have any  
20 person in question, only I think no reasons are given  
21 and I don't know anything about either the person or  
22 the case.

23 Bobby, Charlie has just made me aware of your  
24 memo of August '93 which spells out a number of reasons  
25 for which people could not be retained.

1 MR. DOCTOR: Yes.

2 COMMISSIONER REDENBAUGH: And then our  
3 taskforce subsequent to that said those are very good  
4 and legitimate reasons and that's a good thing to be  
5 aware of. Would you just make us Commissioners aware  
6 of those reasons. So that's what I'm asking. That you  
7 implement your memo of '93.

8 MR. DOCTOR: Lack of attendance is the  
9 primary reason why we have not recommended that certain  
10 members be reappointed. And of course there's also the  
11 indication from the individual that he or she does not  
12 have any interest in being reappointed. But for the  
13 most part, we're talking about lack of attendance.

14 I'd like to move this --

15 I'm sorry. Excuse me. Go ahead.

16 COMMISSIONER HORNER: I just meant -- the  
17 lack of attendance is for all the SACs or a particular  
18 -- are we just talking about North Carolina here?

19 CHAIRPERSON BERRY: No. He is talking about  
20 the memo that Commissioner Redenbaugh is referring to,  
21 in 1993, which was general, if I recall.

22 COMMISSIONER HORNER: I'm sorry. I didn't  
23 mean to interrupt Commissioner Redenbaugh's proposal.

24 COMMISSIONER REDENBAUGH: That's fine.

25 CHAIRPERSON BERRY: A query, Russell. I have

1 a query about what you just said, the exchange between  
2 the two of you. It's my recollection -- and maybe we  
3 need to go back and read the rules again -- that, one,  
4 there is no presumption that people will be  
5 reappointed.

6 COMMISSIONER REDENBAUGH: Yes. That's mine.

7 CHAIRPERSON BERRY: Two, we do not have to  
8 give reasons to people for why they are not  
9 reappointed. I remember a very heated debate here  
10 about that question and that the persons can appeal if  
11 they want to. And at the time of the appeal,  
12 Commissioners can explore those reasons and make up  
13 their own minds. But the mere fact that there was no  
14 presumption meant that you didn't need to give reasons.

15 You may just decide that you'd like some new  
16 people and that you really didn't have to say to the  
17 person who was not being reappointed here is the reason  
18 why you're not being reappointed specifically.  
19 Otherwise, presumption doesn't make any sense. I don't  
20 know what kind of presumption that would be.

21 My understanding from the debate was that  
22 these reasons may be taken up when an appeal is brought  
23 to the Commission if any of us are interested in  
24 discussing it. But the staff isn't supposed to send a  
25 letter to them saying you're not being reappointed and

1 here are the reasons why because that way people would  
2 infer that there is a presumption that they'd be  
3 reappointed unless you find a reason.

4 That's my recollection.

5 COMMISSIONER REDENBAUGH: I have a very  
6 similar recollection, too, which is that we -- and I  
7 think it's a good practice not to tell a person why  
8 they're not being reappointed. That makes a lot of  
9 sense.

10 However, Charlie has just read to me  
11 something we adopted in 1996.

12 Can you give that to Carl to read?

13 It's recommendation 2 of the '96 whatever it  
14 is -- taskforce,

15 CHAIRPERSON BERRY: You want her to read it?  
16 Well, I have it here.

17 Well, I don't have it. I have something  
18 else. It says -- before you read that, it says, "To  
19 members of the North Carolina SAC. In the package that  
20 you received the personnel actions requested." Under  
21 North Carolina, it says, "Two members resigned; two  
22 members were not recommended for reappointment due to  
23 lack of activity and/or for diversity reasons. Member  
24 not recommended for reappointment were informed by  
25 letter dated February 21st, 1997 of their right to

1 appeal this decision to the Commission."

2           So, Carol-Lee just handed me this to remind  
3 me it's in my package and in yours that we were given  
4 reasons. We were.

5           COMMISSIONER REDENBAUGH: Yes.

6           CHAIRPERSON BERRY: For why they were not  
7 reappointed.

8           Anyway, Charlie, if you want to read that for  
9 Russell, you can.

10           MS. PONTICELLO: Yes. This, Madam Chair, is  
11 from the list of recommendations that was produced by  
12 the taskforce that Commissioner Redenbaugh headed in  
13 1996. These were recommendations that the Commission  
14 approved at the July meeting in 1996.

15           "Recommendation Number 2. Verify the  
16 implementation of the notification and appeals  
17 provision (as amended and approved in 1993). The  
18 Commission approved procedures in 1993 to ensure that  
19 SAC members who are not being reappointed be given an  
20 opportunity to state why they should be reappointed.  
21 Current procedures also require that the final  
22 appointment package provided to the Commissioners  
23 should include the names of any members who are not  
24 being reappointed, the reason for their non-  
25 reappointment and the letter from the SAC member, if he

1 or she chose to respond.

2 "The Staff Director -- this was the  
3 recommendation of the taskforce that the Staff Director  
4 would confirm and ensure that these provisions are  
5 being fully implemented."

6 CHAIRPERSON BERRY: Now, Carol-Lee, as I  
7 understood what you said to us, that you followed this  
8 procedure, and we did receive the only letter you got,  
9 and each one of the sheets that is in your package,  
10 after each -- each one of the packages has a chart  
11 called "Characteristics of Proposed State Advisory  
12 Committee." And then under the chart it has "not  
13 reappointed: North Carolina: Asa Spaulding, Jr.,  
14 Deborah C. McKeefan, William A. Stern, Vanessa L.  
15 Travathan." Each one of them has the names of the  
16 people.

17 So they abided by giving you the names of the  
18 people who were not reappointed. The only letter --  
19 you got an appeal. You got one letter and appeal, and  
20 that letter was transmitted to you with the package for  
21 that state.

22 That's the only one you got; right? Which  
23 means that that appeal is here if anyone is interested  
24 in it. And you have the names of the people who were  
25 not reappointed.



1           So, my reading of what was recommended and  
2 what we approved is that the staff did what they were  
3 supposed to do.

4           COMMISSIONER REDENBAUGH: Yes. I think in  
5 the case of North Carolina that I misspoke myself  
6 because I think that is there. And in the Texas case,  
7 the letter was in the packet but I didn't notice it or  
8 we didn't notice it, so it didn't come to my attention.

9           But this is an area that I don't want to make  
10 too -- I think I've already made too big an issue of  
11 this. But what I would like to do is just come --  
12 because I think these things have been substantially  
13 complied with, but I'd like to come back to the '93 and  
14 the '96 recommendations. Maybe I could just summarize  
15 those in one page and bring them back to us for the  
16 next meeting.

17           CHAIRPERSON BERRY: That would be fine. That  
18 would be fine. But I want the staff to feel encouraged  
19 that when they try to function that their work is  
20 appreciated. Because we get -- how many days in  
21 advance do we get these things?

22           MS. HURLEY: About a month.

23           CHAIRPERSON BERRY: A month in advance now.  
24 We don't act on them the first month when we get them.  
25 That's part of the procedure also.

1 Yes, Commissioner Lee?

2 COMMISSIONER LEE: Madam Chair, I just want  
3 to add that since the '96 meeting the staff has put in  
4 every recommendation this Commission has made. Not  
5 only the other things that's mentioned, but the  
6 organizations they've contacted. Very detailed.

7 If you go through everything -- granted, that  
8 letter was on the last page, but if you go through  
9 everything, you will notice all those letters were  
10 included in the package. So I think that the staff has  
11 done a good job in complying with the Commission's  
12 wishes.

13 CHAIRPERSON BERRY: Okay.

14 Judge Higginbotham?

15 COMMISSIONER HIGGINBOTHAM: I wanted to ask  
16 Russell this.

17 What I think I hear on the basis of the  
18 present information you have received and your review  
19 of the comments of the staff, really the only state  
20 which you have an issue with is Texas. And if that is  
21 true, why don't we just send the others through and  
22 bring Texas back next month rather than to hold up the  
23 others.

24 It seems to me that when staff does what  
25 they're supposed to, we want to let them know that

1 deadlines work. And my suggestion is would you be  
2 willing to have the others go through. And if you have  
3 a concern about Texas, it will come up next month and  
4 we'll have to resolve it at that meeting.

5 COMMISSIONER REDENBAUGH: That would  
6 certainly be fine with me.

7 VICE CHAIRMAN REYNOSO: I'd be pleased to  
8 amend my motion to confirm the membership of the Maine  
9 and North Carolina Advisory Committees.

10 COMMISSIONER REDENBAUGH: The seconder  
11 accepts the amendment..

12 CHAIRPERSON BERRY: I want to speak against  
13 the motion, although if it's voted upon, I will vote  
14 for it. And that is because nothing has been stated  
15 here to indicate that the staff violated the procedure  
16 when it came to the Texas nomination. And I don't want  
17 the staff to believe that we think that they somehow  
18 did something they weren't supposed to do.

19 No one has stated -- they did exactly in  
20 Texas. They told us who wouldn't be reappointed. They  
21 gave us the appeal letter. They did all of this. So  
22 that I am willing to support the motion but I just  
23 wanted to make it clear that I haven't heard anything  
24 that anybody said that they violated when they prepared  
25 Texas.

1           And so unless you tell them after we pass  
2 this motion what they did wrong, they won't be able to  
3 do anything any more before next month than they did  
4 this month.

5           Yes, Commissioner Anderson?

6           COMMISSIONER ANDERSON: Well, I'm not sure  
7 we're on the same conversation but the recommendation  
8 as to the procedure said that members who are not being  
9 reappointed would be identified and the reasons for  
10 their non-appointment will be stated.

11           Well, the cover memo on the Texas SAC says  
12 there is no appeal and it certainly doesn't state the  
13 reason for the non-appointment.

14           Now, the staff member who's responsible for  
15 preparing the memoranda has indicated it was a mistake.  
16 I'm willing to accept that and not beat a dead horse.  
17 We haven't heard from the Staff Director who signed the  
18 memoranda, but it seems to me delaying this a month  
19 because obviously the procedure was not followed in the  
20 cover memoranda seems to me to be an obvious course of  
21 action.

22           And if I could agree with my colleague  
23 without being accused of switching sides, I would say  
24 that it's a rather reasonable resolution of this at  
25 this time.

1 CHAIRPERSON BERRY: Call for the question on  
2 voting to approve the Maine and North Carolina SAC --

3 COMMISSIONER ANDERSON: Do we have a second?

4 CHAIRPERSON BERRY: There was a seconder. We  
5 already had a seconder.

6 All in favor, indicate by saying aye.

7 (Chorus of ayes.)

8 Opposed?

9 COMMISSIONER GEORGE: No.

10 CHAIRPERSON BERRY: Seven yes. Motion is  
11 passed.

12 VICE CHAIRMAN REYNOSO: Madam Chair, --

13 CHAIRPERSON BERRY: I want to see if we're  
14 clear on what the staff -- the staff next time for  
15 Texas is supposed to make sure that the memo is correct  
16 and resubmit that information to the Commissioners so  
17 that we can vote on this next time.

18 COMMISSIONER HORNER: And the reasons for  
19 non-reappointment given.

20 VICE CHAIRMAN REYNOSO: I guess I have a  
21 question. What we were read was a 1996 statement of  
22 our decision passed in 1993. Was the 1996 statement a  
23 correct statement of our policy in 1993? That is, that  
24 we would be advised of the reason for non-appointment.  
25 I didn't remember that in our '93 resolution. But if

1 that's what it says, why then we should follow it.

2 CHAIRPERSON BERRY: Well, they'll follow the  
3 procedure and they heard the discussion.

4 VICE CHAIRMAN REYNOSO: Okay.

5 CHAIRPERSON BERRY: Yes, Commissioner George?

6 COMMISSIONER GEORGE: I'd like to ask the  
7 Staff Director, Madam Chairman, to give us some  
8 indication of which appointees were nominated by which  
9 of the sources who were contacted. Occasionally we get  
10 some information, particularly when a Commissioner is  
11 the source of a nomination. But unless I'm missing it,  
12 we don't generally get the source.

13 I would like to know the source, particularly  
14 in the case of the Texas SAC where we had an indication  
15 that the Office of the Governor made some 37  
16 nominations. That's an extraordinary number of  
17 nominations and I would like to know how many of those  
18 or which of those has been accepted.

19 So if that would be possible, it would be  
20 useful for me to have that information.

21 CHAIRPERSON BERRY: Commissioner George, I  
22 think that is politicizing the process for us to know  
23 who in fact had their -- that gives us another factor  
24 to fit it to decide to vote against somebody because  
25 either this Governor or that Governor, that agency,

1 this agency specifically recommended or had people  
2 recommended who they didn't get. Therefore, we should  
3 vote against the package.

4 I just want to point that out. It just gives  
5 more opportunity for turning down people because we  
6 don't like their politics or don't like the politics of  
7 the people who recommend them.

8 That may be a good thing but it seems to me  
9 obvious that that's the opportunity that it creates.  
10 So it's not part of the procedure either, which I guess  
11 if we want it to be part of the procedure, we can make  
12 it part of the procedure.

13 That's my reaction to it.

14 Commissioner Anderson?

15 COMMISSIONER ANDERSON: Well, my concern  
16 would be if you have a Governor making 37 nominations,  
17 I'd be interested to know whether all of them were  
18 accepted or none of them were accepted.

19 COMMISSIONER GEORGE: It can't be all of  
20 them.

21 COMMISSIONER ANDERSON: I don't think that  
22 that is politicizing the issue. I think that's an  
23 important aspect of the information of this procedure,  
24 how we arrive at a slate of candidates.

25 There is one individual that is the Director

1 of the Christian Coalition and the Christian Coalition  
2 is stated here as having one nomination. So, I think  
3 one can maybe conclude that the Director of the  
4 Christian Coalition who's on the SAC may have been the  
5 nominee of the Christian Coalition in Texas.

6 I don't think that politicizes us knowing  
7 that and I certainly would not vote for someone or  
8 against someone because they had been nominated by the  
9 Jewish Federation of Houston or the Christian Coalition  
10 or the Jewish Community Center or the Texas Civil  
11 Rights Project. But I do think where you have a  
12 political office like the Governor making a large  
13 number of nominations it's a good thing for us to know  
14 how successful that Governor was in the appointment  
15 process.

16 COMMISSIONER HIGGINBOTHAM: May I ask --

17 CHAIRPERSON BERRY: Yes. Sure.

18 COMMISSIONER HIGGINBOTHAM: -- the  
19 Commissioner this hypothetical.

20 I guess we all want to have some containment  
21 of what I would call excessive politicalization. It  
22 think that's the question.

23 You know that I would envision if Governor X  
24 nominated 35 people? Then his adversaries would say,  
25 You know what? This Governor didn't nominate any



1 Latino or any African American or anyone else. So  
2 therefore, that Governor tried to show that he is  
3 nonpartisan, extends and gets more so that if you  
4 reveal this -- I don't think this is a cause celebre.  
5 If you reveal this, I don't see how you can avoid in  
6 some cases it becoming a lightning rod unfortunately.

7 Now, if you want to know -- I'm not going to  
8 lose any sleep over it, but I think that's a  
9 consequence when you start publishing and stressing  
10 which nominee was recommended by which person.

11 CHAIRPERSON BERRY: Well, it's not part of  
12 the procedure. So if the Commissioners would like to  
13 have it be part of the procedure, I would entertain a  
14 motion to do so and see if it gains majority support.  
15 Otherwise, it isn't part of the procedure.

16 COMMISSIONER GEORGE: Well, I'd so move. But  
17 I would be perfectly happy just to be provided with the  
18 information without a vote. But if there's some  
19 problem of providing a Commissioner or all the  
20 Commissioners with this information, if for some reason  
21 this information has got to be secret, then I'll make a  
22 motion.

23 My request was just a request for the  
24 information.

25 CHAIRPERSON BERRY: Yes?

1           VICE CHAIRMAN REYNOSO: Madam Chair, my  
2 impression is that much of this information was sought  
3 in part because of the lack of confidence of some  
4 members of this Commission on the staff procedure in  
5 getting members of the Advisory Committee and they  
6 wanted to be sure that the net was wide in terms of  
7 where the staff was going to get recommendations.

8           So we first asked, I think, that we just be  
9 told who was being communicated with. And we thought -  
10 - we as a Commission thought that that made good sense  
11 to make sure that many people have the opportunity to  
12 nominate. Though actually, the local staff itself has  
13 a lot of contacts. That is, they might recommend people  
14 to be on the Advisory Committee who no group nominated.  
15 But our effort to make sure that word would get out all  
16 of these organizations seemed to be perfectly fine.

17           Now we're going one step further. Now we're  
18 saying -- and of all those recommendations, who did you  
19 accept, who did you not accept. I assume the next step  
20 will be -- and give us a one-page memo analyzing why  
21 you accepted or didn't accept them.

22           CHAIRPERSON BERRY: That's the next step.

23           VICE CHAIRMAN REYNOSO: And we go down the  
24 line. I think at some point we'll have to proceed with  
25 some sense of confidence that people are operating in

1 good will to get the diversity that we want.

2 I assume that most of the people that the  
3 Governor recommended in Texas were not accepted because  
4 there weren't that many positions there. On the other  
5 hand, the Governor may have thought it was a nice thing  
6 for him politically to send in a whole slate of people.

7 But the ultimate question is what does the  
8 Advisory Committee look like? Does it have the sort of  
9 balance that we want it to have? And it seems to me  
10 that if we want more information on the individuals, we  
11 have quite a bit on their background and all that. We  
12 can ask the staff for that. But I hate to get into --  
13 I hate to proceed down the line of greater and greater  
14 inquiry that has, I think, some of the potential that  
15 Judge Higginbotham spoke about.

16 CHAIRPERSON BERRY: There is a motion made.  
17 Who seconded it? Dies for want of a seconder?

18 COMMISSIONER ANDERSON: I second it.

19 CHAIRPERSON BERRY: You second it.

20 Is there any further discussion?

21 Yes, Commissioner Redenbaugh?

22 COMMISSIONER REDENBAUGH: I intend to vote  
23 against the motion not on its merits but on the  
24 principle that we would do management too ad hoc in  
25 this instance. The motion may have some merit but I

1 would propose that we take it up at a time when we  
2 review the whole process, if we choose to do that,  
3 rather than just do this on a piecemeal basis.

4 My concern about it is managerial and not  
5 substantive.

6 CHAIRPERSON BERRY: Yes, Commissioner George?

7 COMMISSIONER GEORGE: Madam Chair, are you  
8 willing or is the Staff Director taking the position or  
9 is some determination being made authoritatively here  
10 that the information I requested cannot be made  
11 available to me?

12 CHAIRPERSON BERRY: My point was we have a  
13 procedure which we voted on as Commissioners for how we  
14 deal with these issues. Your request asks for a step  
15 in the procedure which is not part of the procedure.

16 As Commissioner Redenbaugh said, if we  
17 revisit the issue in his committee and there's a  
18 decision to include this as part of the procedure, and  
19 anything else anybody wants to include, and it's  
20 brought here and we agree to it, then it would be a  
21 part of the procedure. But my ruling is that it's not  
22 part of the current procedure that we have before it.  
23 And therefore, if we're going to change the procedure,  
24 we ought to agree to do so. That's my only point.

25 COMMISSIONER GEORGE: It's a request for

1 additional information beyond what we're given. It's  
2 not incompatible with the procedure. It's a request  
3 for additional information. It's not dictated by the  
4 procedure.

5 I wonder if it's your ruling that it's  
6 impermissible under the procedures we have. I think  
7 that would be peculiar ruling. But if that's it,  
8 that's it.

9 CHAIRPERSON BERRY: No, no. I'm ruling that  
10 it's incompatible. Because the procedure permits the  
11 staff to do the work of sorting all these things out  
12 and giving us the information that we have so that we  
13 don't try to intervene in the staff work. We let them  
14 do their work.

15 And I believe that this is going behind the  
16 staff and asking for even more opportunities to  
17 intervene at the level when they are making decisions  
18 about what slate to bring to us. That's my only  
19 ruling.

20 If you object to the ruling, you may have a  
21 vote on whether the ruling is accurate. But that's my  
22 basis for the ruling.

23 COMMISSIONER GEORGE: I don't believe that  
24 the ruling is accurate. However, I want to make a  
25 request to the Staff Director for this information.

1 She, I think, will have to make a determination of  
2 whether it's within her authority to give that  
3 information to me and to other Commissioners. She may  
4 make that decision based on your ruling. She may make  
5 that decision on another basis.

6 I believe that there is nothing incompatible  
7 with our procedure in providing that information, so  
8 I'm making the request of the Staff Director and she'll  
9 have to make the decision she makes.

10 COMMISSIONER HIGGINBOTHAM: Madam Chair, I'm  
11 having a little trouble following Commissioner George,  
12 and it may be because I got up at 5:00 this morning to  
13 catch a 6:30 plane out of New Haven.

14 Are you asking for information solely in  
15 terms of the Governor of Texas?

16 COMMISSIONER GEORGE: Oh, no. I'm sorry if  
17 you got that impression. That's a particular concern  
18 that I have because you have an extraordinary number of  
19 nominations made. I've never seen anything like this  
20 before. But I'm asking more generally to know who  
21 nominated all of the people who were nominated and how  
22 many nominations were accepted of those put forward by  
23 the various groups who were consulted.

24 The Governor of Texas nominated 37. Were two  
25 of his nominees accepted? None? Were five? I would

1 like to know. And I don't know think that information  
2 is secret or confidential or should be withheld from  
3 Commissioners.

4 CHAIRPERSON BERRY: Did you want to say  
5 something, Commissioner Lee?

6 COMMISSIONER LEE: I just have a question.  
7 How would that affect the final outcome, which is we  
8 approve the SAC based on different variables. They  
9 have to be diverse. They have to work in certain  
10 geographical areas.

11 So, for instance, if one person recommended  
12 someone from an underserved area and that one  
13 nomination got accepted and the Governor's Office  
14 represented 37 people from the same area, so naturally  
15 they may not get in.

16 So my question is by us knowing where these  
17 nominees came from or whatever, how does that affect  
18 our position of voting for the SAC membership?

19 CHAIRPERSON BERRY: Commissioner George?

20 COMMISSIONER GEORGE: I thought that would  
21 have been obvious. What it gives us is some sense --  
22 not a complete sense, but some better sense than we can  
23 possibly have now of whether the SAC is going to be  
24 balanced in terms of point of view.

25 CHAIRPERSON BERRY: Ah, now we have it.

1 Which is precisely what the Federal Advisory Committee  
2 Act prohibits us from doing.

3 COMMISSIONER GEORGE: That is a  
4 misinterpretation of the Federal Advisory Committee  
5 Act.

6 CHAIRPERSON BERRY: We are not supposed to  
7 influence the viewpoints of people who advise us or  
8 select them based on viewpoints that we expect to get  
9 from them.

10 COMMISSIONER GEORGE: Madam Chairman, --

11 CHAIRPERSON BERRY: Viewpoints are not  
12 supposed to be the basis on which you set up an  
13 Advisory Committee. Deciding that these people with  
14 these particular viewpoints ought to be the people that  
15 we put on the Advisory Committee. Because any lawyer  
16 knows if you let me name the person who has the  
17 viewpoint that I like, nine times out of 10 they're  
18 going to tell me what I want to hear.

19 COMMISSIONER HIGGINBOTHAM: Madam Chair, --

20 CHAIRPERSON BERRY: I don't know who asked to  
21 be heard.

22 COMMISSIONER GEORGE: If I was recognized,  
23 I'll defer to Judge Higginbotham.

24 COMMISSIONER HIGGINBOTHAM: You know, there  
25 are great issues in this country --



1 CHAIRPERSON BERRY: And these are not they.

2 COMMISSIONER HIGGINBOTHAM: -- which aren't  
3 bizarre. And my greatest feeling of discomfort with  
4 this Commission, in all due respect, is that we are  
5 accelerating our focus on tangential matters and not  
6 doing enough in diagnosing the pathology or diagnosing  
7 the successful cures.

8 If you go down this road for the staff to do  
9 an adequate job, they have to not merely give you this  
10 information but they've got to then look over the  
11 Commission and look at the people who are presently on  
12 and to get that information. Because it could be  
13 absolutely deceptive if you looked at only the current  
14 nominees and not look at the people who are presently  
15 on and their sources.

16 And what I just have a feeling about is that  
17 we're going to spend a tremendous amount of time  
18 focusing on tangential.

19 I gave to each of you -- to the  
20 Commissioners. I have one for you, Madam Chair, and  
21 one for you. When I look at the data on those  
22 statistics which I have in there, those are really big  
23 issues for this country. Whether you have one African-  
24 American in Berkeley Law School or whether you have  
25 four African-Americans at the University of Texas Law

1 School and states which will have more than 50 percent  
2 of their population to be non-white in less than eight  
3 or 10 years, those are pretty critical issues.

4 And I would hate for us to spend a tremendous  
5 amount of staff time on this kind of issue. But if  
6 that be the will of the body, it will be the will of  
7 the body.

8 CHAIRPERSON BERRY: Commissioner Anderson?

9 COMMISSIONER ANDERSON: Well, I would agree.  
10 I think we have a lot more important issues to be  
11 discussing in this Commission. I think we could stay  
12 here every time we meet through the afternoon until  
13 4:00 or 5:00, not leave at 12:00, 1:00.

14 I thought, for example, we'd have a  
15 discussion of the Sonoma County hearing that occurred  
16 last month. And as I listen to the discussion, I have  
17 a different understanding of my colleague's motion that  
18 I seconded.

19 I think for me, the issue comes down to a  
20 more fine point and it is simply this, with regard to  
21 the Governor of Texas. You have a public official  
22 making recommendations of individuals to be placed on a  
23 public advisory committee, a decision to be made by  
24 staff of this governing Commission, and you have  
25 members of the Commission asking for information about

1 that process and being denied that information. I  
2 can't understand that.

3           Whatever the motivation is, whether at that  
4 point we want to argue about balance, we want to argue  
5 about diversity, we want to argue about politics or  
6 partisanship, those are all things that you and I may  
7 agree on but they have no place in this. But where you  
8 have a government official making recommendations of  
9 individuals to a government body, quasi-government  
10 body, to be determined by this government agency at the  
11 staff level, and the Commissioners are being told they  
12 don't have access to that information when they request  
13 it, I can't understand that.

14           So if that's the conclusion, that's the  
15 ruling of the Chair, I'm going to vote against every  
16 SAC reauthorization from now on because I can't  
17 understand how we can go through an entire government  
18 process and part of the members of that government are  
19 denied that information.

20           CHAIRPERSON BERRY: This Commission by its  
21 actions has almost undermined morale completely on the  
22 SACs by what you have done by turning down SAC reports,  
23 by making clear that if they're not nominees now who  
24 you approve of or who come from people you approve of,  
25 by trying to influence the staff so that they will look

1 over their shoulder to make sure that they approve  
2 nominees so that you can vote for them because they  
3 have viewpoints that appear to be something that you  
4 might vote for, and therefore, you might vote for these  
5 people.

6 This is not a procedural issue, Commissioner  
7 Higginbotham, Judge Higginbotham. This is not a  
8 tangential issue. This goes to the heart of what a  
9 State Advisory Committee is for, number one; what are  
10 they going to recommend; what will the staff do when  
11 they're trying to figure out how to configure them.

12 Will they be like they are now when there are  
13 reports to be done, trying to figure out how they can  
14 get the SAC to shape a report even if it doesn't want  
15 to in such a way to get it passed here; even if it's  
16 something they don't even agree with. Otherwise, they  
17 come here and it's going to be voted down.

18 What they want to do is have that kind of  
19 influence without having a majority on the Commission.  
20 That's what this is all about. This whole subject is  
21 not about -- all this issue of viewpoints, which in my  
22 years on the Commission, the Commissioners have never  
23 taken into account any viewpoints of anybody who was  
24 going to be put on a SAC. Not consciously. Somebody  
25 on their own head may have. But to bring to this table

1 a discussion of viewpoints when we're talking about SAC  
2 members who are volunteers, who are to advise us, and  
3 to now have them understand you can't even get  
4 appointed to a SAC -- and who wants to anyway as a  
5 volunteer.

6 I also suspect that the number 37 is probably  
7 a typo because I don't believe the Governor of Texas --  
8 it's going to be one of those debates that, when it's  
9 all over and somebody goes back and looks, finds out  
10 it's not the case. But that happens very often also.

11 But the issue is substantive. It's not  
12 tangential. And it goes to the heart of everything. I  
13 see staff laughing because they probably know that I'm  
14 right.

15 Yes, Commissioner Anderson?

16 COMMISSIONER ANDERSON: Well, I must say that  
17 except for the last comment, I'd have to disassociate  
18 myself entirely from what you've said. As long as I  
19 have been on the Commission, I have never once asked  
20 that a particular individual be included on a SAC and I  
21 have never once asked that a particular individual be  
22 removed from a SAC.

23 What's more, I have voted against accepting  
24 SAC reports and I think the record will show that over  
25 the last four or five years, we have voted down less

1 than one tenth of the SAC reports that have been issued  
2 and referred to us. And I have voted for the  
3 overwhelming majority of SAC reports in favor of  
4 accepting them.

5           So I would disassociate myself with your  
6 characterization. You kept referring to you. If you  
7 were referring to me, I have to respond to that. If  
8 you were referring to someone else, they can speak for  
9 themselves.

10           I think this is an important issue. And like  
11 I say, it doesn't have to do with balance. It doesn't  
12 have to do with partisanship. It simply has to do  
13 where you have a chain of public officials, government  
14 officials in this process, and it gets to the  
15 Commissioners. And the Commissioner asks for  
16 information about that chain of documents and he's  
17 denied that information.

18           I find it astounding and I find it -- if you  
19 want to talk about collegiality, real collegiality.

20           CHAIRPERSON BERRY: There was none before you  
21 spoke, given your -- and I say your -- actions on the  
22 reauthorization letter and not sharing the discussion  
23 with us which undermined collegiality totally on this  
24 Commission. Not the letter but the discussion when the  
25 discussion came up.

1           The record will show that the Commission has  
2 rejected the affirmative action reports from at least  
3 three SACs and that the Commission rejected the Utah  
4 report from another SAC and that in the last year,  
5 reports that have been on contentious issues of this  
6 kind having to do with race, these matters have been  
7 turned down.

8           And so it's one thing to say that yes, over  
9 time we've approved a lot of reports. Usually they're  
10 not contentious. They're not about any contentious  
11 issues. But the real test comes when it's something  
12 where there's contention. And the evidence is in the  
13 reality that there are issues on which the Commission  
14 is divided, both when we get advice from the SAC which  
15 tends to one side or the other, and most of them have  
16 tilted in a position in favor of, say, affirmative  
17 action, that those reports get turned down. That was  
18 the only point that I was making.

19           And I did not mean to personalize it if you  
20 thought I was.

21           I don't know who asked to be recognized.

22           Commissioner Redenbaugh?

23           COMMISSIONER REDENBAUGH: I've lost sight of  
24 the --

25           CHAIRPERSON BERRY: What the issue was?

1                   COMMISSIONER REDENBAUGH:  -- the resolution.  
2  And I'd like clarification.

3                   Is the resolution -- I guess I should asks  
4  Commissioner George -- that this information requested  
5  be available now and forever on all SACs going forward  
6  or is it only in the case where the Governor has  
7  nominated 37?  Is it only in this one case or is this -  
8  - I'm confused about it.

9                   CHAIRPERSON BERRY:  Go ahead.

10                  COMMISSIONER GEORGE:  I take your point, Mr.  
11  Redenbaugh, that the time to set a new policy is when  
12  we sit down to set a new policy.  It's not right now.

13                  COMMISSIONER REDENBAUGH:  Right.

14                  COMMISSIONER GEORGE:  So I'm not proposing a  
15  new policy.  I was simply requesting the information on  
16  the Texas SAC.

17                  At the appropriate time I would like to make  
18  this a matter of policy.  I don't think it needs to be  
19  made a matter of policy for the Staff Director in  
20  individual cases to make that information available to  
21  us.  I see no basis for keeping that information  
22  confidential or secret from members of the Commission.

23                  And I'm amazed that the suggestion is being  
24  made that it is.  And I'm very amazed by the Chairman's  
25  interpretation of the SAC Act -- of the Advisory



1 Committee Act. Although I would be very happy to see  
2 a General Counsel's Office interpretation or opinion  
3 letter pertaining to the Act.

4 I don't think that it would uphold the  
5 Chairman's interpretation. It would take some amazing  
6 gymnastics to do that. But we should have it on the  
7 table.

8 CHAIRPERSON BERRY: We already have a letter  
9 from the General Counsel which includes an analysis of  
10 that, which was given to us before last month's  
11 meeting.

12 There's a motion on the floor.

13 Yes?

14 COMMISSIONER ANDERSON: I would like to  
15 respond to two things. First, as I read Section  
16 5(b)(2) of the Federal Advisory Committee Act, it says  
17 that legislation establishing an advisory committee  
18 assure that, quote, the membership of the advisory  
19 committee would be fairly balanced in terms of the  
20 points of view represented and the functions to be  
21 performed by the advisory committee.

22 So, we can talk about what is involved in the  
23 Advisory Committee Act in terms of balance of  
24 viewpoints, if you like. But I think before we do  
25 that, I would recommend that each member of the

1 Commission be provided with a copy of the Act and that  
2 we put it on the agenda and that we discuss it.

3           The other thing I would like to say is this.  
4 We spoke at length last meeting about the term of  
5 Commissioners in terms of the Commission's  
6 reauthorization act. I spoke a great deal about that  
7 issue. Over the last number of Commission meetings,  
8 the question of balance of viewpoints in SAC reports  
9 was an issue that I spoke to.

10           I have argued I believe on a number of  
11 occasions that the viewpoints represented in the SAC  
12 reports, while they may come out with a specific  
13 conclusion taking one side of an issue over the other,  
14 there ought to be some description, a fair  
15 presentation, of the different views contested on the  
16 issue presented in the report.

17           Now, whether or not members of the committee  
18 staff looked at the transcripts of our meetings and  
19 decided, yes, SAC reports to us ought to reflect a  
20 balance of viewpoints, I can't tell you. But as far as  
21 my view on that provision of the law, it should have  
22 been clear over the many times that we've discussed the  
23 issue of balance in SAC reports.

24           I'd be willing to talk about the  
25 reauthorization legislation for a long period of time

1 if you would like to put it on the agenda for the next  
2 meeting. I would be happy to do that. I thought I  
3 represented my views at the beginning of this meeting.

4           Where you have a bipartisan bill  
5 reauthorizing this Commission after the kind of  
6 investigative reports we've had by GAO and other  
7 agencies, I'm willing to support it even if it has  
8 provisions that I don't entirely agree with.

9           And so it seems to me that the Chair's  
10 largest problem would be with the bipartisan sponsors  
11 of that legislation. Now, they may have whatever  
12 political reason and judgment to co-sponsor that  
13 legislation, but in fact it is very easy for any member  
14 of Congress to introduce whatever kind of legislation  
15 he's willing to introduce. And a member of the  
16 minority on that subcommittee could simply have  
17 introduced legislation to reauthorize the Commission in  
18 its current statutory formulation and disagreed with  
19 everything in the Canady-Scott bill.

20           As far as I understand, the only individual  
21 to have done that was Congressman Barr, whose provision  
22 was to dismember this Commission and take its  
23 responsibility and incorporate it in the Department of  
24 Justice, which I think would be a mistake. That's why  
25 I supported the Canady-Scott bill.

1           But like I say, if you want to put it on the  
2 agenda for the next meeting, I'd be happy to talk about  
3 it until 5:00 p.m.

4           CHAIRPERSON BERRY: I have no problems with  
5 the co-sponsors of the legislation or with any member  
6 of Congress. I have no reason to have any problems  
7 with any of them, not that they would care if I did.

8           My only concern is I don't believe the  
9 Commission should do anything more than we've already  
10 done; to talk about diversity, to make sure that the  
11 recommendations in Russell's taskforce are implemented.  
12 That we shouldn't do anything else that indicates to  
13 anybody, including SACs that we're really concerned  
14 about the outcome of whatever they do.

15           And I would say that. And I wasn't even  
16 speaking to the legislation. And it is to that never  
17 in my time on the Commission have we ever discussed  
18 what some SAC member might think about something or who  
19 they were nominated by, which means they might have  
20 some kind of point of view before they were in fact put  
21 on the SAC.

22           There's a motion on the floor. I've  
23 forgotten what the motion was. So would the maker of  
24 the motion -- or we could have it read back from the  
25 transcript, but it would be easier, faster, to have the

1 maker of the motion read it and the second, so we could  
2 vote on it.

3 COMMISSIONER HORNER: We don't even know who  
4 made the motion.

5 VICE CHAIRMAN REYNOSO: I don't think we had  
6 voted on my motion, which was to confirm the Maine and  
7 North Carolina.

8 COMMISSIONER GEORGE: We did.

9 VICE CHAIRMAN REYNOSO: Did we vote on that?

10 CHAIRPERSON BERRY: That was approved.

11 VICE CHAIRMAN REYNOSO: Then I guess it was  
12 your motion.

13 CHAIRPERSON BERRY: There's another motion on  
14 the floor.

15 VICE CHAIRMAN REYNOSO: Okay. All right.

16 COMMISSIONER HIGGINBOTHAM: And that's  
17 through? Maine and North Carolina are through?

18 CHAIRPERSON BERRY: Yes. And Texas has been  
19 deferred until next month.

20 COMMISSIONER GEORGE: Yes.

21 I have put a request in to the Staff Director  
22 for information as I've described it earlier in my  
23 interventions. I understand that there is a ruling  
24 from the Chair directing the Staff Director -- and  
25 please correct me if I'm wrong --

1           CHAIRPERSON BERRY: I didn't direct the Staff  
2 Director to do anything. I stated that the current  
3 policy in my view did not include that as part of the  
4 procedure.

5           COMMISSIONER GEORGE: Is that a ruling?

6           CHAIRPERSON BERRY: I was simply telling you  
7 what I thought. You used ruling of the Chair. I  
8 didn't. I said the policy, as I understood it,  
9 approved by us after Russell's committee taskforce  
10 recommended it, did not include a step like that. And  
11 that if you wanted a step like that, then you should  
12 have a motion to add that as a step. That's what I  
13 said.

14           COMMISSIONER GEORGE: Okay. Then I take it  
15 you didn't make a ruling but simply stated an opinion  
16 which is contrary to my opinion that it's just an  
17 opinion. In that case, there's not a ruling for me to  
18 move to challenge and I'll simply leave the matter as  
19 my request of the Staff Director into whose court the  
20 ball has now been punted. I'm not mixing metaphors  
21 there, as far as different sports are concerned.

22           But anyway, the ball is left with the Staff  
23 Director for a determination of whether it is within  
24 her authority to make available to me and other  
25 Commissioners the information that I've requested.

1           CHAIRPERSON BERRY: Well, I think that -- and  
2 do you have a motion of that kind to direct her to do  
3 it or are you --

4           COMMISSIONER GEORGE: Oh, is that required?

5           CHAIRPERSON BERRY: Is that what you're  
6 doing? You're directing her to do it? Is that it?

7           COMMISSIONER GEORGE: No. I'm making a  
8 request of her for the information.

9           CHAIRPERSON BERRY: I see. Well, I'm going  
10 to suggest that Russell's taskforce take up this  
11 question along with reviewing generally the matter of  
12 SAC appointments. I asked him earlier to take up the  
13 report process again and he said he would do it when he  
14 had -- he had some other items on his plate -- to take  
15 up this issue to see if there should be any such step  
16 or any other steps that anybody would like to suggest  
17 in the procedure for SAC appointments. And then we can  
18 see where we go from there.

19                   And so I'm asking him to do that.

20                   Would you accept that responsibility?

21           COMMISSIONER REDENBAUGH: Yes. Absolutely.

22           CHAIRPERSON BERRY: Okay. All right.

23                   Yes, Commissioner Horner?

24           COMMISSIONER REDENBAUGH: And I can rely on -  
25 - we'll constitute the --

1           CHAIRPERSON BERRY: The same taskforce you  
2 had before.

3           COMMISSIONER REDENBAUGH: -- the same  
4 committee, which was Commissioners Horner and Reynoso.

5           COMMISSIONER HORNER: Yes, Madam Chair. As a  
6 member of that committee, I'm glad to revisit or look  
7 at this issue with Russell. But I'm not going to vote  
8 on any -- I'm not going to vote affirmatively on any  
9 SAC appointments until we've concluded this process.  
10 And I do not believe that Commissioner George's request  
11 should be subsumed into this process. He's made a  
12 perfectly legitimate request of the Staff Director. I  
13 think the Staff Director is perfectly equipped to  
14 respond to his request or not and to explain her  
15 reasoning to whoever might complain about the outcome.

16           So in agreeing to serve, again, I'm not  
17 willing to defer his particular request.

18           CHAIRPERSON BERRY: Commissioner George?

19           COMMISSIONER GEORGE: Yes, Madam Chairman.  
20 Just so I can plan my own behavior in this matter, I  
21 wonder if the Staff Director could tell me what a  
22 reasonable amount of time would be for her to respond  
23 to my request, either by providing the information or  
24 taking the position that she can't. And I'd also like  
25 to know from Commissioner Redenbaugh when he thinks it



1 will be possible to take up this issue as a policy  
2 matter and get it resolved by the Commission. So I  
3 have a question for each of them.

4 COMMISSIONER REDENBAUGH: Let me go first.  
5 What I plan to do -- what I will do, commit to do --  
6 this is a forward looking thing -- within a date not  
7 later than five days before the next meeting, summarize  
8 what the taskforce did in '93 and '96 and circulate  
9 that to you. And I may or may not have any  
10 recommendations or changes. At least gets us up to  
11 where we are. So, I'll have that on whatever day I  
12 said.

13 Now, then, to look at, Robbie, advising or  
14 improving or amending or obfuscating the process could  
15 take a time beyond which I -- I mean, as a Christian, I  
16 do believe in the second coming but it may tarry. So,  
17 I can't commit when this might be completed but I can  
18 give you the first step. I'll do it before the next  
19 meeting.

20 And I think we may see that there's not a lot  
21 we want to do in this.

22 COMMISSIONER GEORGE: I've forgotten. Who is  
23 the Democrat appointed member of Russell's committee?

24 CHAIRPERSON BERRY: I don't remember.

25 COMMISSIONER GEORGE: Cruz. Okay. So, --

1 and Connie, are you the Republican appointee?

2 COMMISSIONER HORNER: Uh-huh.

3 COMMISSIONER GEORGE: Russell, is there any  
4 reason why your committee couldn't meet and make a  
5 recommendation, even if by phone, and make a  
6 recommendation as to whether to accept the policy I've  
7 proposed by our next meeting, up or down.

8 COMMISSIONER REDENBAUGH: I see no reason why  
9 we couldn't do that. It may still be a -- we can do  
10 that.

11 COMMISSIONER GEORGE: Okay. And can I ask  
12 the Staff Director whether 15 days would be a  
13 sufficient amount of time for you to make a decision  
14 about whether you can provide the information or not?

15 STAFF DIRECTOR MOY: I'm going to -- yes.

16 CHAIRPERSON BERRY: Now, I think you have put  
17 the Staff Director in a position of acting at her  
18 peril. Maybe it was your intent to do that. Because  
19 obviously the Commission is divided on the question of  
20 whether this is something the Staff Director should do,  
21 but yet you're putting her in the position by your  
22 single request. No other Commissioner and not a  
23 majority requested it. And it is clear from the  
24 debate.

25 Now, you might think about when the shoe is

1 on the other foot. Do you want Commissioner  
2 Higginbotham, for example, to ask the Staff Director  
3 for something that you don't think is within the policy  
4 that the Staff Director should do and then say to the  
5 Staff Director, in 10 days time or whatever number of  
6 times, I want that. And you expect the rest of the  
7 Commission to remain silent while that is done when  
8 it's something you don't want.

9 So you might think about when the shoe is on  
10 the other foot.

11 Yes, Commissioner Horner.

12 COMMISSIONER HORNER: Madam Chair, I don't  
13 think it's a question of the Staff Director choosing up  
14 sides here. It's a question of the Staff Director  
15 deciding what's within the law and regulation of the  
16 Commission and what's not. And I would be astounded if  
17 this information were protected through some law or  
18 regulation of which we're not aware, given the federal  
19 government's incredible bias towards sunshine and  
20 acting in the sunshine.

21 So I think we're asking the Staff Director  
22 simply to do her job.

23 CHAIRPERSON BERRY: You're asking her to let  
24 the staff, who she is supposed to protect and who have  
25 certain work to do to let their work be, in my view,

1 interfered with by a Commissioner request which some of  
2 us believe is inappropriate, and for her to make the  
3 decision that she should or should not do so. Which  
4 means that she will either have to decide that the  
5 policy is one thing or another thing. And so I think  
6 that since the Commission is obviously divided on his  
7 issue, you are putting her in a precarious position.  
8 But I'm sure she can deal with it.

9 Yes, Commissioner George?

10 COMMISSIONER GEORGE: I do not believe that  
11 the Staff Director is at her peril. But if she is at  
12 her peril, it is me, Madam Chairman, who has put her at  
13 her peril. It's the Democrat appointed members of this  
14 Commission who are refusing or trying to block the  
15 provision of information that's perfectly legitimate,  
16 that is not secret or confidential to a Commissioner  
17 who wants it.

18 For the life of me, I can't understand why  
19 you don't want that information to be made available  
20 but that's the position you've taken. It's an ordinary  
21 straightforward request.

22 CHAIRPERSON BERRY: I am not opposed to the  
23 information. I know it's not secret information. I'm  
24 opposed to a policy where, before the Commission can  
25 make a decision and has to give more and more of the

1 staff work and go behind the staff in terms of what  
2 they have to do and not leave it to the staff to do its  
3 own work. That's the only point.

4 COMMISSIONER GEORGE: But it is a request for  
5 information. You're opposed to the request. You're  
6 opposing the provision of the information.

7 CHAIRPERSON BERRY: Because you're a  
8 Commissioner and you have a responsibility to let the  
9 staff do its work. An ordinary citizen who requests  
10 that, that's a whole different ballgame.

11 COMMISSIONER GEORGE: So an ordinary citizen  
12 can request something a Commissioner can't request?

13 CHAIRPERSON BERRY: It's not a question of  
14 whether you can request it, Commissioner George.  
15 Obviously you can request it.

16 COMMISSIONER GEORGE: The question is am I  
17 entitled to have it.

18 CHAIRPERSON BERRY: The question is is it  
19 good policy for you to have to have that before you can  
20 decide who will be on the SAC.

21 COMMISSIONER HORNER: Madam Chair, he can  
22 even ask that of a private citizen. It's a good policy  
23 for you make this --

24 CHAIRPERSON BERRY: I see no reason for us to  
25 continue to debate this. The Commissioner has made his

1 request. Commissioner Redenbaugh has agreed that his  
2 committee will meet and the committee is balanced and  
3 it will give us a recommendation. And that's the end  
4 of the question. I mean, I don't see where we're going  
5 to get otherwise discussing it.

6 COMMISSIONER GEORGE: That's fine. That's  
7 fine.

8 CHAIRPERSON BERRY: Okay. We go now to the  
9 Los Angeles hearing report.

10 Can I get a motion on the Los Angeles hearing  
11 report?

12 COMMISSIONER REDENBAUGH: I move the adoption  
13 of the report.

14 CHAIRPERSON BERRY: Could I get a second?

15 VICE CHAIRMAN REYNOSO: Madam Chair, I guess  
16 I'm confused. All we have now is --

17 CHAIRPERSON BERRY: That's right. That's the  
18 first part of it.

19 VICE CHAIRMAN REYNOSO: Oh. So this goes only  
20 to what we have before us. All right.

21 I second it, then.

22 CHAIRPERSON BERRY: Okay.

23 Any discussion?

24 (No response.)

25 All in favor, indicate by -- yes?

1                   COMMISSIONER REDENBAUGH: I'm sorry. I moved  
2 this to have the discussion.

3                   I think the report is in need of further  
4 editing. I'm not talking about issues of content but  
5 merely expression. And so I'm going to vote against my  
6 motion but say that I'm prepared to approve the edited  
7 version of this report.

8                   CHAIRPERSON BERRY: Okay. All right.  
9                   Anybody else have a comment on this?

10                  COMMISSIONER HORNER: Yes, Madam Chair.

11                  The first line of this report reads, "In  
12 March 1991 the City of Los Angeles was shook to its  
13 foundation." And I'm hoping that was just a typo. I  
14 agree with Commissioner Redenbaugh that we need editing  
15 of this and I want to see the edited version before I  
16 vote on it.

17                  CHAIRPERSON BERRY: Anybody else have a  
18 comment?

19                  Yes, Commissioner Redenbaugh?

20                  COMMISSIONER REDENBAUGH: Yes. One of the  
21 suggestions I would make if we're going to edit this  
22 report, is that it be reorganized slightly. For  
23 example, topics of economic development and economic  
24 interest or testimony are kind of sprinkled  
25 chronologically throughout the summary. I would

1 suggest that it may make it a more readable report if  
2 those were -- that testimony was clustered together.

3 I'm not talking about the transcript but this  
4 executive summary.

5 CHAIRPERSON BERRY: Any other comments?

6 COMMISSIONER GEORGE: I just had a question  
7 for my fellow Commissioners. Are we agreed as to the  
8 content? I mean, are all the objections or questions  
9 or proposals having to do with style and organization -  
10 -

11 CHAIRPERSON BERRY: Commissioner Horner?

12 COMMISSIONER HORNER: It's just my practice,  
13 given the significance of minor word changes to major  
14 policy orientations not to say that I agree to content  
15 until I've seen the actual language in which the  
16 content is embodied.

17 CHAIRPERSON BERRY: Any other comments?

18 Yes, Commissioner Higginbotham.

19 COMMISSIONER HIGGINBOTHAM: Life is getting  
20 even shorter and I am anxious for us to move these  
21 things out.

22 Now, it seems to me that with our having  
23 Assistants, if Commissioner Horner or Leon Higginbotham  
24 or anyone does not approve of the style or the grammar,  
25 that it's better that we get our Assistants to write --



1 I guess it's to the Staff Director -- and say we think  
2 line so-and-so is a problem; line so-and-so is a  
3 problem, and then we can move on.

4 But if we go through the route which  
5 Commissioner Horner seems to be suggesting, we can  
6 spend a tremendous amount of time on editing and then  
7 we come to the end and someone says, oh, but I  
8 disapprove it.

9 So what you're really saying when you do that  
10 is I don't care how much editing you've done. And I  
11 think we've got to move things.

12 Can't we find a better way? I don't say this  
13 in critique. I'm asking you can't we find a better  
14 way?

15 CHAIRPERSON BERRY: One way we can do it is  
16 go line by line here in this meeting, as I have  
17 suggested before. That we take the time to take  
18 reports that the staff has worked on and do as the  
19 Commission used to do. I've told you this time and  
20 time again. Sit here and go over it page by page. And  
21 whenever a Commissioner has an objection or wants to  
22 change something, have a suggestion at hand for how you  
23 wish to change it; have everybody agree; and go to the  
24 next page, which is what the Commission used to do with  
25 reports.

1                   Otherwise, as Commissioner Higginbotham says,  
2 the staff goes away, they change it, they come back,  
3 and still somebody doesn't like what they did that  
4 time. Then they go back again and they change it.

5                   COMMISSIONER HORNER: Madam Chair?

6                   CHAIRPERSON BERRY: Yes, Commissioner Horner.

7                   COMMISSIONER HORNER: I would like to respond  
8 to Commissioner Higginbotham's inquiry to me, is there  
9 a better way.

10                   Yes. First of all, I don't see anything I  
11 would object to in this report other than its stylistic  
12 insufficiency. I'm only reserving a right, if there  
13 should be a substantive change that pops up during the  
14 editorial rewrite. I'm just reserving a right.

15                   And secondly, the better way is for the staff  
16 to take the message that we are not content with the  
17 quality of writing that is sometimes presented to us  
18 and that it presents a barrier every time because then  
19 we do have to send it back.

20                   I don't have a single line in that that I  
21 care to negotiate on substance at this point but I have  
22 to say I am suspicious from being burnt in the past  
23 when things get changed and therefore, I'm just  
24 reserving the opportunity to vote after seeing the  
25 final document.

1           But, please, the way for this not to happen  
2 is for the staff to do a better job in the first  
3 instance.

4           CHAIRPERSON BERRY: Commissioner George?

5           COMMISSIONER GEORGE: I agree with Judge  
6 Higginbotham. We need to move this thing along. It's  
7 taken too long already. No need to apportion fault  
8 about that, but it has taken too long. Everybody ought  
9 to be able to agree with that.

10           So, I want to propose without having  
11 something specific in mind, and I hope that we can just  
12 work out something specific, some very concrete  
13 procedure for dealing with the stylistic and  
14 organizational issues here and get the thing done.

15           COMMISSIONER HORNER: We shouldn't have to do  
16 that. It should come to us in good shape.

17           COMMISSIONER GEORGE: It is not at the moment  
18 in good shape as far as several members of the  
19 Commission are concerned. Let's get some procedure in  
20 place for getting this thing approved.

21           COMMISSIONER HORNER: How about just asking  
22 the Staff Director to bring it to us in good shape.

23           COMMISSIONER GEORGE: Let me just ask this.

24           CHAIRPERSON BERRY: Maybe they think it's in  
25 good shape.

1           COMMISSIONER HORNER:  If the Staff Director  
2 redlined one of this frankly and approved it, I doubt  
3 it.

4           CHAIRPERSON BERRY:  I'm going to recognize  
5 Commissioner George, but I'm going to reiterate my  
6 suggestion that we do as Arthur Fleming used to do and  
7 the Commissioners themselves invest the time to sit  
8 here, go over these reports.  I've tried this several  
9 times.  Nobody wants to do it.  And tell the staff  
10 what's wrong with what you don't like.  Maybe if you  
11 did that once, the next time they would have some sense  
12 of what it is you don't like.

13           That takes time.  It takes probably about  
14 three hours to go through this.  But aside from that, I  
15 don't know what we're going to do.  And I despair at  
16 encouraging the staff to finish things because they  
17 know that very often when they do, they're going to run  
18 into this same big problem.  And I thought this thing  
19 was relatively noncontroversial.  And they probably  
20 thought it was well written.

21           I mean, how do I know.

22           Commissioner George?

23           COMMISSIONER GEORGE:  We have enough  
24 substantive and even procedural things to disagree and  
25 fuss over.  I don't think we should spend much time

1 disagreeing and fussing over this.

2 I take it that nobody objects, because I  
3 didn't hear anybody object, to Commissioner  
4 Redenbaugh's suggestion that we gather the economic  
5 opportunity material in a section of its own.

6 I take it from what Commissioner Horner has  
7 said that there are stylistic -- I noticed a few  
8 myself. Probably not as many as she did -- stylistic  
9 infelicities and problems that could be relatively  
10 easily corrected by just going on a wave through that.  
11 I don't think we have to sit here and do it together.  
12 I suspect if we tried as a committee of eight,  
13 especially a committee of the particular eight of us  
14 that are sitting here, that it would be  
15 counterproductive.

16 COMMISSIONER HORNER: It's not our job.

17 COMMISSIONER GEORGE: Well, that's also true.

18 But I don't just want to sort of send this  
19 back into a black hole. I think that we need a  
20 specific plan so we can get this thing voted.

21 We have one concrete suggestion from  
22 Commissioner Redenbaugh. That shouldn't take much time  
23 to do. And a wave through editorially, that shouldn't  
24 take much time to do. One or two people ought to be  
25 able to accomplish this and then, the next time around,

1 let's vote it through.

2 COMMISSIONER HIGGINBOTHAM: Madam Chair?

3 CHAIRPERSON BERRY: Yes, yes, yes,  
4 Commissioner Higginbotham.

5 COMMISSIONER GEORGE: I know that in the  
6 Third Circuit, Court of Appeals for the Third Circuit,  
7 which is Pennsylvania, New Jersey, Delaware and the  
8 Virgin Islands, we have -- or at least when I was there  
9 we had judges who had the temerity to disagree with  
10 each other and that's a terrible situation. So how did  
11 we solve this problem? In the rules it says when a  
12 draft has been submitted and if you disagree with any  
13 portion, you don't say it's lousy because that would be  
14 offensive to call your colleague's work lousy. What  
15 you're obligated to do is to say I disagree with lines  
16 1 through 20 and the alternative language which should  
17 be there is this. Then you don't get caught with any  
18 problem.

19 If we say to the staff we don't think you  
20 wrote it well, we're never going to get it resolved. I  
21 don't think it's asking too much for us to get our  
22 Assistants to individually go over this and say we  
23 think lines X through Z have to be corrected. And if  
24 we were going to do this, I would hope that when you  
25 print it out that you number it by lines. You know,

1 how you put it on the computer.

2           And so therefore, as we're just  
3 communicating, we've got all these -- everyone's got  
4 the same line number, and then each Commissioner who is  
5 dissatisfied does one of two things. Someone will deal  
6 with the first sentence and suggest a different  
7 phraseology. And I think that's the only way it's  
8 going to work. Otherwise, we're going to be in  
9 continuous debates.

10           CHAIRPERSON BERRY: Well, that is similar to  
11 the sitting here doing it except not doing it in here.  
12 And I think that's a good suggestion because since this  
13 body is not like an agency where there's some head of  
14 the agency who it goes up through for review and we've  
15 got a collegial body with eight people and it's hard  
16 for anybody to tell on the staff that if they write a  
17 sentence a particular way will somebody find it  
18 offensive.. It's really hard.

19           COMMISSIONER HIGGINBOTHAM: Excuse me. It's  
20 a little more than being offensive, Madam Chair. This  
21 problem of style is very difficult in terms of what's  
22 good style for one person may be a tragedy for another.  
23 I think that if we don't think it's good, we've got to  
24 state precisely what's wrong, and then the staff  
25 response -- because I know what happens. Staff goes

1 back to their office and they say they didn't like it  
2 but they don't know what the alternative language is.  
3 So they're going to come back with something the next  
4 time which is going to be more provocative to a person.

5 So I think that's the only way we can do it.

6 CHAIRPERSON BERRY: Yes.

7 COMMISSIONER HORNER: Madam Chair, I can only  
8 reiterate that my quarrel is not substantive here.  
9 That I agree with Commissioner Higginbotham that when  
10 we have substantive differences it would be extremely  
11 valuable to describe them by referring to particular  
12 lines in the text where they occur and suggesting  
13 alternatives.

14 My concern here is that we as a Commission  
15 should not be willing to put our names to something I  
16 believe Judge Higginbotham's clerks would never have  
17 presented him out of terror in any of the years of his  
18 tenure. I doubt very much if you ever had a clerk that  
19 wrote the way this is written. And I don't mean to  
20 dwell unduly on this but it is written in a style which  
21 is extremely immature relative to the voice of the  
22 Commissioners themselves. And I do not think it's  
23 asking too much to ask the Commission staff to write in  
24 a voice of maturity and standard English that anyone of  
25 the Commissioners would be able to adopt.



1 I'm not looking for frill, just plain  
2 straightforward mature English style. And I am  
3 certainly, having left the profession of teaching  
4 English many years ago, I am not willing to go line by  
5 line over literally thousands of lines of text looking  
6 for ways to improve the expression to bring it up to  
7 mature standard English.

8 CHAIRPERSON BERRY: Does anyone agree that --  
9 well, how do you want to proceed? We have a motion on  
10 the floor concerning this report for purposes of  
11 discussion. We have Commissioner Redenbaugh's concern  
12 about the economic issues being consolidated, to which  
13 no one voiced an objection. And then we have the  
14 problem of the style and the language.

15 What is your preference in this matter? Do  
16 you want to just vote on the motion or what would you  
17 like?

18 VICE CHAIRMAN REYNOSO: Madam Chair, I say,  
19 in light of several concerns expressed an alternative  
20 to the suggestion that Judge Higginbotham has made,  
21 maybe we ought to set a deadline of two weeks from  
22 today at which time any Commissioner who wants to  
23 express an opinion that "shaken" be substituted for  
24 "shook" or whatever, that we submit that to the Staff  
25 Director within two weeks and then see what they can do

1 with it. Because it is hard for them when -- well, for  
2 example, when Commissioner Horner says that it was  
3 written in a -- I forget the terminology that she used  
4 -- 'mature? I forget. But anyway, I think it's  
5 probably difficult for the staff to translate that to  
6 specific changes.

7 COMMISSIONER HORNER: I'm asking that the  
8 Staff Director assign this to someone who appreciates  
9 the standard that we typically have.

10 CHAIRPERSON BERRY: Well, the thing is done  
11 by a whole bunch of staff people. It tells you on the  
12 first page. There was even editorial policy review and  
13 all sorts of staff people worked on this who are in the  
14 agency; public affairs, legal counsel, technicians and  
15 interns and lawyers and editorial people. So, --

16 COMMISSIONER HORNER: Madam Chair, if the  
17 rest of the Commission wants to accept this, my vote  
18 will not prevent that from happening.

19 CHAIRPERSON BERRY: Yes, Commissioner George?

20 COMMISSIONER GEORGE: I don't think we have  
21 to make a big deal out of this. It might be that the  
22 many hands that were involved in its preparation turned  
23 out to be a drawback because committee work often  
24 generates infelicities and irregularities of language.  
25 And I certainly don't want to stay here talking in ways

1 that might embarrass the people who are responsible for  
2 this. By no means do I want to do that.

3 I do think, though, just having gone through  
4 it myself, and as I say, noticed some of the things but  
5 not all that an English teacher would, that plainly  
6 there are things that we don't want in here going out  
7 as a Commission document.

8 I think if one person -- these are talented,  
9 well educated people. If one person went through it  
10 just with an eye to those issues and to correcting  
11 those irregularities and infelicities, this would be  
12 relatively easy to take care of. Now, it will be a  
13 little more complicated a job, but I still don't see  
14 why one or two people can't do it to reassemble the  
15 points pertaining to economic opportunity in order to  
16 deal with Russell's criticism.

17 But I just don't see why that can't be done.  
18 It seems to be legitimately to be a staff matter. I  
19 don't want to take it away from the staff. A week, two  
20 weeks should be sufficient for somebody to do it. Even  
21 to get the time to do it, it certainly wouldn't take a  
22 week or two weeks to do it.

23 Could we just do that?

24 CHAIRPERSON BERRY: If in addition you have  
25 your Assistant tell the Staff Director if there are

1 particular things --

2 COMMISSIONER GEORGE: Absolutely.

3 CHAIRPERSON BERRY: -- that you are bothered  
4 about.

5 COMMISSIONER GEORGE: That's no problem.

6 CHAIRPERSON BERRY: And every Commissioner  
7 should do that so that you don't end up with people  
8 missing things that you were particularly bothered  
9 about. And then we come back; they fixed everything  
10 else but they forgot this one thing.

11 COMMISSIONER HORNER: Madam Chair, I'm not  
12 going to do a 10-hour editorial job on this. I don't  
13 think it's my job or my responsibility as a  
14 Commissioner to choose verbs. I am certain that  
15 someone who is of the traditional skill level of this  
16 Commission can go through this and fix it without any  
17 great trouble, and I can read it and it will be fine.

18 CHAIRPERSON BERRY: Well, we will ask those  
19 Commissioners who are willing to have their Assistants  
20 go through this and identify areas that that  
21 Commissioner would be particularly uncomfortable with  
22 to so inform the Staff Director in order to be helpful  
23 to the staff. And then we will ask the staff to revise  
24 this and it will be on the agenda for the next meeting.  
25 And then, I guess if people find things they still

1 don't like editorially, they'll just have to -- you  
2 know, will either have to not vote or vote on it any  
3 way.

4 COMMISSIONER GEORGE: When she makes a  
5 decision about who will be doing it, I'd appreciate it  
6 if the Staff Director could just let me know which  
7 member of the staff will be working on it. And if it's  
8 all right with her, if I could communicate directly  
9 with that person.

10 CHAIRPERSON BERRY: Commissioner George,  
11 you're not supposed to do that. That's not the policy.

12 COMMISSIONER GEORGE: No. I've asked --

13 CHAIRPERSON BERRY: The policy is that you're  
14 supposed to call up the Staff Director. We all know  
15 this. And if you want to talk to the person, have the  
16 Staff Director get the person for you so that she's  
17 privy to the discussions you have.

18 COMMISSIONER GEORGE: That's what I'm asking  
19 for.

20 CHAIRPERSON BERRY: That's the policy we  
21 made.

22 COMMISSIONER GEORGE: That's precisely what  
23 I'm asking for, Madam Chairman. I'm not going around  
24 the Staff Director. I'm asking for the Staff  
25 Director's permission to deal with whoever is --

1           CHAIRPERSON BERRY: No, no. No Commissioner  
2 is supposed to do that. That's not our policy.

3           And again, I'm not trying to keep you from  
4 getting information or talk to people, but it applies  
5 to everybody on the Commission.

6           COMMISSIONER GEORGE: No, no. This time I  
7 genuinely believe you're not trying to do that this  
8 time. However, I think that your interpretation of our  
9 policy is quite strained and it results in problems.  
10 It's just much -- well, it's much more efficient if,  
11 with the Staff Director's full knowledge and  
12 involvement we can occasionally, where it can be  
13 helpful and efficient, deal directly with members of  
14 the staff.

15           It's ridiculous to have these barriers. I  
16 can understand that the Staff Director doesn't want and  
17 it's not a good policy to have us going around the  
18 Staff Director and dealing with people without her  
19 involvement and permission. That I understand and have  
20 always supported a policy that would be contrary to  
21 that. But this extremism of never being able to have  
22 any contact with the staff, even when the Staff  
23 Director herself has granted permission and sees the  
24 sense in having an unmediated contact, especially when  
25 you're going back and forth on issues like issues of

1 style.

2 CHAIRPERSON BERRY: So all eight  
3 Commissioners should call up that staff member with  
4 their concerns? I don't know if it ever occurred to us  
5 as Commissioners but staff don't like us calling them  
6 up. You know, the idea a Commissioner is going to call  
7 them up and tell them this and tell them that and tell  
8 them the other.

9 COMMISSIONER GEORGE: When I am permitted to  
10 talk to the staff, every time I'm finished, the staff  
11 member always says, "Commissioner George, what a  
12 pleasure it is to deal with you."

13 CHAIRPERSON BERRY: All right. This motion  
14 that was on the floor is tabled until next time.

15 No. It's not tabled. Who made the motion  
16 anyway?

17 COMMISSIONER REDENBAUGH: Well, I did. I  
18 don't need that it needs to --

19 CHAIRPERSON BERRY: Would you withdraw it?

20 COMMISSIONER REDENBAUGH: I'd do so.

21 VICE CHAIRMAN REYNOSO: Mine was voted on  
22 already.

23 CHAIRPERSON BERRY: All right. It's  
24 withdrawn, then, whoever made it.

25 COMMISSIONER HIGGINBOTHAM: So that I'm

1 clear, what are we supposed to do now?

2 CHAIRPERSON BERRY: Before the next meeting  
3 have your Assistant tell the Staff Director -- if  
4 you're willing -- tell the Staff Director where there  
5 are particular areas of concern to you in this document  
6 so that whoever is editing it will know what those  
7 particular areas are. And each Commissioner who has  
8 such concerns is asked, if they're willing, to have  
9 their Assistant do the same thing.

10 And the staff will then, in light of this  
11 discussion, edit the document again and it will be up  
12 on next month's agenda.

13 Commissioner Anderson?

14 COMMISSIONER ANDERSON: I thought it was  
15 within like the next week or two so that it could be  
16 edited and prepared for a vote.

17 COMMISSIONER HIGGINBOTHAM: Two weeks I  
18 thought you said, didn't you?

19 COMMISSIONER ANDERSON: Yes. By two weeks.

20 VICE CHAIRMAN REYNOSO: I had suggested two  
21 weeks just so they have another two weeks.

22 CHAIRPERSON BERRY: But I thought we were  
23 going to vote -- you mean vote on it between the  
24 meetings? We're going to do that again?

25 COMMISSIONER GEORGE: No, no.



1           VICE CHAIRMAN REYNOSO: I was suggesting that  
2 any suggestions that we have go to the staff within two  
3 weeks so they still have at least two more weeks to  
4 incorporate them.

5           CHAIRPERSON BERRY: The mail goes out how  
6 long before the meeting? Seven days?

7           COMMISSIONER HIGGINBOTHAM: May I make this  
8 suggestion?

9           CHAIRPERSON BERRY: Yes.

10          COMMISSIONER HIGGINBOTHAM: You know what  
11 they say. A camel was a horse designed by a committee.  
12 The first time I heard that I didn't think much of it.  
13 Now that I'm 70 years old, I'm convinced.

14                 I would say that on my end, not only should  
15 you communicate with the staff but you should send a  
16 copy to each Commissioner because part of the problem  
17 is that a staff person hears from Commissioner X and  
18 says, oh, the Commissioner is thinking this and  
19 Commissioner Y may think differently. But if we all  
20 know what's being suggested, then we have a process  
21 under which the staff gets a full spectrum of the  
22 concerns and will be able to evaluate it.

23                 And I may make a suggestion and Commissioner  
24 George will see a better way. But I think you've got  
25 to exchange these letters to the fellow Commissioners,

1 just the way they do on a court when you're dealing  
2 with drafting an opinion.

3 CHAIRPERSON BERRY: So, to the extent -- yes,  
4 Commissioner George?

5 COMMISSIONER GEORGE: Well, if you wanted to  
6 finish the response, that's fine.

7 CHAIRPERSON BERRY: I was going to say to the  
8 extent that the same Commissioners who have their  
9 Assistants do this work do it, then they would share it  
10 with the others. That's your suggestion?

11 COMMISSIONER HIGGINBOTHAM: Yes.

12 CHAIRPERSON BERRY: Yes.

13 COMMISSIONER GEORGE: I certainly have no  
14 problem with that in principle, Judge Higginbotham, but  
15 remember we don't have substantive division over this  
16 particular report, finally, for once. What we have are  
17 stylistic and organizational issues.

18 My problem with that is when you do the kind  
19 of work that you do when you revise organizationally  
20 and stylistically, it requires a certain amount of back  
21 and forth, a certain amount of discussion. That's what  
22 our Assistants did when they worked together on  
23 previous reports when we did have not only stylistic  
24 but more substantive division to work things out. They  
25 got together in a room and that worked at least a

1 couple of times.

2           So, my concern here is that it's difficult to  
3 accomplish our goal simply by faxing in changes on page  
4 3 and page 4 and page 8 and page 27, when you need some  
5 room for discussion with the people who are involved,  
6 the staff member who's doing the work and the  
7 Commissioners who's making the discussions can go back  
8 and forth about why a particular suggestion doesn't  
9 quite work but maybe if we changed -- we could still  
10 make a change that takes into account the concerns that  
11 the Commissioner has on that point. You can go back and  
12 forth that way.

13           CHAIRPERSON BERRY: But there are eight of  
14 us.

15           COMMISSIONER GEORGE: Each of us would be --  
16 well, --

17           COMMISSIONER REDENBAUGH: I find it amazing -  
18 - and I hope I can keep this from my children -- that  
19 we're able to -- I think it's wonderful that we're able  
20 to disagree over issues of policy, and as it should be.  
21 That we disagree so strongly over issues of English  
22 language usage or style is surprising and somewhat  
23 embarrassing. I'd like not to talk any longer on this  
24 particular topic.

25           CHAIRPERSON BERRY: I agree, Commissioner

1 Redenbaugh.

2 COMMISSIONER REDENBAUGH: I thought you  
3 would.

4 CHAIRPERSON BERRY: And that's why I said  
5 that any Commissioner who wants to can send in  
6 information to the Staff Director.

7 COMMISSIONER REDENBAUGH: Thank you.

8 CHAIRPERSON BERRY: But anybody who doesn't  
9 want to, the staff will go about trying to edit it the  
10 best way they can and give it back to us. And we'll  
11 see if we can move on with it.

12 If no one has any other item, we go to the  
13 briefing. This is to bring us up to date on what's  
14 going on with ADA, the ADA Project.

15 Fred, could you bring your folks forward and  
16 do this for us?

17 (Pause.)

18 VICE CHAIRMAN REYNOSO: The Chair has  
19 suggested that we proceed forward, nonetheless. Those  
20 who have to take a break will rejoin us in just a  
21 minute. So why don't we go forward. Tell us who's  
22 doing what.

23 MS. ZALOKAR: Good morning. My name is Nadja  
24 Zalokar and I'm the OCRE Project Director of the ADA  
25 Project.

1           As you know, this project was approved as the  
2 Commission's statutory civil rights evaluation study  
3 for this fiscal year.

4           I'd like to start by talking a little bit  
5 about the purpose and scope of the project. The  
6 purpose of the project is to evaluate federal  
7 implementation, compliance and enforcement of the ADA.  
8 And specifically, of Title I and II, subtitle A, of the  
9 ADA.

10           Title I is the title that prohibits  
11 discrimination on the basis of disability in  
12 employment. Title II, subtitle A, is the title that  
13 prohibits discrimination on the basis of disability in  
14 state and local government services.

15           The project does not include subtitle B of  
16 Title II, which addresses discrimination in  
17 transportation and it doesn't include any of the other  
18 ADA titles. Thus, our primary focus has been the Equal  
19 Employment Opportunity Commission, which enforces Title  
20 I, and the Department of Justice, which enforces  
21 subtitle A of Title II.

22           The report is going to be looking at each  
23 agency's regulations and policy guidance, it's  
24 participation in litigation, processing of complaints,  
25 provision of outreach and education and technical

1 assistance.

2           In order to complete a statutory enforcement  
3 report this fiscal year, we're not going to be  
4 reviewing the state and local fair employment practices  
5 agencies and their role in enforcement of Title I, and  
6 we're also not going to be looking at or evaluating the  
7 Department of Justice's coordination of the other  
8 federal government agencies that are designated to  
9 enforce Title II.

10           Let me bring you up to date on the status of  
11 work on the project.

12           We began working on the project in August,  
13 and since that time we've gathered a great deal of  
14 information. In addition to conducting library  
15 research and interviews with people in the disability  
16 community, disability experts and others, we've  
17 requested and received information from the two  
18 agencies charged with enforcing the ADA, the EEOC and  
19 DOJ, and we're currently in the process of reviewing  
20 and analyzing all the information we've gathered and we  
21 are drafting background and policy chapters.

22           After we've completed this process of  
23 reviewing and analyzing everything we have to date,  
24 probably sometime next month, we are planning to  
25 conduct focused interviews with EEOC and DOJ officials

1 and staff. And these interviews will provide us with  
2 answers to specific questions that we are going to  
3 formulate based on our analysis of what we know or what  
4 we have in house at this point in time.

5 And once we've completed the interview  
6 process, our goal is to draft a report by June. That  
7 way it could undergo the internal review process in  
8 time to be finished this fiscal year.

9 VICE CHAIRMAN REYNOSO: That's just in three  
10 or four months from now?

11 MS. ZALOKAR: Yes. And that's a very, very  
12 tight --

13 In a minute, Dave and Michelle are going to  
14 talk to you, each one, about what we're going to be  
15 doing on Title I, and the other about Title II, but I  
16 wanted to let you know that there's also going to be  
17 kind of an introductory part of the report that will  
18 discuss -- try to place the ADA in a broader context.  
19 We'll review quickly, briefly, the history of how it  
20 was passed and how it fits into other civil rights  
21 legislation relating to disability and also how it fits  
22 into disability policy in general, the nation's  
23 disability policy.

24 And then we'll mention the role that other  
25 federal agencies and programs play in the ADA, such as

1 the National Council on Disability, the President's  
2 Committee on Employment of People with Disabilities,  
3 NIDRE, the National Institute on Disability  
4 Rehabilitation Research and the National Association of  
5 Protection and Advocacy Systems.

6 And finally, we're going to try to present  
7 some socioeconomic information about people with  
8 disabilities, people that the law was designed to  
9 protect.

10 That's sort of the introductory area. And  
11 I'd like to turn it over to David Chambers who will be  
12 discussing what we're going to be doing on Title I.

13 MR. CHAMBERS: OCRE is conducting an  
14 evaluation of EEOC's Title I enforcement. We are  
15 developing a general overview and background  
16 discussion, along with assessments of three key area of  
17 the EEOC's ADA implementation and enforcement efforts.

18 These key areas are EEOC's Title I rulemaking  
19 and enforcement guidance documents; EEOC's complaint  
20 processing system and Title I enforcement activities,  
21 such as charge processing and investigative guidance;  
22 and finally, EEOC's technical assistance and outreach  
23 and education efforts.

24 The background discussion will set the stage  
25 for our evaluation of EEOC's Title I enforcement.



1 We're including in the background a broad overview of a  
2 number of areas, including EEOC's past performance, the  
3 agency's mission and responsibilities, its management  
4 reforms, strategic planning, budget, workload and  
5 staffing.

6           Also in the background discussion we will  
7 briefly introduce all of the main topics that the  
8 report will address in a more in depth fashion in  
9 subsequent sections. These topics include EEOC's  
10 regulations and other guidance, its charge processing  
11 system and its technical assistance and outreach and  
12 education.

13           As far as the first key area, our assessment  
14 of EEOC's rulemaking and enforcement guidance, we'll  
15 focus on two aspects of the agency's Title I  
16 activities. The first is EEOC's process for regulatory  
17 and policy development. This discussion describes and  
18 evaluates how EEOC chooses topics or issues in which to  
19 provide guidance; how the agency develops its  
20 regulations and policies; and to what extent it allows  
21 for outside groups to comment on policy documents  
22 before they are issues.

23           The second part of this assessment is a  
24 discussion on regulatory and enforcement guidance that  
25 EEOC has issued on Title I. Enforcement guidance are

1 documents issued by the agency addressing specific ADA  
2 related topics and issues. EEOC uses these guidance  
3 documents to assist its staff in investigating  
4 complaints of ADA discrimination.

5 EEOC also disseminates these guidance outside  
6 the agency and makes them available to the general  
7 public. Our discussion will evaluate the enforcement  
8 guidance for their clarity and thoroughness, their  
9 consistency with the ADA statute and its legislative  
10 history and their overall effectiveness in conveying  
11 understanding of key ADA issues to investigative staff  
12 and others.

13 This discussion also will indicate areas  
14 where EEOC has not issued enforcement guidance but  
15 perhaps should.

16 The second key area is our assessment of  
17 EEOC's Title I complaint processing system. This  
18 section will include an analysis of EEOC's complaints  
19 database and its charge processing. In this section,  
20 we'll describe and evaluate the agency's use of  
21 alternative dispute resolution, the targeting of  
22 specific Title I employment issues, development and use  
23 of investigative manuals, use of computer technology  
24 and staff training activities.

25 Finally, we will assess EEOC's Title I

1 technical assistance and outreach and education  
2 activities. In this section we'll review how EEOC  
3 develops its technical assistance materials. We'll  
4 discuss the agency elements responsible for performing  
5 technical assistance activities. We'll review and  
6 describe the technical assistance materials EEOC has  
7 issued to date and assess whether there are specific  
8 topics or issues EEOC has not addressed in its  
9 technical assistance but should.

10 And finally, we will discuss how EEOC has  
11 disseminated its technical assistance materials to the  
12 public and evaluate how successful the agency has been  
13 in its dissemination efforts.

14 MS. ZALOKAR: Michelle Avery will discuss  
15 Title II.

16 MS. AVERY: Good morning.

17 Our staff is also looking at the enforcement  
18 of Title II, subtitle A of the Americans with  
19 Disabilities Act specifically for Title II and DOJ's  
20 enforcement, the Department of Justice's enforcement in  
21 that area. We're preparing an overview, a discussion  
22 of its implementation and enforcement efforts. We are  
23 evaluating the Department's Title II technical  
24 assistance and policy guidance development practices,  
25 and we are assessing the Department's complaint

1 processing system and litigation activities.

2 We are preparing an overview that will look  
3 at the Department of Justice's past performance, its  
4 mission and responsibilities, its management reforms  
5 and its strategic planning. We're also going to be  
6 looking at the Department's budget, workload, staffing  
7 and staff training, as well as its investigative  
8 manuals and its use of technology.

9 We're also looking at the Department of  
10 Justice's technical assistance and policy guidance  
11 development. In this area of technical assistance and  
12 policy development we're looking both at the process  
13 that the Department uses to develop its technical  
14 assistance and policy, as well as the materials  
15 themselves, the product of that process.

16 As far as the process is concerned, we're  
17 looking at how the Department develops its technical  
18 assistance materials. We're looking at the materials  
19 themselves, the technical assistance materials, the  
20 specific topics that the Department has not covered and  
21 perhaps should cover. We're looking at dissemination,  
22 how the Department is disseminating these materials,  
23 how effective this dissemination is, and we're also  
24 looking at the extent the Department allows outside  
25 individuals and agencies to comment on technical

1 assistance materials and policy documents before  
2 they're formally issued.

3           As far as the materials themselves, we're  
4 looking at policy letters that the Department has  
5 issued. These policy letters are usually written by  
6 the Department in response to inquiries from the  
7 public, from Congress, and the Department uses these  
8 letters, some of these letters, to convey its policy on  
9 particular Title II issues.

10           These letters are used both to help  
11 investigative staff at the Department, as well as  
12 provide information to the public. Also, in addition  
13 to the policy letters, we are looking at the technical  
14 assistance materials that the Department has issued.  
15 These technical assistance materials are intended to  
16 educate the public, as well as specific groups that may  
17 be concerned with particular Title II issues.

18           And as David mentioned for the EEOC  
19 materials, we're going to be examining technical  
20 assistance materials. We're looking at their clarity  
21 and their thoroughness, their consistency with the  
22 language of the statute, the ADA statute itself, and  
23 the legislative history, as well as the overall  
24 effectiveness of the technical assistance material and  
25 policy letters in conveying an understanding of the

1 statute.

2           And finally, we'll be looking at the  
3 Department of Justice's complaint processing and  
4 litigation activities for Title II cases. To do this,  
5 we are analyzing the Department's complaints database  
6 and its complaints processing mechanism. We are  
7 describing and evaluating the Department's use of  
8 alternative dispute resolution, its reliance on fair  
9 employment practice agencies and the Department's  
10 litigation activities. And as part of that, we will be  
11 looking at the criteria the Department uses in  
12 determining which cases to litigate.

13           For instance, does the Department decide to  
14 litigate individual cases or are they doing a pattern  
15 and practice type of analysis in deciding what to  
16 litigate.

17           Thank you.

18           MS. ZALOKAR: If you have any questions,  
19 please.

20           COMMISSIONER HORNER: This sounds very sound  
21 to me and well thought through. The only question I  
22 have is if you could tell me what you think the top  
23 three controversies are with respect to the ADA,  
24 substantively, procedurally, however, that have come to  
25 the attention of people affected by the ADA. Either

1 those who are disabled or those who are having  
2 regulation imposed upon them in dealing with those who  
3 are disabled.

4 What are the top three controversies?

5 The reason I ask the question is I want to  
6 know whether we're dealing with things that have really  
7 risen to the level of importance to significant parts  
8 of the public.

9 MR. CHAMBERS: I think with respect to  
10 enforcement of the statute by the Equal Employment  
11 Opportunity Commission, there has been a significant  
12 amount of controversy with their enforcement guidance  
13 on psychiatric disabilities.

14 There has been controversy with respect to  
15 several issues relating to how the statute is  
16 interpreted; the issue of mitigating measures; and also  
17 the issue of what's known as judicial estoppel, which  
18 refers to the effects of representations made by  
19 individuals in disability benefits claims, the effect  
20 that that would have on their standing to bring suit as  
21 an ADA claim.

22 COMMISSIONER HORNER: And will our  
23 undertaking confront those issues?

24 MR. CHAMBERS: It will certainly address the  
25 enforcement guidance that have been issued and describe

1 those guidance. It will note controversy in the news  
2 media and amongst disability rights advocates. It will  
3 note positions taken by them on issues.

4 COMMISSIONER HORNER: Disability rights  
5 activities would be on one side on this question and  
6 who would be on the other side? And would we note the  
7 thinking of those who are on the other side, whoever  
8 they are?

9 MR. CHAMBERS: Absolutely.

10 COMMISSIONER HORNER: And who would they be?

11 MR. CHAMBERS: Well, for example, in the case  
12 of psychiatric disabilities, there have been clinicians  
13 in the psychiatric field who have disputed some of the  
14 thinking that's gone into the enforcement guidance that  
15 EEOC has issued. So, --

16 COMMISSIONER HORNER: And what about for the  
17 mitigating measures? Who would be on the other side of  
18 that issue?

19 MR. CHAMBERS: Management.

20 COMMISSIONER HORNER: And are we going to  
21 hear the point of view of management expressed?

22 MR. ISLER: What we have done is contact the  
23 Equal Employment Advisory Council. They represent  
24 management and the respondents and they have given us a  
25 response on all of those issues and their position.



1 And they represent some of the largest respondents in  
2 the country.

3 COMMISSIONER HORNER: And I'm sorry. I --

4 MR. ISLER: We've also contacted disability  
5 advocacy groups on both sides of the issues.

6 COMMISSIONER HORNER: Yes. Okay.

7 MR. ISLER: So it's very diverse.

8 COMMISSIONER HORNER: And for judicial  
9 estoppel? I've already forgotten what that is. What  
10 are the two sides on judicial estoppel?

11 MR. CHAMBERS: Well, it would be the  
12 claimants versus the judges who are saying that they  
13 don't have standing to bring an ADA suit.

14 COMMISSIONER HORNER: I see. So this is a  
15 legal -- it's an issue within the judiciary. Does it  
16 have an outcome for those who are disabled?

17 MR. CHAMBERS: Oh, absolutely.

18 COMMISSIONER HORNER: Which way?

19 MR. CHAMBERS: It's very much against  
20 individuals who want to bring ADA claims. And  
21 certainly the judges who are basing their analysis on  
22 judicial estoppel are narrowing the ambit of the  
23 statute and they're making it more difficult for  
24 someone who has previously claimed disability benefits  
25 to sue.

1           COMMISSIONER HORNER: And will our  
2 undertaking explain why the judiciary or some members  
3 of the judiciary are taking this point of view?

4           MR. CHAMBERS: Oh, absolutely.

5           COMMISSIONER HORNER: Okay.

6           Are there any economic issues relating to  
7 this or are those subsumed under the management point  
8 of view?

9           MR. ISLER: No. We don't feel we're  
10 qualified to deal with those issues.

11          MS. ZALOKAR: We'll raise -- in the  
12 introduction.

13          MR. ISLER: We will raise them but we will  
14 not analyze them, take a position --

15          COMMISSIONER HORNER: Oh, no, no. I just  
16 meant are they going to be part of the discussion.

17          MR. ISLER: In the background. The overview  
18 chapter, yes.

19          COMMISSIONER HORNER: Is that a big part of  
20 the thinking in the argument surrounding the ADA?

21          MS. ZALOKAR: The costs of compliance don't  
22 appear to be always the big -- certainly not the cost  
23 of reasonable accommodation does not appear to be where  
24 it is. It may be costs of lawsuits.

25          COMMISSIONER HORNER: So litigation is a very

1 big issue?

2 MS. ZALOKAR: From management.

3 COMMISSIONER HORNER: From management's point  
4 of view.

5 MS. ZALOKAR: Yes.

6 COMMISSIONER HORNER: And management's  
7 argument is an economic one with respect to litigation  
8 or do you think --

9 MS. ZALOKAR: No. They give other arguments,  
10 as well.

11 COMMISSIONER HORNER: Other arguments. Will  
12 we see this presented?

13 MS. ZALOKAR: Yes

14 COMMISSIONER HORNER: Not in summary, but in  
15 -

16 MS. ZALOKAR: Their arguments, when they come  
17 into what we're talking about in the substance, will be  
18 presented, as well.

19 COMMISSIONER HORNER: Okay.

20 MR. ISLER: But not in great detail.

21 COMMISSIONER HORNER: I guess the question  
22 I'm getting at is if somebody came totally -- if a  
23 Martian arrived on Earth and opened up this report of  
24 ours, would that Martian be able to get an accurate and  
25 full sense of the public argument going on?

1 MR. ISLER: Yes.

2 COMMISSIONER HORNER: Okay.

3 COMMISSIONER LEE: Will your report contain  
4 any data from EEOC and other pertinent agencies?  
5 Complaints filed or --

6 MS. ZALOKAR: Yes. We will be analyzing  
7 complaints databases of both EEOC and DOJ.

8 COMMISSIONER LEE: From the onset?

9 MS. ZALOKAR: From when the ADA --

10 MR. ISLER: We are presenting analyzing  
11 complaint data from 1992, I think, when the Act when  
12 into effect.

13 VICE CHAIRMAN REYNOSO: The question I have  
14 relates to the state agencies. I had understood that  
15 the reports would not go into enforcement by state  
16 agencies but as to both Title I and Title II, I  
17 understand that the report will be taking a look at  
18 technical assistance. And I guess in Title II, my  
19 notes say -- it does say reliance on state fair  
20 employment agencies.

21 So I just wonder what -- so I was a little  
22 bit confused. I wondered how far the report would go  
23 into analyzing the relationship of the federal  
24 government to the state agencies.

25 MR. ISLER: First of all, let me correct one

1 thing. We're not going to look at the fair employment  
2 practice agencies in either Title I or Title II  
3 primarily because of resource reasons. We would not be  
4 able to even interview, get information from five fair  
5 employment -- that would take us another year.

6 The other reason we're not going to do it on  
7 Title 1 is because there's only a small percentage of  
8 the complaints are investigated by FEPA agencies are  
9 relate to EEOC. They do not have contracts with them  
10 to investigate --

11 VICE CHAIRMAN REYNOSO: The EEOC does not  
12 have contracts?

13 MR. ISLER: Not ADA complaints.

14 VICE CHAIRMAN REYNOSO: Not ADA. Oh, okay.  
15 So those are treated differently than other  
16 discrimination --

17 MR. ISLER: That's correct. In order for  
18 them to do that, they have to determine that their  
19 state law is equivalent to federal law. And we're not  
20 going to get into that issue.

21 VICE CHAIRMAN REYNOSO: But nonetheless,  
22 apparently you're going to get into some issue as to  
23 what technical assistance the federal government does  
24 provide to the state agencies; right? At least that's  
25 what I gather.

1 MR. ISLER: That's correct.

2 VICE CHAIRMAN REYNOSO: So that's what I  
3 wondered.

4 MS. ZALOKAR: The technical assistance that  
5 they provide to employers, to people with disabilities  
6 and to state and local government agencies to help them  
7 comply with the law.

8 VICE CHAIRMAN REYNOSO: Yes. Gotcha. Very  
9 good.

10 Commissioner Redenbaugh?

11 COMMISSIONER REDENBAUGH: Yes. Thank you.

12 Well, I'm very impressed with what you've  
13 told us, both with respect to the design. I think it's  
14 more than solid. And the scope. This is a very big  
15 task that you've undertaken.

16 I would say my better question or two were  
17 captured by Commissioner Horner. Thank you, Connie.

18 But I wanted to amplify one of the issues she  
19 raised or follow up a little bit. And that is, in  
20 terms of either the overview or the policy section, to  
21 what extent do you think you'll be able to get into  
22 what's probably the dangerous ground of where,  
23 according to some groups, ADA has been expanded under  
24 regulation and case law beyond what was intended or  
25 what's claimed to have been intended in the statute.

1 MR. CHAMBERS: Well, I think there are strong  
2 arguments on both sides. I mean, if you look at the  
3 cases that have been brought, especially with something  
4 like psychiatric disabilities, there's no question that  
5 plaintiffs are losing, losing, losing. I mean, the  
6 courts are not saying, oh, yes, we're going to hand you  
7 \$50,000 or something. That's not happening.

8 The courts are very much against plaintiffs  
9 with psychiatric disabilities, with temporary  
10 disabilities. So there's really an argument on both  
11 sides. And I think both sides have to be presented.  
12 There's all sorts of material in the news media and in  
13 technical assistance materials and legal materials on  
14 both sides of that fence.

15 So I don't think that it's clearcut either  
16 way at this point on a lot of the issues. I think that  
17 it's almost -- what do you call it? An even split.

18 COMMISSIONER REDENBAUGH: Another question.  
19 And that is, for purposes of the law, are you able or  
20 do you anticipate being able to answer the question of  
21 what is a disability?

22 MR. CHAMBERS: Well, obviously the ADA  
23 statute has very specific meaning for that term.

24 COMMISSIONER REDENBAUGH: Has language.

25 MR. CHAMBERS: Has language that imbues that

1 terms with a very specific meaning.

2 COMMISSIONER REDENBAUGH: Here's what I mean.  
3 And I want to be careful not to give any examples, so I  
4 don't have any already, if you ask.

5 The notion of a person's disability or non-  
6 disability in many cases is a slippery notion.

7 MR. ISLER: Yes.

8 COMMISSIONER REDENBAUGH: How are you going  
9 to handle that?

10 MR. ISLER: We will simply lay out the EEOC's  
11 position and definition. And if there are other  
12 individuals that disagree with that, we will present  
13 that argument and position. And basically, refer them  
14 back to the legislation and court cases.

15 COMMISSIONER REDENBAUGH: And is it true that  
16 one of the central legal questions is what constitutes  
17 a covered disability?

18 MR. ISLER: Defining who's disabled is one of  
19 the leading -- it will be addressed.

20 COMMISSIONER REDENBAUGH: Okay. Good.

21 That's all the questions I've got. Thank  
22 you.

23 VICE CHAIRMAN REYNOSO: Judge Higginbotham?

24 COMMISSIONER HIGGINBOTHAM: I want to  
25 apologize for missing a portion of your presentation



1 because our Commission hasn't become civilized enough  
2 to recognize that some of us after two hours have a  
3 disability, so I missed a portion of it and I'm sorry,  
4 so you may have covered it.

5           There will be four things which I would be  
6 interested in which have not -- may not have been  
7 focused on specifically. First, and most important of  
8 all, is a bibliography. Now, one of the problems when  
9 you have a report and individuals claim that it tilts  
10 one way or it tilts the other, that it is virtually  
11 impossible into any paragraph or into any section to  
12 get what some people are going to consider to be a  
13 perfect balance. But if you put the bibliography in  
14 and you're very, very careful, even if it's an  
15 annotated bibliography, then you really play a very  
16 informative role as to where you go from here.

17           So someone can disregard -- you have to have  
18 enough strength to write your report so someone could  
19 disregard everything you say by what they read in some  
20 portions of the bibliography. So I hope that you will  
21 do that.

22           And not only in the textbooks but in the  
23 leading literature. And it may even be references to  
24 Congressional hearings. So that if you could look at  
25 some senior who's writing a thesis in college and they

1 want to get all the insight, you've done it.

2           So, I think the bibliography is very  
3 important.

4           MR. ISLER: Are you suggesting that we make  
5 that an appendix to the report?

6           COMMISSIONER HIGGINBOTHAM: That's right.  
7 Sure. Yes, by all means. You just eliminate the whole  
8 question of whether it's biased or not.

9           I mean, if you can say, well, look, people  
10 have a source to go to data which you may not have  
11 commented on just because of limited time. So I'm high  
12 on the bibliography.

13           The second would be addressing in some way an  
14 issue through a bifocal lens, and that is the cost for  
15 compliance and the benefits for compliance.

16           Now, I know that that is on the cutting edge,  
17 but that's what the whole debate is. Someone claims  
18 that you've got to spend millions and millions of  
19 dollars in order to put up a little ramp and someone's  
20 saying that it is minuscule. At least you should have  
21 something in it to identify the problem.

22           I'm not asking you to take a choice. But I'd  
23 like to have some commentary on what are the costs for  
24 certain types of compliance.

25           Yes, it has to be partially conjecture, but

1 just so that people can see what the spectrum of  
2 arguments are and also the benefits. What some people  
3 fail to recognize is that if people can have access,  
4 they can get jobs and they otherwise would perhaps not.  
5 And therefore, there are lots of significant economic  
6 advantages.

7           Somehow or another that has to be framed.  
8           Now, I'm giving you my hopes. Maybe I'm  
9 asking too much.

10           Now let me get into the easier issues, the  
11 legal issues.

12           What I am finding increasingly frustrating  
13 from reading governmental reports is that there's a  
14 tendency to talk about the courts have taken this  
15 position and the justice causes, the fair advocates,  
16 have taken the other. There's great division in the  
17 courts and there's great diversion in the circuits.

18           When you're looking at affirmative action,  
19 the Fifth Circuit's rule in Hopwood has not been  
20 adopted in any other circuit, and therefore, its  
21 viability may affect only Texas, Louisiana and  
22 Mississippi. So I think that when you start doing the  
23 legal analysis, it's important to show with some  
24 precision the divergence of legal perspectives.

25           Not that it's the courts. The courts have

1 taken this position; the courts have taken that  
2 position. And you're looking, maybe differentiating  
3 from what the district courts have said. A district  
4 court's opinion is binding only on that specific  
5 district court judge. It's binding then. Versus a  
6 court of appeals judges, which is much broader and  
7 which may be circuit wide. And the Supreme Court.

8           Then, let me talk about the hard problems,  
9 hard problems which you may not be able to deal with.  
10 What are the global implications of these statutes.

11           Now I know that it looks like the old judge  
12 is coming here with his eyes in the clouds but in the  
13 world, one of the real issues is the -- and I favor the  
14 Act -- is the imposition of these standards. One which  
15 makes America less competitive or more competitive.

16           Now the reason why I'm interested in it, it  
17 may very well mean that in terms of domestic policy, if  
18 you want to protect American industry, United States  
19 industry, we may have to get to the point where we talk  
20 in terms of what companies which are sending in  
21 millions of dollars worth of goods, billions of dollars  
22 worth of goods in the united States, how that matter  
23 should be dealt with.

24           Should someone be permitted to be not merely  
25 hostile to a disability policy but encouraged in the

1 negative sense and flood our markets when our  
2 manufacturers or companies cannot.

3 Now, at some point you have to decide whether  
4 you're going to be talking for the ages or talking for  
5 the morning newspaper. I think you have got an  
6 extraordinary opportunity, so let me give you this last  
7 -- if it's permissible to give this parable.

8 Three men were working side by side laying  
9 brick. The first person was asked, "What are you  
10 doing?" He said, "I'm laying brick." The second  
11 person was asked, and he said, "I'm building a wall."  
12 The third person was asked, "What are you doing?" And  
13 he said, "I'm building a cathedral." All doing the  
14 same thing.

15 Occasionally social justice is going to have  
16 to be developed recognizing that these bricks could be  
17 a wall or a cathedral for the profound advancement of  
18 the needs of the people or maybe it's just laying  
19 bricks in a line. And I think that's sort of a very  
20 important philosophical perspective and I hope that we  
21 have some cathedral cases in this report.

22 CHAIRPERSON BERRY: Let me just point out.  
23 Something you said, Judge Higginbotham, reminded me  
24 that we forgot to say that the General Counsel was not  
25 here today because she had a death in her family. But

1 I'm sure she will take note of the points you have made  
2 about the legal issues and the difference in the  
3 circuits and so on in terms of the legal analysis of  
4 these things.

5 Does any other Commissioner have a question  
6 or a comment for the panel?

7 (No response.)

8 Okay. All right, Fred. You got anything  
9 else you want to say or ask us?

10 MR. ISLER: No.

11 CHAIRPERSON BERRY: All right. Well, we  
12 thank you very much and thank your staff.

13 I would entertain a motion to adjourn.

14 VICE CHAIRMAN REYNOSO: So move.

15 CHAIRPERSON BERRY: It's nondebatable.

16 All in favor, indicate by saying aye.

17 (Chorus of ayes.)

18 The meeting is adjourned.

19 (Whereupon, the proceedings were concluded at  
20 1:30 p.m.)

21

22

23

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATE

This is to certify that the attached  
proceedings before: U.S. CCR

In the Matter of: 3/6/ commission meeting

were held as herein appears and that this is the  
original transcript thereof for the file of the  
Department, Commission, Administrative Law Judge  
or the Agency.

  
\_\_\_\_\_  
Official Reporter

Dated: 3/6/93