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U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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FRIDAY, OCTOBER 21, 2011

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The Commission convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C., at 9:30 a.m., Martin R. Castro, Chairperson, presiding.

PRESENT:

- MARTIN R. CASTRO, Chairperson
- ABIGAIL THERNSTROM, Vice Chairperson
- ROBERTA ACHTENBERG, Commissioner
- TODD F. GAZIANO, Commissioner
- GAIL L. HERIOT, Commissioner
- PETER N. KIRSANOW, Commissioner (via telephone)
- DAVID KLADNEY, Commissioner
- MICHAEL YAKI, Commissioner

KIMBERLY TOLHURST, Delegated the Authority of the Staff Director

STAFF PRESENT:

- CHRISTOPHER BYRNES, Senior Attorney-Advisor to the Office of the Staff Director
- PAMELA A. DUNSTON, Chief, ASCD
- LATRICE FOSHEE
- TINALOUISE MARTIN, Director, OM
- TORRANCE MONTGOMERY
- LENORE OSTROWSKY, Acting Chief, PAU
- MICHELE RAMEY
- JOHN RATCLIFFE, Chief, Budget
- DAVID SNYDER
- VANESSA WILLIAMSON
- AUDREY WRIGHT

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COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN
ALEC DEULL (via telephone)
TIM FAY
DOMINIQUE LUDVIGSON
JOHN MARTIN
MARLENE SALLO
ALISON SOMIN

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

(9:31 a.m.)

CHAIRPERSON CASTRO: The meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. It is now 9:31 a.m. Eastern Time, on October 21st.

This meeting is taking place at the Commission's headquarters at 624 9th Street, Northwest, in Washington, D.C.

I am Chairman Marty Castro. Commissioners who are present are myself, Vice Chair Thernstrom, Commissioner Heriot, Commissioner Gaziano, Commissioner Kladney, Commissioner Achtenberg, Commissioner Yaki, and, by phone, Commissioner Kirsanow. Is that right, Commissioner Kirsanow? Are you on the phone?

COMMISSIONER KIRSANOW: I am.

CHAIRPERSON CASTRO: Okay.

COMMISSIONER KIRSANOW: Actually, I am a little bit adjacent to the phone.

(Laughter.)

CHAIRPERSON CASTRO: Okay. That was very funny.

(Laughter.)

I didn't realize Klingons had such a great

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1 sense of humor.

2 (Laughter.)

3 A quorum of the Commission is present. Is
4 the person delegated the authority of Staff Director
5 present? Is the Court Reporter present?

6 THE COURT REPORTER: Yes.

7 CHAIRPERSON CASTRO: Okay. The meeting
8 shall now come to order.

9 **I. APPROVAL OF AGENDA**

10 CHAIRPERSON CASTRO: The first item is the
11 approval of the agenda. Is there a second?

12 COMMISSIONER ACHTENBERG: Second.

13 CHAIRPERSON CASTRO: Okay. Do we have any
14 amendments, proposed amendments to the agenda?

15 (No response.)

16 Seeing none, we have a motion to approve
17 the agenda that has been seconded. Do I have a -- all
18 those in favor of support of that say aye.

19 (Chorus of ayes.)

20 All those against?

21 (No response.)

22 Any abstentions?

23 (No response.)

24 Okay. It passes unanimously.

25 **II. APPROVAL OF THE SEPTEMBER 9, 2011,**

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MEETING MINUTES

CHAIRPERSON CASTRO: Next on the item is the approval of the September 9th meeting minutes. Is there a motion, or is there a second on that motion?

COMMISSIONER KLADNEY: I second.

CHAIRPERSON CASTRO: Okay. Any discussion? Any proposed changes?

(No response.)

Okay. If not, all those in favor of approving the minutes of the September 9th meeting say aye.

(Chorus of ayes.)

Any opposed?

(No response.)

Any abstentions?

(No response.)

Okay.

COMMISSIONER HERIOT: I abstained on the ground that I can't remember whether my Special Assistant told me to vote yes or no.

CHAIRPERSON CASTRO: Okay. She's not here to tell you?

COMMISSIONER HERIOT: Not here.

CHAIRPERSON CASTRO: Okay.

COMMISSIONER HERIOT: I think she said to

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1 vote yes, so that's the abstention that was close to a
2 yes.

3 CHAIRPERSON CASTRO: Okay. That's good
4 enough. If you need to change your vote, let us know.
5 Would not want you to get in trouble on anything.

6 (Laughter.)

7 VICE CHAIR THERNSTROM: We wouldn't want
8 you to take any risky moves either.

9 **III. STATEMENT ON THE PASSING OF**
10 **REV. SHUTTLESWORTH AND PROFESSOR DERRICK BELL**

11 CHAIRPERSON CASTRO: Before we get into
12 the body of the meeting, I just want to make a
13 statement on the passing of two civil rights leaders,
14 Reverend Shuttlesworth and Professor Derrick Bell.
15 The civil rights community suffered two losses this
16 month by the passing of those two great men.

17 Reverend Shuttlesworth passed away on
18 October 5th at the age of 89. He was an outspoken and
19 courageous leader in the civil rights movement who
20 survived beatings, dozens of arrests, and bombings.
21 His courage often placed him in harm's way, yet he
22 consistently strove to end segregation through non-
23 violent means. He was often at the forefront of major
24 milestones in the civil rights movement.

25 He was admired by Reverend Martin Luther

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1 King, who referred to him as one of the courageous
2 freedom fighters. His desire to achieve equality for
3 all people will never be forgotten and remains rooted
4 in the work we do here at the U.S. Commission on Civil
5 Rights.

6 Professor Derrick Bell was a legal scholar
7 who sought to expose racism through his books and
8 articles. He passed away on October 6, 2011, at the
9 age of 80. Professor Bell was the first tenured black
10 professor at Harvard Law School, and also the first
11 black dean at the University of Oregon School of Law.

12 He was a man of strong convictions.
13 Indeed, his scholarly writings -- Professor Bell
14 really adapted a narrative technique that provided
15 women, Latinos, and gay scholars a new way of
16 introducing their experiences into the legal
17 discourse.

18 He was the father of the formation of
19 illegal critical race theory and wrote a book entitled
20 Race, Racism, and American Law -- a book that is still
21 used by many law schools today. Through his writings
22 and lectures, Professor Bell taught his students about
23 confronting authority and standing up for the
24 principles that you have in a very non-violent manner.

25 Both men will be missed greatly, but their

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1 legacy will live on.

2 **IV. PROGRAM PLANNING UPDATE**
3 **AND DISCUSSION OF PROJECTS**

4 CHAIRPERSON CASTRO: We now move on to the
5 program planning, a report from our Acting Staff
6 Director.

7 ACTING STAFF DIRECTOR TOLHURST: Actually,
8 it's the approval of school --

9 CHAIRPERSON CASTRO: Oh, I apologize for
10 that. So as you know, we have the school discipline
11 report up. We are only going to take a look at Part A
12 this time. We have findings and recs that we will
13 take a look at at the November meeting.

14 There were some Democratic findings and
15 recs on this that we also want to tighten up as well,
16 but today we are only going to vote on the body of the
17 report for Part A. So I move that Part A of the
18 report be approved. Do we have a second?

19 VICE CHAIR THERNSTROM: Second.

20 CHAIRPERSON CASTRO: Is there any
21 discussion?

22 (No response.)

23 Hearing none, I will call the question.
24 Vice Chair Thernstrom, how do you vote?

25 VICE CHAIR THERNSTROM: Yes.

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1 CHAIRPERSON CASTRO: Commissioner

2 Kirsanow, how do you vote?

3 COMMISSIONER KIRSANOW: Yes.

4 CHAIRPERSON CASTRO: Commissioner Heriot,
5 how do you vote?

6 COMMISSIONER HERIOT: Yes.

7 CHAIRPERSON CASTRO: Commissioner Gaziano,
8 how do you vote?

9 COMMISSIONER GAZIANO: Just a
10 clarification.

11 CHAIRPERSON CASTRO: Sure.

12 COMMISSIONER GAZIANO: This is as
13 corrected by the Staff Director in her message earlier
14 this week?

15 CHAIRPERSON CASTRO: Yes.

16 COMMISSIONER GAZIANO: Okay. Yes.

17 CHAIRPERSON CASTRO: With those changes.
18 Commissioner Yaki, how do you vote?

19 COMMISSIONER YAKI: Yes.

20 CHAIRPERSON CASTRO: Commissioner
21 Achtenberg, how do you vote?

22 COMMISSIONER ACHTENBERG: Yes.

23 CHAIRPERSON CASTRO: Commissioner Kladney,
24 how do you vote?

25 COMMISSIONER KLADNEY: Yes.

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1 CHAIRPERSON CASTRO: And I also vote to
2 approve, so the motion passes unanimously. As I said,
3 we will bring up findings and recs. Do we have a date
4 by which we want folks to circulate those, Madam Staff
5 Director?

6 ACTING STAFF DIRECTOR TOLHURST: Two weeks
7 before the November meeting.

8 CHAIRPERSON CASTRO: Okay. So whatever
9 the -- what is that date, do we have a date on that?
10 So we will send the exact date around, but it will be
11 two weeks before the November meeting. And as I said,
12 we will probably tighten up some of the Democratic
13 findings and recs as well, and we will send those
14 around.

15 I do want to let folks know that I would
16 like to bring up at the next meeting a discussion on
17 either a page limitation or a word count limitation on
18 statements, dissents, and rebuttals. I think, you
19 know, looking at the last report we had a whole lot of
20 additional information beyond the report, and I
21 certainly want to make sure we all still have the
22 right to have our statements and rebuttals and
23 surrebuttals, but I think we also should provide some
24 regulation in the length of those rebuttals and
25 surrebuttals.

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1 So I would be pleased to have, you know,
2 some compromise ideas circulated among the
3 Commissioners before the next meeting, and at the next
4 meeting have a proposal that we could discuss on that
5 topic. Also --

6 VICE CHAIR THERNSTROM: Are you going to
7 make a concrete proposal?

8 CHAIRPERSON CASTRO: I would plan to, but
9 I would like to get input from the other Commissioners
10 before I would put forward something, to see if we can
11 find, you know, some common ground on that. If not,
12 we will put something forward that the Commission can
13 discuss as a whole and vote on, up or down, as they
14 see fit.

15 COMMISSIONER GAZIANO: Since we don't have
16 much of an opportunity to talk collectively to each
17 other, I just want to say, certainly, we are always
18 open to a discussion, but I think that it is a serious
19 concern if you are just talking about word length.
20 There are certain, you know, discussions about
21 incorporating attachments, which we can clarify --

22 CHAIRPERSON CASTRO: Absolutely.

23 COMMISSIONER GAZIANO: -- appropriate, but
24 just a word length I --

25 CHAIRPERSON CASTRO: Well, that's why I

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1 said page count or word length. I'm not sure --

2 COMMISSIONER GAZIANO: Well, either.

3 Anything that --

4 COMMISSIONER HERIOT: Yes, this will be a
5 serious issue.

6 CHAIRPERSON CASTRO: Well, and that's why
7 I'm letting you know now that we are going to bring it
8 up in November as opposed to just sort of surprising
9 you with it. Okay?

10 COMMISSIONER GAZIANO: That part is good.
11 But the thrust of the length is a serious concern.

12 CHAIRPERSON CASTRO: And we will discuss
13 it. I just want you to know that that's -- as we are
14 looking at the school discipline report, once we
15 approve some findings and recs, I want to have some
16 halfway on -- in my view, a need for some limitation
17 on the addenda that we are going to attach. But we
18 will discuss it.

19 VICE CHAIR THERNSTROM: So you are going
20 to give us as well two weeks to think about what you
21 propose?

22 CHAIRPERSON CASTRO: Sure, absolutely, in
23 advance of the November meeting.

24 VICE CHAIR THERNSTROM: Yes.

25 CHAIRPERSON CASTRO: Yes.

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1 VICE CHAIR THERNSTROM: Yes.

2 CHAIRPERSON CASTRO: If folks have --
3 exactly -- a proposal they want to take a look at,
4 whatever it is that we propose, we will send out in
5 advance of the meeting. I won't come to a meeting and
6 say, "Here is what I'm proposing" and show it to you
7 for the first time. Absolutely not. It will be
8 circulated before. If we can't come up with something
9 that we all agree on, then I will certainly send
10 something that I think would be -- maybe like a 9-9-9
11 plan or something.

12 (Laughter.)

13 VICE CHAIR THERNSTROM: Nine days to come
14 up with nine --

15 (Laughter.)

16 CHAIRPERSON CASTRO: We can discuss that.

17 VICE CHAIR THERNSTROM: I'm for the nine
18 words.

19 CHAIRPERSON CASTRO: You know, it's the
20 idea of just some sort of a regulation on the addenda,
21 so that it doesn't end up outweighing the actual
22 report.

23 I also want to remind you we were going to
24 take up, I think at the September meeting, the
25 additional concept papers we did, and so at the

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1 November meeting we will bring up the concept papers.

2 We already approved two for the fiscal year '12, as
3 you know, voting rights, as their statutory and sex
4 trafficking, as a form of gender discrimination.

5 We had some from the fellow Commissioners
6 who had raised their ideas. And also, I have revised
7 and will circulate my immigration paper, and I know
8 Commissioner Yaki has something. So we will have
9 those circulated two weeks before the next meeting, so
10 that we can have them discussed at the November
11 meeting.

12 Now we move on.

13 COMMISSIONER KLADNEY: Which concept
14 papers, just your two?

15 CHAIRPERSON CASTRO: Yes. Well, we
16 already have some concept papers that our colleagues
17 had circulated before that we put off a vote on. This
18 might have been before you guys --

19 COMMISSIONER ACHTENBERG: Maybe they
20 should be recirculated.

21 CHAIRPERSON CASTRO: They will be -- we
22 will recirculate those as well.

23 COMMISSIONER GAZIANO: I suppose if
24 someone wants to update/amend --

25 CHAIRPERSON CASTRO: Absolutely.

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1 COMMISSIONER GAZIANO: -- that's fine.

2 CHAIRPERSON CASTRO: Absolutely.

3 Absolutely.

4 COMMISSIONER KLADNEY: So is someone going
5 to send those to me?

6 CHAIRPERSON CASTRO: Yes, they will be
7 circulated to all Commissioners in advance of the next
8 meeting.

9 Now we move on to the approval of the
10 scope of discovery plan for the VRA report.
11 Commissioner -- I mean, Acting Staff Director
12 Tolhurst?

13 ACTING STAFF DIRECTOR TOLHURST: Sure. I
14 just -- and I sent something out yesterday via email
15 on this. At the previous meeting and improving the
16 discovery plan, the Commissioners instructed OGC to
17 add a line stating that, in addition to DOJ, we would
18 seek discovery from a sampling of covered
19 jurisdictions.

20 That was left somewhat vague, and so as we
21 are now doing the research into the jurisdictions and
22 starting to think about what our discovery will look
23 like, I wanted to have a conversation clarifying now
24 exactly sort of how many states, what sort of depths,
25 so that expectations are aligned before we start,

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1 rather than having people be disappointed when they
2 see where we're gone.

3 So I put forth a proposal to start the
4 conversation last night about what we might do
5 considering our capacity, and what makes sense for
6 following the concept paper. One proposal I had was
7 that we seek discovery from the nine states that are
8 fully covered by Section 5. A hitch in that is that
9 some of them, probably Mississippi and Virginia, will
10 not file and/or will not file in time for this paper.

11 So another -- an alternative would be that
12 we look at those states and also the partially covered
13 states.

14 COMMISSIONER HERIOT: Kim, can I interrupt
15 for just a minute? How do we know that Virginia and
16 the other state you mentioned -- Mississippi --

17 ACTING STAFF DIRECTOR TOLHURST:
18 Mississippi -- well, Mississippi, we were meeting with
19 the Senator yesterday, and they told us that they have
20 reached an impasse in their state, and are going to
21 put it off for a year. In Virginia, it's a divided
22 legislature politically. They can't get it together.

23 And so I think they are going to ask a federal judge
24 to help them draw their lines, rather than -- which
25 they are just now starting.

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1 COMMISSIONER HERIOT: How do we know that?

2 Is that something you heard from --

3 ACTING STAFF DIRECTOR TOLHURST: It's from
4 Research.

5 COMMISSIONER HERIOT: Okay.

6 ACTING STAFF DIRECTOR TOLHURST: You can
7 Google it and find it.

8 CHAIRPERSON CASTRO: Vice Chair
9 Thernstrom?

10 VICE CHAIR THERNSTROM: I do not think
11 that because they have not got a package upon which
12 the state has already agreed that we have nothing to
13 say about Virginia and Mississippi. There may be an
14 extremely interesting story there about what the
15 conflicts are, what -- you know, what exactly the
16 different maps that have been proposed look like, and
17 what the objections are.

18 And so I don't think we should write off
19 those two states --

20 ACTING STAFF DIRECTOR TOLHURST: Oh, no, I
21 don't think --

22 VICE CHAIR THERNSTROM: -- simply because
23 they don't have finished products.

24 ACTING STAFF DIRECTOR TOLHURST: I agree.
25 I'm suggesting, though, if there end up being a

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1 number of states that haven't filed by the time we
2 need to issue discovery, we might want to expand to
3 some of the partially covered states who have filed,
4 just to make sure we are getting more information.

5 CHAIRPERSON CASTRO: Commissioner Gaziano?

6 COMMISSIONER GAZIANO: Yes, I was going to
7 make a similar point to what Vice Chair Thernstrom
8 made. It may be more interesting if -- to find out
9 the states that couldn't agree early.

10 Now, when you're proposing interrogatories
11 -- and that was another I think issue -- I do think we
12 should just proceed as normal civil litigants do.
13 It's even more important for this agency just to
14 proceed through interrogatories. If there is an
15 interrogatory or two that they have to pass on, then
16 they can supplement their response later.

17 It is also the case, I suppose, that as
18 long as we in the Commission, and you in the staff,
19 are receiving the great majority of responses in a
20 timely manner, it probably wouldn't hurt us if some
21 come in in January or February or supplemented or
22 changed. We want this to be workable.

23 As far as the partially covered
24 jurisdiction, I don't know whether the practice is
25 actually required by law, but my understanding of the

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1 practice is is that states that are partially covered
2 still have to submit to -- for approval, but that the
3 DOJ and/or the relevant court can only object to the
4 effect on the covered jurisdiction. That might be
5 interesting, too.

6 So I think that might be an additional
7 reason to actually include some of the partially
8 covered jurisdiction. Effectively, the approving
9 entity, whether DOJ or the court, can effect the rest
10 of the state if you are -- especially if you are
11 talking about a congressional delegation, by objecting
12 to the districts that are -- that include some of the
13 covered jurisdictions. So --

14 ACTING STAFF DIRECTOR TOLHURST: So I
15 think as a capacity matter, we were hoping to select
16 10 states. So the question could be: would you like
17 us to do a mix of fully covered, partially covered,
18 and then states that didn't file? How would you like
19 us to select those states?

20 VICE CHAIR THERNSTROM: The answer so
21 depends on what --

22 ACTING STAFF DIRECTOR TOLHURST: Well,
23 what happened.

24 VICE CHAIR THERNSTROM: Yes. You are
25 likely -- what the story is in these individual

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1 states, having some hint of the richness of the
2 material that you are likely to end up with.

3 And by the way, just as a kind of
4 postscript to what Commissioner Gaziano was saying,
5 these states have every incentive to work fast. These
6 -- I mean, Virginia and Mississippi can't hold
7 elections with it until they have got maps that have
8 been pre-cleared. So I don't expect them to drag this
9 out forever.

10 CHAIRPERSON CASTRO: Commissioner Kladney?

11 COMMISSIONER KLADNEY: I don't know.
12 Nevada is not a covered state where I'm from, but we
13 have a very interesting thing where Congress --

14 VICE CHAIR THERNSTROM: Yes, you do.

15 COMMISSIONER KLADNEY: -- the legislature
16 didn't meet, and so they brought it to court. The
17 District Judge who is hearing the case is the son of a
18 former Republican governor, and he is a very fair
19 fellow. And he set up three masters to draft maps,
20 and they're in the process of doing that, and people
21 are running for Congress without districts.

22 VICE CHAIR THERNSTROM: Yes.

23 COMMISSIONER KLADNEY: So --

24 VICE CHAIR THERNSTROM: That's exactly --
25 the chair that we're sitting in there, this happens.

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1 That's exactly why this is not going to be dragged out
2 forever. And then, the -- I mean, the Nevada story is
3 extremely interesting. I have been following it a
4 bit. But, unfortunately, it's Section 2, not
5 Section 5.

6 CHAIRPERSON CASTRO: Commissioner Heriot?

7 COMMISSIONER HERIOT: I just wanted to
8 comment on the issue of interrogatories versus more
9 informal methods of getting information. And I would
10 think, just as standard practice for these enforcement
11 reports, we should always go for the more formal,
12 because we've got a deadline for this report. So we
13 can't pussyfoot around. As it turns out, we get lack
14 of cooperation. We've got to be, you know, ready to
15 push hard. And it's much easier to do that if we have
16 used the more formal methods.

17 I think sometimes we may have briefing
18 reports where we are not on any particularly tight
19 schedule, and we think that it might be easier on
20 everybody to use more informal methods. But I think
21 we should err on the side of formality when we are
22 talking about an enforcement report.

23 COMMISSIONER GAZIANO: It's also the case
24 if we're -- if we're sending them to private parties,
25 we might want to be more informal. A government

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1 entity ought to be responsive to the Commission on
2 Civil Rights.

3 COMMISSIONER HERIOT: And they -- I don't
4 think they are going to take offense. And if they do,
5 that's too bad.

6 COMMISSIONER KLADNEY: Will we be also --
7 do we need a request for production of documents?

8 ACTING STAFF DIRECTOR TOLHURST: Yes. I
9 don't -- I think most of the documents are going to be
10 public in this situation, but we will certainly ask
11 for those that are not available publicly. So we
12 still need an answer on how we are going to identify
13 the states, and then I had a secondary question of,
14 once we have a set of states, what I would call the
15 depth of where we are going. So I proposed we would
16 go to this congressional, and then the house and
17 Senate, for the states.

18 CHAIRPERSON CASTRO: States. Vice Chair,
19 and then Commissioner Gaziano.

20 VICE CHAIR THERNSTROM: I would start with
21 the covered states. I think that's the place to
22 start, and then let's -- you know, let's put one foot
23 in front of another here. Then, maybe we need to go
24 to the partially covered states in order to have a
25 report that is interesting. And, indeed, I think this

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1 report may get some attention, and really bring to the
2 public and to the political community information they
3 don't have.

4 CHAIRPERSON CASTRO: Commissioner Gaziano?

5 COMMISSIONER GAZIANO: The only thing I
6 would add is -- Vice Chair Thernstrom can tell me
7 whether all of these states are fully covered or
8 partially covered. I would want some partially
9 covered, but I would also look at the states where
10 there has been a lot of litigation, particularly
11 Supreme Court litigation in the past.

12 There is probably going to be for various
13 reasons. And those states, from my recollection, are
14 Georgia, North Carolina, Texas. Those are the main
15 three. Other --

16 VICE CHAIR THERNSTROM: That's right.

17 COMMISSIONER GAZIANO: And then, I would
18 want to include, what are some of the partially
19 covered states?

20 ACTING STAFF DIRECTOR TOLHURST: North
21 Carolina is one of the partially covered. That's the
22 one that actually --

23 COMMISSIONER GAZIANO: And Georgia is
24 fully covered, isn't it?

25 ACTING STAFF DIRECTOR TOLHURST: I think

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1 we might want to include the partially covered.

2 COMMISSIONER GAZIANO: Is Georgia fully
3 covered? Georgia probably is --

4 ACTING STAFF DIRECTOR TOLHURST: Yes,
5 after Texas.

6 COMMISSIONER GAZIANO: Yes.

7 VICE CHAIR THERNSTROM: Now, this list --
8 but a story in Florida right now by the districting,
9 that's partially covered. You know, whatever.

10 COMMISSIONER HERIOT: Kim, how many fully
11 covered states are there?

12 ACTING STAFF DIRECTOR TOLHURST: Nine.

13 CHAIRPERSON CASTRO: So do you have a
14 specific motion, just to --

15 ACTING STAFF DIRECTOR TOLHURST: No. I
16 just --

17 CHAIRPERSON CASTRO: Do we need a motion
18 on this or is this --

19 ACTING STAFF DIRECTOR TOLHURST: We need
20 something. It could be a motion or it could be just
21 an understanding. We need to have the states
22 identified, so that we can start doing the background
23 research to issue really intelligent discovery.

24 CHAIRPERSON CASTRO: Commissioner
25 Achtenberg, and then Commissioner Kladney, please.

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1 COMMISSIONER ACHTENBERG: Well, on the
2 issue of the depth, is there any -- I am at least
3 tentatively supportive of the notion that it should be
4 as Ms. Tolhurst recommended. Is there any resistance
5 to that? And, if so, what's the nature of the
6 resistance?

7 COMMISSIONER KLADNEY: Well, I understood
8 Ms. Tolhurst to talk about covered states, and then I
9 heard Commissioner Gaziano talk about he wants
10 partially covered states. And then, I heard three
11 states. So --

12 COMMISSIONER GAZIANO: Well, no. I was
13 just saying that they should -- if we are limiting to
14 10, I just sort of -- I'm not sure that it magically
15 has to be 10, whether it's 11. I'm just saying of the
16 10 or 11.

17 CHAIRPERSON CASTRO: Vice Chair, and then
18 Commissioner Heriot.

19 VICE CHAIR THERNSTROM: Let us start with
20 the covered states, and I think Commissioner Gaziano
21 is absolutely right in pointing out that North
22 Carolina has had a lot of litigation. So we are going
23 to take -- maybe we want to add North Carolina. It is
24 only partially covered, but, nevertheless, it is worth
25 looking at.

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1 COMMISSIONER HERIOT: What about Texas?

2 Is that full or --

3 VICE CHAIR THERNSTROM: It's fully
4 covered.

5 CHAIRPERSON CASTRO: Why don't you read
6 the fully covered states out for us, please?

7 ACTING STAFF DIRECTOR TOLHURST: Alabama,
8 Alaska, Arizona, Georgia, Louisiana, Mississippi,
9 South Carolina, Texas, and Virginia.

10 CHAIRPERSON CASTRO: And so we have plus
11 North Carolina?

12 COMMISSIONER HERIOT: Do we want a motion?
13 I'm happy to make a motion?

14 CHAIRPERSON CASTRO: Yes.

15 VICE CHAIR THERNSTROM: Yes.

16 COMMISSIONER HERIOT: I move that we
17 direct the Staff Director, the Acting Staff Director,
18 to look into all of the fully covered states, plus
19 North Carolina. Is that --

20 CHAIRPERSON CASTRO: Is there a second on
21 that?

22 VICE CHAIR THERNSTROM: Yes, I second
23 that.

24 CHAIRPERSON CASTRO: Okay. Any further
25 discussion?

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1 (No response.)

2 Okay. On that motion, we have a motion
3 and a second. Vice Chair, how do you vote?

4 VICE CHAIR THERNSTROM: Yes.

5 CHAIRPERSON CASTRO: Commissioner
6 Kirsanow, how do you vote?

7 COMMISSIONER KIRSANOW: Yes.

8 CHAIRPERSON CASTRO: Commissioner Heriot,
9 how do you vote?

10 COMMISSIONER HERIOT: Yes.

11 CHAIRPERSON CASTRO: Commissioner Gaziano,
12 how do you vote?

13 COMMISSIONER GAZIANO: Yes.

14 CHAIRPERSON CASTRO: Commissioner Yaki?

15 COMMISSIONER YAKI: Yes.

16 CHAIRPERSON CASTRO: Commissioner
17 Achtenberg, how do you vote?

18 COMMISSIONER ACHTENBERG: Yes.

19 CHAIRPERSON CASTRO: Commissioner Kladney,
20 how do you vote?

21 COMMISSIONER KLADNEY: Yes.

22 CHAIRPERSON CASTRO: And I vote in favor,
23 so it is unanimous.

24 ACTING STAFF DIRECTOR TOLHURST: And then,
25 Commissioner Achtenberg had raised a question about my

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1 proposal as to going to the congressional and state
2 house and senate. And I --

3 CHAIRPERSON CASTRO: Okay.

4 ACTING STAFF DIRECTOR TOLHURST: -- I
5 don't know if people disagreed or if you want to have
6 a discussion on that.

7 CHAIRPERSON CASTRO: Why don't we make a
8 motion to that effect.

9 COMMISSIONER ACHTENBERG: Yes, I'll move
10 that.

11 CHAIRPERSON CASTRO: Is there a second to
12 that motion?

13 COMMISSIONER HERIOT: Second.

14 CHAIRPERSON CASTRO: Okay.

15 VICE CHAIR THERNSTROM: I'm sorry. What
16 is the motion?

17 COMMISSIONER GAZIANO: Could you explain
18 the motion?

19 CHAIRPERSON CASTRO: That the depth of it
20 will be congressional, and then state senate and state
21 house.

22 VICE CHAIR THERNSTROM: Well, let's do
23 congressional first and see what we've got, before we
24 go to the state senate and state house. I don't know.
25 I'm going to trust Kim here. I've seen what she's

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1 got and what the -- how robust the information is.

2 CHAIRPERSON CASTRO: Commissioner Gaziano?

3 COMMISSIONER GAZIANO: We can decide I
4 suppose if the data is inadequate that we are not
5 going to try to deal with it. But I think if we do
6 rounds of discovery we are unlikely to -- then we
7 might -- we might actually get some very interesting
8 and -- from many or most of the states. So I would
9 suggest we just ask for it.

10 VICE CHAIR THERNSTROM: Okay.

11 CHAIRPERSON CASTRO: So we have a
12 motion --

13 COMMISSIONER HERIOT: There's a motion on
14 the floor. It has been seconded.

15 CHAIRPERSON CASTRO: Yes, a motion,
16 seconded. All those in favor of making the depth that
17 of congressional, and state senate, and state house,
18 I'll take a roll call vote. Commissioner -- sorry,
19 Vice Chair Thernstrom, how do you vote?

20 VICE CHAIR THERNSTROM: Yes.

21 CHAIRPERSON CASTRO: Commissioner
22 Kirsanow, how do you vote?

23 COMMISSIONER KIRSANOW: Yes.

24 CHAIRPERSON CASTRO: Commissioner Heriot,
25 how do you vote?

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1 COMMISSIONER HERIOT: Yes.

2 CHAIRPERSON CASTRO: Commissioner Gaziano,
3 how do you vote?

4 COMMISSIONER GAZIANO: Yes.

5 CHAIRPERSON CASTRO: Commissioner Yaki,
6 how do you vote?

7 COMMISSIONER YAKI: Yes.

8 CHAIRPERSON CASTRO: Commissioner
9 Achtenberg, how do you vote?

10 COMMISSIONER ACHTENBERG: Yes.

11 CHAIRPERSON CASTRO: Commissioner Kladney,
12 how do you vote?

13 COMMISSIONER KLADNEY: Yes.

14 CHAIRPERSON CASTRO: And I vote in favor.
15 It is unanimous.

16 **V. MANAGEMENT AND OPERATIONS**

17 CHAIRPERSON CASTRO: Okay. We will now
18 move on to the management and operations report, Staff
19 Director's report in particular.

20 ACTING STAFF DIRECTOR TOLHURST: As usual,
21 I am not going to read to you this report of
22 activities, but I will answer any questions that you
23 have. The other, you know, main issue we have been
24 reporting on is the budget, and there is no new news
25 in terms of any new developments for our 2012 or 2013

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1 budgets, while I know many of you have been speaking
2 to people on the Hill about that.

3 CHAIRPERSON CASTRO: It'll probably be
4 resolved, as we thought, in conference, so -- I know
5 there has been bipartisan outreach to educate
6 legislators about it, and I think there is some
7 receptivity to work with us. But it is all going to
8 be driven by what the conference number is, so --

9 VICE CHAIR THERNSTROM: I would just like
10 to commend those who have -- and I know a number of
11 people here have been working to try to bring our case
12 before members of Congress, both Democratic and
13 Republican, and both the House and the Senate. You
14 know, it's very -- it's new and it's heartening to see
15 us really fighting for ourselves here. So I wanted to
16 thank those who have been working.

17 CHAIRPERSON CASTRO: I echo that, and I
18 appreciate everyone's efforts. So thank you.

19 A date here -- I was handed a note that
20 the two-week period before the November 18th meeting
21 is November 4th for the findings and recommendations
22 to be due. And they will be sent to our Acting Staff
23 Director. She will circulate those, along with any
24 revisions to the concept papers. So November 4th.

25 Commissioner Gaziano?

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1 COMMISSIONER GAZIANO: It's education,
2 Vice Chair.

3 CHAIRPERSON CASTRO: That's right.

4 COMMISSIONER GAZIANO: Education. You
5 didn't use an improper word, but someone would --
6 never mind.

7 VICE CHAIR THERNSTROM: Oh, I'm sorry.
8 The sentence I was supposed to say was "to educate the
9 people on the Hill."

10 COMMISSIONER GAZIANO: The Staff Director
11 -- Madam Acting Person with Authority --

12 (Laughter.)

13 -- for all --

14 COMMISSIONER YAKI: Grand Poobah.

15 (Laughter.)

16 COMMISSIONER GAZIANO: On the one-page
17 budget information, I am glad to receive it, but I
18 would like to get your and some of the other
19 Commissioners' input on whether we could get a little
20 bit more detail.

21 Maybe I just didn't read it -- part of it
22 is I maybe didn't read it clear enough, but I also
23 think that if this doesn't show, for example, month-
24 to-month expenditures that we can follow, I am not
25 sure it also has the level of detail that I would

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1 like. I mean, it raises some questions.

2 You know, there are some interesting, you
3 know -- the one that says financial statement audit
4 library service, temporary employment services, at
5 \$222,000, \$150-, headquarters, \$30,000, you know, of
6 that \$222,000, which is for financial statement audit?

7 ACTING STAFF DIRECTOR TOLHURST: Right.

8 COMMISSIONER GAZIANO: Which is for
9 library services? Which is for temporary?

10 We, by the way, may agree and think it's
11 all wonderful. When it's broken down, we may come up
12 with some other idea about hiring a different auditing
13 firm if they're -- you know, or at least we could pose
14 questions. You know, how many hours of work is that,
15 and --

16 ACTING STAFF DIRECTOR TOLHURST: Sure. I
17 understand.

18 COMMISSIONER GAZIANO: -- what does it
19 obtain? I don't know -- how hard is it -- I assume
20 you have month by month ledgers?

21 ACTING STAFF DIRECTOR TOLHURST: I get a
22 monthly report. So part of sending this out was, I
23 mean, at one time Commissioners only got something
24 that looks like this, which is horribly not detailed.

25 So --

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1 COMMISSIONER GAZIANO: Agreed.

2 ACTING STAFF DIRECTOR TOLHURST: -- we
3 have ramped it up to this. We can give out more. I
4 receive something that is incredibly detailed, and
5 somewhat misleading. It is never the correct numbers,
6 so I am little --

7 CHAIRPERSON CASTRO: Explain how it is --

8 COMMISSIONER GAZIANO: I am sort of used
9 to the ledgers that are behind, and I get -- or I've
10 gotten used to them, and I know a little bit how to
11 read them. So you can educate us on --

12 ACTING STAFF DIRECTOR TOLHURST: Well, for
13 example, and particularly this month it was difficult,
14 and it -- starting next month, now that we are in a
15 new fiscal year, it will be a little easier, because
16 the budget folks that would prepare this for us were
17 very busy closing out the year, for example,
18 Commissioners' timesheets who came in at the very end.

19 COMMISSIONER GAZIANO: Guilty.

20 ACTING STAFF DIRECTOR TOLHURST: And so
21 those affect the budget, and so the number here, when
22 I say it's misleading, sometimes those numbers are
23 wrong, because two weeks later we get the bill for
24 three Commissioners' time. And so you will see this
25 and it looks like a small number when it is really

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1 double that. So it's depending on the timing of when
2 things like that come in.

3 But so, you know, we can create an actual
4 -- budgeted versus actual, which I think might -- you
5 might prefer to see. I can tell you -- yes. I mean,
6 why don't I make a hybrid even further between what
7 was sent out but getting closer to this really
8 detailed one and see what you think next month. If
9 that's still not enough detail, we can talk again.

10 COMMISSIONER GAZIANO: I think that that
11 process sounds fine. Other Commissioners?

12 CHAIRPERSON CASTRO: Commissioner Kladney?

13 COMMISSIONER KLADNEY: Are you going to
14 send -- can you send the detailed one, too, so that
15 then we can see exactly what it looks like, and
16 then --

17 ACTING STAFF DIRECTOR TOLHURST: Sure.

18 COMMISSIONER KLADNEY: -- and then maybe
19 decide off of that which items we want to break out?

20 ACTING STAFF DIRECTOR TOLHURST: Yes, I
21 can do that.

22 COMMISSIONER KLADNEY: Just as an idea.

23 ACTING STAFF DIRECTOR TOLHURST: I can do
24 that. I can tell you for the end of this year I know
25 people -- some years hundreds of --

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1 CHAIRPERSON CASTRO: Fiscal year '11?

2 ACTING STAFF DIRECTOR TOLHURST: Yes.
3 Hundreds of thousands of dollars are left and/or there
4 is some kind of spending spree. This year -- and this
5 is always money left. There is often a cushion left
6 in the five digits. Because we -- because of late-
7 coming bills, we always have to leave a cushion, so
8 that we don't become anti-deficient.

9 This year the remainder was \$64,000, which
10 was .7 percent of our obligated budget. So we spent
11 99.3 percent of our budget.

12 COMMISSIONER GAZIANO: And because of the
13 move, were you able to, you know, in the last hour
14 commit back to some --

15 ACTING STAFF DIRECTOR TOLHURST: We did
16 whatever we could, yes.

17 CHAIRPERSON CASTRO: Vice Chair
18 Thernstrom?

19 VICE CHAIR THERNSTROM: Well, now these
20 are obligations, and they are -- let's just say as a
21 preliminary matter I know zilch about budgets. But in
22 any case, on a day it seems to me, in thinking over
23 the long run -- and this is really a question -- you
24 know, don't we have to think about this whole question
25 in the context of a discussion of what the Commission

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1 priorities are going to be? And, I mean, we've got
2 staff vacancies we need to discuss, and is it more
3 important than others, and so forth. And it does seem
4 to me that that is a discussion we need to have before
5 too long.

6 CHAIRPERSON CASTRO: Yes. I mean,
7 ultimately, I think that that is driven by what our
8 bottom-line budget number will be for this fiscal
9 year, which we don't know. And we are not likely to
10 know until some time around Thanksgiving is what we
11 understand. As I said, the ultimate budget number
12 will very likely be decided during the reconciliation
13 process.

14 And once we know that, once we know what
15 our bottom-line dollar number is, then we will be able
16 to determine, based on that, where we are -- what our
17 priorities are going to be. And we will expect a cut.

18 I think every agency may -- you know, is going to
19 expect a cut.

20 Our effort here is to minimize the cut
21 that we are going to receive. And once we know that
22 number, then we will work to have some proposals as to
23 what the priority should be, and we will clearly
24 discuss that. But we just don't know at this point,
25 and --

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1 VICE CHAIR THERNSTROM: So it would not be
2 helpful to you when you go on the Hill to say, "Look,
3 we have had a discussion, and there are priorities we
4 have got with the" --

5 CHAIRPERSON CASTRO: Oh.

6 VICE CHAIR THERNSTROM: -- you know, that
7 we have agreed on that are going to --

8 CHAIRPERSON CASTRO: Yes. Well, here's --
9 yes, here's part of what we have done in the
10 conversations that I know I have had and I know other
11 Commissioners have had to educate our appropriators,
12 is that here is -- here is the 30-something vacancies
13 we have in the organization now. And, by the way, at
14 least six or seven of those are mission-critical,
15 including head of OCRE, et cetera.

16 And as the organization stands now, we've
17 got folks wearing multiple hats in the agency, so that
18 44 FTE number is probably really 30 people. Three or
19 four of them were wearing multiple hats, so anything
20 else beyond that is going to really injure us.

21 And so we just identify the priority being
22 to maintain some of what we've got here and not
23 necessarily saying, "Well, this is the project we are
24 working on," although we do share with them what our
25 approve reports have been, VRA coming up and the human

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1 trafficking, and talk about our efforts to --
2 Commissioner Heriot was wonderful to join me
3 telephonically at a meeting in our efforts to try to,
4 you know, work together cohesively in a bipartisan
5 fashion to reach out and reengerize our SACs and to --
6 so we do talk about specifics.

7 And it has been -- I think it has
8 enlightened the folks, and certainly they understand
9 what our efforts are based on just the lack of the
10 resources that we have had over the years. So -- but,
11 yes, clearly we do need to be able to strategize and
12 prioritize once we do have that bottom-line number,
13 but -- Commissioner Gaziano?

14 COMMISSIONER GAZIANO: Another quick item.
15 Could you update us any more about the search for the
16 OCRE director that I hope is still ongoing?

17 ACTING STAFF DIRECTOR TOLHURST: It's on
18 hold until we get a budget number.

19 COMMISSIONER GAZIANO: Oh, is it? Okay.

20 ACTING STAFF DIRECTOR TOLHURST: Yes.

21 VICE CHAIR THERNSTROM: And the Staff
22 Director position?

23 CHAIRPERSON CASTRO: We have not yet
24 received a nominee, as you all know, and we are still
25 waiting. I know there is a process that is ongoing

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1 still at the White House, and I actually reached out
2 in advance of this meeting and did not hear back,
3 hoping to have some more detailed information to
4 provide. But I don't have anything right now other
5 than --

6 VICE CHAIR THERNSTROM: I've got a
7 bleeding heart over here for Kim.

8 CHAIRPERSON CASTRO: Yes. She is bleeding
9 a lot, so -- and we -- you know, I mean, the White
10 House has been -- we have made clear to them we really
11 need a Staff Director, so -- a periodic call I make
12 every time, not only in advance of this meeting but at
13 other times. So we continue to wait.

14 Any other questions on that?

15 (No response.)

16 Any other questions on Staff Director's
17 report?

18 (No response.)

19 If not, we will move on to a discussion of
20 the proposed use of Commission letterhead and logo.
21 As you know, we had distributed at the last meeting a
22 draft proposed revision to AI 9-1. And I know that
23 there was a suggestion at the last meeting that
24 perhaps there might be some compromise to that. I
25 believe there have been some discussions amongst some

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1 Commissioners. I don't know if folks want to talk
2 about those. I don't know if you all had a thought on
3 that. Commissioner Gaziano?

4 COMMISSIONER GAZIANO: I do. I apologize
5 for not circulating something earlier. But it was I
6 think due in large part to my day job this week that I
7 didn't talk to enough of you to see whether this was
8 viable. This is one alternative, and let me just
9 pause while it's being passed around.

10 (Pause.)

11 I am not necessarily set on this, and I
12 hope we do have consensus on this, because I -- for a
13 variety of reasons, I think every clerk in every
14 agency uses that agency's letterhead, every member of
15 Congress uses their committee or their member of
16 Congress' letterhead.

17 I think that the point that at least I
18 understood was the concern of some Commissioners at
19 the last meeting was that someone might not read a
20 footnote. It might not be prominent enough that we
21 are writing, even if we say in the first sentence --
22 by the way, we looked at some of the letters that
23 minority and majority Commissioners have sent in the
24 past, and I can't -- didn't find a single Commissioner
25 letter that was not sent in some form of letterhead in

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1 the past, which, again, I think is -- just makes
2 common sense.

3 The main feature of this I think to alert
4 the public is that we state in clear and unambiguous
5 terms in the very first sentence that you can't read
6 the letter, get past the first sentence, without
7 seeing that it is both -- if it is not a majority of
8 the Commission, that it is being written in the
9 individual capacities, by whichever number of
10 Commissioners, and then you give the number on the
11 Commission.

12 So anyone can understand that it is a
13 fraction of the Commission and what that fraction of
14 the Commission is. I think that's the -- ought to
15 satisfy everyone's concerns. There is alternatives to
16 indicate -- you know, to make it look kind of like
17 what members of Congress do. I don't think we are
18 strongly wedded to that, at least to the couple of
19 Commissioners I have been able to talk to. So I hope
20 something like this satisfies the concerns of the
21 other Commissioners.

22 CHAIRPERSON CASTRO: I appreciate your
23 suggestion. I personally still don't think it
24 satisfies the concerns. I think it is still a usage
25 of the logo and letterhead. While I appreciate a more

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1 prominent disclaimer, I still think that the
2 opportunity for confusion is still there. And so I
3 don't know if other Commissioners have any thoughts on
4 that.

5 COMMISSIONER GAZIANO: Why is that?

6 CHAIRPERSON CASTRO: Why? You are looking
7 at -- this is the United States Civil Rights
8 Commission, but this is not a, you know, Commission --
9 we are not Commissioners speaking as the majority of
10 the Commission.

11 In their last letter, which, you know, you
12 would argue was prominently disclaimed, still ended up
13 in the media being cast as a statement by the
14 Commission and on a topic which we have not even taken
15 up as a Commission. So my personal view is that while
16 I appreciate the thought put into this, I still don't
17 think it answers the concerns that I have. And I
18 don't know if other Commissioners have thoughts on
19 this proposal, but --

20 COMMISSIONER GAZIANO: If I could respond
21 to that not -- on a matter I brought up before the
22 Commission, the rulemaking that was the subject of
23 that letter was only open for 15 days and would close
24 before the next Commission's meeting. But if we are
25 just sending a -- I could give you the date. Oh, I

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1 wasn't the originator of that letter, but I had our
2 special assistants confirm the facts.

3 Obviously, individual Commissioners, to
4 function, may want to send out correspondence to ask
5 questions, to respond to questions that we receive
6 individually. And it is absolutely unconvincing to me
7 that the practice that every clerk, every employee,
8 every agency had every Commissioner -- every prior
9 Commissioner has used, can't be used, and that this
10 disclaimer is not enough, you can't make people,
11 obviously -- you can't stop any and all conceivable
12 confusion, but I think that the attempt to dissuade us
13 from using any letterhead to me raises more questions
14 than something that is as clear and plain as this.

15 CHAIRPERSON CASTRO: Vice Chair
16 Thernstrom?

17 VICE CHAIR THERNSTROM: What would you
18 like to see, Mr. Chairman, in terms of -- instead of
19 this disclaimer, what would you like to see? I mean,
20 my starting view is if a reporter can get something
21 wrong, can -- if a door is open to -- the door of
22 opportunity is open to distortion, misreading,
23 whatever, reporters will walk through it.

24 I mean, I -- in the last month or so I
25 have seen a number of articles in which I am referred

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1 to as one of the left members of this Commission. I
2 mean, these reporters are -- you know, they are just
3 -- their work is so almost uniformly sloppy with some
4 exceptions. But so what would you like to see?

5 CHAIRPERSON CASTRO: Well, you know, what
6 I would like to see is what we circulated at the last
7 meeting. And, actually, there have been some
8 questions -- some proposed modifications, just to
9 clarify, that were raised by a couple of other
10 Commissioners that I can walk through.

11 But, you know, this is -- we are not like
12 members of Congress. I think when -- pretty much
13 everyone knows for Congress to act you need -- you
14 know, they are the legislative body. So when a member
15 of Congress sends a letter on their letterhead,
16 everyone knows that they are not speaking for
17 Congress. That's pretty clear.

18 So to compare us to Congress, it is apples
19 and oranges. So I am not persuaded by that argument
20 either. And, you know, I understand, you know,
21 someone -- to the extent that, you know, you are
22 sending someone a thank-you note or something, I don't
23 see why that would need to be on Commission
24 letterhead. I don't know what else you would be
25 writing about, unless it is a substantive policy

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1 matter. And in that case, I think that is where the
2 confusion arises.

3 COMMISSIONER GAZIANO: Committee chairmen
4 send -- and Congress send letters all the time, and it
5 is usually not made clear whether it was raised with
6 the committee and subject to vote or whether the
7 chairman is just writing as the chairman.

8 Ranking members -- any committee member
9 writes a letter, and the average public, unless they
10 look things up, don't know whether they're the ranking
11 member or the -- it is also the case that many people
12 in the administration write, and it is entirely
13 unclear whether it is -- there is only one elected
14 President who leads the unitary executive.

15 It is very often the case that they are
16 writing without clear authorization for the -- most of
17 the time it is without clear authorization of the
18 President. But it would be unprofessional and absurd
19 for members in any other agency not to use letterhead.

20 Are you aware of any other Commission of
21 the United States Government where Commissioners are
22 not allowed to use the letterhead of their agency,
23 unless it receives a majority?

24 CHAIRPERSON CASTRO: I don't know the
25 answer to that question, but I know that we are not

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1 members of Congress. There is eight of us, not 535,
2 so the opportunity for confusion, when less than eight
3 of us speak, is more ripe than when one of 535 speak.

4 And as for the executive branch, you know, the fact
5 that they may be speaking in a confusing manner, I
6 mean, they are so much larger than us.

7 We are an eight-person Commission, and I
8 think we can govern ourselves much more clearly -- and
9 we should have the ability to do that -- than the
10 legislative or executive branch. So, but that's --

11 COMMISSIONER GAZIANO: So you haven't
12 surveyed the other commissions?

13 CHAIRPERSON CASTRO: I have not. But I
14 don't see, you know, what other commissions do or not
15 do should necessarily mandate what we do or not do.

16 COMMISSIONER KIRSANOW: Mr. Chairman?

17 CHAIRPERSON CASTRO: Yes, Commissioner
18 Kirsanow?

19 COMMISSIONER KIRSANOW: Thank you, Mr.
20 Chair. Just a few thoughts. First, the Civil Rights
21 Commission has been in existence for more than 50
22 years. And maybe an archivist can take a hard look at
23 this, but in those 50 years I'm not sure that there
24 has ever been a similar instruction. And in times
25 when civil rights issues were perhaps much more

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1 pronounced in terms of their impact on the country,
2 Commissioners, with my knowledge, regularly sent out
3 individualized letters on Commission letterhead.

4 Second, if it -- it strikes me that if a
5 reporter did something wrong -- and I have been
6 involved in a number of situations where reporters got
7 things wrong. I tend to concur, in large measure,
8 with Commissioner Thernstrom's characterization, and
9 not because reporters are -- except that reporters
10 aren't necessarily sloppy, but they are necessarily
11 rushed.

12 I will ask for correction and usually get
13 it. Obviously, corrections don't necessarily -- may
14 not be --

15 VICE CHAIR THERNSTROM: Too late.

16 COMMISSIONER KIRSANOW: -- as something
17 contained in the body of the original story, but
18 almost invariably -- I mean, I can't even think of an
19 instance when I never got a correction.

20 Third, I have been a member of the Civil
21 Rights Commission for about 10 years, and I have never
22 seen any real problem with the letterhead going out.
23 It has gone out -- letters have been sent out by
24 individual Commissioners or groups of Commissioners.

25 I know Commissioner Yaki has done this

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1 when he was in the minority, and I think it is
2 important for him to have his views expressed under
3 the aegis of the Civil Rights Commission. So people
4 make it -- it's very clear, and it's done in a very
5 professional manner, that he is a member of the Civil
6 Rights Commission.

7 And lastly, I have been a member of
8 another governmental agency -- the National Labor
9 Relations Board -- and there was no prescription
10 against the use of NLRB letterhead. Now, of course, I
11 couldn't issue decisions all by myself, or issue rules
12 all by myself, but I could express my opinion. And
13 that is the National Labor Relations Board. I am not
14 aware of any other agencies.

15 But it strikes me that Commissioner
16 Gaziano's offer is a fair compromise. It makes it
17 abundantly clear to anybody who reads it that this is
18 the expressed view of just three Commissioners or two
19 Commissioners or an individual Commissioner. And if
20 the reporter can't get it right, well, I'm not sure,
21 frankly, that a reporter who would get it wrong under
22 those circumstances would be any more likely to get it
23 right with any other kind of formulation.

24 CHAIRPERSON CASTRO: Commissioner Yaki?

25 COMMISSIONER YAKI: Mr. Chair, I

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1 appreciate what you are trying to do, and certainly we
2 want to avoid the -- any confusion over whether the
3 Commission is speaking qua Commission or as individual
4 Commissioners. And I understand your concerns that
5 people may not be able to make that distinction.

6 My concern now, as I sit and think about
7 this -- and just to correct what Commissioner Kirsanow
8 did -- yes, I have sent letters when I was in the
9 minority on letterhead, but it was letterhead that I
10 bought and paid for and designed myself. It was not
11 official letterhead.

12 And, in fact, at the bottom it always
13 said, "Not printed at government expense," because I
14 realized it was something that was part of my training
15 when I was in Congress in terms of the kinds of
16 correspondence that would go out from members of
17 Congress.

18 My question, though, concerns less the
19 proactive letter than the reactive letter or the
20 response letter. On more than one occasion, I was
21 asked by members of Congress to write to them
22 expressing my dissenting views on a particular
23 subject. I am not too sure exactly how I was supposed
24 to be answering that request under the rules that you
25 promulgated today.

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1 COMMISSIONER GAZIANO: Commissioner Yaki,
2 I seem to also remember some that you wrote with
3 Commissioner Melendez as well.

4 COMMISSIONER YAKI: Yes.

5 COMMISSIONER GAZIANO: So you did
6 something arguably similar to --

7 COMMISSIONER YAKI: Right. Except that
8 there is only one clear thing, is that I was part of
9 the group that wrote the AIs back in 2005. And you
10 will find -- I would defy you to find a letter that I
11 wrote that did not state in there that I am writing,
12 or we are writing in our individual capacities, as
13 members of the Commission.

14 We always said that straight out -- said
15 that we did not represent the views of the Commission
16 as a whole. And that was something that the AIs at
17 the time -- we are very careful and conscious about,
18 and I was always careful and conscious about that in
19 every letter that I wrote to Congress, whether it was
20 by myself or with Commissioner Melendez at the time
21 when we were writing together.

22 But my question does go to the fact that
23 there are times when I would be asked by a Senator or
24 a committee to send a letter expressing a dissenting
25 view on an issue that was important to them. And I

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1 don't think they would have been very happy with a
2 letter that was just written on stationery saying,
3 "Michael Yaki," because that's not what they wanted.
4 They wanted a letter from a Commissioner that they
5 could say was from a Commissioner.

6 Sometimes the only way to really identify
7 that you are a Commissioner in the way that -- in the
8 shorthand that people deal with this stuff is the fact
9 that it has some reference to the Commission on Civil
10 Rights on there. I mean, actually, I can tell you
11 that right now that Commissioner Melendez and I went
12 through like two or three different iterations
13 because, unfortunately, most of my letterhead was at
14 my home in San Francisco. Sometimes the letters can
15 be generated out here.

16 And so Richard at the time and I would
17 sort of gerryrig something on it. But, again, but we
18 would make it very clear in the very first paragraph
19 we were not representing the views of the Commission,
20 but only our individual views on a particular subject.

21 COMMISSIONER GAZIANO: Yes. But just one
22 more clarification. I remember various variations
23 when you and Commissioner Melendez -- you did
24 incorporate in all that I remember the basic
25 letterhead that is the --

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1 COMMISSIONER YAKI: Not in all. There is
2 one -- there were a couple of times when the ability
3 to photoshop was defeated. Defeated.

4 (Laughter.)

5 It was for the general purpose and general
6 aim --

7 COMMISSIONER GAZIANO: No, no. My --

8 COMMISSIONER YAKI: -- to have something
9 that looked like the agency.

10 COMMISSIONER GAZIANO: You saw my own
11 letterhead, which I would have to now destroy under
12 all the -- under this, which I don't mind doing. You
13 will see that it mirrors it, with the exception that
14 my name is -- in fact, you have --

15 COMMISSIONER YAKI: You have looked at
16 yours.

17 COMMISSIONER GAZIANO: In fact, you kind
18 of copied this.

19 COMMISSIONER YAKI: We copied yours.

20 COMMISSIONER GAZIANO: Yes, except you
21 didn't put "Not printed at government expense" at the
22 bottom. But to make sure that --

23 COMMISSIONER YAKI: That's electronic.

24 COMMISSIONER GAZIANO: So the -- but my
25 question goes to, how do we respond when a member, a

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1 Senator, someone, is asking for an individual take on
2 an issue? because sometimes that is something that we
3 engage in.

4 CHAIRPERSON CASTRO: Commissioner Kladney,
5 do you have something?

6 COMMISSIONER KLADNEY: I have an addition
7 to your modification. Commissioner Gaziano and I
8 spoke about this before the meeting, and my proposal
9 was something along the following lines, if I may read
10 it. "We write in our individual capacities, two or
11 three Commissioners, or however many, on an eight-
12 member U.S. Commission on Civil Rights regarding"
13 blah, blah, blah. "The following is not a position of
14 the majority of the Commission, and there are
15 differing views on the subject by other members of the
16 Commission."

17 CHAIRPERSON CASTRO: Commissioner Gaziano?

18 COMMISSIONER KLADNEY: That's my proposal.

19 COMMISSIONER GAZIANO: My only concern
20 with that is we may need to write on a matter that we
21 can't raise to the Commission. And if we say it
22 doesn't -- there are differing views, I don't know
23 necessarily that -- you all should have agreed to our
24 EEOC letter, and -- but I didn't know at the time.

25 CHAIRPERSON CASTRO: I didn't see it

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1 before you sent it out, so how could I --

2 COMMISSIONER HERIOT: There was a
3 deadline.

4 COMMISSIONER GAZIANO: There was a
5 deadline.

6 CHAIRPERSON CASTRO: Oh.

7 COMMISSIONER GAZIANO: And we were a
8 couple of days away. But not everything has -- not
9 everything -- we ought to be able to respond to
10 requests before necessarily raising it with the
11 Commission, and maybe we will send a supplementary
12 letter. And that has happened in a couple of cases,
13 too, when a matter has been raised, a matter that was
14 raised by an individual Commissioner or two, then led
15 to a majority letter.

16 CHAIRPERSON CASTRO: Okay.

17 COMMISSIONER GAZIANO: I just think that
18 we wouldn't be able to say that it -- there is
19 necessarily disagreement on a matter. It would also
20 require us to bring everything to the Commission's
21 attention. What if the majority votes not to put it
22 on the agenda? That has happened before, too. What
23 if it was put on the agenda but it didn't receive a
24 vote? What do you think of that?

25 CHAIRPERSON CASTRO: Commissioner Heriot?

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1 COMMISSIONER HERIOT: Scattered thoughts
2 here. You know, sometimes we genuinely don't know
3 what the Commission's view is on an issue, and,
4 therefore, it would be inappropriate to say that there
5 are differing views on the Commission, because there
6 may not be.

7 Sometimes we could -- sometimes we do
8 know, and I have no objection to using that language
9 in those cases where we do know. So at least I think
10 we've got a safe harbor on that. Then, there are
11 going to be cases where instead of saying, "There are
12 differing positions," you could say, "There may be
13 differing positions." Got no objection to that.

14 There are going to be situations where we
15 just suspect that there aren't differing positions,
16 but we just don't have time to wait, because there is
17 a deadline. We ought to be able to agree at the very
18 minimum at this point that if language like that that
19 Commissioner Kladney has proposed is used, then that
20 is fine to use Commissioner letterhead.

21 I do think that we have a good incentive
22 here to come up with some compromise that works,
23 because I believe we are entitled to use the
24 letterhead. And if we don't have an agreement about
25 what everyone is happy with, then we are going to have

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1 -- you know, a thousand flowers are going to bloom,
2 and you may not be happy with all of them. So
3 let's --

4 CHAIRPERSON CASTRO: I'm not sure what
5 that means.

6 COMMISSIONER HERIOT: That means that like
7 every time a Commissioner comes up with an idea of,
8 you know, this has got to work --

9 COMMISSIONER YAKI: She's making a
10 Chairman Mao reference, so I'm not too sure what --

11 (Laughter.)

12 COMMISSIONER HERIOT: Not up on your Mao
13 references, I guess.

14 CHAIRPERSON CASTRO: No, I guess not.
15 I'll have to bring that along with my Robert's Rules
16 of Order next time.

17 Commissioner Achtenberg?

18 COMMISSIONER ACHTENBERG: Mr. Chairman, I
19 think that any use of the symbol other than as an
20 expression, either by the chair or the majority, is
21 ripe for misinterpretation. And I think for
22 simplicity's sake, and so that the Commission will not
23 be misunderstood, I actually think your proposal is
24 really the only workable one at this point. So I want
25 to make clear my support.

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1 CHAIRPERSON CASTRO: Vice Chair
2 Thernstrom?

3 VICE CHAIR THERNSTROM: I'm going to
4 second that.

5 CHAIRPERSON CASTRO: Okay. So --

6 COMMISSIONER GAZIANO: We have another
7 proposal.

8 CHAIRPERSON CASTRO: Okay.

9 COMMISSIONER HERIOT: Starting with Todd's
10 proposal, "We write in our individual capacity as two,
11 three, whatever Commissioners on the eight-member U.S.
12 Commission on Civil Rights, and the views expressed in
13 this letter are not necessarily those of the full
14 Commission."

15 CHAIRPERSON CASTRO: Could you read that
16 again?

17 COMMISSIONER HERIOT: "We write in our
18 individual capacity as 'blank number' of Commissioners
19 on the eight-member U.S. Commission on Civil Rights,
20 and the views expressed herein, or whatever, are not
21 necessarily those of the full Commission." Then, go
22 on to the rest of the letter.

23 COMMISSIONER GAZIANO: I move that we
24 adopt that as a consensus view on how we should notify
25 people who receive these letters of the capacity that

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1 we are writing in?

2 COMMISSIONER HERIOT: The advantage here
3 is that that is all-purpose language. So we can all
4 agree with it. If, instead, we go to your proposal,
5 then, again, the minority Commissioners believe that
6 they are entitled to use the letterhead, and you are
7 going to lose control.

8 CHAIRPERSON CASTRO: Here, let me -- Vice
9 Chair, and then let me make a suggestion.

10 VICE CHAIR THERNSTROM: I just have a
11 question for Commissioner Yaki. I couldn't understand
12 what your bottom line was. What, at the end of the
13 day, would you like to see here?

14 COMMISSIONER YAKI: That's a good -- thank
15 you very much, Commissioner Thernstrom. In concept, I
16 understand the confusion issue. I perhaps have a
17 different viewpoint, different perspective from some
18 of the other Commissioners on the Commission, when --
19 the fact that when I was in the minority, the only
20 voice that I frequently had was access to my status as
21 a Commissioner of the minority when it came to
22 expressing viewpoints on some of the issues that came
23 forward.

24 As you know, there were a number of
25 different letters that were generated by the majority

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1 under the former administration. Those letters went
2 out on Commission letterhead stating that this was the
3 official position of the Commission, and making it
4 sound as if this was the absolute pronouncement of the
5 state of play.

6 I would then often be requested by
7 members, by Senators, by groups, to counter that to
8 show that there were indeed a different way of looking
9 at this. And if you were to ask me, I think that it
10 is very difficult to show that I was speaking as an
11 independent member of the Commission, as someone who
12 had been appointed by either the President or Congress
13 to the Commission, with my own individual point of
14 view.

15 I think the power would have been
16 substantially diminished if either: a) I could not do
17 it, or b) I did it on letterhead that simply said
18 "Michael Yaki." I don't know if I could get away with
19 "Mike Yaki, U.S. Commission on Civil Rights." I don't
20 know if I could get away with "Michael Yaki,
21 Commissioner, U.S. Commission on Civil Rights." I
22 don't know if I could get away with "Michael Yaki,
23 Commissioner Michael Yaki, United States Commission on
24 Civil Rights." I'm a little unclear as to what we
25 define letterhead to be in some ways.

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1 I do know this, and that is when you are
2 -- I see myself as an independent voice on this
3 Commission. I do not see myself as left or right or
4 right or left. I'm a Democrat for sure. My views are
5 -- my views are what they are, but I am also an
6 independent member, independently appointed to this
7 Commission, and I have a right to express my views.

8 Now, you know, the question is: how much
9 is that right circumscribed by the ability to -- and
10 that is why when we did -- when I worked on the AIs
11 with Jennifer Braceras in 2005, in response to other
12 abuses of the use of letterhead at the time, we put in
13 there -- I mean, what confuses me about Commissioner
14 Gaziano's compromise is that that is essentially what
15 the AI states right now.

16 We are supposed to identify the fact that
17 we are speaking as individual members, that we do not
18 speak for the majority, we do not speak on behalf of
19 the Commission. That was the way that we solved it,
20 short of denying anyone letterhead.

21 And I am truly, you know, conflicted on
22 this. If there are substantial abuses going on, or
23 that is not going on, then I am likely to support the
24 chair. But if there are reasonable compromises being
25 done that will be followed and enforceable, I am at

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1 this point open to that, because I can -- as much as,
2 you know, hopefully I will be in the majority sometime
3 soon, I also remember how difficult it was being in
4 the minority and ensuring that my voice was heard
5 during some critical debates that I was concerned
6 about.

7 COMMISSIONER KLADNEY: Can I move for a
8 10-minute recess?

9 CHAIRPERSON CASTRO: Well, yes, let's do
10 that.

11 COMMISSIONER YAKI: Can we just move on
12 and just table --

13 CHAIRPERSON CASTRO: Here is what I was
14 going to suggest before we go to recess is, you know,
15 I -- this was a great discussion, and what I would
16 like to do is take the proposed compromises you have
17 suggested today, what Commissioner Kladney has said,
18 what Commissioner Yaki said, obviously, you know, my
19 point of view, and perhaps circulate a revised AI for
20 us to look at in advance of the November meeting and
21 vote on that would try to incorporate some of the
22 concerns that are raised here, while at the same time
23 trying to address some of the concerns that I have and
24 see if we can actually find a balance.

25 So that we actually can protect the

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1 minority, to the extent right now we don't have one,
2 we've got sort of, you know -- let me finish. So that
3 we can then actually try to get something that is a
4 real compromise without trying to wordsmith something
5 here today.

6 COMMISSIONER HERIOT: I'm happy with
7 putting off the vote until next month.

8 COMMISSIONER KLADNEY: All right.

9 CHAIRPERSON CASTRO: Commissioner Kladney?

10 COMMISSIONER KLADNEY: Then I don't need a
11 recess.

12 COMMISSIONER HERIOT: But this is my
13 chance to talk to people, because nobody is going to
14 want to talk about it during the month, because --

15 CHAIRPERSON CASTRO: Let's do that after
16 the meeting.

17 COMMISSIONER YAKI: But there are other
18 biological reasons for a recess as well, so you --

19 (Laughter.)

20 CHAIRPERSON CASTRO: Let's just move on,
21 but I think we will -- why don't we do that. So if
22 you can actually provide me with the additional
23 language that you had in your second compromise,
24 Commissioner Kladney can give me what he has, and then
25 we will work on trying to come up with something that

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1 would hopefully find everyone's comfort zone. All
2 right? And we'll vote on it in November.

3 We will circulate it in advance, but we
4 can talk about it some more. We have spent a lot of
5 time on this, but it was time well spent. So if
6 that's all right with everyone else --

7 COMMISSIONER HERIOT: Can I just make one
8 more --

9 CHAIRPERSON CASTRO: Sure. Go ahead.

10 COMMISSIONER HERIOT: -- comment for the
11 record here?

12 CHAIRPERSON CASTRO: Yes, ma'am.

13 COMMISSIONER HERIOT: And I just wanted to
14 clarify, because there were a couple of statements
15 made that might be misinterpreted.

16 CHAIRPERSON CASTRO: Okay.

17 COMMISSIONER HERIOT: And that is the
18 difference between this proposal and what we have been
19 doing in the past is simply it has been brought up
20 from a footnote to the text. There have been no
21 letters in which members of the minority have
22 represented themselves as anything other than three
23 individual Commissioners.

24 COMMISSIONER GAZIANO: It's also the case,
25 even in -- there may have been a failing in one or two

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1 letters, but if so I don't remember what they were,
2 where the majority would send out letters. Generally,
3 in the footnote 1 of those letters, it reported that a
4 vote was taken and so and so abstained, so and so
5 voted against. So even in those majority letters, we
6 -- absent some failing, it was our practice to
7 indicate where there was dissent. And I think that's
8 a good practice. That is always a good practice.

9 So I may not be in the majority. I hope
10 when the majority sends out majority -- they do the
11 same, and that would be one of my -- I don't know that
12 we need to crystallize it in an AI, because I don't
13 think AIs are binding on Commissioners. But it is our
14 understanding amongst each other that if you are
15 sending out a majority letter, and some of us have
16 dissented, that that ought to be somewhere in the body
17 of the letter.

18 CHAIRPERSON CASTRO: Commissioner Yaki?

19 COMMISSIONER YAKI: For your information,
20 Mr. Chair, those footnotes were a result of my
21 vociferous protests over how the letters were being
22 written and characterized.

23 VICE CHAIR THERNSTROM: Yes. But surely
24 you wouldn't believe a little footnote doesn't exactly
25 solve the problem.

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1 COMMISSIONER YAKI: That's the best I
2 could get out of --

3 CHAIRPERSON CASTRO: All right. Well,
4 what we'll -- you know, we appreciate the discussion.
5 We will hopefully have a proposal that will reflect
6 the comfort zone for everyone at the November meeting.

7 Next we are moving on to the discussion of
8 the usccr.gov email accounts. Madam Acting Staff
9 Director?

10 ACTING STAFF DIRECTOR TOLHURST: This will
11 be your motion, but I believe that this discussion
12 should go into closed session under Exception 2,
13 information related to internal personnel rules and
14 practices of the Commission.

15 CHAIRPERSON CASTRO: Can I make that
16 motion? So I move pursuant -- pursuant to -- what is
17 this?

18 ACTING STAFF DIRECTOR TOLHURST: Just move
19 to make it closed, and then we can use this.

20 CHAIRPERSON CASTRO: Okay. So closed
21 pursuant to --

22 ACTING STAFF DIRECTOR TOLHURST:
23 Exception 2.

24 CHAIRPERSON CASTRO: -- pursuant to
25 Exception 2 of the Code of -- 45 CFR Section 702.53.

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1 I am moving that we go into closed session to discuss
2 internal personnel rules and practices of the
3 Commission. Do I have a second?

4 COMMISSIONER ACHTENBERG: Second.

5 COMMISSIONER GAZIANO: I'm going to ask
6 for more information before I vote to close the
7 meeting. I don't -- I can't imagine the type of --
8 there are some rules that that might make sense, but
9 just because they fall in that category I think we
10 ought to err on the side of having public discussions.

11 Why do you suspect that this might veer into a ground
12 that we can't keep public?

13 ACTING STAFF DIRECTOR TOLHURST: I agree.

14 I mean, I am all for keeping things public whenever
15 possible, and if that's how the vote goes you can
16 certainly do that. It's a pretty broad exception for
17 internal personnel rules. This is a discussion of an
18 AI governing all personnel, so it is clearly the
19 available exception to us.

20 I believe that, depending on the types of
21 questions that arise, that privilege -- attorney-
22 client advice from OGC -- might be aired during the
23 discussion.

24 COMMISSIONER GAZIANO: Privileged as to
25 who?

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1 ACTING STAFF DIRECTOR TOLHURST: Advice
2 from the General Counsel to the Commissioners as to
3 how to follow the law, how to not violate the law.

4 COMMISSIONER GAZIANO: I don't think legal
5 interpretation is -- we ought to exercise a privilege.
6 With regard -- especially with regard to this issue,
7 we ought to exercise privilege, even if one exists. I
8 would prefer that we keep it open, and that if some
9 particular tiny segment of this begins to go in that
10 direction we can renew the motion.

11 CHAIRPERSON CASTRO: We have a motion that
12 has been made. Has it been seconded?

13 COMMISSIONER ACHTENBERG: Second.

14 CHAIRPERSON CASTRO: Okay. Let's take a
15 roll call vote, then.

16 COMMISSIONER HERIOT: Can I just ask a
17 question?

18 CHAIRPERSON CASTRO: Sure.

19 COMMISSIONER HERIOT: Is there some
20 information regarding a particular individual that is
21 likely to come up?

22 ACTING STAFF DIRECTOR TOLHURST: No, but
23 that's not required under the -- I mean, the exception
24 is -- we could use this for any internal personnel
25 rules or practices. Now, it says we may, so you don't

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1 have to. If you don't want to close it, you don't
2 have to.

3 CHAIRPERSON CASTRO: Well, we'll take a
4 vote, and we'll see how the vote turns out. Vice
5 Chair Thernstrom, how do you vote?

6 VICE CHAIR THERNSTROM: This is a vote on
7 whether to go into --

8 CHAIRPERSON CASTRO: Go into closed
9 session.

10 VICE CHAIR THERNSTROM: -- closed session.
11 I'm also not clear why we're going into closed
12 session on this matter. But I don't -- I'm
13 abstaining. I mean --

14 CHAIRPERSON CASTRO: Sure. Commissioner
15 Kirsanow, how do you vote?

16 COMMISSIONER KIRSANOW: I'm sorry. I
17 didn't hear what Commissioner Thernstrom just said.

18 CHAIRPERSON CASTRO: She is abstaining.

19 VICE CHAIR THERNSTROM: I'm abstaining
20 because it is not absolutely clear to me why this
21 needs closed session.

22 COMMISSIONER KIRSANOW: Yes. I'm in the
23 same position. I guess I would vote no.

24 CHAIRPERSON CASTRO: Okay. Commissioner
25 Heriot, how do you vote?

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1 COMMISSIONER HERIOT: I guess I vote no.

2 CHAIRPERSON CASTRO: Commissioner Gaziano,
3 how do you vote?

4 COMMISSIONER GAZIANO: I vote no, at least
5 for now.

6 CHAIRPERSON CASTRO: Commissioner Yaki,
7 how do you vote?

8 COMMISSIONER YAKI: Aye.

9 CHAIRPERSON CASTRO: Commissioner
10 Achtenberg?

11 COMMISSIONER ACHTENBERG: Aye.

12 CHAIRPERSON CASTRO: Commissioner Kladney?

13 COMMISSIONER KLADNEY: Aye.

14 CHAIRPERSON CASTRO: And I vote in favor.

15 One, two, three, four yeses, three nos, and an
16 abstention. So it passes.

17 COMMISSIONER GAZIANO: There was one time
18 when I suggested that we go into Executive Session,
19 but I wasn't sure, and then when we came back out of
20 Executive Session you all I think properly determined
21 it shouldn't have been in Executive Session. So I
22 hope if we really don't --

23 CHAIRPERSON CASTRO: Absolutely.

24 COMMISSIONER GAZIANO: -- discuss anything
25 that is confidential --

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1 CHAIRPERSON CASTRO: Absolutely, yes.

2 Okay. So now we're going to go into closed session.

3 COMMISSIONER YAKI: We're just throwing
4 some gossip about you, and then we'll --

5 (Laughter.)

6 COMMISSIONER GAZIANO: Any time you
7 mention my name I want --

8 CHAIRPERSON CASTRO: So do I need to say
9 this now?

10 ACTING STAFF DIRECTOR TOLHURST: No.

11 CHAIRPERSON CASTRO: Okay.

12 ACTING STAFF DIRECTOR TOLHURST: We just
13 sign that and post it.

14 CHAIRPERSON CASTRO: Okay.

15 ACTING STAFF DIRECTOR TOLHURST: If we end
16 up not opening --

17 CHAIRPERSON CASTRO: Okay.

18 COMMISSIONER GAZIANO: Would the Staff
19 Director let the record reflect which people, besides
20 the Commissioners, you have determined can stay in the
21 room?

22 ACTING STAFF DIRECTOR TOLHURST: Yes.
23 That's -- the Commissioners, their assistants, Chris
24 Byrnes, and David Snyder.

25 CHAIRPERSON CASTRO: Okay.

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1 COMMISSIONER GAZIANO: And the Court
2 Reporter.

3 ACTING STAFF DIRECTOR TOLHURST: And the
4 Court Reporter.

5 VICE CHAIR THERNSTROM: And those who
6 leave are going to leave a fascinating discussion.

7 (Whereupon, the proceedings in the foregoing matter
8 went into Executive Session at 10:45 a.m.
9 and returned to Open Session at 11:14
10 a.m.)

11 CHAIRPERSON CASTRO: All right. We are
12 back on the record in open session.

13 The next item under Management and
14 Operations is a request that I put on here to discuss
15 the possibility of changing the date for the December
16 Commission meeting. The reason I am asking this as a
17 personal indulgence is that I have been informed that
18 on December 16th, which is the day that our meeting is
19 scheduled, I am going to be receiving an honorary
20 doctorate from Roosevelt University.

21 COMMISSIONER HERIOT: Great.

22 CHAIRPERSON CASTRO: Thanks. And I would
23 like to be there for that, and of course I would also
24 like to be at the Commission meeting. So I was hoping
25 that -- I know December is a tough month for folks,

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1 but I just want to have a discussion here to see if
2 there might be an alternative date that would work for
3 us. And if not, then, of course, you know, I would --
4 the fallback would be that I would not be here
5 December 16th.

6 So I don't know if something like that
7 following Monday, the 19th, would work for folks.

8 COMMISSIONER HERIOT: Monday? I hadn't
9 thought of that.

10 CHAIRPERSON CASTRO: I know it's unusual.
11 Right.

12 COMMISSIONER HERIOT: I think I can do
13 that.

14 COMMISSIONER GAZIANO: Or the previous
15 Monday. The 9th -- I heard the 9th was going to be --
16 it would be inconvenient, very inconvenient for me,
17 but I could make it. I would have to leave a day
18 early from something that is very important to my --

19 COMMISSIONER HERIOT: I can't do the 9th.

20 COMMISSIONER KLADNEY: I can't do the 9th
21 either.

22 COMMISSIONER YAKI: I can do the 19th.

23 COMMISSIONER HERIOT: I can do the 19th,
24 Monday.

25 COMMISSIONER ACHTENBERG: I can as well.

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1 COMMISSIONER GAZIANO: That's just a
2 little close to Christmas holidays. What about the
3 9th or --

4 CHAIRPERSON CASTRO: Bring eggnog.

5 COMMISSIONER YAKI: We're the ones who
6 travel the farthest.

7 COMMISSIONER GAZIANO: I understand. I
8 understand. I was making --

9 COMMISSIONER YAKI: They're hitching
10 Santa's sleigh.

11 COMMISSIONER GAZIANO: Is the 19th better
12 than the 12th?

13 COMMISSIONER HERIOT: Yes.

14 COMMISSIONER YAKI: Yes.

15 COMMISSIONER KIRSANOW: Mr. Chairman, the
16 19th doesn't work for me. I have an oral argument in
17 D.C. Circuit Court that day.

18 CHAIRPERSON CASTRO: Madam Vice Chair?

19 VICE CHAIR THERNSTROM: As you and I have
20 discussed, the period between Thanksgiving and
21 Christmas is just unknown for me. I've got -- I need
22 to do some traveling, and I can't establish the dates
23 until I know I can walk through an airport.

24 CHAIRPERSON CASTRO: Right, I understand.

25 COMMISSIONER KLADNEY: Commissioner

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1 Kirsanow, what time is his argument?

2 CHAIRPERSON CASTRO: What time is your
3 argument, Commissioner?

4 COMMISSIONER KIRSANOW: 10:00.

5 COMMISSIONER HERIOT: How about after --

6 COMMISSIONER KIRSANOW: We expect it will
7 be -- it will last at least an hour.

8 COMMISSIONER HERIOT: How about afternoon?

9 CHAIRPERSON CASTRO: We meet what time?

10 COMMISSIONER YAKI: 1:00.

11 CHAIRPERSON CASTRO: 1:00 on the 19th,
12 would that work?

13 COMMISSIONER KIRSANOW: I see no problem
14 with that. In fact, I will be in town anyway.

15 CHAIRPERSON CASTRO: All right. If that
16 works for everyone, that would be great. I really
17 appreciate your indulgence on that, and hopefully you
18 will be able to be here.

19 VICE CHAIR THERNSTROM: Yes. And if I'm
20 not, I mean, the Commission can function without me.

21 COMMISSIONER YAKI: You ought to come in a
22 Santa Claus outfit, though, just --

23 CHAIRPERSON CASTRO: Pardon me?

24 COMMISSIONER YAKI: You've got to come in
25 a Santa Claus outfit, though.

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1 CHAIRPERSON CASTRO: Oh, my goodness. I
2 don't know about that. How about if I come as Papa
3 Noel instead?

4 COMMISSIONER YAKI: Papa Noel.

5 COMMISSIONER HERIOT: Or wear your new
6 hood.

7 CHAIRPERSON CASTRO: Right. I'll come
8 with the collar and the whole thing, yes. So do we
9 need a vote on that, or can we just do this by
10 unanimous consent.

11 VICE CHAIR THERNSTROM: We don't need a
12 vote on it.

13 CHAIRPERSON CASTRO: All right, all right.
14 So the 19th of December 1:00 p.m. Thank you very
15 much.

16 **VI. STATE ADVISORY COMMITTEE ISSUES**

17 CHAIRPERSON CASTRO: Now we move on to our
18 State Advisory Committees. So I move that the
19 Commission recharter the California State Advisory
20 Committee. Under this motion, the Commission appoints
21 the following individuals to that committee based upon
22 recommendations from our Staff Director: James
23 Bolton, John Dodd, Marc Dollinger, Percy Duran, Cafe
24 Fang, Joe Hicks, Manuel S. Klausner, Sanford Lakoff,
25 Leonard Mitchell, Velma Montoya, Matthew Rosenthal,

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1 Ralph Rossum, Maimon Schwarzchild, Robin Toma --

2 COMMISSIONER HERIOT: Mymon (phonetic).

3 CHAIRPERSON CASTRO: I'm sorry.

4 COMMISSIONER HERIOT: Mymon (phonetic).

5 CHAIRPERSON CASTRO: Mymon (phonetic). I
6 apologize. Maimon Schwarzchild, Robin Toma, Betty
7 Wilson.

8 Pursuant to this motion, the Commission
9 appoints Percy Duran as chair of this rechartered
10 California State Advisory Committee. These members
11 will serve as uncompensated government employees.
12 Under this motion, the Commission authorizes the Staff
13 Director to execute the appropriate paperwork for the
14 appointment. Is there a second?

15 VICE CHAIR THERNSTROM: Second.

16 CHAIRPERSON CASTRO: Okay. We have a
17 motion and a second. Any discussion?

18 (No response.)

19 Hearing none, I call the question. Vice
20 Chair Thernstrom, how do you vote?

21 VICE CHAIR THERNSTROM: Yes.

22 CHAIRPERSON CASTRO: Commissioner
23 Kirsanow, how do you vote?

24 COMMISSIONER KIRSANOW: Abstain.

25 CHAIRPERSON CASTRO: Commissioner Heriot,

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1 how do you vote?

2 COMMISSIONER HERIOT: Yes, although it
3 seems to me that the balance on this committee is not
4 what it was before.

5 CHAIRPERSON CASTRO: Commissioner Gaziano,
6 how do you vote?

7 COMMISSIONER GAZIANO: I make the same --
8 a very delicately balanced but slightly liberal SAC
9 has now become more liberal for reasons unknown, but I
10 think it is close enough, within the margin of error.
11 I will vote yes.

12 CHAIRPERSON CASTRO: Okay. I will just
13 put down a yes there. Commissioner Yaki?

14 COMMISSIONER GAZIANO: I want the record
15 to reflect --

16 CHAIRPERSON CASTRO: The record will
17 reflect it, but I will just put a yes here.
18 Commissioner Yaki?

19 COMMISSIONER YAKI: After Commissioner
20 Gaziano's description of the committee, how can I not
21 vote yes?

22 (Laughter.)

23 CHAIRPERSON CASTRO: Commissioner
24 Achtenberg?

25 COMMISSIONER ACHTENBERG: Yes.

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1 CHAIRPERSON CASTRO: Commissioner Kladney?

2 COMMISSIONER KLADNEY: Just a little
3 comment. I just don't know how Nevada wound up with
4 nine Republicans and three Democrats on the committee.
5 But in accordance with Commissioner Gaziano, I will
6 vote yes.

7 (Laughter.)

8 CHAIRPERSON CASTRO: And I also vote yes,
9 so we have approval with one abstention.

10 Next, we move on to the Arizona State
11 Advisory Committee. Do I do the motion to sever after
12 I read it --

13 ACTING STAFF DIRECTOR TOLHURST: Arizona?

14 CHAIRPERSON CASTRO: I'm sorry, Nebraska.
15 I apologize. It's out of order on my list here.

16 So the next item is the Advisory Committee
17 in Nebraska, so I move that the Commission recharter
18 the Nebraska State Advisory Committee. Under this
19 motion, the Commission appoints the following
20 individuals to the committee based upon the
21 recommendations of our Staff Director: Michaelle
22 Baumert -- did I pronounce the first name right?
23 Glenn Freeman, Edmund Hamann, William Harding, Peter
24 Longo, Cora Micek, Shirley Mora James, Rebecca Murray,
25 Chad Richter, Jose Soto, Kimberley Taylor-Riley,

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1 Kenneth Vampola.

2 Pursuant to this motion, the Commission
3 appoints Glenn Freeman as chair of the rechartered
4 Nebraska State Advisory Committee. These members will
5 serve as uncompensated government employees. Under
6 this motion, the Commission authorizes the Staff
7 Director to execute the appropriate paperwork for the
8 appointment. Is there a second?

9 COMMISSIONER YAKI: Second.

10 CHAIRPERSON CASTRO: Okay. Do we have any
11 discussion?

12 COMMISSIONER GAZIANO: I have two
13 concerns, and I'm not even sure how I'll vote. Again,
14 this is a SAC with only 11 members. I made only one
15 recommendation. Maybe there was some terrible flaw in
16 the --

17 CHAIRPERSON CASTRO: Twelve members.

18 COMMISSIONER HERIOT: It's 12 members.

19 COMMISSIONER GAZIANO: For Nebraska?

20 CHAIRPERSON CASTRO: Yes.

21 COMMISSIONER GAZIANO: Okay. Well, even
22 12, that is still on the low side of what is required.
23 Maybe there was some horrible flaw the staff thought
24 in the one member I advised, but for -- I don't know
25 if this came up last meeting when Commissioner Kladney

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1 was there, but we have been finding these so-called
2 Republicans are the most left-wing Republicans in some
3 of these states that are imaginable, almost veritable
4 Marxists, in fact, so I -- I look beyond the party
5 label and hope for some ideological balance.

6 There are some other parts of this slate
7 that --

8 COMMISSIONER YAKI: Do you want Socialists
9 on there as well, is that what we're talking about?

10 COMMISSIONER GAZIANO: Whatever. There
11 are other portions of this slate that may still make
12 it a workable slate. But in the future, I would urge,
13 for a variety of reasons, that we look for more
14 ideological balance, and that we shoot for more than
15 12.

16 CHAIRPERSON CASTRO: Well, you know, I
17 guess Marxism is in the eye of the beholder. But, you
18 know, as I count this up, there are six Republicans
19 and three Democrats. So frankly, I think there is,
20 you know -- to add another Republican would really
21 make this out of whack.

22 COMMISSIONER GAZIANO: Again, I --

23 CHAIRPERSON CASTRO: I think that --

24 COMMISSIONER GAZIANO: -- I see one --

25 CHAIRPERSON CASTRO: -- this is fairly

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1 balanced.

2 COMMISSIONER GAZIANO: I see one
3 conservative, seven left wing folks, and some that I
4 don't really know.

5 CHAIRPERSON CASTRO: And I think that we
6 have been striving to provide more balance to these
7 State Advisory Committees than we have seen in a long
8 time. While at some time we may see one R or two Rs
9 or one D or two D more than others, I think it is
10 within the margin, although, again, I think this is
11 more than adequately balanced on the Republican side
12 of the agenda.

13 Any other discussion on this?

14 (No response.)

15 Hearing none, then we will take a roll
16 call vote on it. Vice Chair Thernstrom, how do you
17 vote?

18 VICE CHAIR THERNSTROM: Yes.

19 CHAIRPERSON CASTRO: Commissioner
20 Kirsanow, how do you vote?

21 COMMISSIONER KIRSANOW: Yes.

22 CHAIRPERSON CASTRO: Commissioner Heriot,
23 how do you vote?

24 COMMISSIONER HERIOT: I vote -- I guess I
25 vote yes.

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1 CHAIRPERSON CASTRO: Okay.

2 COMMISSIONER HERIOT: By my count we have
3 several liberals, three conservatives, and two
4 indecipherables.

5 CHAIRPERSON CASTRO: Commissioner Gaziano?

6 COMMISSIONER GAZIANO: I think I will go
7 no. My count is a little different than Commissioner
8 Heriot's on the ideological balance, but it's not
9 within the margin of error.

10 CHAIRPERSON CASTRO: Commissioner Yaki?

11 COMMISSIONER YAKI: Yes.

12 CHAIRPERSON CASTRO: Commissioner
13 Achtenberg?

14 COMMISSIONER ACHTENBERG: Yes.

15 CHAIRPERSON CASTRO: Commissioner Kladney?

16 COMMISSIONER KLADNEY: Yes.

17 CHAIRPERSON CASTRO: So we have -- it
18 passes with one, two, three, four, five, six yeses,
19 and I vote yes, so that's seven yeses, and a no.

20 Okay. So now we move on to Arizona. So I
21 move that the Commission recharter the Arizona State
22 Advisory Committee. Under this motion, the committee
23 appoints the following individuals to that committee
24 based upon the recommendations of our Staff Director:
25 Clint Bolick, Blanca Esparza, Jose Esparza, Lawrence

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1 Gallagher, Keli Luther, Andrea Martinez, Jose Matus,
2 James McKenzie, Catherine Medina, Vernon Parker, who I
3 am going to move to sever, Peri Radecic, Frederick
4 Taylor.

5 Pursuant to this motion, the Commission
6 appoints Andrea Martinez as chair of the rechartered
7 Arizona State Advisory Committee. These members will
8 serve as uncompensated government employees. Under
9 this motion, the Commission authorizes the Staff
10 Director to execute the appropriate paperwork for the
11 appointment.

12 Do I sever now or --

13 COMMISSIONER KLADNEY: Sever now.

14 CHAIRPERSON CASTRO: Sever? And I move to
15 sever Vernon Parker from consideration at this time.
16 Is there a second?

17 VICE CHAIR THERNSTROM: Second.

18 CHAIRPERSON CASTRO: Okay. Discussion?
19 Commissioner Gaziano?

20 COMMISSIONER GAZIANO: Just want other
21 Commissioners to know that my special assistant sent a
22 note a week ago to the Staff Director about a concern
23 that I think other people noticed about a particular
24 -- one of the -- since it was a reappointment, the
25 individual's reappointment, we have a particular

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1 policy I know to send an inquiry. It would have been
2 a little better if -- I know with the rush of other
3 business it's difficult to have done that prior to
4 this meeting. I would have liked to have had that
5 resolved earlier.

6 ACTING STAFF DIRECTOR TOLHURST: Actually,
7 the Regional Director is on vacation, and he -- that
8 person has to facilitate that for me. So --

9 COMMISSIONER GAZIANO: Okay. Well, just
10 so that other Commissioners know that I noticed the
11 same issue that was noticed by others, or at least my
12 special assistant did, and tried to draw it to the
13 attention of the appropriate person.

14 I did have only one nominee for this
15 Arizona SAC, too -- again, who didn't make the slate,
16 and this is a small slate. It was the former -- I
17 certainly don't think he would mind, maybe -- if you
18 find this person problematic, that's a personnel issue
19 not to state on the record, but it's a former
20 gubernatorial candidate for Arizona, who lost to the
21 incumbent governor.

22 Len Munsell is an attorney who was --
23 served in different appointed offices, and I that his
24 work on anti-pornography and the exploitation of women
25 involved in pornography is particularly appropriate

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1 for the SAC.

2 He is currently the President of Arizona
3 Christian University, so to have a university
4 president, who has served in other think-tank
5 positions -- you know, I, again, don't know why the
6 staff thought that they couldn't add him to the SAC,
7 but when you have someone of that caliber willing to
8 serve on our SAC, I would recommend him to others,
9 whether or not Mr. Parker, who was severed, is
10 included in the SAC.

11 So I would not -- I don't think I will
12 vote for approval of the SAC at this time, and I
13 substitute that we just postpone voting on this SAC
14 until we know what the full slate is going to be at
15 our next meeting.

16 CHAIRPERSON CASTRO: Any other discussion?

17 COMMISSIONER HERIOT: Is that a motion?

18 COMMISSIONER GAZIANO: Yes. I move to
19 substitute that we postpone vote on this SAC --

20 COMMISSIONER HERIOT: Okay. I will second
21 that.

22 CHAIRPERSON CASTRO: Okay. So we have a
23 motion to postpone the vote. Is there any discussion
24 on that?

25 (No response.)

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1 I would say we should just vote on those
2 that are in front of us. We've got an upcoming
3 potential backlog of SAC rechararters. We have a number
4 that have expired or are expiring, and we just need to
5 move these through. We can still allow this
6 individual, Mr. Parker, to provide his response to the
7 appropriate agency officer. And it could be that he
8 or she -- I'm sorry, he gets that addressed and he
9 comes on. If not, then they can certainly explore
10 whether there is someone, maybe this person that you
11 suggested substituted.

12 COMMISSIONER HERIOT: Given that we could
13 add anyway, why don't we just add the -- add Todd's
14 nominee now?

15 CHAIRPERSON CASTRO: So -- because I don't
16 know what the reason for that person not moving
17 forward was.

18 COMMISSIONER GAZIANO: He hasn't formally
19 applied. He has expressed interest, but --

20 CHAIRPERSON CASTRO: So, you know, I --

21 COMMISSIONER GAZIANO: The application
22 process -- the Staff Director the notifies you that --
23 to go through the formal application process.

24 CHAIRPERSON CASTRO: So --

25 COMMISSIONER GAZIANO: We have

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1 communicated to the Staff Director a month ago that he
2 was interested. And that may be -- not everyone we
3 indicate is interested -- if the Staff Director is
4 putting together a slate, and it is already at 19 --
5 what is our maximum?

6 ACTING STAFF DIRECTOR TOLHURST: And let
7 me say, I don't put together the slates. I forward
8 all of your suggestions to the regions. The regional
9 directors create the slates, because they are, in
10 theory, more familiar with the states that they
11 represent. And they create a balance based not only
12 on political affiliation but all sorts of diversity,
13 skill sets, what people bring to the table.

14 And I -- again, Peter is out. I can ask
15 him why that person wasn't --

16 COMMISSIONER GAZIANO: Sure. I --

17 CHAIRPERSON CASTRO: And for that
18 reason --

19 COMMISSIONER GAZIANO: I am bringing it to
20 your attention. You know, in situations like this, I
21 know your -- in your supervisory role you can raise
22 those kind of questions. I'm just -- I hope that
23 everyone I nominate is invited to join.

24 COMMISSIONER KLADNEY: Well, it sounded
25 like it was --

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1 COMMISSIONER GAZIANO: No, no, no. No,
2 no, I -- I'm trying to suggest that there may be some
3 reason why they don't invite everyone that we
4 recommend. We have had this discussion in prior
5 months about -- but I certainly think that
6 Commissioner recommendation should be given a serious
7 look. That's all I'm saying.

8 COMMISSIONER KLADNEY: So can we approve
9 this slate and then --

10 CHAIRPERSON CASTRO: Right now we have a
11 motion pending to push the slate off to the next, but
12 my view is that we should vote on the slate and give
13 this person an opportunity to present their response
14 to the concerns we have. So, but we need to vote
15 first on the motion to put it off.

16 So on that motion, we will call the
17 question. I vote no on the motion to delay the slate.
18 Vice Chair, how do you vote?

19 VICE CHAIR THERNSTROM: I vote yes.

20 CHAIRPERSON CASTRO: Commissioner
21 Kirsanow, how do you vote?

22 COMMISSIONER KIRSANOW: Yes.

23 CHAIRPERSON CASTRO: Commissioner Heriot,
24 how do you vote?

25 COMMISSIONER HERIOT: Yes.

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1 CHAIRPERSON CASTRO: Commissioner Gaziano,
2 how do you vote?

3 COMMISSIONER GAZIANO: Yes.

4 CHAIRPERSON CASTRO: Commissioner Yaki,
5 how do you vote?

6 COMMISSIONER YAKI: Yes.

7 CHAIRPERSON CASTRO: To delay the slate.

8 COMMISSIONER YAKI: Yes.

9 CHAIRPERSON CASTRO: Commissioner
10 Achtenberg, how do you vote?

11 COMMISSIONER ACHTENBERG: No.

12 CHAIRPERSON CASTRO: Commissioner Kladney,
13 how do you vote?

14 COMMISSIONER KLADNEY: Yes.

15 CHAIRPERSON CASTRO: Okay. So the ayes
16 have it. We will delay Nebraska --

17 COMMISSIONER KLADNEY: No, Arizona.

18 CHAIRPERSON CASTRO: -- I'm sorry, Arizona
19 to next month with a vote of one, two, three, four,
20 five, six yeses and two nos.

21 **VII. ADJOURN**

22 CHAIRPERSON CASTRO: Okay. So that is the
23 business that we have. Is there a motion to adjourn?

24 VICE CHAIR THERNSTROM: I so move.

25 CHAIRPERSON CASTRO: Second?

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COMMISSIONER KLADNEY: Second.

CHAIRPERSON CASTRO: All in favor say aye.

(Whereupon, at 11:32 a.m., the proceedings in the foregoing matter were adjourned.)