

U.S. COMMISSION ON CIVIL RIGHTS

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TELEPHONIC MEETING

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FRIDAY, OCTOBER 30, 2009

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The Commission convened telephonically at 11:30 a.m. Eastern Daylight Time, GERALD A. REYNOLDS, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

ASHLEY L. TAYLOR, JR., Commissioner

MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC
CHRISTOPHER BYRNES
PAMELA A. DUNSTON, Chief, ASCD
ROBERT LERNER, Asst Staff Director for
OCRE
EMMA MONROIG, Solicitor
LENORE OSTROWSKY
EILEEN RUDERT
KIMBERLY TOLHURST
AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

TIM FAY
DOMINIQUE LUDVIGSON
KIMBERLY SCHULD
JOHN MARTIN
ALISON SCHMAUCH

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

2 (11:38 a.m.)

3 CHAIRMAN REYNOLDS: We can get started.
4 We have I guess five commissioners and possibly one
5 phantom commissioner. Operator, could you please
6 start the call, let the public in?

7 THE OPERATOR: Absolutely. Okay. Please
8 go ahead. The call may now begin.

9 CHAIRMAN REYNOLDS: Okay. Good morning.
10 This is Chairman Reynolds. It is 11:39 Eastern
11 Daylight Time on October 30th, 2009. We are having a
12 telephonic meeting with commissioners participating
13 from different locations. I will call the name of
14 each commissioner to determine if there is a quorum to
15 hold the meeting. Vice Chair Thernstrom? Vice Chair
16 Thernstrom?

17 (No response.)

18 CHAIRMAN REYNOLDS: Commissioner Gaziano?

19 COMMISSIONER GAZIANO: Here.

20 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

21 COMMISSIONER KIRSANOW: Here.

22 CHAIRMAN REYNOLDS: Commissioner Heriot?

23 COMMISSIONER HERIOT: Here.

24 CHAIRMAN REYNOLDS: Commissioner Melendez?

25 (No response.)

1 CHAIRMAN REYNOLDS: Commissioner Yaki

2 COMMISSIONER YAKI: Here.

3 CHAIRMAN REYNOLDS: Commissioner Taylor?

4 COMMISSIONER TAYLOR: Here.

5 CHAIRMAN REYNOLDS: Okay. Is the Staff
6 Director present?

7 STAFF DIRECTOR DANNENFELSER: Yes, sir.

8 CHAIRMAN REYNOLDS: Is the Court Reporter
9 on the line?

10 THE REPORTER: Present.

11 CHAIRMAN REYNOLDS: Thank you. The
12 meeting will come to order. To assist the Court
13 Reporter, please identify yourself before making a
14 statement. Whenever it is necessary to take a vote, I
15 will call each of your names. Please answer by
16 saying, "Yea," "Nay," or "Abstain."

17 I. APPROVAL OF AGENDA

18 CHAIRMAN REYNOLDS: I move that we approve
19 the agenda. Is there a second?

20 COMMISSIONER GAZIANO: Second.

21 CHAIRMAN REYNOLDS: Discussion?

22 COMMISSIONER GAZIANO: Were there going to
23 be some amendments to it?

24 CHAIRMAN REYNOLDS: Yes. I have several.
25 I just wanted to see if anyone wanted to go first.

1 Okay. Here are the amendments that I
2 would like to make. I would like to amend the agenda
3 so that the discussion of the new Black Panther Party
4 project is the first item on the agenda and move the
5 approval of the minutes so that it is taken up after
6 our vote on a meeting calendar for 2010, making the
7 update on the Title IX project the last item.

8 Is there a second?

9 COMMISSIONER GAZIANO: Second. Gaziano.

10 CHAIRMAN REYNOLDS: Any other changes?

11 (No response.)

12 CHAIRMAN REYNOLDS: Discussion?

13 (No response.)

14 CHAIRMAN REYNOLDS: Okay. Commissioner
15 Gaziano, how do you vote?

16 COMMISSIONER GAZIANO: Yes.

17 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

18 COMMISSIONER KIRSANOW: Yes.

19 CHAIRMAN REYNOLDS: Commissioner Heriot?

20 COMMISSIONER HERIOT: Yes.

21 CHAIRMAN REYNOLDS: Commissioner Yaki?

22 COMMISSIONER YAKI: No.

23 CHAIRMAN REYNOLDS: Commissioner Taylor?

24 COMMISSIONER TAYLOR: Yes.

25 CHAIRMAN REYNOLDS: And I also vote in the

1 affirmative. Let the record reflect that Commissioner
2 Yaki voted against the motion. The remaining
3 commissioners voted in favor of the motion. The
4 motion passes.

5 IV. PROGRAM PLANNING

6 - UPDATE ON PROPOSED HEARINGS FOR

7 FY 2010 ENFORCEMENT REPORT

8 CHAIRMAN REYNOLDS: Okay. Next up, we
9 will have an update on the proposed hearings for the
10 2010 enforcement report. Mr. Staff Director or the
11 General Counsel, will you please provide an update on
12 the progress of our enforcement report on the
13 Department of Justice's dismissal of voter
14 intimidation charges against members of the New Black
15 Panther Party?

16 MR. BLACKWOOD: Yes, this is David
17 Blackwood. Since --

18 COMMISSIONER GAZIANO: Can you speak up a
19 little bit or get a little closer to the mike?

20 MR. BLACKWOOD: Yes. This is David
21 Blackwood.

22 COMMISSIONER YAKI: This is Commissioner
23 Yaki. I still can barely hear him.

24 CHAIRMAN REYNOLDS: Okay. David, we need
25 you to get close to the mike and speak up.

1 MR. BLACKWOOD: I am trying a different
2 microphone. Can you hear me now?

3 COMMISSIONER YAKI: This is Commissioner
4 Yaki. That is not much better.

5 MR. BLACKWOOD: All I can tell you is the
6 microphone is now about an inch from my mouth.

7 CHAIRMAN REYNOLDS: Okay. Well, project.

8 MR. BLACKWOOD: I will do my best. Since
9 our last meeting, I have interviewed by telephone
10 several witnesses who were present in Philadelphia.
11 As a result of those interviews, it became clear, at
12 least in my mind, that I think there is a need to
13 change what I originally proposed and what was sent
14 out as far as this meeting, the discovery plan and the
15 hearing proposal, in this way.

16 Many of the witnesses that were present in
17 Philadelphia were campaign workers who do not live in
18 Philadelphia, nor are they within 100 miles of
19 Philadelphia. Many seem to be from the New York or
20 Connecticut area.

21 As a result of the people I spoke with, it
22 seems to me and the fact that many of them expressed
23 an intention to or willingness to come to Washington
24 to testify that I would suggest the following changes,
25 that: one, the discovery that takes place in

1 Philadelphia could be done in the form of depositions,
2 specifically geared, most, at least at this stage, I
3 would propose to you, geared, towards members of the
4 New Black Panther Party as well as any other
5 individuals that we identify who are only in the
6 Philadelphia area.

7 And by that, I would at this point say
8 that I have identified Mr. and Mrs. Counts, who were
9 actually within the polling place at the time as poll
10 watchers. There may be other individuals, however,
11 that I would identify who would testify at a
12 deposition in Philadelphia without a hearing.

13 What I would suggest to you makes at least
14 more physical sense is to move the hearing that was
15 originally out of the picture in Philadelphia to the
16 Washington office. And we can either combine them
17 with a DOJ hearing or treat them as separate hearings,
18 but I would just suggest to you that we could move it
19 to Washington.

20 CHAIRMAN REYNOLDS: Any other items that
21 you would like to update us on?

22 MR. BLACKWOOD: As far as there are some
23 individuals with whom we have not had any success
24 contacting yet. And that includes the videographer,
25 who took many of the videos, portions of the videos,

1 that were on YouTube. He has made contact with us,
2 but we haven't actually met to go through or interview
3 him.

4 Other individuals, we are searching for
5 addresses, but, even at this stage, we have sufficient
6 witnesses who have directly observed the incidents
7 that occurred in Philadelphia.

8 COMMISSIONER YAKI: This is Commissioner
9 Yaki. I have some questions for the General Counsel.

10 CHAIRMAN REYNOLDS: Go ahead, Commissioner
11 Yaki.

12 COMMISSIONER YAKI: I am a bit confused by
13 what you just said. I thought you said that the
14 Counts were people who were not poll watchers, but
15 your discovery plan says that they were poll watchers.

16 MR. BLACKWOOD: I must have misspoken.
17 The Counts were poll watchers. There are a variety of
18 distinctions. There are people that are roving poll
19 watchers. There are those who have certificates to
20 actually physically be within the polling place.
21 Those require someone to be a resident of
22 Philadelphia. Mr. and Mrs. Counts fall into that
23 latter category.

24 COMMISSIONER YAKI: And when you were
25 talking about you were interviewing witnesses, were

1 they other poll watchers who were not situated within
2 the Philadelphia area? They would, therefore, be
3 outside the 100-mile radius?

4 MR. BLACKWOOD: Generally they are with
5 one exception. We have one poll watcher who was "a
6 roving poll watcher," who was a resident of
7 Philadelphia, Mr. Chris Hill. He has indicated that
8 he would be willing to come to Washington, D.C.

9 The other individuals, though, were
10 campaign workers who showed up from out of state.
11 They were outside the polling place but were not
12 allowed in the polling place.

13 COMMISSIONER YAKI: Are you suggesting
14 that we basically cancel the Philadelphia hearing?

15 MR. BLACKWOOD: No. What I am suggesting
16 is shifting the Philadelphia hearing and we could
17 actually stage it in Washington. As to those --

18 COMMISSIONER YAKI: Well, I have problems
19 with the fact that shifting is based on basically
20 self-referred discovery on the -- so are you saying
21 that the members of the New Black Panther Party, you
22 will simply interview them remotely through -- not
23 remotely. You will go to Philadelphia and interview
24 them via the deposition process? Is that what you
25 were saying?

1 MR. BLACKWOOD: That is how I would
2 propose the start-up. That time is spent on what we
3 learn at the depositions.

4 COMMISSIONER YAKI: But they would be
5 outside the 100-mile range if we were to have a
6 hearing only in Washington, D.C., wouldn't they?

7 MR. BLACKWOOD: That is correct.

8 COMMISSIONER YAKI: So the commissioners,
9 such as myself, would be deprived of the ability to
10 give questions and answers to those folks if their
11 only appearance is through the transcript of the
12 interview. Is that correct?

13 COMMISSIONER GAZIANO: You could attend
14 the deposition or they could come to a hearing
15 somewhere else.

16 COMMISSIONER YAKI: Commissioner Gaziano,
17 would you please allow Mr. Blackwood to answer the
18 question.

19 COMMISSIONER GAZIANO: I'm sorry that I'm
20 not constrained by your idiotic moods, Mr. Yaki.

21 CHAIRMAN REYNOLDS: Okay. Okay. Hold on,
22 folks.

23 COMMISSIONER YAKI: I'm sorry, Mr. Chair.
24 I would like that remark noted for its insane and
25 utterly --

1 CHAIRMAN REYNOLDS: All right. He hit you
2 first. So get your shot in so we can move on.

3 COMMISSIONER YAKI: No. He --

4 COMMISSIONER GAZIANO: Then I get to get
5 my shot in.

6 COMMISSIONER YAKI: I am asking questions
7 of the General Counsel. Commissioner --

8 COMMISSIONER GAZIANO: And if you can't
9 have a civil conversation, Michael, if you can't have
10 a civil conversation without playing your little
11 childish games, then --

12 CHAIRMAN REYNOLDS: Commissioner Gaziano,
13 he was speaking --

14 COMMISSIONER YAKI: In keeping with his
15 heroes in the Congress who like to interrupt people at
16 any moment in time --

17 COMMISSIONER GAZIANO: I did not interrupt
18 you. I was supplying a response.

19 CHAIRMAN REYNOLDS: Commissioner Gaziano,
20 this is wasting time. Let's focus.

21 COMMISSIONER YAKI: I am asking questions.

22 CHAIRMAN REYNOLDS: Okay. Continue.

23 COMMISSIONER YAKI: I am asking the
24 General Counsel, are we basically limited, therefore,
25 to the transcript of those witnesses for a Washington

1 hearing?

2 CHAIRMAN REYNOLDS: And the answer is?

3 MR. BLACKWOOD: This is David Blackwood.

4 Commissioner Yaki, first, you would have the right to
5 be at the deposition.

6 COMMISSIONER YAKI: Would I -- I'm sorry.

7 Go ahead.

8 MR. BLACKWOOD: Now, the way past practice
9 has been, as I understand it, at the Commission, one,
10 commissioners have a right to be at any deposition.

11 Two, after I have finished my questions, commissioners
12 are allowed time to ask any questions that they have.

13 So that is first.

14 Second, depending on what happens at the
15 deposition, yes, if we didn't shift the hearing to
16 Washington, they would be outside the 100-mile range.

17 It all depends in my mind what happens at the
18 deposition.

19 As we know, in the original litigation,
20 these individuals did not even file a response. So I
21 am somewhat -- frankly, I think it makes sense to
22 proceed with depositions first to see if they will
23 even respond to our subpoenas.

24 COMMISSIONER YAKI: Well, I have two
25 comments on that assuming Commissioner Gaziano doesn't

1 try and interrupt me.

2 CHAIRMAN REYNOLDS: You got your shot
3 already.

4 COMMISSIONER YAKI: One is -- I am sorry,
5 Mr. Chairman. I withdraw the remark.

6 One, if you were going through the
7 deposition way, I would request that any dates,
8 proposed dates, that you schedule for this -- I am
9 giving notice that I have an interest in attending and
10 possibly asking questions, number one. So I would
11 like any date to be coordinated so that it could
12 possibly work with my schedule, number one.

13 Number two, I am still not sure whether or
14 not this is appropriate given the fact that the
15 limited discovery that we seem to have seems to be fed
16 to us by those who have an interest in reprosecuting
17 this case because, as far as I can see, every single
18 fact witness with the exception of anyone who happened
19 to be actually on the YouTube video of individuals
20 from the Republican Party -- and we have very few, if
21 any.

22 And I want to know what the discovery is
23 for that people from the affected precinct who were
24 actually voters as well as the fact that I think it is
25 important that the Election Day operations director,

1 who is identified as John Giordano, also be part of
2 any Philadelphia-based process that is in place
3 because I am not comfortable reading the discovery
4 plan that there is any attempt to ascertain a complete
5 set of facts other than those with people who already
6 have a large axe to grind in an election that they
7 lost.

8 CHAIRMAN REYNOLDS: Mr. Blackwood, I
9 assume that your efforts to secure witnesses has not
10 been biased by the political affiliations or
11 ideologies of the individuals who were witnesses of
12 the incident that occurred in Philadelphia. Is that
13 right?

14 COMMISSIONER YAKI: Mr. Chairman, this is
15 Commissioner Yaki. Let me say I am not insinuating at
16 all.

17 CHAIRMAN REYNOLDS: Well, I just --

18 COMMISSIONER YAKI: I am simply saying he
19 is acting on information provided to him by others on
20 the Commission.

21 CHAIRMAN REYNOLDS: I understand that.

22 COMMISSIONER YAKI: It seems to be rather
23 self-preferred. And I am wondering what we are doing
24 beyond this to contact a broader section of
25 individuals.

1 CHAIRMAN REYNOLDS: Well, Commissioner
2 Yaki, that is where my question was leading.

3 COMMISSIONER YAKI: I apologize.

4 CHAIRMAN REYNOLDS: Mr. Blackwood, would
5 you care to respond?

6 COMMISSIONER YAKI: I didn't want to
7 insinuate that Mr. Blackwood was conducted any biased
8 interviews.

9 CHAIRMAN REYNOLDS: Well, I just want to
10 put the issue squarely on the table.

11 MR. BLACKWOOD: This is David Blackwood.
12 I can tell you, Commissioner Yaki, you are correct in
13 that the leads tended to come from one party because
14 that was the nature of the incident. It was
15 Republican operatives were showing up at poll watchers
16 when we made the report.

17 That said, our plan is to, either myself
18 or other individuals from OGC, go to Philadelphia,
19 check some of the paper record with regard to other
20 individuals that were at the polling place.

21 Specifically we know for a fact that there
22 were Democratic poll watchers there. There should be
23 records with the Board of Elections as to who these
24 individuals are. And it absolutely is part of our
25 plan to identify them and try to talk with them, but I

1 couldn't give you a name because I don't know who it
2 is.

3 We also know that on the video, in talking
4 to the witnesses, at one time there is a woman there
5 who is identified by the other witnesses as a
6 Democratic campaign worker. She was observed right
7 next to the or right behind the new Black Panther
8 individuals. Obviously we would like to talk to her.

9 But I don't have any contact information.

10 COMMISSIONER YAKI: Thank you. Thank you
11 very much, Mr. Chair. And I would just simply urge
12 the General Counsel to continue those efforts in order
13 to ensure as much as possible that we have, again, the
14 complete set of facts.

15 To me, if we are going to do this, it
16 would seem odd that we not go to Philadelphia simply
17 because, one, our presence there alone may actually
18 encourage others to come forward and speak who we're
19 having trouble talking to; secondly, there may be some
20 logistical issues involved with what schedule there
21 may be for depositions.

22 Then, again, if, indeed, the fact that
23 there may be more than just two or three individuals
24 potentially in Philadelphia we would wish to speak to
25 on the record, at some point we may reach a critical

1 mass where a hearing is required.

2 And, again, I am referring to the fact
3 that I think that the Election Day operations director
4 -- I don't know if the Philadelphia police officers
5 generally have authority to travel to Washington, D.C.

6 And when you add those and when you start adding
7 potential other individuals, including voters who were
8 there at the time, I would not want us to just --

9 CHAIRMAN REYNOLDS: Commissioner Yaki, we
10 are not going to vote on this matter yet. I am just
11 putting --

12 COMMISSIONER YAKI: I just want to put
13 that out there.

14 CHAIRMAN REYNOLDS: Yes. I understand.
15 Mr. Blackwood has made a recommendation. We will mull
16 it over. And we will have to raise this issue again.

17 COMMISSIONER GAZIANO: Mr. Chairman?

18 CHAIRMAN REYNOLDS: Yes?

19 COMMISSIONER GAZIANO: This is Todd
20 Gaziano. I would like to offer a motion at this time.

21 CHAIRMAN REYNOLDS: Please go ahead.

22 COMMISSIONER GAZIANO: It is the motion
23 that I circulated, but for the record, it is
24 relatively short. I suppose I should read it into the
25 record --

1 CHAIRMAN REYNOLDS: Yes.

2 COMMISSIONER GAZIANO: -- unless there is
3 unanimous consent that we --

4 CHAIRMAN REYNOLDS: Please read it into
5 the record.

6 COMMISSIONER GAZIANO: Okay. And then let
7 me speak to the motion immediately afterward if it is
8 seconded. Pursuant to the Commission's authority
9 under 42 USC section 1975(a) and 45 CFR section 7024
10 and in furtherance of our investigation of the
11 implications of DOJ's actions in the new Black Panther
12 Party litigation for enforcement of section 11(b) of
13 the Voting Rights Act, I move to authorize the
14 Chairman to subpoena any of the individuals listed in
15 the two draft hearing proposals prepared by the
16 General Counsel dated October 21, 2009 and any other
17 individuals the General Counsel and the Discovery
18 Subcommittee identify who are similarly situated to
19 the witnesses identified in the draft hearing
20 proposals or who fall within one of the categories
21 identified below to appear as specified in the
22 subpoena to give deposition and/or hearing testimony
23 and produce written or other matter called for in the
24 subpoenas.

25 The five categories are: one, former

1 defendants in the New Black Panther Party NBPP
2 litigation; two, individuals with information about
3 the events in Philadelphia; three, former and current
4 DOJ personnel with knowledge of the NBPP litigation;
5 four, custodians of records at DOJ regarding past VRA
6 section 11(b) allegations, investigations, and related
7 documents; and, five, others with potential relevant
8 information about the DOJ actions in the NBPP
9 litigation.

10 CHAIRMAN REYNOLDS: This is Chairman
11 Reynolds. I second the motion.

12 Please continue, Commissioner Gaziano.

13 COMMISSIONER GAZIANO: This is obviously a
14 helpful step. It may have been already implicit in
15 the votes that we have previously taken initiating
16 this, but I think it is good for the record for the
17 Commission to authorize you to issue the subpoenas.

18 And I think that I want to sort of second
19 the notion that the General Counsel just explained.
20 We have been working with him on some of the issues
21 that would be involved and costly decisions to rent a
22 hotel, having a hearing in Philadelphia. It certainly
23 makes more sense to find out what deposition evidence
24 there is and then for the rest of the Commission to be
25 informed by that and then make a decision on the

1 hearing.

2 CHAIRMAN REYNOLDS: Well --

3 COMMISSIONER GAZIANO: But, regardless of
4 the hearing issue, this is certainly a simple step to
5 further the investigation.

6 CHAIRMAN REYNOLDS: Additional comments?

7 COMMISSIONER YAKI: This is Commissioner
8 Yaki. One, I am not too sure about the cost issue
9 because I am certain that there are going to be a
10 number of commissioners who are going to want to
11 attend any potential deposition in Philadelphia for --

12 CHAIRMAN REYNOLDS: Gentlemen, let's punt
13 this particular issue. The location of the deposition
14 and the hearings, that issue is not on the table
15 today. We have a recommendation. Once we have had an
16 opportunity to give it some thought, we can put it on
17 the agenda and have a full-blown discussion.

18 Right now we have a motion on the table.
19 And I would like to stay focused on the motion.

20 COMMISSIONER YAKI: I was just addressing
21 one of the rationales for the motion. But, that being
22 the case, I find this motion extremely problematic. I
23 find that especially number five is just a scatter
24 shot, carte blanche standard. I am not too sure
25 whether it would pass any muster whatsoever in terms

1 of specificity.

2 And my question actually is at the General
3 Counsel, which is, have we had in the past such broad
4 and rather vague authority granted for subpoenas or
5 are we required under the statute or under any other
6 applicable law to be a little more specific in terms
7 of determining the standard of what is potentially
8 relevant information, what is "information," how are
9 we going to identify that, and then how are we going
10 to prioritize to whom these subpoenas are going to.

11 MR. BLACKWOOD: This is General Counsel
12 again. In answer to your question, number one, as I
13 understand the motion as adopted by reference, the
14 list of witnesses that we have specifically identified
15 as to past practice, I can tell you that we have
16 scoured the agency with regard to past practices. We
17 haven't found anything with regard to this specific
18 issue.

19 In reviewing the motion yesterday, I did
20 look at the statute in our CFRs. And I didn't see the
21 issue, frankly, addressed. So I do believe the
22 Commission has the authority and discretion to pass on
23 the authority of identifying it as they will.

24 That said, obviously I will be working
25 with the subcommittee that was authorized by the

1 Commission before any subpoenas would be issued.

2 COMMISSIONER YAKI: This is Commissioner
3 Yaki. Did I just understand you to say that this was
4 limited to people who have been identified so far?

5 MR. BLACKWOOD: No. The wording
6 obviously, what you just said, is broader than that,
7 but it did encompass as well the specific individuals
8 identified. And there aren't any other individuals
9 that I am aware of currently.

10 I assume that part of the motion was that
11 we would not keep coming back and saying, "Now we have
12 another one given the timing or the --

13 COMMISSIONER YAKI: Excuse me. But who is
14 going to determine the potentially relevant standard,
15 as stated in number 5 of Commissioner Gaziano's memo?
16 Is it going to be you? Is it going to be
17 Commissioner Gaziano? Who is it?

18 MR. BLACKWOOD: Well, as a practical
19 matter, first I would identify the individuals, the
20 informal process. Obviously I would confirm that with
21 the Subcommittee that has been identified. And,
22 frankly, then the Chair also has the power because
23 only he can sign subpoenas.

24 CHAIRMAN REYNOLDS: Any other comments?

25 COMMISSIONER YAKI: So what you are

1 telling me, then, is that the Subcommittee and the
2 Chair have sole discretion to determine, not the
3 Commission as a whole, what is potentially relevant?

4 MR. BLACKWOOD: I assume that is the
5 purpose of the motion as to whether the Commission is
6 delegating that authority.

7 COMMISSIONER HERIOT: Yes. I don't think
8 there is anything out of the ordinary about delegating
9 such authority. I would call the question.

10 CHAIRMAN REYNOLDS: Okay. Commissioner
11 Gaziano, how do you vote?

12 COMMISSIONER GAZIANO: Yes.

13 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

14 COMMISSIONER KIRSANOW: Yes.

15 CHAIRMAN REYNOLDS: Commissioner Heriot?

16 COMMISSIONER HERIOT: Yes.

17 CHAIRMAN REYNOLDS: Commissioner Yaki?

18 COMMISSIONER YAKI: No.

19 CHAIRMAN REYNOLDS: Commissioner Taylor?

20 COMMISSIONER TAYLOR: Yes.

21 CHAIRMAN REYNOLDS: And I vote yes also.

22 Commissioner Yaki voted against the motion. The
23 remaining commissioners voted for it. The motion
24 passes.

25 III. MANAGEMENT AND OPERATIONS

1 - APPROVAL OF CALENDAR OF 2010 COMMISSION MEETINGS

2 CHAIRMAN REYNOLDS: Okay. Next up. On
3 October 9th, the Staff Director sent a list of
4 potential dates for Commission meetings during 2010.
5 He sent an updated list on October 22nd. That
6 includes teleconference dates, in addition to
7 in-person meeting dates.

8 As is our typical practice, in-person
9 meetings, business meetings, will start at 9:30
10 Eastern Standard Time. And teleconference will be
11 scheduled for 11:30 Eastern Standard Time.

12 Obviously selecting these meeting dates
13 does not preclude adjustments, additions, and
14 deletions of meeting dates throughout the year, as is
15 necessary to accommodate Commission business and other
16 projects.

17 I move to adopt the suggested dates for
18 phone and in-person Commission meetings for calendar
19 year 2010. Is there a second?

20 COMMISSIONER HERIOT: Second.

21 CHAIRMAN REYNOLDS: Discussion?

22 COMMISSIONER YAKI: I just do not
23 understand why we have these telephonic meetings and
24 we can't get our business done in a regular fashion.

25 COMMISSIONER HERIOT: The fact that you

1 walk out on meetings to defeat a quorum has a lot to
2 do with it.

3 COMMISSIONER YAKI: I would just like to
4 --

5 CHAIRMAN REYNOLDS: All right, folks.
6 Let's let Commissioner Yaki continue.

7 COMMISSIONER YAKI: I am sorry.
8 Commissioner Heriot, were you referring perhaps to my
9 practice of attempting to use my own parliamentary
10 procedure?

11 I suppose that, you know, you would find
12 it objectionable since it is against you, but I would
13 simply say that I don't believe that the schedule of
14 telephonic meetings is necessary. I think that it is
15 premature to require them.

16 And I think that what it does, it is a
17 self-fulfilling prophecy in terms of our being or not
18 being able to get anything done at our normal
19 meetings. I mean, if you want to talk about how our
20 meetings are run, Commissioner Heriot, maybe we can
21 talk about the fact that we still continue to get
22 motions the day before Commission meetings, which
23 gives some commissioners very little time in which to
24 thoroughly analyze them or not.

25 CHAIRMAN REYNOLDS: Commissioner Yaki?

1 COMMISSIONER YAKI: I object to the --

2 CHAIRMAN REYNOLDS: I understand that you
3 would prefer, that you have a strong preference, that
4 these teleconferences not take place. You have
5 expressed your views in prior meetings. And we
6 understand your position.

7 Commissioner Gaziano, how do you vote?

8 COMMISSIONER GAZIANO: Yes.

9 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

10 COMMISSIONER KIRSANOW: Yes.

11 CHAIRMAN REYNOLDS: Commissioner Heriot?

12 COMMISSIONER HERIOT: Yes.

13 CHAIRMAN REYNOLDS: Commissioner Yaki?

14 COMMISSIONER YAKI: No.

15 CHAIRMAN REYNOLDS: Commissioner Taylor?

16 COMMISSIONER TAYLOR: Yes.

17 CHAIRMAN REYNOLDS: I, too, vote in favor
18 of the motion. So it is one vote against. That vote
19 is Commissioner Yaki's.

20 COMMISSIONER YAKI: Mr. Chair?

21 CHAIRMAN REYNOLDS: Yes?

22 COMMISSIONER YAKI: I would like to make a
23 motion from the floor, a very simple motion that has
24 been discussed before.

25 CHAIRMAN REYNOLDS: Well --

1 COMMISSIONER YAKI: I do not think that it
2 requires a great amount of intellectual disposition or
3 would cause any surprise to anyone. If we are going
4 to go ahead and do this, it makes no sense whatsoever
5 for our special assistants to be put on the public
6 side of the call, rather than the commissioners' side
7 of the call. When you think about the fact that staff
8 in the meeting present in D.C. are on the
9 commissioners' side of the call as well and our staff
10 if they are present at that meeting are on the
11 commissioners' side of the call, why our staff
12 participating remotely cannot be on the commissioners'
13 side of the call I think is unfair.

14 And I would ask that, going forward,
15 special assistants be allowed to participate on the
16 commissioners' side of the call.

17 CHAIRMAN REYNOLDS: Is there a second?

18 COMMISSIONER GAZIANO: Mr. Chairman, I
19 would be interested to hear the moving Commissioner's
20 reasoning. Our staff, most of our special assistants
21 normally do not speak at meetings. They just listen,
22 regardless of where they sit. So I might depending on
23 the rationale.

24 COMMISSIONER YAKI: Well, the rationale is
25 that: a) they are our special assistants; b) there

1 are going to be times -- and perhaps it was before
2 your time, Commissioner Gaziano, and before your time,
3 Commissioner Heriot -- where we will be on a remote
4 phone call. And the question would be asked.

5 And it is a heck of a lot easier to try
6 and clarify what may or may not have happened or get
7 information to a special assistant than sit there and
8 try to e-mail them separately, rather than simply say,
9 you know, blank, Joe, James, or whatever, "Did we do
10 this? Do you have a record of that in your notes?
11 Can you pull that out?" or whatever.

12 I mean, it just seems ridiculous that only
13 by virtue of being in the D.C. office is a special
14 assistant afforded an opportunity to be on the
15 commissioners' side of the call.

16 And if we are going to be doing this more
17 and more, the fact of the matter is that there are
18 going to be times when someone is going to be asking
19 their special assistant for some information.

20 And, rather than go through 300 channels
21 or if you are in a location where you only have access
22 by phone and your BlackBerry doesn't work, you may be
23 in some remote location, where you are dialling in,
24 and there is no other way to communicate with your
25 special assistant, other than through the open phone

1 lines.

2 COMMISSIONER GAZIANO: I might support the
3 motion, but I just wonder if we could put it off to
4 the next meeting to think about it, discuss it.

5 COMMISSIONER HERIOT: I would like to
6 consider these issues later, instead of right now.

7 COMMISSIONER YAKI: Consider what issues,
8 Commissioner Heriot? You were the one who blocked my
9 special assistant from joining a meeting the other
10 day.

11 COMMISSIONER HERIOT: Because we were
12 under the impression that special assistants were not
13 supposed to be on the call.

14 COMMISSIONER YAKI: I am not saying they
15 are going to be there --

16 COMMISSIONER HERIOT: You seem to be
17 acknowledging it yourself.

18 COMMISSIONER YAKI: -- they're going to be
19 there speaking. They're there as a resource to us
20 should we need it. And I can tell you right now that
21 there are times, there have been times when --

22 CHAIRMAN REYNOLDS: Commissioner --

23 COMMISSIONER HERIOT: I know there are
24 times when you want your special assistant to be on
25 the call so they know about whether or not we are able

1 to raise a quorum so you will know whether to get back
2 on the call. If we got --

3 CHAIRMAN REYNOLDS: Commissioner, can we
4 --

5 COMMISSIONER HERIOT: That is what your --

6 CHAIRMAN REYNOLDS: Commissioner Heriot?
7 Okay, folks. Commissioner Yaki, at this point, it
8 appears as if you do have some support from
9 Commissioner Gaziano. He has asked whether you would
10 be willing to postpone this particular motion. Will
11 you postpone?

12 COMMISSIONER HERIOT: You don't need to
13 ask him that. It hasn't been seconded.

14 COMMISSIONER YAKI: Commissioner Heriot,
15 you are such a bundle of charm in the morning. It
16 really is --

17 CHAIRMAN REYNOLDS: Okay. Commissioner
18 Yaki, will you --

19 COMMISSIONER YAKI: I would say I am
20 raising this as an issue. I would like it to be
21 placed on the agenda as a motion at the next in-person
22 meeting of the Commission.

23 CHAIRMAN REYNOLDS: Okay. Very good. Mr.
24 Staff Director, please make sure that it is on the
25 agenda for the November 6th meeting.

1 II. APPROVAL OF MINUTES OF SEPTEMBER 3,
2 SEPTEMBER 11, SEPTEMBER 24, OCTOBER 8, AND
3 OCTOBER 16 MEETINGS

4 CHAIRMAN REYNOLDS: Okay. The next item
5 is the approval of the minutes of the meetings held on
6 September 3rd, September 11th, September 24th, October
7 8th, and October 16th of 2009.

8 I move that each set of these minutes be
9 approved. Is there a second?

10 COMMISSIONER GAZIANO: Second. I would
11 like to make a minor amendment to one of them.

12 CHAIRMAN REYNOLDS: Okay. Please allow me
13 to go first in terms of the amendments. I have
14 several. And it is possible that your concern will be
15 taken care of with my amendments.

16 The first item, I would like to make a
17 change to the September 3rd set of minutes. Kim
18 Schuld is listed as a commissioner assistant
19 participant in the second paragraph, but she reports
20 that she was not present for that meeting. So her
21 name should be deleted from the list.

22 Second, under the section titled "State
23 Advisory Committee Issues," on page 2, number 2, the
24 second paragraph, dealing with the Hawaii SAC
25 rechartering, I would like the first sentence of the

1 second paragraph of that section to read as follows,
2 "The commissioners voted to table consideration of
3 Daphne Barbee-Wooten indefinitely unless she can
4 establish that the racially offense remarks that she
5 is reported in various news accounts to have made
6 called to our attention by Commissioner Gaziano are
7 inaccurate."

8 Furthermore, the third sentence of that
9 paragraph should be "The commissioners agree to
10 consider Ms. Barbee-Wooten's application at the
11 October 2009 meeting pending a response from Ms.
12 Barbee-Wooten regarding the news accounts of her
13 purported remarks."

14 Any other changes to the September 3rd set
15 of minutes?

16 COMMISSIONER GAZIANO: No. That satisfies
17 my concern.

18 CHAIRMAN REYNOLDS: Okay. Commissioner
19 Gaziano, how do you vote?

20 COMMISSIONER GAZIANO: Yes.

21 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

22 COMMISSIONER KIRSANOW: Yes.

23 CHAIRMAN REYNOLDS: Commissioner Heriot?

24 COMMISSIONER HERIOT: Yes.

25 CHAIRMAN REYNOLDS: Commissioner Yaki?

1 Commissioner Yaki?

2 COMMISSIONER YAKI: Abstain.

3 CHAIRMAN REYNOLDS: Commissioner Taylor?

4 Commissioner Taylor?

5 (No response.)

6 CHAIRMAN REYNOLDS: Okay. We have four
7 votes in favor, one vote by Commissioner Yaki. It is
8 an abstention. The motion passes.

9 Okay. Next up. Next up are, let's see,
10 the September 11th meetings -- the minutes, rather. I
11 don't know why I keep making that mistake. Here are
12 the changes I would like to make.

13 In the paragraph under the approval of the
14 minutes of the August 7th, 2009 meeting, I would like
15 the first sentence revised to add an "s" to Panther
16 and include the words "voter intimidation" before
17 "issue" and change the word "issue" to "case" towards
18 the first sentence in that paragraph. So that the
19 sentence would read as follows, "The Commission
20 amended the language at page 2 to reflect that
21 Commissioner Melendez abstained and Commissioner Yaki
22 was absent for the vote to send a letter to the
23 Department of Justice on the Black Panthers voter
24 intimidation case."

25 Additionally, I believe the last sentence

1 of this section, entitled "Staff Director's Report,"
2 should be amended so it reads as follows,
3 "Commissioner Melendez requested the formation of a
4 subcommittee to deal with modifications to the 2010
5 budget."

6 Any additional changes, discussion with
7 regard to the September 11th minutes?

8 (No response.)

9 CHAIRMAN REYNOLDS: Okay. Commissioner
10 Gaziano, how do you vote?

11 COMMISSIONER GAZIANO: Yes.

12 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

13 COMMISSIONER KIRSANOW: Yes.

14 CHAIRMAN REYNOLDS: Commissioner Heriot?

15 COMMISSIONER HERIOT: Yes.

16 CHAIRMAN REYNOLDS: Commissioner Yaki?

17 COMMISSIONER YAKI: Abstain.

18 CHAIRMAN REYNOLDS: Commissioner Taylor?

19 (No response.)

20 CHAIRMAN REYNOLDS: I vote in favor of the
21 motion. So Commissioner Yaki abstained. The
22 remaining commissioners voted in favor. The motion
23 passes.

24 Next up, the --

25 COMMISSIONER YAKI: I would like to have a

1 quorum call.

2 CHAIRMAN REYNOLDS: Okay. Commissioner
3 Yaki?

4 COMMISSIONER YAKI: Present.

5 CHAIRMAN REYNOLDS: Commissioner Heriot?

6 COMMISSIONER HERIOT: Here.

7 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

8 COMMISSIONER KIRSANOW: Here.

9 CHAIRMAN REYNOLDS: Commissioner Gaziano?

10 COMMISSIONER GAZIANO: Here.

11 CHAIRMAN REYNOLDS: Commissioner Taylor?

12 (No response.)

13 CHAIRMAN REYNOLDS: Okay. We have a
14 quorum.

15 COMMISSIONER YAKI: Commissioner Yaki is
16 leaving the conference.

17 CHAIRMAN REYNOLDS: I am not surprised.

18 All right. Sudden business, Commissioner Yaki, or
19 parliamentary tactics?

20 COMMISSIONER HERIOT: Do we have to ask?

21 COMMISSIONER GAZIANO: Let the record
22 reflect. What should the record reflect, Mr.
23 Chairman?

24 CHAIRMAN REYNOLDS: Well --

25 COMMISSIONER GAZIANO: That as soon as

1 Commissioner Yaki's presence or lack thereof would
2 deny us a quorum, he leaves.

3 CHAIRMAN REYNOLDS: Well, it is well
4 within his right to engage in these type of tactics,
5 but it is also perfectly clear that it has a corrosive
6 effect on our relationship. And there are moments
7 where he would like the support for certain things
8 that he is doing. And these types of tactics do not
9 help his cause.

10 In any event --

11 COMMISSIONER GAZIANO: We can't, I
12 suppose, vote on any further minutes, but do you think
13 we can continue the discussion if other commissioners
14 can stay on at least of the program planning for the
15 sex discrimination?

16 CHAIRMAN REYNOLDS: That is correct. We
17 will finish up the minutes at a later date since that
18 requires a vote.

19 IV. PROGRAM PLANNING (Continued)

20 - UPDATE ON FY 2010 PROJECT ON SEX DISCRIMINATION
21 IN HIGHER EDUCATION ADMISSIONS

22 CHAIRMAN REYNOLDS: Mr. Staff Director,
23 would you please provide an update on the 2010 project
24 on sex discrimination in higher education admissions?

25 STAFF DIRECTOR DANNENFELSER: Thank you,

1 Mr. Chairman.

2 Last evening I sent around a list that was
3 prepared by Dr. Lerner regarding a sample of colleges
4 and universities within a 100-mile radius of the
5 Commission headquarters that we could seek information
6 from, also a broader list of the colleges and
7 universities from which that sample was drawn.

8 I would like to at this point ask Dr.
9 Lerner to elaborate on his methodology in choosing
10 that sample and also about where he stands with
11 gathering this information.

12 DR. LERNER: Thank you, Mr. Chairman, Mr.
13 Staff Director. This is Robert Lerner.

14 Basically so I think the samples are --

15 COMMISSIONER HERIOT: We can't hear you.

16 STAFF DIRECTOR DANNENFELSER: Can't hear.

17 DR. LERNER: Sorry. I will try and do
18 this a little louder. Basically there are two
19 strategies one can use -- is that better?

20 COMMISSIONER HERIOT: Yes.

21 DR. LERNER: Okay.

22 -- in selecting a sample. One is what I
23 call a sampling strategy of discovery, which is to
24 look for schools that might have some likelihood of
25 discriminating against women admissions.

1 In effect, this is what we have done. And
2 there are some reasons to do that. First of all, that
3 was the procedure outlined in the concept paper as we
4 interpreted it.

5 And, second of all, it was also our own
6 initial thought about the best way to proceed. It
7 wasn't immediately obvious, for example, that all
8 institutions discriminate in their admissions policies
9 against women. So we want to try to see if we can
10 find someone. Some actually will do so obviously. Of
11 course, we don't know which ones until we actually get
12 the data.

13 In any event, this is really a sampling
14 strategy of discovery used in response to the
15 question, can we find anything here at all? As I
16 said, samples are the things that the Staff Director
17 -- pieces of information that the Staff Director and
18 staff -- that include the list of schools from which
19 we sample and the actual sampling that we did
20 yesterday of the schools that we would like to go on
21 and subpoena.

22 The second strategy, very briefly, is one
23 of inference. This is where you think you have a
24 reasonable hypothesis as to what types of schools are
25 doing what in terms of actually discriminating and to

1 formally test that hypothesis.

2 For example, you might have a hypothesis
3 that public schools are less likely to discriminate
4 against women in private schools, or that less
5 selective schools are likely to discriminate, and so
6 on.

7 What this sampling strategy would do is
8 require, to use the technical, stratification, because
9 schools of each type would be explicitly included in
10 the design.

11 Without going into great detail, we
12 decided not to do this because our reading of the
13 original intent was, in fact, that we should pick
14 those schools as a matter for discovery, schools that
15 we thought were most likely to discriminate. And
16 that's why the simplest way to do that is to follow
17 the strategy, as I said, of discovery. So this is
18 what we did.

19 Now, perhaps in selecting the sample,
20 there are essentially two parts. The first part is to
21 have the Staff Director indicate the design, list the
22 schools from which the selection will be made. The
23 second part is to actually select the schools.

24 The design, this is the list. It is sort
25 of an unusual list sustained by the fact that, of

1 course, we planned on institutions that are four-year
2 and it contained four-year undergraduate colleges or
3 are four-year undergraduate colleges. I mean, there
4 are institutions that have to be located within our
5 subpoena range. Of course, that is within 100 miles
6 of the Commission's headquarters. This is a little
7 bit tricky.

8 We were able to determine this by
9 measuring the distance from our Zip Code to the
10 institutions' Zip Codes using a device on the
11 Department of Education's website called the College
12 Navigator database, which gave us an initial list of
13 institutions.

14 From this list, we -- this is a very large
15 list. So from this list, we came up with the main
16 institutions that we believed would be unsuitable for
17 the project.

18 The first five institutions that we
19 eliminated were those that were listed Peterson's
20 Guide to Colleges, which, incidentally, our basic
21 source for school selectivity that were in a sense
22 noncompetitive. If school colleges are out of --
23 essentially based on the admissions policies, we don't
24 want them.

25 Second, we eliminated all religious

1 seminaries. When I say, "seminaries," I mean
2 specifically institutions that are designed to train
3 clergy, like seminaries for priests or for Orthodox
4 rabbis. We do not mean religious schools governed by
5 a religious group these are included in the sample
6 list. If you can't speak to us, we have included them.

7 Third, we eliminated all institutions that
8 enroll under 1,000 students. The thought here is
9 simply that if you're talking about 250 students per
10 class and 125 students. How will you do this?

11 You also wind up pretty much eliminating
12 the last category of schools, which are private,
13 for-profit institutions, which there are quite a few
14 in the area. Most of them are nonselective or
15 minimally selective. All of them are very small.

16 And this gave us the list of institutions
17 from which we made the selection. That was the Excel
18 charts, the one without lines in it and the one that
19 we sent you last night.

20 Now, how do we select the schools? Here
21 we follow again the strategy that was outlined in the
22 concept paper. We cite the selected schools within
23 the following categories: HBCUs since that was
24 mentioned; private, non-religious, moderately
25 selective colleges since that was specifically

1 mentioned; public moderately selective colleges;
2 private moderately selective religious institutions;
3 and, finally, last but not least, highly selective
4 private institutions. That gave us five categories.
5 We draw these institutions from this list that you
6 have in front of you.

7 Basically, we selected the individual
8 schools that you see in front of us. We decided we
9 couldn't have a category for simply one institution.
10 So we take the two private HBCUs and selected two
11 public ones to go along with it given what I listed
12 before.

13 We selected, of course, all the three most
14 highly selective, private schools that were on the
15 initial sampling list. Those are listed again in the
16 categories.

17 We selected four public schools. And
18 those we got from the larger list, a list of those
19 schools on a random basis for non-religious private
20 schools, also on a random basis; and, last but not
21 least, the private religious schools.

22 As I said, those that were not
23 specifically were all done on a random basis before
24 bias or selectivity using SPSS statistical software
25 which actually produces a random selection. And that

1 is how we wound up with the sample.

2 I just have it in my oral summary. I do
3 have it, but I wasn't able to finish it in time to
4 send it. So you can actually contemplate that as you
5 are going to the lists.

6 CHAIRMAN REYNOLDS: Okay. Questions,
7 comments?

8 COMMISSIONER HERIOT: Yes. I have a
9 question. Why was the University of Richmond not
10 selected given that it is the school that public
11 accusations have been made about?

12 DR. LERNER: Only because the strategy
13 that we have adopted adding institutions for
14 categories. We just take them at random. And if it
15 would show up, we selected it. And it turned out that
16 Catholic University did show up. So they picked them.

17 It doesn't mean we couldn't edit. It
18 would be perfectly reasonable to do so.

19 COMMISSIONER HERIOT: Yes, I would be
20 inclined to add the University of Richmond since it is
21 the institution that has been publicly accused of
22 this.

23 DR. LERNER: Well, once they do that --
24 and, as I said, it is perfectly legitimate to do so.
25 But that is what we are acknowledging that we are

1 doing. That I think will be --

2 COMMISSIONER HERIOT: Oh, yes, yes. I
3 mean, that is why I want to do it.

4 DR. LERNER: From a technical point of
5 view, I have a problem with that. There was no
6 conspiracy. It just happened to be the way
7 randomization turned out. I thought in general
8 randomization was a good way to deal with it because
9 it would reduced bias. But I think it is perfect
10 reasonable to make the suggestions you did.

11 Given that our approach is what I call a
12 sampling strategy of discovery and suggested enough
13 information about those particular institutions. So I
14 am perfectly agreeable to doing what you suggest.

15 COMMISSIONER HERIOT: Okay. Then I would
16 move to do that if we had a quorum. Do we need to
17 move to do that or is that something that just can
18 done informally.

19 CHAIRMAN REYNOLDS: We didn't vote on the
20 original battle plan that Dr. Lerner just described.
21 So I don't believe that we need a vote to change as
22 long as there are no objections.

23 COMMISSIONER HERIOT: Yes. If we could
24 entertain a motion to delete them next time?

25 CHAIRMAN REYNOLDS: Yes, yes. I mean, it

1 --

2 COMMISSIONER HERIOT: I doubt anyone will
3 have any strong feelings.

4 COMMISSIONER GAZIANO: Sure. For what it
5 is worth, I second Gail's reasoning, including
6 University of Richmond.

7 CHAIRMAN REYNOLDS: Any other questions or
8 comments?

9 STAFF DIRECTOR DANNENFELSER: This is the
10 Staff Director. The concept paper spoke to private
11 HBCUs. And we only found two private HBCUs that were
12 in this 100-mile radius. So we took those two and
13 then did a random selection on the -- I believe there
14 were six public HBCUs. And we did a random selection
15 and got two more of those.

16 So I just wanted to get a sense of whether
17 that is something that the commissioners think is a
18 good way to go.

19 COMMISSIONER HERIOT: That sounds fine to
20 me.

21 STAFF DIRECTOR DANNENFELSER: And then
22 with the elite institutions, the highly selective,
23 there were only three. There were exactly three,
24 which were Johns Hopkins, Georgetown, and Gettysburg
25 College. So we just took those three.

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CHAIRMAN REYNOLDS: Okay. If there are no other questions, we will adjourn. Thank you.

(Whereupon, the foregoing matter was concluded at 12:28 p.m.)

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