

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION MEETING

**Unedited**

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FRIDAY, SEPTEMBER 12, 2008

+ + + + +

The meeting convened, in Room 540, 624  
Ninth Street, N.W., Washington, D.C., at 1:30 p.m.,  
Abigail Thernstrom, Vice Chairperson, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman (via telephone)  
ABIGAIL THERNSTROM, Vice Chairman  
TODD GAZIANO, Commissioner  
GAIL L. HERIOT, Commissioner  
PETER N. KIRSANOW, Commissioner  
ARLEN D. MELENDEZ, Commissioner  
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel  
DEMITRIA DEAS  
PAMELA A. DUNSTON, Chief, Admin. Services and  
Clearinghouse Division  
LATRICE FOSHEE  
TINALOUISE MARTIN, Director of Management  
EMMA MONROIG, Solicitor  
KARA SILVERSTEIN, Attorney-Advisor (OSD)  
AUDREY WRIGHT  
MICHELE YORKMAN

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ORIGINAL

## COMMISSIONER ASSISTANTS PRESENT:

TIM FAY  
DOMINIQUE LUDVIGSON  
JACK KAMMEN  
KIMBERLY SCHULD  
HANS VON SPAKOVSKY

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	Adjourn	

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P-R-O-C-E-E-D-I-N-G-S

1:36 p.m.

VICE CHAIR THERNSTROM: (presiding) The meeting will come to order.

This is a meeting of the U.S. Commission on Civil Rights, held on September 12th, 2008, at 624 Ninth Street, Northwest, Room 540, Washington, D.C.

All Commissioners are present. Is that accurate? Commissioner Reynolds is coming in by phone. Yes, all Commissioners are present.

The first item on the agenda is the --

COMMISSIONER YAKI: Point of order?

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER YAKI: Because this is the business meeting, we should probably do a roll call.

VICE CHAIR THERNSTROM: Sure.

Commissioner Kirsanow, present?

COMMISSIONER KIRSANOW: Here.

VICE CHAIR THERNSTROM: Commissioner Heriot?

COMMISSIONER HERIOT: I'm here.

VICE CHAIR THERNSTROM: Commissioner Gaziano?

COMMISSIONER GAZIANO: Here.

VICE CHAIR THERNSTROM: The Vice Chair is

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1 here.

2 The Chair?

3 CHAIR REYNOLDS: Is here. Well, present.

4 VICE CHAIR THERNSTROM: Present..

5 Commissioner Taylor?

6 ~~COMMISSIONER TAYLOR:~~ Here.

7 VICE CHAIR THERNSTROM: Commissioner

8 Melendez?

9 COMMISSIONER MELENDEZ: Here.

10 VICE CHAIR THERNSTROM: Commissioner Yaki?

11 COMMISSIONER YAKI: Here.

12 **I. Approval of Agenda**

13 VICE CHAIR THERNSTROM: The first item on  
14 the agenda is the approval of the agenda. Can I have  
15 a motion to approve the agenda?

16 COMMISSIONER GAZIANO: I would like to  
17 amend the agenda. I would like to amend the agenda,  
18 immediately after approval of the agenda, to recognize  
19 me to correct the record regarding the hiring of Hans  
20 von Spakovsky.

21 VICE CHAIR THERNSTROM: I will second it.

22 Can we take a vote on the agenda as  
23 amended by Commissioner Gaziano?

24 All in favor?

25 (Chorus of ayes.)

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1 Any opposition or abstentions?

2 (No response.)

3 Okay. Chairman Reynolds has decided to  
4 remove the FY 2008 Statutory Report from consideration  
5 at this meeting. I, therefore, move to amend the  
6 agenda to delete the item -- I'm sorry, I should have  
7 said before we approved the agenda. I, therefore,  
8 amend the agenda to delete the item "FY 2008 Statutory  
9 Report: Enforcing Prohibitions of Religious  
10 Discrimination in Prison" in order to do ongoing edits  
11 and work. It is not ready quite for approval.

12 Do I have a second on amending --

13 COMMISSIONER MELENDEZ: Second.

14 VICE CHAIR THERNSTROM: All in favor?

15 COMMISSIONER YAKI: Discussion?

16 VICE CHAIR THERNSTROM: Yes.

17 COMMISSIONER YAKI: Why, specifically, are  
18 we postponing it and when -- and is it going to be due  
19 before the end of the fiscal year?

20 COMMISSIONER GAZIANO: Could we talk about  
21 that in the Staff Director's report? This is just an  
22 amendment of the agenda.

23 COMMISSIONER YAKI: No, I can ask for  
24 this.

25 COMMISSIONER GAZIANO: I'm asking you

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1 whether you're willing to have that during the Staff  
2 Director's --

3 COMMISSIONER YAKI: No, because I want to  
4 know why we're voting to take it off the agenda.

5 CHAIR REYNOLDS: I'm sorry, what's the  
6 question? \_\_\_\_\_ --

7 VICE CHAIR THERNSTROM: Why we are taking  
8 off the agenda the discussion of the Statutory Report.  
9 That was the question of Commissioner Yaki.

10 CHAIR REYNOLDS: The document is still  
11 being revised.

12 COMMISSIONER YAKI: And do we have an  
13 expectation that it will be finished prior to the end  
14 of the fiscal year?

15 CHAIR REYNOLDS: That is our expectation.

16 COMMISSIONER YAKI: So the expectation  
17 will be that we're going to try to have some sort of  
18 special meeting in order to deal with it?

19 CHAIR REYNOLDS: I believe that it is  
20 likely that we will have to have a special meeting to  
21 discuss the Statutory Report.

22 COMMISSIONER MELENDEZ: Just a question:  
23 are we saying that might be tacked onto next month's  
24 meeting?

25 COMMISSIONER YAKI: No, we have to do it

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1 before then.

2 STAFF DIRECTOR DANNENFELSER: The  
3 expectation would be to have a special meeting before,  
4 a telephonic meeting, presumably, before that time.

5 VICE CHAIR THERNSTROM: Mr. Chairman, do  
6 ~~you want to respond to that, to the timing at all?~~

7 CHAIR REYNOLDS: Well, at this point I  
8 don't believe that we're in a position to select a  
9 date.

10 VICE CHAIR THERNSTROM: Right, but you're  
11 talking about a telephonic meeting, is that correct?

12 CHAIR REYNOLDS: Yes. We'll have to have  
13 a telephonic meeting to discuss the Statutory Report.  
14 The date on when the telephone meeting will take  
15 place, we're not ready to discuss that now.

16 COMMISSIONER YAKI: Another follow-up  
17 question?

18 VICE CHAIR THERNSTROM: So he can hear  
19 you, do you want to speak a little louder?

20 COMMISSIONER YAKI: Can you hear me,  
21 Commissioner Reynolds?

22 CHAIR REYNOLDS: Yes.

23 COMMISSIONER YAKI: What exactly are the  
24 reasons why it is not ready now? Is it being  
25 rewritten? Is it being annotated? Is it being -- I

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1 mean, to what extent is it not ready?

2 CHAIR REYNOLDS: The document needed a  
3 significant amount of work. The areas include factual  
4 errors. There were some issues with the analysis. So  
5 quite a bit of work needs to be done on the document  
6 before it is ready.

7 COMMISSIONER YAKI: Well, Chair Reynolds,  
8 my only request -- and this is why I brought it up  
9 before we amended the agenda, because I think it is  
10 important to have this information out there, whether  
11 we need to amend the motion or not, and I'm not  
12 suggesting that we do.

13 But I presume that because it is going, as  
14 you describe it, to be substantially rewritten with  
15 factual errors done, what have you, this will in some  
16 respects be a very different document than one which  
17 has been presented to us before. I would hope that we  
18 are given sufficient time in which to (a) review it,  
19 but (b) after review, and after approval, will we have  
20 sufficient time in which to write concurring or  
21 dissenting statements, and will that be part of what  
22 is sent to Congress or will it have to be delayed  
23 because we have to get something out before the end of  
24 the month?

25 CHAIR REYNOLDS: The document is going to

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1 go out as a whole. We are not going to send it out in  
2 piecemeal fashion. We will provide a sufficient  
3 amount of time for folks to review.

4 It's not a new document. In fact, you'll  
5 have less to review rather than more.

6 COMMISSIONER YAKI: Okay. Well, I was  
7 just concerned when you said it had to be  
8 substantially rewritten.

9 CHAIR REYNOLDS: Yes, but this is not an  
10 -- I did not mean to suggest that we were adding new  
11 facts. But to answer your series of questions, yes,  
12 you will have an adequate amount of time to review  
13 and, no, the document is not going to be sent out in  
14 piecemeal fashion. It will be sent out as a whole  
15 with the body of the report as well as the dissents  
16 and concurrences.

17 COMMISSIONER YAKI: Thank you very much  
18 for answering my questions, Mr. Chair.

19 VICE CHAIR THERNSTROM: Is there any more  
20 discussion on this question? Are we ready to vote to  
21 amend the agenda to remove the Statutory Report from  
22 the agenda?

23 All in favor?

24 (Chorus of ayes.)

25 Any opposed?

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1 COMMISSIONER MELENDEZ: One abstention.

2 COMMISSIONER YAKI: Two abstentions.

3 VICE CHAIR THERNSTROM: Two abstentions.

4 Let the record show that Commissioners Yaki and  
5 Melendez have abstained.

6 ----- VICE-CHAIR THERNSTROM: The second item it  
7 the approval of the minutes of July --

8 COMMISSIONER GAZIANO: Madam Chairwoman?

9 VICE CHAIR THERNSTROM: Yes.

10 COMMISSIONER GAZIANO: We amended the  
11 agenda.

12 VICE CHAIR THERNSTROM: I forgot that.  
13 I'm sorry about that.

14 **II. Hiring of Hans von Spakovsky**

15 VICE CHAIR THERNSTROM: The second item is  
16 Commission Gaziano's --

17 COMMISSIONER GAZIANO: And I would like to  
18 move now, that is, an order for unanimous consent that  
19 the record print the written statement as if I had  
20 read it at the conclusion of my brief summary, but I  
21 would prefer not to have to go read the statement.  
22 But I would like to know that before my summary.

23 Is there unanimous consent from the  
24 Commissioners to have my written statement on the  
25 record on Hans von Spakovsky's hiring included in the

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1 record as if read?

2 VICE CHAIR THERNSTROM: With the  
3 understanding that you are going to summarize it  
4 briefly now?

5 COMMISSIONER GAZIANO: Yes, I will  
6 summarize it and pass it around, and I will suggest a  
7 recess, if necessary, for people to read it.

8 COMMISSIONER YAKI: I would like to read  
9 it first before --

10 COMMISSIONER GAZIANO: Okay, then I move  
11 that at the conclusion of my brief remarks that my  
12 written submission be admitted into our official  
13 record as if it were read. I would like a vote on  
14 that.

15 VICE CHAIR THERNSTROM: Discussion?

16 (No response.)

17 All in favor?

18 (Chorus of ayes.)

19 Opposed? Abstentions?

20 COMMISSIONER YAKI: I abstain.

21 COMMISSIONER MELENDEZ: Abstain.

22 VICE CHAIR THERNSTROM: Two abstentions.  
23 Commissioners Yaki and Melendez abstain.

24 COMMISSIONER GAZIANO: Now for my  
25 hopefully brief summary, there were, as I think all

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1 the Commissioners know, some very fanciful blog  
2 stories and a highly misleading *Washington Post* story  
3 on the hiring of Hans von Spakovsky as a consultant to  
4 serve in the capacity of a special assistant.

5 The blog stories were based on leaks by  
6 our career staff involving personal and confidential  
7 emails from me to them, and then somebody engaged in  
8 wild speculation to the writers of the blog stories  
9 about what Hans von Spakovsky work would be performed,  
10 what work he would be performing for me.

11 Those paranoid blog stories, or I should  
12 say -- yes, the paranoid blog stories were fueled by  
13 Commissioner Yaki's highly misleading comments to *The*  
14 *Washington Post*. Such comments by Commissioner Yaki  
15 were a breach of an agreement we had reached on the  
16 telephonic meeting on how the authority would be  
17 treated.

18 I think, among the unfortunate statements  
19 that Commissioner Yaki made, he belittled the  
20 experience that many of our special assistants, many  
21 of the current special assistants have. He also  
22 suggested that somehow we should engage in age  
23 discrimination in hiring special assistants; we should  
24 not look for experienced assistants.

25 But, more importantly, by fueling the

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1 notion that somehow there was something improper --  
2 first of all, he fueled the notion that the blog  
3 stories related that Hans von Spakovsky, who is an  
4 honorable public servant whose work for the government  
5 has always been vindicated and whose legal views have  
6 always prevailed in the courts, that somehow there was  
7 something troubling if Mr. von Spakovsky would advise  
8 me about voting rights issues or advise anyone on the  
9 Commission on voting rights issues, when there was an  
10 agreement among Commissioners that we would not  
11 question the work that such special hires would  
12 perform for each Commissioner. And it was at the  
13 urging of Commissioner Yaki that we authorized, made  
14 this authority, and that we agreed to his concern  
15 about treating such matters as confidential.

16 So at this time I will submit the full  
17 written statement for the record and give each of you  
18 a copy. I suggest that if any Commissioner would like  
19 a brief recess to read it before any further  
20 discussion, that that would be appropriate.

21 [INSERT]  
22  
23  
24

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1 Point of Personal Privilege

2  
3 I was surprised and disappointed by three  
4 matters relating to fanciful stories that were  
5 published about the hiring of a distinguished lawyer,  
6 Hans von Spakovsky, to serve as the equivalent of my  
7 special assistant on the Commission for approximately  
8 40 days. My disappointment would not merit the  
9 Commission's time except that the stories paint the  
10 Commission in a false light and the facts fueling the  
11 stories involve the breach of an agreement among the  
12 commissioners about the hires. We have a duty to  
13 correct the record.

14 It is also a point of honor for me to respond  
15 briefly to the facile claims periodically regurgitated  
16 against Hans von Spakovsky by conspiracy-minded  
17 activists who somehow blame him for their defeats on  
18 the voter ID issue in the Supreme Court and before  
19 various state legislatures. The truth always  
20 vindicates the honorable government service provided  
21 by Mr. von Spakovsky, and his legal views have been  
22 adopted by the highest courts in the land.  
23 Unfortunately, his detractors rarely, if ever,  
24 apologize when Mr. von Spakovsky is exonerated from  
25 their false charges or when he prevails as a matter of

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1 law. Hell apparently hath no fury like a partisan  
2 activist whose conspiracy theory is dismissed as so  
3 much hot air. But have they no shame as well?

4 My concerns relating to the Commission are as  
5 follows: First, I am disappointed that confidential  
6 ~~personnel~~ information was leaked by Commission staff  
7 and that someone then contrived conspiracy theories  
8 about the work that Mr. von Spakovsky might perform  
9 for me, when it was clear that such statements had no  
10 basis in truth. Second, I am not surprised that the  
11 left-wing blogosphere would print wild stories, but I  
12 was quite surprised that a reporter for *The Washington*  
13 *Post* would accept the salient misrepresentations in  
14 those breathless stories without calling me or reading  
15 the relevant transcript of our meeting. If the *Post*  
16 reporter had read the transcript of our meeting that  
17 the blog stories linked to (rather than accepting the  
18 activists' spin on what it contained) he would have  
19 known that the central narrative of the blog stories  
20 was false. In short, he would have known that Mr. von  
21 Spakovsky was not hired to work for the permanent  
22 staff of the Commission; he would have known that it  
23 was a non-story that commissioners without  
24 confidential special assistants were granted authority  
25 to use consultants for a brief time to help them with

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1 their work; and thus, he would not have speculated on  
2 whether Mr. von Spakovsky would be working on voting  
3 rights issues for me without talking with me. In the  
4 reporter's defense, Commissioner Yaki's comments  
5 falsely supported the paranoid blog stories.

6 I am most disappointed, and genuinely so, by the  
7 breach of a gentleman's agreement by Commissioner  
8 Yaki--a gentleman's agreement that Commissioner Yaki  
9 himself urged. That Commissioner Yaki knowingly  
10 misrepresented the nature of the temporary hiring  
11 authority to the press and that he commented  
12 negatively on the work he imagined Mr. von Spakovsky  
13 would be performing for me--in the nature of my  
14 special assistant--is a gross violation of  
15 collegiality to say the least. I will not soon forget  
16 that the hiring process at issue was initiated largely  
17 to accommodate Commissioner Yaki, and that I was  
18 instrumental in urging other commissioners to accede  
19 to his wishes. It is for this reason that I expect an  
20 apology from Commissioner Yaki, whose partisan  
21 exuberance we often laugh off, but who was, at least  
22 in this case, undisciplined and unprofessional.

23 First, let me correct the record: The  
24 transcripts of our Commission meetings of July 11 and  
25 particularly of our telephonic meeting of July 28

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(pages 49-70), available on our website at <http://www.usccr.gov/calendar/trnscript/072808ccr.pdf>, leave absolutely no doubt of the following:

1. It was pursuant to Commissioner Yaki's repeated urging that the Staff Director, General Counsel, and other commissioners investigated options to provide temporary special assistants (for up to two months) to the four commissioners who did not have confidential special assistants assigned to them. The legal authority and especially the practicality of trying to go through the schedule C process to hire temporary special assistants within a two-month time frame seemed doubtful to me in mid-July.

2. In order to accommodate Commissioner Yaki's request, the Staff Director and the General Counsel recommended at the July 28 telephonic meeting (scheduled at Commissioner Yaki's request) to use existing authority to hire consultants with expertise in civil rights, who would then be detailed to the commissioners who recommended that they be hired. Although they would not in fact be schedule C political appointees, all commissioners agreed that if the authority was granted, that these particular consultants would be treated as if they were confidential, special assistants for certain purposes,

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1 serving at the pleasure and convenience of the  
2 supervising commissioner.

3 3. The General Counsel explained some  
4 advantages and disadvantages of the recommended  
5 approach. The advantages included clearer legal  
6 authority for the temporary assistance, the relative  
7 speed with which the Commission could complete the  
8 contract process, and the flexibility for  
9 Commissioners to recommend consultants with more than  
10 the normal expertise for a permanent special  
11 assistant, whose salary levels are capped at the GS-13  
12 level. The Staff Director and General Counsel  
13 reiterated that although such consultants would need  
14 to have a demonstrated expertise in civil rights, the  
15 supervising commissioner also would have greater  
16 flexibility to attract someone on a temporary basis  
17 whose salary history might justify the slightly higher  
18 hourly rate of pay. Notwithstanding the possibility  
19 of hiring more experienced consultants, each contract  
20 would expire on September 30 and have the same total  
21 compensation cap. Thus, a supervising commissioner  
22 who recommended a more experienced consultant at the  
23 maximum GS-15 hourly rate (hardly a princely sum for  
24 lawyers with experience in the private sector) would  
25 have to settle for fewer total hours under the capped

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1 contract.

2 4. Commissioner Yaki's principal and repeated  
3 concern with this approach at the July 28 meeting was  
4 whether anyone hired on his recommendation to serve  
5 him would be asked to reveal his confidences,  
6 including what ~~he wanted the consultant to~~ help him  
7 with. The General Counsel explained that Yaki's  
8 concern could be satisfied with an agreement to treat  
9 such temporary consultants as if they were special  
10 assistants for purposes of confidential communications  
11 and the type of assistance they would provide their  
12 supervising commissioners. The Staff Director and  
13 commissioners, including me, assured Commissioner Yaki  
14 that we would treat such a working relationship as  
15 confidential. Naturally, we expected Commissioner  
16 Yaki to abide by such a gentleman's agreement as well.

17 5. Toward the end of the discussion, I  
18 addressed Commissioner Yaki and asked him which of the  
19 less optimal options "give you greater confidence that  
20 you'll have someone to help you?" It was on the basis  
21 of his answer that I agreed to support the motion to  
22 give him what he wanted, i.e., the proposal for  
23 temporary consultants.

24 6. In response to my and Vice Chairman  
25 Thernstrom's questions regarding what would help

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1 Commissioner Yaki the most, he stated that it would  
2 help him greatly to have any assistance and that he  
3 could find someone to help him in very short order.  
4 He then stated: "I'm fully confident that the person  
5 who I would select would be utterly loyal to me and  
6 utterly opposed to anything that the majority would do  
7 at the Commission." Underlying Commissioner Yaki's  
8 joke was his clear message, which he made explicit in  
9 his next sentence, that he would use any consultant  
10 assigned to him for his own ends, and that such ends  
11 likely would be directly opposed to the agenda of a  
12 majority on the Commission. It was with that  
13 understanding that Commissioner Taylor and I voted  
14 with the two Democratic Commissioners to provide the  
15 authority Commissioner Yaki wanted, with three other  
16 commissioners abstaining.

17 My factual correction of the record is  
18 supplemented as follows:

19 Approximately two weeks after the authority was  
20 approved, I was fortunate enough to secure the consent  
21 from Former FEC Commissioner Hans von Spakovsky to  
22 assist me as a part-time consultant for approximately  
23 40 days. I began the process to secure the  
24 appropriate consulting agreement a few days later,  
25 including emailing our personnel and administrative

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1 staff information on Hans's salary history and my  
2 request that compensation be set at the GS-15 pay  
3 level, even if that was inadequate for his prior  
4 government service. At about the time the paperwork  
5 was completed, the liberal blog stories began to  
6 circulate with leaked information from my emails to  
7 our career staff. The confidential salary request is  
8 about the only part of the blog stories with a factual  
9 basis, even if it was presented with a misleading and  
10 sinister spin.

11 The Commission and I are very fortunate that Mr.  
12 von Spakovsky is willing to work part-time for us at a  
13 significant cut in his former government pay level,  
14 especially given the much higher rate he can earn in  
15 the private sector based on that experience. In  
16 addition to serving as a full-time Commissioner on the  
17 Federal Election Commission, Mr. von Spakovsky was a  
18 senior career counsel to the Assistant Attorney  
19 General for Civil Rights in the U.S. Department of  
20 Justice, and was a Georgia state election official,  
21 among other legal work in his distinguished career.

22 Among the most fanciful "factoids" in the  
23 liberal blog stories was the implication that Mr. von  
24 Spakovsky was hired on my recommendation to work as  
25 part of the Commission's permanent, career staff.

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1 Would that the Commission should be so lucky to  
2 attract a man of Mr. von Spakovsky's distinction and  
3 accomplishment for a permanent job! But those who fed  
4 the paranoid delusions of the Hans-haters knew  
5 otherwise.

6 ~~That neither Mr. von Spakovsky nor I are~~  
7 particularly sensitive regarding my salary request and  
8 his prior earning history does not excuse those who  
9 leaked it. This is a serious embarrassment to the  
10 Commission. (I, for one, had tried to operate under  
11 the illusion that all our staff was trustworthy.)  
12 Yet, under the authority granted by my fellow  
13 commissioners, my request actually *limited* the hours  
14 Mr. von Spakovsky could work for me to the fewest  
15 possible number. No matter. The spinmeisters were  
16 happy to give the Hans-haters the impression that  
17 their boogie man was a permanent, full-time hire.  
18 Once again, if only the Commission were so lucky.

19 The blog stories contained biased conspiracy  
20 theories regarding what work Mr. von Spakovsky would  
21 be performing (based on "inside sources"), and dredged  
22 up the same, old false complaints about Mr. von  
23 Spakovsky that have been repeatedly debunked.

24 Committed conspiracy theorists are rarely worth  
25 talking to, but I was happy to speak to reputable

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1       journalists who called at my well-publicized work  
2       number. I was pleased to confirm that the truth was  
3       rather more prosaic than the conspiracy theories. For  
4       the most part, the story in the *Atlanta Journal*  
5       *Constitution* (ajc.com) was accurate even if  
6       unwarranted and somewhat slanted. However, one of my  
7       quotes is taken out of context and merits correcting  
8       here.

9               I recently learned that Commissioner Yaki did  
10       not make use of the authority to hire someone to  
11       assist him, despite his repeated requests for  
12       assistance and his assurance he could hire someone  
13       quickly if the authority was granted. Nevertheless,  
14       in contrast to Commissioner Yaki's concern that we  
15       might learn what skullduggery he had in mind for  
16       anyone that he might recommend, I had no hesitancy  
17       describing to the AJC reporter the primary tasks that  
18       I had asked Hans to carry out in his work for me.

19              I have asked Hans to help me submit comments and  
20       edits to our FY 2008 statutory report on the  
21       accommodation of religious practices in the nation's  
22       prisons, which presents some very thorny factual and  
23       legal issues. I have also asked Hans to help me get  
24       up to speed on the fair housing topic the Commission  
25       adopted for our FY 2009 statutory report. (The

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1 mortgage crisis is complicated issue that will require  
2 a clear research focus.) I denied the principal  
3 conspiracy theory in the blog stories that I had asked  
4 Hans to work on our June briefing report concerning  
5 DOJ preparations for the 2008 election--but I quickly  
6 added ~~that there would be~~ nothing wrong if I had.  
7 Indeed, I explained that von Spakovsky testified as an  
8 expert at our June briefing on that subject, which  
9 briefing was broadcast on C-SPAN several times for the  
10 entire world to watch.

11 I explained that Hans probably would not work on  
12 the June briefing report because that report was  
13 unlikely to be drafted by our staff and delivered to  
14 us prior to the end of September when Hans's contract  
15 expires. If a draft briefing report is sent to me  
16 before September 30, I will certainly seek Hans's  
17 guidance on what findings and recommendations I should  
18 consider. It would be strange indeed for the  
19 Commission to request Hans's expert testimony on the  
20 subject but for me to avoid seeking his opinion now  
21 that he is a paid consultant assigned to assist me.  
22 Thus, the statement attributed to me that Hans would  
23 have no involvement in the 2008 election briefing  
24 report is misleading to the extent it implies that his  
25 work for me on the report would be improper.

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1  
2 But the comments and essential thrust of Commissioner  
3 Yaki's attempt to mislead *The Washington Post* reporter  
4 is more disappointing to me personally. Commissioner  
5 Yaki did not attempt to communicate with me about how  
6 I might use Mr. von Spakovsky's assistance. Yet,  
7 Commissioner Yaki's quotes in the *Post* unambiguously  
8 reflect his understanding that Hans was being hired as  
9 one of our special assistants, and the blog stories  
10 clearly identify who he was to serve. The *Post*  
11 reports that Commissioner Yaki "opposed the move" of  
12 the Commission to hire Hans for my benefit. To my  
13 knowledge, Commissioner Yaki has not denied that  
14 report. If so, how did Commissioner Yaki try to  
15 oppose my request? On what ground did he attempt to  
16 do so? Was he ever going to tell me or the other  
17 commissioners about such efforts?

18 Commissioner Yaki is quoted in the *Post* story  
19 and elsewhere gratuitously defaming Mr. von Spakovsky,  
20 but it is especially bizarre that he attempts to  
21 establish that there is something wrong in my seeking  
22 someone with extensive civil rights experience--rather  
23 than some "young folks out of law school who are  
24 excited to learn." First, is Commissioner Yaki aware  
25 that it is a violation of the civil rights laws to

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1 engage in age discrimination in hiring? Second, is it  
2 not apparent to him that a person hired for only 40  
3 days is of little use if he must learn on the job?  
4 Third, if Commissioner Yaki were paying attention to  
5 the specific terms of the authority he voted for, then  
6 he would have known that we were required to recommend  
7 consultants with appropriate substantive experience.  
8 Putting all that aside, Commissioner Yaki belittles  
9 other commissioners' special assistants as merely  
10 "young folks [just] out of law school who are excited  
11 to learn." The special assistants serving the current  
12 commissioners, including Commissioner Melendez's  
13 assistant who sometimes helps Commissioner Yaki, are  
14 much more experienced than Commissioner Yaki implies.

15 Commissioner Yaki also fans the partisan flames  
16 of the breathless blog stories that Mr. von  
17 Spakovsky's assistance to me "is troubling" because  
18 "we have two reports dealing with voting rights that  
19 are ... yet to be published, and my concern is what  
20 role he will have in regard to those reports." Given  
21 that Commissioner Yaki promised us that anyone he  
22 hired to assist him would serve his ends alone and  
23 that such interests would be directly contrary to the  
24 majority's agenda, why is it troubling to him that  
25 another commissioner might have some assistance as

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1 well? How could it be any of his concern how Mr. von  
2 Spakovsky serves one commissioner, when he so ardently  
3 asserted the need for complete confidentiality with  
4 respect to someone he might hire?

5 But more to the point, Commissioner Yaki's  
6 actions on the Commission belie the notion that he is  
7 really troubled or concerned about any assistance I  
8 might receive performing my duties on the Commission.

9 He was the head of the Democratic Platform Committee  
10 the month of his slander, and he never has had any  
11 problem forcefully responding to my views. We even  
12 agree from time to time, which makes it all the more  
13 disappointing that he would leap at the chance to  
14 mislead the press about the nature of the hiring  
15 authority he urged and that he would comment  
16 negatively about the work my assistant might perform  
17 for me. His partisan exuberance got the better of  
18 him, and I hope he regrets it.

19 I expect that neither the *Post* reporter nor I  
20 will be so trusting of Commissioner Yaki again. (It  
21 would be an embarrassment to any editor who learned  
22 the truth, and almost humorous that it ran on page A-2  
23 of the *Post*.) Because the reporter spoke at least  
24 briefly with Vice Chair Thernstrom, he did not repeat  
25 several of the blog errors. Nevertheless, the *Post*

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1 printed the defamatory comments by Commissioner Yaki  
2 and also repeated other charges against Hans, without  
3 mentioning that the *Post* itself had previously  
4 published a story exonerating Hans from at least one  
5 of the false charges.

6 ~~I sincerely regret that the *Post* story dredged~~  
7 ~~up these tired claims against Hans. The *Wall Street*~~  
8 ~~*Journal* has printed Hans's op-ed which provides a~~  
9 ~~convincing defense against these charges. But I do~~  
10 ~~want to conclude with two quick points here:~~

11 1. The Supreme Court's decision upholding the  
12 constitutionality of Indiana's voter ID law in  
13 *Crawford* vindicates Hans's legal opinion that state  
14 voter ID laws do not violate federal law, as does the  
15 common sense view of a large majority of the American  
16 people who support voter ID laws. Whether one  
17 supports such laws as a matter of policy or not, it is  
18 specious to argue that Hans or the Justice Department  
19 was wrong to allow the Georgia's voter ID law to go  
20 into effect, a law that has since been upheld by the  
21 courts. Court decisions have similarly upheld the  
22 correctness of legal positions taken by Hans and the  
23 Justice Department on other voting rights issues,  
24 demonstrating that the positions taken by Mr. von  
25 Spakovsky were based on the law, not partisan views.

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1           2.    Although *The Washington Post* article also  
2   repeated other baseless claims made in a letter to the  
3   Senate about Hans, the article failed to mention the  
4   extensive response that he submitted to the Senate,  
5   addressing and completely refuting every claim. The  
6   legal decisions he made were clearly based on the law  
7   and prior precedent, and the facts and court holdings  
8   show that they were legally correct. Unfortunately,  
9   some in Washington have taken differences of opinion  
10   on legal and policy issues that most lawyers and  
11   adults encounter every day and tried to equate them  
12   with malfeasance, damaging our ability to have  
13   spirited debates on important public policy issues  
14   free of rancor and destroying the ability of  
15   government lawyers to render objective legal opinions  
16   without opening themselves up to unfair attacks when  
17   others disagree with those opinions for political  
18   reasons.

19           [END OF INSERT.]

20  
21  
22  
23  
24  
25  
  
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1 VICE CHAIR THERNSTROM: We will take a  
2 brief recess in order to read this.

3 CHAIR REYNOLDS: Could someone email the  
4 document to me?

5 VICE CHAIR THERNSTROM: Yes.

6 -- COMMISSIONER GAZIANO: I thought I emailed  
7 you a copy this morning.

8 CHAIR REYNOLDS: Okay. I'll have to  
9 check.

10 COMMISSIONER MELENDEZ: Madam Chair?

11 VICE CHAIR THERNSTROM: Yes?

12 COMMISSIONER MELENDEZ: Are you suggesting  
13 we recess and then go back to the top of the agenda  
14 after we come back in?

15 VICE CHAIR THERNSTROM: Absolutely.

16 COMMISSIONER MELENDEZ: Okay.

17 VICE CHAIR THERNSTROM: Would you like to  
18 recess?

19 COMMISSIONER MELENDEZ: How many pages  
20 have we got?

21 COMMISSIONER GAZIANO: Only if a  
22 Commissioner wants to recess, I suppose. I'm content  
23 to let it rest unless any other Commissioner -- oh, I  
24 should add I am very concerned about the leak of the  
25 personnel matter by our career staff. It turns out

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1 that Mr. von Spakovsky and I are not particularly  
2 concerned that his earning history was much higher  
3 than the maximum hourly rate. This was given a  
4 sinister spin in the blog stories, that somehow he was  
5 being paid too much, when, in fact, according to the  
6 rules that the General Counsel explained to us, by  
7 requesting such a rate of pay, it minimized the number  
8 of hours Mr. von Spakovsky could work for me.

9 But that somebody leaked that information,  
10 regardless of whether Mr. von Spakovsky thinks his  
11 earning history is particularly sensitive or not -- he  
12 was a public servant; he was a former Commissioner of  
13 the FEC, as we all know -- it's still disturbing. I  
14 suggest that other Commissioners might be troubled by  
15 that as well.

16 COMMISSIONER YAKI: Point of order?

17 VICE CHAIR THERNSTROM: Yes.

18 COMMISSIONER YAKI: I think if there are  
19 allegations that there was a leak by staff, then  
20 Commissioner Gaziano should prove it up rather than  
21 simply trying to besmirch the good name of the  
22 employees of this agency, No. 1.

23 And No. 2, I will stand by my comments in  
24 *The Washington Post*, and if he has a problem with  
25 that, we can talk about it at some other point. But I

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1 do think that if he's going to engage in accusations  
2 that seek to impugn the integrity of members of the  
3 Commission staff, he should either prove it up or not  
4 make such wild accusations in public.

5 COMMISSIONER GAZIANO: I would be glad to  
6 respond. -----

7 First of all, I'm giving you the courtesy  
8 to raise my concerns with you face to face, a courtesy  
9 you didn't give me when you gave highly misleading  
10 comments to *The Washington Post* speculating on how  
11 Hans von Spakovsky would be serving me, and how it  
12 troubled you, when I know that those sort of matters  
13 don't really trouble you. You have been very forceful  
14 and you're quite able to respond to any of us with or  
15 without assistance.

16 But as to the leak, it quotes, some of the  
17 blog stories quote my emails to personnel staff. I  
18 think that it speaks for itself that someone has  
19 leaked, and about salary level information.

20 It's also in the blog stories that Mr. von  
21 Spakovsky was hired at my request. Now in the sort of  
22 breathless blog stories, it implies that this is a  
23 permanent, full-time hire, which I imagine made the  
24 story sound more distressing to the Hans haters.

25 But explain to me, Mr. Yaki, how such

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1 information from my emails to the professional staff  
2 could have gotten into the blog stories without  
3 somebody improperly disclosing it.

4 COMMISSIONER YAKI: Well, Mr. Gaziano,  
5 since you call me "Mr.", I'll call you "Mr." back. I  
6 have no idea, but, like I said, that's for you to  
7 prove up. That's not for me --

8 COMMISSIONER GAZIANO: It speaks for  
9 itself, Mr. Yaki.

10 COMMISSIONER YAKI: -- to speculate,  
11 Commissioner, No. 1.

12 COMMISSIONER GAZIANO: I did not accuse  
13 any --

14 COMMISSIONER YAKI: No. 2, I'm not going  
15 to go into a whole discussion about what was or was  
16 not said with *The Washington Post* other than I made it  
17 very clear that this was a temporary provision that  
18 was being made, No. 1.

19 And No. 2, what people say and what people  
20 quote are sometimes two different things, but I'm not  
21 going to hide behind that in terms of what I say.

22 I would just like to state for the record  
23 that if such a thing happened, I think that is  
24 unfortunate, but I think that to sort of go on a  
25 public rampage in terms of the staff and this thing

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1 is, I think, not conducive to an agency whose morale  
2 is already rated amongst the lowest in the federal  
3 government, and how they have been treated and working  
4 under very difficult conditions for the past at least  
5 three years that I've been on here.

6 ~~And if there was something of this nature~~  
7 that, just as you say to me I should have done it a  
8 different way, then I will say to you, you should have  
9 done it a different way. That's what we have an  
10 Executive Director for; that's what we have legal  
11 counsel for, rather than simply putting it out there  
12 as if any one of a number of people who are in or not  
13 in this room were the instigators of the alleged leak.

14 COMMISSIONER GAZIANO: I am much more  
15 bothered by your behavior, Commissioner Yaki, than I  
16 am about the leak. I am much more bothered -- if  
17 you're standing by *The Washington Post* story, it says  
18 that you tried to stop -- you were opposed -- you  
19 tried to oppose the hiring of Hans von Spakovsky.

20 COMMISSIONER YAKI: No, I never said that.

21 COMMISSIONER GAZIANO: That's what *The*  
22 *Washington* -- that's not a quote, but that's what *The*  
23 *Washington Post* says.

24 COMMISSIONER YAKI: I don't recall it  
25 saying that.

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1 COMMISSIONER GAZIANO: So if you stand by  
2 it --

3 COMMISSIONER YAKI: I don't recall it  
4 saying that.

5 COMMISSIONER GAZIANO: But I am more  
6 bothered that you asked for this authority -- I helped  
7 secure a majority for you for your help, and your  
8 principal concern was that the work such a consultant  
9 would do for you would be kept confidential and no one  
10 would question it, and you breached that agreement.

11 COMMISSIONER YAKI: I never breached that  
12 agreement. I don't know what you're talking about.

13 COMMISSIONER GAZIANO: I think your quotes  
14 speak for themselves, Commissioner Yaki.

15 COMMISSIONER YAKI: Well, you know,  
16 Commissioner Gaziano, this is something that you and I  
17 are going to disagree upon. If you want to take it on  
18 in public and you really want to get into this, we can  
19 certainly do that, and I can certainly imagine we  
20 could take another hour or so of the Commission's time  
21 with regard to what I believed we were going to do  
22 with regard to trying to get help.

23 And I notice that you don't mention the  
24 other comments that I made about the appointment,  
25 which to me are much more important and much more

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1 address my concerns and the point that I was  
2 attempting to make.

3 We can go into that if you want. We can  
4 sit here and do another hour and dance on this with  
5 you being righteously offended and casting aspersions  
6 at me and the staff. If you want to do that, that's  
7 fine. If you're going to waste their time, go ahead.  
8 I'm ready.

9 COMMISSIONER GAZIANO: Well, I am  
10 satisfied, unless you say any further slander. That's  
11 why I submitted it in writing, to save everyone time.

12 VICE CHAIR THERNSTROM: Well, it goes into  
13 the record in writing, and I think at this point we  
14 can move on.

15 COMMISSIONER YAKI: Then I want an  
16 opportunity to respond in writing in the next agenda.

17 COMMISSIONER GAZIANO: I object to that.

18 COMMISSIONER YAKI: Well --

19 COMMISSIONER GAZIANO: We can vote on it.

20 COMMISSIONER YAKI: Why don't we vote on  
21 it, and let's see what fairness is about here?

22 VICE CHAIR THERNSTROM: Well, you know  
23 what, you have not yet read the document. If you  
24 want --

25 COMMISSIONER YAKI: Well, that's why I

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1 said at the next meeting. That's why I'm not saying  
2 this meeting.

3 VICE CHAIR THERNSTROM: If you want at the  
4 next meeting, after you've read the document and  
5 considered it, to raise, as Commissioner Gaziano did  
6 ~~today, to raise the question on your behalf of~~  
7 inserting a statement in the record, why don't you  
8 just wait and do it at that point after you have read  
9 it, after we've all read it and had a chance to  
10 consider it? I do not want to vote on this until that  
11 has happened.

12 COMMISSIONER YAKI: That's fine, but we  
13 could get into a long amendment agenda debate back and  
14 forth because I'm sure he'll want to respond to my  
15 response, and then this will keep on going.

16 VICE CHAIR THERNSTROM: Well, let us --

17 COMMISSIONER GAZIANO: Let me correct -- I  
18 probably would not object to your submission at that  
19 time.

20 VICE CHAIR THERNSTROM: Well, in any case,  
21 we can put that issue off until the next meeting. It  
22 can be voted on at the next meeting just as your  
23 request was voted on today at this meeting. So  
24 there's no reason for having further to discuss this  
25 at this point.

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1 CHAIR REYNOLDS: Agreed.

2 (Laughter.)

3 VICE CHAIR THERNSTROM: Agreed.

4 COMMISSIONER KIRSANOW: Disagree.

5 VICE CHAIR THERNSTROM: Commissioner  
6 Kirsanow, the reporter is having trouble with you.

7 COMMISSIONER KIRSANOW: Commissioner  
8 Gaziano raises a point that troubles me. If there was  
9 a leak of emails, I don't think we should simply just  
10 pass this by and say, well, let's discuss it at some  
11 other point.

12 Now we can read through this and decide at  
13 the next meeting what we're going to do about this  
14 particular statement or any response that Commissioner  
15 Yaki has made, but, Vice Chair Thernstrom, you and I  
16 were on this Commission when there were other  
17 instances where documents were purloined --

18 VICE CHAIR THERNSTROM: Yes.

19 COMMISSIONER KIRSANOW: -- and the Hill  
20 asked for an investigation --

21 VICE CHAIR THERNSTROM: Right.

22 COMMISSIONER KIRSANOW: -- when the  
23 Commission didn't investigate it.

24 VICE CHAIR THERNSTROM: Yes.

25 COMMISSIONER KIRSANOW: I'm troubled --

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1 if, in fact, emails have somehow, private emails have  
2 somehow been disclosed or inappropriately publicized,  
3 I think that we should look into that. That's  
4 something that troubles me.

5 I have noted in the course of the last  
6 year or so that there have been other instances -- at  
7 least it suggests itself in terms of some of the  
8 litigation this Commission has been involved in that  
9 there have been other instances in which confidential  
10 information may have been disclosed. I'm not sure of  
11 that, but there's some highly peculiar circumstances  
12 suggested in the litigation that I think we may want to  
13 take a look at.

14 VICE CHAIR THERNSTROM: And are you  
15 suggesting that the Staff Director take a look at the  
16 question? What are you suggesting specifically?

17 COMMISSIONER KIRSANOW: I don't have a  
18 motion.

19 VICE CHAIR THERNSTROM: Okay.

20 Commissioner Heriot, you had your hand up?

21 COMMISSIONER HERIOT: I think this is much  
22 more serious than you're suggesting here. If  
23 confidential documents, personnel matters, are getting  
24 into the media, that's something that really needs to  
25 be investigated. You can't just paper over that as

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1 if, gee, nothing's happened; we wouldn't want to --

2 VICE CHAIR THERNSTROM: Who is the you in  
3 that sentence?

4 COMMISSIONER HERIOT: You, us, you know,  
5 you plural.

6 VICE CHAIR THERNSTROM: The Commission  
7 can't?

8 COMMISSIONER HERIOT: The Commission, we.  
9 So I would very much urge that we conduct an  
10 investigation and that the responsibility for doing  
11 that be delegated to the Staff Director.

12 But the ultimate responsibility for making  
13 sure that things are conducted appropriately lies with  
14 the Commission. So we do have to take that  
15 responsibility here.

16 VICE CHAIR THERNSTROM: Do you want to  
17 make a specific proposal?

18 COMMISSIONER HERIOT: I would propose that  
19 the Staff Director conduct an investigation into the  
20 leakage of confidential information.

21 VICE CHAIR THERNSTROM: Well, if we're  
22 going to make such a proposal, I would like to add the  
23 General Counsel -- the Staff Director and the General  
24 Counsel, since there are legal matters here.

25 COMMISSIONER HERIOT: Well, how about I

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1 make a motion then?

2 VICE CHAIR THERNSTROM: Pardon me?

3 COMMISSIONER HERIOT: I move that the  
4 Staff Director and the General Counsel conduct an  
5 investigation into what happened with regard to  
6 leaking confidential information regarding personnel.

7 VICE CHAIR THERNSTROM: Is there a second?

8 COMMISSIONER KIRSANOW: I second the  
9 motion.

10 VICE CHAIR THERNSTROM: Okay. Discussion?

11 Yes, Commissioner Yaki.

12 COMMISSIONER YAKI: Thank you very much,  
13 Madam Vice Chair.

14 As I brought up, this is something that  
15 should have been assigned to the Executive Director  
16 and discussed with the Executive Director to follow up  
17 and to research. I would agree that it should be  
18 done. I think that is the way it should be handled.

19 If the Staff Director believes that the  
20 General Counsel is required to be part of that, then  
21 that is within the Staff Director's discretion.

22 VICE CHAIR THERNSTROM: Okay, but as the  
23 motion reads, certainly you can't object to -- I mean  
24 it would be between the Staff Director and the General  
25 Counsel to decide on what the role of the General

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1 Counsel should be, can be. I mean we can leave that  
2 up to them.

3 As the motion reads, it is asking the  
4 Staff Director with the General Counsel to investigate  
5 this. Do you have objection to --

6 COMMISSIONER YAKI: No, I just --

7 VICE CHAIR THERNSTROM: -- simply adding  
8 the General Counsel?

9 COMMISSIONER YAKI: Not at all. I would  
10 simply state that I would hope that the investigation  
11 is done in accordance with established procedures,  
12 that we don't try to make up something on the fly, but  
13 if there is some record or procedure for doing this,  
14 that we follow that and ensure all due process during  
15 the investigation.

16 VICE CHAIR THERNSTROM: Well, I would hope  
17 so, too. One of the advantages, aside from the fact  
18 that there are legal matters involved here, of having  
19 the General Counsel involved is that he has been here  
20 longer than the Staff Director.

21 COMMISSIONER YAKI: No, no, I have no  
22 objection to the General Counsel.

23 VICE CHAIR THERNSTROM: All right. Can we  
24 take a vote on this?

25 COMMISSIONER KIRSANOW: Further

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1 discussion. I just want to be clear --

2 VICE CHAIR THERNSTROM: Wait a minute.

3 COMMISSIONER KIRSANOW: I just want to be  
4 clear. We do have limited resources. Just a question  
5 to Commissioner Heriot. This has to do specifically,  
6 your motion is directed specifically at the emails to  
7 which Commissioner Gaziano --

8 COMMISSIONER HERIOT: Right. Leaking the  
9 confidential --

10 COMMISSIONER KIRSANOW: Okay.

11 COMMISSIONER GAZIANO: Emails or other  
12 documents.

13 COMMISSIONER HERIOT: Yes, there may be  
14 other things that were leaked as well that are not  
15 email messages.

16 COMMISSIONER GAZIANO: But I don't know  
17 what exactly was leaked.

18 COMMISSIONER HERIOT: Confidential  
19 personnel --

20 COMMISSIONER GAZIANO: There may have been  
21 some other document that quoted my email, so it wasn't  
22 exactly my email that was leaked to the bloggers.

23 COMMISSIONER KIRSANOW: Okay.

24 COMMISSIONER GAZIANO: I don't know how  
25 the information --

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1 COMMISSIONER HERIOT: Personnel  
2 information.

3 COMMISSIONER GAZIANO: And the bloggers,  
4 what the bloggers attribute was my request.

5 COMMISSIONER KIRSANOW: Right. I just  
6 want to be definite ~~with respect~~ to what the scope --

7 COMMISSIONER GAZIANO: And again, that  
8 speaks for itself. That speaks for itself.

9 COMMISSIONER KIRSANOW: Right. I just  
10 want to be definite with respect to the scope of the  
11 investigation.

12 VICE CHAIR THERNSTROM: All right. Are we  
13 ready to vote on this?

14 All in favor?

15 (Chorus of ayes.)

16 Any dissents or amendments or abstentions?

17 (No response.)

18 Chairman Reynolds, did I hear an aye from  
19 you?

20 CHAIR REYNOLDS: Yes, you did.

21 VICE CHAIR THERNSTROM: Okay, that is a  
22 unanimous --

23 COMMISSIONER TAYLOR: Vice Chair  
24 Thernstrom --

25 VICE CHAIR THERNSTROM: Yes.

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1 COMMISSIONER TAYLOR: My expectation is  
2 that we will receive at least a preliminary report at  
3 our next meeting.

4 VICE CHAIR THERNSTROM: I would assume  
5 that it can be done before the next meeting.

6 COMMISSIONER TAYLOR: I just wanted to  
7 receive confirmation that we would receive a  
8 preliminary report at our next meeting on this issue.

9 COMMISSIONER HERIOT: You mean by that  
10 our next live meeting?

11 COMMISSIONER TAYLOR: Yes, our next live  
12 meeting, yes.

13 STAFF DIRECTOR DANNENFELSER: Okay. By  
14 the October 17th meeting.

15 VICE CHAIR THERNSTROM: Okay, that was a  
16 unanimous vote.

17 **III. Approval of Minutes**

18 VICE CHAIR THERNSTROM: We are ready to  
19 move on to approval of the minutes of July 11th, 2008,  
20 August 19th, 2008, and September 6th, 2008.

21 There will be a separate discussion on the  
22 minutes of each of these meetings.

23 Can I have a motion?

24 **July 11, 2008 Meeting**

25 COMMISSIONER GAZIANO: I move the adoption

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1 of the approval of the July 11th meeting. I raise  
2 just a point of clarification rather than an actual  
3 correction.

4 I am satisfied, after reviewing the  
5 transcript, that the transcript, that the minutes as  
6 supplemented by the transcript are clear.

7 So I move for their adoption.

8 COMMISSIONER HERIOT: Second.

9 VICE CHAIR THERNSTROM: It has been moved  
10 and seconded. Any discussion?

11 (No response.)

12 Can we vote, therefore, on approval of the  
13 minutes of July 11th, 2008? All in favor?

14 (Chorus of ayes.)

15 Any abstentions, dissents?

16 (No response.)

17 **August 19, 2008 Meeting**

18 VICE CHAIR THERNSTROM: Going on to August  
19 19th, I need a separate motion on that.

20 COMMISSIONER GAZIANO: I move to amend the  
21 agenda of -- or the minutes, just to strike the  
22 sentence under "Approval of the Minutes" on what I  
23 questioned. Just strike that sentence. I did not  
24 question whether the Commissioners agreed to consider  
25 previously-approved unscheduled briefing topics, just

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1 under what conditions those were to be placed on a  
2 list. But since that's now been done, I move to  
3 approve the minutes with the second sentence under  
4 "Approval of the Minutes" to be struck.

5 VICE CHAIR THERNSTROM: Any discussion on  
6 that? \_\_\_\_\_

7 COMMISSIONER YAKI: Just a point of  
8 information. You mean you didn't say it? Is that  
9 what you're saying?

10 COMMISSIONER GAZIANO: I didn't say it --  
11 I didn't say what was written. I did not question  
12 whether Commissioners agreed to consider previously-  
13 approved unscheduled briefing topics.

14 I fully well understood that we agreed to  
15 consider them because you had asked that they be  
16 included. And since you had asked that they be  
17 included, the Staff Director gave you assurances he  
18 would include them. And he did.

19 COMMISSIONER YAKI: I just wanted to know  
20 what he was talking about.

21 VICE CHAIR THERNSTROM: I am afraid the  
22 reporter couldn't hear that.

23 COMMISSIONER YAKI: I just wanted to know  
24 what the heck he was talking about. Now I know.

25 VICE CHAIR THERNSTROM: Okay. Can we take

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1 a vote?

2 With the amendment that Commissioner  
3 Gaziano has just suggested for -- can we take a vote  
4 on approving the August 19th, 2008 minutes?

5 All in favor?

6 Chairman Reynolds, are you still there?

7 (Off-the-record interruption regarding  
8 conference call.)

9 CHAIR REYNOLDS: Okay, I think I ran out  
10 of dimes.

11 (Laughter.)

12 VICE CHAIR THERNSTROM: Yes, I was going  
13 to say approval of the -- as amended by Commissioner  
14 Gaziano, approval of the minutes of August 19th, 2008.

15 COMMISSIONER YAKI: I abstain. I wasn't  
16 there. So I abstain.

17 VICE CHAIR THERNSTROM: Any other  
18 abstentions or opposition?

19 (No response.)

20 Commissioner Yaki abstains. Otherwise, we  
21 have unanimous approval.

22 **September 6, 2008 Meeting**

23 VICE CHAIR THERNSTROM: Okay, we move on  
24 to the September 6th, 2008 meeting.

25 Can I have a motion to approve the minutes

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1 for that meeting?

2 COMMISSIONER MELENDEZ: So moved.

3 VICE CHAIR THERNSTROM: Second?

4 COMMISSIONER TAYLOR: Second.

5 VICE CHAIR THERNSTROM: Any discussion?

6 COMMISSIONER MELENDEZ: One correction.

7 On page 12, line 14, I don't know if I was the person  
8 that said that. Page 12, line 14.

9 VICE CHAIR THERNSTROM: I don't have it in  
10 front of me, unfortunately.

11 COMMISSIONER MELENDEZ: Where it says --  
12 I'll read it -- "Well, I am still confident  
13 Commissioner Yaki can get that increased, but apart  
14 from that, I think we will have to deal with that  
15 first."

16 I thought it was somebody else that said  
17 that. It says I said that. I thought we should --

18 COMMISSIONER YAKI: That was Commissioner  
19 Reynolds who said that.

20 COMMISSIONER MELENDEZ: Yes, but it wasn't  
21 me, I don't believe.

22 VICE CHAIR THERNSTROM: Mr. Chairman, is  
23 that something you recognize that you said?

24 CHAIR REYNOLDS: I'm sorry, I didn't hear  
25 what was said.

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1 VICE CHAIR THERNSTROM: Say it and put  
2 your microphone up to your face.

3 COMMISSIONER MELENDEZ: Line 14 says,  
4 "Well, I am still confident Commissioner Yaki can get  
5 that increase," -- talking about appropriations, it  
6 sounds like -- "but apart from that, I think we will  
7 have to deal with that first."

8 CHAIR REYNOLDS: Are you referring to the  
9 possibility or the likelihood that we will have a  
10 Continuing Resolution?

11 COMMISSIONER MELENDEZ: It had to do with  
12 the appropriations had not gone to the floor of the  
13 House or the Senate at this point.

14 "It's quite likely that we're going to be  
15 dealing with a Continuing Resolution."

16 Then somebody said, "Well, I am still  
17 confident Commissioner Yaki can get that increase" --

18 VICE CHAIR THERNSTROM: This is the  
19 transcript, not the minutes.

20 COMMISSIONER MELENDEZ: I mean --

21 STAFF DIRECTOR DANNENFELSER: I believe  
22 that you're referring to the transcript, but not the  
23 minutes because the minutes are very brief.

24 COMMISSIONER MELENDEZ: Okay. Okay.

25 VICE CHAIR THERNSTROM: I'm sorry, once

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1 again, you have to repeat yourself for the reporter.

2 COMMISSIONER MELENDEZ: Okay, I was just  
3 referring to the transcript which goes along with the  
4 minutes.

5 STAFF DIRECTOR DANNENFELSER: We can check  
6 on the accuracy of the transcript for you.

7 COMMISSIONER MELENDEZ: Okay. All right.

8 VICE CHAIR THERNSTROM: We will check on  
9 the accuracy of the transcript. We will correct it if  
10 you are, indeed, right in questioning it.

11 In the meantime, can we have a vote to  
12 approve the minutes of September 6th, 2008?

13 All in favor say aye.

14 (Chorus of ayes.)

15 Any abstentions? Any dissents?

16 (No response.)

17 It's a unanimous vote.

18 **IV. Announcements**

19 VICE CHAIR THERNSTROM: Okay, we're on to  
20 announcements.

21 For the month of September, Congress has  
22 designated September 15th through October 15th as  
23 Hispanic Heritage Month. This month was chosen  
24 because it includes two significant holidays.

25 The 16th of September celebrates the

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1 independence from Spain of six Latin American  
2 countries: Costa Rica, El Salvador, Guatemala,  
3 Honduras, Mexico, Nicaragua, and Chile.

4 The second holiday is the Day of the  
5 People on October 12th, which celebrates Hispanic and  
6 Indian cultures.

7 Hispanic Heritage Month is a time to honor  
8 the rich diversity of the Hispanic-American community  
9 and to learn about the history, culture, and  
10 traditions of people who have made and continue to  
11 make remarkable contributions to American society.

#### 12 V. Staff Director's Report

13 VICE CHAIR THERNSTROM: Staff Director,  
14 your report please.

15 STAFF DIRECTOR DANNENFELSER: Thank you,  
16 Madam Vice Chair.

17 I just want to take a moment to update the  
18 Commissioners on some ongoing projects.

19 Regarding appropriations, staff submitted  
20 the FY 2010 budget estimate to OMB, and this is the  
21 budget that Commissioners voted to approve on  
22 September 6th. It's for approximately \$12.4 million,  
23 and the estimate is about \$705,000 more than the  
24 estimated budget that the Commission submitted to OMB  
25 for 2009.

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1 Staff is continuing to process invoices  
2 for the end of the fiscal year and is working with GSA  
3 to rectify any outstanding payment issues.

4 The agency's auditors are now onsite at  
5 the Commission headquarters to collect information  
6 about the annual audit.

7 Commission staff received the results of  
8 an OPM audit of delegated competitive examining  
9 operations. The audit, which was conducted from July  
10 1st through July 3rd, found that the agency's Human  
11 Resources Division has made significant improvements  
12 since the last audit conducted in September 2005 and  
13 identified a few areas that require corrective action.

14 The Commission has 60 days to respond with a report  
15 of the actions it has taken or plans to take with  
16 respect to the required recommended actions.

17 The Office of General Counsel participated  
18 in a pre-hearing conference on a Merit Systems  
19 Protection Board claim, and OGC has also submitted the  
20 Voter Fraud and Voter Intimidation Report for  
21 publication.

22 Regarding complaints processing, between  
23 July 21st and August 22nd, the Office of Civil Rights  
24 Enforcement received and processed 149 complaints.

25 The Regions continue to plan SAC meetings.

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1 In the month of September, the New Jersey SAC will  
2 meet on September 5th, Pennsylvania on September 8th,  
3 Rhode Island on the 10th and 19th. Florida had a  
4 meeting on yesterday, September 11th. Wyoming has a  
5 meeting on September 13th, Vermont on September 16th  
6 and 17th, Alabama on the 18th, Connecticut, September  
7 22nd, and the District of Columbia is planning one for  
8 September 30th.

9 That's my report, Madam Vice Chair.

10 VICE CHAIR THERNSTROM: Does anybody have  
11 any questions for the Staff Director?

12 COMMISSIONER MELENDEZ: Yes, I do. Was  
13 the FY 2009 submitted to Congress? Has that already  
14 been done, and when would we receive a copy of that  
15 final version?

16 STAFF DIRECTOR DANNENFELSER: That has  
17 been done. We will get that out to you in the next  
18 couple of days.

19 COMMISSIONER MELENDEZ: Okay. The other  
20 question I had, you had mentioned that we had hired  
21 some consultants within the agency here. One of those  
22 was former Staff Director Marcus. Was there a cap on  
23 that, how much allocation we would have on that, or is  
24 it a period of time or certain cost that we would  
25 expend on whatever he was going to do?

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1 STAFF DIRECTOR DANNENFELSER: For him  
2 specifically?

3 COMMISSIONER MELENDEZ: Yes.

4 STAFF DIRECTOR DANNENFELSER: We had a cap  
5 of \$5,000.

6 COMMISSIONER MELENDEZ: Okay, and where  
7 are we at with that, halfway or --

8 STAFF DIRECTOR DANNENFELSER: I don't have  
9 the exact dollars. I believe it's less than that, but  
10 I can check on the dollar amount.

11 COMMISSIONER MELENDEZ: Okay. All right,  
12 thank you.

13 COMMISSIONER GAZIANO: I meant to ask you  
14 this just by myself, but maybe it is better that other  
15 Commissioners have a chance to weigh-in.

16 I understand that the Commission purported  
17 to amend its ethics rules in a CFR filing in The  
18 Federal Register. I don't remember seeing a draft  
19 copy of that or being asked about that. Was that  
20 circulated to other Commissioners or to me maybe and I  
21 didn't see it?

22 STAFF DIRECTOR DANNENFELSER: It was voted  
23 on. I am told it was voted on about a year ago.

24 COMMISSIONER GAZIANO: I see. Okay.  
25 Well, that's maybe why I didn't see it. Okay.

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1 New question then.

2 STAFF DIRECTOR DANNENFELSER: Okay.

3 COMMISSIONER GAZIANO: New question. Why  
4 does it take a year to get something published in  
5 the -- by the way, I may have a concern about it which  
6 I'll raise later, if my concern is -- but why did it  
7 take a year for an ethics rule to be -- was it  
8 circulated to the Commissioners? I suppose. So it  
9 was voted on by the Commission, is that correct?

10 STAFF DIRECTOR DANNENFELSER: I will turn  
11 to the Solicitor for an explanation.

12 SOLICITOR MONROIG: There was an initial  
13 vote on the original proposal. Then one of the staff  
14 here prepared an AI concerning a volunteer program,  
15 volunteerism. This regulation is approved in  
16 conjunction with the Office of Government Ethics. So  
17 I sent the AI that was prepared to them to see if they  
18 found that there was any discrepancy. In effect, they  
19 thought that the AI could not be approved because it  
20 was in conflict with that regulation.

21 So then it took a long time because there  
22 were negotiations between the person who prepared the  
23 AI and the personnel of the Office of Government  
24 Ethics.

25 Then when the changes were finalized, it

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1 was submitted again for the Commissioners for a final  
2 vote.

3 COMMISSIONER GAZIANO: So when was the  
4 final vote?

5 SOLICITOR MONROIG: I would have to look  
6 that up, but it was several months ago.

7 COMMISSIONER GAZIANO: I don't think it's  
8 been since I've been on the Commission, February, or  
9 there was one meeting I missed. There was one meeting  
10 I missed.

11 SOLICITOR MONROIG: I think it's more  
12 recent than that, Commissioner.

13 COMMISSIONER GAZIANO: Okay. Well, if  
14 someone could get --

15 SOLICITOR MONROIG: It was just several  
16 months ago.

17 COMMISSIONER GAZIANO: If someone could  
18 get back to me, maybe it was the one meeting I missed.

19 SOLICITOR MONROIG: Sure. I will send you  
20 by email the dates and the information.

21 COMMISSIONER GAZIANO: Thank you.

22 SOLICITOR MONROIG: You're welcome.

23 **VI. Program Planning**

24 **FY 2009 Briefing Topics**

25 VICE CHAIR THERNSTROM: We are moving on

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1 here to the briefing topics for the first quarter of  
2 FY09. On September 3rd, the Staff Director sent a  
3 list of 21 proposed FY 2009 briefing topics. This  
4 list contained suggestions submitted by Commissioners  
5 along with the FY08 and FY09 topics that were  
6 previously considered.

7 Commissioners were asked to rank their top  
8 five choices. The Staff Director assigned points to  
9 the topics based on how we ranked them. The top five  
10 selections were:

11 Employers' rights to specify English as  
12 the language of the workplace. That received 17  
13 points.

14 School choice as a civil right, 16 points.

15 Gender imbalance/discrimination in higher  
16 education, 10 points.

17 Compliance with the Supreme Court's  
18 decision in the Seattle/Louisville cases, which  
19 received nine points.

20 And finally, do federal contracting  
21 setaside programs produce viable minority-owned  
22 businesses? Also, it received nine points.

23 Based on our revised system for selecting  
24 briefing topics, we need to determine a topic on which  
25 we will hold a briefing during the first quarter of

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1 FY09. This briefing will be held on November 7th or  
2 December 12th.

3 So can we have a discussion of these five  
4 topics? Then I'm not clear how this is going to work.

5 Okay, we have to evidently decide whether  
6 we're going to ~~pick a topic~~ at this time for November  
7 7th or December 12th. We have no concept paper yet.  
8 We would then subsequently distribute a concept paper  
9 -- or whether people want to wait for the concept  
10 paper?

11 So let's have a discussion on this. After  
12 discussion, I will ask for motions from the floor to  
13 approve a briefing topic for the first quarter of '09,  
14 without specifying whether the date would be November  
15 or December.

16 I would ask that the motion to approve the  
17 topic be contingent upon subsequent circulation of and  
18 Commission approval of a concept paper.

19 I see two hands wishing to discuss this.

20 Commissioner Yaki.

21 COMMISSIONER YAKI: Yes, thank you very  
22 much, Madam Vice Chair.

23 This is for the Staff Director. Am I  
24 misreading the AIs or are we supposed to have the  
25 concept paper before we vote on the topic versus the

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1 other way around?

2 STAFF DIRECTOR DANNENFELSER: I think the  
3 AI does not speak to that specifically, that we have  
4 to have a concept paper before we have a briefing, but  
5 the AI is not explicit on the point of whether we need  
6 to have the concept paper before we can vote on the  
7 topic.

8 VICE CHAIR THERNSTROM: But the vote  
9 would, in any case, be contingent upon approval of the  
10 concept paper, as I understand it here.

11 Mr. Chairman, have you got anything to say  
12 on this before I turn to Commissioner Heriot?

13 CHAIR REYNOLDS: Only that it is my bias  
14 to -- I mean, if the AI is clear on the matter, then  
15 we need to --

16 VICE CHAIR THERNSTROM: No, it isn't.

17 CHAIR REYNOLDS: -- follow the AI --

18 VICE CHAIR THERNSTROM: It is not.

19 CHAIR REYNOLDS: -- unless there is a good  
20 reason to deviate.

21 VICE CHAIR THERNSTROM: No, it is not  
22 clear on the matter.

23 COMMISSIONER HERIOT: Actually, it's  
24 pretty clear in not requiring it. It never says you  
25 have to have a concept paper to vote on --

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1 VICE CHAIR THERNSTROM: Okay. All right.

2 It's clear in the sense of --

3 COMMISSIONER HERIOT: I think it's clear  
4 , that you don't have to.

5 VICE CHAIR THERNSTROM: -- not demanding a  
6 concept paper. There's nothing in the AIs which  
7 demand a concept paper prior to a vote. So the  
8 absence of that requirement is clear.

9 Commissioner Heriot.

10 COMMISSIONER HERIOT: I was just going to  
11 argue in favor of generally trying to narrow down the  
12 topic to one, I hope, or two before anybody does a  
13 concept paper because it is a lot of work to do  
14 concept papers on 40 different proposals. So that's  
15 why I think it makes perfect sense --

16 VICE CHAIR THERNSTROM: Well, we've got  
17 five here.

18 COMMISSIONER HERIOT: Well, five is a lot.

19 VICE CHAIR THERNSTROM: Yes.

20 COMMISSIONER HERIOT: Forty is what we had  
21 before the vote, and that would mean we would have to  
22 wait an extra month before we can do anything --

23 VICE CHAIR THERNSTROM: Well, we are  
24 talking now about five.

25 COMMISSIONER HERIOT: -- because we

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1 tabulate these votes. So it makes much more sense to  
2 pick the topic, then do the concept paper, get the  
3 concept paper approved. I think that's the way we did  
4 it with the one we have here today. It worked very  
5 well, much more sensible than just pouring labor down  
6 a rathole and writing up concept papers for briefings  
7 that never get conducted.

8 VICE CHAIR THERNSTROM: Commissioner  
9 Melendez.

10 COMMISSIONER MELENDEZ: My understanding,  
11 that concept papers were to help you decide whether or  
12 not you wanted to move forward with that topic,  
13 identifying costs, as to what it would cost,  
14 identifying possible speakers, that we would kind of  
15 have an idea who was going to be speaking before we  
16 even made the decision. Or am I mistaken? I think  
17 that's part of it at least.

18 STAFF DIRECTOR DANNENFELSER: Well, that  
19 is certainly true with respect to actually conducting  
20 the briefing, that those things are all part of the  
21 process of conducting the briefing. Then, of course,  
22 there's normally a briefing report that would follow  
23 the briefing. So those are all related.

24 COMMISSIONER MELENDEZ: I guess my other  
25 point was I think that we need to be consistent with

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1 what we do in this Commission. Either we try to do it  
2 a certain way and not keep jumping back and forth.

3 VICE CHAIR THERNSTROM: I think  
4 consistency or consistency with respect at least to  
5 the briefing would demand that we have a concept paper  
6 before the hearing, so we could, in fact, modify it,  
7 you know --

8 COMMISSIONER HERIOT: Or even kill it.

9 VICE CHAIR THERNSTROM: -- or even kill  
10 it. But consistency would demand that we do not have  
11 a concept paper in order to vote on the topic, as I'm  
12 proposing we do today.

13 Is there any further discussion? Yes?

14 COMMISSIONER TAYLOR: As I recall, the  
15 process has worked fairly well in that, after we have  
16 voted, we have discussed the matter and refined it  
17 before we have approved the concept paper. So I think  
18 it has worked in the past, and I think it's a process  
19 we should use for purposes of deciding what we are  
20 going to do in this last quarter or first quarter of  
21 the fiscal year.

22 VICE CHAIR THERNSTROM: Yes, Commissioner  
23 Yaki.

24 COMMISSIONER YAKI: I think that, in  
25 practice, what Commissioner Taylor says has proven to

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1 be true, except for the fact that it was in the  
2 context of being able to review three to four  
3 different concept papers or more at the same time,  
4 where we could determine whether or not what was  
5 initially proposed really was something that we were  
6 interested in and could move forward on.

7 If I recall the prior process correctly,  
8 we would approve a series of topics, concept papers  
9 would be developed for them, and then we would sort  
10 of, from among those, schedule our briefings  
11 accordingly.

12 So I am just concerned that by just doing  
13 one we're limiting ourselves in terms of what, if we  
14 don't like it and we haven't done anything with regard  
15 to having alternative two or three available.

16 VICE CHAIR THERNSTROM: Well, I don't  
17 believe your description of the decisionmaking process  
18 with respect to today's briefing is accurate.

19 COMMISSIONER YAKI: No, I wasn't talking  
20 about today's briefing. I was talking about how we  
21 had done it before in the past. In the past we had  
22 done it with having voted on them, the staff prepared  
23 concept papers for each of them, and then we went from  
24 there.

25 VICE CHAIR THERNSTROM: No, I mean when

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1 Marty distributed, when the Staff Director distributed  
2 the list, there was a descriptive paragraph for each  
3 one.

4 COMMISSIONER YAKI: No, I know that.

5 VICE CHAIR THERNSTROM: Yes.

6 — -- COMMISSIONER YAKI: What I am talking  
7 about is that for 2005, 2006, and 2007 we would, if I  
8 recall the procedure correctly -- and correct me if  
9 I'm wrong, Mr. Chair -- but we voted on a series of  
10 them. We agreed to move with them. Concept papers  
11 were developed for them. Sometimes we would look at  
12 the concept papers and decided maybe not so great  
13 after all, and that would enable us to switch topics  
14 around.

15 I'm just saying that, with regard to the  
16 fact that we now have more than one on the table here,  
17 simply limiting ourselves to one without getting some  
18 flesh-out on maybe an alternative two or three is very  
19 limiting.

20 VICE CHAIR THERNSTROM: Chairman Reynolds,  
21 have you got something to say on this?

22 CHAIR REYNOLDS: Okay. The AI may not be  
23 clear, but looking at past practice and some of the  
24 arguments that have been put on the table, I believe  
25 that having a concept paper that describes what we

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1 plan to do, the approach that we plan to take, is  
2 probably -- at least that is an approach that I would  
3 probably prefer.

4 VICE CHAIR THERNSTROM: Well, Commissioner  
5 Yaki is suggesting that we have concept papers on more  
6 than one topic, so that we have some choice about the  
7 November-December, whatever it turns out to be,  
8 briefing with information about more than one topic.

9 CHAIR REYNOLDS: Concept papers for the --  
10 and I apologize, I didn't catch all that was said. So  
11 concept papers on, say, the top three or top five  
12 vote-getters? Is that the idea?

13 VICE CHAIR THERNSTROM: Commissioner Yaki,  
14 is that what you are asking for?

15 COMMISSIONER YAKI: I would say at least  
16 the top three, yes.

17 VICE CHAIR THERNSTROM: He's saying at  
18 least the top three.

19 I've got both Commissioners Gaziano and  
20 Heriot's hands raised. Why don't I go to them and  
21 come back to you, if you've got some further thoughts?

22 CHAIR REYNOLDS: It sounds good.

23 COMMISSIONER GAZIANO: First, I want to  
24 say I think our vote at the last meeting was to change  
25 the way we would select briefing reports, and we have

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1 instructed that a new AI needs to be written, but that  
2 to the extent that our vote last month overrode the  
3 way that we should read our existing AI, I think that  
4 that is more than appropriate.

5 I, for one, think that we should not keep  
6 ~~kicking the can down the road~~. This is an issue we  
7 may get into later as to the timing. I think it would  
8 be helpful if we were to try to shoot for the November  
9 slot because December briefings I think are hard to  
10 always get Commissioners and other witnesses to  
11 attend. If we don't even decide on which of the  
12 various topics until October, we're really narrowing  
13 the opportunity.

14 So that is a substantive reason why I hope  
15 we can just decide on a topic. Even if you choose the  
16 top three, which if we discuss them, we might decide  
17 what appeared to us to be a top three topic -- it's  
18 really more complicated; it's too broad. So at least  
19 a discussion is in order, but I hope we can actually  
20 come to a discussion and then amend the AI, pursuant  
21 to our vote of the last business meeting, to clarify  
22 that.

23 CHAIR REYNOLDS: Commissioner Gaziano, my  
24 statement -- well, I agree that we should move forward  
25 during this Commission meeting with a discussion, but

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1 I also presumed that we would not wait until October  
2 17th to vote. I presumed that we would vote during  
3 the telephonic meeting that we'll have between now and  
4 the end of the month.

5 VICE CHAIR THERNSTROM: On the basis of  
6 one concept paper or three concept papers? What is  
7 your preference here?

8 CHAIR REYNOLDS: Right now I think that we  
9 should have a discussion and return to the issue after  
10 the various proposals.

11 VICE CHAIR THERNSTROM: Okay.

12 Yes, Commissioner Heriot?

13 COMMISSIONER HERIOT: It may be that there  
14 are not going to be five or four or three or two that  
15 we are interested in conducting. So I would urge that  
16 we not pick a number, but I would certainly urge that  
17 it not be something as large as three, four, or five.

18 Coming up with these concept papers is  
19 really a lot of work, and it is something that has to  
20 be done basically with a huge amount of Commissioner  
21 input. So this notion of, shall we decide on a  
22 briefing before we have a concept paper or not, I  
23 think that is really so many angels dancing on the  
24 head of a pin, because both proposals require that the  
25 concept paper be adopted, either today or at some

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1 later date. So we do adopt these things on the basis  
2 of concept papers.

3 What I don't want to have is a procedure  
4 under which we have to write up concept papers that  
5 really there's not that much Commissioner support for.

6 That is the ~~danger~~ that we seem to be moving toward.

7 I very much hope we don't do it. We're already  
8 behind in turning out briefing reports. Spending a  
9 lot of time on concept papers is a mistake.

10 CHAIR REYNOLDS: Commissioner Heriot --  
11 well, Madam Vice Chair --

12 VICE CHAIR THERNSTROM: Yes?

13 CHAIR REYNOLDS: -- please recognize me.  
14 I don't want to cut anyone off.

15 VICE CHAIR THERNSTROM: Yes. No, Chairman  
16 Reynolds, please do come in on this.

17 CHAIR REYNOLDS: Chairman Heriot (sic),  
18 you make some good points.

19 COMMISSIONER HERIOT: THERNSTROM: You're  
20 the Chairman, Mr. Chairman. I'm just a lowly  
21 Commissioner.

22 (Laughter.)

23 CHAIR REYNOLDS: Well, you just got a  
24 promotion because I'm tired of the damned job.

25 (Laughter.)

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1 In any event --

2 COMMISSIONER GAZIANO: Is this a  
3 battlefield promotion?

4 (Laughter.)

5 CHAIR REYNOLDS: Well, folks, how about  
6 this? Let's start the conversation. Let's see if we  
7 can coalesce around one of the topics or maybe two,  
8 and at that point -- I mean if there is a consensus  
9 for a particular topic, then I think that the decision  
10 has been made. Then we'll have a single concept paper  
11 written. But if there is sufficient support for two,  
12 then that's a different sort of thing.

13 COMMISSIONER HERIOT: Yes, I don't object  
14 to two. I object to three.

15 CHAIR REYNOLDS: But I think that we  
16 should start the conversation with respect to the top  
17 three.

18 VICE CHAIR THERNSTROM: Okay. So let us  
19 talk about this. I have to interject that I think to  
20 have five topics here, none of which touch on the  
21 historic election we are heading into on November 4th,  
22 when we are the U.S. Commission on Civil Rights, and  
23 we do, obviously, have an historic first here --

24 COMMISSIONER YAKI: I would put that as  
25 No. 1 on my list.

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1 VICE CHAIR THERNSTROM: I mean I have said  
2 this before, but I'll say it again. I think it's  
3 absurd for this Commission to ignore the first  
4 election in which an African-American is running as  
5 the standard-bearer of one of the two major parties  
6 and may by the time we have a meeting have been  
7 elected President.

8 COMMISSIONER GAZIANO: Madam Vice  
9 Chairman, it's historic also because we are likely to  
10 have either that or the first woman Vice President.

11 I certainly support an examination of  
12 that. I just think that it would be a lot more  
13 productive that we know what the research or what the  
14 key research issues are by the time we devote to that.

15 I suspect that other Commissioners feel  
16 the same way. I suspect that probably all eight of us  
17 think that that's a terribly important issue.

18 There may be allegations of voter  
19 irregularities that we also need to investigate.  
20 There are certainly thousands of lawyers who are  
21 massing to look for such violations and suggest that  
22 they might be there.

23 So I think the nimbleness on our proposals  
24 is helpful in that regard, but that doesn't mean we  
25 need to -- it seems a little premature to me is all.

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1 I think that we all agree with your statement though.

2 VICE CHAIR THERNSTROM: Yes, I mean good.

3 I hope we do all agree that this election cannot be  
4 ignored by the Civil Rights Commission, and that out  
5 of the election in some form should come a briefing  
6 topic.

7 So somebody speak to the issue of what we  
8 should do in November or December, and Commissioner  
9 Gaziano is right to say December is always a  
10 problematic month in which to hold briefings.

11 COMMISSIONER GAZIANO: But if we're here  
12 for a briefing in November on some subject, but there  
13 is something for us to talk about after the briefing  
14 relating to the election, we can then begin to set the  
15 agenda for the next hearing.

16 VICE CHAIR THERNSTROM: Right. Right.

17 Yes, Commissioner Yaki.

18 COMMISSIONER YAKI: Well, Commissioner  
19 Thernstrom, I agree that December is not optimal. I'm  
20 just wondering if the week of the election is any more  
21 optimal.

22 VICE CHAIR THERNSTROM: No, it's not  
23 optimal. I agree with you it's not optimal at all.

24 COMMISSIONER YAKI: In terms of people's  
25 schedules and witnesses' schedules.

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1 VICE CHAIR THERNSTROM: We may not even  
2 know the outcome of the election.

3 COMMISSIONER YAKI: No, no, no. I know.  
4 I know. I would not --

5 COMMISSIONER GAZIANO: Are you planning on  
6 being chad counting?

7 (Laughter.)

8 COMMISSIONER YAKI: I would not presume to  
9 have a briefing on the election in any case on  
10 November 7th because --

11 VICE CHAIR THERNSTROM: No. No, we're  
12 not.

13 COMMISSIONER YAKI: -- I'm sure that  
14 there's going to be some state that's going to be  
15 counting --

16 VICE CHAIR THERNSTROM: The winners are  
17 still going to be under their hangover and the losers  
18 are still going to protest.

19 COMMISSIONER YAKI: No, no, no. But I'm  
20 also stating that for any briefing the week of the  
21 election might --

22 VICE CHAIR THERNSTROM: No, that's what I  
23 understood you to say.

24 COMMISSIONER YAKI: -- be difficult as  
25 well.

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1 VICE CHAIR THERNSTROM: Yes.

2 COMMISSIONER YAKI: And I question, query  
3 whether we should push the meeting back to the 14th or  
4 not.

5 COMMISSIONER GAZIANO: Could we possibly  
6 take up that issue later?

7 VICE CHAIR THERNSTROM: We can take up  
8 that issue --

9 COMMISSIONER YAKI: No, I just throw it  
10 out there.

11 VICE CHAIR THERNSTROM: Yes. No, the  
12 point is well-taken.

13 COMMISSIONER HERIOT: I am already booked  
14 on -- oh, that's the wrong month. Hold on. I can't  
15 rearrange my schedule at this point, not for Friday  
16 anyway.

17 VICE CHAIR THERNSTROM: Okay, look, let us  
18 not decide, which is what I proposed before, not  
19 decide between November and December. We'll cross  
20 that bridge.

21 Let us talk about these specific topics  
22 and what we might propose or two topics that we might  
23 propose to have concept papers for when we do have a  
24 meeting in November or December.

25 COMMISSIONER YAKI: Sure, and I would just

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1 like to state, in response to a comment earlier, I  
2 won't be the one counting the chads.

3 VICE CHAIR THERNSTROM: Okay, that's off-  
4 topic.

5 (Laughter.)

6 - Do-you-have something to say about the  
7 topics you want to put to the top of the list at this  
8 point?

9 COMMISSIONER YAKI: The top five? I  
10 didn't vote for any single one of them. So the answer  
11 is don't start with me.

12 VICE CHAIR THERNSTROM: Okay.

13 COMMISSIONER GAZIANO: It works. The  
14 system works.

15 (Laughter.)

16 VICE CHAIR THERNSTROM: Commissioner  
17 Gaziano?

18 COMMISSIONER GAZIANO: Said in jest.

19 VICE CHAIR THERNSTROM: Probably not taken  
20 in jest. Go on.

21 COMMISSIONER GAZIANO: I think there's  
22 merit in a lot of these. My question is really, on  
23 the school choice issue, I think the employers' right  
24 to specify English as the language in the workplace is  
25 a more clearly-defined topic. So I would like to hear

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1 maybe a little bit more discussion.

2 I voted for the school choice one as well,  
3 but I didn't like the way it was framed. So if there  
4 are some suggestions on -- or I didn't like it as much  
5 -- suggestions on how we could have an effective and  
6 narrow hearing on that, then that might move up a  
7 little higher on my list.

8 VICE CHAIR THERNSTROM: Well, I would like  
9 to have a little discussion about whether school  
10 choice -- I'm a big school choice advocate, but I'm  
11 not sure that it qualifies as a topic for the  
12 Commission. I'm not sure it's a civil right, though I  
13 understand the argument. I'm just a little queasy  
14 about it.

15 Somebody else? Commissioner Heriot.

16 COMMISSIONER HERIOT: Of the five topics,  
17 you know, in one sense or another, I like them all.  
18 I'm not real keen on Seattle/Louisville. I guess that  
19 would be not on my list.

20 VICE CHAIR THERNSTROM: Because?

21 COMMISSIONER HERIOT: Because I think it's  
22 just a little too narrow for us and probably something  
23 that is going to be resolved by the courts. I'm not  
24 sure what our contribution would be.

25 I agree with Commissioner Gaziano that the

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1 school choice issue is an interesting one, but I would  
2 like to see it narrowed into something that we really  
3 can have an effect upon. But if someone can come up  
4 with a formulation, we've got some angle other than  
5 school choice as a civil right, because I'm not  
6 -convinced that I regard it as a civil right; I don't  
7 see it that way.

8 VICE CHAIR THERNSTROM: So you're joining  
9 me on that question?

10 COMMISSIONER HERIOT: I am joining you on  
11 that question.

12 The one I like the best was the English in  
13 the workplace because I thought that was something  
14 that could be made pretty narrow and we could prepare  
15 for it in time for a November briefing.

16 COMMISSIONER GAZIANO: And that was your  
17 suggestion.

18 COMMISSIONER HERIOT: That's why I love  
19 it, I guess.

20 Gender imbalance discrimination, I like  
21 that one a lot, too. That's kind of a combination of  
22 two ideas. I think somebody else suggested gender  
23 imbalance in higher education, and I suggested gender  
24 discrimination in higher education.

25 The reason I am not keen on that being the

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1 November briefing is that I would like to see the  
2 Commission do some original research in that area, to  
3 subpoena admissions data from some of the schools that  
4 have been accused of gender discrimination, so that we  
5 actually have some facts in front of us.

6 --- One of the things that I agree with  
7 Commissioner Yaki on is that the Commission ought to  
8 do more generating actual new data. He's talked about  
9 using our subpoena power. I would like to use it as  
10 well.

11 VICE CHAIR THERNSTROM: And what do you  
12 think we might find out in that topic? What form  
13 would the discrimination take?

14 COMMISSIONER HERIOT: For example, the  
15 University of Richmond has been accused of engaging in  
16 just ordinary discrimination, allowing male students  
17 to be admitted to the school with significantly lower  
18 academic credentials, for no reason other than they  
19 are male. That's what I would be looking for.

20 VICE CHAIR THERNSTROM: For no reason  
21 other than women are becoming the majority at so many  
22 campuses.

23 COMMISSIONER HERIOT: They are the  
24 majority at the University of Richmond and at many  
25 schools -- many schools.

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1 VICE CHAIR THERNSTROM: I don't really  
2 understand why this Seattle/Louisville topic doesn't  
3 grab you. That is, it seems to me the question is how  
4 many student transfer programs are there that resemble  
5 that which the Supreme Court struck down.

6 COMMISSIONER GAZIANO: Do we have studies  
7 and witnesses that are prepared? That is my question.

8 VICE CHAIR THERNSTROM: I don't know.

9 COMMISSIONER GAZIANO: I'm just not sure  
10 that there's the data or studies or witnesses or --

11 VICE CHAIR THERNSTROM: Yes, I just don't  
12 know.

13 COMMISSIONER KIRSANOW: Even if there  
14 were, I doubt that --

15 VICE CHAIR THERNSTROM: The reporter is  
16 having a problem again.

17 COMMISSIONER KIRSANOW: I haven't seen any  
18 data, and even if there were, my presumption is that  
19 this is not a topic that is digestible by November or  
20 December.

21 VICE CHAIR THERNSTROM: That's fine with  
22 me.

23 How about the federal contracting setaside  
24 programs and minority-owned businesses? Anybody want  
25 to speak to that topic?

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1 COMMISSIONER TAYLOR: It doesn't move me.

2 VICE CHAIR THERNSTROM: It doesn't move  
3 you? What topic does move you?

4 COMMISSIONER TAYLOR: Who is a proponent  
5 of school choice as a civil right? Can someone speak  
6 to that?—No, I had a slightly different twist on it,  
7 but --

8 VICE CHAIR THERNSTROM: Give us your --

9 COMMISSIONER GAZIANO: I am not a fan,  
10 either, for the record, that I think it is a  
11 fundamental constitutional right. Choice in  
12 government -- schools -- it doesn't seem to me to be.

13 It might be a state-created statutory right. I think  
14 it is a very important one for states to provide, but  
15 for the record I am agreeing with the Vice Chair on  
16 that point as well.

17 But what is your --

18 COMMISSIONER TAYLOR: I mean school choice  
19 strikes me as a remedy to a problem as opposed to  
20 necessarily a right. So I would tweak the proposal  
21 that way.

22 VICE CHAIR THERNSTROM: Yes, a lot of us  
23 are having problems with it as a right.

24 COMMISSIONER TAYLOR: But if there was  
25 someone who was a proponent of this topic as currently

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1 framed, I wanted to hear that so I understood it. Or  
2 if it is just one that has been recycled because it  
3 has been around for a while?

4 (No response.)

5 Okay, well, I think that helps. The  
6 silence, then, I think helps me at least understand  
7 where we are.

8 Since I have the mike, I am perhaps  
9 trapped by the rule. What moves me did not make the  
10 top five.

11 But racial disparities in health care  
12 access and outcomes --

13 VICE CHAIR THERNSTROM: I like that topic  
14 a lot.

15 COMMISSIONER TAYLOR: -- is what moves me.

16 VICE CHAIR THERNSTROM: Yes, I like that  
17 topic a lot.

18 COMMISSIONER TAYLOR: I'll tell you why it  
19 moves me, if I may. It moves me because I think in  
20 minority communities it is important that we discuss  
21 and begin to distinguish myth from fact, and in the  
22 health care area I would like to talk about what is  
23 the byproduct of discrimination and what is the  
24 byproduct of ignorance, cultural cues that have been  
25 passed down from generation to generation.

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1           One we all know is the Tuskegee  
2 experiment, which was a fact, but which has generated  
3 myth throughout the black community about certain  
4 things and a distrust of institutions, which is  
5 understandable, but that is a topic that interests me.

6       It's is a ~~topic~~ that I think really allows the  
7 Commission to talk about important civil rights issues  
8 for the 21st century.

9           So that is my thought.

10          VICE CHAIR THERNSTROM: Commissioner Yaki,  
11 do you like that topic? Do you want to talk --

12          COMMISSIONER YAKI: Yes, I voted for it.  
13 The reason it is important for me is that, especially  
14 in the Asian-American communities, especially among  
15 the subgroups, the newcomers like the Mung population,  
16 some of the Cambodians, and others, there are distinct  
17 disparities in health care access. Some of it has to  
18 do with language ability, cultural competency on the  
19 part of health care providers.

20          So I think it is something that is very  
21 topical and continues to be very topical. It is one  
22 of those things that is talked about often in the  
23 context of the CDC and the Health and Human Services,  
24 but it has not yet -- in fact, I think it was  
25 addressed by a state, by a SAC report about three or

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1 four years ago, but has not yet been taken up by the  
2 full Commission, and I think it should be.

3 VICE CHAIR THERNSTROM: I like this topic  
4 a lot. Anybody else want to speak to it? Yes,  
5 Commissioner Heriot.

6 COMMISSIONER HERIOT: I can imagine liking  
7 it in the future a lot because I think, if it were  
8 worked up really well, it might, in fact, be a good  
9 topic. I think it requires a lot of work, but  
10 sometime in the next year I would love to do it.

11 COMMISSIONER MELENDEZ: I would like to do  
12 it as soon as possible. If it is one of the five that  
13 gets designated, we are probably not looking at it  
14 until after the next year, 2009, anyway. So I would  
15 sure like to see it.

16 COMMISSIONER HERIOT: Each quarter we have  
17 a different list.

18 COMMISSIONER GAZIANO: I understand each  
19 quarter we are going to vote.

20 COMMISSIONER HERIOT: Yes.

21 COMMISSIONER GAZIANO: So this is changing  
22 my opinion. I will rank that one higher next time.

23 COMMISSIONER HERIOT: Next time, yes.

24 COMMISSIONER GAZIANO: But I might want to  
25 see what the -- I imagine there are a lot of studies

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1 out there. What could we get our hands around? What  
2 kind of an impact could we make is my question on this  
3 one.

4 My four brothers and father are doctors.  
5 I sort of have been imbued with some of this stuff. I  
6 know that some of it is good and some of it is crap.

7 COMMISSIONER HERIOT: Yes.

8 COMMISSIONER GAZIANO: So I would want to  
9 know what we could do.

10 COMMISSIONER HERIOT: And I would not  
11 favor just a full-blown briefing on just general  
12 medical access issues, but narrow it down to something  
13 where we can actually find facts that are useful.

14 VICE CHAIR THERNSTROM: Well, what strikes  
15 me in this discussion is that let's just narrow it.  
16 We are trying to come up with two topics on which to  
17 have concept papers to look at, but so far we don't --

18 COMMISSIONER HERIOT: Or one.

19 VICE CHAIR THERNSTROM: Pardon me?

20 COMMISSIONER HERIOT: Or one.

21 VICE CHAIR THERNSTROM: Or one, right.  
22 But I'm impressed by the fact that there doesn't seem  
23 to be a lot of enthusiasm in this group for any one  
24 topic.

25 COMMISSIONER GAZIANO: I can speak to a

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possible vision for employers' rights to specify English language in the workplace at that point. But I would like to hear anyone who has an idea on school choice first -- we now know not as a civil right, but there are lots of interesting angles on school choice.

So if someone ~~is~~ willing to describe --

VICE CHAIR THERNSTROM: An appropriate angle.

COMMISSIONER GAZIANO: -- an angle that we could do in November --

VICE CHAIR THERNSTROM: And one that is appropriate for this Commission.

COMMISSIONER HERIOT: Yes, one we have jurisdiction over.

COMMISSIONER GAZIANO: Yes, one question is, you know, might be what the effect of existing school choice programs may be on improving minority student treatment. I mean I am just throwing that out.

VICE CHAIR THERNSTROM: I am going to tell you right now what the answer is. We don't know. These studies are all over the map. There is no consensus.

COMMISSIONER GAZIANO: Okay. What about why minority parents are so enthusiastic and focus on

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1 the safety issue? I know that is one of the issues.

2 VICE CHAIR THERNSTROM: Yes, that is a  
3 huge issue for them.

4 COMMISSIONER GAZIANO: All else being  
5 equal, even if you just think the education is better,  
6 -for parents who care and, by the way, you think your  
7 child is not in a dangerous environment --

8 VICE CHAIR THERNSTROM: Yes, that is a  
9 huge factor.

10 COMMISSIONER GAZIANO: I would love that  
11 angle.

12 CHAIR REYNOLDS: In addition to that, just  
13 the existence of competition, the effects on the  
14 public schools, I should say the other public  
15 schools --

16 VICE CHAIR THERNSTROM: District schools.

17 CHAIR REYNOLDS: That is another positive  
18 effect.

19 VICE CHAIR THERNSTROM: Well, we don't  
20 know that for sure. I mean the literature on this is  
21 contentious, to say the least.

22 COMMISSIONER GAZIANO: Could I propose,  
23 just see what people like, to either focus on the  
24 safety issue, the opportunity for core or  
25 predominantly minority parents to send their kid to a

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1 safer school? We could have one panel with parents  
2 and advocates who feel strongly about that, and we  
3 could have another panel with the experts who have  
4 studied that. Maybe some would be law enforcement  
5 experts.

6 VICE CHAIR THERNSTROM: I don't know.

7 COMMISSIONER GAZIANO: No enthusiasm? I'm  
8 searching. I'm searching.

9 English is my top one, but --

10 VICE CHAIR THERNSTROM: Yes, Commissioner  
11 Heriot.

12 COMMISSIONER HERIOT: Anybody for a  
13 motion?

14 VICE CHAIR THERNSTROM: Sure.

15 COMMISSIONER HERIOT: I move that we  
16 select the English in the workplace topic, that we  
17 prepare a concept paper for that, with an eye toward  
18 having a November briefing.

19 COMMISSIONER KIRSANOW: Second it.

20 COMMISSIONER GAZIANO: Would you mind  
21 telling us what you think that hearing would look  
22 like?

23 COMMISSIONER HERIOT: I think what the  
24 hearing would look like is that -- and other people  
25 are certainly welcome to elaborate on this and, in

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1 fact, I hope we can talk through this topic on this  
2 occasion today.

3 It would be to have either the Chairman of  
4 the EEOC or one of the Commissioners present to us the  
5 EEOC's views on this topic, and that we bring in some  
6 of the people who have been litigating these issues,  
7 like the Salvation Army case, in particular, is a case  
8 that I think has grabbed a lot of public attention.

9 Talk out the policies that go behind the  
10 EEOC's position, and that would be our -- and we could  
11 have people from various organizations who were  
12 interested in this issue. I know that there is the  
13 pro-English group I am sure would like to talk to us  
14 about this issue. I suspect that MALDEF --

15 COMMISSIONER GAZIANO: Perhaps lawyers who  
16 have litigated these cases against the EEOC.

17 COMMISSIONER HERIOT: That is what I mean  
18 by the Salvation Army case. I would think get the  
19 people in who litigated that case and get someone in  
20 from MALDEF. Get someone in from pro-English and  
21 employer --

22 VICE CHAIR THERNSTROM: And have just a  
23 brawl.

24 COMMISSIONER HERIOT: I would definitely  
25 like to hear from somebody who actually has run a

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1 business and can tell us whether this is a problem or  
2 not for them.

3 COMMISSIONER YAKI: I am sure there is  
4 going to be people on both sides.

5 COMMISSIONER HERIOT: I am sure there are  
6 employers that have no problem either way, I mean have  
7 a problem one way or the other way, but we have a law  
8 that is a one-size-fits-all. So that is the issue  
9 that has to be addressed.

10 COMMISSIONER TAYLOR: If I may? We should  
11 also add, I think, to that the --

12 VICE CHAIR THERNSTROM: Yes, Commissioner  
13 Taylor, for the record.

14 COMMISSIONER TAYLOR: We should reach out  
15 to the LPGA, who recently announced an English-only  
16 policy for players on tour and then rescinded that  
17 policy before it was formally instituted.

18 COMMISSIONER YAKI: You just want to score  
19 some tickets to an event.

20 (Laughter.)

21 COMMISSIONER TAYLOR: No, I would never  
22 use an important civil rights issue to attend a  
23 sporting event. Never.

24 (Laughter.)

25 I resemble that remark.

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1 (Laughter.)

2 COMMISSIONER HERIOT: Why not?

3 (Laughter.)

4 COMMISSIONER TAYLOR: But I think we  
5 should, if we are going to go down this line, we  
6 should talk to LPGA.

7 COMMISSIONER YAKI: Well, wait, wait. I  
8 think the Commission actually tried that with the Hall  
9 of Fame game about two years ago --

10 COMMISSIONER TAYLOR: Oh, that's right.

11 COMMISSIONER YAKI: -- with the first  
12 African-American player in the NFL.

13 COMMISSIONER TAYLOR: Really?

14 COMMISSIONER YAKI: Yes. You were part of  
15 that.

16 COMMISSIONER TAYLOR: I don't recall that.

17 COMMISSIONER YAKI: You were actually the  
18 instigator of that.

19 COMMISSIONER TAYLOR: I think I missed  
20 that meeting.

21 (Laughter.)

22 COMMISSIONER GAZIANO: I would mention  
23 there's a case involving the Navajo. It has been  
24 litigated by -- the Philly Cheese Steak case. I mean  
25 so there are some other -- case studies may be very

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1 helpful because it is one thing to get a Commissioner  
2 from the EEOC who says, well, this could be a proxy  
3 for national origin discrimination, and it all sounds  
4 very fuzzy. The rubber hits the road when we get the  
5 business owners and the lawyers --

6 VICE CHAIR THERNSTROM: Yes, I agree.

7 COMMISSIONER GAZIANO: -- to these who  
8 said, "But this was our accommodation. We tried to  
9 work, but the EEOC was completely inflexible." At  
10 least that is what I have heard.

11 VICE CHAIR THERNSTROM: Or wonderfully  
12 flexible, whatever it turns out to be.

13 COMMISSIONER KIRSANOW: I still think it  
14 makes sense to have someone from the EEOC here --

15 COMMISSIONER GAZIANO: Absolutely.

16 VICE CHAIR THERNSTROM: Oh, absolutely,  
17 yes.

18 COMMISSIONER KIRSANOW: -- to explain why  
19 it is that they have their position.

20 COMMISSIONER GAZIANO: Maybe on the second  
21 panel, to react. "Oh, no, they got it wrong; we're  
22 really reasonable. They were" -- whatever.

23 So we could pose questions. Well, the  
24 witness on the first panel says this.

25 COMMISSIONER HERIOT: Yes. I know there's

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1 a tendency sometimes to put a government official on a  
2 panel first --

3 COMMISSIONER GAZIANO: No, I think second.

4 COMMISSIONER HERIOT: -- and then shuffle  
5 them off. But I think what we would want will be to  
6 have the EEOC-official-come last, so that that person  
7 could hear the testimony and we could ask questions  
8 based on what we have already heard.

9 VICE CHAIR THERNSTROM: Are we ready to  
10 have a vote on that topic as the topic for November or  
11 December? Have we come up with a second one that we  
12 would like a concept paper on? That is fine, but are  
13 we willing to --

14 COMMISSIONER HERIOT: The motion doesn't  
15 speak to exclusivity.

16 VICE CHAIR THERNSTROM: Yes, right. Are  
17 we ready to go ahead and vote on this particular topic  
18 as one of the November/December options?

19 CHAIR REYNOLDS: Yes.

20 VICE CHAIR THERNSTROM: Good. Okay,  
21 somebody move.

22 COMMISSIONER KIRSANOW: It has been moved  
23 and seconded.

24 COMMISSIONER HERIOT: It's been moved and  
25 seconded.

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1 VICE CHAIR THERNSTROM: Has it been moved  
2 and seconded on this topic?

3 COMMISSIONER HERIOT: Yes, on this topic.

4 COMMISSIONER KIRSANOW: Yes.

5 VICE CHAIR THERNSTROM: I'm sorry. I  
6 didn't realize that. Okay.

7 All in favor?

8 (Chorus of ayes.)

9 Anybody opposed?

10 Commissioner Yaki is opposed.

11 Commissioner Melendez is opposed, for the record.

12 Okay, Commissioners Yaki and Melendez,  
13 have you got another topic that you would like to see  
14 a concept paper? Of course, we certainly could have  
15 two concept papers to stare at.

16 COMMISSIONER YAKI: Madam Chair?

17 VICE CHAIR THERNSTROM: Yes.

18 COMMISSIONER YAKI: I don't see why we  
19 wouldn't be able to try to put together something on  
20 the racial disparities in health care access and  
21 outcomes topic.

22 VICE CHAIR THERNSTROM: Commissioner  
23 Taylor, why don't you speak to that as one of our two  
24 topics for November or December, which would mean -- I  
25 don't know whether that is harder to do.

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1 COMMISSIONER TAYLOR: I don't know yet. I  
2 mean I just don't know.

3 Is it possible, can we just have a concept  
4 paper put together on the issue, so we can have two  
5 things to select from?

6 -- COMMISSIONER HERIOT: I don't see anything  
7 wrong with it, for the concept paper, but I would like  
8 to see this topic done up really well. That would  
9 mean giving some real thought to it. But if somebody  
10 wants to try to have a first draft at that, I would  
11 like to see that the concept paper for that topic goes  
12 through some process where we get something that is  
13 really done well because it is an important issue, and  
14 it is a big one, unlike the --

15 VICE CHAIR THERNSTROM: Well, I would like  
16 to see a concept paper on that as well. It is not one  
17 of the top five, but I like the topic a lot. There's  
18 obviously considerable support here for it.

19 So I would like to take a vote on that as  
20 a second topic on which we get a concept paper.

21 COMMISSIONER KIRSANOW: Madam Vice Chair,  
22 who is working on the concept paper?

23 COMMISSIONER HERIOT: I will.

24 COMMISSIONER KIRSANOW: I mean we have  
25 been throwing around concept papers here, and I am not

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1 sure who --

2 COMMISSIONER GAZIANO: You will work on  
3 all, any one we vote on?

4 COMMISSIONER HERIOT: No, I will work on  
5 those two. I will work on those two, fine. Okay? I  
6 may need some help on the second one.

7 COMMISSIONER TAYLOR: I will work on that  
8 one.

9 COMMISSIONER YAKI: I will work on --

10 COMMISSIONER TAYLOR: I will work on that  
11 one.

12 COMMISSIONER YAKI: You'll work on the  
13 second one?

14 COMMISSIONER TAYLOR: Yes.

15 VICE CHAIR THERNSTROM: All right.

16 COMMISSIONER YAKI: If you don't mind, we  
17 will work on the second one together.

18 COMMISSIONER TAYLOR: Okay.

19 VICE CHAIR THERNSTROM: We can  
20 circulate --

21 COMMISSIONER HERIOT: I will handle the  
22 first one, but I would like some input into the second  
23 one as well.

24 VICE CHAIR THERNSTROM: Yes, okay.

25 COMMISSIONER HERIOT: But I am thinking

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1 the second one is probably going to take, to get my  
2 vote ultimately, it might take more than a month to  
3 work it up.

4 COMMISSIONER TAYLOR: Okay.

5 VICE CHAIR THERNSTROM: Well, let's give  
6 it a try.

7 COMMISSIONER HERIOT: Yes, that's fine.

8 VICE CHAIR THERNSTROM: All in favor?

9 (Chorus of ayes.)

10 Any opposed?

11 (No response.)

12 That was a unanimous decision.

13 So we have now got two topics that are  
14 candidates for November or December, and on both we  
15 are going to have concept papers.

16 Do we need to do anything else at this  
17 point or can we move --

18 COMMISSIONER GAZIANO: May I ask a  
19 question, Madam Chair?

20 VICE CHAIR THERNSTROM: Yes, sure.

21 COMMISSIONER GAZIANO: How important to  
22 those who are interested in the health care one that  
23 it be the topic this quarter? That is where I am -- I  
24 think the Staff Director was going to speak. If we  
25 were to choose a topic either today or at the

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1 telephonic meeting that is going to be scheduled in a  
2 few weeks, then it could be done by November. We  
3 don't know that -- your concept paper might not be  
4 done in a week, but is it important, you think, that  
5 that be considered for this quarter?

6 -- COMMISSIONER TAYLOR: No. I mean if we  
7 can put it all together --

8 COMMISSIONER HERIOT: Can we consider some  
9 original research here as well? You know, there may  
10 be things where we can actually pull together some  
11 data that hasn't been pulled together before.

12 COMMISSIONER TAYLOR: Trying to squeeze it  
13 into this first quarter of the fiscal year is not a  
14 priority from my perspective.

15 COMMISSIONER HERIOT: And now, Mr. Staff  
16 Director, what kind of timeframe would you want? We  
17 may move the November -- assuming it is November, we  
18 may move it from the 7th. Some people are going to be  
19 blurry-eyed, I am told. They think it is going to be  
20 a close election.

21 COMMISSIONER YAKI: I never said that.

22 (Laughter.)

23 VICE CHAIR THERNSTROM: Well, you might be  
24 right.

25 COMMISSIONER GAZIANO: You're conceding?

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1 You're conceding your candidate's defeat this early?  
2 David Broder said not to do that, Commissioner Yaki.

3 STAFF DIRECTOR DANNENFELSER: I think that  
4 the sooner we could get a concept paper, the better it  
5 would be for the staff to really be able to develop  
6 the briefing and to do whatever research would be  
7 needed for the briefing. So if we are able to do  
8 that, perhaps get a concept paper by the end of the  
9 month, that the time by which we would have the  
10 special meeting relating to the Statutory Report, that  
11 would be the optimum thing.

12 So if one topic lends itself more to that  
13 timeliness than the other, that would certainly be a  
14 case for it, but I share the same view, having most  
15 recently been at the Department of Health and Human  
16 Services, that this other topic is a topic of interest  
17 to me as well and one that I worked on at the  
18 Department.

19 But I think Commissioner Yaki had a  
20 comment or question as well.

21 VICE CHAIR THERNSTROM: Commissioner Yaki.

22 COMMISSIONER YAKI: Yes. Just in response  
23 to the comments and the likelihood of the time  
24 constraints we have, given that it is now September, I  
25 would simply state that we should probably focus on

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1 the first topic that I did not vote for as the  
2 November/December topic, and focus more on the second  
3 topic as the first topic for the new calendar year,  
4 just for ease of planning for everyone to deal with.

5 VICE CHAIR THERNSTROM: This is directed  
6 to the Staff Director. I have a question about  
7 whether we can realistically have another briefing in  
8 this calendar year. We are so behind on our briefing  
9 reports. We've got to pull a concept paper together  
10 and agree on it.

11 COMMISSIONER HERIOT: It sounds like we  
12 are going to agree on it pretty easily. So that is  
13 not our problem.

14 VICE CHAIR THERNSTROM: On the concept  
15 paper?

16 COMMISSIONER HERIOT: We've got remarkable  
17 consensus on the English in the workplace.

18 COMMISSIONER YAKI: Except for these two.

19 (Laughter.)

20 VICE CHAIR THERNSTROM: Whatever. There  
21 is already a time squeeze, it seems to me. Am I  
22 wrong?

23 STAFF DIRECTOR DANNENFELSER: Well, you  
24 are correct in that we are still contending with the  
25 backlog of the briefing reports and then, of course,

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1 the situation with the Statutory Report.

2 But I believe the Commission is committed  
3 to doing a certain number of hearings in FY 2009 and  
4 that we are going to have to walk and chew gum, I  
5 guess, as it were, and move forward.

6 VICE CHAIR THERNSTROM: I mean I  
7 personally would not have an objection if we said our  
8 first briefing is going to be in January.

9 COMMISSIONER HERIOT: Well, we don't  
10 really have any guarantee there is going to be any  
11 report for us to be working on in November at this  
12 point. So it is this or like go on vacation, and I  
13 would definitely object to vacation.

14 VICE CHAIR THERNSTROM: Yes, we are not by  
15 statute allowed to go on vacation.

16 COMMISSIONER TAYLOR: May I? Let me pick  
17 up on Commissioner Yaki's suggestion that we  
18 effectively focus as best we can on a concept paper  
19 with respect to this English-only issue for the first  
20 quarter in the fiscal year of '09 and move the health  
21 disparities to the second quarter, but then allow me,  
22 if I could, to offer just something for discussion.

23 I think it is important that we at least  
24 have something else to consider on the concept paper,  
25 and I want to volunteer to put something together on

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1 race and sex bias in the media. So I would like --  
2 just for folks to consider.

3 COMMISSIONER YAKI: I voted for that one,  
4 too.

5  
6 COMMISSIONER HERIOT: I like that one,  
7 too.

8 COMMISSIONER TAYLOR: Just for folks to  
9 consider.

10 COMMISSIONER YAKI: Why is it everything I  
11 am voting on you're bringing up now, Ashley?

12 (Laughter.)

13 COMMISSIONER TAYLOR: Just for folks to  
14 consider. I know it is not going to be popular.

15 COMMISSIONER GAZIANO: That is the anti-  
16 First Amendment --

17 COMMISSIONER TAYLOR: No. That's why I  
18 said --

19 COMMISSIONER GAZIANO: I want to hear you  
20 phrase it.

21 COMMISSIONER TAYLOR: It's not --

22 COMMISSIONER HERIOT: I just wanted to say  
23 I think that any Commissioner should be free to come  
24 to any meeting at any time with a concept paper on any  
25 topic. The only reason we go through the voting thing

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1 is to save us the trouble of doing concept papers that  
2 aren't going to get any traction.

3 If you are preparing this, you are  
4 forewarned that people obviously didn't vote a lot for  
5 it.

6 COMMISSIONER TAYLOR: We liked it. It  
7 could have been five --

8 COMMISSIONER YAKI: If you had given it a  
9 five, Ashley, we wouldn't be having this discussion.  
10 I gave it a five. We would not be having this  
11 discussion.

12 COMMISSIONER HERIOT: As long as  
13 Commissioners don't try to guilt-trip other  
14 Commissioners into going for it just because "I put in  
15 the work" when you put in the work knowing that it  
16 didn't get the votes. But you might be able to  
17 persuade us.

18 COMMISSIONER TAYLOR: But I like to have  
19 this discussion, so we all know we are going to have a  
20 couple of concept papers floating around; we give  
21 folks a choice. You never know, you may see something  
22 you like in this concept paper.

23 COMMISSIONER YAKI: I don't think guilt-  
24 trip really has any place on this Commission right  
25 now.

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1 (Laughter.)

2 COMMISSIONER TAYLOR: It is not going to  
3 be anti-First Amendment, by the way, in my mind at  
4 all.

5 COMMISSIONER GAZIANO: I am going to try  
6 to work on some angle regarding school choice. I  
7 don't know if I'll get -- but before I write something  
8 up, I want to hear at least one or two of you who  
9 thinks that an angle I imagine is of interest to them,  
10 but I am going to try to do that.

11 VICE CHAIR THERNSTROM: I like the media  
12 bias topic.

13 (Laughter.)

14 COMMISSIONER HERIOT: If that many people  
15 liked it, why didn't it get onto the list?

16 COMMISSIONER YAKI: I voted for it. That  
17 was my No. 1.

18 STAFF DIRECTOR DANNENFELSER: I'll vouch  
19 for that; he did.

20 COMMISSIONER YAKI: That's right.

21 COMMISSIONER TAYLOR: We will have a  
22 concept paper, and it will not be anti-First  
23 Amendment. That is not the point at all. That's not  
24 the point at all.

25 COMMISSIONER GAZIANO: Okay, that won't be

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1 the point. I am just wondering if that is the  
2 problem, but I am open-minded.

3 COMMISSIONER TAYLOR: It cannot be a  
4 problem, certainly not in my view at least, anti-First  
5 Amendment, to make observations and highlight --

6 COMMISSIONER GAZIANO: I'm sorry. We are  
7 the government. We are the government.

8 COMMISSIONER HERIOT: We wouldn't want the  
9 President of the United States to be holding this  
10 hearing.

11 COMMISSIONER TAYLOR: I don't know. I  
12 don't know. We'll see.

13 COMMISSIONER GAZIANO: We are the  
14 government and --

15 VICE CHAIR THERNSTROM: We have declared  
16 ourselves to be open, I hope, to a concept paper from  
17 Commissioner Taylor on this subject.

18 COMMISSIONER TAYLOR: We'll see.

19 VICE CHAIR THERNSTROM: Commissioner  
20 Taylor, I invite you to write a concept paper on this  
21 subject.

22 Do we actually need a formal vote? Does  
23 anybody object?

24 COMMISSIONER HERIOT: No, that's my point.  
25 Anybody should be able to write a concept paper on

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1 any topic at any time.

2 VICE CHAIR THERNSTROM: All right. I  
3 think that we have gone as far as we can, unless  
4 anybody has anything else to say --

5 COMMISSIONER YAKI: Are we going to  
6 adjourn?

7 **FY 2009 Statutory Report**

8 VICE CHAIR THERNSTROM: No. We have one  
9 more topic, the Statutory Report for 2009.

10 So the originally-approved topic for the  
11 report was Fair Housing Initiative with an emphasis on  
12 the Home Sweet Home Program. Several Commissioners  
13 expressed skepticism about the relevance of that  
14 program. It was suggested that the Commission  
15 consider other areas within the realm of fair housing.  
16 Several Commissioners suggested including research  
17 about redlining and subprime loans.

18 COMMISSIONER YAKI: Reverse redlining.

19 VICE CHAIR THERNSTROM: Whatever. In  
20 order to flesh out the topic a bit more, so that staff  
21 can develop a concept paper for approval at a later  
22 date.

23 I would like to open the floor up to a  
24 short discussion, since I see Commissioner Yaki  
25 looking at his watch, and I am sure we would all

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1 appreciate getting out of here, but let's talk about  
2 this a minute.

3 COMMISSIONER MELENDEZ: Wasn't this an  
4 issue where people kind of ended up with these  
5 mortgages that basically foreclosed because maybe it  
6 wasn't fair that they got into them in some manner?  
7 Whether or not that involves Housing and Urban  
8 Development as far as specific agencies that we might  
9 look at, I don't know. And the Department of Justice  
10 that enforces it?

11 COMMISSIONER YAKI: It is not only that  
12 they couldn't afford it. They were also steered into  
13 this. There is also substantial at least anecdotal  
14 evidence out there that they could have qualified for  
15 standard loans but were basically steered into the  
16 interest-only subprimes.

17 VICE CHAIR THERNSTROM: Well, this topic  
18 is getting more interesting as people start to talk  
19 about it.

20 Yes?

21 COMMISSIONER TAYLOR: But if it is our  
22 Statutory Report, though, are we forced to refocus on  
23 the HUD policies and enforcement issues?

24 COMMISSIONER YAKI: Well, it is also -- it  
25 is not just HUD; it is also, I think, partly the Fed

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1 and the oversight of Fannie Mae and Freddie Mac.

2 COMMISSIONER TAYLOR: You mean Freddie?

3 COMMISSIONER YAKI: Yes, that thing.

4 COMMISSIONER TAYLOR: We have to keep  
5 bringing it back, I think, to the enforcement issue as  
6 opposed to the general policy discussion.

7 VICE CHAIR THERNSTROM: Yes, absolutely.

8 COMMISSIONER YAKI: Right.

9 VICE CHAIR THERNSTROM: Yes, absolutely.

10 COMMISSIONER YAKI: We can entitle it,  
11 "Asleep at the Wheel".

12 COMMISSIONER GAZIANO: The question that I  
13 am trying to get up-to-speed with mostly with this  
14 able assistant/consultant that I have, who has done  
15 outstanding work, other than what the paranoid blog  
16 stories imagine him to be doing, is looking at certain  
17 incentives and pressures that the regulators may have  
18 caused the mortgage lenders to pursue.

19 Although I think my able consultant  
20 understands that pretty well, I am not sure that I do,  
21 and I still think there are some questions that we  
22 have to pursue, but I would like to share that with  
23 you all.

24 You know this wasn't a topic that was my  
25 No. 1, but I am very interested in making it a

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1 valuable research agenda when we vote on it.

2 VICE CHAIR THERNSTROM: Is there a way --  
3 you know, I don't want to prolong this discussion, but  
4 I do want the staff to get a little more direction on  
5 this topic than we are going to be able to provide  
6 them by just kind of running off at the mouth, as it  
7 were, here at the moment.

8 Yes?

9 COMMISSIONER YAKI: I have a suggestion.

10 VICE CHAIR THERNSTROM: Yes?

11 COMMISSIONER YAKI: I guess the question  
12 is, can staff canvass the applicable media right now?

13 I mean right now it is pretty well-documented that in  
14 the subprime market, primarily in the Midwest, that 52  
15 percent of the subprime loans were made to African-  
16 Americans and about 36 or 43 percent were made to  
17 Hispanics, and that there was pretty aggressive  
18 targeting of those two communities as part of the  
19 marketing mechanism for these subprimes, and query  
20 whether -- I mean there are issues regarding sort of a  
21 bastardization of the Community Reinvestment Act.

22 There are questions involving, as  
23 Commissioner Gaziano pointed out, whether there was  
24 any fault at federal regulators trying to move credit  
25 out in a way that crazy-incentivized banks to engage

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1 in these products.

2 But I think there are questions to be had  
3 about: were these two minority populations targeted?  
4 Why were they targeted? What has been the impact on  
5 them and the communities in which they live? Why were  
6 they targeted, things like that? What mechanism did  
7 they use to target these folks? In the end, what were  
8 the federal regulators doing as they were watching  
9 this happen?

10 There is this one person, you know, who is  
11 now the darling of Wall Street for having claimed a  
12 year and a half ago that the subprime was going to  
13 crash, crash and burn. So apparently people knew a  
14 year and a half ago what was going on, but no one --  
15 as I said, people were either asleep at the wheel or  
16 took their hands off the wheel or put their hands over  
17 their eyes, to the detriment of these two populations  
18 in America.

19 VICE CHAIR THERNSTROM: Well, I have a  
20 suggestion here because I do think that the staff  
21 would have a hard time putting something together on  
22 the basis of this abbreviated conversation. My  
23 suggestion is that Commissioner Gaziano and  
24 Commissioner Yaki both write up a few paragraphs on --  
25 not working together, working separately -- on --

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1 COMMISSIONER YAKI: We could work  
2 together.

3 (Laughter.)

4 VICE CHAIR THERNSTROM: Yes.

5 COMMISSIONER GAZIANO: I hope.

6 VICE CHAIR THERNSTROM: No, I think there  
7 is a point to this.

8 In formulating what you see as a possible  
9 topic here and have everybody look at it and to give  
10 -- this is not a full-blown concept paper, but it is  
11 simply a few paragraphs --

12 COMMISSIONER YAKI: Sure.

13 VICE CHAIR THERNSTROM: -- to suggest to  
14 the staff what they might use, to give them a basis on  
15 which to develop a concept paper for the Statutory --

16 COMMISSIONER YAKI: We will exchange  
17 notes. We will redline each other's thing until it is  
18 unrecognizable and then send it back to each other.  
19 We'll be fine.

20 VICE CHAIR THERNSTROM: No, I mean I don't  
21 want to waste the staff's time. I think there are at  
22 least two people here who have some notion of how this  
23 could be shaped into a good Statutory Report.

24 So why don't we just do that --

25 COMMISSIONER YAKI: Okay.

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1 VICE CHAIR THERNSTROM: -- and take it  
2 from here?

3 COMMISSIONER YAKI: I would be pleased to  
4 do that, Madam Chair.

5 VICE CHAIR THERNSTROM: For now, can I  
6 have a motion to adjourn the meeting?

7 COMMISSIONER YAKI: Yes, you can have one.

8 VICE CHAIR THERNSTROM: Anybody opposed?

9 COMMISSIONER HERIOT: I'm opposed; I want  
10 to stay -- (spoken jokingly).

11 (Laughter.)

12 (Whereupon, at 3:20 p.m., the meeting was  
13 adjourned.)

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