

# U.S. COMMISSION ON CIVIL RIGHTS

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SEVENTH CONGRESS  
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# U.S. COMMISSION ON CIVIL RIGHTS

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THURSDAY, APRIL 11, 2002

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE CONSTITUTION,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 1:15 p.m., in Room 2237, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. [Presiding.] The Committee will come to order.

This is the Subcommittee on the Constitution of the Judiciary Committee. I will begin with my opening statement.

The purpose of this oversight hearing is to inquire into the management practices of the United States Commission on Civil Rights.

Following its inception in 1957, the commission played an important role in investigating civil rights abuses that plagued our Nation at that time. The commission has now reached a critical stage in its history.

Over time, the commission has been criticized by individuals on both sides of the civil rights debate. However, recently, the commission has come under fire from all sides at the same time by sources that include the New Republic, Salon.com, and the Washington Post, for example.

Recent press reports have criticized the Chair for engaging in a confrontation with the White House over the appointment of a new commissioner, Peter Kirsanow. I would like to recognize Commissioner Kirsanow will be attending this afternoon, although he will not be a witness, but he will be in the audience. We understand that he is on his way. He had a flight.

I'm fully confident that the appeals court will defer to the President's interpretation of the appointment power that is entrusted to President and grant Commissioner Kirsanow his rightful seat on the commission.

The decline in public confidence in the commission has led the Subcommittee on the Constitution, this Committee, to conduct oversight to evaluate the commission's operations.

Among other things, we are concerned about the effect of poor management practices on the quality of the commission's work product, the apparent exclusion and disparagement of minority viewpoints and participation, and, after a review of documents recently produced to the Subcommittee, the failure to implement fully management reforms recommended by the GAO 5 years ago.

The 1997 GAO report entitled "U.S. Commission on Civil Rights: Agency Lacks Basic Management Controls" characterized the commission as, and I quote, "an agency in disarray" with "broad management problems," unquote.

The commission has not adequately revised administrative instructions to inform staff of management policies. Despite the purported use of project reports recommended by GAO to inform commissioners of detailed project costs, staffing needs, and deadlines, commissioners remain in the dark about these basic issues.

In April 2000, the commission hired McKinney & Associates, a Washington, D.C., public relations firm, while at the same time maintaining three employees in its own public affairs office. From the extensive criticism of the commission in the press, it appears that the commission's expenditure of \$170,000 on McKinney & Associates has been a waste of money. The commission, moreover, cannot explain what exactly McKinney does for the commission.

The commission appears to operate without consultation with commissioners. The commission frequently withholds meeting transcripts from commissioners and issues letters and press releases under commissioners' names without their approval.

The commission's recent effort to suppress a book review that favorably mentioned Commissioner Abigail Thernstrom raises questions about the basic fairness of the commission and its ability to accept differing points of view.

The staff director's confirmation that the commission engages in unregulated shredding raises concerns about whether staff have received training on how to comply with the Federal Records Act.

We are concerned that the commission fails to consider commissioners' suggestions of witnesses for upcoming hearings and frequently withholds witness lists from commissioners.

The commission also fails to clarify basic hearing procedures for commissioners such as: "What is the topic of the next hearing?" and "Who has been asked to testify?"

In June 2001, the commission withheld statistical data used in formulating the conclusions of the Florida report from dissenting commissioners Thernstrom and Redenbaugh and suppressed the final version of the dissent.

A preliminary report and the final report were leaked to the press before the commission released copies to the commissioners, or to Florida Governor Jeb Bush, or to Florida Secretary of State Katherine Harris. The commission then made no formal leak inquiry.

More recently, the commission disregarded OMB budget procedures and its own budgeting process by failing to submit its budget to commissioners for approval in June of 2001. And in October of 2001, it refused to forward discrimination complaints received on the commission hotline to the Justice Department for investigation.

The continued mismanagement of the commission undermines public confidence in the commission's work. The commission is now more a public spectacle than it is a serious fact-finding agency that informs the public about the state of civil rights in America.

In view of these concerns, I look forward to hearing from our witnesses today.

At this time, I'll yield to the Ranking Member, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

What is a public spectacle is not the commission but the statement of the Chairman we just heard. The Chairman referred to the loss of public confidence in the commission. I see no loss of public confidence in the commission. I see a campaign of defamation against the commission launched by the right wing people who don't approve of civil rights as part of the Republican Party.

The Chairman referred to Commissioner Kirsanow and to the campaign against the President's appointment of Commissioner Kirsanow waged by the chairman of the commission. I know of no Commissioner Kirsanow. I know of a gentleman named Mr. Kirsanow, whom the President, disobeying the law passed by Congress and signed in 1994, I think it was, changing the tenure of members of the commission, attempted to point to a nonexistent vacancy on the commission. I know that the courts upheld the opinion of the chairperson and the majority of the commission that the vacancy didn't exist.

The Chairman is entitled to his opinion that the court decision is wrong, but he's not entitled to call Mr. Kirsanow a commissioner or to berate the chairperson of the commission for following the law and for being upheld by the court on what the law is.

With all the genuine civil rights issues facing the Nation, the Subcommittee today dedicates itself to the assume task of reviewing purchase orders, organizational charts, internal administrative manuals, and the like. While I certainly take Congress' oversight responsibilities seriously, I cannot help but wonder if the petty and punitive nature of the majority's inquiries and the disrespectful almost abusive manner in which the majority has dealt with the commission belies an agenda other than ensuring that the commission is doing its job correctly.

In fact, I believe it represents an agenda prefer ensuring that the commission cannot do its job correctly.

I have often fought fraud, waste, and abuse in Government. As the majority's witness, Mr. Schatz, will recall, we worked together a few years ago to do what almost no Member of Congress would ever think of doing: We managed to kill a costly, unnecessary, and wasteful highway project in my own district. It did not make me particularly popular at home, but this was a pork-barrel project that simply, in my opinion, was not needed and would have wasted about \$300 million of the taxpayers' money. And I was happy at Mr. Schatz' assistance in being able to kill the project, although people are trying to revive it and we will have to continue to oppose it if they make more attempts.

I have no regrets. That was then.

Thousands of pages have been produced on everything from the purchase of office equipment to harassment over the very serious matter of Commissioner Wilson's tenure, a matter decided in the commission's favor by the U.S. District Court for the District of Columbia.

Mr. Chairman, back in 1995, when as part of the Republican revolution the name of the Subcommittee was changed from the Subcommittee on Civil and Constitutional Rights to the Subcommittee

on the Constitution, I had hoped that the name change would not signal a change in emphasis and was only symbolic of the majority's, apparently, disregard for civil and constitutional rights. In my service on the Subcommittee in the ensuing years, I have found that this change was really truth in labeling. The work of the Subcommittee has had as much to do with its historical record as a vigorous guardian of civil and constitutional rights as it does with the future of Amtrak.

If anything, the Subcommittee has become a focal point for assaults on the constitutional rights of the American people. Whether considering constitutional amendments that would promote the suppression of free speech or the Subcommittee's tireless and often creative efforts to undermine a woman's constitutional right to choose, this Subcommittee has been anything but the proud guardian of individual liberty it was for so many years.

Mr. Chairman, somewhere on the road to Damascus the party of Lincoln has become the party of Jefferson Davis. Whatever our differences on policy, I find this transition a heartbreaking loss to the Nation.

I will leave it to my colleagues on the other side of the aisle to count paperclips and engage in other theatrics. We are fortunate today to have Mr. Hilary Shelton, director of the Washington bureau of the NAACP, and Mr. Les Jin, the commission staff director, with us. With the indulgence of the Chair, I hope to discuss the topic of civil and constitutional rights. According to clause 1(k)(5) of House rule X, civil liberties is still within our jurisdiction, and it would be nice if we got a chance to exercise that jurisdiction one of these days.

The commission has issued a number of reports and recommendations, not all of which have been controversial, and many of which have resulted in real changes that have benefited the civil liberties of the people we represent. It might be nice if the Subcommittee could actually hold a hearing or consider legislation based on that work, based on those reports, even some of the non-controversial reports. I would be happy to work with the Chair on such a project.

I can vouch for the fact that in my own city of New York, as a result of commission report, police Commissioner Ray Kelly recently issued a tough new order against racial profiling and ordered that it be read and posted in every precinct in the city.

Mr. Chairman, I hope the current fascination with the commission, rather than with the civil rights issues it reports on, is not a form of partisan retribution for its incisive and clarifying report on the illegal disenfranchisement of Florida voters in the 2000 election.

Using the power of Congress to harass or kill the messenger should be beneath us.

I would urge my colleagues to remember why we are here and the fundamental rights with whose guardianship we are entrusted, so that we may rise above some of these administrative issues and get on with the work of safeguarding civil liberties.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you.

At this time I would like to welcome and introduce our panel. And our first witness this afternoon will be Commissioner Abigail Thernstrom, appointed to the commission by House Speaker Dennis Hastert in January of 2001.

Commissioner Thernstrom is a senior fellow at the Manhattan Institute in New York, where she has researched and published extensively on civil rights issues. She is the author of the 1997 award-winning work "Whose Votes Count? Affirmative Action and Minority Voting Rights." Thernstrom and her husband, Harvard historian Stephan Thernstrom, are co-authors of the New York Times-acclaimed book "America in Black and White: One Nation Indivisible."

Commissioner Thernstrom serves on the boards of the Center for Equal Opportunity and the Institute for Justice. She has appeared on "Fox News Sunday," "Good Morning America," and the "Jim Lehrer Newshour." She has published articles in the Wall Street Journal, New York Times and Washington Post.

She holds a Ph.D. from the Harvard University Department of Government.

Our second witness this afternoon will be Les Jin, appointed staff director for the commission by President Clinton in October 2000. Mr. Jin is responsible for the day-to-day operations of the commission. He is a former general counsel with the U.S. Information Agency and more recently with the U.S. Broadcasting Board of Governors. He served as a trial attorney with the U.S. Equal Employment Opportunity Commission in Chicago and as a hearings officer with the Chicago Commission on Human Relations. He has also worked for the Legal Assistance Foundation of Chicago.

He has served on the board of the National Asian-Pacific American Bar Association and was general counsel for the Organization of Chinese-Americans.

Mr. Jin received his law degree from the University of Oregon and earned a master's in public administration from the John F. Kennedy School of Government at Harvard University.

Our third witness will be Hilary O. Shelton, director of the NAACP Washington Bureau. Prior to working for the NAACP, Mr. Shelton served as the Federal liaison assistant director of the government affairs department of the United Negro College Fund.

Prior to serving the college fund, Mr. Shelton served as program director for the United Methodist Church's Social Justice Advocacy Agency and the General Board of Church and Society.

Mr. Shelton serves on the boards of the National Center for Democratic Renewal, the Leadership Conference on Civil Rights, and the National Violence Against Women Task Force.

Mr. Shelton holds a B.A. in communication and political science from the University of Missouri and an A.A. in legal sciences from Northeastern University.

Our fourth and final witness will be Thomas A. Schatz, the president of Citizens Against Government Waste, the CAGW. Mr. Schatz is a nationally recognized spokesperson on Government waste.

During his 15 years with CAGW, Mr. Schatz has testified numerous times on Government waste issues before the Committees of the United States Senate and the House of Representatives. He has



appeared as an expert on ABC News with Peter Jennings, CBS News with Dan Rather, NBC News with Tom Brokaw, "Larry King Live," and the "McNeil-Lehrer Newshour."

Prior to joining Citizens Against Government Waste in 1986, he spent 6 years as the legislative director for Congressman Hamilton Fish and 2 years practicing law and lobbying. Mr. Schatz holds a law degree from George Washington University.

We'd like to welcome all four of the witnesses here this afternoon. We would ask the witnesses, if possible, to confine their testimony to within 5 minutes. We have a lighting system before you there. When the yellow light comes on, that means you've used up 4 minutes and try to wrap up in the final minute and we'll give a little leeway here and there, but we'd appreciate it if you'd try to keep it within 5 minutes. When the red light comes on, that means the 5 minutes has been used up.

And we'll begin with Commissioner Thernstrom.

**STATEMENT OF ABIGAIL THERNSTROM, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS**

Ms. THERNSTROM. Mr. Chairman, Members of the Subcommittee, I thank you for holding this hearing and for inviting me to testify.

My name is Abigail Thernstrom, as you know. And as the Chairman mentioned, I am a political scientist by training, a senior fellow at the Manhattan Institute in New York, a member of the State Board of Education in Massachusetts, where I live, and a commissioner on the U.S. Commission for Civil Rights since January 2001.

I'm also the author of numerous books and articles on race and ethnicity.

I'm going to speak briefly, and I ask that a more detailed testimony be entered into the record.

Mr. CHABOT. Without objection.

And all the statements of all four witnesses will be entered into the record.

Ms. THERNSTROM. Thank you.

In the decades since 1957 when the commission was first formed, a revolution in the status of blacks and the state of race relations has occurred in this country. But on the road to racial equality, there's obviously still much to do. And the commission can play an important part, in theory.

In practice, however, the commission hurts more than it helps. It sullies the drive for civil rights, and it taints a cause to which every American should be committed.

This is the picture that I've seen in the 15 months that I've served, and a review of the historical record shows that this has been the case for years.

Here are some of the reasons. The commission's hearings and briefings make a mockery of intellectual inquiry. Its reports are never circulated in draft form to distinguished scholars with a variety of perspectives. And as a consequence, the work is shoddy and ideologically driven.

The conclusions drawn by the commission in its reports are so crude and so predictable that I could write them myself before any hearing or briefing took place.

Press releases are issued in the name of all commissioners, although I have not seen them beforehand and I often find them objectionable. Moreover, they can be woefully inaccurate. They state facts that are not facts about actions taken by the commission and about the American racial and ethnic landscape.

The chairman, Mary Frances Berry, has a public relations agency funded with taxpayer money that works only for her. I believe I have fiduciary responsibility for such decisions, although I am never consulted.

Commission meetings are marked by procedural chaos. Rules are changed arbitrarily. I'm never sure what will be on the agenda until I get there, and topics and speakers are switched without warning with the result that I cannot adequately prepare for meetings and I waste time on issues that will not be addressed.

I lack basic access to the staff and its work. Direct conversations with anybody outside the staff director, Les Jin, office are explicitly prohibited. Moreover, memos to Mr. Jin containing vital questions are regularly unanswered or only very partially answered.

Communications from Mr. Jin can be, well, let's say just totally bewildering. For instance, July 20th, 2001, I received a memo stating I did not participate in a meeting between Commissioner Redenbaugh and the general counsel, and that the deadline to discuss the issues at hand had passed. In fact, there was no meeting and no deadline, as I made clear in an uncontested memo of July 23.

Alas, this incident did not surprise me. A contempt for facts runs through much of the commission's work.

Grandstanding substitutes for effective work. The hotline established to record instances of discrimination against Arab-Americans and Muslims was a disaster as Time magazine accurately reported. It was basically useless.

That did not bother Chairman Berry, who on October 12 said, quote, "People around the country have expressed their gratitude, so I think we ought to be proud that we're doing this rather than worrying about whether it's helping anybody," end quote.

Reports take years to complete, as shown on the chart on the easel. And often the information that has been gathered is obsolete. For instance, the racial and ethnic tension report was supposed to take 3 to 5 years; it took 11 years to complete.

Most important, secrecy and a fear of dissenting voices pervades all of the commission's work. That was evident in the recent cancellation of important hearings on education. Instead, the staff is writing a report behind closed doors, although three commissioners have considerable expertise on the subject.

This fear of dissenting voices was most obvious in connection with the commission's Florida report, a report the Washington Post editorial described as, quote, "highly politicized, contributing little beyond noise to the national discussion of the problems in the 2000 election."

The extraordinary secrecy extended to the witness list at one of the Florida hearings, although, in fact, that list, I subsequently learned, had been released to the press by the public relations agency that works solely for the chairman. I hadn't seen the list, however.

Fear of input from affected parties in Florida, from scholars outside the commission, from commissioners themselves, drove a process that lacked even bare-bones integrity. Process and substance cannot be separated. A corrupt process ensures a worthless result.

In the minutes I have left, I will confine myself to just a few words about the suppression of the Thernstrom-Redenbaugh dissent on totally specious legal grounds. That the U.S. Commission on Civil Rights should even think about suppressing a dissent is of course jaw-dropping. This commission thought and it acted. Indeed, the commission contemplated a speech code for dissents, which would have restricted them to two or three pages and prohibited independent research.

Chairman Berry often claims the dissent has not in fact—that the dissent has in fact been published by the commission. Not so. It has never been published by the commission.

A crude first draft of the dissent has been included in a pile of material taken from Senate hearings on election reform. I was not permitted to submit the polished and quite amended version. I was given no opportunity to submit my rejoinder to the work of the commission's statistical expert, although I had been promised a chance to do so. And the dissent does not appear labeled as such in the proper place for dissents.

Mr. CHABOT. Commissioner, could you wrap up?

Ms. THERNSTROM. Yes.

Mr. CHABOT. Thank you.

Ms. THERNSTROM. I have offered the briefest outline of the extraordinary number of problems that plague the commission. I will provide many others, supported by documents, in my written testimony.

Final word: It has been a long time, in my view, since the commission did any meaningful work to advance the cause of civil rights. The commission should be a source of hard facts on current civil rights issues and a place of robust debate. It is neither. It is a national embarrassment.

Thank you very much.

[The prepared statement of Ms. Thernstrom follows:]

#### PREPARED STATEMENT OF ABIGAIL THERNSTROM

Mr. Chairman and members of the Subcommittee, thank you for holding this hearing and for inviting me to testify.

My name is Abigail Thernstrom. I am a political scientist by training, a senior fellow at the Manhattan Institute in New York, a member of the state board of education in Massachusetts where I live, and a commissioner on the U.S. Commission on Civil Rights, appointed in January 2001.

I am the author of a multiple-award winning book, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, and the co-author of *America in Black and White: One Nation, Indivisible*, a history of race relations and racial change in the decades since World War II. I am presently working on a book entitled *Getting the Answers Right: Race, Class and Academic Achievement*, which will be published by Simon and Schuster in 2003.

I will speak briefly and ask that a more detailed testimony be entered into the record.

A revolution in the status of blacks and the state of race relations has occurred in the decades since the Commission was formed in 1957. But on the road to racial equality, there is still much to do, and the Commission can play an important part—in theory.

In practice, however, it hurts more than it helps. It sullies the drive for civil rights—taints a cause to which every American should be committed. Or at least that is the picture I have seen in the fifteen months I have served.

Here are some of the reasons:

- Its hearings and briefings make a mockery of intellectual inquiry. Its reports are never circulated in draft form to distinguished scholars with a variety of perspectives and, as a consequence, the work is shoddy and ideologically-driven. Preliminary findings are issued without following basic scholarly or collegial process. Reports are leaked to the press before being given to Commissioners.

During the two Florida Hearings (January 11–12 and February 16, 2001), the most basic processes that would have guaranteed a fair and balanced hearing were not followed.

Chairman Berry and the staff director, Les Jin, refused to disclose the list of witnesses before the hearings on February 16.<sup>1</sup> The rationale given: the witnesses were afraid, and had requested that their names be kept under wraps. However, McKinney and McDowell, a public relations firm retained by the Commission, has acknowledged in print that it had prior access to the witness list, which it distributed to the press before the hearings.<sup>2</sup>

Further, it is absurd to say that these witnesses feared for their well-being. They had been interviewed by the staff attorneys and told that their testimony would be public; hearings were open to the press and filmed by C-Span. Had the procedure been proper, all commissioners would have been given an opportunity to suggest witnesses and would have known precisely who was appearing in order to adequately prepare for questioning.

Before the Commission had closed the record for the Florida hearings, the chairman issued preliminary findings and leaked her personal statement to the New York Times. Although it was described as an official Commission statement, in fact commissioners had not seen it. I attach the New York Times article of March 8, 2001, and the statement subsequently released to the Commission itself on March 9, 2001.<sup>3</sup>

On March 9, the Commission also issued a press release, attached, that obfuscates the distinction between a personal statement issued by the chairman and one voted on by the Commission, prior to publication.

Before the chairman released her preliminary statement, I had asked to see the documents that staff attorneys had received in response to questions raised by the Florida election. They were attorney-work products and not available for review, I was informed. Basic documents were for staff-eyes only. I attach the memoranda recording my requests and responses from the staff director.

During the drafting process, only the office of the general counsel had access to the Florida report. On several occasions, to no avail, Commissioner Redenbaugh and I requested the timeline for the release of the report.<sup>4</sup> Ultimately, stories on the re-

<sup>1</sup> USCCR transcript, February 16, 2001, p. 30:

Commissioner THERNSTROM: It is correct that I had an agenda, but all the witness—I have no idea who any of the witnesses are before the lunch break—

Chairperson BERRY: None of us do. Do you want to know why? I'll tell you.

You know as many witnesses as the rest of us. Some of the witnesses for their own protection did not want to be identified in any documents before they appeared today. They feared for reasons of their own that their names not be disclosed. So in order to protect them their names haven't been written down anywhere. The Commission has done that in the past to protect people and so it was thought necessary, as I am told, to do that.

<sup>2</sup> In a paper by McKinney & McDowell dated January 2001, p. 2, it says: "The firm also distributed via e-mail the second advisory and hearing agenda/witness list (obtained from the Commission) to many additional media representatives who contacted the firm for information prior to the hearings.

<sup>3</sup> Seelye, Katharine, New York Times, March 9, 2001, p. A14.

<sup>4</sup> At the April 13 Commission meeting, the Chair did not specify when Commissioners would receive a draft copy of the report. Her only statement was: "So Eddie, we have to have that [the draft report] at some point before then if we are going to act on it at the June meeting."

On May 22, Commissioners Thernstrom and Redenbaugh sent a memo to the Chair and asked two questions: when exactly Commissioners could expect to receive the report, and what was the status (begin and end dates) of the affected agency review?

On May 23, Les Jin's special assistant, Kim Alton left a voice mail in Redenbaugh's assistant voice mail saying that the staff director said that Commissioners should refer to the April transcript.

On May 24, Commissioner Redenbaugh sent another memo to the chairman protesting this lack of response, and reiterating the two questions. That memo was acknowledged (on or about

Continued

port were published in the Washington Post, New York Times and the Los Angeles Times before I had even received a copy of the draft. In other words, the media were privy to the report's conclusions before I was. On June 9, 2001, the Washington Post called this leak "stupid and destructive."<sup>5</sup>

- Press releases are issued including my name, although I have not seen them beforehand and in fact often disagree with their substance. Moreover, they can be woefully inaccurate. For instance, following its meeting this past September, a press release stated that commissioners had voted for a hotline to solicit and catalogue complaints of discrimination involving Arabs and Muslims. In fact, this vote never took place.<sup>6</sup> Moreover, there had been no discus-

May 31) by Dr. Berry's assistant, Krishna Toolsie, who again referred Commissioner Redenbaugh's assistant to the April transcript in which Dr. Berry informed the Commissioners that they would have the report in early June.

On June 1, Les Jin sent Commissioners a brief memo stating only that the report "was not quite ready for distribution to the Commissioners"; it would be sent out "in accordance with the timeline discussed during the April Commission meeting"; and the Commission was "proceeding with the requirements for legal sufficiency and affected agency review . . ."

On Monday June 4, at approximately 9:30 a. m., Commissioner Redenbaugh's assistant, Charlie Ponticelli, met with staff director Jim's special assistant, Kim Alton, in the anteroom of the staff director's office. Ponticelli stressed the Commissioners' concern that all Commissioners be given adequate time to review the draft report, and she again asked when exactly they would receive the report. Kim Alton said the report was downstairs with the General Counsel and that she did not know when Commissioners would receive the report but that she would check with the staff director for further details. At approximately 5:00 p. m. Kim Alton left a voice mail message indicating that the report would be available "at 6:30 today." At 6:00 p. m., Ponticelli received a call from New York Times' reporter Katharine Seelye asking for Commissioner Redenbaugh's number so that she could get his reaction to the report. Seelye was told that neither had yet received the report. At 11:00 p. m. that evening, a messenger sent by the Commission arrived at Ponticelli's house with a copy of the report. Commissioner Thernstrom's assistant received her copy of the report about the same time. Commissioner Thernstrom received her copy of the report, the next day, Tuesday, June 5 after noon. That morning the New York Times, the Washington Post and the Los Angeles Times ran stories about the report which had been leaked to those papers by the Commission.

<sup>5</sup> Getler, Michael, *The Washington Post*, "When Leaks Backfire," June 10, 2001.

<sup>6</sup> USCCR transcript, September 14, 2001, pp. 50-55. The hotline is not mentioned in the discussion and not voted on.

Chairperson BERRY: Well, I think that the first thing is that the staff should find out what the Community Relation Service is doing. Because they're small too, and they don't have much money, but their mandate as I understand it, unless it's changed in the last couple of years, is to be conciliators. And they used to do reports all the time, because I used to use them on incidents that were happening in various places and their efforts to try to go out and conciliate. So we need to find out what they're doing.

And usually RDs in the past have operated in tandem with them. I don't know whether they're doing that now anymore, but they should be in consultation with them.

I hear Ivy saying in the background that they are, so that's good. And they should be, and they should report to us on what's going on. Because my gut reaction is that CRS is the place that ought to be doing this job of actually out on the ground conciliating and collecting information and data and passing it along. And RD's ought to be working with them, and our SACs and coordinating that. And until we get some other advice to do something else, why don't we simply say to our staff that that ought to be happening and they ought to make sure that it is. Unless somebody has an objection.

Vice Chairperson REYNOSO: Vice Chair.

Chairperson BERRY: Yes, Vice Chair?

Vice Chairperson REYNOSO: I think that the gathering of data is very important because there's such a tendency of denial in terms of anything negative that's happening in our country.

Commissioner EDLEY: Exactly.

Vice Chairperson REYNOSO: That's probably very important.

Secondly, I just want to point out that somehow the description of the Near East of part of this world has been expanded. Because I heard concerns by Indians—

Chairperson BERRY: Yes.

Vice Chairperson REYNOSO:—and people of Indian ancestry. I never knew that India was in the Near East, but somehow that they too apparently have come under harassment. So it's a large body of Americans that are potentially coming under this type of fellow citizen or police type of heightened scrutiny and harassment. So I think it's very important.

Chairperson BERRY: Well, the history of all this is that that's what usually happens. People who look like or people think are, and they have no idea anyway because we have such a faulty knowledge as Americans of geography anyway, so we hardly know where anyplace is and where anybody came from.

One of my students yesterday who is Hispanic, Mexican he calls himself, was saying he needs to get a big sign to put in front of him to carry around saying "I'm Mexican," because people are harassing him because they thought he was an Arab. He was Arab-looking they said. They didn't know what that was, but that's what he was doing.

So, in any case, I think the statement now—so what we'll do is tell the staff, CRS, work with them, find out what they're doing, the data collection and all the rest of it, and the RDs out

unit has become a very expensive clipping service—nothing more. Two of its employees have quit recently.

According to a cumulative cost analysis issued by McKinney & McDowell, senior staff at the public relations agency charge the Commission \$200 an hour. However, I have never seen an accounting, although I suspect I have fiduciary responsibility as a Commissioner.

I have asked, at a minimum, to receive copies of the press releases issued at taxpayer expense and including my name. McKinney & McDowell told my assistant, Kristina Arriaga, that they worked only for the chairman. Often, I have had to request copies of press releases after I see them posted on the internet or quoted in news articles.

- Commission meetings are marked by procedural chaos. Rules are changed arbitrarily. I can't be sure of what will be on the agenda until I arrive at a monthly meeting, and topics and speakers are switched without warning. As a result I cannot adequately prepare for meetings, and I waste time on issues that will not be addressed. Thus, a hearing on welfare was scheduled for the meeting in March; at the very last moment, the chairman substituted a speaker on bioterrorism.

This problem has risen several times in years prior to my service on the Commission. I include sections of the transcripts of two meetings—one in 1996 and another in 1999—at which commissioners protested this practice on the record.<sup>9</sup> In spite of assurances by the chairman and memoranda requesting an explanation, this practice continues.

On March 8, the chairman justified the last minute change by stating that the briefing was being conducted by a “speaker”<sup>10</sup> even though the agenda and the Fed-

<sup>9</sup>USCCR transcript, November 15, 1996

Chairperson Berry stated: “Well, you will know at least at the meeting before the meeting, if there's some emergency thing added.” Commissioner George asked: “So nothing will be added unless it's added at a meeting before that meeting at which the briefing will be held.” And the Chairperson replied: “Yes, Yes. And if it's an emergency and we have to for some other way do it that way, somebody will call you and tell you. Okay? The staff director. How's that?”

USCCR transcript, June 18, 1999.

Chairperson Berry stated: “There may be emergencies from time to time, or items that happened and that Commissioners would be notified when they occurred . . . we will try to make sure that in the future . . . the staff director will be instructed to make sure that people know a month in advance if there is a briefing scheduled for already for something.” She reiterated: “So the general rule then, as I understand it, will be that Commissioners will be notified a month in advance.”

<sup>10</sup>USCCR Transcript, March 8, 2002, pp. 59–68.

Chairperson BERRY:—whatever else you guys want to do, you can do it, but we want to do this. Maybe that would have been okay.

Yes?

Commissioner BRACERAS: I actually have a question about the briefing for today, and actually how it came about. Because—

Chairperson BERRY: I'd be happy to tell you.

Commissioner BRACERAS: Okay. Well, great. Because I had spent some time, actually—and my special assistant had spent some time—preparing for a briefing on welfare reform and educating ourselves on that. And I think that this topic that we have for today is interesting, and I'm pleased to welcome the witness here today to talk about it. But in terms of process, I have to say I was a little concerned about how this came about and the timing of it, because we did not have time to educate ourselves about this issue the way we had started to do on welfare.

So from the memorandum that came over my fax, it indicated that somebody on the staff had, I guess, fallen ill, and that was the reason for the change on the welfare briefing. And I was just wondering if you could tell me who it was—who on the staff was responsible for welfare that fell ill that made it impossible to have that briefing.

Chairperson BERRY: Do you want to name the person that's—

Staff Director JIN: I don't think I would—unless my counsel tells me, I don't think I would be appropriate in this kind of forum.

Commissioner BRACERAS: Okay. You don't have to tell me who's ill, but can you tell me who was responsible for welfare?

Staff Director JIN: Well, the way you phrased the question, I mean, once I say that—

Commissioner BRACERAS: Well, there's only one person who was responsible for the briefing?

Staff Director JIN: Well, there's a person who was responsible for taking the initiative to do the early work to get it to a second point, and others would have jumped in and helped.

Commissioner BRACERAS: And there was no one else who could take over when that person fell ill?

Staff Director JIN: And the situation was that a number of things happened sequentially so that—when we were going through it, we thought that the person would—we knew there were some major things, but we didn't think that they would last this long. And it just kept on piling up.

sion of the matter at any Commission meeting. I include the text of the transcript and the discussion of this issue.

Records show that other commissioners in past years (before my time) have protested the practice of the chairman to release statements without consultation. I attach a memo dated August 10, 1995 written by Commissioner Robert George addressing the use of the press office in releasing statements made by Chairman Berry.

- The chairman, Mary Frances Berry, has a public relations agency, funded with taxpayer money, that only works for her.<sup>7</sup>

On August 15, 2001, Scripps Howard published an article stating that the Commission had paid \$135,000 to a private public relations firm, McKinney & McDowell. A survey conducted by Scripps Howard of twelve other government commissions of similar size found that only one agency had hired a public relations consultant and that was five years ago for one specific project.<sup>8</sup>

I am not an expert in government contracting, but I do suspect that, as a commissioner, I am responsible when taxpayer money is being used to pay an outside public relations firm. Furthermore, the contract had no obvious justification; the Commission has a Public Affairs Unit whose job McKinney & McDowell assumed.

Until a month ago, the Commission had a Public Affairs Unit staffed by three career employees. Les Jin, however, has slowly stripped this unit of all authority, removing (in November 2001) its ability even to answer its own phones. Media cannot reach the PAU directly. They work through Jin's office, which screens calls. The

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there with the SACs to the extent we can do it, is being another place where people can complain and getting the message out.

The statement, we will rewrite the statement and it will have several elements. It will commend those who have made statements and who have encouraged people. It will commend the President for his statement about the need to not harass people and discriminate against them.

It will say something about the law enforcement and their efforts, and the need to take care as we go forward on this.

And we will try to get this into all the right hands today.

And then the staff will consider Christopher's suggestion about getting someone to write a paper about this and what suggestions we might make.

Now, today if we want to or we can wait until the next time, make the suggestion to EEOC that they start thinking about guidelines. I don't know, is that something you wanted to do now or you wanted the staff to look into, or to what, Christopher? The one about trying to give guidance to—

Commissioner EDLEY: I think we ought to do it. In other words, I would like us to instruct the staff to formulate such a memo for you to send over—

Chairperson BERRY: Okay.

Commissioner EDLEY:—calling on—maybe to send it to the AG and the Chair of the EEOC asking them to put something together.

You know, I'm sitting here just thinking again about that example in Florida, and I don't—you know, I'm a Harvard law professor and I don't know what the legal answer. I don't know as a matter of current doctrine. That bothers me.

Chairperson BERRY: You mean that the flying school would—

Commissioner EDLEY: Would automatically send somebody's information over to the FBI just because they look like—just because they're from—so I think there's a lot of murkiness here, and I think it'll take a couple of months to, obviously, produce any kind of a document of guidance. But I think that sending them something now saying we think you need to get on this would show that at least we're being forward thinking.

Chairperson BERRY: Well, coming from the presence of Philadelphia and Penn as opposed to Cambridge, I am also puzzled about it. But in terms of what I know legally, if there is a declaration of war, of course, all bets are off.

Commissioner EDLEY: Right.

Chairperson BERRY: Because then people can do anything they want to almost—almost to anyone including the bar is somewhat lowered as for what you can do in time of war. But, of course, we don't have a declaration of war, so that's a different situation.

And even in time of war, one wonders whether just because someone looks a certain way, they should somehow be harassed or have law enforcement officials sicked on them as a person.

So let's have the staff look into all these questions and try to come up with something for us.

Is the staff clear on what we're asking the staff to do?

Staff Director JIN: I think we are.

<sup>7</sup>The Statement of Work originally issued by the USCCR in the year 2000 stated: "Based on background information to be provided by the Commission, the Contractor shall perform research, plan, coordinate and perform both press and public outreach services. . . . The Statement of Work was amended. The new task section read: "Based on background information to be provided by the Commission, the Contractor shall perform research, counsel, plan and coordinate public relations based on guidance from the USCCR Chair and when designated, other senior staff throughout the contract period."

<sup>8</sup>Sergent, Jennifer, "Civil Rights Commission PR Expenditures Questioned," August 15, 2001.

Commissioner BRACERAS: Okay. Well, that's fine. And I obviously wish the person well. But my question is more of an institutional one as to why there wasn't somebody who could have taken over and shepherded the project to completion, since we had all—or at least some of us had spent time preparing for that project?

Chairperson BERRY: Commissioner Braceras, the staff director, I think he's responded. But let me respond to how this came about. And I had planned to do it when we introduced our guest. Commissioner BRACERAS: Well, I'd actually like the staff director to answer that question.

Chairperson BERRY: He doesn't know; I do. He knows why it came about, but I had a role to play in it. So I would like to express what that role is.

Commissioner BRACERAS: Great.

Chairperson BERRY: And I had planned to do it when I introduced our guest, who I'm pleased to have here. And it's not time to do that yet. But in any case, we had a discussion in November about bioterrorism and healthcare issues and underserved populations and the Office of Homeland Security, which was just being established.

The staff after that—there were a lot of questions in our discussion that were unanswered. And the staff, as they continued to monitor this, I was speaking with the staff director about the possibility that OCRE might write a memo for us to read at some point about these issues.

And they did that. And then when we came to set the agenda for this meeting, having time available, I said, well, you could send a memo out, and we could just discuss the memo and see where we are on it. Then I said, well, maybe rather than doing that, we shouldn't have a briefing. Because the way we do briefings is we get names, and we do panels, and we do all of that, and there wasn't time for that. But that we should just ask someone who is an expert on public health delivery systems to come in and briefly talk with us about it. And then if the commissioners wanted to have a formal briefing after that in which they invited witnesses or did whatever they could, and that this was a wise and best use of our time.

So I took it as my responsibility in setting the agenda, which is one of the two responsibilities I have to do that. So I'm the one who—

Commissioner BRACERAS: Well, that's all great. My only question was, why was that now instead of welfare. And my other question goes to not only the timing but how we were informed of it. Because in looking over some transcripts from this commission in the past, I noticed that you had in 1996 promised Commissioner George that commissioners would always be given a month's notice before they were going to have a speaker or a briefing, and that nobody would come and give testimony to this commission without us having a chance to prepare. And that commissioners would know at the meeting before you was coming to speak at the following meeting. And you reiterated that in 1999. And that's readily available in the transcript.

So I'm curious to know why that didn't happen this time. Because like you said, this is an issue that the Commission has been discussing since November. It's clearly not an emergency. It could have been put on the calendar for April, and that would have given us some time to brief ourselves and familiarize ourselves with the issues, which I would like to do before the gentleman speaks so that I can better understand what he has to say and formulate some more intelligent questions.

So given your previous statements and assurances that business would not be conducted that way, I'm wondering why it was.

Chairperson BERRY: The first answer is, I did not state that no speaker would come before the Commission without this happening. I said there would not be a briefing without people being given notice.

Commissioner BRACERAS: So change the title of what's been proposed instead of what are the rules?

Chairperson BERRY: Commissioner Braceras, you spoke; I'm speaking.

May I speak?

Commissioner BRACERAS: Feel free.

Chairperson BERRY: Are you in charge?

Now, I did not state that no speaker would ever come to the Commission. I know I didn't say that, and you know I didn't say it. And I have just told you—

Commissioner BRACERAS: I'm happy to pull up the transcript.

Chairperson BERRY: The transcript—read the transcript. Read where I said no speakers will come.

Commissioner BRACERAS: I don't have it in front of me, but when I—

Chairperson BERRY: Well, you throw out these things that are not true.

Commissioner BRACERAS: Well, when I go back to my office, I'll fax it to you.

Chairperson BERRY: Okay. Do that. Do that. Because I know I didn't say that.

Now, the second thing is, I have just told you this is not a briefing; that we could have just discussed the memo, since we have time available when we were going to have welfare reform. This is not an issue where we're making a decision; we're just having a discussion. And it seemed entirely reasonable to have someone who was an expert on short notice come in and just discuss it with us.

Now, if you object—

Commissioner BRACERAS: Oh, I don't object at all. I don't know why—I actually—

Chairperson BERRY: If commissioners object, you may move that you object. And the—

Commissioner BRACERAS: I don't object at all.

Chairperson BERRY:—Commissioners can vote on it. And we will ask the speaker to leave.

Commissioner BRACERAS: And actually—no, I'm very interested in hearing this speaker. But I'm actually baffled as to why you're so angry about this. Because all I'm asking for as going forward, a little more notice so that I can have time and other commissioners can have time to educate themselves—

Continued



eral Register indicated there would be a "briefing." At the meeting, I asked for a clarification of the distinction between speakers and briefings. That question was subsequently posed as well in a memo to the staff director. I have yet to receive an answer.

- I lack basic access to the staff and its work. Direct conversations with anyone outside of the Les Jin's office are prohibited.

I was told by the former general counsel that this prohibition was detailed in the Administrative Instructions, but I find no language in the AIs that creates a fire wall between commissioners and staff other than Les Jin.<sup>11</sup> Moreover, memos to Jin containing vital questions are regularly unanswered or only very partially answered. Communications from him can be . . . well, let's say, just totally bewildering. For instance, on July 20, 2001 I received a memo stating that I did not participate in a meeting between Commissioner Redenbaugh and the general counsel, and that the deadline to discuss the issues at hand had passed. In fact, there was never a meeting, and never a deadline, as I made clear in an uncontested memo of July 23. He has yet to respond to that memorandum.

- Grandstanding substitutes for effective work. The hotline to record instances of discrimination experienced by Muslims and Arab-Americans was a disaster, as Time magazine accurately reported on February 9, 2002. It was basically useless. That did not bother Chairman Berry who, on October 12, said: "People around the country have expressed their gratitude, so I think we

Chairperson BERRY: Do you—

Commissioner BRACERAS: Excuse me.

Chairperson BERRY:—have a motion, Commissioner Braceras?

Commissioner BRACERAS: No. I'd like to finish speaking.

Chairperson BERRY: Do you have a motion?

Commissioner BRACERAS: I'd like to finish speaking.

Chairperson BERRY: Do you have a motion?

Commissioner BRACERAS: I have a point of order, which has to do with the way this commission conducts business. And I would like to request that in the future commissioners are given better notice than we've received in this case. And by that, I mean a month's notice of what is going to happen at the next meeting so that we can inform ourselves appropriately.

It baffles me that that request angers you so.

Chairperson BERRY: Do you have a motion on that? Because our procedure now is not to notify commissioners a month ahead of what the agenda is for the meeting. I don't even know what it is a month ahead. But if you'd like to change the procedure, you may move to do so.

Commissioner BRACERAS: I'm not asking for a complete agenda. I'm asking, if there's going to be a speaker or a substantive discussion of a civil rights issue, to have notice of that so that we may prepare. The fact that this has angered you so is really, I think, quite revealing to anybody who's watched this commission. Because I don't understand why you would be against commissioners—

Chairperson BERRY: Do you have a motion?

Commissioner BRACERAS:—preparing and having information.

Chairperson BERRY: Do you have a motion?

Commissioner BRACERAS: No. I think I've said what I need to say.

Chairperson BERRY: Okay.

Are we going to proceed or not? Or are we—

Commissioner THERNSTROM: Well, I just have a question.

Chairperson BERRY:—simply going to keep discussing all these procedural questions for the rest of the day.

Commissioner BRACERAS: I'm not.

Commissioner THERNSTROM: I just have a question.

I don't really—there seems to be—I don't understand the categories of people coming before this commission, the categories of events. That is, there seems to be hearings. Commissioner Edey referred this morning to a forum, but by that I think he means the hearings. Then there are briefings. Then there is another category in which there are speakers, but I don't know what that category is; I don't know what the context is.

And I just—I don't understand the structure of how this commission operates. And I think we do need to have some understandable rules so that there isn't—and some regular structure. I don't understand what a speaker is. Is a speaker just somebody who appears? Can they appear at the last moment, invited at the last moment, and we don't prepare for it?

Chairperson BERRY: Do the commissioners wish to hear from Dr. Akhter or not?

<sup>11</sup> Various memoranda from December 17, 1993 to September 9, 1997 attached reiterate the chairperson's view that Commissioners cannot communicate directly with the staff or that special assistants are not to talk to the staff. A memo dated December 17, 1993 from Commissioners Carl Anderson, Arthur Fletcher, Robert George, Constance Horner and Russell Redenbaugh express concern over Chairman Berry's statement "express[ing] discomfort at having Commissioner assistants located at Commission headquarters and . . . may take action to remove them."

ought to be proud that we're doing this rather than worrying about whether it's helping anybody."<sup>12</sup>

- Most important, an apparent fear of dissenting voices pervades all of the Commission's work. That was evident in the recent cancellation of important hearings on education; the staff is writing an education report behind closed doors.

This fear of dissenting voices was most obvious in connection with the Commission's Florida report, of course—a report that an unsigned Washington Post editorial described as “highly politicized,” contributing little “beyond noise, to the national discussion of the problems in the 2000 election.”<sup>13</sup>

Fear of input from affected parties in Florida, from scholars outside the Commission, and from Commissioners themselves drove a process that lacked even bare-bones integrity. And a corrupt process insured a worthless result.

I would like to speak briefly about the suppression of the Thernstrom-Redenbaugh dissent—on totally specious legal grounds. That the U.S. Commission on Civil Rights should even think about suppressing a dissent is of course jaw-dropping. This Commission not only thought about silencing a dissenter; it acted.

Chairman Berry often claims the dissent has in fact been published by the Commission. Not so. A crude first draft of the dissent has been included in a pile of material taken from Senate hearings on election reform. I was not permitted to submit the polished and quite amended version. And that crude first draft does not appear labeled as a dissent, published in its proper place. Furthermore, The Commission's statistical expert, Dr. Allan J. Lichtman, wrote a rejoinder to my dissent, although I had been told no rejoinder was forthcoming without a notational vote. His work was thus inserted into the Senate record (unbeknownst to me), despite the fact that I had been promised a chance to respond to anything he wrote.<sup>14</sup>

<sup>12</sup> October 12, 2001, USCCR, p. 25.

<sup>13</sup> “Sins of the Commission,” Washington Post, February 11, 2002; Page A24.

<sup>14</sup> USCCR Transcript, June 11, 2001, pp. 130–133.

Commissioner THERNSTROM: Commissioner Redenbaugh has something on this point.

Commissioner REDENBAUGH: On this matter.

Chairperson BERRY: Oh, yes, Commissioner Redenbaugh.

Commissioner REDENBAUGH: Yes, I am baffled by—no, concerned, really, by having a Commissioner's dissent reviewed and analyzed. I mean I think we have and should have a one-bite policy or we get in a situation where then are we going to then analyze the analysis?

Chairperson BERRY: Commissioner Redenbaugh, the majority report of this Commission, by the vote of six to two, is a report which includes a particular statistical analysis. The vote was six to two.

Commissioner REDENBAUGH: Yes, I'm aware.

Chairperson BERRY: And if the dissenters want to challenge the statistical analysis, at least there ought to be a possibility for the statistician to look at it and to comment on it since the majority of this Commission agrees to it. Now, if Commissioner Thernstrom would then like to look at his analysis and analyze it, and then if he would like to look at hers and analyze that, fine, I don't care. You can analyze it till the cows come home. But, in any case, since it is by a majority vote of this Commission, that it is the position of this Commission, it seems to me all together fitting and proper that this be done.

Yes, Commissioner Thernstrom? Do you have a point on that or something else?

Commissioner THERNSTROM: No, on this. I just wondered if there was any precedent on this matter? It seems to me that you have a report, it's going to be perfectly clear it was supported by six Commissioners, and then you have a dissent to the report. And my understanding is that's always the way it's been done. And because otherwise, yes, I'm going look at Professor Lichtman, and I'm going to say, “Well, Allan, I want to respond to that.” I agree with Commissioner Redenbaugh, one bite of the apple. That's what we've always done, to the best of my knowledge.

Chairperson BERRY: That's not what we've always done.

Commissioner EDLEY: Madam Chair?

Chairperson BERRY: And do Commissioners—just so we can get out of this—this is a democracy, can I have a motion that we permit Professor Lichtman to analyze the materials in the document that will be submitted?

Commissioner EDLEY: Madam Chair, I'd make that motion and clarify that if he does do an analysis and circulates the analysis, that you then just do sort of a notational vote to find out if there's a majority of the Commissioners that would like his analysis included in the report.

Chairperson BERRY: Okay. All right.

Commissioner EDLEY: Because it may be that the majority would conclude that there's no need for it to be.

Chairperson BERRY: Right. So if that's the case, then why don't you make that motion?

Vice Chairperson REYNOSO: Say “So moved.”

Commissioner EDLEY: So moved. (Laughter.)

Chairperson BERRY: Could I get a second?

Commissioner LEE: Second.

- Finally, I would like to address the issue of who manages the operations of this agency. During the House Budget Subcommittee hearing on July 17, 1997, Chairman Berry repeatedly stated that she did not manage the “day-to-day” operations of the agency. Further, she said: “I clearly believe there should be better management at the Commission, that’s why we have a new staff director.” It is true that the statute has delegated day-to-day responsibility to the staff director. However, the chairman and the Commission as a whole are responsible for the operations of the Commission. Under 42 U.S.C. § 1975d(3) the Commission appoints personnel it deems advisable and under § 1975h(1) the Commission has the power to make rules and regulations necessary to carry out the purposes of the Commission.

Therefore, contrary to the testimony of the chairman in the 1997 hearings the Commission does not merely supervise the staff director, but rather, has ultimate authority over all personnel, and sets policies and rules governing such personnel. The Commission has a fiduciary obligation to oversee the staff director’s management and set the terms by which he does so. Indeed, under 45 CFR § 701.12 the staff director is the chief executive officer of the agency. That term has a specific meaning. The staff director is answerable to the Commission just as a CEO is answerable to a Board of Directors, and just as a Board of Directors cannot absolve itself of responsibility for malfeasance, misfeasance or nonfeasance of the CEO, the Commission cannot absolve itself of the malfeasance, misfeasance or nonfeasance of the staff director, nor, by virtue of § 1975d(3), any other staff member. In this regard, and by virtue of the responsibilities charged to the Chair under 45 CFR § 701.11(c), the Chair has a special responsibility for ensuring that the staff director discharges his responsibilities in accordance with the directives of the Commission.

The Commission, and most particularly the chairman, cannot be blind to or disclaim responsibility for the day-to-day operational failures of the staff director in an Enronesque fashion.

Other management issues plague the Commission. On April 13, 2001, after I had protested the staff director’s lack of responsiveness to my concerns, the chairman stated that the staff director does not work for any particular commissioner. He works collectively “for the Commission” and does not answer to individual commissioners.<sup>15</sup>

Finally, contrary to the chairman’s statement, as CEO the staff director is unequivocally responsible for responding to an individual Commissioner (not just the Chair or the Commission as a whole) where such Commissioner is performing his or her fiduciary obligations under § 1975.

Mr. Chairman, every year the Commission has requested a substantial budget increase. However, the Commission is unable to plan the year, let alone month to month. The chairman’s penchant for secretiveness and her desire to control the discourse and the terms of the discussion are such that the entire staff of the Commission floats from day to day.

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Commissioner EDLEY: Whatever the transcript says I said.

Chairperson BERRY: All in favor indicate by saying aye.

(Commissioners vote aye.)

Chairperson BERRY: So ordered.

<sup>15</sup>USCCR transcript, April 13, 2001, pp. 4–6.

Chairperson BERRY: [C]ommissioners only have two-one employee as individual Commissioners. That one employee is your assistant, if you have one. We collectively have one employee that we supervise. That is the staff director. The Commissioners collectively do not supervise the staff. The staff director supervises the staff, but we supervise the staff director collectively.

What that means is the staff director is not responsible for responding to any individual Commissioner’s direction. The staff director will of course respond to factual inquiries on matters made by Commissioners, but the staff director does not routinely—does not take direction from any individual Commissioner. The staff director does take direction from the Commission as a whole. That is the way the statute is set up. That is the way the regulations are set up.

The staff director does have a close working relationship with the Chair of the Commission, whoever that is, primarily because the Chair of the commission is responsible for setting the Commission’s agenda each month, and has to determine whether or not, for example, materials are ready to go on the agenda, the status of issues, and whether or not things should go forward. The Commissioners have expressed orally in meetings and in other ways that that is the way they understand the relationship to go.

The staff director has not routinely responded in writing to inquiries from individual Commissioners. First of all, if would be too time consuming. Secondly, the staff director does not report to any individual Commissioner but the Commission as a whole.

Although the staff director or his assistant will respond orally to anything anybody wants to know—any Commissioner wants to know, to their special assistant if they have one. If not, to them, if they prefer.

Being an independent Commission should not mean that the agency is unaccountable for the \$9 million dollars it spends every year. At the Commission meeting, last month, Commissioner Braceras asked what might be on the agenda in April. The response from the chairman was: "I have no idea"<sup>16</sup> and the staff director was unable or unwilling to answer either.

<sup>16</sup> USCCR transcript, March 8, 2002, pp. 107–112.

Commissioner BRACERAS: I have a question as to what may be coming on the agenda for April.

Chairperson BERRY: I have no idea.

Commissioner BRACERAS: Well, I'm asking staff or whoever might know, because, obviously, somebody's planned something.

Chairperson BERRY: Do you know yet, Staff Director?

Commissioner BRACERAS: I hope somebody's planning something.

Staff Director JIN: Well, I mean—

Chairperson BERRY: Something will come. I just don't know what.

Staff Director JIN: I guess I'm kind of reminded, at the last meeting we were talking about this meeting. And the chair was saying that we hope to have welfare reform.

Commissioner BRACERAS: Okay, great.

Staff Director JIN: No. My point is this. My point was, like, we try to plan ahead, but you never know what comes up. Okay?

Commissioner BRACERAS: Okay. Well, in a noncommittal way—

Staff Director JIN: No, no. Okay, no—

Commissioner BRACERAS:—can you tell me what you may be planning—

Staff Director JIN: I—I—

Commissioner BRACERAS: Here's why I ask—

Staff Director JIN: I hope to have—

Commissioner BRACERAS: Let me just say something.

Staff Director JIN: I hope to have the Alaska Report up by next month.

Commissioner BRACERAS: Okay.

Staff Director JIN: I hope to have that. I'm optimistic, but we'll just have to see.

Commissioner BRACERAS: But are there any briefings, hearings, speakers, anything of that nature—

Staff Director JIN: Well, I mean, what I will do is—

Commissioner BRACERAS:—planned for April?

Staff Director JIN: At this moment, no. But I will do is—I mean, we're always looking at different things. If certain things come up where I think there's an opportunity, then I will raise it with the chair. Because as the chair indicated, she's the person responsible who determines what goes on the agenda. And if she feels that it makes sense to come up, then maybe I can persuade her to do that. If not, then not.

Commissioner BRACERAS: Okay. Well, two things. If there are going to be any briefings, speakers or hearings, I would just appreciate as much notice as possible so I can educate myself on the issues.

The main reason I raise it, frankly, if I know we've talked about going to Florida, probably not as early as April. But I know that's been on the agenda. And just having two toddlers at home, if I'm going to be making a more lengthy trip or a trip that's farther away, I need to make arrangements. So to the extent there were—

Chairperson BERRY: Commissioner Braceras, we will meet here in April.

Commissioner BRACERAS: Okay. I'm just making sure.

Chairperson BERRY: I know that.

Commissioner BRACERAS: That's fine. But I'm just asking the staff to take into consideration that, obviously, everybody at this table has personal commitments and personal—other areas of work and things in their lives. So if we're going to Florida at a scheduled meeting or otherwise, I really would like four weeks notice to make whatever personal arrangements I need to make.

And I'm telling you that now, because if it comes up in July, I don't want to hear about the trip on July 1st; I'd like to hear about it in May, if possible. So I'm just asking for that consideration.

Chairperson BERRY: Understood.

Commissioner BRACERAS: And I think all of us could use that.

Chairperson BERRY: Understood.

Yes, Commissioner Wilson?

Commissioner WILSON: I just want to assure Commissioner Braceras that usually we vote on a date when we're going someplace.

Commissioner BRACERAS: Okay, great.

Commissioner WILSON: Way in advance.

Chairperson BERRY: But we're not going anywhere in April.

Commissioner BRACERAS: All right.

Chairperson BERRY: We'll be here. I don't know what we're going to do, but we'll be here.

Commissioner BRACERAS: I mean, my point was two-fold, Madam Chair.

First of all, assuming we were going to be here, I wanted to be prepared and informed for whatever substantive issue we're discussing. And then the other point was more of a forward-looking point, that we've had this discussion about going to Florida for several months now. And to the extent that—as soon as this narrows down, I think the commissioners need to be informed quickly so that we can make those arrangements, because it may be a longer period of

Continued

The problems I have outlined are, frankly, the tip of a very large iceberg. Obviously, the Commission should function in a responsible manner. It should be a place of procedural integrity, a forum for robust debate, and a source of hard facts on current civil rights issues. It fails on all these counts. Indeed, it has become a national embarrassment.

Thank you very much.

Mr. CHABOT. Thank you, Commissioner Thernstrom.

Mr. Jin.

#### STATEMENT OF LES JIN, STAFF DIRECTOR, U.S. COMMISSION ON CIVIL RIGHTS

Mr. JIN. Thank you, Chairman Chabot, Congressman Nadler, and Members of the Subcommittee.

I am Les Jin, the staff director for the U.S. Commission on Civil Rights. I have served in this position, as you noted, for a year and a half. And I thank you for this invitation to provide testimony on the management practices of this agency.

As the Subcommittee knows, over the last 9 or 10 months, we have gotten six sets of inquiries from the Subcommittee. We have responded fully to each of them. They've covered most all if not every one of the topics that have been raised here so far. Among those submissions are the three full boxes over there that we have provided. And we have been totally responsive.

I am proud of the work of the managers and staff of the commission. They perform in a generally exemplary fashion, despite the challenging constraints brought about by the commission's diminished resources.

In your letter of invitation, Mr. Chairman, you indicated that you wanted me to provide testimony on my thoughts on the management practices of the Civil Rights Commission. I am pleased to provide you and the Subcommittee with this information. I look forward to discussing the substantive results of the management practices.

The ultimate test of good management is that the commission has produced quality work in a timely manner, covering a broad range of civil rights topics.

Ms. THERNSTROM. Oh my.

Mr. JIN. Two issues in which the commission has made enormous contributions to the public discussions are civil rights issues and, with respect to election reform—

Ms. THERNSTROM. No.

Mr. JIN [continuing]. And the post-September 11th issues.

Beyond holding public forums and issuing reports, the commission has worked to monitor and track the impact of our activities, since it is our hope that our work leads to positive changes and progress for the struggle for equality.

Although the results of the commission's activities are not always quantifiable, primarily because we are a study commission and do not possess enforcement powers, there are many instances where the commission's activities played a role in creating substantive change that have improved the area of civil rights. They include:

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time than usual, and we need to plan for that in our personal lives. So that was just a second FYI.

Chairperson BERRY: All right. Anyone else have anything else?

First, the commission held high-profile hearings in Florida in January and February of 2001, highlighting many of the shortcomings in the Florida November 2000 election.

In May 2001, Governor Jeb Bush signed into law the Florida Election Reform Act of 2001. State legislation as well as the national election reform proposal currently being debated in this Congress address some of the recommendations and concerns raised in the commission's two reports, one on Florida and the other on election reform.

Second, in August of 2000, the commission studied the issue of racial profiling and police-community relations in a report titled "Police Practices and Civil Rights in New York City." And as Congressman Nadler noted, since that time, the New York Police Department commissioners issued a strongly worded order against the use of any racial profiling for arrests, car stops, or any other law enforcement actions.

In 1986, this Subcommittee convened oversight hearings in response to a GAO audit report entitled "Operations of the U.S. Commission on Civil Rights," which found that from approximately 1984 to 1986, the agency issued one report, no State advisory committee reports, and no reports analyzing Federal civil rights enforcement. That was a dismal record.

I am pleased to report to you that in addition to all of the other work conducted by this commission currently, including many, many reports being issued the last several years, it has issued a civil rights enforcement report every year since 1989.

Nearly 10 years later, in July 1997, the GAO provided—performed another audit of the agency that recommended some areas of improvement for the commission. These 1997 recommendations pale in comparison to the 1986 findings of improper personnel practices, operating procedures, and changes—and charges of financial mismanagement.

I emphasize that these GAO—I emphasize these GAO reports because I believe that it is crucial that this Subcommittee's review of today's management issues be placed in proper context when considering where this commission has been and how far it has come.

To appraise the management of the commission, it is important to understand that, under the statute and commission policy, the commissioners are part-time officials who meet once a month and maintain policy guidance and review, and approve or disapprove the work of the staff.

The civil service staff under the supervision of the staff director produce the work products of the commission. This includes directing investigations, selecting witnesses for hearings, and experts and advocates for briefings and consultations.

Commissioners make suggestions, but the staff decides how proceedings may be most effectively conducted.

The staff also handles civil rights complaints about the activities of other Government agencies from the public and monitors the work of the Federal civil rights enforcement agencies. In addition, it provides support to State and local civil rights forums conducted by the 51 State advisory committees.

As a matter of commission policy, commissioners do not involve themselves in the day-to-day operation of the commission. Each

commissioner has the same information access to drafts of the reports, witness lists, agendas, and other materials, at the same time. The policies and procedures ensure that the work is not biased in the direction of any of the commissioner's views and protects the integrity of the commission's work.

The current commission operates according to these long-established policies and has expressed no desire to change them.

It is no secret that, at times, the commission disagrees over—the commissioners disagree over commission policies, practices, and procedures.

I suggest to the Subcommittee that what has been described as alleged mismanagement issues are in fact disagreements about the policies, practices, and procedures.

Mr. Chairman, I request that my prepared statement be inserted into the record. And I would also ask that the six sets of questions from the Subcommittee, dated June 22, 2001; July 10, 2001; July 20, 2001; August 21, 2001; February 14, 2002; and March 17, 2002; and our responses, be inserted into the record as well.

Thank you, Mr. Chairman.

Mr. CHABOT. Without objection, they'll be accepted into the record.

[The prepared statement of Mr. Jin follows:]

#### PREPARED STATEMENT OF LES JIN

##### I. INTRODUCTION

Chairman Chabot, Congressman Nadler and members of the Subcommittee, I am Les Jin, the Staff Director of the United States Commission on Civil Rights. I have served in this position for approximately 1-1/2 years and I thank you for this invitation to provide testimony on the management practices of the agency.

As an independent, bipartisan, fact-finding agency of the federal government, the Commission is mandated to collect, study, and publish information concerning denials of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice. More specifically, the Commission is charged to investigate allegations in writing under oath or affirmation relating to deprivations (A) because of color, race, religion, sex, age, disability, or national origin; or (B) as a result of any pattern or practice of fraud; of the right of citizens of the United States to vote and have those votes counted. The Commission reports its findings and recommendations to the President and Congress.

As the Staff Director of the Commission, I serve as the administrative head of the agency and am responsible for its day-to-day activities. The Commissioners meet each month, with the exception of August, in order to establish the agenda of the agency. It is my responsibility to execute the Commission's agreed upon agenda by working with the agency's management team. I regularly meet each week, if not more often, with the managers in order to discuss the status of ongoing activities.

I am proud of the work of the managers and staff of the Commission. They perform in an exemplary fashion, despite the challenging constraints brought upon by the Commission's diminished resources over the past almost decade. The agency has received flat-lined appropriations since its last reauthorization. In 1995, the Commission received \$9,000,000 and was authorized at 95 FTEs. Under our most recent appropriation (FY 2002), the Commission received \$9,096,000 and was authorized at 76 FTEs. Adjusted for inflation, the Commission would be appropriated \$10,459,934 if the 1995 appropriation were reflected in 2002 dollars.

In your letter of invitation Mr. Chairman, you indicated that you wanted me to provide testimony on my "thoughts on the management practices of the Civil Rights Commission." I am pleased to provide you and the Subcommittee with this information, and I also look forward to discussing the substantive results of these "management practices." It is no secret that at times the Commission is very divided based on political philosophy. Sometimes these philosophical differences get translated into other arenas, such as management issues. Thus, I believe that the Subcommittee will find that many of the alleged management issues are the result of disagreements based on civil rights policy that have spilled over into a debate on

Commission management. The ultimate test of good management is that the Commission has produced quality work in a timely manner, covering a broad range of civil rights topics.

Two issues on which the Commission has made enormous contributions to the public discussion are civil rights issues with respect to election reform and post-September 11. I would encourage the Subcommittee to schedule hearings before this Congress adjourns on both topics and invite the Commission to present testimony on these issues that are so fundamental to the civil rights of our citizens.

## II. ACCOMPLISHMENTS OF COMMISSION

As the nation's conscience on matters of civil rights, the Commission strives to keep the President, the Congress, and the public informed about civil rights issues that deserve concentrated attention. In doing so, the agency continually reminds all Americans why vigorous civil rights enforcement is in our national interest. Within the past two years, the Commission has approved and published several reports on a diverse range of topics that include studies on the enforcement of the Americans with Disabilities Act, police practices, voting irregularities during the 2000 presidential election and proposed recommendations for election reform legislation. Attached to this statement is a full list of projects the Commission has produced recently and on which it is currently working.

As America confronts the tragic circumstances surrounding September 11, incidents of harassment and direct attacks against Arab and Muslim Americans and others perceived as members of these groups continue to emerge. The Commission is uniquely situated to respond to the Muslim and Arab American communities by offering assistance in addressing incidents of religious and ethnic intolerance. To date, the Commission has established a complaint hotline to solicit and catalogue discrimination complaints from members of the affected communities; held a briefing on U.S. immigration policies in the aftermath of recent terrorist activities; sought the advice of a renowned expert on bioterrorism and its relationship to access to health care; and had its State Advisory Committees organize forums or engage in other efforts on post September 11 civil rights issues. As they are completed, summaries of the Advisory Committees' reviews will be posted on the Commission's Web site. To our knowledge, this collection of projects and efforts by the Commission and its advisory committees comprise the broadest and most extensive examination of these civil rights issues by any public or private entity. Such reviews bolster the greatness of our nation, which rests on our exceptional diversity of religions, nationalities, and ethnic backgrounds.

In 1996, the Commission created a Web site that continues to increase in popularity as we work to make it more user friendly. Hits to our Web site have increased more than ten fold between 2000 and 2001. Visitors to the Web site can download Commission reports, order publications, file a civil rights complaint, and view certain briefings online.

Beyond holding public forums and issuing reports, the Commission has worked to monitor and track the impact of our activities, since it is our hope that our work leads to positive changes and progress in the struggle for equality. Although the results of the Commission's activities are not always quantifiable, primarily because we are a study commission and do not possess enforcement powers, there are many instances where the Commission's activities played a role in creating substantive changes that improved the area of civil rights. These include:

- The Commission held high profile hearings in Florida in January and February, 2001, highlighting many of the shortcomings in the Florida November 2000 election. In May of 2001, Governor Jeb Bush signed into law the Florida Election Reform Act of 2001. This state legislation as well as the national election reform proposal currently being debated in this Congress address some of the recommendations and concerns raised in the Commission's reports, *Voting Irregularities in Florida During the 2000 Presidential Election and Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election System*.
- In August 2000, the Commission studied the issue of racial profiling and police-community relations in a report titled *Police Practices and Civil Rights in New York City*. Since that time the NYPD chief has issued a strongly worded order against the use of any racial profiling for arrests, car stops, or any other law enforcement actions.
- In March 1999, as a result of recommendations made in a Commission report titled *Helping Employers Comply with the ADA*, the EEOC issued enforce-



ment guidance on reasonable accommodation and undue hardship under the ADA.

- In a 1992 report titled *Civil Rights Issues Facing Asian Americans in the 1990s*, the Commission recommended that the Department of Justice prepare and disseminate a "civil rights handbook" that informs all groups, particularly recent immigrants, of their civil rights. Subsequent to this recommendation, the Justice Department published a brochure that resembles our recommendation entitled "Federal Protections Against National Origin Discrimination," which is printed in 12 languages and is available on Justice's Web site.
- In 1999, the Justice Department issued a major policy guidance and established a formal technical assistance and training program on Title VI requirements and enforcement. The Department of Justice's Coordination and Review Section attributed this development to the recommendation made in the Commission's report, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*.

While conducting studies and issuing reports are the Commission's main vehicles for fulfilling its civil rights mission, they are not its only tools. Other tools include the Commission's Web site, national complaints tracking and referral unit, library, and public service announcements, as well as other publications.

### III. IMPROVEMENTS

In preparing for today's hearing, I reviewed some of the records from the 1986 oversight hearings this Subcommittee convened. These hearings were held in response to a GAO audit and observations by the Subcommittee, which found that from approximately 1984 to 1986, the agency issued only one report, which was on comparable worth, no State Advisory Committee reports, and no reports analyzing federal civil rights enforcement. With this unfortunate track record, I am pleased to report that the Commission has issued a civil rights enforcement report every year since 1989.

Nearly 10 years later in July 1997, the GAO performed another audit of the agency that recommended some areas of improvement for the Commission. These 1997 recommendations pale in comparison to the 1986 findings of improper personnel practices and operating procedures and charges of financial mismanagement. I emphasize these GAO reports because I believe that it is crucial that the Subcommittee's review of today's management issues be placed in proper context when considering where this Commission has been and how far it has come. Moreover, as noted in the next section, these accomplishments have occurred in a most difficult budgetary environment that becomes more precarious every year.

### IV. BUDGETARY NEEDS

The Commission's appropriations have remained stagnant for close to a decade. It has received level or "flat-lined" funding since it was last authorized in 1994. The requests that the Commission has submitted have been well justified, but these flat-lined appropriations have had a significant effect on the agency.

Further, funding cuts in the mid to late eighties forced the Commission to eliminate or consolidate five major offices: the Office of Program and Policy, the Office of Research, the Planning and Coordination Unit, the Solicitor's Unit, and the Equal Employment Opportunity Unit. The duties of the staff assigned to these offices have placed a greater workload on the remaining Commission staff.

Managing and working in such an environment are difficult for a number of other reasons. Planning is hard with a stagnant budget that does not account for inflation. As a result, our budget shrinks each year. Additionally, our diminishing budget makes it difficult to recruit and retain committed and qualified staff.

A review of the positions that we have had to leave vacant illustrates an important story. The Commission does not have a director of Congressional Affairs. In fact it does not have one full time staff dedicated to Congressional Affairs. The director of our Budget and Finance Division is also serving as the director of Human Resources. Further stretching the management team is the fact that the Commission's deputy director position has been vacant for many years. In most agencies, this position is responsible for the organization's day-to-day management.

Another consequence of being a small agency with poor and inadequate funding levels is a significant portion of our staff resources is used toward fundamental administrative support functions, rather than services or programs. No matter how small an agency, the Commission remains a federal agency with the same fixed

costs and responsibilities to operate in accordance to all the rules and requirements applicable to all federal agencies.

#### V. CONCLUSION

Day-to-day management is a significant challenge, aggravated by the Commission's severe budgetary problems and a structure where policy and philosophical disagreements sometimes are converted into alleged management problems. When examining the "management practices" of the Commission, one has to begin with the question of whether it is effectively and efficiently accomplishing its mission as stated in our legislation. As demonstrated in the forgoing sections, the answer is it is and, in recent years, has been improving.

#### ATTACHMENT ACCOMPLISHMENTS OF COMMISSION

Within the limits of our sparse budget, the Commission has accomplished a great deal. The Commission accomplishments include (i) conducting oversight responsibilities over federal agencies; (ii) investigating other civil rights matters, and (iii) addressing emerging issues.

##### A. Overseeing Federal Agencies

The Commission is statutorily mandated to monitor the federal government, including agencies like the U.S. Department of Justice, to ensure the federal government is fulfilling its civil rights enforcement responsibilities. Our role is particularly significant because the Commission serves as the only independent federal agency possessing this important oversight function. Generally, the Commission accomplishes this function through conducting fact-finding studies and publishing reports. For example, the Commission has conducted during the past 18 months or plans to initiate during FY 2002 the following studies and reports:

- *Funding Federal Civil Rights Enforcement: 2000 and Beyond* (February 2001): Examined the budgets of civil rights enforcement agencies and found that their resources lag behind their workloads.
- *A Bridge to One America: The Civil Rights Performance of the Clinton Administration* (April 2001): Provided an overview of civil rights issues from 1993 to 2000, highlighted initiatives of the Clinton administration, and assessed the administration's effectiveness in addressing civil rights issues.
- *Federal Efforts to Eradicate Employment Discrimination in State and Local Governments: An Assessment of the U.S. Department of Justice's Employment Litigation Section* (September 2001): Evaluated the efforts of the Department of Justice's Employment Litigation Section (ELS) in enforcing Title VII of the Civil Rights Act of 1964, as amended. In particular, the Commission's report focused on the extent to which ELS is fulfilling its mandate as the lead federal office charged with eliminating employment discrimination in the public sector.
- *Ten-Year Review of Commission Recommendations*: Will examine the impact of previous Commission reports and evaluate federal agencies' efforts to implement recommendations stemming from Commission reports issued between 1991 and 2000.

##### B. Other Reports and Investigations

In addition to monitoring federal agencies, the Commission is also responsible for identifying and investigating denials of civil rights and equal protection under the laws. The Commission achieves this mission through investigations and hearings, which culminate in fact-finding reports, statements, and recommendations addressing these problems.

Among key accomplishments in this area are the following:

- *Sharing the Dream: Is the Americans with Disabilities Act Accommodating All?* (October 2000): Analyzed the ADA's goals and the impact the act has had on those it was intended to protect. The report also discussed the practical effects of the ADA and court decisions affecting its scope.
- *Police Practices and Civil Rights in New York City* (August 2000): Looked into the police practices of New York City and the impact these practices have on the civil rights of individuals living in communities served by the NYPD.
- *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination-Volume VII: The Mississippi Delta Report* (February

2001): Examined three topics with respect to racial and ethnic tensions in the Delta: economic opportunity, educational opportunity, and voting rights.

- *Revisiting Who Is Guarding the Guardians? A Report on Police Practices and Civil Rights in America* (November 2000): Explored how police practices have evolved since the Commission's landmark 1981 report, *Who Is Guarding the Guardians?*
- The Commission concluded two days of hearings on environmental justice in February 2002 and will issue a report in either late FY 2002 or early FY 2003. The project evaluates the effects of waste treatment or poisonous chemical facilities in minority or disadvantaged communities and whether environmental statutes and regulations are adopted and enforced without discrimination based on race, ethnicity, and/or other bases.
- During FY 2002, the Commission will examine the issue of Educational Accountability. This project will focus on the civil rights implications and the methods of holding public education institutions accountable for how well children are being educated.
- In the second half of FY 2002, the Commission will study Native American Access and Justice Issues. The Commission will examine the criminal justice system to determine the extent to which Native Americans experience discrimination in the administration of justice. This is a national examination of issues raised earlier in South Dakota on the same subject, which resulted in the March 2000 South Dakota Advisory Committee report, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System*.

The Commission has volunteer State Advisory Committees (SACs) in every state and the District of Columbia. The SACs serve as the Commission's "eyes and ears" and advise it on civil rights developments in their respective states. The SACs fulfill this role in many ways, including through the issuance of reports. Among the reports published in the past 12 months are the following:

- *Equal Educational Opportunity for Native American Students in Montana Public Schools* (July 2001)
- *Race Relations and Des Moines' New Immigrants* (May 2001)
- *Civil Rights Issues Facing Arab Americans in Michigan* (May 2001)
- *The Decision to Prosecute Drug Offenders and Homicides in Marion County, Indiana* (April 2001)
- *Community Forum on Race Relations in Racine County, Wisconsin* (March 2001)

### C. Addressing Emerging Issues

Most Commission projects are proposed, developed, and implemented through a process of advanced planning. Despite this planning, unexpected issues arise that are of a nature that compels the Commissioners to address them. These "emerging issues" have such a significant impact on civil rights that the Commission's role as "conscience of America" on civil rights issues would be severely undermined if the Commission failed to address them immediately or if the Commission was unable to properly address these issues due to inadequate resources. Among emerging issues the Commission has addressed in the past 12 months are the following:

- *Voting Irregularities in Florida During the 2000 Presidential Election* (June 2001): Completed a formal investigation of alleged voting irregularities in the state of Florida arising out of the November 7, 2000, presidential election. This report examines the extent of and reasons for voter disenfranchisement in Florida and covers such issues as Election Day problems, disenfranchisement of citizens with disabilities and those with limited English proficiency, felon exclusion lists, voting technology, resource allocation, and election responsibility and accountability.
- *Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election System* (November 2001): Continued the Commission's ongoing monitoring of voting rights enforcement and election reform. The report reviewed national election reform initiatives, as well as studies and proposals of both public and private entities, and provided recommendations for reform.
- *Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians* (June 2001): Addressed new issues affecting Native Hawaiians resulting from a U.S. Supreme Court decision. While this was an Advisory Com-

mittee project, it exemplified an effective collaboration between the Commission's headquarters office and a SAC. It included active participation of three Commissioners at the SAC-sponsored community forum and allocation of headquarters resources in developing the final report.

- *Boundaries of Justice Briefing*: The civil rights issues stemming from the tragic events of September 11 serve as an example of an emerging issue that required immediate Commission action. The events of September 11, 2001, led Americans to join together in their commitment to combat terrorism. However, the Commission found that too frequently the events also led individuals to commit hate crimes and acts of discrimination. In October 2001, the Commission held a briefing to identify and address some of these concerns. Additionally, a number of the Commission's SACs are conducting forums and engaging in other activities on these topics.
- *Alaska Forum*: In August 2001, the Alaska Advisory Committee organized a fact-finding forum primarily focusing on three areas of civil rights concerns: education, employment, and the administration of justice. This forum was sparked by numerous incidents of hatred and bias that culminated in January 2001, when a group of teenagers attacked unarmed Native Alaskans with paintball guns and videotaped their escapades. Three Commissioners also participated in this forum. The SAC held a second forum in conjunction with the annual Conference of the Alaska Federation of Natives in October 2001. A report will soon be published that summarizes the issues that arose in the two forums and provides recommendations.

Mr. CHABOT. Thank you very much.  
Mr. Shelton.

#### **STATEMENT OF HILARY O. SHELTON, DIRECTOR, NAACP WASHINGTON BUREAU**

Mr. SHELTON. Thank you, Mr. Chairman, Mr. Nadler, and other Members of the Committee.

I come to you today on behalf of the more than 500,000 card-carrying members of the NAACP, who comprise more than 1,700 branches across the Nation and in Europe and Asia. The NAACP is the oldest, largest and most widely recognized civil rights organization in the United States. And since its founding in 1909, the NAACP has been a leading voice for the civil rights of all Americans.

I am pleased to have the opportunity to discuss the work of the U.S. Commission on Civil Rights. Let me say from the outset that I am somewhat disappointed in this hearing, so far in that it appears that the Subcommittee's primary interest is not the substance of the commission's work but rather the day-to-day details of the commission's internal management.

Given the Subcommittee's jurisdiction and its long history of helping to construct some of the most important civil rights laws in the history of our Nation, I had hoped to come here today to share with you a mutual admiration for the work of the commission. I had also hoped to hear representatives of the commission and the Subcommittee pledge to continue to work together to address some of the more pressing problems that continue to plague our Nation.

The NAACP deeply appreciates and often relies upon the important work of the U.S. Commission on Civil Rights. The investigations and reports produced by the commission, and the recommendations that have come from its work, have been of vital importance to the continued efforts by my association and by this Nation to make good on the promise of equality and freedom for all.

Like every important civil rights battle that we have fought over the years, the founding of the U.S. Commission on Civil Rights in 1957 was not without controversy. It was established thanks to the persistence of President Eisenhower and the courage of many Members of the Congress. The commission was founded at a time when lynchings and church bombings were still very much a part of American life, and it was the object of at least one proposed bill to, quote, "meet the funeral expenses of members of the Civil Rights Commission," unquote.

As the members of the NAACP know all too well, it is perhaps an occupational hazard of those who choose to speak truth to power that they will become the object of scorn, ridicule, harassment, and persistent efforts to silence them.

The commission has a long track record in the field of civil rights and of taking positions that are sometimes neither popular with the public nor with the existing political powers. Yet time and again, the commission has persisted. Their findings have withstood the test of time, and their recommendations have proven to be accurate, if not essential, for helping to mend some of the serious flaws that continue to plague our Nation.

Many Members of the Committee are aware of the long record of important issues that the commission has tackled during its tenure. Many of the commission's reports, from the first one in 1959 on the protection of voting rights, have led to landmark pieces of legislation that have improved the plight of millions of Americans.

While I am probably repeating a history that most Members of the Subcommittee are familiar with, I think that the strength of the work of the U.S. Commission on Civil Rights bears repeating again and again.

Due to time constraints, I will highlight only a few of the works of the commission. I am sorry that I cannot adequately even begin to summarize the depth and breadth of the work of the commission, and I hope that the Subcommittee will schedule another hearing in the near future to focus on the substance of the work of the Civil Rights Commission.

During its tenure, the commission has investigated and reported on issues affecting native Hawaiians; age discrimination; the education, employment, and administrative concerns of native Alaskans; the funding of civil rights enforcement by the Federal Government; efforts to eradicate employment discrimination in State and local governments; racial and ethnic tensions in American communities; the implementation of Americans with Disabilities Act; ways of strengthening relations between racial and ethnic minorities and law enforcement; and environmental justice issues in low-income, racial and ethnic minority communities.

Often, the reports issued by the commission have directly resulted in legislative action by Congress, the States, and local governments as well. Often, this legislation closely follows many of the recommendations issued by the commission.

As I have mentioned, the commission's reports have also been of significant assistance to the NAACP. In the late 1990's, the commission issued a compilation of essays on the crisis of young, inner-city African-American men. This report has been used extensively

by the NAACP in our efforts to address many of the issues that it raised.

Lastly, true to its roots, in June 2001, the commission issued a report on problems that surfaced in the 2000 presidential election. As the Subcommittee may be aware, the NAACP was and continues to be very involved in the problems that were brought to light in the 2000 election and in trying to implement changes at the State and Federal levels to see to it that these problems are corrected.

Like the first report issued by the commission in 1959, the most recent report on voting rights violations has made an impact on election reform legislation currently moving through the Congress. As a matter of fact, the Senate just approved election reform legislation just a few minutes ago.

And so I would like to thank the Members of the Subcommittee for allowing me to reemphasize the crucial works of the commission. I hope that after your careful examination of the commission and all that it has done and all that it still has to do, this Subcommittee will become one of its biggest champions, providing it with the resources necessary to be effective in its pursuit of equality and fairness for all Americans.

The commission serves as the conscience of the Nation. The commission's reports allow us to sift facts from fiction, and serves as a barometer to let us know how we as a Nation are doing in our promise to provide every American, regardless of his or her race, ethnicity, religion, disability, or gender with the opportunities to pursue life, liberty, and the pursuit of happiness.

Our country needs the U.S. Commission on Civil Rights, as it is one of our primary defenses against allowing the forces of racism and bigotry to continue to hold us back from reaching our full potential.

Thank you very much.

[The prepared statement of Mr. Shelton follows:]

PREPARED STATEMENT OF HILARY O. SHELTON

Thank you, Mr. Chairman. I come to you today on behalf of the more than 500,000 card-carrying members of the NAACP, who comprise more than 1700 branches across the nation and in Europe and Asia. The NAACP is the oldest, largest and most widely-recognized civil rights organization in the United States, and since it's founding in 1909, the NAACP has been a leading voice for the civil rights of all Americans. Whether in the classroom, the community, or the workplace, the NAACP has fought for equal rights before the courts, in the states, and here in our nation's capitol. I am pleased to have the opportunity to discuss the work of the U.S. Commission on Civil Rights.

Let me say from the outset that I am somewhat disappointed in this hearing so far in that it appears that the Subcommittee's primary interest is not the substance of the Commission's works but rather the day-to-day details of the Commission's internal management.

Given the Subcommittee's jurisdiction and its long history of helping to construct some of the most important civil rights laws in the history of our nation, I had hoped to come here today to share with you a mutual admiration for the work of the Commission. I had also hoped to hear representatives of the Commission and the Subcommittee pledge to continue to work together to address some of the more pressing problems that continue to plague our nation.

The NAACP deeply appreciates and often relies upon the important work of the Civil Rights Commission. The investigations and reports produced by the Commission, and the recommendations that have come from its work, have been of vital importance to the continued efforts by my association and by this nation to make good on the promise of equality and freedom for all.

Like every important civil rights battle that we have fought over the years, the founding of the US Commission on Civil Rights in 1957 was not without controversy. It was established thanks to the persistence of President Eisenhower and the courage of members of the Congress. The Commission was founded at a time when lynchings and church bombings were still very much a part of American life, and it was the object of at least one proposed bill to "meet the funeral expenses for members of the Civil Rights Commission. . . ."

As the members of the NAACP know all too well, it is perhaps an occupational hazard of those who choose to speak truth to power that they will become the objects of scorn, ridicule, harassment and persistent efforts to silence them. The Commission has a long track record in the field of civil rights and of taking positions that are sometimes neither popular with the public nor with the existing political powers. Yet time and again, the commission has persisted. Their findings have withstood the test of time and their recommendations have proven to be accurate, if not essential, for helping to mend some of the serious flaws that continue to plague our nation.

Many members of this committee are aware of the long record of important issues that the Commission has tackled during its tenure. Many of the commission's reports, from the first one in 1959 on the protection of Voting Rights, have led to landmark pieces of legislation that have improved the plight of millions of Americans.

While I am probably repeating a history that most Members of this subcommittee are familiar with, I think that the strength of the work of the US Commission on Civil Rights bears repeating again and again. Due to time constraints, I will highlight only a few of the works of the Commission. I am sorry that I cannot adequately even begin to summarize the depth and breadth of the work of the Commission, and I hope that the Subcommittee will schedule another hearing in the near future to focus on the substance of the work of the Civil Rights Commission.

During its tenure, the Commission has investigated and reported on issues affecting native Hawaiians; age discrimination; the education, employment and administrative concerns of native Alaskans; the funding of civil rights enforcement by the federal government; efforts to eradicate employment discrimination in state and local governments; racial and ethnic tensions in American communities; implementation of the Americans with Disabilities Act; ways of strengthening relations between racial and ethnic minorities and local law enforcement; and environmental justice issues in low-income, racial and ethnic minority communities.

Often, the reports issued by the Commission have directly resulted in legislative action by Congress, the states, and local governments. Often this legislation closely follows many of the recommendations issued by the Commission.

As I have mentioned, the commission's reports have also been of significant assistance to the NAACP. In the late 1990's, the Commission issued a compilation of essays on the crisis of young, inner city African American men. This report has been used extensively by the NAACP in our efforts to address many of the issues raised.

Lastly, true to its roots, in June 2001 the Commission issued a report on problems that surfaced in the 2000 Presidential election. As the Subcommittee may be aware, the NAACP was and continues to be very involved in the problems that were brought to light in the 2000 election, and in trying to implement changes at the state and federal level to see that these problems are corrected. Like the first report issued by the Commission in 1959, the most recent report on voting rights violations is having an impact on election reform legislation currently moving through Congress.

And so I would like to thank the members of this subcommittee for allowing me to reemphasize the crucial works of the Commission. I hope that after your careful examination of the Commission and all that it has done and all that it still has to do, this Subcommittee will become one of its biggest champions, providing it with the resources necessary to be effective in its pursuit of equality and fairness for all Americans.

The Commission serves as the conscience of the nation. The Commission's reports allow us to sift fact from fiction, and serves as a barometer to let us know how we as a nation are doing in our promise to provide every American, regardless of his or her race, ethnicity, religion, disability, or gender with the opportunities to pursue life, liberty and happiness.

Our country needs the US Commission on Civil Rights, as it is one of our primary defenses against allowing the forces of racism and bigotry to continue to hold us back from reaching our full potential.

Mr. CHABOT. Thank you, Mr. Shelton.

Mr. Schatz.

**STATEMENT OF THOMAS SCHATZ, PRESIDENT, CITIZENS  
AGAINST GOVERNMENT WASTE**

Mr. SCHATZ. Thank you very much, Mr. Chairman. I'm glad to be here today as president of Citizens Against Government Waste, representing our 1 million and supporters around the country.

By way of background, I was legislative director for 6 years for the Honorable Hamilton Fish, who was a former Ranking Member of this full Committee. During that time, I worked on reauthorization of the Voting Rights Act of 1982, the Voting Accessibility for the Elderly and Handicapped Act in 1984, and the Fair Housing Act.

I am personally familiar with the fine work of the commission, and I am somewhat disillusioned that the commission today appears to be more partisan and more political. Regardless of how and when this partisanship began, it's important for commissioners to cooperate with each other and for the commission and this Subcommittee to cooperate with each other.

There is no question that the work of the commission deserves to be given a full airing by the committee, that the issues that it deals with are important. But when the Washington Post questions the very need for its existence, it's obvious that there are some problems that need to be addressed. And I think that before the work can continue or can at least be seen without the veil of partisanship, management issues are extremely important, regardless of how small they might seem to be.

In July 1997, the GAO did review management issues at the commission and found that it was in disarray with limited awareness of how its resources were used. GAO concluded the commission and its operations lacked order, control, and coordination. It found that management was unaware of how taxpayer funds were being used.

These deficiencies made the commission vulnerable to misuse of resources and that the lack of attention to basic requirements applying to all Federal agencies, such as up-to-date descriptions of operations and internal guidance for employees, reflects poorly on the overall management of the commission.

GAO also recommended that the commission develop and document policies and procedures, assigning responsibility for management functions to the staff director and other commission officials and provide mechanisms for holding those people accountable for managing the day-to-day functions of the agency.

And certainly this Subcommittee is exercising appropriate jurisdiction to ask questions about how management is being conducted.

The two recent comments, both in *Time* magazine, regarding the hotline reporting hate crimes or discrimination in the wake of September 11th, which they described—began as a joke and ended as a potential tragedy. The article points out how the initial press release listed the wrong 800-number, sending callers not to the commission but to a love connection service. Possibly an honest mistake, but certainly something that caused a great deal of consternation under the circumstances.

There are also—there's also a dispute between the Department of Justice and the commission as to what to do with the information that came in from that hotline.



Again, going back to the Post, and I just want to quote briefly from that article. It said that the only function of the commission is to inform and elevate the debate. If it cannot do this, it is not worth having. It is certainly not worth spending \$9 million of public money each year to inflame passions further.

And I, again, hope that we can get beyond this and get back to the fine work that had been done over the years by the commission.

We do have a very specific concern about the relationship between the private public relations firm, McKinney and McDowell, and the commission.

The commission has paid some \$170,000 to this agency, yet it still has its own public affairs office that pays employees about \$208,000 a year. In the initial contract with McKinney, it called for the public relations firm to represent all commissioners, but it was later amended so that the services would only be responsible to the chairwoman.

The commission's staff director has argued that the agreement with McKinney is for contracted services, not consulting services, and therefore the commission's \$50,000 limit on consulting services would not be applicable. Regardless of characterization, and I'll leave that to the lawyers to argue about, it is highly unusual for any Federal agency to hire a private firm to handle public relations, regardless of whether it's consulting or contracting. Other agencies do not do this on a regular basis.

In a recent Scripps Howard column, several public affairs directors in other agencies were asked about hiring outside assistance for this purpose. All commented on how unusual this is and said it is not warranted. The U.S. Sentencing Commission, in particular, has a similar budget to the Civil Rights Commission and said they would never even think about using the resources of that commission in that manner.

There appears to be a dispute between the need for oversight by this Subcommittee and the independence of the commission. We just are looking for some accountability and for the taxpayers to be assured that their money is being spent wisely.

It appears that, given the dispute between the Subcommittee and the commission, the best way to solve this dispute might be to call for another study by the General Accounting Office. That would not impede the work of the commission; it would not impede the Subcommittee from looking at other issue; and hopefully it will bring in an impartial third party, so that we can move with the kind of work that Mr. Nadler has talked about and that other witnesses have talked about. And we can move forward in that manner.

The U.S. Commission on Civil Rights' past history is rich and purposeful. But no matter how large or small an agency, no matter its mission, taxpayers expect their money to be spent in an efficient and orderly manner with timely and tangible results from that investment.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Schatz follows:]

## PREPARED STATEMENT OF THOMAS A. SCHATZ

My name is Thomas A. Schatz and I am president of Citizens Against Government Waste. CAGW is a 501c (3), private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement and inefficiency in the federal government. CAGW was founded in 1984 by J. Peter Grace and nationally-syndicated columnist Jack Anderson to build public support for implementation of President Reagan's Private Sector Survey on Cost Control, better known as the Grace Commission. CAGW currently has more than one million members and supporters. Since 1986, CAGW has helped save taxpayers more than \$687 billion. CAGW does not receive any grants from the federal government. I appreciate the opportunity to provide testimony before this subcommittee today.

By way of background, I was the legislative director for six years for the late Rep. Hamilton Fish (R-N.Y.), a former ranking member of the Judiciary Committee. During that time I worked on reauthorization of the Voting Rights Act of 1982, the Voting Accessibility for the Elderly and Handicapped Act in 1984, and the Fair Housing Act.

I am personally familiar with the fine work of the Civil Rights Commission, but I have become disillusioned that the commission today appears to be more political and less bipartisan. Partisanship can undermine the morale of staff and distort the conclusions of the commission's studies and reports. Regardless of how and when this partisanship began, it is important for commissioners to cooperate with each other, and for the commission and this subcommittee to cooperate with each other. This is necessary so that the commission can focus on its stated mission and purpose and the committee can properly conduct its oversight role.

As you know, the United States Commission on Civil Rights was established in 1957 as a result of the Civil Rights Act. It is supposed to be an independent, bipartisan fact-finding agency within the executive branch. Its two main goals are to investigate claims of voting rights violations and studying and disseminating information on civil rights laws and policies.

The commission has eight part-time commissioners and a staff director that oversees civil servants that run the day-to-day operations. Of the eight commissioners, four are appointed by the President of the United States, two by the Speaker of the House and two by the President pro tempore of the Senate. Commissioners serve six-year terms and the President may remove a commissioner for "neglect of duty" or "malfeasance in office."

In 1996, in preparation for the commission's reauthorization and because of complaints of mismanagement, the General Accounting Office (GAO) was instructed by the House Judiciary Subcommittee on the Constitution to conduct a review of the civil rights agency. The GAO was asked to provide information on the commission's management of projects during fiscal years 1993 through 1996 and its process for disseminating project reports to the public.

In July of 1997, even though the GAO focused its review on the management of individual projects, it found much broader management problems at the commission. GAO found the agency in disarray, with limited awareness of how its resources were used. For example, GAO discovered:

- Agency policies and procedures were unclear and it had no documented organization structure available to the public that described its procedures or program processes;
- Key records, which provided documentation about its operations and project management, were misplaced, lost or nonexistent;
- Commission officials could not provide the amount or percentage of the budget used by various offices or functions;
- Management controls over operations were weak and did not ensure that statutory deadline responsibilities or program objectives were being met;
- Projects appeared to account for only about 10 percent of appropriations, even though these projects addressed a number of civil rights issues, and projects were poorly managed and took years to complete;
- Project management guidance—the Administrative Manual—was out of date and largely ignored; and
- Three different offices disseminated project reports, but a lack of coordination among the offices created a high risk of duplicative work.

The GAO concluded that the commission and its operations lacked order, control, and coordination. It found that management was unaware of how federal funds—taxpayer hard-earned dollars—were being used. It further concluded that these deficiencies made the commission vulnerable to "misuse of its resources" and that a

"lack of attention to basic requirements applying to all federal agencies, such as up-to-date descriptions of operations and internal guidance for employees, reflects poorly on the overall management of the commission."

The GAO recommended that the commission develop and document policies and procedures that assign responsibility for management functions to the staff director and other commission officials and provide mechanisms for holding those people accountable for properly managing the day-to-day functions of the agency.

Unfortunately, recent press reports indicate that perhaps the agency is still having serious management problems. An article in *Time* discussed how its hotline for reporting hate crimes or discrimination in the wake of September 11 "began as a joke and ended as a potential tragedy."

As I understand it, a hotline already existed but instead of using that one, the commission created a new one. Obviously the staff didn't do a thorough check to see if it would work properly. The article points out how the initial press release listed the wrong 800 number, sending callers not to the commission but to a love connection service.

Even more disturbing, once the calls did come in, according to a letter from the Department of Justice (DOJ) Assistant Attorney General Ralph Boyd, the commission did not forward the information to DOJ. This made it impossible for DOJ to follow-up and investigate the complaints. Frankly, a hate crime is a crime and not just a civil rights issue. All crimes need to be followed up by the appropriate law enforcement authorities.

Furthermore, we were disappointed with Chairwoman Mary Frances Berry's remarks at an October 12 commission meeting concerning the botched hotline. She said, "People around the country have expressed their gratitude, so I think we ought to be proud that we're doing this rather than worrying about whether it's helping anybody."

The *Washington Post* has also criticized the agency, most recently on February 11 of this year. It said the commission has become nothing more than a partisan battleground.

For example, instead of issuing highly politicized and controversial reports, such as the one on the Florida election that contributed little to the debate on civil rights, the *Post* suggested that the commission might examine how various counter-terrorism policies are affecting Arab-Americans and what alternatives might mitigate that effect. The *Post* also said the commission might review how alternatives to university affirmative action programs have worked. Yet, the *Post* stated, "the commission's forays in these areas have been unimpressive." The *Post* noted that the only function of the commission is "to inform and elevate the debate. If it cannot do this, it is not worth having. It is certainly not worth spending \$9 million of public money each year to inflame passions further."

CAGW is concerned about the recent reports concerning the commission's \$135,000 in payments in 2000 to the public relations firm of McKinney and McDowell, while the agency still maintains its own public affairs office that pays employees at a total of \$208,537 a year. According to a purchase order, senior staff at McKinney receive \$200 an hour, while associate staff receive \$150 an hour for their services. Yet, as we understand it, there is still no director in the commission's public affairs office in spite of the fact that several eligible applicants applied for the position, and the deputy director recently left.

We are also disturbed about the change in the contract between the commission and McKinney. The original contract called for McKinney to respond and represent the commission, but it was later amended so McKinney's services would only respond to the chairwoman. Certainly, while the chairwoman has the right to speak for the commission, all commissioners should be available to the media. In addition, commissioners sometimes do not receive copies of press releases until days or weeks after they are issued. This is inexcusable.

The commission's staff director has argued that the agreement for McKinney is for contracted services, not consulting services, and therefore the commission's \$50,000 limit on consulting services would not be applicable. Regardless of characterization, it is highly unusual for a federal agency to hire a private firm to handle their public relations. When it is done, it is usually for a special project that has a limited life span.

Other agencies do not do this on a regular basis. In a recent Scripps Howard column, public affairs directors in other agencies were asked about hiring outside assistance. Dave Grinberg, a spokesman at the Equal Employment Opportunity Commission said, "We're a small agency. We have a small budget, and we don't have the money to throw around like that." Timothy McGrath, staff director of the U.S. Sentencing Commission, said his agency appropriations do not allow him to hire public-relations consultants, and Claudia Bourne Farrell, a spokesperson for the

Federal Trade Commission, stated her agency does all their press work: "We do all of it ourselves. We take the bullets like the men we are."

Hiring a private firm such as the Civil Rights Commission has done is an expensive proposition and appears to be a waste of tax dollars. Two full-time government public affairs employees could be provided for a full year for the sum of \$135,000. It is also our understanding that calls from the public affairs office are now being directly routed to the staff director's office. One purpose of a public affairs office is to screen calls, provide whatever information they can, and only pass on the calls that require the director's input. To do otherwise is a sign of poor management and wasted resources.

CAGW has other concerns regarding the commission's management structure and its ability to provide key records. CAGW has been made aware that some commissioners felt the need last year to file Freedom of Information (FOIA) requests to obtain documents and computer disks concerning the commission's report on the Florida election. On attempting to access these documents, questions were raised about the guidelines and the relationship between individual commissioners, the chairwoman and the staff director. Whatever the guidelines are or should be, sitting commissioners should not have to feel the need to file a FOIA request to obtain information on any activities or documents within the commission.

Regarding how this commission is being managed, there are disputes among the commissioners and between this subcommittee and the commission. The commission may be independent, but that doesn't mean it can be unaccountable. The president's budget calls for accountability and the taxpayers demand it.

It is our understanding that there has been a series of letters between the commission and this subcommittee. There are questions and disputes over whom said what and whether progress has been made since the last GAO audit. The best way to solve this problem is for the GAO to conduct another impartial audit of the commission to see if its original recommendations have been implemented and to determine whether there are other management or personnel issues that need to be addressed.

For example, we suggest the GAO discover if:

- The commission has updated its agency policies, procedures and organizational structure and whether such information is available to the public;
- The commission can provide key records on its operations and management in a timely manner to Congress, the commissioners or the public;
- The commission knows how its budget is spent and in what departments;
- The commission has an updated Administrative Manual and whether it is kept current;
- Projects are better managed and completed in a timely manner, as well as their costs;
- The commissioners are aware of ongoing projects, including their costs, time frames, staff involved and when the reports will be completed;
- The commission has been able to better coordinate dissemination of their reports; and
- The commission works closely with civil rights offices that are located in all federal agencies, as well as whether this work is redundant.

It is our understanding that the commission has asked for a 66 percent budget increase. At a time when all federal expenditures are being prioritized to meet the country's need to win the war on terrorism, we believe this should not be granted. In addition, no increase in the budget should be appropriated until another investigation by the GAO is undertaken. It is important to see whether the commission has implemented the recommendations the GAO made in 1997 and what needs to be done to address any new management inadequacies.

The U.S. Commission on Civil Rights' past history is rich and purposeful. But, no matter how large or small an agency, no matter its mission, taxpayers expect their money to be spent in an efficient and orderly manner with timely and tangible results from that investment. While the chairwoman talks about accountability to the commission's constituents, the commission must also be accountable to taxpayers.

Mr. CHABOT. Thank you very much.

I'd like to thank all the witnesses for keeping relatively close to the 5-minute limit.

And I'll recognize myself for 5 minutes to begin the questioning.

Mr. Jin, in your written statement, you assert that, and I quote, "sometimes philosophical differences get translated into other areas, such as management issues," unquote. I think I understand what you're saying. I believe you're saying that, for example, you declined to respond to Commissioner Thernstrom's memo requesting information, to which she is legitimately entitled, because of philosophical disagreements. You're saying that you deny commissioners the opportunity to have witnesses with views contrary to the majority's, because of philosophical differences, and not only can minority views not win, they can't even be heard. You're saying that commissioners are denied access to the staff who work for the commission because of philosophical differences.

Yes, there are philosophical differences, but commissioners should not be deprived of the full opportunity to carry out the responsibilities of their offices by management practices that have the effect of keeping them in the dark about the work that the commission is supposed to be performing.

It comes down to this: Will you respond to memos, and will you give advance notice of hearing topics and witnesses, and will you allow staff to discuss their work with commissioners, will you permit witnesses suggested by the minority commissioners to be heard? What are you and the agency going to do—the commission to do to stop depriving minority commissioners the basic tools to participate fully in the work of the commission?

Would you please respond?

Mr. JIN. With pleasure, Mr. Chairman.

First of all, with due respect, I do disagree with your characterization as to what I meant.

I think it's very important to understand the rules and procedures that govern the commission. The commission is overseen by eight commissioners who are all part-time. That includes the Chair; everybody is part-time. A full-time staff director is hired by majority vote of the commissioners after being nominated by the President to be the day-to-day manager of the commission.

Under the rules of the commission, it is the staff director who is responsible for the products once the decision is made to go ahead with a project. The commissioners establish the agenda, establishes the policy, and the staff director moves forward.

So when we're talking about access to staff, for example—and this is just an example; I think there were a number of questions that were—comments that were made, both by the chairman as well as by Commissioner Thernstrom, that fall into this category.

That is not envisioned or permitted, because commissioners are envisioned under the rules to decide policy and decide the agenda, and the staff director is to move forward. It does not envision or allow for commissioners to be involved in the day-to-day projects.

And if any commissioner disagrees with that, they can try to take it up with the commission and change that.

So when I act the way I do in terms of access, in terms of a number of the other things, it is to comply with the decisions of the commissioners as a body. I work for the commissioners a body; I don't work for any individual commissioner.

So there are times when any one commissioner might ask me to something, and if that's not the will of the commissioners as a body, then I'm not really allowed to do it.

In terms of answering Commissioner Thernstrom's memos and so forth, we do answer her memos. We do answer her. She, I know, would like to answer in writing. We often don't answer in writing. We often answer verbally, from my special assistant to her special assistant. And this, again, is in accordance with the rules that have been set up by the commission. It's been discussed in the commission meetings. It's been decided at commission meetings.

So I'm just trying to follow the rules as set up by the commission. That is my responsibility and my obligation.

Mr. CHABOT. I've got limited time, so I thank you for your response.

I now turn to Commissioner Thernstrom. Commissioner Thernstrom, you've heard his responses. And I'd also like to refer to your opening statement, in which you said, and I again quote: On the road to racial equality, there is still much to do, and the commission can play an important role in theory. In practice, however, you had some other comments to make.

I've got, as I say, limited time. Would you respond to that? And could you elaborate a bit on while you feel that the commission at this point is an agency in disarray, as it's been described?

Ms. THERNSTROM. Well, first let me say, I'm in—I think that my long—the long testimony that I'll be submitting spells out with—in a very detailed record the disarray in the agency. And, of course, I did speak to that a bit.

But let me say a couple of things. One, on the question of the commission, yes, it can still play a constructive role.

I deeply resent Congressman Nadler's implication that I as a Republican am somehow anti-civil rights.

Mr. NADLER. Excuse me, I wasn't referring to you. I was referring to the party as a whole.

Ms. THERNSTROM. Well, I am—I am a Republican.

Mr. SMITH. That's worse. [Laughter.]

Ms. THERNSTROM. Yes.

Mr. CHABOT. He wasn't just referring to you. He was referring to all of us. [Laughter.]

Ms. THERNSTROM. Well, okay—

Mr. CHABOT. So that's not as bad, yes.

Mr. NADLER. Not to any individual member of the party.

Ms. THERNSTROM. Oh, I see. That's not as bad.

I mean, nobody upstages me in this country as more committed to civil rights.

And, indeed, I am in the course of finishing a book called "Getting the Answers Right: Race, Class and Academic Achievement," because I am addressing the most important civil rights issue in this country, which is the racial gap in academic achievement.

As part of the failure of the commission, part of the picture of the failure of the commission, you might think about or, you know, I might talk a second about what is happening with respect to the education hearings.

We are having, once again, kind of a drive-by shooting. That is, tomorrow we have hearings on the individual disabilities education

act, something I know something about, something I've written on. It's going to be three witnesses. That is no way to address the very complicated issue of special ed.

Then we've got this behind-the-doors, secret report being written on education. There is an important civil rights issue here that we could come together on. And there is no way of doing so under the present rules.

And by the way, there is a clear record, which I can submit, of memos only partially answered from me to the staff director, only partially answered or not answered at all.

And the staff director doesn't work for individual commissioners. I'm sorry. He is a CEO. I mean, does it function like Enron? He works for all of us and he——

Mr. CHABOT. My time has expired.

Ms. THERNSTROM. Okay.

Mr. CHABOT. So I'm at this point I'm going to defer to the gentleman from New York for 5 minutes to ask questions.

Mr. NADLER. Thank you.

Let me direct my question to Mr. Shelton. Thousands of voters were disenfranchised in the 2000 election. Could you explain how the government of the State of Florida and the companies it hired to purge lists, and through other methodologies, accomplished this? And what impact did this have on the voting rights, in particular, of African-Americans in Florida?

Mr. SHELTON. Yes, sir. As you know, the NAACP held hearings in Florida, just four short days after the debacle of November 7th, 2000. What we found is a number of mistakes were made. I'll try to keep my remarks short.

Mr. NADLER. I have a number of other questions for you.

Mr. SHELTON. Absolutely.

First, as we talk about the erroneous purging of voters from the rolls, what we found is that an organization or a company was hired from Texas to go through the voting rolls to find out who indeed should be purged because they were felony offenders. Even the company, as they handed over that list of voters that should be purged, said that this is incorrect. That is, there are a number of names on these rolls that would have to be double-checked; the names on the names on the rolls were done based on the first and last names of the people that were on the rolls and were not based on things like Social Security numbers, birth dates or other issues that would be much more helpful in purging.

As a result, many, many——

Mr. NADLER. So those lists were not double-checked.

Mr. SHELTON. They were not double-checked.

Mr. NADLER. And they were, in fact, inaccurate by about 20 percent.

Mr. SHELTON. That's correct. That is correct.

As a matter of fact, as they were handed to Katherine Harris and other officials in the Florida State government, they realized that, indeed, they should double-check them and decided not to.

As a result, at one of the NAACP hearings, to just kind of put a face on it, an African-American Catholic priest testified before the NAACP that he had been purged from the rolls because they

said he was, "a convicted felon." His response was: I'm not a swearing man, but I can assure you—

Mr. NADLER. Do you have any—excuse me. Do you have any estimate as to how many people were improperly purged from the list?

Mr. SHELTON. We could only begin to estimate, sir. A very conservative estimate would put us in the tens of thousands.

Mr. NADLER. In the tens of thousands of non-felons purged as felons because of a list that was admittedly about 20 percent inaccurate—

Mr. SHELTON. Yes, sir.

Mr. NADLER [continuing]. And was not double-checked.

Mr. SHELTON. Yes, sir.

Mr. NADLER. Was this brought to the attention of the government of Florida in advance of the election?

Mr. SHELTON. Yes.

Mr. NADLER. And what did they do?

Mr. SHELTON. Nothing.

Mr. NADLER. Nothing.

Now, let me switch subjects a bit. Some people have suggested that the infamous butterfly ballots, which have caused mistakenly—which may have caused many elderly Holocaust survivors to mistakenly vote for someone called by some people a Nazi apologist is evidence that these people are, quote, "too stupid," unquote, to deserve the franchise, because they were misled by the carelessly designed butterfly ballot.

What are your thoughts about their being too stupid to deserve the franchise?

Mr. SHELTON. That's absolutely ludicrous. When the system fails, they're blaming the victims. There were so many examples of this kind of blaming of the victims throughout the State of Florida and other places throughout the country, as a matter of fact, but very specifically in Florida, suggest that in areas along those lines.

But there were also some very similar circumstances in which very modern equipment was put into place and no training was given, and the error rate actually increased as a result.

The bottom line is you're absolutely right. To suggest that we blame those people—they were not prepared—they were not provided the ample opportunity to cast a vote that could be counted—is absolutely ludicrous.

Mr. NADLER. The Subcommittee issued a report, which was referred to I think by Commissioner Thernstrom, on this whole debate. The commission, I meant, not the Subcommittee.

What were your observations about that report? Did it make findings—reasonable findings and reasonable recommendations?

Mr. SHELTON. Yes, sir. As a matter of fact, it was extremely consistent with the findings of the NAACP and other entities throughout the country, including the report that was done by MIT and Cal-Berkeley.

Mr. NADLER. I have one more question for you, and then I hope I have time for one question for Commissioner Thernstrom.

Commissioner Thernstrom said that a, quote, "corrupt process ensured a worthless result," unquote. Do you believe that is an apt commentary on the election in 2000 in the State of Florida?



Mr. SHELTON. No, sir. I think the results of the study that was done by the U.S. commission was extremely accurate, extremely helpful.

Mr. NADLER. That's not what I—I didn't ask about the study.

I said, Commissioner Thernstrom said that a corrupt process ensured a worthless result. Do you believe that that was an applicable commentary to the conduct of the election in Florida in 2000?

Mr. SHELTON. No, sir. I do not think that her comments were helpful at all. As a matter of fact, if I'm understanding your question—I apologize if I'm not. If I'm understanding your question, what the report showed was that a number of fixes could be done to our system.

Mr. NADLER. You didn't understand my question.

Mr. SHELTON. Okay. I'm sorry.

Mr. CHABOT. I thought it was a great answer myself. [Laughter.]

Mr. NADLER. But he's—you're saying, yes, they could fix the process. Certainly, they can. They've passed legislation, which hopefully will fix it.

My question is—

Ms. THERNSTROM. He agrees with you.

Mr. NADLER [continuing]. A corrupt process ensured a worthless result; that was what she said about a commission report. Forget the commission report.

Mr. SHELTON. Yes.

Mr. NADLER. Do you think that that comment is applicable to the conduct of the election in Florida in 2000?

Mr. SHELTON. That her comment—

Mr. NADLER. Yes.

Mr. SHELTON [continuing]. On the election in Florida?

Mr. NADLER. Yes.

Mr. SHELTON. I think that her comment on the election in Florida was inaccurate.

Mr. NADLER. Was inaccurate.

Mr. SHELTON. Her comment. Her comment was on—I'm sorry. I apologize.

Mr. NADLER. All right. Never mind.

Mr. SHELTON. I misunderstood.

Mr. CHABOT. The gentleman's time has expired.

Mr. SHELTON. Let me—

Mr. CHABOT. The record speaks for itself.

Mr. SHELTON. But let me respond to what I think you're asking. If you're asking if the report that was done by the commission—

Mr. NADLER. No. Let me be very clear. I'm sorry.

I'm asking, do you think that the many flaws and disenfranchisements of the—that you—or that you think have been documented properly both by the commission report, by the NAACP report, et cetera, that show, as you put it, tens of thousands of non-felons were thrown off the list, were thrown off the voting rolls because they were felons, that many people were disenfranchised, do you think that that problem was so severe that it corrupted the election process in Florida?

Mr. SHELTON. Oh, yes, sir. [Laughter.]

Thank you. Absolutely.

Mr. NADLER. Thank you.

Mr. CHABOT. The gentleman's time has fully expired. [Laughter.] We'll recognize the gentleman from Indiana, Mr. Hostettler, for 5 minutes.

Mr. HOSTETTLER. Thank you, Mr. Chairman.

Mr. Jin, in your statement, you talk about the—well, in your discussion earlier, you talked about the actions of the staff with regard to relationship with individual members. Several times you said the action of the staff and the action of the commission results from the will of the body of the commission.

At one point—and I thought another word was going to come out of your mouth. And at one point I think you almost said the term "majority" when you said that the action of the commission takes place and the action of the staff of the commission takes place as a result of the will of the majority of the commission. Is that accurate?

Mr. JIN. Well, Mr. Congressman, yes, when a majority votes, then I need to follow the majority.

Mr. HOSTETTLER. Right. And you didn't subsequently challenge any of Ms. Thernstrom's contentions with regard to the information that was made available to her in a timely fashion of their ability to have their report published. Was that a majority will of the commission, that that not take place in a timely manner?

Mr. JIN. No, Congressman. I just couldn't respond to everything she said in one answer.

Mr. HOSTETTLER. So when you responded no—

Mr. JIN. Congressman, we fully—we fully have complied with all the rules and regulations in terms of our interactions with Commissioner Thernstrom.

Mr. HOSTETTLER. The rules and regulations—

Mr. JIN. In fact—

Mr. HOSTETTLER [continuing]. As created by the majority of the—

Mr. JIN. Well, not only by the majority, but by the rules, by statute, and anything else that's applicable.

Mr. HOSTETTLER. Right. Well, but by—the majority of the commission determines the activity of the commission and the staff.

Mr. JIN. As long as it's consistent with the—with statutes and other rules, sure.

But, Congressman, I just want to make clear that there shouldn't be an impression left here that we don't try to cooperate with individual commissioners. That's not true at all.

In fact, one thing that Commissioner Thernstrom raised was that we didn't set up meetings, you know, so she could talk to staff. My point was not that she couldn't talk to staff. My point was that, if there were circumstances in which it was appropriate for her to talk to staff, we'd be happy to have her talk to staff.

Mr. HOSTETTLER. So you as staff director are going to determine the appropriate conditions by which commissioners can talk to staff?

Mr. JIN. In accordance with the commissioners—

Mr. HOSTETTLER. The majority of the commissioners' desires?

Mr. JIN. That's right. Commissioners cannot individually, just on their own, decide to talk to staff whenever they want to talk to staff. That's not in accordance with the rules.

Mr. HOSTETTLER. Is that right?

Mr. JIN. That is true. That is true.

But we have, on a number of occasions, tried to set up meetings with Commissioner Thernstrom. Once we set up a meeting with her special assistant with our staff to discuss the hotline a day after she requested. A second time, Commissioner Thernstrom might have a different memory as to what happened, but we tried to set up a meeting to talk about her dissent, and somehow it seemed like, you know, she did not show up for the meeting. A third time—

Mr. HOSTETTLER. Excuse me.

Mr. JIN. A third time, I have with me here—

Mr. HOSTETTLER. I'm asking you questions.

Mr. JIN. Okay.

Mr. HOSTETTLER. If you could just respond to one of my questions.

A day after you made the request; was that the day that she requested the meeting that she could attend?

Mr. JIN. Excuse me?

Mr. HOSTETTLER. When you said that you set up the meeting the day after she requested it, did you set up the meeting the day that she said she could attend the meeting?

Mr. JIN. No. That one did take place. That was with her special assistant. It occurred the day after she requested. Her special assistant met with the staff to discuss the hotline.

Mr. HOSTETTLER. Turning to Commissioner Thernstrom, that was the day that you requested that your staff—I guess my question—it's very intriguing to me that the staff determines the time by which the commissioners can talk to the staff on these very issues. And that may be in accordance with the rules of the majority will of the Commission on Civil Rights.

Mr. JIN. It's not just the majority, Congressman. It's the concept of the commission that the commissioners are part-time; they hire a full-time staff director to manage the place full-time. The commissioners set policy and set the agenda.

And so the staff director is responsible for the product. If the commissioners as a body are not satisfied with the product, then, you know, then I'm accountable.

Mr. HOSTETTLER. "As a body," when you "a body," does that mean unanimous consent? Unanimous consensus?

Mr. JIN. Well, something that gets lost in the discussion is that—not only here but elsewhere—is that many, many of our votes are by unanimous vote.

For example, our vote to go down to Florida was a unanimous vote. It was a bipartisan, unanimous vote. That happens a lot. It doesn't happen every time, but it happens a lot.

And so like with any other body or like with most organizations, you know, if there's not unanimous agreement, then the majority often is what dictates, what moves forward.

Mr. HOSTETTLER. Okay. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman's time has expired.

The gentleman from Texas, Mr. Smith, is recognized for 5 minutes.

Mr. SMITH. Thank you, Mr. Chairman. I have a couple questions for Mr. Jin, but before I address questions to him, I would like to thank you for holding this hearing and say to you that you are doing a great job of executing the responsibility—fulfilling the responsibility of the Subcommittee in having an oversight hearing. And it is our responsibility not just to look at and judge and analyze the work of a commission but also to look at the management as well, because if you don't have good management, you don't have good work.

And it strikes me, given the partisanship, given the lack of responsiveness, given questions about management, given objective, outside auditors that have found that the commission has been ineffective, that maybe we should consider doing with the Civil Rights Commission what we've decided to do as a full Committee with the Immigration and Naturalization Service and did so by a vote of 32-to-2 yesterday, and that is considering restructuring the commission so we can get back to its original purpose and so we can get back to the times when the commission enjoyed the full respect and admiration of the American people, because they conducted themselves in a bipartisan fashion.

Mr. NADLER. Would the gentleman yield for a moment?

Mr. SMITH. I'd like to ask my question—

Mr. NADLER. For one sentence. For one sentence.

Mr. SMITH [continuing]. And then, if I have time—

Mr. NADLER. For one sentence, Lamar.

Mr. SMITH [continuing]. I will be happy to yield. But I'd like to finish my questions. And then I'll be happy to yield to the gentleman.

Mr. Jin, my questions go to the McKinney and Associates contract that the commission I think awarded in 2000. Is that contract still in existence?

Mr. JIN. Congressman, we entered into a series of purchase order agreements with McKinney and Associates. And we have—

Mr. SMITH. Okay, do you still have an association?

Mr. JIN. We still have a purchase order agreement with them.

Mr. SMITH. Okay. And how much has been paid to McKinney and Associates since April 2000?

Mr. JIN. The—in 2001, I think we paid \$125,000.

Mr. SMITH. And what's the total amount since 2000?

Mr. JIN. Since 2000, I believe it's around \$185, \$190,000.

Mr. SMITH. And who determines whether or not to contract with this entity? Is that done by competitive bidding or is it a decision of the staff director, meaning you? Or how is that determined?

Mr. JIN. It's done by me in consultation with the staff, in accordance with the laws and other rules.

Mr. SMITH. And so it's not done by any kind competitive system?

Mr. JIN. We sole-source this contract.

Mr. SMITH. Okay. Will you—in regard to McKinney and Associates—and I don't know this to be the case, so it's just an open question—did you know any of the principles involved personally before you awarded the contract to them?

Mr. JIN. No, I did not.

Mr. SMITH. And had no prior dealings with them at all prior?

Mr. JIN. I had no prior dealings with them.

Mr. SMITH. Okay.

Mr. JIN. And in fact, the relationship actually began shortly before I got there as staff director.

Mr. SMITH. Okay. And why was McKinney and Associates hired? Was it hired in part because you weren't able to fill a position of director of public affairs?

Mr. JIN. Yes, Mr. Congressman. I think the reason is that the Commission on Civil Rights is in the business of disseminating reports, findings, and recommendations. That's a critical part of our work; thus, we need to have expert advice on publicizing and disseminating those products, especially—

Mr. SMITH. You answered my question by saying "right." Have any more efforts been made to hire someone for that position since you started entering into contracts with McKinney?

Mr. JIN. Congressman, see the problem is that our staff of public affairs did not have any expertise in this area. And because—when I came, I made an assessment in working with McKinney and Associates and found them to be very effective. I decided that, at least at this time, it did not make sense to go out and try to hire again. Efforts had been made before I got there to hire and had been unsuccessful, apparently.

And so we could re-examine that question. That's something I reconsider on a periodic basis, because I need to make a decision as to what's the best use of resources.

Mr. SMITH. It seems to me it would certainly be more cost-effective and save the taxpayers a lot of dollars if you were to hire an individual to perform that service rather than to continue to contract with an outside group.

Mr. JIN. I disagree with that, Congressman, because when we hire McKinney and Associates, we don't just hire one person. We hire the whole firm. So if certain work required the senior partner, we can get her services. If some work didn't require that, we can hire somebody—

Mr. SMITH. If that's the case, Mr. Jin, why did you even make an effort to try to fill the position by interviewing individuals if you feel like it wasn't—

Mr. JIN. Well—

Mr. SMITH [continuing]. It wouldn't be worthwhile?

Mr. JIN. Congressman, perhaps I wasn't clear, that actually happened before I got there, so I was not part of that initial—

Mr. SMITH. So you don't intend to make any efforts to try to hire somebody to fulfill that responsibility?

Mr. JIN. That's not correct. Like I said, I periodically re-evaluate that decision, to see what would be the best use.

But, I mean, one of the things that I think that to look at this—I mean, one of the advantages of having a contractor is that, especially when your resources are very precarious, you can make decisions to shift resources much quicker than if you hire a staff.

The other thing is privatization is something that I think that President Bush supports strongly. I know President Clinton supported it. And I think there are a lot of circulars, A-76 and others, that encourages privatization when appropriate.

Mr. SMITH. Well, privatization is appropriate particularly when it saves the taxpayers dollars, and I don't think it's doing so in this particular instance.

Mr. JIN. I disagree with that, Congressman.

Mr. SMITH. Mr. Chairman, if you'll give me a little bit more time, I'd like to yield to the gentleman from New York—

Mr. CHABOT. The gentleman's time has expired. I'll recognize the gentleman for an additional 3 minutes, if he has questions. And I'll do the same thing for myself.

Mr. NADLER. I just wanted about 10 seconds.

Mr. CHABOT. You've got 3 minutes, so you can that if you'd like it.

Mr. NADLER. Thank you. I simply wanted to comment that I doubted that a proposal to restructure the Civil Rights Commission would get a 32-to-2 vote on this Committee.

Mr. SMITH. I think that's a fair statement.

Mr. NADLER. Let me, since I have this extra time, I do have one—I appreciate—I do have one question for Commissioner Thernstrom.

Commissioner, you stated, I believe, that when—and certainly—I don't remember if you stated it, but it was certainly in your written statement that when—that your dissent on something, on some report, maybe on the election report—

Ms. THERNSTROM. It's the Florida report.

Mr. NADLER. On the Florida report. It was not accepted by the commission because it contained the work of a consultant, Mr. John Lott, whose services were provided at not cost to the minority.

Is it possible that that was not accepted because in fact it is the law that that it is illegal to accept free services for a Government agency?

Ms. THERNSTROM. My reading of that statutory provision was quite different. It was simply that I, as a commissioner, could not work free for the commission. That is, I have a ceiling on the number of hours I can work, and I can't contribute my services. And I think that is a fair reading of that statutory provision.

However, since there was a legal—and I did consult, by the way, a number of distinguished attorneys on the question.

But, however, since there was a legal dispute, it should have been, and I suggested that I suggested that it should—this is what should happen, it should have been submitted to the Office of Legal Counsel of the U.S. Department of Justice for a ruling on that.

The commission refused to do that. We could have gotten a legal opinion. And I would have certainly accepted that legal opinion.

As it was, I think that it was just a fig leaf for suppressing a dissent that the conclusions of which the commission did not like.

Mr. NADLER. Let me ask—

Ms. THERNSTROM. And, by the way, there were two expert witnesses, two experts, statistical experts, that helped me. Somehow the commission didn't object to the second one.

Mr. NADLER. Let me ask you, on the question, let me ask you the following.

I've always believed, and I haven't read the statute recently, but I've always been told that it's illegal for Government agencies to accept volunteer labor, including—I mean, we are told specifically,

when we take office as Members of Congress, our handbook—or whatever they give us, whatever they call it, the list of rules and regs—that we as Members of Congress are similarity prohibited from accepting free services from anybody, because that's part of the Federal law.

So I'm surprised to hear that that is in question—

Ms. THERNSTROM. The commission—

Mr. NADLER. Let me ask you this.

Ms. THERNSTROM. I'm sorry. Can I answer that?

Mr. NADLER. Hold on. Did you—because I'm limited to 3 minutes. Let me get this is.

Did you submit yourself the question to the Department of Justice Office of Legal Counsel?

Ms. THERNSTROM. I did—

Mr. NADLER. And if not, why not?

Ms. THERNSTROM. Well, I submitted it to a number of attorneys. But, no, I can't—I did not have the power myself to submit it to the Department of Justice.

Mr. NADLER. You think he would've rejected the question?

Ms. THERNSTROM. Pardon me?

Mr. NADLER. Do you think the Office of Legal Counsel would've refused to answer the question—

Ms. THERNSTROM. I assume that they would have. But—

Mr. NADLER [continuing]. If you had submitted it.

Ms. THERNSTROM [continuing]. Look, there was precedent on the commission.

The commission did not hire an expert. I turned for expert advice to two experts, my husband, most importantly, and Professor Lott. There was precedent.

Mary Frances Berry, the chairman, had done exactly the same thing with a Berkeley professor, Cabeza, in 1988, and her dissent and Cabeza's report was part of the official record.

There was precedent for exactly what I did. And I, again, I would have been glad to have this legally straightened out. But as it is—I mean, if you were to read the transcript of the discussion of my dissent, there was a fit about my even looking or trying to look, given the paucity of information I could get from the statistical expert, looking at the data. The statistical expert, Alan J. Lichtman, would not do what any scholar does, which is to give me the machine-readable data and the regression output.

Mr. NADLER. I'm sorry, the what?

Mr. CHABOT. Machine-readable—

Ms. THERNSTROM. The machine-readable data that he used and the—and his regression outputs.

That is standard scholarly practice. I was getting e-mails from across the country from people on the political left, who agreed with your assessment of disenfranchisement in Florida, saying, "By the way, do you happen to have Lichtman's data? Have you got it in machine-readable form?" "No, I'm sorry. It seems to be secret, even though the commission relied upon it in writing its report."

Mr. CHABOT. The gentleman's time has expired.

Mr. NADLER. Excuse me? I have to ask.

Mr. Staff Director, is that true? Has all the data not been allowed to be looked at?

Ms. THERNSTROM. Oh, well, now, there's—it has—it magically—some of it magically appeared way after I had—the time had expired for me to respond to it.

Mr. NADLER. Then the question is, have you now looked at that and have you found that regression data wrong?

Ms. THERNSTROM. Oh, I have found many problems with it. And, in fact, I've got a response to Lichtman, which was, of course, never accepted by the commission, never published by the commission.

And by the way, in that response, Lichtman drops his assertion that the black spoilage rate was 9 times that of white. It drops to what I estimated it was, which was 3 times.

Mr. NADLER. So you did get the information—

Ms. THERNSTROM. No, I got some of the information—

Mr. NADLER. You did. And I might point out—

Ms. THERNSTROM [continuing]. Late.

Mr. NADLER [continuing]. That the minority on this Committee did not get your testimony until a few minutes before, until today.

Ms. THERNSTROM. That is—

Mr. NADLER. We didn't have a chance to look at that.

Ms. THERNSTROM [continuing]. Not up to me.

Mr. NADLER. I understand that.

Ms. THERNSTROM. But in any case, I only got—

Mr. NADLER. So I feel your pain.

Ms. THERNSTROM. I only got some of the regressions.

And by the way, some of Lichtman's work, some of his regressions, some of his statistical work, was done after the report.

Mr. NADLER. I asked the question, by the way, of Director Jin to comment on this.

Mr. JIN. Yes.

Mr. CHABOT. I think he already answered, didn't he?

Mr. NADLER. No, no, she answered.

Mr. JIN. Just half a second, Congressman.

Mr. NADLER. He didn't.

Mr. CHABOT. I think he did.

Mr. JIN. Congressman, we provided Commissioner Thernstrom with everything that we had. What Commissioner Thernstrom wanted us to do was to ask Dr. Lichtman to create new data, and that we could not do for an individual commissioner. That's what she wanted us to do.

Mr. NADLER. And you provided it timely?

Mr. JIN. Yes, sir, we did.

The other thing I just wanted—

Ms. THERNSTROM. It's not true.

Mr. JIN. I wanted to correct the record.

Mr. NADLER. Excuse me. There's a conflict. You gave your answer; let him give his. We understand you don't agree.

Mr. JIN. I just need to correct something that Dr. Thernstrom said that's totally untrue. She said that Dr. Berry had done the same thing that she did on the dissent in terms of hiring—

Mr. NADLER. Wait a minute. Let me understand what you—

Mr. CHABOT. The gentleman's time has expired. The gentleman's time has—



Mr. NADLER. Excuse me, we let her run over time. I want to hear his answer. I just want to make sure we understand what he's saying, and then you can run the rest of it.

Mr. CHABOT. Give you answer.

Mr. NADLER. You're saying that the material was given to her on time and that she wanted something else? Is that what you're saying?

Mr. JIN. She wanted something that didn't exist.

Mr. NADLER. Okay.

Ms. THERNSTROM. It's ridiculous.

Mr. NADLER. Finish what you were saying. You started to say that—

Mr. JIN. Thank you, Congressman.

I just want the record to be clear. When—what happened was back in the previous report, Dr. Berry had cited a—somebody that had done a consultation for the commission. The commission had already hired the person along with a number of other people to provide their views. And so in her dissent, or in her statement, Dr. Berry and I believe another commissioner cited that work. And how that got translated for Commissioner Thernstrom into that she did the same thing, I do not know.

Mr. NADLER. Thank you very much.

Mr. CHABOT. All right, thank you.

All right, we're in our second round of questions at this point.

The gentleman from Virginia, I would allow him to ask his questions.

Mr. NADLER. It's the first round.

Mr. CHABOT. We're in our second round. You don't have your first round after you're already starting your second round.

But I will defer to the end if you'd like to go ahead now.

Mr. SCOTT. Whatever.

Thank you, Mr. Chairman.

Mr. CHABOT. We're in our second round.

Mr. SCOTT. How much time do—

Mr. CHABOT. We had 3 but we're going to give you 5 because Mr. Nadler took 8 on the 3, so go ahead. [Laughter.]

Mr. SCOTT. Thank you, Mr. Chairman.

I just had one question to the staff director. Did you receive a letter from several Members of Congress asking the commission to look into the Department of Justice Civil Rights Division on the preclearance procedure under the Voting Rights Act, specifically how they handled Virginia and Mississippi congressional redistricting cases?

Mr. JIN. Yes, Congressman, we did. And we had—we did have a meeting with them.

Mr. SCOTT. Are you going to hold hearings on that?

Mr. JIN. What we're doing right now is we're still having interaction with them, in terms of determining kind of what to do. I understand that the—I believe that the Senate is thinking of having hearings. And so I think we were going to monitor that and determine what, if anything, we should do.

But at this point, we're just meeting to find out information, because we're still at staff level.

Mr. SCOTT. Thank you.

Jerry, did you want time?

Mr. NADLER. No, I have no questions right now.

Mr. SCOTT. Thank you. I yield back.

Ms. THERNSTROM. Tongue-tied.

Mr. CHABOT. Would the gentlelady from Texas like to ask any questions?

Ms. JACKSON LEE. Mr. Chairman, I will not take up the time of the Committee. You were very gracious and the Ranking Member was very gracious.

Let me just get one simple question. Commissioner Thernstrom, I did not hear your testimony. Is the gist of your testimony, besides the thrust of this hearing, which a question of mismanagement, but is the thrust of your comments to suggest that the U.S. Commission on Civil Rights now undermines the opportunity for improved race relations in the United States? What is the thrust of your—

Ms. THERNSTROM. Well, I mainly talked about procedural matters, the procedural disarray that I see on the commission, and the way that it functions, which I don't think is effective.

And my point is that there is—the question of process and the question of substance is inseparable and that if you don't get the process right—and it's true in the U.S. Senate, it's true in the Florida hearings, it's true wherever, you know, you look—that if you don't get the process right, you can't get the substance right.

And, indeed, if you do get the process right and, for instance, you come out in the minority on a question of substance, if the process is right, you can always go back and revisit the substantive issues, and you have confidence in the way the conclusions were arrived at.

But the way the commission functions, the shoddy way in which the commission functions, produced and continues to produce work that does not meet my standards as a scholar and shouldn't meet your standards.

Ms. JACKSON LEE. Well, I certainly appreciate the books that you have authored and that, having come out of a academic tradition, most of us here in the United States Congress, we realize the distinction.

But you're not suggesting that you would be happier with the commission if every member was anti-affirmative action and had a conclusion that race relations were where they should be in the United States? I mean, are you suggesting that the procedure rises above the substance? Meaning the importance of the existence of the U.S. Civil Rights Commission may in fact rise above some of the procedural details that I hope can be fixed, but that the mission of the Civil Rights Commission that addresses the question of race relations, which still are in a quagmire in this country, you're not suggesting that procedures should cause elimination of this commission and/or that the commission should be of one thought and one mind, for example, that affirmative action is not relevant or does not—is not necessary?

Ms. THERNSTROM. I appreciate very much that question, by the way, because it allows me to say a couple of things.

I opened my statement by saying I think the drive for racial equality in this country has a long ways to go. I would never say

we have reached the end of that road. Far from it. And, therefore, I would like to see the commission play a role.

And, indeed, I agree that in the old days the commission played an extremely important role. I wrote a book on voting rights. I relied heavily on the wonderful work that laid the grounds for both the 1964 Civil Rights Act and the 1965 Voting Rights Act. Those were invaluable.

And the commission could still do invaluable work.

I'm also not opposed to affirmative action. I am opposed to racial double-standards, racial preferences.

But I would never want a commission—and affirmative action, to me, means aggressive anti-discrimination, to me.

I would never want a commission of one point of view. I have a long history myself as being in the position of a dissenter. I was part—in a minor way—part of the civil rights movement in the late '50's, early '60's. I was a very important part of the anti-war movement when Barney Frank was opposing me. We were—he was for the war. We were both graduate students at Harvard and debating these questions.

I have had a long history of dissent. And I really believe in vigorous dissent.

Ms. JACKSON LEE. Thank you.

And being fair to you—I am a guest of this Committee, by the way, I'm not a Member of the Subcommittee.

But I do want to say that you then support the excellent work, and I guess I've biased my comments now, that the commission did, Dr. Berry did, on election review in Florida and the NAACP. Do you applaud that work?

Ms. THERNSTROM. No, I don't think that the Florida was good, and I have written a very long dissent in—

Ms. JACKSON LEE. First of all, I know this—

Ms. THERNSTROM [continuing]. In examining it.

Ms. JACKSON LEE. This Committee will look at the procedures, certainly those of us who wear legal hats and academic hats, which you wear, are tuned to procedure. I do think, however, in the course of allegations or suggestions of mismanagement, and I'm still reviewing the documentation, I have not heard—well, dissent is appreciated. But I have not heard vast voices undermining the work that the Civil Rights Commission did on the election debacle in Florida or the NAACP.

Now, whether the t's are crossed and i's are dotted on the final report, I can tell you that today the Senate voted 99-to-1 to pass election reform, primarily or in most part based upon the documentation that they received from the commission, which I assume that you were a part of, and the NAACP.

I would only say, Mr. Chairman, so that I can be a polite non-member, that I hope we will fix the t's and i's, but I think it begs the question of the substance and the importance of maintaining the strength of this commission, the work that it does.

And I will finish by saying I hope that you will provide a hearing to Congressman Scott on the redistricting issues, which happen to deal with one person, one vote.

But I thank you very much, Mr. Chairman and Mr. Nadler, for your kindness.

Mr. CHABOT. I thank the gentlelady for her comments.

And I have just a few questions to wrap up the hearing.

Mr. Shelton, you had mentioned in your written statement that you felt that commission had an exemplary civil rights record. Were you aware that the Civil Rights Commission currently has five EEO complaints pending? And why does a civil rights agency have EEO complaints against it?

Mr. SHELTON. Certainly I don't know the answer to the question of internal discrimination within the agency. However, I am quite aware of the work that they've done in the areas of election reform, the work that they've done in the areas of criminal justice concerns, racial profiling and other concerns. I know the work of the U.S. Commission on Civil Rights as it addresses the issues of discrimination in our society at—

Mr. CHABOT. As far as those complaints against the commission itself, you're just not aware of those.

Mr. SHELTON. I'm not aware of them.

Mr. CHABOT. Let me ask you another question. As we've said earlier, there have been—there has been considerable media criticism of the commission from traditionally commission supporters, like the Washington Post and the New Republic and Time.com and some others. Why do you think the commission continues to get all this negative media attention? And would the NAACP pay \$170,000 if it couldn't get decent press?

Mr. SHELTON. Let me answer your first question first. I assume this is a two-part question.

Answering your first question first, I honestly don't understand why the Washington Post or any other entity would raise the kind of criticisms they are of the commission.

Mr. CHABOT. It's principally mismanagement type issues and—

Mr. SHELTON. Sure. It's always—

Mr. CHABOT [continuing]. Not giving information out to minority members of the commission and things of that nature. So it is a whole laundry list of things.

Mr. SHELTON. It's always fascinating to me when commissions like the U.S. Commission on Civil Rights, or even organizations like the NAACP, who are extremely effective in carrying out their primary responsibilities, when a smokescreen is oftentimes raised of internal conflict or internal issues that no one else can see except those on the inside.

It's very interesting to me that these kinds of issues would be raised, especially as we sit here on the day when the United States Senate has now passed election reform legislation. Following the House, they have passed election reform—

Mr. CHABOT. Well, the purpose—see, that's—we have an oversight hearing and we're not really involved in a lot of—like the election in Florida and the action on the Senate floor today, all of which may be either commendable or things which ought to be looked into.

But we're only looking at oversight and the mismanagement.

Let me turn to Mr. Schatz for the final things that I have that I would like to bring up.

Staff Director Jin wrote to the director of the Office of Management and Budget on the November—November 28th of last year

and to the Chairman and Ranking Member of the Subcommittee on the Constitution on February of this year, seeking an increase of its authorization by two-thirds, from \$9 million up to \$16 million.

Based on your assessment of the commission's overall mismanagement, do you believe if that increase is granted—and you talked about obviously the title of the organization you represent is Citizens Against Government Waste.

Do you—in your opinion, have you seen demonstrated waste that this Committee should be concerned about?

Mr. SCHATZ. Mr. Chairman, that's one of the reasons I suggested having the General Accounting Office take another look prior to granting this increase. I realize the timing may not work. Of course, the budget gets done during the course of this year. Maybe GAO can't complete another study prior to that time.

But certainly, it's our view that things should be put on hold. The commission's budget has been flat for a number of years. It always seems around in Washington that more money will solve management problems. I think the management problems should be solved before more money goes into any agency, whether it's Defense or Veterans Department or Transportation or anywhere else.

Asking for more money seems to be the panacea for just about anything that seems to be wrong with any agency. And we think particularly in these times when we're looking at other priorities, the President has demanded accountability in his budget, as every President does, that we should be looking very carefully at any request for increase in any agency. The Civil Rights Commission is no exception to that standard that we've tried to adhere to.

Mr. CHABOT. Okay. Thank you very much for your testimony.

I thank the members of the panel for their testimony here this afternoon.

Mr. NADLER. Mr. Chairman?

Mr. CHABOT. Your complete statements will be made a part of the record.

Mr. Nadler is recognized.

Mr. NADLER. Thank you, Mr. Chairman. I ask unanimous consent that all Members be permitted to provide additional materials for the record.

Mr. CHABOT. Without objection, that request will be granted.

Again, we thank the panel for being here this afternoon. We thank the Members for participating. And at this time, we're adjourned.

[Whereupon, at 2:40 p.m., the Subcommittee was adjourned.]

# APPENDIX

## STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

The purpose of this oversight hearing is to inquire into the management practices of the United States Commission on Civil Rights. Following its inception in 1957, the Commission played an important role in investigating civil rights abuses that plagued our nation. The Commission has now reached a critical stage in its history. Over time, the Commission has been criticized by individuals on both sides of the civil rights debate. However, recently, the Commission has come under fire from all sides at the same time by sources that include the New Republic, Salon.com, and the Washington Post.

Recent press reports have criticized the Chair for engaging in a confrontation with the White House over the appointment of a new Commissioner, Peter Kirsanow. I would like to recognize Commissioner Kirsanow who is in our audience today. I am fully confident that the appeals court will defer to the President's interpretation of the appointment power that is entrusted to him and grant Commissioner Kirsanow his rightful seat on the Commission.

The decline in public confidence in the Commission has led the Subcommittee on the Constitution to conduct oversight to evaluate the Commission's operations. We are concerned about the effect of poor management practices on the quality of the Commission's work product, partisan bickering within the Commission, the apparent exclusion and disparagement of minority viewpoints and participation, and, after a review of documents recently produced to the Subcommittee, the failure to implement fully management reforms recommended by GAO five years ago.

The 1997 GAO Report entitled "U.S. Commission on Civil Rights: Agency Lacks Basic Management Controls" characterized the Commission as "an agency in disarray" with "broad management problems." Five years later, the Commission still has not updated its organizational structure to comply with FOIA. The Commission has not adequately revised Administrative Instructions to inform staff of management policies. Despite the purported use of project reports recommended by GAO to inform Commissioners of detailed project costs, staffing needs, and deadlines, Commissioners remain in the dark about these basic issues.

In April 2000, the Commission hired McKinney & Assoc., a Washington, D.C. public relations firm, while at the same time maintaining three employees in its own public affairs office. From the extensive criticism of the Commission in the press, it appears that the Commission's expenditure of \$170,000 on McKinney & Assoc. has been a waste of money. The Commission, moreover, cannot explain what exactly McKinney does for the Commission.

The Commission appears to operate without consultation with Commissioners. The Commission frequently withholds meeting transcripts from Commissioners and issues letters and press releases under Commissioners' names without their approval. The Commission's recent effort to suppress a book review that favorably mentioned Commissioner Abigail Thernstrom raises questions about the basic fairness of the Commission and its ability to accept differing points of view. The Staff Director's confirmation that the Commission engages in unregulated shredding raises concerns about whether staff have received training on how to comply with the Federal Records Act.

We are concerned that the Commission fails to consider Commissioners' suggestions of witnesses for upcoming hearings and frequently withholds witness lists from Commissioners. The Commission also fails to clarify basic hearing procedures for Commissioners such as: "What is the topic of the next hearing?" "Who has been asked to testify?" and "When does the hearing record close?"

In June 2001, the Commission withheld statistical data used in formulating the conclusions of the Florida Report from dissenting Commissioners Thernstrom and Redenbaugh and suppressed the final version of the dissent. A preliminary report and the final report were leaked to the press before the Commission released copies to the Commissioners, Florida Governor Jeb Bush, and Florida Secretary of State Katherine Harris. The Commission made no formal leak inquiry.

More recently, the Commission disregarded OMB budget procedures—and its own budgeting process—by failing to submit its budget to Commissioners for approval in June of 2001. And in October of 2001, it refused to forward discrimination complaints received on the Commission hotline to the Justice Department for investigation.

The continued mismanagement of the Commission undermines public confidence in the Commission's work. The Commission is now more a public spectacle than it is a serious fact-finding agency that informs the public about the state of civil rights in America. In view of these concerns, I look forward to hearing from our witnesses today.

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UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

Statement of  
The Honorable Jennifer C. Braceras  
Commissioner  
U.S. Commission on Civil Rights

To the House Judiciary Committee  
Subcommittee on the Constitution

April 11, 2002

I would like to thank Chairman Chabot and the members of the Subcommittee for taking this opportunity to examine the management and practices of the U.S. Commission on Civil Rights.

My name is Jennifer C. Braceras. I am a lawyer by training and currently serve as the John M. Olin Fellow in Law at Harvard Law School. In December 2001, President George W. Bush appointed me to a six-year term on the U.S. Commission on Civil Rights ("the Commission"). I was sworn in on December 7, 2001.

Although I have served as Commissioner for only four months, I am a long-time observer of the Commission and its practices. In 1997, the independent and non-partisan General Accounting Office reported that the Commission was an "agency in disarray." My limited time on the Commission has led me to believe that this characterization is as true today as it was in 1997.

I. Background

Prior to my appointment to the Commission, I published an article in *The Weekly Standard* in which I wrote that the Commission had "outlived its usefulness."<sup>1</sup> In particular, I wrote that the agency has long been overshadowed by other federal civil rights agencies — such as the Equal Employment Opportunity Commission, the Civil Rights Division at the Department of Justice, and the Office for Civil Rights at the Department of Education — which have the enforcement power the Commission lacks. In addition, I argued that the politicization of the Commission and its work has greatly compromised the Commission's integrity and intellectual honesty, thereby rendering the Commission irrelevant.

<sup>1</sup> Jennifer C. Braceras, *Uncivil Commission: In Florida, the Civil Rights Commission Achieves a New Low*, THE WEEKLY STANDARD at 22 (February 26, 2001).



I continue to believe that this once respected federal agency has in recent years become marginalized and is increasingly inconsequential. I recognize, however, that the existence of the Commission today is not in question. Although we live in a country that endeavors to provide all of its citizens with equal opportunities, many Americans (including many people of color) have yet to realize the full promise of America. As long as that remains the case, the political cost of eliminating a body named the "United States Commission on Civil Rights" is too high for any politician to pay.

Therefore, when I was asked to replace outgoing Commissioner Yvonne Lee on the Commission, I agreed to serve in the hope that I might contribute to efforts to impose greater discipline and oversight on Commission management, and thereby help to promote a new era of civility and bipartisanship in discussions regarding civil rights issues.

Toward that end, I submit the following summary of some of the Commission's troubling management practices.

## II. Who is in charge?

Although the Code of Federal Regulations clearly outlines the responsibilities of the Staff Director in running day-to-day operations of the Commission, it is the responsibility of the Commissioners to set the policy agenda and priorities of the Commission. My short time at the Commission has led me to believe, however, that Commissioners, in fact, have little input into Commission activities and projects and are expected simply to defer unquestioningly to the Staff Director's recommendations.

### *A. Who Sets Priorities?*

To illustrate, the Commission has long planned a hearing for the sixth installment of the Equal Education Opportunity Project. At the Commission's December 2001 meeting, it was announced that the Commission would conduct a hearing on high-stakes educational testing and accountability in February 2002.<sup>2</sup> In January 2002, Chairman Mary Frances Berry announced that the staff was postponing the education hearing until March 2002 in order to allow time for the Commission to conclude its on-going hearings on Environmental Justice.

At the February meeting, Staff Director Les Jin informed us the education hearing would not take place in March as planned because the staff needed additional time to review documents in preparation for the hearing. We were told at that time that the hearing would be held in April.<sup>3</sup> Then, at the March meeting, the Staff Director announced that the staff wished to cancel

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<sup>2</sup> See Transcript of December 7, 2001 meeting of the U.S. Commission on Civil Rights at 89.

<sup>3</sup> See Transcript of February 8, 2002 meeting of the U.S. Commission on Civil Rights at 12 (hereinafter, "February Transcript").

entirely the hearing on high-stakes educational testing, and instead complete the education report based solely on their review of subpoenaed documents and relevant literature.<sup>4</sup>

Several Commissioners with a particular interest in the topic of high-stakes educational tests objected to canceling the Commission's public hearings and expressed concern that, without public hearings, Commissioners would lack access to a full range of opinions and information on this very important issue. I noted that it is the responsibility of the Commissioners to set priorities, and inquired as to the workload of the staff so that we might prioritize Commission projects and determine the best use of staff resources. The Chairman became visibly agitated at this suggestion and stated that the discussion had "gotten completely out of control."<sup>5</sup> When pressed to explain her statement, the Chairman intimated that Commissioners should not ask questions and should simply let the staff "do their jobs."<sup>6</sup>

This notion, embodied in the Chairman's remarks, that the Commission exists merely to rubber-stamp the decisions of the Staff Director, constitutes an abdication of the agenda-setting function of the Commission and provides one just example of how Commissioners are treated as peripheral to the work of the Commission.

#### *B. What's on the Agenda?*

Commission management continuously neglects to notify Commissioners of substantive changes to the Commission agenda. For example, the March 8, 2002 meeting was originally scheduled to include a briefing on "Welfare Reform." My special assistant and I each spent considerable time in the weeks leading up to the meeting researching and studying the issue and its civil rights implications. When we received the agenda for the March meeting, less than one week before the briefing was to take place, we noticed that the briefing topic had been changed arbitrarily to "Bioterrorism." Neither the Staff Director nor anyone on his staff had bothered to contact us to inform us of this significant change in the Commission's agenda. When I inquired at the March as to the Commission's procedures for notifying Commissioners about substantive changes in the agenda, the Chairman responded that she had decided to invite the speaker on bioterrorism because the staff was unable to arrange a briefing on welfare reform as planned.<sup>7</sup>

This is not the first time that a sitting Commissioner has questioned the staff's notification procedures. In 1996, former Commissioner Robert P. George questioned the staff's failure to properly notify commissioners regarding the topics of at substantive briefings. At that time, the Chairman assured Commissioner George that the staff would notify Commissioners of briefings approximately one month prior to the briefing in order to allow commissioners time to prepare.<sup>8</sup> Yet the Commission has repeatedly failed to do so.

<sup>4</sup> See Transcript of March 8, 2002 meeting of the U.S. Commission on Civil Rights at 9-10 (hereinafter, "March Transcript").

<sup>5</sup> March Transcript at 48.

<sup>6</sup> *Id.* at 49-51.

<sup>7</sup> *Id.* at 60-63.

<sup>8</sup> The Chairman reiterated this procedure at a meeting of the Commission in June, 1999. See Transcript of June 8, 1999 meeting of the U.S. Commission on Civil Rights at 7.

The lack of proper notification procedures affords Commissioners very little time to prepare for briefings so that they might participate constructively in the work of the Commission. The failure of Commission management to adequately notify Commissioners of substantive agenda items provides yet another example of the staff's utter lack of interest in Commissioner input.

### C. *Communication Between Staff and Commissioners*

In my four months at the Commission, I have been appalled at the complete lack of communication between staff and Commissioners. When Commissioners ask questions, they are routinely told to "bring it up at the Commission meeting"—yet when they do so, they are told to address their inquiries to the staff. My special assistant has been informed by other agency personnel about "internal rules" prohibiting communication between special assistants (who work for individual commissioners) and the staff, and she has been warned not to communicate directly with non-administrative personnel in the Staff Director's office. Moreover, memoranda from Commissioners to the Staff Director requesting basic information are routinely ignored. For example, on January 3, 2002 I wrote to the Staff Director to express my concerns regarding the his authority to hire outside legal counsel to intervene in federal court litigation without prior Commission approval.<sup>9</sup> Although I requested that the Staff Director inform me in writing of the legal basis for his actions, the Staff Director never responded to my inquiry.

On February 1, 2002, I sent a second letter to the Staff Director following up on my initial request for information. I received no response to this second letter. Accordingly, at the regularly scheduled Commission meeting on February 8, 2002, I asked the Staff Director to inform me as to the statutory or regulatory authority for his unilateral actions. Before the Staff Director had answered my question, the Chairman interjected that "it would be inappropriate for the staff director to respond to you in writing."<sup>10</sup> To this date, the Staff Director has not responded to my inquiries.

### III. Press Releases, Public Statements and Official Letters.

The Chairman routinely issues press releases, public statements, and letters to high-ranking elected officials on behalf of the entire body without authorization from the Commission and without first notifying the Commissioners or circulating a draft document to Commissioners. For example, on January 14, 2002, the Chairman sent a letter to Florida Governor Jeb Bush demanding a status report on the implementation of Florida's voting reforms by May 1, 2002. A copy of this letter was forwarded to Commissioners with materials for the March meeting, nearly three full weeks after it was sent to Governor Bush. At no time, however, did the full Commission vote to request a status report from the Governor of Florida or to authorize the Chairman to send such a letter. Unfortunately, however, this practice of issuing statements and

<sup>9</sup> Specifically, the letter sought information regarding the Staff Director's decision to hire, at taxpayer expense, the New York law firm Paul, Weiss, Ruffkind, Wharton & Garrison to advise the Commission in the matter of *U.S. v. Wilson, D.N. 1:01-CV-02541-GK*.

<sup>10</sup> February Transcript at 33.

letters on behalf of the entire body without prior approval or authorization appears to be routine. Indeed, in the four short months since I have been on the Commission, the Chairman and Staff Director have issued at least three such statements without first seeking prior approval or input from the Commission as a whole.

#### IV. Subpoena Power

The Commission clearly has the legal authority to issue subpoenas. Although the Chairman has the ministerial authority to sign subpoenas on behalf of the entire body, the law is clear that the decision to issue a subpoena must in the first instance be approved by a vote of the Commission. The Chairman, however, reserves this power to herself, issuing subpoenas to high-ranking government officials without prior authorization from or consultation with other Commissioners. In my opinion, the Chairman has misused the Commission's subpoena power. For example, in February 2002 the Commission held hearings on the issue of Environmental Justice. Rather than subpoena the Directors of the offices charged with addressing this issue within various Cabinet departments, Chairman Berry chose to subpoena the Cabinet Secretaries themselves, including Secretary Mel Martinez from the Department of Housing and Urban Development, Secretary Norman Mineta from the Department of Transportation, Secretary Gale Norton from the Department of the Interior, and EPA Director Christine Todd Whitman. It is difficult to rationalize this move as anything other than a publicity gimmick.

#### Conclusion

I agree with the sentiment expressed in a recent *Washington Post* editorial that, "A serious, rigorous commission could create breathing space for creative civil rights dialogue un beholden to the orthodoxies of either the left or the right."<sup>11</sup> Unfortunately, the Commission as currently managed is far from achieving this goal. But perhaps this hearing is the first step.

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<sup>11</sup> *Sins of the Commission*, WASHINGTON POST, February 11, 2002.

## USCCR Project History

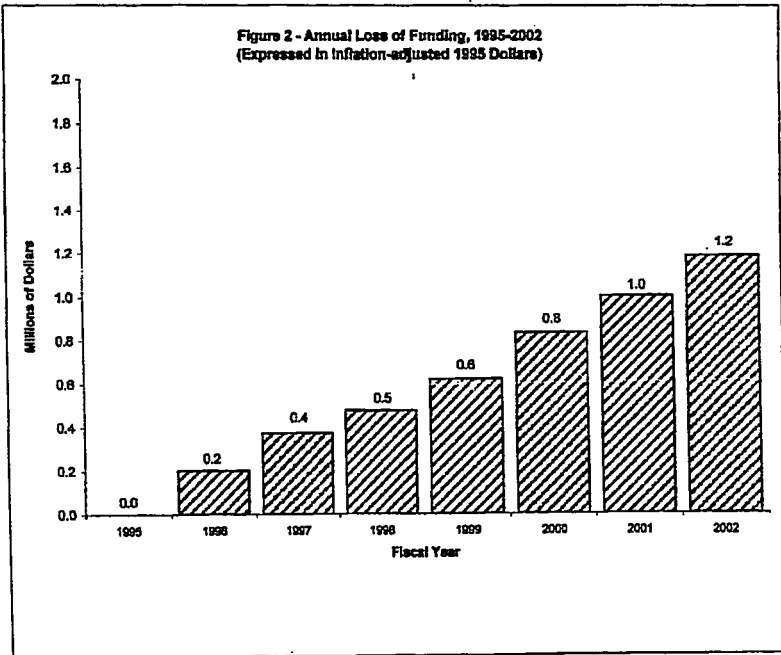
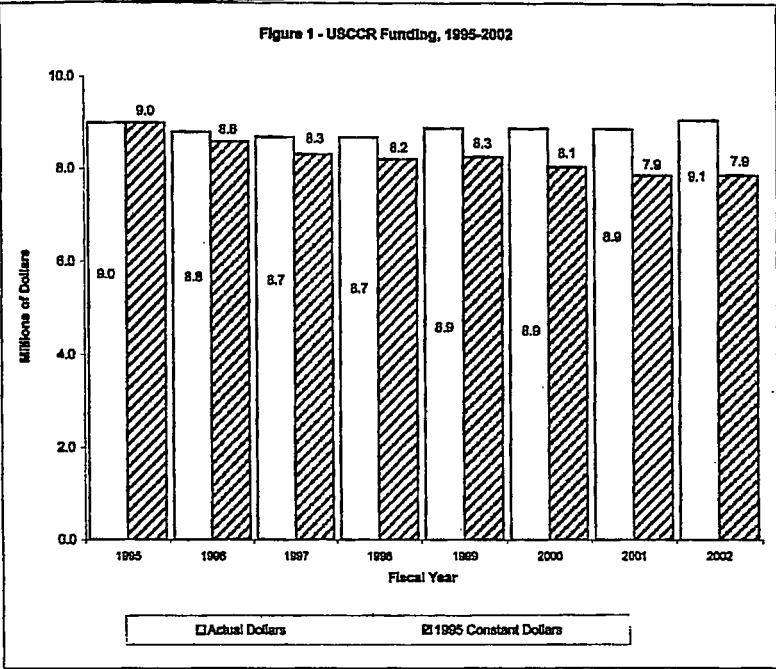
Dates correspond to federal fiscal years.

Project	Estimated Completion	Project Start	Actual Completion	Time to Completion
<b>RACIAL AND ETHNIC TENSIONS IN AMERICA</b>	3-5 years	1991	2001	11 years
Vol. I - Mt. Pleasant		1991	1993	2 years
Vol. II - National Perspective		1991	1995	5 years
Vol. III - Chicago		1992	1995	4 years
Vol. IV - Miami		1995	1998	5 years
Vol. V - Los Angeles		1992	1998	7 years
Vol. VI - New York		1993	2000	8 years
Vol. VII - Mississippi Delta		1996	2001	6 years
<b>TOWARDS EQUAL OPPORTUNITY IN EDUCATION</b>	N/A	1991	2003 (pending)	13 years
Vol. I - Enforcement		1995	1997	3 years
Vol. II - Disabilities		1995	1997	3 years
Vol. III - Limited English Proficiency		1995	1997	3 years
Vol. IV - Ability Grouping Practices		1996	1999	4 years
Vol. V - Title IX		1996	2000	5 years
Vol. VI - (Accountability)		1996	2003 (pending)	8 years
<b>AN EVALUATION OF FAIR EMPLOYMENT LAW</b>	N/A	1996	2001	5 years
Vol. I - EEOC		1996	2000	4 years
Vol. II - DOJ		1996	2001	5 years
<b>AMERICANS WITH DISABILITIES ACT</b>	N/A	1996	2000	5 years
Part I: Employers and State/Local Governments		1996	1998	3 years

Part II: Public hearing		1997	2000	4 years
<b>SCHOOLS AND RELIGION</b> (5 hearings downgraded to 3 hearings)	2 years	1996	2000	5 years
<b>CRISIS OF YOUNG AFRICAN AMERICAN MALES IN THE INNER CITIES</b>	originally 5 years changed to 2 years	1996	2000	5 years
<b>EQUAL ACCESS TO HEALTH CARE FOR WOMEN AND MINORITIES</b>	18-24 months	1998	1999	1-1/2 years
<b>NEW YORK CITY: POLICE PRACTICES AND CIVIL RIGHTS</b>	N/A	1999	2000	1 year
<b>ASIAN PACIFIC AMERICANS PETITION</b> (transcript of hearing and legal summary)	N/A	1999	1999	6 months
<b>CIVIL RIGHTS EVALUATION OF THE CLINTON ADMINISTRATION</b>	N/A	2001	2001	1 year
<b>FLORIDA VOTING IRREGULARITIES IN 2000 PRESIDENTIAL ELECTION</b>		2001	2001	4 months
<b>EXPANDING ECONOMIC OPPORTUNITIES OF AFRICAN AMERICAN, ASIAN AMERICAN AND PACIFIC ISLANDERS, AND LATINO YOUTH</b>	3 years	1997	2003 (pending)	7 years

MATERIAL SUBMITTED FOR THE HEARING RECORD

Miscellaneous Documents Submitted by the Honorable Abigail Thernstrom,  
Commissioner, U.S. Commission on Civil Rights







UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

January 4, 2002

**MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM**

**FROM:**

LES JIN *LJ*  
Staff Director

**SUBJECT:**

Response to December 19, 2001 Memorandum

I regret that your busy schedule will make it difficult for you or your special assistant to meet with me and/or the appropriate Commission staff members to discuss the status of the upcoming environmental justice and education hearings. Despite this being the holiday season, appropriate staff and I have been available to meet during the entire period since I wrote you on December 17. In the event that your schedule may change, my office is available to set-up a conference call or in-person meeting to discuss your views and receive your input.

As the Staff Director, I work to achieve the goals outlined and approved by the Commission. My responsibility is to implement the decisions and priorities of the Commission as a body. My role is to serve the Commissioners as a group, as opposed to working for individual Commissioners. This was discussed at length at our April 2001 meeting. Nevertheless, I also try to accommodate individual Commissioner requests, and disagree with the assertions contained in your December 19 memorandum regarding my responsiveness to your requests.

In fact, many instances where you claim I have failed to respond appear to be situations where the responses were in the form of conversations between Kim Alton, one of our special assistants, and your assistant, Kristina Arriaga. That our responses are often verbal, either directly to the Commissioner or indirectly through his/her special assistant, is not unusual. I can assure you that you and the other Commissioners are treated similarly in this regard. This approach is consistent with past Commission practices and was discussed at our April 2001 meeting also.

I regret that you disapprove of how I have managed the Commission. I hope you will change your mind once you have a chance to review this letter. Regardless, however, as noted during prior discussions at Commission meetings, my job is not to respond to the preferences of individual Commissioners, but rather to ensure that I am responding appropriately to the Commissioners as an entity. Unfortunately, this does leave open the possibility that, at any given time, one or more Commissioners would disapprove of

how I handle my duties. Certainly, if the Commissioners as an entity determine that I have incorrectly judged its guidance and need to make changes, I assure you that I will make those changes immediately. Thus, if you remain dissatisfied with my general performance or with any specific matters, I can only suggest that you take the matters up with the Chairperson or the Commissioners, in conformity with Commission policy.

In the meantime, my suggestion that we schedule a meeting to discuss the upcoming hearings remains open and I do hope that your schedule will permit such a meeting to take place in the near future. Regardless, I assure you that the dedicated Commission staff will continue to work over the upcoming weeks and months to ensure that these projects are ready for presentation at the appointed time.

cc: Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Jennifer C. Braceras, Commissioner  
Christopher Edley, Jr., Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Victoria Wilson, Commissioner



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

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December 19, 2001

Memorandum to Les Jin, Staff Director

From: Commissioner Abigail Thernstrom

RE: Memorandum date December 17, 2001

I am writing in reference to your memorandum dated December 17 entitled "Upcoming Briefings." You invite me or my special assistant to meet with you or appropriate staff members to discuss an environmental justice briefing that will take place roughly three weeks from now—with the holidays in between and everyone extremely busy or away.

On April 17—eight months ago—I sent you a memorandum suggesting two names for the environmental justice briefing. I never received a response to that memorandum nor was I ever informed if the suggested participants were ever approached. Further, on August 29, I sent you another memorandum regarding the environmental justice briefing.<sup>1</sup> I never received an answer. Considering the fact that the briefing has been postponed several times, there has been plenty of opportunity to invite the suggested speakers.

On September 23, I sent a memorandum regarding the educational hearing.<sup>2</sup> I have yet to hear from anyone on staff who is actually working on this project. Nor have you answered any of my specific questions regarding the hearings.

<sup>1</sup> Excerpt from August 19 memorandum for Les Jin from Commissioner Thernstrom: On July 19<sup>th</sup> Commissioner Thernstrom sent a memo requesting specific information about the Environmental Justice briefing which has been repeatedly rescheduled and finally announced for September 14<sup>th</sup>. On July 27<sup>th</sup> Commissioner Thernstrom's assistant received a call from your office confirming the briefing would take place and was told more details were forthcoming. Last week and this week she left messages requesting the additional information to no avail. Since April 17<sup>th</sup> we have expressed in writing a particular interest in this topic and have sent the biographical information of two experts. Have these experts been invited? Is the Environmental Justice briefing taking place?

In addition, is anyone else invited to speak, participate or present a report or paper at the forthcoming Commission meeting on any topic? Has the Commission retained any consultants in association with any upcoming project?

<sup>2</sup> Excerpt from September 23 memorandum for Les Jin from Commissioner Thernstrom: I would like the Commission to invite the following expert to participate in the upcoming education hearing to take place in

Your memorandum of December 17 is thus ridiculously late, as well as willfully incomplete.

Moreover, this is not a first. For the last nine months I have sent memoranda to you suggesting the names of participants for various hearings.

On October 5, I sent you a detailed list of experts on immigration for a projected briefing on October 12. You never responded to my memorandum nor invited any of the suggested experts.

In addition, you failed to respond to any of the other issues addressed in the memorandum I sent you on December 4, 2001. For instance, I have repeatedly<sup>3</sup> requested the Commission meeting transcripts either be available on-line on the USCCR website or be sent to me in machine-readable form. However, I have yet to receive discs for July, September, October and November. I know that transcribers and court reporters routinely have these transcripts ready a few days after the Commission meeting. Why this is even an issue I should have to bring up repeatedly is baffling. Our last Commission meeting took place December 7, I do not understand why it would take weeks to get a copy of a transcript.

Nor do I understand why you would want to run an office that is literally the worst-run in my long experience dealing with agencies and organizations across the political spectrum.

Please respond to this memorandum in writing or have someone in your staff e-mail me with answers to the specific questions I have asked. The Commission is in the business of bringing a balanced view to the public, I do not understand why there is resistance to include differing academic opinions on the important topics the Commission is about to consider.

Suggesting that my special assistant meet with yours is futile since I cannot even get the most basic information from your office.

My e-mail address is [thernstr@fas.harvard.edu](mailto:thernstr@fas.harvard.edu)

---

December. Ms. Kati Haycock/ Director/ Education Trust/ 1725 K Street, NW/ Suite 200/ Washington, D.C. 20006/ Tel. (202) 293-1217/ Her assistant's name is: Ivy Herndon

I understand your office is working on setting up this hearing. This is a topic of particular interest to me. Please let me know in which ways I can assist your office in preparing a balanced panel for this hearing.

<sup>3</sup> Excerpt from August 29 memorandum: As Commissioner Thernstrom has noted before, it would save the Commission resources if these transcripts and commission meeting transcripts were posted on-line on the website. Which office is handling maintenance of the website. Has this or any other service associated to the website provided by an outside entity? Commissioner Thernstrom would be happy to contact the transcriber services directly and request that her transcripts be sent by e-mail.

**Thank you.**

**CC:   The Honorable Steve Chabot  
      The Honorable Jerrold Nadler  
      The Honorable Dick Arme  
      Mary Frances Berry, Chairman  
      Cruz Reynoso, Vice Chairman  
      Jennifer C. Braceras, Commissioner  
      Christopher Edley, Jr., Commissioner  
      Elsie M. Meeks, Commissioner  
      Peter Kirsanow, Commissioner**




OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20428

December 17, 2001

**MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM**

**FROM:** LES JIN   
Staff Director

**SUBJECT:** Upcoming Hearings

In response to your requests for information on the upcoming environmental justice and education hearings, I invite you and/or your special assistant to meet with me and/or the appropriate Commission staff members to discuss the status of these two projects.

Please have your special assistant contact Kim Alton in my office with convenient meeting dates and times and I will work to have this scheduled as soon as possible.

Thank you.

cc: Hon. Steve Chabot  
Hon. Jerrold Nadler  
Hon. Dick Armey  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Jennifer C. Braceras, Commissioner  
Christopher Edley, Jr., Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Victoria Wilson, Commissioner



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

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I-305  
'01 DEC -4 P406

December 4, 2001

Memorandum for Les Jin

From: Commissioner Abigail Thernstrom  
Re: Various

1. Commission meeting transcripts

Since I arrived to the Commission in January, I have repeatedly asked that materials, particularly meeting transcripts, be sent to me electronically. It seems to me that this is a simple and reasonable request.

I am missing the machine-readable version of the transcripts for July, September, October and November. I have been requesting these transcripts through my special assistant since July and reiterated my request in writing on November 2.

I would also like to request electronic versions of the transcripts for the years 1995 through present.

I have repeatedly asked why these transcripts are not posted on the USCCR website for easy access but your office has never answered.

2. ~~Upcoming Hearings~~

In your memorandum dated November 19, you indicate that the planning meeting will take place in December. How does this rearrange the schedule for next year?

- a. Briefing on Environmental Justice  
If there is going to be a hearing or a briefing in January, no doubt you started planning this already. Is the environmental briefing taking place in January? If so, who has been invited?
- b. Educational hearing and subpoenas  
Have there been any subpoenas sent out to request witnesses or documentation for the education hearing? If so, under whose authority were these issued?
- c. Request for list of witnesses invited

1 of 1 DOCUMENT

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The Washington Post

December 22, 2001, Saturday, Final Edition

SECTION: EDITORIAL; Pg. A21

LENGTH: 532 words

HEADLINE: Discrimination Is Not a Thing of the Past

BODY:

In his hysterical diatribe about Mary Frances Berry and the important work of the U.S. Civil Rights Commission ["The Uncivil Commissioner," op-ed, Dec. 16], George F. Will chooses not to address the heart of the issue: the independence and integrity of the commission, and whether it will survive an administration intent on killing the messenger instead of fixing the problems the messenger reveals.

The issue is not Berry or her leadership of the commission. She has not been accused of violating commission rules and procedures. Her only crime seems to be her willingness to speak truth to power.

When President Eisenhower created the Civil Rights Commission in 1957, it was a radical idea. It was the only bipartisan, independent federal fact-finding agency that reviewed discrimination on the basis of race, color, religion, sex, handicap, age and national origin. It is our nation's conscience on civil rights -- reminding us of where we have been and where we need to go.

The commission is no relic of a bygone era. Today, it continues to shine a light onto some of the most difficult and complex civil rights issues facing the nation. Its recent hearings and its report on voting irregularities in Florida may have displeased the administration, but the essential findings of the commission were confirmed by a consortium of newspapers that subsequently examined many of the same issues. Whether we like it or not, the Civil Rights Commission exposed a Third World election system at the core of American democracy. It is a problem that demands change.

The commission's agenda has further broadened to reflect changes in the nation's demographics and a new paradigm of racial discrimination that defies black and white labels. Last summer the commission held hearings on the problems of racism in Alaska, prompted by public outrage over paint-ball attacks by white teens on Alaska Natives in Anchorage last winter. The commission's report is pending, but its inquiry has helped to push the state into addressing longstanding problems of discrimination against the Alaska Native population. After Sept. 11, the commission established a hot line that received thousands of calls from Muslim and Arab Americans who complained about hate crimes.

The Bush administration's effort to appoint Cleveland lawyer Peter Kirsanow to a seat on the eight-member panel is not the first attempt to manipulate this agency, and it probably will not be the last. The question of Kirsanow's appointment is properly before the federal courts. Unfortunately, the case is reminiscent of President Reagan's effort in 1983 to remove a sitting commissioner. That case too went to federal court, and Reagan lost.



The 2000 presidential election is over, but the U.S. Civil Rights Commission seems destined to pay a price for its unflinching look at problems in Florida's election system. Given the problems since Sept. 11, one would think that the last thing our country needed was a divisive battle over the independence and integrity of the nation's civil rights watchdog.

-- Wade Henderson

The writer is executive director of the Leadership Conference on Civil Rights.

LOAD-DATE: December 22, 2001

*The Washington Post, February 23, 2002*

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The Washington Post

February 23, 2002, Saturday, Final Edition

**SECTION:** EDITORIAL; Pg. A20

**LENGTH:** 378 words

**HEADLINE:** A Serious Commission

**BODY:**

I agree with The Post on the need for a serious and rigorous Civil Rights Commission, but the Feb. 11 editorial was most unfair. Since 1957 the commission's job has been to investigate denials of equal opportunity, to monitor federal agency implementation of civil rights laws and policies, and to aid the federal government in assessing the need for new remedies.

Contrary to The Post's gibe that the commission contributed little beyond noise to discussion of voting denials in the 2000 presidential election, the agency conducted a thorough investigation and issued a thoughtful report that Congress is using in fashioning new legislation. Nor is the mark of an effective agency the absence of controversy. While I appreciate The Post's good words about the moral authority the commission had during my era of the 1960s, it was frequently under attack then. For example, Attorney General William Rogers labeled the commission's 1959 recommendation for voting registrars as radical, only to see it become law with passage of the Voting Rights Act six years later.

Ever since the Reagan administration took a wrecking ball to the commission's independence, replacing eminent commissioners with people who could not distinguish between fact and opinion, the commission has had hard times. The job of rebuilding has been led by people -- including Mary Berry, Cruz Reynoso, Christopher Edley and the late Leon Higginbotham -- who have made lifelong contributions to scholarship and legal advocacy in the field.

The Post is right that there is much to do. It would be helpful, for example, to have a factual investigation into the efficacy of proposed alternatives to affirmative action policies and to weigh the need for security against the costs of racial profiling and detention of immigrants.

Here is a modest proposal: When the next Republican vacancy arises, the appointment should be a distinguished conservative lawyer in the mold of Erwin Griswold (who served the commission in the '60s) or Lewis Powell. That would contribute to the constructive dialogue The Post seeks.

WILLIAM L. TAYLOR

**Washington**

The writer was general counsel of the U.S. **Commission on Civil Rights** from 1963 to 1965 and staff director from 1965 to 1968.

**LOAD-DATE:** March 02, 2002

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Terms: "commission on civil rights" and "william taylor" ([Edit Search](#))

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Date/Time: Tuesday, April 9, 2002 - 12:35 PM EDT

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ONE HUNDRED SEVENTH CONGRESS

## Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6218

(202) 225-3951

<http://www.house.gov/judiciary>

June 22, 2001

The Honorable Mary Frances Berry  
Chairperson  
United States Commission on Civil Rights  
624 Ninth Street, N.W.  
Washington, D.C. 20425

Dear Chairperson Berry:

As Chairman of the House Judiciary Committee's Subcommittee on the Constitution, I am concerned about the June 5, 6, and 9, 2001 reports in *The New York Times* that the United States Commission on Civil Rights ("Commission") failed to involve all commissioners in the preparation of its draft report entitled "Voting Irregularities in Florida During the 2000 Presidential Election" ("Report"), prematurely leaked the Report to the public, and failed to provide affected parties with full access to the contents of the Report.

Other press reports echoed these original articles. In a June 10, 2001 article, *The Washington Post* ombudsman concluded that the leak "was a stupid and destructive leak, no matter where it originated. It undermines the credibility of the commission and politicizes and diverts attention from what should have been an authoritative and inclusive final report." *Salon.com* acknowledged in a June 8, 2001 article that Commissioner Abigail Thernstrom "had a point" that the report was "full of politically charged rhetoric and broad assumptions of injustice with little statistical backup."

Most recently, in the June 25, 2001 issue of *The New Republic*, the editors wrote that the draft report "imp[re]ss[es] that Florida's election officials were racist, even though [it] didn't have any proof." The editors further recognized that the Report had been leaked before the two Republican-appointed members of the Commission had seen it and that Florida Governor Jeb Bush was refused complete access to the full Report. Finally, the editors concluded that the process used resulted in a report that "will likely hinder the cause of electoral reform it was meant to help."

These public reports raise serious questions concerning the adherence of the Commission to procedures that guaranty basic fairness to all involved in the work of the Commission by ensuring that different perspectives are considered. In my judgment, failure to ensure such fairness would greatly undermine the authority of the Commission and the validity of its conclusions.

The Honorable Mary Frances Berry  
 June 22, 2001  
 Page 2 of 8

Accordingly, I intend to conduct oversight of the Commission as it is currently constituted to determine whether its procedures -- both as enunciated and as implemented -- are sufficient to sustain public confidence in the work of the Commission and whether Congressional reauthorization of the Commission, which has not occurred since 1994 (and expired in 1996), is necessary to provide the Commission with adequate direction and tools to ensure that the Commission conducts its work in a fair and proper manner.

Pursuant to Rules X and XI of the House of Representatives, please provide all information and documents responsive to the following requests:

*Editorial Policy Board Review*

1. Were four copies of the complete draft of the Report transmitted to the Office of the Staff Director for editorial policy review, as required by Administrative Instruction 1-6, section 13.01?
  - a. If so, on what date? And did the editorial policy board review the draft Report "to determine the adequacy and accuracy of the substantive information in the draft document (e.g., conceptual soundness, adherence to Commission policy, quality of research, argumentation, and documentation of major points)," as required by Administrative Instruction 1-6, section 13?
  - b. If not, please explain why four copies of the complete draft of the Report were not transmitted to the Office of the Staff Director for editorial policy review, as required by Administrative Instruction 1-6, section 13.01:
2. If the editorial policy board reviewed the draft Report "to determine the adequacy and accuracy of the substantive information in the draft document (e.g., conceptual soundness, adherence to Commission policy, quality of research, argumentation, and documentation of major points)," as required by Administrative Instruction 1-6, section 13, who were the members of the editorial policy board who conducted such a review and on what date(s) was such a review conducted?
3. If the editorial policy board reviewed the draft Report "to determine the adequacy and accuracy of the substantive information in the draft document (e.g., conceptual soundness, adherence to Commission policy, quality of research, argumentation, and documentation of major points)," as required by Administrative Instruction 1-6, section 13, was a meeting of the editorial policy board held within 3 workdays after receipt of the editorial policy board's comments, as permitted by Administrative Instruction 1-6, section 13.05? If so, on what date(s) was the meeting held?

The Honorable Mary Frances Berry  
 June 22, 2001  
 Page 3 of 8

4. If the editorial policy board reviewed the draft Report "to determine the adequacy and accuracy of the substantive information in the draft document (e.g., conceptual soundness adherence to Commission policy, quality of research, argumentation, and documentation of major points)," as required by Administrative Instruction 1-6, section 13, did the project staff revise the draft Report in accordance with the the editorial policy board's comments, as required by Administrative Instruction 1-6, section 13.06? If so, please answer the following questions:
- a. On what date(s) did the project staff revise the draft Report in accordance with the editorial board comments?
  - b. Did the assigned office director "inform[] the Staff Director by memorandum of any areas where agreement was not reached and changes were not made," as required by Administrative Instruction 1-6, section 13.06? If so, please produce to the Subcommittee a copy of that memorandum.

*Defame and Degrade Review*

5. Did an office within the Commission, including the Office of General Counsel, submit the draft Report to the General Counsel for the General Counsel to determine whether the draft Report "tend[ed] to defame, degrade, or incriminate any person," as required by Administrative Instruction 7-1, section 4.02?
- a. If so, was a statement appended to that office's submission that "(a) states whether, in its view, the proposed report contains material which may defame, degrade, or incriminate any person; (b) identifies those parts of the draft report that may contain such material; and (c) present or makes available factual information necessary for determining whether identified material may defame, degrade or incriminate any person," as required by Administrative Instruction 7-1, section 4.02?
  - b. If not, please explain why no office within the Commission submitted the draft Report to the General Counsel for the General Counsel to determine whether the draft Report "tend[ed] to defame, degrade, or incriminate any person," as required by Administrative Instruction 7-1, section 4.02.
6. Regardless of whether an office within the Commission, including the Office of General Counsel, submitted the draft Report to the General Counsel for the General Counsel to determine whether the draft Report "tend[ed] to defame, degrade, or incriminate any person," as required by Administrative Instruction 7-1, section 4.02, did the General Counsel or anyone else at the Commission determine that the draft Report did not "tend[] to defame, degrade, or incriminate any person," as that term is used in 45 C.F.R. § 702.18?

The Honorable Mary Frances Berry  
 June 22, 2001  
 Page 4 of 8

- a. If so, please answer the following questions:
    - i. Who made the final determination that the draft Report did not "tend[] to defame, degrade, or incriminate any person?"
    - ii. On what date was that determination made?
    - iii. Were any documents relied upon by the Commission in determining that the draft Report did not "tend[] to defame, degrade, or incriminate any person?" If so, please produce to the Subcommittee copies of any and all such documents.
  - b. If not, please answer the following questions:
    - i. Did the General Counsel, "relying on facts presented by the originating office, review the proposed report and accompanying submissions and specify in writing (a) the material, if any, that tends to defame, degrade, or incriminate a person; (b) the persons, organizations, etc., that have a right of response under 45 C.F.R. § 702.18; and (c) instructions to the originating office to implement this regulatory right of reply," as required by Administrative Instruction 7-1, section 4.03? If so, please produce to the Subcommittee a copy of that document.
    - ii. If the Commission did not delete any statement that made the draft Report one that "tend[ed] to defame, degrade, or incriminate any person," why did the Commission not afford such persons that which such persons were entitled under 45 C.F.R. § 702.18?
7. If the Commission determined that the draft Report did not "tend[] to defame, degrade, or incriminate any person," as that term is used in 45 C.F.R. § 702.18, did the Commission look to Administrative Instruction 7-1, section 3:01 for guidance in determining whether the draft Report "tend[ed] to defame, degrade, or incriminate any person?"
- a. If so, please explain in detail how the Commission determined that the draft Report did not contain any statements "that (a) allege discrimination based on race, color, religion, sex, age, disability, or national origin, (b) allege commission of illegal acts, or (c) are likely to damage the business or reputation of, or otherwise to injure, the person criticized." In doing so, please note that Black's Law Dictionary defines "allege" in the following manner: "To state, recite, claim, assert, or charge; to make an allegation." Black's Law Dictionary, 74 (6<sup>th</sup> ed. 1990).

The Honorable Mary Frances Berry  
 June 22, 2001  
 Page 5 of 8

- b. If not, please explain why the Commission did not look to Administrative Instruction 7-1, section 3.01 for guidance in determining whether the draft Report "tend[ed] to defame, degrade, or incriminate any person."

*Legal Sufficiency Review*

8. Did an office within the Commission, including the Office of General Counsel, submit the draft Report to the Office of General Counsel for "legal sufficiency review," as required by Administrative Instruction 1-6, section 14.01?
- a. If so, please answer the following questions:
- i. How long did it take the Office of General Counsel to complete the "legal sufficiency review?"
  - ii. If the draft Report originated in the Office of General Counsel, did any staff within the Office of General Counsel work on both the draft Report and its "legal sufficiency review," in violation of Administrative Instruction 1-6, section 14.04? If so, please produce to the Subcommittee a list of the names and titles of such staff members.
- b. If not, please explain why no office within the Commission submitted the draft Report to the Office of General Counsel for "legal sufficiency review," as required by Administrative Instruction 1-6, section 14.01.
9. Regardless of whether an "office within the Commission" submitted the draft Report for "legal sufficiency review," was a legal sufficiency review conducted? If so, did that review reflect consideration of the ruling of the United States Court of Appeals for the Eleventh Circuit in Nipper v. Smith, 39 F.3d 1494 (11<sup>th</sup> Cir. 1994) (regarding the elements of a violation of section 2 of the Voting Rights Act)?
10. If an office within the Commission, including the Office of General Counsel, submitted the draft Report to the Office of General Counsel for "legal sufficiency review," as required by Administrative Instruction 1-6, section 14.01, did the Office of General Counsel send to the assigned office the annotated draft and a memorandum of comments that specifies that the document is legally sufficient or recommends changes necessary to make it legally sufficient, and was a copy of the memorandum sent to the Office of the Staff Director, as required by Administrative Instruction 1-6, section 14.06?



The Honorable Mary Frances Berry

June 22, 2001

Page 6 of 8

- a. If so, please produce to the Subcommittee a copy of that memorandum.
  - b. If not, please explain why the Office of General Counsel did not send to the assigned office the annotated draft and a memorandum of comments that specifies that the document is legally sufficient or recommends changes necessary to make it legally sufficient, and why a copy of the memorandum was not sent to the Office of the Staff Director, as required by Administrative Instruction 1-6, section 14.06.
11. If an office within the Commission, including the Office of General Counsel, submitted the draft Report to the Office of General Counsel for "legal sufficiency review," as required by Administrative Instruction 1-6, section 14.01, in performing the "legal sufficiency review," did the General Counsel determine that "non-legal problems could seriously detract from the publication?" If so, please answer the following questions:
- a. What were the "non-legal problems" that the General Counsel determined "could seriously detract from the publication?"
  - b. Did the General Counsel bring these "non-legal problems" to the attention of the editorial policy board at a meeting of the editorial policy board or at any other time?
12. If an office within the Commission, including the Office of General Counsel, submitted the draft Report to the Office of General Counsel for "legal sufficiency review," as required by Administrative Instruction 1-6, section 14.01, were substantive changes made to the draft Report after the initial "legal sufficiency review," e.g., as a result of editorial policy or affected agency reviews?
- a. If so, was the new material submitted for an expedited "legal sufficiency review," as required by Administrative Instruction 1-6, section 14.08?
  - b. If not, please explain why substantive changes were not made to the draft Report after the initial "legal sufficiency review," e.g., as a result of editorial policy or affected agency reviews.

*Affected Agency Review*

13. After completing any revisions occasioned by legal and editorial review, did the director of the assigned office send "the sections of the draft Report (but not the conclusions, findings, recommendation, or letter of transmittal) that pertain to a government agency to the affected agency for review and comment on the accuracy of the material contained in those sections," as required by Administrative Instruction 1-6, section 15.01?

The Honorable Mary Frances Berry  
 June 22, 2001  
 Page 7 of 8

- a. If so, please answer the following questions:
- i. Who sent such sections?
  - ii. On what date were such sections sent?
  - iii. To whom were such sections sent?
  - iv. Which sections were sent to each "affected agency" that was sent sections?
  - v. Administrative Instruction 1-6, section 15.02 provides that "[a]ffected agency review should usually be completed in 4 weeks." How much time did the Commission provide "affected agencies" to review and to comment on the accuracy of the material contained in those sections sent to the "affected agencies?"
  - vi. Either before or upon receipt of sections of the draft Report that were sent by the Commission, did any "affected agency" request to receive other or all sections of the draft Report for any purpose, including for the purpose of reviewing the ultimate findings and conclusions? If so, please answer the following questions:
    1. Which "affected agencies" made such a request? If such request were made in writing (or reduced to writing by the Commission) please produce to the Subcommittee copies of any and all such documents.
    2. Did the Commission grant the request of any such "affected agency? If so, which "affected agencies?" If not, why not?
- b. If not, please explain why after completing any revisions occasioned by legal and editorial review, the director of the assigned office did not send "the sections of the draft Report (but not the conclusions, findings, recommendation, or letter of transmittal) that pertain to a government agency to the affected agency for review and comment on the accuracy of the material contained in those sections," as required by Administrative Instruction 1-6, section 15.01.

*Public Disclosure Policies*

14. Please produce to the Subcommittee all documents related to the policies regarding public disclosure of reports or draft reports of the Commission in effect on June 4, 2001. Please

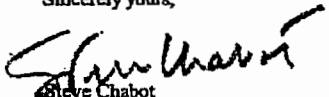
The Honorable Mary Frances Berry  
June 22, 2001  
Page 8 of 8

- include any documents related to policies regarding disclosure of draft reports prior to or at the meeting at which a draft report is to be considered by the Commission and the publication of draft reports on the Commission website.
15. Please produce to the Subcommittee all documents related to the public disclosure of the draft Report, including all documents relating to McKinney/McDowell Associates' involvement in the public disclosure of the draft Report.
  16. Did you take any steps to identify the source of the June 4, 2001 public disclosure of the draft Report that resulted in the reports in The New York Times and The Washington Post. If so, what did you do? Did you identify the source? And, if so, who was the source? If you did not take any such steps, why not?

Please provide written responses and produce responsive documents to Jonathan Vogel of my staff in H2-362 Ford House Office Building not later than July 9, 2001. Documents should be consecutively Bates-stamped and produced in duplicate. Please also provide the Subcommittee with a production log indicating the identity of the person or office from whose files each document was produced and specifying the request to which the documents produced are responsive.

Thank you for your cooperation.

Sincerely yours,



Steve Chabot  
Chairman  
Subcommittee on the Constitution

- cc: The Honorable Jerrold Nadler, Ranking Member  
Vice Chairperson Cruz Reynoso  
Commissioner Christopher Edley, Jr.  
Commissioner Yvonne Y. Lee  
Commissioner Elsie M. Meeks  
Commissioner Russell G. Redenbaugh  
Commissioner Abigail Thernstrom  
Commissioner Victoria Wilson  
Lee Jim Staff Director



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

July 9, 2001 :

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
U.S. House of Representatives  
H2-362 Ford House Office Bldg.  
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your June 22, 2001 correspondence regarding the Commission's report entitled, *Voting Irregularities in Florida During the 2000 Presidential Election*. We are forwarding to you a set of documents that I introduced into the record at the June 27, 2001 Senate Committee on Rules and Administration hearing on election reform issues. These materials address some of the procedural matters discussed in your letter.

I have asked our Staff Director, Les Jin to respond to the inquiries in your letter concerning the Administrative Instruction Manual and other staff matters, since those issues concern the day-to-day operations of the Commission, for which he is legally responsible. The Commissioners, as you know, are part-time officials who set policy for the Commission. We are not onsite at the Commission's Washington, D.C. headquarters. Rather, we are located around the country, employed in full-time professional responsibilities.

The Administrative Instruction Manual is for internal management guidance only and is a means of providing general information to employees. The Staff Director issues the manual and may modify or interpret it consistent with the overall objective, which is effective internal agency management. The instructions contained therein are to the staff and not to the public or persons and agencies external to the Commission.

Let me assure you that all Commissioners had an equal opportunity to consult with the staff during the preparation of the Florida Report.<sup>1</sup> Second, the Commissioners heard a report from the General Counsel before the Florida Report was approved, affirming that affected agencies had an opportunity to review any material concerning them before Commission consideration of the Report.<sup>2</sup>

<sup>1</sup> See attached April 13, 2001 USCCR meeting transcript, pages 4-16, 21-29.

<sup>2</sup> See attached June 8, 2001 USCCR meeting transcript, pages 32-38, 115-117, 125-126.

In addition, if the Florida Report was leaked, and it appears that it was, all Commissioners, irrespective of their political affiliation, were injured by its premature disclosure. In fact, we were faced with trying to explain the substance and importance of the Report without the distraction of discussing leaks and so-called procedural irregularities. Unfortunately, the incorrect media accounts of procedural irregularities, based on one-sided discussions with those opposed to the Florida Report, have been a distraction. For your review, I have enclosed a copy of the letter to the New York Times asking for a correction. This letter was widely disseminated to the media. A copy of a letter subsequently published in the New York Times is also included.

We are pleased to answer your questions and would welcome an opportunity to discuss with your subcommittee how non-existent procedural irregularities became a matter of public discussion. In addition, we are extremely eager to discuss the substance of our Florida Report with your subcommittee, which has done so much important work over the years in the cause of protecting Constitutional rights, including the right to vote.

Sincerely,



Mary Frances Berry  
Chairperson

Attachments

cc: The Honorable Jerrold Nadler, Ranking Member  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Abigail Thornstrom, Commissioner  
Victoria Wilson, Commissioner  
Les Jin, Staff Director



OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

July 9, 2001

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515-6215

Re: Inquiries of House Judiciary Committee's Subcommittee on the Constitution

Dear Congressman Chabot:

Dr. Mary Frances Berry, the Chairperson of the U.S. Commission on Civil Rights, has asked me to respond to your letter of June 22, 2001 since it contains inquiries related to the day to day operations of the Commission for which I am legally responsible. As you know, the Commission operates with part-time Commissioners who make policy and a full time Staff Director who manages the civil service staff.

I am including a set of documents submitted to the U.S. Senate Committee on Rules and Administration on June 27, 2001, which make plain that all Commissioners had an equal opportunity to involve themselves in the work on the Florida Report. The documents also make plain that affected agencies and officials were given a complete opportunity to review materials concerning them in the report before it was approved by the Commission. Further, the documents include a letter to the media asking for a correction of incorrect reports on the procedures staff followed and a subsequent letter published in response.

As for leaks, the enclosed documents show that the Commission has discussed the problem of leaks and has asked for advice from several authorities, including the Office of Management and Budget (OMB), the Office of Personnel Management (OPM), the Office of Government Ethics (OGE) and the Inspector General for the U.S. Department of Agriculture (USDA), who handles our affairs (see attachments). No one has to date arrived at a leak-proof solution or a way to identify who leaks. The Commissioners plan to discuss the subject again at the July 13, 2001 meeting.

The Administrative Instructions are contained in an Administrative Manual, which is the official primary medium for describing internal agency structure policies and processes, and a means of providing general information to employees of the U.S. Commission on Civil Rights. The Administrative Instructions are for internal management guidance only. The Staff Director issues the manual and may modify, or interpret it, consistent with the overall objective, which is

effective internal management of the agency. These instructions are to the staff and not to the public or persons and agencies external to the Commission.

The Commission's responses to your inquiries are stated below.

***Editorial Policy Board Review***

*Response to inquiry number 1*, on May 23, 2001 four copies of the draft Report were given to the Office of the Staff Director for editorial policy review. The editorial policy review board performed the appropriate review.

*Response to inquiry number 2*, the editorial policy review board consisted of 3 career civil service employees of the Commission from the Office of the Staff Director, Office of Management and the Office of Civil Rights Evaluation. The review was performed between May 23, 2001 and May 30, 2001

*Response to inquiry number 3*, Administrative Instruction 1-6, § 13.05 provides that a meeting of the editorial policy review board will be held within 3 working days of the receipt of the editorial review board comments, "[i]f necessary." A meeting was not necessary in this instance.

*Response to inquiry number 4*, between May 30, 2001 and June 1, 2001, the draft report was revised pursuant to comments provided by the editorial policy review board. There were no areas of disagreement that prevented changes from being made to the report. Thus, there is no memorandum from the office director to the Staff Director regarding any disagreement.

***Defame and Degrade Review***

*Response to inquiry number 5*, staff within the Office of General Counsel performed the defame and degrade review simultaneously with the legal sufficiency review [AI 7-1, § 4.02. AI 1-6, § 14.05]. All attorneys conducting the defame and degrade and the legal sufficiency review were instructed to "pay close attention to any defame and degrade concerns that may arise in the chapters assigned to (them)." [Memorandum from Commission General Counsel Edward A. Hailes, Jr. to Voting Rights Team, dated May 21, 2001.]

*Response to inquiry number 6*, 45 C.F.R. § 702.18 does not define defame and degrade. The use of the term "defame and degrade" in 45 C.F.R. § 702.18 was not triggered because it was not determined that the draft report submitted on May 21, 2001 tended to defame, degrade or incriminate any person. The General Counsel determined that there were no defame and degrade concerns on May 28, 2001. [AI 7-1, § 4.03.] All relevant administrative instructions as well as internal documents were relied upon in determining whether the draft report tended to defame, degrade or incriminate any person. Because the documents are attorney work product, they have not been produced. Also, as you are well aware, the law recognizes and gives deference to an agency's interpretation of its own rules and regulations [Please see *Holland v. Apfel* 2000 U.S. Dist. LEXIS 6134.]

*Response to inquiry number 7*, all relevant administrative instructions as well as internal documents were relied upon in determining whether the draft report tended to defame, degrade or incriminate any person. The internal documents offered guidance, examples, definitions and analyses regarding the precedent by which the Commission has determined whether any of its publications tended to defame, degrade or incriminate any person.

#### ***Legal Sufficiency Review***

*Response to inquiry number 8*, the Draft Voting Rights report underwent a legal sufficiency review as anticipated by Administrative Instruction 1-6, § 14.01. The draft report was submitted to the Office of General Counsel staff by the General Counsel on May 21<sup>st</sup>; and the review was completed by May 28, 2001..

All attorneys in the Office of General Counsel worked on some portion of the draft report. In light of the internal guidance provided by Administrative Instruction 1-6, § 14.04, the General Counsel in assigning the draft report for legal sufficiency review insured that no attorney was assigned to perform a legal sufficiency review on any part of the draft report on which they had worked. Therefore, no staff member performed a legal sufficiency review in violation of Administrative Instruction 1-6, § 14.04 as interpreted by the Commission.

*Response to inquiry number 9*, in completing the legal sufficiency review, the relevant statutory provisions along with their legislative history, as well as all applicable U.S. Supreme Court precedent, including the recent decision in *Hunt v. Cromartie* (121 S Ct 1452), were considered. To the extent that lower court decisions were applicable to the analysis in the draft report, including the fact-based importance of Section 2 inquiries, and were consistent with the relevant statutes and U.S. Supreme Court precedent, they were considered.

*Response to inquiry number 10*, all attorneys who were assigned to perform the legal sufficiency review provided the General Counsel with a copy of the portion of the report which they were assigned to review, annotated with suggested changes and memorandum of comments. The General Counsel provided these annotated draft copies along with the memorandum of comments to the Office of General Counsel staff responsible for preparing the report. Since the draft report and the legal sufficiency review were performed intra-office, the provision in Administrative Instruction 1-6, §14.06 regarding the provision of a copy of the memorandum of comments forwarded to the office responsible for drafting the report to the Staff Director was inapplicable.

*Response to inquiry number 11*, during the legal sufficiency review there were no "non-legal problems" identified which could "seriously detract from the publication" of the report.

*Response to inquiry number 12*, while changes were made to the draft report as a result of the legal sufficiency review, these changes were not "substantive" and therefore no additional "expedited legal sufficiency review," as provided for in Administrative Instruction 1-6, §14.08 was required.



**Affected Agency Review**

*Response to inquiry number 13*, on May 24, 2000 the Office of General Counsel sent the respective agencies listed below relevant pages of the report. Please find attached a copy of the cover letter and enclosures sent to each of the following parties for affected agency review. The review period for these agencies is noted in the enclosures. The entire affected agency review period covers the time the staff devotes to affected agency issues in addition to the time the agencies review and respond to the relevant portions of the draft materials. The time frames noted in Administrative Instruction 1-6, section 15.02 provide guidance to the staff on when the staff should finish its work in this area of the project. It is not intended for the public; nor does it create an entitlement of a thirty day review period for agencies.

**Federal Election Commission**  
 Jim Pehrkon, Staff Director  
 Lois Lerner, Acting General Counsel

**Office of Governor John Ellis Bush**  
 Charles T. Canady, General Counsel

**Office of Secretary of State Katherine Harris**  
 Deborah K. Kearney, General Counsel

**Office of the Attorney General**  
 The Honorable Robert Butterworth  
 Attorney General

**Florida Election Commission**  
 Phyllis Hampton, General Counsel

**Florida Office of Executive Clemency**  
 Janet Keels, Coordinator

**Florida Department of Law Enforcement**  
 Michael Ramage, General Counsel

**Department of Highway Safety and Motor Vehicles**  
 Enoch Whitney, General Counsel

**Florida Department of Corrections**  
 Michael W. Moore, Secretary  
 Lou A. Vargas, General Counsel

**Governor's Select Task Force on Election Procedures, Standards and Technology**  
 Mark Pritchett, Executive Director

**Florida Justice Institute**  
 Randall Berg, Executive Director

**Florida Atlantic University**  
 Anthony James Catanese, President

**DBT Online, a ChoicePoint Company**  
 Michael deJanes, General Counsel

**Equifax, Inc.**  
 Kent E. Mast, Corporate Vice President, General Counsel and Secretary

**Florida State Association of Supervisors of Elections**  
 Pam Iorio, President

**Alachua County Supervisor of Elections**  
 Beverly Hill, Supervisor of Elections

**Broward County of Elections**  
 Miriam M. Oliphant, Supervisor of Elections

**Duval County Supervisor of Elections**  
 John Stafford, Supervisor of Elections

**Gadsden County Supervisor of Elections**  
 Shirley Knight, Supervisor of Elections

**Leon County Supervisor of Elections**  
 Ion V. Sancho, Supervisor of Elections

**Madison County Supervisor of Elections**  
 Linda Howell, Supervisor of Elections

**Madison County Attorney**  
 George T. Reeves, County Attorney

**Miami-Dade County Supervisor of Elections**  
 David Leahy, Supervisor of Elections

**Monroe County Supervisor of Elections**  
 Harry L. Sawyer, Jr., Supervisor of Elections

**Monroe County Administrator**  
 James L. Roberts, Administrator

**Okaloosa County Supervisor of Elections**  
 Patricia M. Hollarn, Supervisor of Elections

**Palm Beach County Supervisor of Elections**  
 Teresa LePore, Supervisor of Elections

**Palm Beach County State's Attorney**  
 Barry Krischer, State's Attorney

**Pinellas County Supervisor of Elections**  
 Deborah Clark, Supervisor of Elections

On June 3, 2001, the Office of the Governor of Florida requested an entire copy of the report. As all pages relevant to the Office of the Governor were sent on May 24, 2001, no additional pages were forwarded.

The Office of the Florida Secretary of State requested an entire copy of the status report issued by a majority of the Commissioners at the March 8, 2001 Commission meeting. That request was granted.

The Office of the Supervisor of Elections of Leon County requested two additional pages. That request was granted.

***Public Disclosure Policies***

*Response to inquiry number 14*, please find enclosed a copy of the transcript and minutes of a Commission meeting, in which the discussion of leaks took place following the apparent leak of the draft report, "*Police Practices and Civil Rights in New York City*."

*Response to inquiry number 15*, there are no documents concerning the premature public disclosure of the draft report, including any documents relating to McKinney & McDowell Associates.

*Response to inquiry number 16*, shortly after I realized that the report had been leaked, I examined past episodes of leaks at the Commission. A little over a year ago, after a series of reports had been leaked, the Commissioners directed the individual who was Staff Director at that time to conduct a comprehensive examination to address the leak problems and to attempt to identify the sources of those leaks. The Staff Director formed a committee and a comprehensive examination ensued. While some suggestions were made to improve security, the overall conclusion was that it was very hard to stop leaks and even harder to identify the individuals responsible. The Staff Director and her committee were not able to identify those responsible for the leaks.

Since last year, we have made some efforts to decrease the likelihood of leaks occurring.

However, on a project such as the Florida Voting Rights project, where a large number of people, i.e., Commissioners, staff and outside people, have all or parts of the report at various times, it is virtually impossible to either stop all leaks or to identify the individual or individuals responsible. As we know from problems that the Department of State and the CIA have had recently, even organizations able and willing to put a premium on secrecy and stopping leaks and espionage cannot guarantee success. The Commission cannot operate effectively with the level of secrecy and security tolerated by some of the other federal agencies. A certain amount openness is essential to our process. Thus, preventing leaks is even harder. Moreover, any Commission decision to aggressively address the leak problem needs to be measured in the context of our very limited resources.

After evaluating all the facts, I tentatively have concluded that further efforts to identify those responsible for leaking the report are not likely to be successful. However, I am examining some options to decrease the possibilities of leaks in the future.

I hope that this correspondence is fully responsive to your inquiry.

Sincerely,



Les Jin  
Staff Director  
U.S. Commission on Civil Rights

#### Attachments

cc: The Honorable Jerrold Nadler, Ranking Member  
Mary Frances Berry, *Chairperson*  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Abigail Thernstrom, Commissioner  
Victoria Wilson, Commissioner

F. JAMES KEENE/KEENE, JR., Wisconsin  
CHAIRMAN

MURRY J. HIDE, Illinois  
GEORGE W. GREGG, Pennsylvania  
HOWARD EDWARDS, North Carolina  
LAMAR S. SMITH, Texas  
ELTON GALLEGLY, California  
BOB COOLIDGE, Nevada  
STEVE CHABOT, Ohio  
SON BARR, Georgia  
WILLIAM L. JENNINGS, Tennessee  
ASA HUTCHERSON, Arkansas  
CHRIS CHAMBERLAIN, Utah  
LINDSEY O. GRAHAM, South Carolina  
SPENCER BACHUS, Michigan  
JOE SCARBOROUGH, Florida  
JOHN W. HOSTETTLER, Indiana  
MARK GREENE, Wisconsin  
MIC BELLER, Florida  
DANIEL B. SISK, California  
MELISSA A. HART, Pennsylvania  
JEFF FLAKE, Arizona

ONE HUNDRED SEVENTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6215

[202] 225-3351

<http://www.house.gov/judiciary>

July 10, 2001

JOHN COFFERS, JR., Maryland  
BARBARA ROSENTHAL, Indiana

BURNEY BRANK, Massachusetts  
HOWARD L. BERMAN, California  
NICK BOGHRIS, Virginia  
JEROME H. RUDOLPH, New York  
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MAURIE HATCHER, California  
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WILLIAM D. DELANEY, New York  
ROBERT WIGLER, Florida  
TAMMY BALDWIN, Wisconsin  
ANTHONY G. WEISS, Pennsylvania  
ADAM B. SCHIFF, California

The Honorable Mary Frances Berry  
Chairperson  
United States Commission on Civil Rights  
624 Ninth Street, N.W.  
Washington, D.C. 20425

Dear Chairperson Berry:

In light of the disagreement between Commissioner Abigail Thernstrom and you at the June 27, 2001 Senate Rules and Administration Committee hearing on the issue of the production of data used by Professor Allan Lichtman in connection with the report entitled "Voting Irregularities in Florida During the 2000 Presidential Election" ("Report"), the Subcommittee has several questions that are relevant to its oversight authority of the United States Commission on Civil Rights ("Commission").

Pursuant to Rules X and XI of the House of Representatives, please provide all information and documents responsive to the following questions:

1. Please produce to the Subcommittee all documents related to the employment of Professor Allan Lichtman. This production should include, but should not be limited to, any contract between the Commission and Professor Lichtman, any and all descriptions of the scope of Professor Lichtman's work, and any and all documents provided to the Commission by Professor Lichtman regarding his experience and qualifications.
2. Please explain the process typically used by the Commission to enter into employment agreements with persons who assist the Commission in drafting a report. Did the Commission follow this process with Professor Lichtman? How was the Commission's process with respect to Professor Lichtman different? How was it similar?
3. Please produce all documents and other materials relating or referring to the methodology used by Professor Lichtman in his analysis, including the software program used to run the regressions referred to in his analysis.
4. Professor Lichtman's analysis refers to a "multiple regression analysis that controlled for the

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U.S. HOUSE OF REPRESENTATIVES  
CLERK

The Honorable Mary Frances Berry  
July 10, 2001  
Page 2 of 3

percentage of high school graduates and the percentage of adults in the lowest literacy category." Please produce to the Subcommittee the machine-readable data used to run those regressions.

5. Since the Commission's adoption of the Report at the Commission's meeting on June 8, 2001, has Professor Lichtman added to his analysis a new chart, namely "Chart 7," and a discussion of that chart? If so, please explain when the new chart and the discussion of the chart were incorporated into Professor Lichtman's analysis. Also, please explain why these additions to his analysis were made subsequent to the Commission's vote to approve the Report and who at the Commission decided to include the additions to the analysis within the Report. Was there ever a Commission vote on whether to include them? If not, why not?
6. In a paragraph contained within Professor Lichtman's analysis, Professor Lichtman refers to "a multivariate ecological regression equation that includes the percentage of Hispanics as well as blacks in the precincts of Dade County." A note claims that inserting data on Hispanics "into the county-level regression equations used for statewide estimates" affects the results. Please produce to the Subcommittee the machine-readable data used to run these regressions.

Please provide written responses and produce responsive documents to Jonathan Vogel of my staff in H2-362 Ford House Office Building not later than July 16, 2001. Documents should be consecutively Bates-stamped and produced in duplicate. Please also provide the Subcommittee with a production log indicating the identity of the person or office from whose files each document was produced and specifying the request to which the documents produced are responsive.

Thank you for your cooperation.

Sincerely yours,



Steve Chabot

Chairman

Subcommittee on the Constitution

cc: Vice Chairperson Cruz Reynoso  
Commissioner Christopher Edley, Jr.  
Commissioner Yvonne Y. Lee  
Commissioner Elsie M. Meeks  
Commissioner Russell G. Redenbaugh

**The Honorable Mary Frances Berry**

**July 10, 2001**

**Page 3 of 3**

**Commissioner Abigail Thernstrom**

**Commissioner Victoria Wilson**

**Les Jin, Staff Director**



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

July 16, 2001

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515-6215

Re: Second Set of Inquiries from House Judiciary Committee's Subcommittee on the Constitution

Dear Congressman Chabot:

This letter is written pursuant to the inquiries delineated in your July 10, 2001 letter regarding the production of data used by Dr. Allan Lichtman in connection with the U.S. Commission on Civil Rights ("Commission") report entitled "Voting Irregularities in Florida During the 2000 Presidential Election." ("Report") As with the responses to your previous inquiries dated June 22, 2001, Dr. Mary Frances Berry, the Chairperson of the U.S. Commission on Civil Rights, has asked me to respond to your questions as they pertain to the day to day operations of the Commission for which I am legally responsible. As you know, the Commission operates with part-time Commissioners who make policy and a full time Staff Director who manages the civil service staff.

Your letter refers to a "disagreement" between Chairperson Berry and Commissioner Abigail Thernstrom over the production of the data used by Dr. Lichtman at the June 27, 2001 Senate Rules and Administration Committee hearing. The Office of the Staff Director made accessible to Commissioner Thernstrom all readily available information from Dr. Lichtman. The additional data requested by her is public information that Dr. Lichtman downloaded from the internet, but never to discs. Since the additional data requested by Commissioner Thernstrom is readily available to the public and, in the interest of the appropriate management of the taxpayer dollars which finance the activities of the Commission, the Office of the Staff Director determined that it was more economical to refer her to the web addresses cited in Dr. Lichtman's report than to pay Dr. Lichtman to download what may otherwise be free information. Moreover, other scholars have been able to access the data with little effort. [Please see the report of Dr. Philip A. Klinkner, Associate Professor of Political Science of Hamilton College,



**"Whose Votes Don't Count? An Analysis of Spoiled Ballots in the 2000 Florida Election,"**  
submitted to the United States Senate Committee on Rules and Administration.]

The Commission is pleased to answer all inquiries regarding the employment of Dr. Lichtman as an expert consultant. My answers cannot account for the process by which Commissioners Russell G. Redenbaugh and Abigail Thernstrom engaged the publicly-acknowledged assistance of non-employees of the Commission, including Professor Stephan Thernstrom, Professor John Lott, and others to perform activities related to the dissenting statement to the Report. The dissenting statement is under review to ensure that the Commission operates in accordance with its administrative instruction regarding such employment and is in compliance with the Commission's statutory provision on employment of experts and consultants. As a result, no comparison can be made between the process by which Dr. Lichtman was involved with the Report against any other "consultant" or "expert."

Also, your letter purports to quote language used by Dr. Lichtman regarding his analysis provided to the Commission for the Report. Although your letter does not cite to the source of the quotations, I presume you are referring to Dr. Lichtman's report. The answers to inquiries that include the quotations with no indicated source reflect my understanding that you are referring to Dr. Lichtman's report entitled "Report on the Racial Impact on the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida."

The Commission's responses to your inquiries are stated below. The Office of the General Counsel and the Office of the Staff Director generated all documents.

**Response to inquiry number 1**, please find attached a copy of all public documents related to the employment of Dr. Allan Lichtman by the Commission for the Report. All confidential information (such as Dr. Lichtman's date of birth and social security number) has been deleted. The attached documents include the following:

- Applicants for Consultant or Expert Positions Determination of Rate of Pay
- April 23, 2001 Memorandum from Edward A. Hailes, Jr., Commission General Counsel to Les R. Jin, Commission Staff Director; Regarding Justification and Scope of Work for Dr. Allan Lichtman
- U.S. Commission on Civil Rights Disclosure Form for Voting Rights Project
- May 17, 2001 Memorandum from Edward A. Hailes, Jr., Commission General Counsel to Les R. Jin, Commission Staff Director; Regarding Compensation for Dr. Allan Lichtman
- Request for Personnel Action
- USCCR Employment of Consultant or Expert Certification Regarding Statement of Employment and Financial
- Notification of Personnel Action

- U.S. Commission on Civil Rights Expert Certificate
- Statement of Conditions of Intermittent Appointment
- Appointment Affidavits
- Curriculum Vitae of Dr. Allan Lichtman

*Response to inquiry number 2*, the process typically used by the Commission to enter into employment agreements with persons who assist the Commission in drafting reports is outlined in Administrative Instruction 2-15. The Commission followed the process in Administrative Instruction 2-15 with the employment of Dr. Lichtman. To my knowledge, this process has been routinely followed by the Commission in hiring experts and consultants.

*Response to inquiry number 3*, the methodology used by Dr. Lichtman for the Report is fully explained in his separate report entitled "Report on the Racial Impact on the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida." Dr. Lichtman used the methodology of ecological regression that is described and referenced in his report. He also used multiple regression analysis, probably the most commonly used methodology in social science. The regressions were run on the standard statistical software known as Statistical Package for Social Science or SPSS. A copy of Dr. Lichtman's SPSS program is not produced, as such a conveyance may be violative of copyright laws.

*Response to inquiry number 4*, the data used to run the regression analysis that "controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category" is available on the internet. As a basis for his analysis, Dr. Lichtman utilized data that is obtainable from various public sources. These sources are cited in further detail in that section of the Commission's report that discusses the racial impact of Florida's ballot rejections in the 2000 presidential election. Once Dr. Lichtman downloaded this data, he employed statistical techniques to determine the regression results, which were not stored in the requested formats. Neither he nor any Commission staff person possesses a computer diskette version of any "machine-readable data" for the regression analyses. Instead, Dr. Lichtman provided the Commission with a printout of all data and indicated where the raw data could be downloaded from publicly available sources. This information was made available to any of the agency's Commissioners who requested it.

In order to comply with the Subcommittee's request, Dr. Lichtman would have to execute several tasks at Commission expense, recognizing that the data you are requesting does not currently exist in the format that you have requested. Dr. Lichtman would have to repeat his analysis, download the data, and place the information in this format. Again, this information is publicly available and easily accessible as demonstrated by the independently derived study performed by Professor Klinkner. Moreover, this process would generate an additional and unbudgeted expense for our agency. Accordingly, we anticipate that the Subcommittee would agree that satisfying this request would be an inappropriate use of American taxpayers' funds, since the underlying information used in Dr. Lichtman's analysis is freely available to members of the

public at minimal, if any, cost. Indeed, the media, other scholars, and the public have already accessed this data from its original sources, with little effort.

An additional copy of Dr. Lichtman's report is attached for your convenience. Please refer to the citations in Dr. Lichtman's report.


*Response to inquiry number 5*, you request an explanation of the "addition" of Chart 7 to Dr. Lichtman's analysis in the Report "[s]ince the Commission's adoption of the Report at the Commission's meeting on June 8, 2001." Chart 7 of the Report was included in the draft of the Report provided to the Commissioners and has not changed. Because of your reference to the June 8, 2001 meeting, I believe you may be referring to Graph 6 of the Report that compares the rate of ballot spoilage between Hispanics and African Americans in Dade County. Dr. Lichtman explained at the June 8, 2001 meeting that he chose Dade County because "if [the ballot rejection rates] really was education that was driving this, you would see, not exactly, but a comparably strong relationship when you look at the relationship between Hispanic racial composition of the precincts and the percent of rejected ballots." [Dr. Allan Lichtman, statement before the U.S. Commission on Civil Rights, meeting, Washington, D.C., June 8, 2001, p. 71:] Dr. Lichtman found a "negative relationship" between education and the ballot rejection rate. [Ibid.] Without objection, Chairperson Berry moved that Graph 6 and its surrounding analysis be included in the report. [Ibid, p.97.] Thus, the majority's vote to approve the Report "with the understanding that the staff will, as usual, make changes in conformity with the discussion here and editorial changes" incorporated not only Chart 7, but also Graph 6.

*Response to inquiry number 6*, the data used to run the regression analyses regarding a "multivariate ecological regression equation that includes the percentage of Hispanics as well as blacks" in Dade County precincts and the insertion of data on Hispanics into "county-level regression equations used for statewide estimates" is available on the internet. As a basis for his analysis, Dr. Lichtman utilized data that is obtainable from various public sources. These sources are cited in further detail in that section of the Commission's report that discusses the racial impact of Florida's ballot rejections in the 2000 presidential election. Once Dr. Lichtman downloaded this data, he employed statistical techniques to determine the regression results, which were not stored in the requested formats. Neither he nor any Commission staff person possesses a computer diskette version of any "machine-readable data" for the regression analyses. Instead, Dr. Lichtman provided the Commission with a printout of all data and indicated where the raw data could be downloaded from publicly available sources. This information was made available to any of the agency's Commissioners who requested it.

In order to comply with the Subcommittee's request, Dr. Lichtman would have to execute several tasks at Commission expense, recognizing that the data you are requesting does not currently exist in the format that you have requested. Dr. Lichtman would have to repeat his analysis, download the data, and place the information in this format. This process would generate an additional and unbudgeted expense for our agency. Accordingly, we anticipate that the Subcommittee would agree that satisfying this request would be an inappropriate use of American taxpayers' funds, since the underlying information used in Dr. Lichtman's analysis is

freely available to members of the public at minimal, if any, cost. Indeed, the media, other scholars, and the public have already accessed this data from its original sources, with little effort. Please refer to the citations in Dr. Lichtman's report.

Sincerely,



Les Jin  
Staff Director  
U.S. Commission on Civil Rights

**Attachments**

cc: The Honorable Jerrold Nadler, Ranking Member  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Abigail Thornstrom, Commissioner  
Victoria Wilson, Commissioner

K. JAMES BRIDGEMAN, J., Member  
Chairman

REIMY, J. HYDE, Member  
ROBERT W. CELLS, Pennsylvania  
ROBERT G. COLL, South Carolina  
LANCE E. CRUTE, Texas  
CLYDE WALKER, Colorado  
RICH KORNBLUTH, Oregon  
STEVE CHABOT, Ohio  
BOB LAMM, Oregon  
WILLIAM L. JACKSON, Tennessee  
ADA HATCHER, Alaska  
GARY CROUSE, Utah  
LANCE E. CRUTE, Texas  
MURPHY, B. MICHAEL, South Carolina  
JIM HANCOCK, Florida  
JERRY B. HUNT, Idaho  
JAMES R. HONAN, Michigan  
ART WELLS, Texas  
MURPHY, B. MICHAEL, South Carolina  
MERRILL A. HUNT, Pennsylvania  
JOE FLAKE, Arizona

ONE HUNDRED SEVENTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON THE JUDICIARY

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WASHINGTON, DC 20515-6216

(202) 225-3981

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July 20, 2001

JOHN CONYERS, JR., Chairman  
RANNEY HOPKINS, Member  
MICHAEL B. ROSEN, Member  
HOWARD L. Berman, Chairman  
RICK WADSWORTH, Oregon  
ANTHONY D. MARTIN, New York  
BENNETT L. "BOBBY" SCOTT, Virginia  
KEVIN C. MCCARTHY, California  
BRUCE A. LACROIX, Utah  
MICHAEL W. BURGESS, California  
MARKET V. SPEER, Pennsylvania  
WALTER B. DELANEY, Pennsylvania  
ROBERT WELLS, Florida  
TOMMY HANCOCK, Michigan  
ANTHONY D. MARTIN, New York  
ROSE K. SCHUPP, Colorado

The Honorable Mary Frances Berry  
Chairperson  
United States Commission on Civil Rights  
624 Ninth Street, N.W.  
Washington, D.C. 20425

Dear Chairperson Berry:

I appreciate your timely response to my June 22, 2001 letter, sent on behalf of the Subcommittee on the Constitution, seeking information and documents from the United States Commission on Civil Rights ("Commission") relating to the report entitled "Voting Irregularities in Florida During the 2000 Presidential Election" ("Report"), although I take issue with much of your response. I also appreciate receiving Les Jin's letters dated July 9, 2001 and July 16, 2001. However, many of his responses to the Subcommittee's inquiries were inadequate and unresponsive.

The purpose of this letter is to renew our request for information and documents that the Commission failed to provide in its initial responses and to follow up on Mr. Jin's responses. The numbered requests below correspond to the requests from my June 22, 2001 and July 10, 2001 letters.

June 22, 2001

Before Mr. Jin addressed the Subcommittee's specific requests for information and documents, he stated that he had enclosed "a set of documents submitted to the U.S. Senate Committee on Rules and Administration on June 27, 2001, which make plain that all Commissioners had an equal opportunity to involve themselves in the work on the Florida Report." Mr. Jin provided the Subcommittee with several memoranda regarding requests for data used by Professor Allan Lichtman. In one memorandum from Edward A. Hailes, Jr., General Counsel, to Commissioner Abigail Thernstrom, which was sent through Mr. Jin and which was dated June 19, 2001, Mr. Hailes referred to "a copy of a disk containing data that was used by former Commission staff member, Dr. Rebecca Kraus, who briefly provided assistance to our office until she left the agency for a promotional opportunity." Dr. Kraus was referred to again in a June 20, 2001 memorandum from

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Mr. Hailes to Commissioner Thernstrom, which was also sent through Mr. Jin. Please answer the following questions regarding Dr. Kraus:

- a. In what capacity was Dr. Kraus employed by the Commission? What was the scope of Dr. Kraus' work for the Commission?
- b. On what date was Dr. Kraus employed by the Commission? On what date did her employment terminate?
- c. Please produce to the Subcommittee all documents and disks related to the employment of Dr. Kraus. This production should include, but should not be limited to, any contract between the Commission and Dr. Kraus, any and all descriptions of the scope of Dr. Kraus' work, and any and all documents provided to the Commission by Dr. Kraus regarding her experience and qualifications.

Editorial Policy Board Review

1. Mr. Jin claimed that on May 23, 2001, four copies of the draft Report were given to the Office of the Staff Director for editorial policy review and that the editorial policy review board "performed the appropriate review."

The question, however, was whether "the editorial policy board review[ed] the draft Report 'to determine the adequacy and accuracy of the substantive information in the draft document (e.g., conceptual soundness, adherence to Commission policy, quality of research, argumentation, and documentation of major points),' as required by Administrative Instruction 1-6, section 13."

Stating that the editorial policy review board "performed the appropriate review" does not adequately answer the Subcommittee's question. Please answer the specific question posed by the Subcommittee.

2. The Subcommittee has no follow-up questions.
3. The Subcommittee has no follow-up questions.
4. The Subcommittee has no follow-up questions.

Defame and Degrade Review

5. Mr. Jin claimed that the "staff within the Office of General Counsel performed the defame and degrade review" and that the attorneys who conducted the defame and degrade review were

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instructed "to pay close attention to any defame and degrade concerns that may arise in the chapters assigned to (them)."

The question, however, was whether "a statement [was] appended to [the submitting] office's submission that '(a) states whether, in its view, the proposed report contains material which may defame, degrade, or incriminate any person; (b) identifies those parts of the draft report that may contain such material; and (c) present or makes available factual information necessary for determining whether identified material may defame, degrade or incriminate any person,' as required by Administrative Instruction 7-1, section 4.02."

Stating that the attorneys who conducted the defame and degrade review were instructed "to pay close attention to any defame and degrade concerns that may arise in the chapters assigned to (them)" does not adequately answer the Subcommittee's question. Please answer the specific question posed by the Subcommittee.

In addition, please produce to the Subcommittee (1) a copy of the May 21, 2001 memorandum from Commission General Counsel Edward A. Hailes, Jr. to Voting Rights Team, as described in Mr. Jin's response, and (2) copies of any and all drafts of the Report (and please indicate the date of each draft).

6. Mr. Jin stated that "[t]he General Counsel determined that there were no defame and degrade concerns on May 28, 2001." Mr. Jin also stated that "internal documents" were relied upon in determining whether the draft Report tended to defame, degrade, or incriminate any person, but he refused to produce such documents to the Subcommittee, citing the attorney work product doctrine.

First, please explain why the General Counsel made a determination on the defame and degrade issue two days before the editorial policy board review was completed and four days before the draft Report was revised pursuant to comments provided by the editorial policy board.

Second, it is well established that acceptance of a claim of the work-product doctrine rests in the sound discretion of the Subcommittee. The legal basis for Congress's prerogative in this area is based upon its inherent constitutional prerogative to investigate, which has been long recognized by the United States Supreme Court as extremely broad and encompassing, and which is at its peak when the subject is fraud, abuse, or maladministration within a government agency. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975); Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 272 U.S. 135, 177 (1926).

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The Subcommittee does not accept the Commission's claim of the work-product doctrine. Please produce the documents requested by the Subcommittee.

7. Mr. Jin stated that "all relevant administrative instructions as well as internal documents were relied upon in determining whether the draft report tended to defame, degrade or incriminate any person." He further stated that internal documents "offered guidance, examples, definitions and analyses regarding the precedent by which the Commission has determined whether any of its publications tended to defame, degrade or incriminate any person."

The question, however, was whether "the Commission look[ed] to Administrative Instruction 7-1, section 3.01 for guidance in determining whether the draft Report 'tend[ed] to defame, degrade, or incriminate any person.'"

Stating that "all relevant administrative instructions as well as internal documents were relied upon in determining whether the draft report tended to defame, degrade or incriminate any person" does not adequately answer the Subcommittee's question. Please answer the specific question posed by the Subcommittee.

As a follow-up question, the Subcommittee asked the Commission to "explain in detail how the Commission determined that the draft Report did not contain any statements "that (a) allege discrimination based on race, color, religion, sex, age, disability, or national origin, (b) allege commission of illegal acts, or (c) are likely to damage the business or reputation of, or otherwise to injure, the person criticized," and in doing so, to note that Black's Law Dictionary defines "allege" in the following manner: "To state, recite, claim, assert, or charge; to make an allegation." Black's Law Dictionary 74 (6<sup>th</sup> ed. 1990). Mr. Jin totally ignored this question. Please also answer this question posed by the Subcommittee.

#### Legal Sufficiency Review

8. Mr. Jin claimed that the draft Report was submitted to the Office of General Counsel for "legal sufficiency review" by May 21, 2001 and that such review was completed by May 28, 2001. He admitted that staff within the Office of General Counsel worked on both the draft Report and its "legal sufficiency review," but he claimed that such work was not in violation of Administrative Instruction 1-6, section 14.04 because the General Counsel "insured that no attorney was assigned to perform a legal sufficiency review on any part of the draft report on which they had worked."

First, please explain why the Office of General Counsel *received* the draft Report for it to perform the "legal sufficiency review" nine days before the editorial policy board review was completed and eleven days before the draft Report was revised pursuant to comments provided by the editorial policy board, and please explain why the Office of General Counsel



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*completed* the "legal sufficiency review" two days before the editorial policy board review was completed and four days before the draft Report was revised pursuant to comments provided by the editorial policy board.

Second, it is apparent from the text of Administrative Instruction 1-6, section 14.04 that the Commission violated section 14.04 because "the report originate[d] in the Office of General Counsel" and "staff who worked on the report [were] assigned to its legal sufficiency review." The Office of General Counsel could have avoided committing this violation by not assigning all the attorneys in the Office to the drafting of the Report. Please provide an explanation for this violation of section 14.04.

9. Mr. Jin stated that a "legal sufficiency review" was performed and that "the relevant statutory provisions along with their legislative history, as well as applicable U.S. Supreme Court precedent" were considered. Jin also states that "[t]o the extent that lower court decisions were applicable to the analysis . . . and were consistent with the relevant statutes and U.S. Supreme Court precedent, they were considered."

The question, however, was "did [the 'legal sufficiency review'] reflect consideration of the ruling of the United States Court of Appeals for the Eleventh Circuit in Nipper v. Smith, 39 F.3d 1494 (11<sup>th</sup> Cir. 1994) (regarding the elements of a violation of section 2 of the Voting Rights Act)."

Stating that "the relevant statutory provisions along with their legislative history, as well as applicable U.S. Supreme Court precedent" were considered and that "[t]o the extent that lower court decisions were applicable to the analysis . . . and were consistent with the relevant statutes and U.S. Supreme Court precedent, they were considered" does not adequately answer the Subcommittee's question. Please answer the specific question posed by the Subcommittee.

10. Mr. Jin claimed that the referenced requirement contained in Administrative Instruction 1-6, section 14.06 was inapplicable because "the draft report and the legal sufficiency review were performed intra-office."

First, nowhere in Administrative Instruction 1-6, section 14.06 does it state that whenever the same office within the Commission both drafts a report and performs its "legal sufficiency review" the provisions of section 14.06 are inapplicable. Although Mr. Jin claims that "all attorneys who were assigned to perform the legal sufficiency review provided the General Counsel with a copy of the portion of the report which they were assigned to review, annotated with suggested changes and memorandum of comments," the Office of General Counsel apparently failed to send the memoranda to the Office of the Staff Director. This failure constituted a violation of section 14.06 which states that "[a] copy of the memorandum

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is sent to the Office of the Staff Director." Please explain this violation of section 14.06.

Second, the Commission failed to produce to the Subcommittee copies of the memoranda, as the Subcommittee had requested. Please produce the documents requested by the Subcommittee. To the extent that the Commission does not read the Subcommittee's prior request as a request for such memoranda, the Subcommittee hereby makes a request for the memoranda. In addition, please produce to the Subcommittee copies of the annotated portions of the draft Report to which Mr. Jin referred in his response.

11. The Subcommittee has no follow-up questions.
12. Mr. Jin claimed that "while changes were made to the draft report as a result of the legal sufficiency review, these changes were not 'substantive' and therefore no additional 'expedited legal sufficiency review,' as provided for in Administrative Instruction 1-6, § 14.08 was required."

First, the Subcommittee assumes Mr. Jin meant to claim that while changes were made to the draft Report as a result of *editorial policy or affected agency reviews*, these changes were not "substantive." Second, Black's Law Dictionary defines "substantive" in the following manner: "An essential part or constituent or relating to what is essential." Black's Law Dictionary 1429 (6<sup>th</sup> ed. 1990). The Subcommittee may, therefore, revisit this request following the Commission's production of documents pursuant to Request No. 10.

#### Affected Agency Review

13. Mr. Jin claimed that "on May 24, 2000 [sic] the Office of General Counsel sent [several agencies listed by Mr. Jin] relevant pages of the report." He purported to have enclosed copies of the letters and enclosures sent to each such agency. Each letter provided that the agency had until June 6, 2001 to submit any comments and that "[t]he Commission will decline all requests for additional time to submit comments and will only consider comments received on or before June 6, 2001 for its final publication." Mr. Jin also stated that the June 3, 2001 request of the Office of the Governor of Florida for a copy of the whole draft Report was denied, but the request of the Office of the Supervisor of Elections of Leon County for two additional pages was granted.

First, the Commission failed to produce to the Subcommittee a copy of the cover letter and enclosures sent to the Office of the Governor of Florida. Please produce those documents to the Subcommittee.

Second, although Administrative Instruction 1-6, section 15.02 provides that "[a]ffected agency review should usually be completed in 4 weeks," each agency had less than 2 weeks

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(consisting of only 8 business days because one day was Memorial Day) to submit comments – even less if one considers the time it took for the Commission's letter to reach each agency and the time it took for each agency's submission to reach the Commission. Mr. Jin stated that the 4-week time period described in section 15.02 refers not to the amount of time each agency should be given to submit comments, but rather to "the time the staff devotes to affected agency issues in addition to the time the agencies review and respond to relevant portions of the draft materials." This is a very strained reading of section 15.02, considering that section 15 is organized into four chronologically-ordered subsections.

Please answer the following questions:

- a. Describe all the tasks the Commission performed in devoting time to affected-agency issues and describe the approximate amount of time spent on each task.
- b. On what date did the Commission begin to devote time to affected-agency issues?
- c. On what date did the Commission finish devoting time to affected-agency issues?
- d. Did the project staff "prepare a memorandum detailing action on all [comments of affected agencies] for the information of the Staff Director," as required by Administrative Instruction 1-6, section 15.03?
  - i. If so, please produce that memorandum to the Subcommittee.
  - ii. If not, please explain why the project staff did not "prepare a memorandum detailing action on all [comments of affected agencies] for the information of the Staff Director," as required by Administrative Instruction 1-6, section 15.03.

Third, please explain why the Commission denied the June 3, 2001 request of the Office of the Governor of Florida for a copy of the entire draft Report but granted the request of the Office of the Supervisor of Elections of Leon County for two additional pages, considering that the content of all the pages of a report on alleged voting irregularities in Florida must be said to "pertain" to the Office of the Governor of Florida. In doing so, please note that Black's Law Dictionary defines "pertain" in the following manner: "To belong or relate to, whether by nature, appointment, or custom." Black's Law Dictionary 1145 (6<sup>th</sup> ed. 1990).

Public Disclosure Policies

14. Mr. Jin responded to this request by referring the Subcommittee to an excerpt from an April 2000 Commission meeting transcript and the minutes of that meeting, both of which he

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attached. During the April 2000 Commission meeting, the Commission discussed the leak of the draft report entitled "Police Practices and Civil Rights in New York City."

The request, however, was for "all documents related to the policies regarding public disclosure of reports or draft reports of the Commission in effect on June 4, 2001." The request asked that the Commission "include any documents related to policies regarding disclosure of draft reports prior to or at the meeting at which a draft report is to be considered by the Commission and the publication of draft reports on the Commission website."

Referring the Subcommittee to a partial transcript and minutes of an April 2000 Commission meeting does not adequately answer the Subcommittee's request. Please produce the documents requested by the Subcommittee.

15. Mr. Jin claimed that "there are no documents concerning the premature public disclosure of the draft report, including any documents relating to McKinney & McDowell Associates." If any such documents have been created or have otherwise come into the custody, control, or possession of the Commission since the time Mr. Jin made this response, please produce such documents to the Subcommittee. Moreover, the Subcommittee's request was intended to encompass a request for all documents relating or referring to McKinney & McDowell Associates. Please produce to the Subcommittee copies of any and all such documents.
16. Mr. Jin claimed to have "examined past episodes of leaks at the Commission" and to have "evaluat[ed] all the facts" before he "tentatively . . . concluded that further efforts to identify those responsible for leaking the report are not likely to be successful." First, please describe in detail how Mr. Jin "evaluat[ed] all the facts" before reaching his tentative conclusion.

Second, please state whether the Office of General Counsel has been the focus of Mr. Jin's evaluation, considering that at the Commission's July 2001 meeting the Chairperson stated, with no objection from the Office of General Counsel or anyone else at the meeting, that the newspapers to which the draft Report was leaked apparently had a preliminary -- as opposed to final -- draft of the Report because the newspapers reported a different page total than that which the final draft Report had.

Specifically, did Mr. Jin ask any person in the Office of General Counsel whether he or she was the source of the leak? If so, whom did he ask and what was the response? If not, why not? In addition, please inform the Subcommittee whether Mr. Jin or you have received any information about the source of the leak. If either of you have such information, what is the information and from whom did you receive it?

Although the Commission was asked by the Subcommittee to provide "a production log indicating the identity of the person or office from whose files each document was produced," Mr.

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Jin did not provide such a log. Please provide the log requested by the Subcommittee.

July 10, 2001

Before Mr. Jin addressed the Subcommittee's specific requests for information and documents, he stated the following with respect to the disagreement between Commissioner Abigail Thornstrom and Chairperson Mary Frances Barry at the June 27, 2001 Senate Rules and Administration Committee hearing on the issue of the production of data used by Professor Allan Lichtman in connection with the report entitled "Voting Irregularities in Florida During the 2000 Presidential Election" ("Report"):

The Office of the Staff Director made accessible to Commissioner Thornstrom all readily available information from Dr. Lichtman. The additional data requested by her is public information that Dr. Lichtman downloaded from the internet, but never to discs. Since the additional data requested by Commissioner Thornstrom is readily available to the public and, in the interest of the appropriate management of the taxpayer dollars which finance the activities of the Commission, the Office of the Staff Director determined that it was more economical to refer her to the web addresses cited in Dr. Lichtman's report than to pay Dr. Lichtman to download what may otherwise be free information. Moreover, other scholars have been able to access the data with little effort.

The Subcommittee appreciates Mr. Jin's interest in "the taxpayer dollars which finance the activities of the Commission," but Commissioner Thornstrom expressed a reasonable concern over having the *precise* numbers used by Professor Lichtman in his multiple regression analyses so that Commissioner Russell Redenbaugh and she could review Professor Lichtman's work as part of their dissenting statement. Referring Commissioner Thornstrom to "the web addresses cited in Dr. Lichtman's report" would require Commissioner Thornstrom to pick and choose among numbers that appear at those web addresses -- something Commissioner Thornstrom has reasonably resisted.

If, as Mr. Jin concedes, "other scholars have been able to access the data with little effort," then it should take Professor Lichtman a short time, and therefore little expense, to download from the Internet the precise numbers he used in his multiple regression analyses. That being so, the Commission's refusal to request that Professor Lichtman perform this task suggests that Professor Lichtman is unable to identify the precise numbers he used in his analyses. If that suggestion is untrue, as the Subcommittee hopes and expects it is, it would serve the Commission well for it to request that Professor Lichtman download from the Internet the precise numbers he used in not only his multiple regression analyses, but all of his analyses, and to promptly provide such downloaded data to Commissioner Thornstrom.

Please inform the Subcommittee whether the Commission has decided to reconsider its position with

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respect to Commissioner Thernstrom's request for Professor Lichtman's data and intends to provide such data to Commissioner Thernstrom.

- i. Mr. Jin stated that he "attached a copy of all *public* documents related to the employment of Dr. Allan Lichtman by the Commission for the Report" and that "[a]ll confidential information (such as Dr. Lichtman's date of birth and social security number) has been deleted." (Emphasis added.)

The request, however, was for "all documents related to the employment of Professor Allan Lichtman," and was, thus, not limited to "public documents." To the extent the Commission has custody, control, or possession of additional documents related to the employment of Professor Lichtman, the Commission should produce such documents to the Subcommittee. In addition, although the Subcommittee does not object to the Commission's redaction of certain, confidential information relating to Professor Lichtman, such as his date of birth and his social security number, because the Commission's document production does not clearly indicate the places in which information was redacted, the Subcommittee has no way of knowing what was withheld by the Commission on that ground.

Please reproduce to the Subcommittee those Bates-stamped pages on which information was redacted by the Commission and please stamp or write "REDACTED" where such information was redacted on the page. Furthermore, please answer the following questions:

- a. One document produced by the Commission (Bates-stamped 000006) contained a signed disclosure by Professor Lichtman that he was "designated an 'expert' in the matter of *Coyner v. Harris*, a class action lawsuit filed in Leon County, Florida, claiming 'Votomatic' voting machines are 'inherently flawed' and violate Florida law, in addition to the equal protection rights of Florida voters." (Footnote omitted.) The document, which was dated May 2, 2001, further provided that the defendants in the *Coyner* case are "Florida Secretary of State Katherine Harris and other state and county officials." Please explain in detail why the Commissioner chose to hire Professor Lichtman despite the Commission's knowledge that Professor Lichtman was working for litigants in Leon County, Florida to provide testimony adverse to "Florida Secretary of State Katherine Harris and other state and county officials."
- b. Professor Lichtman's curriculum vitae (Bates-stamped 000015-000035) does not make reference to his publicly-acknowledged consulting work for former Vice President Al Gore approximately six years ago. Did the Commission know, before the Commission retained his services, that Professor Lichtman had performed consulting work for former Vice President Al Gore?
  - i. If so, please explain in detail how the Commission knew and why the

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Commission chose to hire Professor Lichtman despite the Commission's knowledge that Professor Lichtman had performed consulting work for former Vice President Al Gore.

- ii. If not, please explain in detail whether knowing, before the Commission retained his services, that Professor Lichtman had performed consulting work for former Vice President Al Gore would have changed or in any way affected the Commission's decision to retain Professor Lichtman's services.
2. Mr. Jin claimed that "the process typically used by the Commission to enter into employment agreements with persons who assist the Commission in drafting reports is outlined in Administrative Instruction 2-15" and that "[t]he Commission followed the process in Administrative Instruction 2-15 with the employment of Dr. Lichtman." Mr. Jin produced to the Subcommittee a copy of Administrative Instruction 2-15. Please answer the following questions with respect to the Commission's compliance with Administrative Instruction 2-15:
    - a. Section 7 (Compensation), as opposed to section 7 (Procedures), provides that "[c]ompensation for the services of experts or consultants will be based upon their expertise and contribution to the needs of the Commission." That section further provides that "[p]ay will generally be computed at the first step of the grade in the General Schedule ranging from GS-11 to 15," "[e]xceptions will be made and the rate of pay set at a higher step of a given grade when it would best reflect equal pay for equal work," and "[t]he maximum rate for any expert or consultant will not exceed the maximum rate for GS-15 in the General Schedule." (Emphasis added.) In a memorandum from Edward A. Hailes, Jr., General Counsel, to Les R. Jin, Staff Director, dated May 17, 2001 and Bates-stamped 000007, Mr. Hailes stated that "[b]ased upon the expertise of Dr. Allan J. Lichtman, as well as his contribution to the needs of the Commission, I recommend that Dr. Lichtman be compensated at a GS-15 (Step 10) level in the General Schedule." (Footnote omitted and emphasis added.)
      - i. Why did Mr. Hailes recommend that Professor Lichtman be compensated at the tenth step of the GS-15 grade in the General Schedule "[b]ased upon the expertise of Dr. Allan J. Lichtman, as well as his contribution to the needs of the Commission," when section 7.02 provides that "exceptions [to section 7.01 which provides that "[p]ay will generally be computed at the first step of the grade in the General Schedule ranging from GS-11 to 15] will be made and the rate of pay set at a higher step of a given grade when it would best reflect equal pay for equal work?" (Emphasis added)?"
      - ii. What rate of pay did the Commission agree to provide Professor Lichtman?

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- b. Section 8.03 provides that "[w]hen there are any questions concerning the appropriateness or propriety of the appointment of an expert or consultant, prior approval of the Office of Personnel Management (OPM) will be requested." Did the Commission seek prior approval of OPM to retain Professor Lichtman?
- i. If so, please provide a detailed explanation for why prior approval of OPM was sought, please provide the date(s) the Commission sought prior approval of OPM, and please produce any and all documents related to the Commission's efforts in seeking prior approval of OPM.
  - ii. If not, please provide a detailed explanation for why prior approval of OPM was not sought. The Commission's explanation should address, among other things, the Commission's knowledge that Professor Lichtman was working for litigants in Leon County, Florida to provide testimony adverse to "Florida Secretary of State Katherine Harris and other state and county officials" and the Commission's knowledge, if any, that Professor Lichtman had performed consulting work for former Vice President Al Gore.
3. Mr. Jin stated that "the methodology used by Dr. Lichtman for the Report is fully explained in his separate report entitled 'Report on the Racial Impact on the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida,'" that "Dr. Lichtman used the methodology of ecological regression that is described and referenced in his report," and that "he also used multiple regression analysis, probably the most commonly used methodology in social science."

The request, however, was for "all documents and other materials relating or referring to the methodology used by Professor Lichtman in his analysis, including the software program used to run the regressions referred to in his analysis." The Subcommittee appreciates Mr. Jin's identification of the software program used by Professor Lichtman and understands the Commission's reason for not producing a copy of that program. But aside from producing to the Subcommittee a copy of Professor Lichtman's report, the Commission did not produce a single document "relating or referring to the methodology used by Professor Lichtman in his analysis."

To the extent the Commission has custody, control, or possession of additional documents "relating or referring to the methodology used by Professor Lichtman in his analysis," the Commission should produce such documents to the Subcommittee.

4. Mr. Jin stated that "[I]n order to comply with the Subcommittee's request, Dr. Lichtman would have to execute several tasks at Commission expense, recognizing that the data [the



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Subcommittee is] requesting does not currently exist in the format that [the Subcommittee has] requested."

Although the Subcommittee does not request that the Commission create a disk that does not already exist at the Commission or that is not possessed by Professor Lichtman, considering that, by Mr. Jin's own admission, the information requested by the Subcommittee is not only "publicly available and easily accessible" but has been accessed by others "with little effort," as stated above, it would serve the Commission well for it to request that Professor Lichtman download from the Internet the precise numbers he used in not only his multiple regression analyses, but all of his analyses, and to promptly provide such downloaded data to the Commission for its records and to the Subcommittee.

In addition, please produce to the Subcommittee the regression table for the multiple regression analysis "that controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category," as well as the regression tables for all other regression analyses mentioned by Professor Lichtman in his report.

5. The Subcommittee has no follow-up questions.
6. Like his response to Request No. 4, Mr. Jin stated that "[i]n order to comply with the Subcommittee's request, Dr. Lichtman would have to execute several tasks at Commission expense, recognizing that the data [the Subcommittee is] requesting does not currently exist in the format that [the Subcommittee has] requested."

Again, although the Subcommittee does not request that the Commission create a disk that does not already exist at the Commission or that is not possessed by Professor Lichtman, considering that, by Mr. Jin's own admission in response to this request, the information requested by the Subcommittee is "freely available" and has been accessed by others "with little effort," as stated above, it would serve the Commission well for it to request that Professor Lichtman download from the Internet the precise numbers he used in not only his multiple regression analyses, but all of his analyses, and to promptly provide such downloaded data to the Commission for its records and to the Subcommittee.

In addition, please produce to the Subcommittee the regression table for the "multivariate ecological regression equation that includes the percentage of Hispanics as well as blacks in the precincts of Dade County," as well as the regression tables for all other regression analyses mentioned by Professor Lichtman in his report.

Although the Commission was asked by the Subcommittee to provide "a production log indicating the identity of the person or office from whose files each document was produced," Mr. Jin merely stated that "[t]he Office of the General Counsel and the Office of the Staff Director

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generated all documents." Because Mr. Jin did not indicate the identity of the person or office from whose files *each document* was produced, the Subcommittee has no way of knowing which documents were produced from the Office of General Counsel and which were produced from the Office of the Staff Director. Please provide the log requested by the Subcommittee.

\* \* \*

*Please provide written responses and produce responsive documents to Keith Ausbrook of the Committee on the Judiciary at 2138 Rayburn House Office Building not later than July 30, 2001. Documents should be consecutively Bates-stamped and produced in duplicate. Please also provide the Subcommittee with the production logs originally requested by the Subcommittee indicating the identity of the person or office from whose files each previously-requested and each newly-requested document was produced and specifying the request to which the documents produced are responsive.*

Thank you for your cooperation.

Sincerely yours,



Steve Chabot  
Chairman  
Subcommittee on the Constitution

cc: The Honorable Jerrold Nadler, Ranking Member  
Vice Chairperson Cruz Reynoso  
Commissioner Christopher Edley, Jr.  
Commissioner Yvonne Y. Lee  
Commissioner Elsie M. Meeks  
Commissioner Russell G. Redenbaugh  
Commissioner Abigail Thornstrom  
Commissioner Victoria Wilson  
Les Jin, Staff Director



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

July 30, 2001

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
U.S. House of Representatives  
H2-362 Ford House Office Building  
Washington, D. C. 20515

Dear Chairman Chabot:

I am pleased to respond to your latest set of questions relating to the internal management of the U. S. Commission on Civil Rights. A detailed response to the specific questions is provided in the attached letter from our staff director, Les R. Jin, who is responsible for the day-to-day operations of the Commission.

I remain disconcerted that the Subcommittee's only apparent interest in the Commission's report on "Voting Irregularities in Florida During the 2000 Presidential Election" is the day-to-day details of the Commission's internal management. Given the Subcommittee's jurisdiction and long history in constructing the architecture of our nation's civil rights laws, I had hoped the Commission could come before the Subcommittee to discuss the substance of the report.

As I am sure you know, at the behest of President Dwight Eisenhower, the Congress created the Commission in 1957, in part, to investigate allegations of voting rights violations that were occurring in the Deep South. In the Florida investigation, the Commission exercised its authority, followed the law, abided by its procedures, and in that process uncovered some ugly truths about the adverse impact of Florida's election system on groups of eligible voters who are protected by the civil rights laws of our nation. I certainly hope the Subcommittee plays a role in helping to remedy the problems illuminated.

I understand the authority of the Subcommittee to provide oversight of this agency. However, oversight does not, I am sure you will agree, include compromising or interfering with the Commission's independence. Long before my appointment to the Commission in 1980, I observed its work and statutory history and know well its longstanding obligation of producing reports on civil rights violations without interference from the executive or legislative branches. The Commission cannot exercise its statutory mandate to act as a watchdog over the enforcement of our civil rights laws, if it is not free to choose its own experts, write reports without interference and publish conclusions without fear of reprisal.

The Commission is entirely satisfied with the work of its expert Dr. Allan Lichtman and has no need for him to perform additional tasks. Our work with the Florida report is finished. However, in deference to the Subcommittee, we will ask Dr. Lichtman to make himself available for any consultation the Subcommittee requires. Please let our Staff Director know if you require his services.

Sincerely,



Mary Frances Berry  
Chairperson

cc: The Honorable Jerrold Nadler, Ranking Member  
Vice Chairperson Cruz Reynoso  
Commissioner Christopher Edley, Jr.  
Commissioner Yvonne Y. Lee  
Commissioner Elsie M. Meeks  
Commissioner Russell G. Redenbaugh  
Commissioner Victoria Wilson  
Commissioner Abigail Thernstrom



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

July 30, 2001

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515-6215

Re: Third Set of Inquiries from House Judiciary Committee's Subcommittee on  
the Constitution

Dear Congressman Chabot:

This letter is in response to the Subcommittee's third request for information outlined in your July 20, 2001 letter regarding the U.S. Commission on Civil Rights ("Commission") report entitled "Voting Irregularities in Florida During the 2000 Presidential Election." ("Voting Rights Report") As with the responses to your previous letters dated June 22, 2001, and July 10, 2001, Dr. Mary Frances Berry, the Chairperson of the U.S. Commission on Civil Rights, has asked me to respond to this set of questions since it contains inquiries regarding the day-to-day operations of the Commission for which I am legally responsible. As you know, the Commission operates with part-time Commissioners who make policy and a full time Staff Director who manages the civil service staff.

Before I turn to your specific questions, it appears that the Subcommittee continues to misunderstand the purpose, intent and legal effect of the Commission's internal Administrative Instructions. As I explained in my initial response, these instructions are for internal management purposes only and, as such, the Staff Director may use these as guidance, but is free to modify or deviate from them if it fulfills the mission of the Commission. Administrative Instruction ("AI") 1-1 makes this clear. It provides that the AIs are only intended to "supplement, summarize, clarify and explain sometimes complex managerial or administrative policies as they relate to the day-to-day operations of the U. S. Commission on Civil Rights and its employees." In other words, these Administrative Instructions serve as guidelines for the internal operation of the Commission, but are by no means legal mandates. As you are well aware, before the Commission could adopt legally mandated procedures it would be required to go through the administrative rulemaking processes requiring public notice of the procedures and an opportunity for public comment. Accordingly, the Commission's AIs are not legal standards that can be "violated" as the Subcommittee mistakenly concludes throughout its third request for information. This continued mischaracterization of the legal effect of the Commission's AIs is not supported by any legal authority and only serves to unnecessarily confuse matters and lead the Subcommittee's inquiry down a non-productive path.

The Commission's responses to your specific inquiries are stated below.

**The June 22, 2001 Requests for Information**

**Employment of Dr. Rebecca Kraus**

*In response to inquiry a:* The Commission is pleased that the Subcommittee has acknowledged Dr. Rebecca Kraus' involvement in this important Report. Her expertise, diligence and cooperative efforts will be missed by agency staff who had the opportunity to work with her. Dr. Kraus was employed as a Social Science Analyst, in the Commission's Office of Civil Rights Evaluation. The scope of her duties corresponded to those detailed in the enclosed job description for this particular position (Bates #s 000001 to 000005).

*In response to inquiry b:* Dr. Kraus began her employment with the Commission on August 17, 1997. Her employment terminated with this agency on April 7, 2001.

*In response to inquiry c:* The response to this inquiry can be found by referring to a copy of Dr. Kraus' resume (Bates #s 000006 to 000008) that details her experience and qualifications. No disks or employment contracts exist, other than those Federal documents that are required pursuant to Office of Personnel Management ("OPM") employment guidelines for civil service employees. These documents were transferred to her new Federal employer when her employment ended with the Commission.

**Editorial Policy Board Review**

*In response to inquiry number 1:* The statement that the Editorial Policy Review Board performed the appropriate review encompasses the language in Administrative Instruction 1-6, §13. (Bates #s 000009 to 000025) The Editorial Policy Review Board members were instructed to read the draft Report and determine its adequacy and accuracy as provided in AI 1-6, §13. Please note, again, that AI 1-6, § 13, as stated within the Commission's Administrative Manual, "serves to supplement, summarize, clarify and explain" managerial or administrative policies and "may not stand alone." [AI 1-1, § 1.02. AI 1-1, § 1.03.]

**Defame and Degrade Review**

*In response to inquiry number 5:* The statement that the attorneys who conducted the defame and degrade review were instructed "to pay close attention to any defame or degrade concerns that may arise in the chapters assigned" is an affirmative response to the question of whether

a statement [was] appended to the [submitting office's] submission that '(a) states whether, in its view, the proposed report contains material which may defame, degrade, or incriminate any person; (b) identifies those parts of the draft report that may contain such material; and (c) present or makes available factual information necessary for determining

whether identified material may defame, degrade or incriminate any person,' as required by Administrative Instruction 7-1, section 4.02.

The Commission interprets AI 7-1, § 4.02, as unnecessary for intra-office communications for defame and degrade review. The purpose of the aforementioned language in AI 7-1, § 4.02 was to provide other offices with a mechanism to formally communicate to the Office of General Counsel about any potential issues with a draft report submitted for review. Since the Office of General Counsel worked on the draft and the subsequent defame and degrade review, the above described memorandum was unnecessary.

The attorneys assigned to perform the defame and degrade review used the May 16, 2001 version of the Report. Please find attached a copy of the May 16, 2001 version of the draft report. These are produced at Bates #s 000026 to 000185.

*In response to inquiry number 6:* The question posed regarding the determination by the General Counsel that the Report contained no defame and degrade concerns prior to the completion of the Editorial Policy Review Board's review of the Report is answered by reflecting on the purpose of both reviews. Editorial Policy Review is mutually exclusive from Defame and Degrade Review and, thus, is neither interconnected nor reliant upon each other in any way. As you will see in AI 1-6, § 13.03, the purpose of Editorial Policy Review is "to determine the adequacy and accuracy of the substantive information in the draft document (e.g., conceptual soundness, adherence to Commission policy, quality of research, argumentation, and documentation of major points)." The purpose of Defame and Degrade Review is to "ensure that Commission reports do not defame or degrade persons named in them." [AI 1-6, § 14.04] Therefore, the completion of the Editorial Policy Review was not a condition precedent to the General Counsel's determination that the Report contained no defame and degrade concerns.

As to the Subcommittee's request for internal documents besides the AIs, which have already been provided, the Commission relied upon a June 24, 1971 Commission memorandum, "Criteria for Determining When A Person May be Defamed, Degraded, or Incriminated by a Commission Publication" from John Powell, former General Counsel to former Staff Director, Howard A. Glickstein, and upon a September 22, 1980 Commission memorandum, "Outline on section 102(e) 'Defame and Degrade' Standards and Procedures" from Eileen M. Stein, former General Counsel, to OGC attorneys, Bates #s 000186 to 000517.

*In response to inquiry number 7:* The statement that "all relevant administration instructions as well as internal documents were relied upon in determining whether the draft report tended to defame, degrade or incriminate any person" is an affirmative and more encompassing response to the question of whether the "Commission look[ed] to Administrative Instruction, 7-1, § 3.01 for guidance in determining whether the draft Report tend[ed] to defame, degrade, or incriminate any person." The Commission deems AI 7-1, § 3.01 to be relevant to defame and degrade review and, in conformance with usual practice, is used as the standard of review.

Your request for an explanation of how the Commission determined the draft Report did not contain any statements "that (a) allege discrimination based on race, color, religion, sex, age, disability, or national origin, (b) allege commission of illegal acts, or (c) are likely to damage the

business or reputation of, or otherwise to injure, the person criticized" was not ignored. As stated in my July 9, 2001 letter, all relevant administrative instructions as well as internal documents were relied upon in determining whether the draft report tended to defame, degrade or incriminate any person. The internal documents offered guidance, examples, definitions and analyses regarding the precedent by which the Commission has determined whether any of its publications tended to defame, degrade or incriminate any person. The attorneys assigned to perform a defame and degrade review of parts of the report which (s)he did not author compared the draft Report provided against all relevant administrative instructions and the guidance, examples, definitions and analyses provided in internal documents in the process of determining whether the draft Report tended to defame, degrade or incriminate any person. The attorneys, then, informed the General Counsel of their individual determinations. The General Counsel determined that there were no defame and degrade concerns on May 28, 2001.

#### Legal Sufficiency Review

*In response to inquiry number 8:* In my July 9th 2001 response, I stated "[t]he draft report was submitted to the Office of General Counsel Staff by the General Counsel on May 21st ..." The Subcommittee's request makes it appear that the draft report was received from some entity outside of the Office of General Counsel. The Subcommittee's use of language, "Mr. Jin claimed that the draft Report was submitted to the office of General Counsel" (emphasis added), and "why the Office of General Counsel received the draft Report" (emphasis in the original) clearly infers that the report was developed outside of the General Counsel's office and then submitted to the Office of General Counsel for legal sufficiency review. My initial response made it clear, however, that the draft report was developed by the staff in the General Counsel's office. It is for this very reason that some of the staff that worked on the report also performed legal sufficiency reviews on the draft report but in no case did a member of the Office of General Counsel Staff perform a legal sufficiency review on any part of the Report on which they had worked.

This was not a "violation" of the Administrative Instructions since AIs are not legal mandates. As explained in my initial response, because of the small number of staff, the national interest in the Commission's investigation and the need to complete the report and investigation in a reasonable time frame, a management decision was made to have all General Counsel staff work on some aspect of the report. At the same time, because of the guideline provided in AI 1-6, § 14.04, the General Counsel insured that in doing the legal sufficiency review, no General Counsel staff member performed a legal sufficiency review on any part of the draft report on which s(he) had worked.

As to the timing of the legal sufficiency review, because of the desire to keep the process moving, the draft report underwent legal sufficiency review as soon as it was possible to complete the review. Because this review was done intra-office it was physically possible to start this review before copies were distributed for the editorial review process. As soon as copies were available for editorial review these copies were provided.

*In response to inquiry number 9:* In response to request number 9 of the Subcommittee's third request for information, I stand by the Commission's initial response. By way of further



response, to the extent that there are legal principles in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) that were relevant to the Commission's legal sufficiency review, those principals were considered.<sup>1</sup> As I am sure the Subcommittee is well aware, both the trial court and appellate court accepted the methodology used by Dr. Allan Lichtman, as one of the experts in *Nipper*. The court explained "[a]ll of the experts used ecological regression and extreme case analysis to study the voting behavior in the circuit and county judicial elections. The experts in this case used substantially the same techniques that were approved (and relied on) by the Supreme Court in *Gingles*." *Nipper*, 39 F.3d at 1505, n. 20. In the statistical analysis he performed for the Commission, Dr. Lichtman used those precise methodologies—ecological regression and extreme case analysis. Indeed in *Nipper* the District Court adopted Dr. Lichtman's statistical estimates as findings of fact, *Nipper*, 39 F.3d at 1506. The Appellate Court then found racial polarization in voting, *Nipper*, 39 F.3d at 1537-41, but ultimately determined that the plaintiffs were not entitled to relief "because none of the remedies the appellants propose could be implemented without undermining the administration of justice." *Nipper*, 39 F.3d at 1546-47.

**In response to inquiry number 10:** In response to request number 10 of the Subcommittee's third request for information, there was no "violation" of the Commission's Administrative Instruction 1-6, §14.06. See explanation above.

**In response to inquiry number 12:** In response to request number 12 of the Subcommittee's third request for information, because no changes were made to the draft report, which would be deemed "substantive" within the meaning of the guidance provided by Commission Administrative Instruction 1-6, § 14.08, there was no additional "expedited legal sufficiency review."

#### Affected Agency Review

**In response to inquiry number 13:** I apologize that a copy of the cover letter and enclosures sent to the Office of the Governor of Florida were not included. Those documents are attached and can be referenced at Bates #s 000518 to 000548.

The Commission addressed the interpretation of Administrative Instruction 1-6, § 15.02 in its prior letter dated July 9, 2001: "The time frames noted in this Administrative Instruction provide guidance to the staff on when the staff should finish its work in this area of the project. It is not intended for the public; nor does it create an entitlement of a thirty day review period for agencies." Again, this phrase, which clearly suggests that the staff should complete the affected agency review in 4 weeks, should not be read to imply that the affected agencies have 4 weeks to submit comments. The Commission has interpreted this rule to imply that the agency or

<sup>1</sup> *Nipper v. Smith* involved judicial elections. The *Nipper* court recognized "there are significant differences between the legislative and judicial areas", and that "[t]he unique nature of judicial election" has its own special set of issues. *Nipper*, 39 F.3d at 1534-35. The Court continued "[i]n sum, the factors to be considered in the totality of the circumstances [the test required under § 2 of the Voting Rights Act of 1965 and the Supreme Court's landmark decision in *Thornburg v. Gingles*, 478 U.S.30, 106 S.Ct. 2752 (1986)] must be modified to account for the unique features surrounding judicial elections." *Nipper*, 39 F.3d at 1536. Since the Commission's Voting Rights Report did not involve judicial elections, *Nipper*'s discussion of the elements of proof required in judicial elections is of marginal relevance.

agencies receiving documents have some undetermined amount of time, which is less than 4 weeks, to return comments to the staff, so that the same staff can complete its work within the suggested 4 week window.

*In response to inquiry a:* The Commission performed innumerable tasks while working on "affected agency issues" -- including, but not limited to, reviewing the report for specific references to affected agencies and/or individuals, preparing cover letters for each agency and individual "affected" by the report, mailing those letters out to affected agencies and individuals, collecting responses from affected agencies and individuals, and incorporating comments into the draft report.

*In response to inquiry b:* On or about May 16, 2001, members of the Commission staff informally began the affected agency review when directed by team leaders to list the pages of the report, which related to individuals or agencies in their areas of responsibility.

*In response to inquiries c and d:* Comments received from the affected agencies were considered and a memorandum, which included changes, was presented to the Staff Director and the Commissioners on June 8, 2001. Please see enclosed copy of the memorandum dated June 7, 2001, at Bates #s 000549 to 000555.

All of the contents of all the pages of the report on alleged voting irregularities in Florida do not "pertain" to the Office of the Governor of Florida. The Office of the Supervisor of Elections of Leon County made a reasonable request for an additional two pages, which directly related to the actions of the Leon County Supervisor of Elections, and we granted that request. The Commission sent the Office of the Governor of Florida those pages which specifically related to him and his actions.

#### Public Disclosure Policies

*In response to inquiry number 14:* All documents related to the policies regarding the Commission's public disclosure of reports, or draft reports, have been previously submitted to the Subcommittee.

*In response to inquiry number 15:* The answer I provided in our July 9, 2001 letter to the Subcommittee was fully responsive. Since that date, no documents have been created or have otherwise come into the custody, control or possession of the Commission. We have no additional documents pertaining to the premature public disclosure of draft reports, including documents relating or referring to McKinney & McDowell Associates.

*In response to inquiry number 16:* I spoke to the General Counsel to determine whether an investigation to identify the source of the leak might be productive and, if so, the best course to proceed. I specifically asked him whether he had encountered leaks before and, if so, how he tried to address them. The General Counsel noted that a number of months earlier, a memorandum he sent to his staff had appeared in the Washington Times. In determining how to proceed, he realized that about all he could do was ask each individual who had received a copy

of the memorandum whether he/she was the culprit. He had concluded that such an approach would be ineffective. The General Counsel and I concluded that any effort to identify the individual or individuals responsible for the leak would only be demoralizing, wasteful and ineffective. Additionally, as I noted in my earlier responses, I learned that earlier aggressive efforts to identify individuals responsible for leaking documents completely failed after a considerable expenditure of resources. In light of the above, I gave a full report of my efforts and conclusions to the Commissioners at our July meeting. The Commission endorsed my decision pertaining to the fruitlessness of efforts regarding the draft report. I have not received any information about the source of the leak.

**The July 10, 2001 Request for Information**

*In response to the Subcommittee's discussion of Professor Lichtman's data:* The Commission remains pleased to answer all inquiries regarding the employment of Dr. Lichtman as an expert consultant. Other scholars across the nation have been able to easily download this information and recreate and confirm the results of Dr. Lichtman's analysis. However, as stated in the Chairperson's letter, the Commission is willing to ask Dr. Lichtman to make himself available to the Subcommittee in order to respond to any questions it may have regarding the data he relied upon and the statistical methodologies he employed.

*In response to inquiry number 1:* Enclosed find all additional documents related to the employment of Dr. Lichtman, indicated by Bates #s 000556 to 000566. The Commission has also reproduced the Bates-stamped pages on which information had been redacted in the last submission - now the word "REDACTED" has been written where information was redacted.

*In response to inquiry number 1a:* The Commission hired Professor Lichtman because he is a nationally-recognized scholar and expert who is preeminent in his field. Dr. Lichtman is a Professor of History at American University in Washington, D.C. He received his Ph.D. from Harvard University in 1973 in History, with a specialty in Quantitative Analysis of Historical Information. Dr. Lichtman is the author of numerous books and articles on political history, quantitative methodology and the application of social science methods to voting rights issues. He has been a consultant or expert witness in more than sixty federal voting rights and redistricting cases. Dr. Lichtman has worked for both plaintiffs and defendants in those cases. He has worked on many cases for the U.S. Department of Justice going back to the early 1980's, spanning several different Presidential Administrations. Dr. Lichtman has worked for both Democratic and Republican interests, including the Republican Redistricting Task Force in Massachusetts in the post-1990 redistricting and, very recently, Mayor Guiliani's Charter Revision Commission within the City of New York. Dr. Lichtman applied to the analyses conducted for the Civil Rights Commission the same methodologies he used in numerous voting rights cases, and the same methodologies that have been accepted by the U.S. Supreme Court in its landmark 1986 voting rights decision, *Thornburg v. Gingles*.

As for his work in the matter of *Coyner v. Harris*, the Commission placed it into the context of the more than sixty federal voting rights and redistricting cases for which Dr. Lichtman was either a consultant or an expert witness. The Commission was satisfied that Dr. Lichtman's work

on Coyner would not conflict with the analyses he would be conducting for the Voting Rights Project. Dr. Lichtman signed a disclosure form stating that he, too, believed a conflict did not exist.

*In response to inquiry number 1b:* As part of the hiring process, Dr. Lichtman was interviewed by two Commission staff attorneys. Dr. Lichtman was asked during the interview process whether he had worked for any political party's 2000 Presidential campaign -- which would have caused him to be removed from further consideration. Dr. Lichtman said he had not. He did make it clear, however, that he had worked for both Democratic and Republican interests in the past, and he discussed what those interests were. While neither attorney specifically recalls all the interests Dr. Lichtman mentioned during the interview, both attorneys said the issue of Dr. Lichtman's working for Vice President Gore approximately six years ago may well have been discussed during the interview.

*In response to inquiries numbers 1 b (i) and (ii):* As was stated in response to inquiry number 1b, as part of the hiring process, Dr. Lichtman was interviewed by two Commission staff attorneys. During that interview process, Dr. Lichtman made it clear that he had worked for both Democratic and Republican interests in the past, and he discussed what those interests were. While neither attorney specifically recalls all the interests Dr. Lichtman mentioned during the interview, both attorneys said the issue of Dr. Lichtman's working for Vice President Gore approximately six years ago may well have been discussed during the interview. As to why Dr. Lichtman was hired despite his having worked for both Democratic and Republican interests in the past, please see the Commission's response to inquiry 1a.

The task given to Dr. Lichtman was to determine the racial impact, if any, of the ballot spoilage which occurred in Florida. He succeeded in performing the assigned tasks.

*In response to inquiries numbers 2, 2 a.i. / ii:* Dr. Allan J. Lichtman is a noted scholar with a specific expertise in the area of statistical analysis that was best suited for the Commission's investigation into voting irregularities in Florida during the 2000 presidential election. He has worked for members of both major political parties, though he did not perform services for any presidential hopeful during the 2000 election cycle. He has substantial experience, superior qualifications, and impeccable credentials. After considering the advisory services the Commission required, the time it would take for an expert in the field to perform these services, as well as Dr. Lichtman's customary hourly fee, Mr. Hailes determined, in consultation with the Commission's Human Resources Department, that Dr. Lichtman's hourly fee (applied over the projected number of hours it would take to perform these services) would far exceed the maximum allowable pay computed at the tenth step of the GS-15 level in the General Schedule. The AI suggests, in part, that the maximum amount of compensation for a consultant or expert is GS-15, step 10. In order to secure Dr. Lichtman's services for this investigation, Mr. Hailes recommended that Dr. Lichtman be compensated at the tenth step of the GS-15 grade, since that amount would more closely parallel "equal pay for equal work" than the general computation at the first step of the grade in the General Schedule at the GS-11 level.

In determining the appropriate rate of pay for Dr. Lichtman, Mr. Hailes applied the criteria listed in the relevant provisions of Administrative Instruction 2-15, both with regard to compensation

and procedures. His recommendation is consistent with Commission practice in the appointment of experts. I agreed that the exception was justified.

*In response to inquiry number 1/ii:* There were no questions concerning the appropriateness or propriety of Dr. Lichtman's appointment as an expert or consultant for this project, pursuant to Administrative Instruction 2-15, section 8.03. Accordingly, the Commission did not seek OPM's prior approval before retaining Professor Lichtman. As stated in previous Commission responses to the Subcommittee's inquiries, Dr. Lichtman was engaged as an expert for this Report due to his recognized expertise as a professor, scholar, researcher, and consultant in the area of voting rights. Dr. Lichtman's experience includes projects for the Republican Party in Massachusetts, as well as the Democratic Party in Michigan. He has also been involved with voting rights cases on behalf of plaintiffs and defendants, and analyzing a variety of voting issues occurring in Florida, Mississippi, Illinois, Alabama, North Carolina, Maryland, Connecticut, New York, South Carolina, Texas, and other states. Dr. Lichtman's professional background did not create cause for alarm in the Commission, nor should it generate unnecessary concern among the Subcommittee's members. Indeed, his experience serves to complement his overall level of skill.

*In response to inquiry numbers 3, 4, and 6:* Pursuant to items 3, 4 and 6 of the July 10, 2001 letter, the Subcommittee requests the background data upon which Dr. Lichtman based his statistical analysis and his methodology for doing his analysis. As the Commission explained in the July 16, 2001 response, this information is contained in his report, a complete copy of which has been given to the Subcommittee, or is referenced in his report so it is easily accessible by anyone reading the report. The Commission has no other disks of background data upon which Dr. Lichtman's based his report in its possession. As explained in the Chairperson's letter, the Commission is willing to ask Dr. Lichtman to make himself available to the Sub-Committee for any consultation the Committee might require.

We trust this provides the Subcommittee with the information it needs to perform its oversight functions. All documents were produced by the Office of the General Counsel, unless the attached production log indicates otherwise.

Sincerely,



Les Jin  
Staff Director

Attachments

cc: The Honorable Jerrold Nadler, Ranking Member  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner

**Yvonne Y. Lee, Commissioner**  
**Elsie M. Meeks, Commissioner**  
**Russell G. Redenbaugh, Commissioner**  
**Abigail Thernstrom, Commissioner**  
**Victoria Wilson, Commissioner**

**USCCR DOCUMENT PRODUCTION LIST:**  
**NON OGC DOCUMENTS<sup>1</sup>**

***July 30, 2001 USCCR Response to Subcommittee***

<u>BATES #S</u>	<u>NAME OF DOCUMENT</u>	<u>SOURCE</u>
000001-000005	Social Science Analyst position description	HRD
000006-000008	Resume of Dr. Rebecca Kraus	Dr. Kraus
	Documents related to the employment of Dr. Allan J. Lichtman	Dr. Lichtman, HRD

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<sup>1</sup> USCCR offices: "HRD": Human Resources Division; "OGC": Office of the General Counsel. All other documents (unless otherwise specified) originated in OGC.

**USCCR DOCUMENT PRODUCTION LIST:**  
**NON OGC DOCUMENTS<sup>1</sup>**

*June 27, 2001 USCCR Documents Submitted to the U.S. Senate Committee on Rules and Administration during testimony from Chairperson Mary Frances Berry. The Office of the Staff Director submitted all documents to the Senate Committee.*

***July 9, 2001 USCCR Response to Subcommittee***

<b><u>BATES #s</u></b>	<b><u>NAME OF DOCUMENT</u></b>	<b><u>SOURCE</u></b>
000001 - 000003	Supplemental Statement on USCCR procedures pertaining to the Florida Voting Rights Report - Dr. Mary Frances Berry, Chairperson	OSD
000009 - 000010	3/8/01 letter to Governor Bush from Chairperson Berry, discussing Florida's plans for election reform	OSD
000011-000033	4/13/01 USCCR meeting transcript	ASD
000034-000035	6/11/01 Letter to the Editor of the New York Times, from Les Jin, Staff Director	OSD
000037	6/11/01 letter to Les Jin, from Commissioner Abigail Thernstrom	Commissioner Thernstrom
000038	6/11/01 memorandum to Les Jin, from Charlie Ponticelli, Special Assistant to Commissioner Russell Redenbaugh	Commissioner Redenbaugh
000039	6/12/01 memorandum to Commissioner Thernstrom, from Les Jin	OSD
000040	6/12/01 memorandum to Charlie Ponticelli from Les Jin	OSD
000041	6/12/01 memorandum to Edward Hailes, Jr., General Counsel, from Commissioner Redenbaugh	Commissioner Redenbaugh
000043	6/18/01 memorandum to Edward Hailes, Jr., from Commissioner Thernstrom	Commissioner Thernstrom
000048-000049	6/20/01 memorandum to Les Jin from Commissioner Thernstrom	Commissioner Thernstrom
000051	6/20/01 memorandum to Commissioner Redenbaugh, from Les Jin	OSD
000052-000054	5/12/00 minutes of monthly USCCR meeting	ASD
000055-000067	6/8/01 minutes of monthly USCCR meeting	ASD

<sup>1</sup> USCCR offices: "OSD": Office of the Staff Director; "ASD": Administrative Services Division; "OGC": Office of the General Counsel. All other documents (unless otherwise specified) originated in OGC.





The Honorable Mary Frances Berry  
 August 21, 2001  
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the premature disclosure of draft reports, including documents relating or referring to McKinney & McDowell Associates."

The Commission's response and its failure to produce the documents requested appears to be a deliberate attempt to conceal from the Subcommittee evidence that the Commission has spent appropriated funds on McKinney & McDowell Associates in excess of those permitted under its appropriation authority. A recent article by the Scripps Howard News Service reports that documents that were responsive to the Subcommittee's request exist, and that those documents reflect payments to McKinney & McDowell Associates that "are more than double the amount that the panel is allowed to pay to outside consultants, according to the requirements of its 2001 spending allocation from Congress."

As you know, Congress has historically limited the funds available to the Commission to compensate consultants, and it did so for fiscal year 2001, providing, with respect to its \$8.9 million appropriation, "that not to exceed \$50,000 may be used to employ consultants." Federal Funding, Fiscal Year 2001, Pub. L. 106-553, 114 Stat. 2762, 2762A-98 (2000). As you also know, the unauthorized expenditure of appropriated funds is subject to criminal penalties. See 31 U.S.C. § 1341(a)(1)(A) (prohibiting expenditures in excess of the amount available in an appropriation); 31 U.S.C. § 1350 (imposing a fine of not more than \$5,000, imprisonment for not more than 2 years, or both for violations of 31 U.S.C. § 1341(a)).

To limit the scope of the request, however, the Subcommittee requires only those documents responsive to the request that were created on or after October 1, 1998. The Subcommittee also requests the production at the same time of any and all documents related to the retention, employment, or payment of any consultants or contractors during the same time period, including any documents discussing the legality or propriety of payments to consultants or contractors.

Finally, although the Subcommittee had previously asked for a limited production of documents related to Professor Allan Lichtman, the Subcommittee now asks that you produce all documents related to or referring to Professor Lichtman, including any documents containing any reference to the retention of Dr. Lichtman as an intermittent employee as a GS-15. According to documents already produced to the Subcommittee, Dr. Lichtman's usual rate of pay as a consultant is \$2400 per day -- more than six times the rate of pay of a GS-15.

In addition, the Commission's conclusions regarding its "defame and degrade" review are plainly inconsistent with its request that the Attorney General conduct an investigation. According to documents already produced to the Subcommittee, the Commission's definition of

The Honorable Mary Frances Berry

August 21, 2001

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"defame and degrade" material triggering special concerns includes "evidence or statements indicating that a person has committed an illegal act" and "allegations of racial, ethnic, or sex discrimination, even if the discrimination is not illegal." With respect to public officials, such allegations are defamatory "if they injure the official's reputation in the community . . . ." Finally, a person is identifiable in a Commission report when "in light of all the circumstances, it is probable that the community could identify the defamée as the object of criticism."

Despite the Florida Report's criticism of the Governor and the Secretary of State of Florida, the Commission found no "defame and degrade" issues under its definitions. Therefore, in light of the Commission's conclusions that there was no evidence of illegal acts with respect to an identifiable person or allegations of discrimination -- legal or illegal -- please provide a complete explanation of the basis for your request that the Attorney General conduct an investigation of evidence that you have already concluded was not evidence of illegal conduct or, for that matter, discrimination.

The Subcommittee also remains concerned that the Commission arbitrarily disregards its own Administrative Instructions ("AIs"). Presumably, the AIs were developed to provide the Commission with an orderly and cost-effective means of conducting its business, and to give at least other Commissioners a basic understanding of the process by which the Commission conducts its work. The Staff Director's July 30, 2001 letter, however, claimed that it is permissible for the Commission to "modify or deviate from [the Administrative Instructions] if it fulfills the mission of the Commission." Please explain how the "deviat[ions] and modificat[ions]" from the AIs, as set forth in the Subcommittee's July 20, 2001 letter, "fulfilled the mission of the Commission." Also, please produce all documents relating or referring to the decision of any person to "modify or deviate" from the AIs in connection with the Florida Report.

Finally, the Subcommittee is concerned that the publication of the dissent in an appendix is not consistent with past Commission practice regarding the publication of dissenting views. Therefore, please produce all documents relating or referring to the publication of the dissenting views with respect to the Florida Report. Please also provide all documents related to the publication of dissenting views since October 1, 1998.

With the exception of the documents related to McKinney & McDowell Associates, please produce all documents and information responsive to this request not later than Tuesday, September 4, 2001, to the Subcommittee on the Constitution office, H2-362 Ford House Office Building, U.S. House of Representatives, Washington, D.C. 20515.

The Honorable Mary Frances Berry

August 21, 2001

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If you have any questions regarding this request, please contact Subcommittee Chief Counsel Brad Clanton at 202-226-7680.

Sincerely,



Steve Chabot  
Chairman  
Subcommittee on the Constitution

cc: The Honorable Jerrold Nadler  
Ranking Member



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

August 28, 2001

The Honorable Steve Chabot  
Chairman Subcommittee on the Constitution  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515-6215

Re: Fourth Set of Inquiries from House Judiciary Committee's Subcommittee on the Constitution

Dear Chairman Chabot:

I have asked Staff Director Les R. Jin to respond to your latest requests concerning the management and operations of the Commission. We welcome your questions, but I must say that I remain puzzled and disappointed by the Subcommittee's apparent lack of interest in the actual substance of the Commission's report, "Voting Irregularities in Florida During the 2000 Presidential Election." I am also troubled by the fact that members of the press received your latest correspondence and obtained comments from your staff, and then contacted my office for a response before I received your August 21st letter.

I have the deepest respect for the oversight responsibilities of Congress. However, I am concerned that the Subcommittee continues to criticize the agency for not producing documents we have already produced, or for supposedly not providing information that is in the documents already delivered. This criticism, combined with erroneous complaints about the Commission's internal procedures, and apparent disinterest in the report's discussion of the serious problems that faced disabled and minority voters in Florida, is worrisome. We become concerned when unwarranted criticism of the agency seems to result from the selection of projects or the conclusions reached. We know you agree with us that any interference with the statutory independence of the Commission as a watchdog over civil rights in the federal government must be avoided.

We do not know how the Florida report was prematurely disclosed to the press and are deeply chagrined that it occurred. Furthermore, every Commissioner had full opportunity to access everything the Commission has in its possession or had available on the details of the study carried out by Dr. Lichtman for his contribution to the Florida report. The staff reviewed defame and degrade concerns in compliance with our usual procedures and statute and regulations.

Affected agencies were provided an opportunity to review and respond to portions of the report in compliance with our usual procedures. Some, including Secretary of State Katherine Harris, chose not to respond.

The agency has not suppressed any statement by any Commissioner including the dissent to the Florida report, which the Commission decided could not be published in the usual place for dissents because to do so would violate our statute. We arrived at a solution to publish the material submitted in a Senate hearing that included the dissent in the appendix. This way, it could be published in the public interest, without violating the law. As you know, our reports are prepared by civil service staff. But each Commissioner has full opportunity to discuss the work in progress with staff and to make suggestions about sources and experts. The prohibition against using uncompensated services I am told applies across the government in the name of accountability. We have submitted documents previously and are submitting additional ones today, in response to your latest request, supporting these conclusions.

The Commission, like other government agencies has contracts with private firms and could not function without them, in the absence of huge increases in staffing. Also, government agencies as you know are encouraged to maximize private sector contracting. The law draws a clear distinction between consultants and contractors as has our appropriations bills. As the government's principal watchdog over civil rights policies, we are pleased that we have been able to have a public relations services contract with McKinney and McDowell, a firm that is woman-owned, minority-owned and certified under criteria set forth by the General Services Administration (GSA). We executed the contract with McKinney and McDowell in order to utilize a cost-effective way of achieving one of our most important functions.

As a study Commission, without sufficient outreach and public dissemination of our work we would be totally ineffective. We cannot inform the public if we do not possess the tools to do so. McKinney and McDowell's expertise has permitted us to perform our public service function more effectively.

If you have any additional inquiries, we will be pleased to respond to them.

Sincerely,



Mary Frances Berry  
Chairperson

cc: The Honorable Jerrold Nadler, Ranking Member  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Commissioner  
Yvonne Y. Lee, Commissioner

**Elsie M. Meeks, Commissioner**  
**Russell G. Redenbaugh, Commissioner**  
**Abigail Thernstrom, Commissioner**  
**Victoria Wilson, Commissioner**



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20428

OFFICE OF STAFF DIRECTOR

August 28, 2001

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515-6215

Re: Fourth Set of Inquiries from House Judiciary Committee's Subcommittee on the Constitution

Dear Congressman Chabot:

Chairperson Mary Frances Berry has asked me to respond to the second part of the inquiries contained in your letter of August 21, 2001.

The Commission remains pleased to answer all inquiries regarding the employment of Dr. Lichtman as an intermittent employee. It bears repeating that the Commission hired Professor Lichtman because he is a nationally-recognized scholar and expert who is preeminent in his field. He has been a consultant or expert witness in more than sixty federal voting rights and redistricting cases. Dr. Lichtman has worked for both plaintiffs and defendants in those cases. Dr. Lichtman has worked for both Democratic and Republican interests, including the Republican Redistricting Task Force in Massachusetts in the post-1990 redistricting and, very recently, Mayor Guiliani's Charter Revision Commission within the City of New York.

The Commission requested, received, and reviewed, the required documentation regarding the selection, retention and compensation of Dr. Lichtman. The Commission followed its procedures and requirements relating to the compensated services of Dr. Lichtman to ensure compliance with the Commission's statutory provision on employment of experts and consultants.

Your letter indicates that you "previously asked for a limited production of documents related to Professor Allan Lichtman" and the Subcommittee now asks that [the Commission] produce all documents related to or referring to Professor Lichtman, including any documents containing any reference to the retention of Dr. Lichtman as an intermittent employed as a GS-15." I am pleased



to report to the Subcommittee that the Commission previously provided more documents than perhaps your previous request contemplated. Indeed, the Commission previously submitted to the Subcommittee the totality of documents in its possession relating to or referring to the retention of Dr. Allan Lichtman. The documents were generated in the routine course of selecting and retaining Dr. Lichtman as an intermittent employee in an expert consultant position. We are submitting all of these documents again with the hope that the Subcommittee will not further suggest that the Commission is disregarding the Congress' constitutional responsibility to conduct oversight. Since your last request, Dr. Lichtman has prepared a supplemental analysis of the dissenter's submission to the U.S. Senate Committee on Rules and Administration that, although not requested, is also included.

The documents previously submitted to the Subcommittee and now submitted again demonstrate that it was appropriate to retain Dr. Lichtman at the maximum allowable level of pay. The documents support the rationale of the Commission to compensate Dr. Lichtman at the tenth step of the GS-15 level in the General Schedule, as opposed to the first step of the grade in the General Schedule at the GS-1 level. The Subcommittee's suggestion that "Dr. Lichtman's usual rate of pay as a consultant is \$2400 per day – more than six times the rate of pay of a GS-15" actually bolsters the Commission's appropriate determination that he should be compensated at the maximum and not the lowest allowable level of pay. It is not unusual, of course, for the Government to compensate a skilled individual at the maximum rate though it is less than the usual rate of pay for that individual.

You further ask for "a complete explanation of the basis for [the Commission's] request that the Attorney General conduct an investigation of evidence that [the Commission has] already concluded was not evidence of illegal conduct or, for that matter, discrimination."

Despite the considerable expenditure of Commission resources in responding to previous requests for documents, it appears that the documents that have been forwarded to the Subcommittee have not been helpful to your oversight responsibilities. This question about "evidence of illegal conduct or, for that matter, discrimination," shows a fundamental lack of understanding of the role of the Commission, and the differences in its defame and degrade requirements and its ultimate duty to make findings and recommendations. The Commission is a factfinding agency. The Commission does not adjudicate violations of the law, hold trials, or determine civil or criminal liability. The Attorney General has the responsibility to enforce the Voting Rights Act of 1965, as amended, which prohibits intentional and unintentional discrimination. For example, the Commission has been clear in pointing out that undeniably large percentages of African American voters were more likely than white voters to have their ballots rejected in the Florida 2000 presidential election. In stating this finding, the Commission's report does not identify a single public official for "illegal conduct or, for that matter, discrimination." Instead, the Commission, understanding the purpose and reach of the Voting Rights Act, as amended, recommends that the agency authorized to enforce the Act should examine the evidence uncovered by the Commission to determine whether violations of the law occurred.

As stated in my July 9, 2001 letter, and repeated in my July 30, 2001 letter, all relevant defame and degrade procedures and requirements were followed, and all relevant Administrative Instructions as well as internal documents were relied upon in determining whether the draft report tended to defame, degrade or incriminate any person. The internal documents offered guidance, examples, definitions, and analyses regarding the precedent by which the Commission has determined whether any of its publications tended to defame, degrade or incriminate any person.

The Commission is allowed to use, without triggering statutory defame and degrade requirements, evidence more critical of government officials than would be permissible where private persons are involved. Generally, criticism of public entities need not be handled under these procedures because of prevailing standards of fair comment and public criticism of government. The General Counsel determined, after considering the careful and comprehensive review of the proposed report by attorney advisors, that none of the statements or evidence in the report concerning an identifiable public official went beyond a level of fair criticism that would trigger the Commission's defame and degrade requirements.

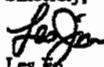
Consistent with your previous mischaracterization of the purpose of the Commission's Administrative Instructions, you now suggest that the Commission "arbitrarily disregards its AIs." I have been as forthcoming as possible about the authority of the Staff Director to modify or deviate from them if it fulfills the mission of the Commission. I did not state that the Commission acts arbitrarily in this manner. There has been no instance where I have arbitrarily exercised my authority under the Commission's AIs. I suggested in my previous response that the Subcommittee's mischaracterization of the legal effect of the Commission's AIs is not supported by any legal authority and only serves to unnecessarily confuse matters and lead the Subcommittee's inquiry down a non-productive path. Your renewed attempt to chastise the Commission based upon a fundamentally flawed understanding of the purpose of the AIs confirms my earlier predictions on this subject. There are no documents for the Commission to produce relating or referring to the decision of any person to "modify or deviate" from the AIs in connection with the Florida Report.

I am pleased to provide you with all of the relevant documents regarding your final concerns about the publication of a dissenting statement in an appendix to the Florida report. I presume your final concern is in regard to the well-established statutory prohibition on the use of voluntary services and the relationship of that prohibition to the appropriate concerns of the Commission regarding its publication responsibilities. No matter what others have done or may do, I will not permit the Commission to violate this statutory provision or any other on my watch.

You may recall that in my July 9, 2001 response to you, I pointed out that I could not account for the process by which Commissioners Russell G. Redenbaugh and Abigail Thernstrom engaged the publicly-acknowledged, uncompensated assistance of non-employees of the Commission, including Professor Stephan Thernstrom, Professor John Lott, and others to perform activities related to the production of the dissenting statement to the Report. I can tell you that they did not ask to meet with staff to give advice on the Report or suggest experts while the work was in progress although all Commissioners were reminded that they should do so if they had any

concerns. I can also tell you that they did not inform me that they wished to engage expert advice and seek my guidance on how that may be accomplished legally.

Sincerely,



Les Felt  
Staff Director

U.S. Commission on Civil Rights

Attachments

cc: The Honorable Jerrold Nadler, *Ranking Member*  
Mary Frances Berry, *Chairperson*  
Cruz Reynoso, *Vice Chairperson*  
Christopher Edley, Jr., *Commissioner*  
Yvonne Y. Lee, *Commissioner*  
Elsie M. Meeks, *Commissioner*  
Russell G. Redenbaugh, *Commissioner*  
Abigail Thernstrom, *Commissioner*  
Victoria Wilson, *Commissioner*



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

August 28, 2001

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
U.S. House of Representatives  
H2-362 Ford House Office Building  
Washington, D.C. 20515

Dear Chairman Chabot:

Chairperson Berry has asked me to respond to your questions regarding the operations and management of the U.S. Commission on Civil Rights ("Commission") in connection with our Florida Report.

First, let me clarify that, despite your assertion, the Commission has never deliberately attempted to conceal evidence pertaining to any matter, including the services of McKinney and McDowell Associates. In your previous letter, the Subcommittee sought documents on the premature disclosure of draft reports as it might relate to McKinney and McDowell. As stated earlier, we have no documents on premature disclosure. We are now forwarding all documents in the Commission's possession that relate to McKinney and McDowell as requested in your August 21st letter.

The Commission has not exceeded the \$50,000 limitation on employing consultants nor have we exceeded our appropriation authority. Our appropriation language provides "That not to exceed \$50,000 may be used to employ consultants."<sup>1</sup> The word "employ" used in our appropriation language is commonly understood to refer only to employees and the employee-employer relationship. Employee, as defined in 5 U.S.C. 2105, means an officer or individual who is appointed under a delegated authority, is engaged in the performance of a Federal function, and is subject to the supervision of an officer or employee of the Federal Government. As you know, employees are subject to different laws and regulations than those of a contractor. McKinney and McDowell Associates has never been employed by this agency. The Commission has entered into purchase order arrangements with the firm McKinney and McDowell Associates, which we are providing as well as other purchase orders from October 1998 to the present. This submission does not include interagency agreements made for the procurement of goods and services such as Lexis-Nexis and travel. With the exception of Professor Lichtman, the Commission has no other intermittent appointees.

Consistent with other government agencies, the Commission executes numerous purchase orders for supplies and services each fiscal year. In fact, similar to other government agencies we would not be able to function without their use. In the spirit of OMB Circular A-76 which states, "the Federal Government shall rely on commercially available sources to provide commercial products and services"<sup>2</sup> and the FAIR Act of 1998, as passed by Congress emphasizing the use of commercial sources whenever feasible,<sup>3</sup> the Commission believes

<sup>1</sup> Public Law 106-553, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 2001, United States Public Laws 106<sup>th</sup> Cong., 2nd Sess. (Dec. 21, 2000).

<sup>2</sup> Attachment 2, Circular Number A-76, Executive Office of the President, Office of Management and Budget, Performance of Commercial Activities (Revised 1999).

<sup>3</sup> Public Law 105-270, Federal Activities Inventory Reform Act of 1998, United States Public Laws 105<sup>th</sup> Cong., 2d. Sess. (Oct. 19, 1998).

it was acting in the best interest of the government when it sought to contract for public relations services from the private sector. Finally, 48 C.F.R. 37.101(b) states, "agencies shall generally rely on the private sector for commercial services." We have been advised that McKinney and McDowell is a small, minority- and women-owned and disadvantaged firm. Furthermore, we understand that McKinney and McDowell is a qualified 8(a) firm in the Small Business Administration program as well as a contractor approved for use by the General Services Administration to provide press relations to all government agencies when needed. For your information, we are also forwarding the checks representing the disbursements made to McKinney and McDowell.

The Commission's purchase orders with McKinney and McDowell are for nonpersonal services. Nonpersonal services, as defined by the Federal Acquisition Regulations, ("FAR") "means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees."<sup>4</sup> The FAR also states that the use of nonpersonal service contracts are proper.<sup>5</sup> In compliance with the FAR, the Commission acquired the advisory and assistance services of McKinney and McDowell by contract. Subpart 37.2, section 37.203(a) of the FAR states:

The acquisition of advisory and assistance services is a legitimate way to improve Government services and operations. Accordingly, advisory and assistance services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.<sup>6</sup>

The issues surrounding the Commission's use of commercial suppliers and services are not new. In fact, in Fiscal Years 1987 - 1990 the Commission's appropriation specifically stated that "not to exceed \$20,000 may be used to employ consultants: Provided further, That not to exceed \$185,000 may be used to employ temporary or special needs appointees: ... Provided further, That not to exceed \$40,000 shall be available for new, continuing or modifications of contracts for performance of mission-related external services ..."<sup>7</sup>

These earmarks were inserted by the Congress in response to a 1986 report by the General Accounting Office (GAO), which criticized the Commission's hiring practices. The GAO presented its findings during a hearing before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights on March 25, 1986. In a statement submitted to the Subcommittee, the General Government Division Director for GAO reported that, "During fiscal years 1984 and 1985, the Commission obligated a total of \$930,291 on 622 mission-related contracts...From the beginning of fiscal year 1983 through December 31, 1985, the period covered by our review, the Commission made 212 noncareer appointments vs. 60 career appointments. The total of 212 was composed of 151 temporaries, 41 consultants, and 20 Schedule Cs."<sup>8</sup>

<sup>4</sup> 48 CFR 37.101, Title 48-Federal Acquisition Regulations System, Chapter 1, Subchapter F, Part 37, Subpart 37.1, 37.101, Code of Federal Regulations.

<sup>5</sup> 48 CFR 37.203, Title 48-Federal Acquisition Regulations System, Chapter 1, Subchapter F, Part 37, Subpart 37.2, 37.203, Code of Federal Regulations.

<sup>6</sup> *Ibid.*

<sup>7</sup> Public Law 99-591, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1987, United States Public Laws 99<sup>th</sup> Cong., 2d Sess. (Oct. 30, 1986);

Public Law 100-102, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1988, United States Public Laws 100<sup>th</sup> Cong., 1st Sess. (Dec. 22, 1987); Public Law 100-459, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1989, United States Public Laws 100<sup>th</sup> Cong., 2d Sess. (Oct. 1, 1988); Public Law 101-162, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1990, United States Public Laws 101<sup>st</sup> Cong., 1st Sess. (Nov. 21, 1989).

<sup>8</sup> U.S. Commission on Civil Rights/GAO Audit: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 12 (1986).

In light of these severe management problems in the 1980s, Congress recognized the federal government-wide distinctions and functions of consultants and contractors, and subsequently imposed limitations on the Commission's use of these services. The limitation on service contracts was removed in the Commission's FY 1991 appropriation and has not appeared in subsequent years.<sup>9</sup> As you know, the Commission's current appropriation does not mention the use of contractors.<sup>10</sup> Thus, your letter's reference to the Commission's unauthorized expenditure of appropriated funds is inapplicable.

As a study commission whose statutory duties include serving as a "liaison with private groups, public groups, and the media to provide civil rights information to Government officials, organizations, and the public," the Commission's use of McKinney and McDowell represents a prudent management decision to effectively increase and promote the dissemination of information relating to our activities and publications. The purpose of obtaining the services of any media relations firm are in no way related to a simple desire to improve the image of the agency. Rather, the decision reflects our effort to comply with our duty to inform the public of critical civil rights issues in America.

Sincerely,



Les Jin  
Staff Director

Attachments

cc: The Honorable Jerrold Nadler, Ranking Member  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Abigail Thernstrom, Commissioner  
Victoria Wilson, Commissioner

<sup>9</sup> Public Law 101-515, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1991, United States Public Laws 101th Cong., 2<sup>nd</sup> Sess. (Nov. 3, 1990).

<sup>10</sup> Public Law 106-553, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 2001, United States Public Laws 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (Dec. 21, 2000).

A. JAMES BISHOP, JR., Missouri  
CIVIL RIGHTS

MICHAEL J. HYDE, Illinois  
ROBERT W. BYRD, West Virginia  
ROBERTO C. CLAY, South Carolina  
LARRY E. BROWN, Texas  
BLUETT C. CURTIS, California  
BOB BYRD, Virginia  
STEVE DENTON, Ohio  
JOE BART, Georgia  
WILLIAM L. CLAY, Tennessee  
J. ANTHONY WARREN, Arizona  
CHRIS CANNON, Utah  
LARRY T. BROWN, South Carolina  
MICHAEL BUCKNER, Alabama  
JOE SCARBOROUGH, Florida  
JOHN M. MCCARTHY, Indiana  
MARK GREEN, Minnesota  
MICHAEL PERDUE, Florida  
DANIEL E. CLAY, California  
MELISSA A. JOHNS, Pennsylvania  
JEN FLAKE, Arizona

ONE HUNDRED SEVENTH CONGRESS

## Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2130 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

February 14, 2002

JOHN COITTE, Jr., Michigan  
BUD SHULTZ, Florida

STEPHEN HATCH, New Hampshire  
HOWARD L. Berman, California  
RICK WADSWORTH, Virginia  
JONAS MEADES, Iowa  
ROBERT C. "BOBBY" SCOTT, Virginia  
KATHY L. HATCH, North Carolina  
ZOE LUPOMBA, California  
SHELIA JACKSON-VALE, Texas  
MELANIE WATERS, California  
MARTIN T. MALONE, Massachusetts  
WILLIAM A. DELANEY, Massachusetts  
ROBERT MCDONALD, New York  
TIMOTHY W. WEAVER, New York  
ALBERT R. SCHWARTZ, California

The Honorable Mary Frances Berry  
Chair  
United States Commission on Civil Rights  
624 Ninth Street, N.W.  
Washington, D.C. 20425

Dear Chair Berry:

As Chairman of the Subcommittee on the Constitution, it is my responsibility, as you know, to conduct oversight of the U.S. Commission on Civil Rights which you chair. I am deeply troubled by reports of the Commission's activities that continue to undermine public confidence in the Commission. The Washington Post's February 11 editorial page reflects the public dismay over the Commission's activities.

First, I am concerned by a report in the Washington Post on January 24, 2002, that you decided to suppress University of Maryland Professor Christopher Foreman Jr.'s review of Boston University Professor Glenn Loury's book, "The Anatomy of Racial Inequality" because the review favorably mentioned Commissioner Abigail Thernstrom. In a January 22 letter to Christopher Foreman, Staff Director Les Jin stated that the "general practice" of the journal is to delete all "references to sitting Commissioners." Past issues of the Journal, however, contain numerous references to Commissioners, notably a 1999 interview with Commissioner Elsie Meeks. The report raises serious questions about the basic fairness of the Commission and its ability to consider the different perspectives of all involved in the Commission's work.

Other press reports echo such concerns about the Commission. On January 25, 2002, The Washington Times reported that the Commission had issued subpoenas to Transportation Secretary Norman Y. Mineta, Housing and Urban Development Secretary Mel Martinez, Secretary of Interior Gale A. Norton, and Administrator of the Environmental Protection Agency Christie Whitman, for the Commission's February 8 hearing on environmental justice. Subpoenning cabinet members is an unprecedented and unnecessary move when expert testimony from the EPA and other officials would suffice.

The Honorable Mary Frances Berry  
 February 14, 2002  
 Page 2 of 8

Furthermore, I have serious doubt that the Chair of the Commission has the authority to issue subpoenas without a vote of the Commission. The plain language of the Commission's authorizing statute clearly provides only that "the Commission," not just the Chair, may issue subpoenas. 42 U.S.C. § 1975a(e)(2). While I am aware that Commission regulations provide for issuance of subpoenas by the Chair, I question the Commission's authority to issue such a regulation given the plain language of the statute limiting that authority. Please provide all records, including legal opinions or memoranda, referring or relating to the Commission's authority to issue subpoenas.

I am also disturbed by reports of the Commission's mistreatment of Presidential appointee, Commissioner Peter Kirsanow. I strongly object to the district court's ruling which erroneously focused on one part of the 1994 statute and ignored legislative history. Congress intended in the 1994 reauthorization to maintain the scheme of regularly staggered terms established in the 1983 legislation, which you, yourself, sought, claiming -- contrary to your current position -- that such staggering would preserve the independence of the Commission. H. Rep. No. 98-197 at 4 (1983). Even if there were any ambiguity in the 1994 legislation, the court should defer to the President's interpretation of the appointment power that is entrusted to him, not to the Commission, by the statute. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). I am confident that the appeals court will overturn the ruling and grant Commissioner Kirsanow his rightful seat on the Commission.

These reports and incidents raise serious questions concerning the neutrality and basic fairness of the Commission. Accordingly, I plan to continue the Subcommittee's oversight of the Commission to ensure that the Commission conducts its work in a fair and proper manner. Pursuant to Rules X and XI of the House of Representatives, please provide all information and documents responsive to the following requests:

*GAO Report Compliance*

In July 1997, the GAO issued a report entitled "U.S. Commission on Civil Rights: Agency Lacks Basic Management Controls" The GAO Report characterized the Commission as "an agency in disarray", pointing out "broad management problems." The Report concluded that the Commission lacked accountability for resources and failed to maintain appropriate documentation of agency operations. As part of my oversight responsibilities, I intend to review the Commission's progress. Please provide an explanation as to what the Commission has done in response to the 1997 GAO findings.



The Honorable Mary Frances Berry  
February 14, 2002  
Page 3 of 8

1. In 1997, the Commission had not updated its depiction of its organizational structure as required under the Freedom of Information Act (FOIA). Has the Commission complied with FOIA? Please provide final approved documents establishing the following:
  - a. Current organizational structure
  - b. Commission procedures
  - c. Program processes of the Commission
2. The GAO report noted that Commission officials could not provide costs and information on job functions for Commission offices. Please provide detailed information on the costs and functions of each departmental unit within the Commission.
3. The Report found that the Commission had not updated its Administrative Manual in ten years. Has the Commission updated internal management guidance so that staff are assured that their efforts comply with the administrative policies of the Commission, applicable legislation, and federal rules and regulations? If so, please provide all relevant records.
4. The Report concluded that the Commission could not provide the amount or percentage of the budget used by various Commission offices or functions. Please provide a cost breakdown of the following activities for Fiscal Years 1997-2001:
  - a. Complaint referrals;
  - b. Clearinghouse activities;
  - c. Regional operations;
  - d. Report publication and dissemination;
  - e. Public service announcements.
5. The Report found that Commission projects were poorly managed and often take years to complete. Please provide a list of all projects completed in the last five years. Please produce the following documents related to each project:
  - a. Documents assigning each project to an office;
  - b. Documents approving the project;

The Honorable Mary Frances Berry  
 February 14, 2002  
 Page 4 of 8

- c. Concept paper;
  - d. Proposal;
  - e. Documents authorizing the establishment or postponement of any hearing date;
  - f. Documents approving the report.
6. The Report noted that the Commission lacked a formal mechanism to inform Commissioners about the status of projects. The GAO recommended that the Commission establish a management information system for Commissioners and staff to use in planning projects and tracking progress
- a. Has the Commission adopted an internal management policy? Please provide documents establishing such a policy.
  - b. Who assigns staff projects?
  - c. When are Commissioners notified that a project has been started?
  - d. Do Commissioners receive information on the costs of projects, time frames, staffing levels, and completion dates? Please produce all documents reflecting the transmission of such information to other Commissioners since January 1, 1998.
7. The Report found that the Commission uses three different offices to disseminate project reports, but a lack of coordination among these offices raises the potential for duplicative work.
- a. Are separate mailing lists still maintained by the office responsible for conducting the project, the Congressional Affairs Unit, and the Office of Management?
  - b. Has the general mailing list been updated?
  - c. If so, how often has it been updated?
  - d. Who is in charge of making updates?

The Honorable Mary Frances Berry  
 February 14, 2002  
 Page 5 of 8

- e. Have the various lists been purged to eliminate duplication?
- f. If so, when was this completed?

*Public Affairs*

I am deeply concerned about unnecessary expenditures for an outside public relations firm when the Commission has a Public Affairs Unit ("PAU") that should be performing the same or similar functions. On August 16, 2001, a Scripps Howard article reported that the Commission paid \$135,000 to McKinney & McDowell Associates of Washington, while at the same time paying the full-time salaries of two people in its own press office. I am aware that the Commission continues to pay McKinney & McDowell to handle a large share of its public affairs work. Further, it has come to my attention that the Commission has rerouted the phone lines from the PAU to Staff Director Les Jin's office. Accordingly, I would like answers to the following questions regarding the role of the PAU within the Commission:

- 8. I understand that two employees currently work in the PAU. Please provide me with the following information:
  - a. Job descriptions;
  - b. Length of employment;
  - c. Prior media background.
- 9. What are the PAU's responsibilities? Please provide copies of all PAU work product for the past five years.
- 10. Charles Rivera resigned as Director of Public Affairs in 1998. Has the commission replaced him?
  - a. Has the Commission advertised the position? Please provide documentation.
  - b. If so, how many applications have been received?
  - c. Has the Commission interviewed any applicants? If so, who?
  - d. Have EEO complaints been filed against the agency by any of the applicants?

The Honorable Mary Frances Berry  
 February 14, 2002  
 Page 6 of 8

11. How is the PAU able to perform its duties when the telephone lines have been rerouted to the Staff Director's office? Have the duties of the PAU changed?
  - a. Who fields media calls?
  - b. Is a media list compiled?
    - i. Who compiles it?
    - ii. Is it updated?
    - ii. If so, who updates the list?
  - c. Who and by what means are media notified about news briefings, hearings, etc?
  - d. Who follows up with media after events?
12. How have the responsibilities of the Public Affairs Unit changed since Summer 2000 when the Commission hired the public relations firm of McKinney & McDowell?
13. The McKinney & McDowell contract information sent to the Subcommittee in Summer 2001 is incomplete.
  - a. Please submit missing contracts for June, July, and August 2000.
  - b. Expenses for January totaled \$18,473, yet McKinney & McDowell billed in three increments of \$7,500, \$7,500, and \$10,000. Please explain the discrepancies.
  - c. Contracts provided are devoid of work descriptions. Please submit all Commission billing records for McKinney & McDowell showing days, dates, and hours worked and services provided.
  - d. Please provide copies of official records for all Commissioners showing the days and dates worked since January 1, 1998.
14. On June 23, 2000, McKinney & McDowell submitted an extensive paper entitled: "Review of the Public Affairs Unit."
  - a. How much did the Commission pay for completion of this study?

The Honorable Mary Frances Berry  
 February 14, 2002  
 Page 7 of 8

- b. Were any of the recommendations implemented by Public Affairs personnel?
- c. If so, which recommendations?

*Shredding of Documents*

I have also received information that Commission has shredded documents that may be required to be preserved and archived in accordance with the Federal Records Act, 44 U.S.C.A. § 2901. No records or other documents of the Commission may be disposed of except as authorized by the National Archives and Records Administration under the General Records Schedule. To assist the Subcommittee in evaluating the Commission's compliance with the Federal Records Act, please answer the following questions:

15. Has the Commission acquired a shredder in the last six months? If so, please describe the shredder and the purpose for which it was acquired?
16. How does the Commission determine which documents to shred and under whose authority?
17. How many documents has the Commission shredded in the last six months?
18. What types of documents have been shredded? Please describe documents in detail.
19. Has the agency regularly sent documents to the National Archives and Records Administration in compliance with the General Records Schedule? Please provide documentation.

*Draft Procedures*

It has come to my attention that the Commission is drafting new procedures on hearings and investigations.

20. What elements will be incorporated in the new procedures? Please provide all information and documents relating to these draft procedures.

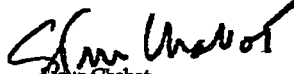
Please provide written responses and responsive documents by courier to Oversight Counsel Kristen Schultz in H2-362 Ford House Office Building no later than 5:00 P.M. on Friday, February 22, 2002. Documents should be consecutively Bates-stamped and produced in duplicate. Please also provide the Subcommittee with a production log indicating the identity of

The Honorable Mary Frances Berry  
February 14, 2002  
Page 8 of 8

the person or office from whose files each document was produced and specifying the request to which the documents produced are responsive.

Thank you for your cooperation.

Sincerely,



Steve Chabot  
Chairman  
Subcommittee on the Constitution

cc: The Honorable Jerrold Nadler  
Vice Chair Cruz Reynoso  
Commissioner Abigail Thornstrom  
Commissioner Christopher Edley, Jr.  
Commissioner Jennifer C. Braceras  
Commissioner Peter N. Kirsanow  
Commissioner Elsie M. Meeks  
The Honorable Les Jin, Staff Director



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

February 22, 2002

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
U.S. House of Representatives  
H2-362 Ford House Office Bldg.  
Washington, DC 20515

Dear Mr. Chairman:

This letter is in response to the Subcommittee's request for information outlined in your letter of February 14, 2002, regarding the U.S. Commission on Civil Rights (Commission). Dr. Mary Frances Berry, the Chairperson of the U.S. Commission on Civil Rights, has asked me to respond to this set of questions since it contains inquiries regarding the day-to-day operations of the Commission for which I am responsible. As you know, the Commission operates with part-time Commissioners who make policy and a full-time Staff Director who manages the civil service staff.

In your correspondence, you expressed concern over media criticism of the Commission. Certainly, there are those who have negative views of the agency, such as the enclosed 1981 editorial suggesting that the Commission has completed its work and as replied to by then Republican Chair Arthur Flemming. (See Attachment A& B.) We also refer you to the attached letter from Mr. William Taylor who is a former General Counsel (1963 to 1965) and Staff Director (1965 to 1968) of the Commission. (See Attachment C.) Mr. Taylor currently serves as vice chairman of the Citizens' Commission on Civil Rights.

Your letter also referred to a book review. This review noted the work of Commissioners Christopher Edley and Abigail Thernstrom. I was greatly concerned that sitting Commissioners had, in varying degrees, inappropriately become part of the book review. In my view, this is very different from the 1999 example discussed in your letter where a Commissioner was interviewed for the *Journal*. My concern had nothing to do with whether the review favorably or unfavorably mentioned either Commissioner. Ultimately, I decided to leave the decision on whether to include references to the Commissioners with the *Journal's* writer-editor, who had been working with Dr. Foreman. As a result, the writer-editor decided to leave in the references to Commissioners Edley and Thernstrom in the book review.

As to the concern you raised about subpoenaing cabinet members, the Commission has a long-standing practice of subpoenaing all witnesses that are within its jurisdiction whenever a hearing

is held. This applies to government and non-government witnesses regardless of whether the individuals are willing or reluctant to appear. This practice means that no value judgments can be drawn on a witness's willingness or unwillingness to testify since all witnesses are compelled to testify by subpoena. The practice applies to all department and agency heads, including cabinet members, because they generally are in the best position to speak to the policies of their department or agency.

The suggestion contained in a referenced article that we have never subpoenaed cabinet members is inaccurate. At least twice in the past, the Commission has subpoenaed agency heads who appeared before the agency. Furthermore, once a subpoena is issued, it is not uncommon for department or agency officials, after discussions with the Commission, to designate other staff to appear as the more appropriate spokesperson. Finally, the Commission agrees that it, and not the Chairperson, has the legal authority to issue subpoenas. When the Commission approves a hearing it approves the issuance of subpoenas. The Chairperson's signature on the subpoena, a ministerial act, reflects the Commission's decision to issue subpoenas and hold a hearing in accordance with the Commission's practice. The Chairperson's signature is required by regulation 45 C.F.R. § 702.4(e).

With respect to *U.S. v. Wilson*, we believe that the federal district court ruled correctly. However, the case is pending in the federal appeals court, and the Commission has already stated that it will of course abide by the final decision of the court.

Further, we note that the 1997 GAO report is not the first GAO report to find inadequacies with the Commission. Moreover, the 1997 report did not tell the full story. The management and administration of the Commission were ongoing problems as discussed in the 1988 GAO report, *U.S. Commission on Civil Rights: Concerns About Commission Operations*. As reflected in 1988, the Commission's Administrative Manual was issued in 1975 and not updated until 1982. Unlike the 1988 GAO report, the 1997 report discussed in your letter found no management and administrative improprieties. Additionally, following the 1997 report, the Commission addressed the three recommendations made by GAO. The actions taken by the Commission to address the 1997 GAO recommendations are more fully discussed in the attached letters provided in response to inquiry number 1.

The following are responses to your other questions and requests for documents:

**In response to inquiry 1:** The Commission has successfully responded to the management initiatives recommended by GAO in a July 1997 audit report. The Commission is one of the smallest agencies in the Federal government and remains very accessible to the public. In 1999 the Office of General Counsel, consistent with the GAO recommendation that the Commission provide more information on its structure, submitted to the Federal Register proposed revisions to the Code of Federal Regulations to provide public access to current organizational structure, procedures and program processes. The revisions were returned to the agency for technical non-compliance with the Office of Federal Register's rules and procedures and the process of finalizing the revisions is still underway. In the interim, the Commission has provided information about the agency to the public through other means. Our Web site posts public



information about the Commission and describes the Commission's FOIA process. Additionally, the Commission is preparing to submit revised information on its structure and how the public may contact the Commission to the National Archives for inclusion in the *U.S. Government Manual*.

Please see attached 1999 letters to Representative Charles Canady and to GAO from Staff Director Ruby Moy on the Commission's implementation of the GAO recommendations.

**In response to inquiry 2:** The Commission, based on its size, has found that it is more efficient to maintain a central budget. However, within this centralized budget, the Commission may track expenses by department and project. Unfortunately, in 1997 the GAO auditors did not request and were not provided this information. Responsive to the Subcommittee's request, attached are documents describing the functions and cost of each department.

**In response to inquiry 3:** As reflected in the 1988 GAO Report, the Commission's Administrative Manual was issued in 1975 and not updated until 1982. However, in response to the 1997 GAO report, the Commission established a task force to review and, where applicable, rewrite the Administrative Instructions used to provide management guidance to Commission staff. Several changes have since been made to the Administrative Manual.

Responsive to this request, attached is a copy of the Commission's Administrative Instructions Manual, which was reissued on April 15, 1999.

**In response to inquiry 4:** Responsive to this request, attached are documents providing cost breakdowns.

**In response to inquiry 5:** As a result of GAO recommendations in 1997, the Commission instituted a management information system to assist in tracking the status of Commission projects. Based on the use of this system, as well as other measures, Commission projects approved subsequent to the 1997 GAO report were completed within a period of 12 to 18 months after final project approval. The Commission has completed the following reports since 1997. This list does not include 37 State Advisory Committee reports, 12 briefings and 2 statements on various civil rights topics since 1997.

#### 2001

- *Voting Irregularities in Florida During the 2000 Presidential Election\**
- *Federal Efforts to Eradicate Employment Discrimination in State and Local Governments: An Assessment of the U.S. Department of Justice's Employment Litigation Section*
- *A Bridge to One America: The Civil Rights Performance of the Clinton Administration\**
- *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report*
- *Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election Systems*
- *Funding Federal Civil Rights Enforcement: 2000 and Beyond*

2000

- *Revisiting Who Is Guarding the Guardians? A Report on Police Practices and Civil Rights in America\**
- *Sharing the Dream: Is the ADA Accommodating All?*
- *Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts*
- *Police Practices and Civil Rights in New York City\**
- *Equal Educational Opportunity and Nondiscrimination for Girls in Advanced Mathematics, Science, and Technology Education: Federal Enforcement of Title IX*
- *The Crisis of the Young African American Male in the Inner Cities*
- *Toward an Understanding of Percentage Plans in Higher Education: Are They Effective Substitutes for Affirmative Action?*

1999

- *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VI: The New York Report*
- *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume V: The Los Angeles Report*
- *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality, Volume I, The Role of Governmental and Private Health Care Programs and Initiatives*
- *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality, Volume II, The Role of Federal Civil Rights Enforcement Efforts*
- *Equal Educational Opportunity and Nondiscrimination for Minority Students: Federal Enforcement of Title VI in Ability Grouping Practices*

1998

- *Helping State and Local Governments Comply with the ADA: An Assessment of How the United States Department of Justice is Enforcing Title II, Subpart A, of the Americans with Disabilities Act*
- *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission is Enforcing Title I of the Americans with Disabilities Act*
- *Schools and Religion*

1997

- *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*
- *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and Lau v. Nichols*
- *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume IV: The Miami Report*
- *A Community Meeting on Race Relations in Ruleville, Mississippi*
- *Discussion of Race Relations Issues in Greene County, Alabama*

\* Denotes reports not included in annual program planning documents because they were approved by the Commission as civil rights issues requiring immediate attention and with the understanding that formal program planning was not necessary.

**In response to inquiry 5a-e:** Responsive to this request, attached are program planning proposals and corresponding meeting transcripts from 1997 to 2002.

**In response to inquiry 5f:** Commission projects are approved at Commission meetings. Responsive to this request, attached are minutes from Commission meetings.

**In response to inquiry 6a:** Responsive to this request, see attached Administrative Instruction I-3 titled Monthly Office Activity Report/Monthly Project Report. The Staff Director issued this Administrative Instruction to Commission staff on April 15, 1999.

**In response to inquiry 6b:** The Commissioners determine the agency's policies and programs and staff members implement their decisions with day-to-day directions coming from managers under the supervision of the Staff Director.

✓ **In response to inquiry 6c:** Each month the Commissioners receive the Staff Director's report, which contains information on the status of ongoing projects. In addition, each month the Staff Director's report is listed as a meeting agenda item in order to enable the Commissioners to ask any questions they may have as a result of reading the Staff Director's report or on any other matter.

✓ **In response to inquiry 6d:** Commissioners receive in-depth information on Commission projects during the annual program planning meeting and subsequent discussions of the agency's appropriations requests. (See attached program planning proposals, transcripts, and budget materials.) Upon request, Commissioners have received more detailed information on agency projects.

**In response to inquiry 7a-f:** The Congressional Affairs Unit and the Office of Management maintain separate mailing lists. Congressional Affairs maintains a list of Congressional members. Under the Office of Management, the Administrative Services and Clearinghouse Division has a general public mailing list. Additionally, project offices will create a mailing list specific to a project. When a report is issued, the investigating office sends a copy of the report to persons involved in providing research information for that specific report. Each office updates its mailing list as time and resources permit. The general mailing list was updated in 1998 and we are not aware of any duplication contained in our lists.

**In response to inquiry 8a:** While your letter noted an understanding that two employees work in PAU, three are assigned to the unit. Responsive to this request, attached are the job descriptions.

... **In response to inquiry 8b & c:** The supervisory public affairs specialist, writer-editor, and public affairs assistant have been employed respectively by the federal government for 32 years,

3 years, and 7 years. The supervisory public affairs specialist has a prior background in personnel, and the writer-editor has prior work experience involved in writing and editing for various publications.

Current staff in PAU have no prior media expertise. As discussed in our response to inquiry 9, the Commission unsuccessfully conducted a search for a Director of Public Affairs. Consequently, we believe that using McKinney and Associates (McKinney), formerly known as McKinney and McDowell, to address the Commission's many media relations components represents an effective use of Commission resources.

**In response to inquiry 9:** Responsive to this request, see attached Administrative Instruction 9-1 titled Public Affairs Unit for the duties and responsibilities of that office. In my August 28, 2001, letter to you, I explained that the agency's use of McKinney represents a prudent management decision, and that continues to be my view. I believe that this public relations firm has been able to supplement the productivity and in many instances fill a critical void in the Public Affairs Unit. (See attached PAU work product from 1997 to 2002. Daily press clippings and local civil rights activities compiled by the unit are not included in the attachments.)

**In response to inquiry 10a:** Yes, the Commission advertised the vacancy twice. (See attached vacancy announcements.)

**In response to inquiry 10b:** Fifteen and 13 applicants were rated eligible and referred to the selecting official from the first and second vacancy announcements.

**In response to inquiry 10c:** No applicants were interviewed as a result of the first vacancy announcement. Thirteen applicants were interviewed from the second announcement. We understand your request for the names of applicants but release of their names and other personal information appears to raise confidentiality and privacy issues.

**In response to inquiry 10d:** Yes, one applicant filed an EEO complaint. On May 30, 2001, the EEOC affirmed that no discrimination occurred.

**In response to inquiry 11:** The Public Affairs Unit remains responsible for preparing the *Civil Rights Journal* and *Update*, public service announcements, routine press releases, daily press clippings, specialty month activities for the agency, briefings for international guests, reports on local area activities that relate to civil rights issues, and other duties assigned by the Staff Director. Each PAU staff member continues to have his or her own telephone line and the rerouting of one telephone line has not hindered members of PAU from performing the above listed activities.

**In response to inquiry 11a:** Press inquiries are given to the Office of the Staff Director, which answers questions or forwards callers requiring further information to McKinney or PAU staff as appropriate.

**In response to inquiry 11b:** The manner in which media lists are compiled varies depending upon the subject matter and timing of the Commission project. Each month, the PAU prepares a press sign-in form for those who attend the monthly Commission meeting. The form is given to the Office of the Staff Director and subsequently forwarded to McKinney, which maintains media contact lists of reporters and specialty press that have expressed an interest in Commission activities or specifically cover a particular subject matter.

**In response to inquiry 11c:** Media notification of Commission activities is a joint effort between the Public Affairs Unit and McKinney. The Commission has used the PR Newswire for many years to distribute press releases and advisories. McKinney utilizes the AP Daybook and its own database of media sources to notify the press about upcoming Commission activities.

**In response to inquiry 11d:** Depending on the subject matter and amount of media interest, follow-up is performed by McKinney, a special assistant in the Office of the Staff Director, or PAU staff.

**In response to inquiry 12:** As previously stated in answer 11, the Public Affairs Unit remains responsible for preparing the *Civil Rights Journal* and *Civil Rights Update*, public service announcements, routine press releases, daily press clippings, specialty month activities for the agency, briefings for international guests, reports on local area activities that relate to civil rights issues, and other duties assigned by the Staff Director.

**In response to inquiry 13a:** Responsive to this request, attached is a purchase order for services from McKinney covering June and a portion of July 2000. The above-referenced purchase order with McKinney ended on or about July 10, 2000. No purchase order existed for a portion of July and the month of August 2000, nor was the Commission billed during that timeframe.

**In response to inquiry 13b:** We are unable to verify information in your request, specifically the un-referenced January \$18,473 expense. However, Commission records previously sent to the Subcommittee reflect that the Commission was billed \$25,000 in installments of \$7,500, \$7,500, and \$10,000 pursuant to a purchase order agreement. The Commission, therefore, is not aware of any discrepancy in the purchase order with McKinney.

**In response to inquiry 13c:** As mentioned in 13a and b and as reflected in our August 28, 2001, submissions to the Subcommittee, we executed purchase orders with McKinney covering specific time periods. The purchase orders required that McKinney provide its professional services, as appropriate and necessary, during the specified timeframes. The purchase orders were not based on an hourly billing system. Please also refer to the documents submitted in our August 28, 2001 response.

**In response to inquiry 13d:** The attached minutes show the days and dates each Commissioner "worked" or was present for a Commission meeting. Also attached are available time sheets that have been submitted by Commissioners to date.

**In response to inquiry 14:** The cost of the study was included in the fixed price purchase order existing in early 2000 and as a result, the cost related to the study versus other work cannot be segregated.

**In response to inquiry 14b & c:** The recommendations prepared by McKinney are contingent upon the revamping of PAU personnel and additional financial and human resources. As discussed in response 10, the search for a qualified candidate to serve as the Director of Public Affairs was unsuccessful, and the use of McKinney has proven to be a cost effective use of Commission resources for one of our most important functions. Moreover, these services can be terminated at will, an important advantage for an agency such as the Commission, whose budget has been flat-lined for eight consecutive years. In recognition of the above, the Commission has relied on McKinney to fulfill some of the recommendations.

**In response to inquiry 15:** The Commission purchased a new shredder in January 2002 to replace a 13-year-old shredder that was no longer serviceable. The unit purchased was to safeguard privacy information on documents submitted by Commissioners, staff, State Advisory Committee members, and anyone else submitting documents containing Privacy Act information. This safeguard serves to protect individuals from "identity theft" by professional criminals who search through discarded and unshredded documents looking for such information.

**In response to inquiry 16:** Commission policy, as reflected in its Administrative Instruction (AI 4-8) on records management, is to provide for the "systemic maintenance, review, disposition and control" of Commission records consistent with federal law and regulations. The Commission may shred duplicate documents that are no longer needed, documents not required for retention in accordance with the General Records Schedule, or documents containing Privacy Act information. Each office at the Commission has the responsibility for file maintenance.

**In response to inquiry 17:** The Commission does not keep records or count the total number of documents shredded.

**In response to inquiry 18:** In the past six months, the Commission shredded the following types of documents: travel authorizations, travel vouchers, documents supporting travel authorizations, transaction lists supporting travel and payroll transactions, and duplicates of these listed documents. In each instance, the documents contained social security numbers, credit card information, payroll information, or personal financial institution information that would readily lend itself to identity theft or inappropriate use.

Additionally, dated materials collected from hearings, consultations, or briefings were shredded. Specifically, the Commission shredded documents pertaining to the internal structure and operations of various financial companies. At the request of the Commission, these companies produced these documents, marking them as confidential, in response to a Commission investigation into employment practices. Also, informational booklets and catalogues about organizational groups appearing before a Commission hearing or briefing were shredded.

**In response to inquiry 19:** Yes, please see attached FY 2001 records accessions to the National Archives and Records Administration and the Commission's records schedule currently in effect.

**In response to inquiry 20:** The Commission is currently reviewing whether to draft new procedures on the hearing process. Because this process is in a preliminary stage, there are no documents concerning what elements, if any, will be incorporated in the hearing process.

We trust this provides the Subcommittee with the information it needs to perform its oversight functions.

Sincerely,



Les Jin  
Staff Director

Enclosures

cc: The Honorable Jerrold Nadler, Ranking Member  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Jennifer C. Braceras, Commissioner  
Christopher Edley, Jr., Commissioner  
Elsie Meeks, Commissioner  
Abigail Thornstrom, Commissioner  
Victoria Wilson, Commissioner

**J. LOUIS ARMBRISTER, JR., Indiana**  
**Chairman**

**HENRY J. HYDE, Illinois**  
**HOWARD M. COHEN, Pennsylvania**  
**HOWARD COHEN, North Carolina**  
**LARRY E. BROWN, Texas**  
**ALTON CHALKLEY, California**  
**KEVIN BOON, Utah**  
**BO BODANSKY, Kansas**  
**STEVE COLLINS, Ohio**  
**BOB BARR, Georgia**  
**WILLIAM L. EDWARDS, Tennessee**  
**CHARLIE CRONIN, Utah**  
**LARRY H. ROBERTS, South Carolina**  
**SPENCER BACCHUS, Alabama**  
**JOHN R. SPECTER, Indiana**  
**BLAKE CANNON, Tennessee**  
**THE KILLIAN, Florida**  
**CAROL A. BELMONT, California**  
**WILLIAM A. HART, Pennsylvania**  
**JOHN BLAZE, Arkansas**  
**MARK PENCE, Indiana**

ONE HUNDRED SEVENTH CONGRESS

**Congress of the United States**  
**House of Representatives**  
**COMMITTEE ON THE JUDICIARY**

2128 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6218

(202) 225-3851

<http://www.house.gov/judiciary>

March 7, 2002

**JOHN COFFEY, Jr. Michigan**  
**Assistant Secretary**

**RAMSEY FRANK, Massachusetts**  
**ROBERT L. BISHOP, Colorado**  
**MARK BUCKNER, Florida**  
**CHARLES CRONIN, New York**  
**ROBERT C. "BOBBY" BODDY, Virginia**  
**MARSH L. BUCK, North Carolina**  
**JOE LOPEZ, California**  
**DELLA JACKSON, Texas**  
**WILLIAM W. BRYCE, Mississippi**  
**WALTER E. WATKINS, Massachusetts**  
**WILLIAM D. COLE, Maryland**  
**ELBERT HOLLER, Florida**  
**THOMAS BALDWIN, Minnesota**  
**ANTHONY D. MARTIN, New York**  
**ADAM B. SMITH, Colorado**

The Honorable Les Jin  
 Staff Director  
 United States Commission on Civil Rights  
 624 Ninth Street, N.W.  
 Washington, D.C. 20425

Dear Staff Director Jin:

I am deeply disappointed by your response to my February 14, 2002 letter requesting information and documents regarding the day-to-day operations of the U.S. Commission on Civil Rights ("Commission"). Your February 22, 2002 response, which was delivered to the Subcommittee on the Constitution three days after the deadline, was both evasive and incomplete, renewing my concerns that the agency is poorly managed and its actions continue to undermine public trust in the Commission and its work.

First, I was disturbed by your lack of concern over the recent media criticism of the Commission. Your reliance on the Commission's past disregard of such criticism does not allay my concerns about current criticism of the Commission. Recurring criticism has the effect of eroding public confidence in the Commission leading many, including this Subcommittee, to question its continued existence. Continued criticism also raises the question of whether the Commission's substantial expenditures on a public relations firm have resulted in any benefit to the Commission.

It is impossible to evaluate your asserted interpretation of the Commission's authority to issue subpoenas when you have disregarded the request for documents. Your concession that the Chair has no legal authority to issue subpoenas appears to contradict the Chair's practice of subpoenaing witnesses without a Commission vote, notably the Chair's recent subpoenaing of four Administration cabinet heads. I question your implication that the Commission need not approve the issuance of subpoenas because "when the Commission approves a hearing it approves the issuance of subpoenas." Please explain the legal authority for this position and provide, as previously requested, all records, including legal opinions or memoranda, referring or relating to the Commission's authority to issue subpoenas. Please also provide all records related to the specific procedure followed by the Commission in authorizing the recent subpoenas of the Administration cabinet heads.



The Honorable Les Jin  
 March 7, 2002  
 Page 2 of 7

I also maintain that the United States District Court for the District of Columbia ruled incorrectly when it allowed the Commission to intervene in *United States, et al. v. Wilson*, No. CA 01-2541 GK (D.D.C. Jan. 27, 2002)(Kessler, J.). The court's decision is plainly contrary to the Attorney General's exclusive and plenary statutory authority to conduct litigation on behalf of the United States, its agencies, and officers. 28 U.S.C. §§ 516, 519.

In response to my request, the General Accounting Office issued an opinion on February 27, 2002 that "the Commission does not have statutory authority to use its appropriated funds to hire outside counsel." Letter from Anthony H. Gamboa, General Counsel, General Accounting Office, to The Honorable Steve Chabot at 1 (Feb. 27, 2002). I have relayed the GAO's findings to Solicitor General Theodore B. Olson as he maintains the government's appeal of the intervention order. I strongly urge you to read the attached copy of the GAO opinion in light of GAO's conclusion that the Commission lacks authority to litigate and that no appropriations are available for your continued retention of Paul, Weiss, Rifkind, Wharton, and Garrison for litigation in opposition to the position of the United States. In deference to the court's decision, however, GAO has suspended any action pending the outcome of the appeal.

Your incomplete responses to my requests the failure to produce all requested documents raises serious questions concerning the operations and administration of the Commission. Accordingly, I plan to continue the Subcommittee's oversight of the Commission to ensure that the Commission conducts its work in a fair and proper manner. Pursuant to Rules X and XI of the House of Representatives, please provide all information and documents responsive to the following requests:

#### *GAO Report Compliance*

In addressing the 1997 GAO Report findings, you make the plainly incorrect statement that the Report, entitled *U.S. Commission on Civil Rights: Agency Lacks Basic Management Controls*, "found no management and administrative improprieties." Although you state that the Commission has addressed the GAO's recommendations, you fail to show that the Commission has implemented many of these policies – five years after GAO made its recommendations.

1. I was disappointed to learn that the proposed revisions of the Commission's structure submitted to the Federal Register in 1999 were "returned to the agency for technical non-compliance" and "the process of finalizing the revisions is still underway." The letter you produced, sent by Staff Director Ruby Moy to the Subcommittee on January 29, 1999,

The Honorable Les Jin  
 March 7, 2002  
 Page 3 of 7

states that Commission staff expected to be in compliance "by the end of the calendar year."

- a. What if any progress has the Commission made since 1999 in revising the agency's structure to comply with the Federal Register? Please provide documents establishing such progress.
  - b. When does the Commission intend to resubmit its structure to the Federal Register?
  - c. Please explain your statement that the Commission is "preparing" to submit revised information for inclusion in the U.S. Government Manual. How far along are you in this process? Please provide documents establishing such preparation.
2. Your answer to inquiry 2 of my request was completely unresponsive. You provided a description of the functions of each department but provided no breakdown of agency costs by department. You state that the Commission tracks departmental costs within its central budget.
    - a. Again, please provide cost data for each of the Commission's departments.
    - b. If such data does not exist, please provide documents establishing that the agency tracks costs of individual departments within its central budget.
  3. In response to inquiry 3, you refer to the enclosed Administrative Manual reissued on April 15, 1999 and state that "several changes have since been made" but fail to identify and explain these changes. Again, what changes have been made to internal management guidance to assure staff that their efforts comply with administrative policies and the law? Please identify and provide an explanation of all changes to the Commission AIs since 1999.
  4. In response to inquiry 4, you provided a cost breakdown for all activities except clearinghouse activities. Again, please provide this cost data.
  5. Your answer to inquiry 6 was incomplete. Many of the project reports submitted omit information on project costs, time frames, staffing levels, and completion dates. Similarly, the staff director reports produced in the form of Commission meeting transcripts, commonly omit detailed project information.
    - a. If detailed project information is omitted from project reports and staff director reports, how does the Commission notify Commissioners of project status?

The Honorable Les Yin  
March 7, 2002  
Page 4 of 7

- b. You state, "Upon request, Commissioners have received more detailed information on agency projects." Are you suggesting that Commissioners can only obtain certain project information by request?
6. I was disappointed to learn that the Commission continues to maintain separate mailing lists creating the potential for duplicative work that concerned the GAO in 1997. You neglected to answer whether the Commission purges its lists stating, "we are not aware of any duplication contained in our lists."
- a. Again, has the Commission purged its lists?
  - b. If so, when was this completed?
  - c. Why has the Commission not updated its general mailing list since 1998?
  - d. Do you plan to update the general mailing list in the near future? If so, when?

*Public Affairs*

7. I was surprised to learn that the Commission hired McKinney & Assoc. because it could not fill the position of Director of Public Affairs, although you admit in your response to inquiry ten that 28 eligible candidates applied. (Note: These questions do not require you to reveal any privacy information.)
- a. Why did the Commission fail to interview any of the 15 eligible candidates who applied after the first vacancy announcement?
  - b. Why did the Commission reject the 13 applicants interviewed after the second vacancy announcement?
8. I found it unusual that Commission news releases list a variety of press contacts including Gwen McKinney, Kim Alton, your personal assistant, and even you, yourself.
- a. Why does the Commission designate a different contact for each release?
  - b. How does the Commission determine who to list as the press contact?
  - c. Why do several releases omit contact information entirely? Does the Commission not wish to be contacted concerning the substantive issues of these releases?

The Honorable Les Jin  
 March 7, 2002  
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9. You state that the hiring of McKinney and the rerouting of the PAU phone lines to your office "has not hindered" PAU employees from performing their activities.
- a. You state that PAU staff prepares "routine press releases."
    - i. How do you define "routine press releases" for purposes of disseminating work to the PAU?
    - ii. Who makes this determination?
  - b. You state that PAU staff are also charged with organizing "specialty month activities" and facilitating "briefings for international guests."
    - i. What are "specialty month activities"? Please provide examples and supporting documents.
    - ii. How often does the Commission hold "briefings for international guests"? Please provide examples and supporting documents.
10. I was dismayed to see that in response to inquiry 13, you provided only one McKinney invoice (dated May 25, 2000) and one purchase order (dated March 13, 2000).
- a. The Subcommittee has made three requests for the complete set of McKinney contracts. At present, we possess incomplete records for the period of June 2000-June 2001. Again, please provide ALL responsive documents for the period of June 2000-March 2002, in order by date, matching documents attached, including documents previously submitted since our records remain disordered and incomplete, consisting of:
    - i. Invoices;
    - ii. Purchase orders;
    - iii. Scope of work for engagement documents;
    - iv. Statements of work.
  - b. You note that McKinney does not bill on an hourly basis, but fail to explain McKinney's billing method.
    - i. Is McKinney billed in accordance with a retainer agreement?

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 March 7, 2002  
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- ii. If so, what is the retainer period and amount. Please provide a copy of the agreement.

*Shredding of Documents*

11. I was disturbed to learn that no central authority regulates Commission shredding. How does the Commission ensure that individual offices are not shredding documents that should be retained and or forwarded to the National Archives and Records Administration ("Archives")?
12. I was surprised to discover that the Commission "does not keep records or count the total number of documents shredded."
  - a. Why doesn't the Commission keep records of agency shredding?
  - b. Again, isn't the Commission concerned about destroying documents that are required by law to be forwarded to the Archives?
13. You provided records showing that the Commission transmitted documents to the Archives on February 16, 2001 and March 16, 2001.
  - a. Did any transmittals occur prior to or after Spring 2001, in compliance with the General Records Schedule?
  - b. If so, please provide ALL records relating to transmittals of documents to the Archives since January 1, 2000.
14. In response to question 20, you state that no documents exist relating to the new procedures on hearings and investigations. I am aware that a draft document exists. Please supply the draft.<sup>1</sup>

*Cunningham Report*

15. In the February 6, 1998 Commission meeting transcript, Chair Berry refers to the

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<sup>1</sup> Your suggestion that there is no such document when I have information that a draft exists suggests that you did not consider my request for this (or, for that matter, any other document) to include a request for any drafts. That view is incorrect – my document requests included any drafts, notes, or other written or electronic record responsive to the request.

The Honorable Les Jin  
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Cunningham report which explains the scheme of uniform staggered Commission terms established in the 1983 legislation. Please provide a copy of the Cunningham report.


*Pending Litigation*

16. Are there any EEOC complaints pending against the Commission?
- a. If so, how many?
  - b. When were the complaints initiated?
  - c. What is the status of these complaints?

Please provide written responses and responsive documents by courier to Oversight Counsel Kristen Schultz in H2-362 Ford House Office Building no later than 5:00 P.M. on Wednesday, March 13, 2002. Documents should be consecutively Bates-stamped and produced in duplicate. Please also provide the Subcommittee with a production log indicating the identity of the person or office from whose files each document was produced and specifying the request to which the documents produced are responsive.

Thank you for your cooperation.

Sincerely,



Steve Chabot  
Chairman  
Subcommittee on the Constitution

cc: The Honorable Jerrold Nadler  
The Honorable Mary Frances Berry  
The Honorable Cruz Reynoso  
The Honorable Abigail Thernstrom  
The Honorable Christopher Edley, Jr.  
The Honorable Jennifer C. Braceras  
The Honorable Peter N. Kirsanow  
The Honorable Elsie M. Meeks

Enclosure



United States General Accounting Office  
Washington, DC 20548

B-289701

February 27, 2002

The Honorable Steve Chabot  
Chairman, Subcommittee on the Constitution  
Committee on the Judiciary  
House of Representatives

Dear Mr. Chairman:

This responds to your letter of January 15, 2002, regarding whether the U.S. Commission on Civil Rights (Commission) may use appropriated funds to employ outside legal counsel to intervene in *United States v. Wilson*<sup>1</sup> and to pay the salary of a Commission member, Victoria Wilson, past November 29, 2001. Subsequent to your request, the U.S. District Court for the District of Columbia granted the Commission's motion to intervene. The order granting the Commission's motion, however, did not address the availability of the Commission's appropriations to employ outside counsel to represent it in the litigation. The court, in addition, ruled on the merits of the case in favor of Victoria Wilson. The Department of Justice (Justice) then filed a motion to appeal both court orders.

In our opinion, the Commission does not have statutory authority to use its appropriated funds to hire outside counsel. However, given the court's order granting the Commission's motion to intervene and Justice's appeal of the court's order, we plan to take no action with respect to the Commission's use of appropriated funds to pay outside counsel pending resolution of the appeals from the district court's ruling. If the appellate court upholds the district court order granting the Commission's motion to intervene, we will take no further action. In addition, the district court ruled that Ms. Wilson's term does not expire until January 2006. Given the district court's ruling on this point, the Commission may use its appropriation to continue to pay Ms. Wilson's salary pending resolution of the appeals from the district court's ruling.

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<sup>1</sup> No. 01-CV-2541 (D.D.C. filed Dec. 7, 2001).

**BACKGROUND**

This matter arises as a result of a dispute over the expiration of Commissioner Wilson's term in office. On December 6, 2001, President Bush appointed Peter A. Kirsanow to a 6-year term on the Commission. According to Justice, the Kirsanow appointment was to fill a vacancy created by the expiration, on November 29, 2001, of Ms. Wilson's term. When Mr. Kirsanow arrived for the next scheduled Commission meeting on December 7, 2001, the Commission, by a vote of five to three, refused to seat him. The Commission Chair and four other commission members (including Ms. Wilson) contended that Ms. Wilson's term had not expired on November 29 and would not expire until January 2006. Motion to Intervene on Behalf of Commission at 4.

Justice asserts that Ms. Wilson was appointed solely to complete the remainder of Commissioner A. Leon Higginbotham's term. Complaint at 1-2. President Clinton had appointed Ms. Wilson to the Commission in January 2000 to fill a seat that had been vacant for just over a year as a result of Judge Higginbotham's death in December 1998. *Id.* Judge Higginbotham's 6-year term would have expired on November 29, 2001. Ms. Wilson and the Commission argue that Ms. Wilson is entitled to a full 6-year term, expiring in January 2006. Defendant's Memorandum in Opposition to Motion for Summary Judgment at 2; Intervenor's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 2.

When the Commission refused to seat Mr. Kirsanow, Justice filed suit in the U.S. District Court for the District of Columbia against Ms. Wilson seeking a declaratory judgment that Mr. Kirsanow is entitled to a seat on the Commission and that Ms. Wilson is no longer entitled to a seat. Complaint at 7. The Commission staff director retained the law firm Paul, Weiss, Rifkind, Wharton & Garrison (Paul, Weiss) to intervene on behalf of the Commission in the lawsuit between the United States and Ms. Wilson. Memorandum from Les Jin, Staff Director, Commission on Civil Rights, to the Commission, Dec. 21, 2001. On January 27, 2002, the court granted the Commission the right to intervene but did not address the availability of the Commission's use of appropriated funds to employ outside counsel to represent it in litigation. Order Granting Intervenor's Motion to Intervene as Defendants at 1. Subsequently, on February 4, 2002, the court held that Ms. Wilson's term does not expire until January 2006. Order Granting Defendant's Motion for Summary Judgment, Feb. 4, 2002. Justice filed a notice of appeal on that same day, appealing both the court's order granting the Commission's motion to intervene and the court's order on the merits. Plaintiff's Notice of Appeal, Feb. 4, 2002.



## DISCUSSION

**Question I: Are appropriations available for the U.S. Commission on Civil Rights to employ outside legal counsel to intervene in a suit between the Justice Department and Victoria Wilson regarding the expiration of Ms. Wilson's term in office?**

It is well established that unless otherwise authorized by law, Justice has authority over the supervision and conduct of all litigation in which the United States, its agencies, or its officers have an interest. See, e.g., *E.T.C. v. Guignon*, 390 F.2d 323, 324 (8<sup>th</sup> Cir. 1968) (the Federal Trade Commission may not seek enforcement of its own subpoenas in a federal district court without the aid or consent of the Attorney General); *Mehle v. American Management Sys.*, 172 F. Supp. 2d 203, 206 (D.D.C. 2001) (describes the statutory grant of litigation authority to the Attorney General as "plenary"); *Ocean Shipping Antitrust Litigation*, 500 F.Supp. 1235, 1239 (S.D.N.Y. 1980) (absent authorization or consent of Justice, the Federal Maritime Commission is without authority to move independently to intervene).

The heart of Justice's authority is 28 U.S.C. § 516: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."<sup>2</sup> Since 1870, Justice has had by statute nearly exclusive authority to perform or provide litigative services to agencies and their employees. See Act of June 22, 1870, §§ 5, 14-17, 16 Stat. 162 (now codified at 28 U.S.C. §§ 515-519, 543, 547; 5 U.S.C. § 3106); *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9; (1988) (sections 516 and 517 "create a general rule that applies unless contradicted in some other provision").<sup>3</sup> We have interpreted these statutes generally to preclude the use of appropriated funds, other than those appropriated to Justice, to employ or hire attorneys to represent the government's interest in a court action, unless otherwise authorized by statute. 70 Comp. Gen. 647, 649-650 (1991); 55 Comp. Gen. 408, 411 (1975).

As relevant to the facts and circumstances here, there are two situations in which an agency may use its appropriations to hire outside counsel for the conduct of litigation: (1) if the agency has specific statutory authority to litigate or hire outside counsel, or (2) if the Attorney General declines to provide the agency representation but agrees that representation is appropriate and approves the agency's hiring of outside counsel for representation.

<sup>2</sup>The Commission is an agency for purposes of 28 U.S.C. § 516. See 5 U.S.C. § 105.

<sup>3</sup>In *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993), the court of appeals found that the Postal Service could bring suit even though Justice refused to represent it or consent to the Postal Service's use of outside counsel. However, in that case, the court of appeals specifically found that the Postal Service's governing statute permitted it to seek judicial review of specified rates. Accordingly, the court found that the Postal Service was otherwise authorized by law to conduct litigation in these circumstances.

The present circumstances satisfy neither of these conditions. The Commission did not cite statutory authority permitting it to conduct litigation in its own behalf or otherwise to hire outside counsel for litigative purposes. In our survey of the Commission's statutory authorities, we identified no authority that would permit the Commission to hire outside counsel for the conduct of litigation. The second circumstance in which an agency may engage outside counsel also is absent here. Justice expressly disagreed that outside representation is appropriate when it advised the Commission that it had no statutory authority to hire Paul, Weiss. Letter from Assistant Attorney General, Robert D. McCallum, Jr., Civil Division, Justice Department to Commission Chair, Dec. 8, 2001.

We have recognized that in some instances, an agency may use its appropriations to hire outside counsel if Justice approves. For example, we held that the Small Business Administration (SBA), with Justice approval, could use its appropriations to hire outside counsel to represent an SBA employee who was sued for acts performed within the scope of his employment. 55 Comp. Gen. 408 (1976) (Justice assigned a U.S. Attorney to the matter, but the U.S. Attorney had to withdraw from the case for administrative reasons). Nevertheless, our case law does not support an agency's use of its appropriations to pursue its own litigative policies that are inconsistent with the litigative policy of Justice. The Commission's litigative policy in this instance is inconsistent with Justice's. See Motion to Intervene on Behalf of Commission at 6 (the Commission stated that it has an interest in protecting Ms. Wilson from improper removal and preventing improper removal of its officers in the future). Section 516 of title 28 of the United States Code clearly reposes in the Attorney General the discretion and authority to define the litigative policies of the United States. Thus, the Commission lacks statutory authority to engage outside counsel for the conduct of litigation.

On January 27, 2002, the United States district court granted the Commission's motion to intervene. Order Granting Intervenors' Motion to Intervene as Defendants at 1. While it is somewhat anomalous to find an agency litigating a position inimical to the interests of the United States as defined by Justice, the court has recognized the Commission as a party to the lawsuit. The court's order does not reach the issues before us, however, that is the availability of the Commission's appropriations to engage outside counsel to represent it in litigation. Nevertheless, given the present posture of this case and in deference to the court and the judicial system, we plan no action concerning this matter pending resolution of any appeals. If the appellate court upholds the district court order granting the Commission's motion to intervene, we would take no further action.

Question 2: Are appropriations available to pay Victoria Wilson's salary past November 29, 2001?

The district court ruled on February 4, 2002, that pursuant to the Civil Rights Commission Amendments Act of 1994, Pub. L. No. 103-419, 108 Stat. 4338, Ms. Wilson's appointment to the Commission is for a six-year term, not solely to fill

the remaining years of Commissioner Higginbotham's term. As a result, Ms. Wilson's term will not expire until January 2006.

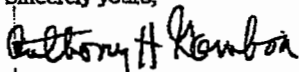
The Commission's appropriation for salary and expenses is available only to pay the salary and expenses of a commissioner. Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law. 31 U.S.C. § 1301(a). Each member of the Commission, who is not otherwise in the service of the United States, receives a sum equivalent to the compensation paid at level IV of the Executive Schedule. 42 U.S.C. § 1975b(b). An individual who is not a commission member may not receive this compensation. Given the district court's ruling on Ms. Wilson's term as a commissioner, the Commission may continue to use its appropriation to pay Ms. Wilson's salary, pending resolution of the appeals from the district court's ruling.

#### CONCLUSION

Because the district court granted the Commission's motion to intervene, we withhold our objections to the Commission's use of appropriated funds to retain outside counsel to intervene in United States v. Wilson. If the appellate court upholds the district court order granting the Commission's motion to intervene, we will take no further action. Further, pending resolution of the appeals of the district's court's ruling on the expiration of Ms. Wilson's term, the Commission may use its appropriation to continue to pay Ms. Wilson's salary. Under separate cover, we will notify the Commission and its fiscal officers of our findings. We trust that this responds to your request. Should you have any questions, please contact Ms. Susan Poling at (202) 512-2667.

We are sending copies of this letter to the Ranking Minority Member, Subcommittee on the Constitution; Chairman, House Committee on Judiciary; Ranking Minority Member, House Committee on Judiciary; Chairman, Senate Committee on Judiciary; Ranking Minority Member, Senate Committee on Judiciary, and other appropriate congressional parties.

Sincerely yours,



Anthony H. Gamboa  
General Counsel



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

March 13, 2002

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
U.S. House of Representatives  
H2-362 Ford House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman:

I am responding to the sixth request for information and documents that you have submitted to the Commission in less than a one-year period. However, I disagree with your characterization of our February 22, 2002 response. I have responded appropriately to all of the inquiries, as I understand each request. Additionally, despite your assertion, my February 22, 2002, reply was faxed to your office on that due date. Moreover, my office was also prepared to forward to you on that date the 1,942 pages of documents that correspond to my response.

In my February 22<sup>nd</sup> letter, I responded to your questions regarding the Commission's subpoena authority and practices. Again, the Commission's approval of a hearing permits the staff to begin to properly execute the project through the gathering of background research materials and data and the subsequent issuance of subpoenas. The Commission staff identifies the appropriate individuals to be subpoenaed and the Chairperson, acting pursuant to the already expressed authority of a majority of the Commission, signs the subpoenas recommended by the staff. Thus, the staff is authorized by the Commission to prepare for a hearing once the project has been approved. Our statute and regulations do not require any additional vote by the Commission on the execution of the project or more specifically, the use of subpoenas.

The Commission has continued to make significant improvements in its operations and management and I believe that the increase in work-product over the past few years is evidence of these positive changes. I reiterate that, unlike the 1988 GAO report, the 1997 report found no management and administrative improprieties.

Please find below the answers to your March 7, 2002 letter.

In response to inquiry 1a,b,c: The Commission staff has made revisions based on the requests received from the Federal Register and is scheduled to resubmit this information by Friday,

March 15, 2002. A proposed submission of the information to be included in the U.S. Government Manual has been forwarded to the National Archives. See attached document.

**In response to inquiry 2:** This question was answered in the February 22, 2002 response. See document titled U.S. Commission on Civil Rights Breakout of Departmental Obligations (bates # 001825.)

**In response to inquiry 3:** Since 1999, the following Administrative Instructions (AI) have been transmitted to Commission staff: AI 1-18B, Order of Precedence; AI 4-18, Information Technology and Systems Management; AI 4-19, System Security and Disaster Preparedness; and AI 4-20 Information Systems Security and Disaster Preparedness Plan. All of these AIs were forwarded to you as part of my February 22<sup>nd</sup> response.

AI 1-18B was reissued to ensure that day-to-day administration of the Commission would be uninterrupted in the absence of the Staff Director.

AI's 4-18, 4-19, and 4-20 were created to provide Commission employees guidance on the use of information technology resources in accordance with federal regulations, policies and guidelines.

**In response to inquiry 4:** Clearinghouse activities are not segregated into a budget category but are included in the costs categorized under the Commission's Administrative Services and Clearinghouse Division (ASCD).

**In response to inquiry 5a & b:** As previously stated in my February 22 response, each month the Commissioners receive the Staff Director's report, which contains information on the status of ongoing projects. In addition, each month the Staff Director's report is listed as a meeting agenda item in order to enable the Commissioners to ask any questions they may have as a result of reading the Staff Director's report or on any other matter. Commissioners receive in-depth information on Commission projects during the annual program planning meeting and subsequent discussions of the agency's appropriations requests. Therefore, I believe that the Commissioners are adequately apprised of our activities and that ample opportunity is available at each meeting in order to clarify any issues.

We are not suggesting that "Commissioners can only obtain certain project information by request." To the contrary, staff makes every effort to anticipate and inform the Commissioners in the Staff Director's report of any information that Commissioners may need concerning any ongoing project. To the extent that staff is unable to anticipate desired information by the Commissioners, Commissioners are free to make requests for more detailed information.

**In response to inquiry 6a-d:** The mailing lists maintained by the Commission each serve a distinct purpose that has worked well in the past for each individual unit. The Commission has not purged its mailing lists but plans to merge the lists once our local area network (LAN) is completely installed. Preparations are currently underway to install the LAN. Because the GAO audit found no duplication of our mailing lists, staff efforts to purge or merge the lists were postponed until the LAN was installed and operational.

**In response to inquiry 7a & b:** Please be assured that the federal rules and regulations that pertain to hiring were followed as the Commission sought to fill the public affairs position. The first vacancy announcement failed to emphasize that candidates should possess experience with civil rights issues. Thus, a second vacancy announcement was created that provided more detailed information on the knowledge, skills and abilities required for the position. Unfortunately, after interviewing thirteen applicants, none of them were of a sufficiently high quality to be considered suitable for the position.

**In response to inquiry 8a-c:** As stated in my February 22, 2002 response, the current staff in PAU have no prior media experience. With this limitation in mind, a press contact is designated for press releases and advisories based upon my determination of the person most knowledgeable and able to communicate the subject matter contained in the release. The Commission's press releases are printed on letterhead paper that contains a telephone number where more information can be obtained.

**In response to inquiry 9a i-ii:** Each year the Commission issues routine press releases in recognition of special emphasis month celebrations such as Black History Month, Women's History Month, and Asian Pacific American Month. PAU staff are reminded by OSD staff to prepare the appropriate release.

**In response to inquiry 9bi:** Each year PAU staff organizes the agency's celebration of special emphasis month activities (e.g., Black History Month, Women's History Month, and Asian Pacific American Month). Typically, the Deputy of PAU will form a committee of staff members to create an agenda for the program. Past programs have included distinguished speakers, presentations by a Commissioner and staff members as well as a sampling of different types of foods. The staff person with sole responsibility for this activity has been on leave and I learned today that she resigned, effective last week. Other staff members in her office indicate that they do not have knowledge of this function. Therefore, we were unable to obtain the documents you requested but if we locate the documents responsive to this request we will forward them to you.

**In response to inquiry 9bii:** The staff person with sole responsibility for this activity has been on leave and I learned today that she resigned, effective last week. Other staff members in her office indicate that they do not have knowledge of this function. Therefore, we were unable to obtain the documents you requested but if we locate the documents responsive to this request we will forward them to you.

**In response to inquiry 10a:** See attached documents. At the Subcommittee's request, we are resubmitting documents previously provided to the Subcommittee in our August 28, 2001 response as well as new documents received after our August 28 response.

**In response to inquiry 10b:** After work has been performed by the contractor, the contractor invoices the government in accordance with the instructions contained in the purchase order. The contractor's use of the word retainer is an invoice misstatement, as no retainer agreement exists. Rather, payment is made to the contractor in arrears of the services rendered.

**In response to inquiry 11& 12:** As previously stated in my February 22, 2002 response, the Commission acts in accordance with the General Records Schedule and AI 4-8, Records Management, in maintaining, reviewing, and disposing of Commission records. Office heads consult with the agency's records management contact in order to comply with the General Records Schedule and AI 4-8.

In addition, the documents that have been shredded are non-records materials (i.e., drafts, duplicates) that do not require the creation of a log or other record keeping mechanism. We are confident that the only documents that have been shredded were non-records materials that are not required to be forwarded to the National Archives and are not considered to be either permanent or temporary records of the agency.

**In response to inquiry 13a:** Yes, transmittals did occur during that time period in compliance with the General Records Schedule.

**In response to inquiry 13b:** See attached records accessions to the National Archives and Records Administration.

**In response to inquiry 14:** There is no draft document. However, staffers in the Office of the General Counsel have been tasked to review the chapters and they have prepared comments on the introduction and three of the chapters that have not been reviewed by anyone. Enclosed are the introduction and three chapters.

**In response to inquiry 15:** Regarding this question, we have only been able to locate one "report" apparently, prepared by Cunningham that relates to the topics discussed at the February 6, 1998 meeting. This "report" does not purport to explain any system of "uniform staggered Commission terms established in the 1983 legislation." See attached document.

**In response to inquiry 16a:** There are five EEO matters pending with the Commission.

**In response to inquiry 16b:** The complaints were filed on or about November 13, 1995, April 29, 1996, May 21, 2001, May 24, 2001 and April 10, 2001.

**In response to inquiry 16c:** November 13, 1995 complaint – on appeal by both parties; April 29, 1996 complaint – pending in district court; May 21, 2001 complaint – pending a hearing; May 24, 2001 complaint – report of investigation by independent third party found complaint to be unfounded and complainant requested a hearing; April 10, 2001 – report of investigation by independent third party found complaint to be unfounded.

We trust this provides the Subcommittee with the information it needs to perform its oversight functions.

Sincerely,

A handwritten signature in black ink that reads "Les Jin". The signature is written in a cursive, flowing style.

Les Jin  
Staff Director

Enclosures

cc: The Honorable Jerrold Nadler, Ranking Member  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Jennifer C. Braceras, Commissioner  
Christopher Edley, Jr., Commissioner  
Elsie Meeks, Commissioner  
Abigail Thernstrom, Commissioner  
Victoria Wilson, Commissioner



USCCR DOCUMENT PRODUCTION LIST<sup>1</sup>*MARCH 13, 2002 USCCR RESPONSE TO SUBCOMMITTEE*

<u>BATES #S</u>	<u>NAME OF DOCUMENT</u>	<u>SOURCE</u>	<u>QUES.#</u>
000001-000004	U.S. Government Manual Submission	OGC	1
001825 <sup>2</sup>	U.S. Commission on Civil Rights Breakout of Departmental Obligations	BFD	2
000005-000015	USCCR Records Schedule	ASCD	13b
000016-000072	Staff comments to introduction and three chapters	OGC	14
000073-000074	Timing of Commissioner Appointments Under 4,5 and 6 year terms	OSD	15
000075-000159	McKinney Documents	BFD	10a

<sup>1</sup> USCCR offices: "OSD": Office of the Staff Director; "OGC": Office of the General Counsel; "BFD": Budget and Finance Division; and "ASCD": Administrative Services and Clearinghouse Division.

<sup>2</sup> This document is numbered with a bates stamp number (001825) from our February 22, 2002 submission and consequently is not in numerical order with this submission.



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

March 25, 2002

The Honorable Steve Chabot  
Chairman  
Subcommittee on the Constitution  
Committee on the Judiciary  
U.S. House of Representatives  
H2-362 Ford House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman:

Please find attached the documents that are responsive to questions 9bi and 9bii from your March 7, 2002 letter. The answer to question 9bi was provided in my March 13 response.

In response to inquiry 9bii: The PAU deputy director conducted approximately 12-17 briefings per year.

We trust this provides the Subcommittee with the information it needs to perform its oversight functions.

Sincerely,

A handwritten signature in black ink that reads "Les Jin".

Les Jin  
Staff Director

Enclosures

cc: The Honorable Jerrold Nadler, Ranking Member  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Jennifer C. Braceras, Commissioner  
Christopher Edley, Jr., Commissioner  
Elsie Meeks, Commissioner  
Abigail Thernstrom, Commissioner  
Victoria Wilson, Commissioner

**USCCR DOCUMENT PRODUCTION LIST<sup>1</sup>*****MARCH 22, 2002 USCCR RESPONSE TO SUBCOMMITTEE***

<b><u>BATES #S</u></b>	<b><u>NAME OF DOCUMENT</u></b>	<b><u>SOURCE</u></b>	<b><u>QUES.#</u></b>
0000160-0000290	USCCR Special Emphasis Month Materials	PAU	9bi
0000291-0000424	USCCR PAU Briefing Materials	PAU	9bii

Miscellaneous Documents Submitted by Mr. Les Jin, Staff Director, U.S. Commission on Civil Rights

THE FLORIDA ELECTION REPORT:  
DISSENTING STATEMENT BY COMMISSIONER ABIGAIL THERNSTROM AND  
COMMISSIONER RUSSELL G. REDENBAUGH

FINAL REVISION, AUGUST 17, 2001

The United States Commission on Civil Rights, charged with the statutory duty to investigate voting rights violations in a fair and objective manner, has produced a report that fails to serve the public interest. *Voting Irregularities Occurring in Florida During the 2000 Presidential Election* is prejudicial, divisive, and injurious to the cause of true democracy and justice in our society. It discredits the Commission itself and substantially diminishes its credibility as the nation's protector of our civil rights.

The Commission's report has little basis in fact. Its conclusions are based on a deeply flawed statistical analysis coupled with anecdotal evidence of limited value, unverified by a proper factual investigation. This shaky foundation is used to justify charges of the most serious nature—questioning the legitimacy of the American electoral process and the validity of the most recent presidential election. The report's central finding—that there was “widespread disenfranchisement and denial of voting rights” in Florida's 2000 presidential election—does not withstand even a cursory legal or scholarly scrutiny. Leveling such a serious charge without clear justification is an unwarranted assault upon the public's confidence in American democracy.

The statistical analysis in the report is superficial and incomplete. A more sophisticated regression analysis by Dr. John Lott, an economist at Yale Law School, challenges its main findings. Dr. Lott was unable to find a consistent, statistical significant relationship between the share of voters who were African Americans and the ballot spoilage rate.

Furthermore, Dr. Lott conducted additional analysis beyond the report's parameters, looking at previous elections, demographic changes, and rates of ballot spoilage. His analysis found *little relationship between racial population change and ballot spoilage*, and the one correlation that is found runs *counter* to the majority report's argument: An increase in the black share of the voting population is linked to a slight decrease in spoilage rates, although the difference is not statistically significant.

Nothing is more fundamental to American democracy than the right to vote and to have valid votes properly counted. Allegations of disenfranchisement are the fertile ground in which a dangerous distrust of American political institutions thrives. By basing its conclusion on allegations that seem driven by partisan interests and that lack factual basis, the majority on the Commission has needlessly fostered public distrust, alienation and manifest cynicism. The report implicitly labels the outcome of the 2000 election as illegitimate, thereby calling into question the most fundamental basis of American democracy.

What appears to be partisan passions not only destroyed the credibility of the report itself, but informed the entire process that led up to the final draft. At the Florida hearings, Governor Jeb Bush was the only witness who was not allowed to make an opening statement. The Chair, Mary Frances Berry, was quoted in the Florida press as comparing the Governor and Secretary of State to “Pontius Pilate . . . just washing their hands of the whole thing.” On March 9, six commissioners voted to issue a “preliminary assessment”—in effect, a verdict—long before the staff had completed its review of the evidence.

The report claims that “affected agencies were afforded an opportunity to review applicable portions”; in fact, affected parties were never given a look at the preliminary assessment, and had only ten days in which to review and respond to the final report, in violation of established procedures and previous promises.

Most recently, a request for basic data to which we—and indeed, any member of the public—were entitled was denied to us. The Commission hired Professor Allan Lichtman, an historian at American University, to examine the relationship between spoiled ballots and the race of voters. We asked for a copy of the machine-readable data that Professor Lichtman used to run his correlations and regressions. That is, we wanted his computer runs, the data that went into them, and the regression output that was produced. The Commission told us that it did not exist—that the data as he organized it for purposes of analysis was literally unavailable.

Professor Lichtman, who knows that as a matter of scholarly convention such data should be shared, also declined to provide it.

Even now, five weeks after our first request, we still have not received the multiple regressions and the machine-readable data that were used in them. They are the foundation upon which the Commission's report largely rests.

At the June 13 monthly Commission meeting, members of the commission staff and some commissioners argued that this document is not a proper "dissent" but a "dissenting report," and that the commission cannot allow the preparation of a dissenting report. In a July 10 memo, the staff director stated that the Commission "does not envision any Commissioner 'engag[ing] in a complete reanalysis of the staff's work.'" But it is obviously impossible to write a thorough dissent without re-analyzing the quantitative and other evidence upon which important claims have been based.

Perhaps no previous member of the commission has felt the need to write quite such a lengthy critique of a report endorsed by the majority. But the explanation may be that the Commission has never written an important report that so demanded elaborate critical scrutiny. In any event, it is curious that an agency devoted to the protection of minority rights should show so little respect for the freedom of expression of its own members who happen to disagree with the majority on an issue.

Process matters. And that is why it is important to examine, with integrity, possible violations of the electoral process in Florida and other states. When the process is right, participants on another day can revisit the outcome—use the procedures (fair and thus trusted) to debate policy or to vote again. But when the process is corrupt, the conclusions themselves (current and future) are deeply suspect. The Commission investigated procedural irregularities in Florida; it should have gotten its own house in order first.

Had the process been right, the substance might have been much better. The Commission's staff would have received feedback from Florida officials, commissioners, and other concerned parties, on the basis of which it might have revised the report. It should be consulting with commissioners in the course of drafting a report, including those who do not share the majority view. As it is, at great expense, the Commission has written a dangerous and divisive document. And thus it certainly provides no basis upon which to reform the electoral process in Florida or anywhere else.

#### SUMMARY

##### *I. The statistical analysis done for the Commission by Dr. Allan Lichtman does not support the claim of disenfranchisement.*

The most sensational "finding" in the majority report is the claim that black voters in the Florida election in 2000 were nine times as likely as other residents of the state to have cast ballots that did not count in the presidential contest. Dr. Lichtman's work does not establish this dramatic claim.

(a) *Disenfranchisement is not the same thing as voter error.* The report talks about voters likely to have their ballots spoiled; in fact, the problem was undervotes and overvotes, some of which were deliberate (the undervotes, particularly). But the rest are due to voter error. Or machine error, which is random, and thus cannot "disenfranchise" any population group. It was certainly not due to any conspiracy on the part of supervisors of elections; the vast majority of spoiled ballots were cast in counties where the supervisor was a Democrat.

(b) *The ecological fallacy:* The majority report argues that race was the dominant factor explaining whose votes counted and whose were rejected. But the method used rests on the assumption that if the proportion of spoiled ballots in a county or precinct is higher in places with a larger black population, it must be African American ballots that were disqualified. That conclusion does not necessarily follow, as statisticians have long understood. This is the problem of what is termed the ecological fallacy.

We have no data on the race of the individual voters. And it is impossible to develop accurate estimates about how groups of individuals voted (or misvoted) on the basis of county-level or precinct-level averages.

(c) *The failure to consider relevant explanatory variables:* The Commission's report assumes race had to be the decisive factor determining which voters spoiled their ballots. Indeed, its analysis suggests that the electoral system somehow worked to cancel the votes of even highly educated, politically experienced African Americans.

In fact, the size of the black population (by Dr. Lichtman's own numbers) accounts for only one-quarter of the difference between counties in the rate of spoiled ballots (the correlation is .5). And Dr. Lichtman knows that we cannot make meaningful

statements about the relationship between one social factor and another without *controlling for or holding constant* other variables that may affect the relationship we are assessing.

Although Dr. Lichtman claims to have carried out a "more refined statistical analysis," neither the Commission's report nor his report to the Commission display evidence that he has successfully isolated the effect of race per se from that of other variables that are correlated with race: poverty, income, literacy, and the like. A complex model applied to the Florida data by our own expert, Dr. John Lott, enables us to explain 70 percent of the variance (three times as much as Dr. Lichtman was able to account for) without using the proportion of African Americans in each county as a variable.

In fact, using the variables provided in the report, Dr. Lott was unable to find a consistent, statistically significant relationship between the share of voters who were African American and the ballot spoilage rate. Further, removing race from the equation, but leaving in all the other variables only reduced ballot spoilage rate explained by his regression by a trivial amount. In other words, the best indicator of whether or not a particular county had a high or low rate of ballot spoilage is not its racial composition. Other variables were more important.

(d) *The obvious explanation for a high number of spoiled ballots among black voters is their lower literacy rate.* Dr. Lichtman offers only a perfunctory and superficial discussion of the question, and fails to provide the regression results that allegedly demonstrate that literacy was irrelevant. This claim is impossible to reconcile with the Commission's own recommendation that more "effective programs of education for voters" are needed to solve the problem. Moreover, the data upon which he relies are too crude to allow meaningful conclusions. They are not broken down by race, for one thing.

(e) *First time Voters:* An important source of the high rate of ballot spoilage in some Florida communities may have been that a sizable fraction of those who turned out at the polls were there for the first time and were unfamiliar with the rules of the electoral process. Impressionistic evidence suggests that disproportionate numbers of black voters fell into this category. The majority report's failure to explore—or even mention—this factor is a serious flaw.

(f) *The Time Dimension:* Most social scientists understand that the interpretation of social patterns on the basis of observations at just one point in time is dangerously simplistic. But that is all the majority report offers. It focuses entirely on the 2000 election returns.

Dr. Lott, by contrast, did two analyses that take the time dimension into account. He looked at spoilage rates by county for the 1996 and 2000 presidential races, and compared them with demographic change. A rise in a county's black population did not result in a similar rise in spoilage rates, suggesting, again, that race was not the causal factor at work.

Dr. Lott also examined data from the 1992, 1996, and 2000 races, and found that the "percent of voters in different race or ethnic categories is never statistically related to ballot spoilage."

(g) *County-level Data v. Precinct Data:* The Commission's report, as earlier noted, estimates that black ballots were nine times more likely to be spoiled than white ballots. And it presents some precinct-level data, providing estimates based on smaller units that are likely to be somewhat closer to the truth than estimates based on inter-county variations. The report ignores the fact that the county-level and precinct-level data yielded quite different results. Ballot rejection rates dropped dramatically when the precinct numbers were examined, even though comparing heavily black and heavily nonblack precincts should have sharpened the difference between white and black voters, rather than diminishing it. Dr. Lichtman obscures this point by shifting from ratios to percentage point differences.

Dr. Lichtman's precinct analysis is just as vulnerable to criticism as his county-level analysis. It employs the same methods, and again ignores relevant variables that provide a better explanation of the variation in ballot spoilage rates. No variables other than race and the type of voting system were even considered in this analysis.

(h) *Whose Fault Was It?* The majority report lays the blame for the supposed "disfranchisement" of black voters at the feet of state officials—particularly Governor Jeb Bush and Secretary of State Katherine Harris. In fact, however, elections in Florida are the responsibility of 67 county supervisors of election. And, interestingly, in all but one of the 25 counties with the highest spoilage rates, the election was supervised by a Democrat—the one exception being an official with no party affiliation.

The majority report argues that much of the spoiled ballot problem was due to voting technology. But elected Democratic Party officials decided on the type of ma-

chinery used, including the optical scanning system in Gadsden County, the state's only majority-black county and the one with the highest spoilage rate.

(i) *The Exclusion of Florida's Hispanics:* Hispanics are a protected group under the Voting Rights Act. Moreover, the majority report speaks repeatedly of the alleged disenfranchisement of "minorities" or "people of color." One section is headed "Votes in Communities of Color Less Likely to be Counted." And yet the crucial statistical analysis provided in Chapter 1 entirely ignores Florida's largest minority group—people of Hispanic origin. The analysis in the Commission's report thus excluded more Floridians of minority background than it included.

The analysis conducted by Dr. Lichtman treats not only Hispanics, but Asians and Native Americans as well as if they were, in effect, white. He dichotomizes the Florida population into two groups, blacks and "nonblacks."

In the revised report, Dr. Lichtman did add one graph dealing with Hispanics in the appendix, but this addition to his statistical analysis is clearly only an afterthought. At the June 8 Commission meeting, Dr. Lichtman stated he looked at this issue only at the last minute. This is a strange and regrettable omission.

## II. THE TESTIMONY OF WITNESSES FAILS TO SUPPORT THE CLAIM OF SYSTEMATIC DISENFRANCHISEMENT

Based on witnesses' limited (and often, uncorroborated) accounts, the Commission insists that there were "countless allegations" involving "countless numbers" of Floridians who were denied the right to vote. This anecdotal evidence is drawn from the testimony of 26 "fact witnesses," residing in only eight of the state's 67 counties.

In fact, however, many of those who appeared before the Commission testified to the absence of "systemic disenfranchisement" in Florida. Thus, a representative of the League of Women Voters testified that there had been many administrative problems, but stated: "We don't have any evidence of race-based problems . . . we actually I guess don't have any evidence of partisan problems." And a witness from Miami-Dade County said she attributed the problems she encountered not to race but rather to inefficient poll workers: "I think [there are] a lot of people that are on jobs that really don't fit them or they are not fit to be in."

Without question, some voters did encounter difficulties at the polls, but the evidence fails to support the claim of systematic disenfranchisement. Most of the complaints the Commission heard in direct testimony involved individuals who arrived at the polls on election day only to find that their names were not on the rolls of registered voters. The majority of these cases were due to bureaucratic errors, inefficiencies within the system, and/or error or confusion on the part of the voters themselves.

## III. THE COMMISSION'S REPORT FAILED TO DISTINGUISH BETWEEN BUREAUCRATIC PROBLEMS AND ACTUAL DISCRIMINATION

Other witnesses did offer testimony suggesting numerous problems on election day. But the Commission, in discussing these problems, failed to distinguish between mere inconvenience, difficulties caused by bureaucratic inefficiencies, and incidents of possible discrimination. In its report, the complaint from the voter whose shoes were muddied on the path to his polling place is accorded the same degree of seriousness as the case of the seeing-impaired voter who required help in reading the ballot, or the African American voter who claimed she was turned away from the polls at closing time while a white man was not.

There were certainly jammed phone lines, confusion and error, but none of it added up to widespread discrimination. Many of the difficulties, like those associated with the "butterfly ballot," were the product of good intentions gone awry or the presence of many first-time voters. The most compelling testimony came from disabled voters who faced a range of problems, including insufficient parking and inadequate provision for wheelchair access. This problem, of course, had no racial dimension at all.

## IV. THE REPORT'S INTERPRETATION OF THE VOTING RIGHTS ACT DISTORTS THE LAW

The report essentially concludes that election procedures in Florida were in violation of the Voting Rights Act, but the Commission found no evidence to reach that conclusion, and has bent the 1965 statute totally out of shape.

The question of a Section 2 violation can only be settled in a federal court. Plaintiffs who charge discrimination must prevail in a trial in which the state has a full opportunity to challenge the evidence. To prevail, plaintiffs must show that "racial politics dominate the electoral process," as the 1982 Senate Judiciary Committee Report stated in explaining the newly amended Section 2.

The majority's report implies that Section 2 aimed to correct all possible inequalities in the electoral process. Had that been the goal, racially disparate registration and turnout rates—found nearly everywhere in the country—would constitute a Voting Rights Act violation. Less affluent, less educated citizens tend to register and vote at lower rates, and, for the same reasons, are likely to make more errors in casting ballots, especially if they are first time voters. Neither the failure to register nor the failure to cast a ballot properly—as regrettable as they are—are Section 2 violations.

Thus, despite the thousands of voting rights cases on the books, the majority report cannot cite any case law that suggests punch card ballots, for instance, are potentially discriminatory. Or that higher error rates among black voters suggest disenfranchisement.

There is good reason why claims brought under Section 2 must be settled in a federal court. The provision requires the adjudication of competing claims about equal electoral opportunity—an inquiry into the complex issue of racial fairness. The Commission is not a court and cannot arrive at verdicts that belong exclusively to the judiciary. Yet, while the majority report does admit that the Commission cannot determine if violations of the Voting Rights Act have actually occurred, in fact it unequivocally claims to have found “disenfranchisement,” under the terms of the statute.

#### V. THE REPORT MISTAKENLY HOLDS FLORIDA STATE OFFICIALS RESPONSIBLE FOR THE CONDUCT OF ELECTIONS

The report holds Florida's public officials, particularly the governor and secretary of state responsible for the discrimination that it alleges. “State officials failed to fulfill their duties in a manner that would prevent this disenfranchisement,” it asserts. In fact, most of the authority over elections in Florida resides with officials in the state's 67 counties, and all of those with the highest rates of voter error were under Democratic control.

The report charges that the governor, the secretary of state and other state officials should have acted differently in anticipation of the high turnout of voters. What the Commission actually heard from “key officials” and experts was that the increase in registration, on average, was no different than in previous years; that since the development of “motor voter” registration, voter registration is more of an ongoing process and does not reach the intensity it once did just prior to an election; and that, in any event, registration is not always a reliable predictor for turnout.

The majority report also faults Florida state officials with having failed to provide the 67 supervisors of elections with “adequate guidance or funding” for voter education and training of election officials. What the report pointedly ignores is that the county supervisors are independent, constitutional officers who make their budget requests to the boards of county commissioners, not to the state.

#### VI. THE COMMISSION'S ANALYSIS OF THE FELON LIST IS SLANTED

The report asserts that the use of a convicted felons list “has a disparate impact on African Americans.” “African Americans in Florida were more likely to find their names on the list than persons of other races.” Of course, because a higher proportion of blacks have been convicted of felonies in Florida, as elsewhere in the nation. But there is no evidence that the state targeted blacks in a discriminatory manner in constructing a purge list, or that the state made less of an effort to notify listed African Americans and to correct errors than it did with whites. The Commission did not hear from a single witness who was actually prevented from voting as a result of being erroneously identified as a felon. Furthermore, whites were twice as likely as blacks to be placed on the list erroneously, not the other way around.

The compilation of the purge list was part of an anti-fraud measure enacted by the Florida legislature in the wake of a Miami mayoral election in which ineligible voters cast ballots. The list for the 2000 election was over-inclusive, and some supervisors made no use of it. (The majority report did not bother to ask how many counties relied upon it.) On the other hand, according to the *Palm Beach Post*, more than 6,500 ineligible felons voted.

Based on extensive research, the *Miami Herald* concluded that the biggest problem with the felon list was not that it wrongly prevented eligible voters from casting ballots, but that it ended up allowing ineligible voters to cast a ballot. The Commission should have looked into allegations of voter fraud, not only with respect to ineligible felons, but allegations involving fraudulent absentee ballots in nursing homes, unregistered voters, and so forth. Across the country in a variety of jurisdictions, serious questions about voter fraud have been raised.



VII. THE REPORT'S CRITICISM OF FLORIDA LAW ENFORCEMENT OFFICIALS IS UNWARRANTED

Despite clear and direct testimony during the hearings, as well as additional information submitted by Florida officials after the hearings, the report continues to charge the Florida Highway Patrol with behavior that was "perceived" by "a number of voters" as "unusual" (and thus somehow "intimidating") on election day. In fact, only two persons are identified in the report as giving their reactions to activities of the Florida Highway Patrol on election day. One testified regarding a police checkpoint, and the other testified that he found it "unusual" to see an empty police car parked outside of a polling facility. Neither of these witnesses' testimony indicates how their or others' ability to vote was impaired by these events.

VIII. PROCEDURAL IRREGULARITIES AT THE U.S. COMMISSION ON CIVIL RIGHTS

Procedural irregularities have seriously marred the report. The Commission ignored not only the rules of evidence, but the agency's own procedures for gathering evidence. By arguing that "every voice must be heard," while in fact stifling the voice of the political minority on the Commission itself, it is guilty of gross hypocrisy.

Among the procedural problems in the drafting of the report:

- Republican-appointed commissioners were never asked for any input in the composition of the witness list or in the drafting of the report itself. In fact, at one point, we were denied access to the witness lists altogether prior to the hearing. An outside expert with strong partisan affiliations was hired to do a statistical analysis without consultation with commissioners.
- At the hearings in Florida, the secretary of state and other Republican witnesses were treated in a manner that fell far short of the standard of fair, equal and courteous.
- The majority reached and released its verdict, in the form of a "preliminary assessment," long before the analysis was complete/
- Florida authorities who might be defamed or degraded by the report were not given the proper time to review the parts of the report sent to them—to say nothing of their right to review the report in its entirety.
- Affected agencies were not given adequate time to review applicable provisions, and a draft final report was made available to the press that included no corrections or amendments on the basis of affected agency comments.
- Commissioners were given only three days to read the report—one less day than three major newspapers had—before its approval by the Commission at the June 8 meeting. This and other aspects of the process were contrary to the schedule, and made careful, detailed feedback at the time literally impossible.

In its efforts to investigate procedural irregularities in Florida, the Commission has clearly engaged in serious procedural irregularities of its own. By consistently violating its own procedures for fair and objective fact-finding, the Commission undermines its credibility and calls into question the validity of its work.

I. THE STATISTICAL ANALYSIS DONE FOR THE COMMISSION BY DR. ALLAN LICHTMAN DOES NOT SUPPORT THE CLAIM OF DISENFRANCHISEMENT

The most sensational "finding" in the majority report, and the one that received most attention in the press, is the claim that black voters in the Florida election in 2000 were allegedly nine times as likely as other residents of the state to have cast ballots that did not count in the presidential contest, and that 52 percent of all disqualified ballots were cast by black voters in a state whose population is only 15 percent black. This charge made the headlines, but it is nothing more than a wild guesstimate.

Dr. Lichtman's statistical analysis is badly flawed, strongly slanted to support preconceived conclusions that cannot withstand careful scrutiny. The assertion that votes by African Americans were nine times as likely to be rejected as those by whites, we will show in detail below, is completely unsubstantiated. Dr. Lichtman's other estimates are not much more reliable, and he fails to examine the impact of variables that were of great importance in determining the outcome.

Below we provide a broader and more sophisticated regression analysis prepared for us by an econometrician, an analysis which clashes with that provided in the majority report on virtually every important point.

*Disenfranchisement is not the same as voter error.*

It is important to note at the outset that the majority report's account of Dr. Lichtman's findings employs language that serves to obscure the true nature of the phenomenon under investigation. These pages are filled with references to the "disenfranchisement" of black voters, as if African Americans in Florida last year were faced with obstacles comparable to poll taxes, literacy tests, and other devices by which southern whites in the years before the Voting Rights Act of 1965 managed to suppress the black vote and keep political office safely in the hands of candidates committed to the preservation of white supremacy.

Black votes, we are told again and again, were "rejected" in vastly disproportionate numbers. "Countless Floridians," the report concludes, were "denied . . . their right to vote," and this "disenfranchisement fell most harshly on the shoulders of African Americans."<sup>1</sup> In a particularly masterful bit of obfuscation, the majority report declares that, "persons living in a county with a substantial African American or people of color population are more likely to have their ballots spoiled or discounted than persons living in the rest of Florida." This alleged fact, the reader is told, "starts to prove the Florida election was not 'equally open to participation' by all."<sup>2</sup>

Let us be clear: According to Dr. Lichtman's data, some 180,000 Florida voters in the 2000 election, 2.9 percent of the total, turned in ballots that did not indicate a valid choice for a presidential candidate and thus could not be counted in that race. Six out of ten of these rejected ballots (59 percent) were "overvotes"—ballots that were disqualified because they indicated more than one choice for president. Another 35 percent were "undervotes," ballots lacking any clear indication of which presidential candidate the voter preferred.<sup>3</sup> (The other 6 percent were invalid for some other unspecified reason. Since they are ignored in the majority report, they will be here as well.)

Hence the chief problem in Florida was voters who cast a ballot for more than one candidate for the same office, and the second most common problem was voters who registered no choice at all. Ballots were "rejected," in short, because it was impossible to determine which candidate—if any—voters meant to choose for president.

Some of these overvotes and undervotes, it should be noted, may have been the result of deliberate choices on the part of voters. In fact, Chair Mary Frances Berry remarked at the hearing in Miami that she herself has sometimes "over-voted deliberately."

Chair Berry cannot be the only voter in the United States to make such a choice. According to the exhaustive investigation of the ballots conducted by the *Miami Herald*, 10 percent of all the overvotes in the state showed votes for both Bush and Gore.<sup>4</sup> Some of these voters, it is reasonable to assume, were attempting to convey the message that either candidate would be equally acceptable. Some voters in Citrus County put giant X's through the names of all presidential candidates, perhaps to indicate "none of the above."<sup>5</sup>

Similarly, some of the undervotes under discussion here must be recorded by people who could not settle on a choice for president but who turned up to register their preferences in other contests. We know from the *Miami Herald's* inspection of the 61,111 undervoted ballots in the state that almost half—46.2 percent—had no markings at all for president.<sup>6</sup> It seems reasonable to assume that many of them did not *intend* to register a choice among the presidential candidates, and had come to the polls to vote for other offices. According to exit polls in Miami-Dade County, 1 percent of the voters made choices for other offices, but not in the presidential race.<sup>7</sup> If so, that would account for 56 percent of all the undervotes in Miami-Dade.

<sup>1</sup> Report, 154.

<sup>2</sup> Report, 18.

<sup>3</sup> Report, 21. Note that later in the report, on page 148, the majority asserts that it was highly anomalous that 63 percent of spoiled ballots in Palm Beach County were overvotes, and blames the alleged anomaly on the infamous butterfly ballot. The pattern, according to the report, was "just the opposite of what we normally observe, which is five percent or less of the spoiled ballots." How could the author of this passage possibly think that 5 percent or less was the norm for overvotes in Florida when the Lichtman figures cited earlier in the report reveals that fully 59 percent of all the spoiled ballots in the state were overvotes?

<sup>4</sup> Martin Merzer, *The Miami Herald Report: Democracy Held Hostage* (New York: St. Martin's Press, 2001), 194

<sup>5</sup> *Ibid.*, 195.

<sup>6</sup> *Ibid.*, 230–231.

<sup>7</sup> Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton, N.J.: Princeton University Press, 2001), 61.

If half of these unmarked ballots in Florida were produced by voters who really did not want to make a choice for president, that would reduce the number of so-called "spoiled ballots" in the state from 180,000 to less than 150,000. It would be interesting if we could make a similar statistical estimate of the proportion of over-voters who did it deliberately; unfortunately that is impossible.

What is clear is this: In these instances, overvoting and undervoting are not "problems" that require "remedies." And they certainly are not evidence that anyone is being "disenfranchised." They represent the actual preferences of the voters in question, and it is misleading to label them "spoiled" ballots at all.

The majority would have us believe that "countless" numbers of Floridians who were legally entitled to vote had their ballots "spoiled." In fact, we are not talking about "countless" ballots. We are talking about 180,000 invalid ballots, *minus* those that did not indicate a clear presidential choice because the voter had not decided on a presidential preference. Thus the 180,000 figure, 2.9 percent of the total, is an upper bound estimate of the true figure, which is undoubtedly smaller by an unknown amount. The county-by-county figures on so-called spoiled ballots are likewise exaggerations, biased upward to an unknown amount.

Still, there are overvotes and undervotes that undoubtedly did not reflect the will of the voters. What accounts for them? The opening paragraph of the introduction to the majority report suggests that the issue is whether "votes that were cast were properly tabulated."<sup>8</sup> What does this mean? Are we to believe African Americans cast their ballots correctly on election day, but that many of their ballots were incorrectly tabulated by the machines, or the people who conducted manual recounts in some counties? There is no evidence whatsoever to support that implication.

Some of the 180,000 rejected ballots may have the result of machine error, of course—but very few. Machine error, according to experts who have studied it, is rare, involving at most 1 in 250,000 votes cast.<sup>9</sup> And machine error is obviously random, and thus cannot "disenfranchise" any population group. No one has yet shown that a VotoMatic machine can be programmed to distinguish black voters from others and to record votes by African Americans in such a way as to facilitate their rejection.

There is only one other explanation of what the Commission tentatively describes as "disenfranchisement." The problem is *voter error*, a term that astonishingly appears nowhere in the majority report. This is the central fact the majority report attempts to obscure. Some voters simply did not fill out their ballots according to the instructions. They failed to abide by the very elementary rule that you must vote for one and only one candidate for the office of president of the United States, and therefore their attempt to register their choice failed. Their ballots were rejected, and their votes did not count.

### *The Ecological Fallacy*

Did African American voters in the 2000 Florida election have more difficulty completing their ballots correctly than did other citizens of the state, and hence have a higher rate of ballot rejection? Quite possibly so, but Dr. Lichtman's estimates upon which the Commission relied are open to very serious doubt. At best, they are highly exaggerated, and strong evidence (Dr. Lott's research, discussed below) suggests they are entirely wrong.

How can we figure out whether there were major racial differences in the rate of voter error or ballot spoilage in the 2000 election? We have no data whatever on the race of those individuals who cast invalid ballots. We have secret ballots in the United States, and accordingly cannot know how any individuals actually voted. Thus we cannot know with any precision how particular ethnic or racial groups voted, or at what rate their ballots were actually counted.<sup>10</sup> Whatever conclusions we draw about the matter must be based on estimates that will be susceptible to error. The question is whether the analysis and interpretations offered in the major-

<sup>8</sup>Report, 1.

<sup>9</sup>According to the Caltech/MIT Voting Project, "state and federal voting machine certifications tolerate very low machine failure rates: no more than 1 in 250,000 ballots for federal certification and no more than 1 in 1,000,000 in some states." The problem, according to these investigators, has to do with "how people relate to the technologies. . . ." See the Caltech/MIT Voting Project, "A Preliminary Assessment of the Reliability of Existing Voting Equipment," February 1, 2001, 13.

<sup>10</sup>Exit polls are commonly used to estimate how particular groups voted, and even they are far from perfect. One flaw is that absentee voters are not represented at all. In any event, we can't tell from an exit poll whether someone failed to complete a valid ballot; if they thought they had erred, presumably they would have had it invalidated and have received another.

ity report are at least pretty good approximations of reality. There are many reasons to doubt that they are.

The majority report attempts to draw conclusions about this important matter by examining county-level, and to a limited extent, precinct-level data. It argues that race was the dominant factor explaining whose votes counted and whose votes were rejected. The method employed to reach that conclusion rests on the assumption that, if the proportion of spoiled ballots tends to increase across counties or across precincts as the proportion of black residents in those counties increases, it must be African American voters whose ballots were disqualified. This simple methodology may seem intuitively appealing—but it is well established that it is often wrong.

Statisticians have long understood the difficulty of making such inferences due to a phenomenon that is known in the social science literature as the “ecological fallacy.” The classic discussion of this issue is in an article that was published half a century ago in the *American Sociological Review*.<sup>11</sup> In that paper, W.G. Robinson reported that he had examined the correlation between the proportion of a state’s population that was foreign-born and the state’s literacy rate. He found, surprisingly, a positive correlation between the literacy rate and the proportion of immigrants in the population. Contrary to the conventional wisdom, the larger the foreign-born population, the higher the overall literacy rate was in a state. The correlation was .53, a bit higher than the one found by Dr. Lichtman between race and ballot spoilage rates.

Did that really prove that Americans born abroad were more literate, on the average, than those born within the United States? Robinson chose this case because he had reliable data against which to check the ecological estimate; census data were available for *individuals*. When Robinson analyzed it, he found that country of birth was *negatively* correlated with literacy; the actual figure was  $-.11$ . Immigrants were actually significantly less likely than natives to be literate, despite the strong state-level correlation suggesting just the opposite.

The state-by-state correlation gave a completely false picture, because it happened that the states with highly literate populations were also more developed economically and attracted more immigrants because jobs were available there. New York, for example, was more literate than Arkansas. It also had a higher fraction of immigrants in its population, but not enough to pull the state average literacy rate down very much.

A more recent example derives from the work of an eminent mathematical statistician at the University of California at Berkeley, David A. Freedman.<sup>12</sup> Using data from the 1995 Current Population Survey, Freedman found that the correlation between the proportion of immigrants in the population of the 50 states and the proportion of families with incomes over \$50,000 in 1994 was .52. Foreign-born Americans, judging from this ecological correlation, were considerably more affluent than their native-born neighbors. But the evidence also allowed Freedman to look at incomes on the individual level. When you do that, it turns out that in the nation as a whole, 35 percent of native-born American families were in the \$50,000 and over income bracket—but only 28 percent of immigrant families were. The true correlation between being foreign-born and having a high family income was not the .52 estimated from state-level data; it was instead a mildly *negative* correlation of  $-0.05$ .

In this instance, too, estimates based on ecological correlations were not just a bit off, a little imprecise but still close enough to the truth for most purposes. They were way off the mark, and indeed had falsely transformed relationships that were actually negative into positive ones.

The problem of the ecological fallacy afflicts all of the statistical analyses Dr. Lichtman did for the majority report. We must remember that counties do not vote. Precincts do not vote. Only individuals vote. It is impossible to develop accurate estimates about how groups of individuals vote (or misvote) on the basis of county-level or precinct-level averages.

In his appearance before the June 8, 2001 meeting of the Commission on Civil Rights, Dr. Lichtman sounded a note of caution about his findings. He declared that a correlation does not “by itself prove” that there were “disparate rates” at which ballots by African Americans and “non-African Americans” were rejected.<sup>13</sup> That is certainly true. But he went on to claim that the “more advanced statistical proce-

<sup>11</sup> W.G. Robinson, “Ecological Correlations and the Behavior of Individuals,” *American Sociological Review*, vol. 15 (June, 1950), 351–357.

<sup>12</sup> D.A. Freedman, “Ecological Inference and the Ecological Fallacy,” University of California at Berkeley Department of Statistics Technical Report No. 549, Oct. 15, 1999. This paper will appear as a chapter in the forthcoming *International Encyclopedia of the Social Sciences*.

<sup>13</sup> Transcript of June 8, 2001 meeting, 42.

dures" he employed could reliably do so. Unfortunately, that is not true. The use of ecological regression techniques does not solve the problem of the ecological fallacy, because it depends upon exactly the same aggregated data as simple correlational analysis, and makes the same, often incorrect, "constancy assumption." It assumes that there is no relationship between the composition of geographical areas and the relationship in question, when in fact there often is.

If the information utilized in an analysis is based on averages for geographical units, whether they are counties or precincts, the results will necessarily be imprecise and they may be just plain wrong, as in the example of immigrant literacy levels given above. When David Freedman did an ecological regression of state-level data to assess the relationship between immigration and family income, he found that it estimated that fully 85 percent of foreign-born American families had 1994 family incomes above \$50,000. But the true figure, from individual-level data, was really only 28 percent.<sup>14</sup> Ecological regression, in this case, yielded results that were wildly mistaken. In another paper, Freedman provided a similar critique of ecological regression estimates of political behavior specifically, in instances in which individual-level data happened to be available, and he found ecological regression estimates to have been highly unreliable.<sup>15</sup>

In sum, inferences about individual behavior on the basis of the average distribution of some characteristic across geographical units are sometimes wildly inaccurate. They must be examined with great caution and skepticism. The majority report does not display the necessary caution about what the facts reveal. A more searching analysis, summarized below and spelled out in Appendix I, demonstrates how misleading Dr. Lichtman's findings are.

#### *The Commission's Failure to Analyze Factors Other Than Race*

Was race itself a decisive factor in determining which voters spoiled their ballots in the 2000 election in Florida, as the majority report contends? Did the electoral system somehow work in such a way that even highly educated, politically experienced African Americans, for example, cast ballots that were somehow spoiled in some unspecified and mysterious way? The majority report claims that the answer was yes, though it provides no indication of how the process worked to produce that result. Dr. Lichtman's statistical analysis, the report claims, demonstrates that such was the case.

It does nothing of the sort, even if we set aside for the sake of argument the serious doubts most statisticians have about the accuracy of any estimate based on an ecological regression or correlation. The report begins with the simple correlation between the percentage of African American registered voters in Florida's counties and the percentage of spoiled ballots. That correlation is .50.<sup>16</sup> Speaking in statistical shorthand, that "explains" 25 percent of the total variance across the counties. (It doesn't necessarily "explain" anything in ordinary language, we shall see later).

In other words, if you want to know why some Florida counties have a high and some a low rate of spoiled ballots, knowing their racial composition only accounts for *one quarter* of the difference.

Social scientists know that a simple correlation of about .5 between two variables has very little meaning. We cannot make meaningful statements about the relationship between one social factor and another without *controlling for* or *holding constant* other variables that may affect the relationship we are assessing. Since no other variables are included in this correlation, anyone who ever took Statistics 101 would realize that it is of just about zero value.

The Commission's report acknowledges the need for "a more refined statistical analysis" of this matter. It notes that "an obvious question" was "presented" by the findings of the simple correlation. "Is there some other factor that better explains this disparity of ballot rejection rates?" That certainly is a crucial question. "The answer," the commission assures us, "is no."

The first thing to note about this key passage is that it doesn't sound like anything a sophisticated social scientist would write. To say that the issue is whether "some other factor better explains" a disparity implies that the analyst, like a voter casting a ballot for president, must pick one and only one candidate. The question that a "refined statistical analysis" would ask is not whether some of other single

<sup>14</sup>The explanation is that immigrants tend to be attracted to the richer states—California and New York rather than Tennessee and Mississippi. Thus their presence is associated with high average incomes at the state level, but that does not mean that *their* average incomes are especially high.

<sup>15</sup>D. A. Freedman, S. P. Klein, M. Ostland, and M. Robert, "On 'Solutions' to the Ecological Inference Problem," *Journal of the American Statistical Association*, vol. 93 (December 1998), 1518–1523.

<sup>16</sup>Report, 21.

factor "better explains" something. It would ask what combination of factors best explains the phenomenon, and what causal weight may be attributed to each of these factors. Such a complex determination is precisely the purpose of multivariate regression analysis.

Furthermore, the claim that there "no other factor . . . better explains" the disparity in ballot rejection rates implies that many possibly relevant factors have been analyzed by Dr. Lichtman. The report states explicitly that he did a regression that "controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category." It also claims that he did a similar regression analysis for counties that used punch card or optical scanning technology recorded centrally. The discussion clearly implies that various other factors were also considered, but were found to be of no significance—not worth mentioning. Appendix I of Dr. Lichtman's report gives county-level values for such variables as median income and percent living in poverty, and the reader naturally assumes that all of these were examined in his "more refined statistical analysis." Perhaps they were, but since Dr. Lichtman does not provide the actual results of the regression analyses, it is impossible to tell.

This failure to spell out necessary details is in striking contrast to a new book about the Florida election by Judge Richard Posner. Although *Breaking the Deadlock* is aimed at a general audience, unlike Dr. Lichtman's report, Judge Posner nonetheless includes seven tables that provide the complete details of the regression analyses that he performed to determine the sources of the undervotes and overvotes in Florida.

The "refined statistical analysis" provided by Dr. Lichtman, we conclude after careful study, consists of nothing more than adding two measures of education (very inadequate measures, we shall argue below) and controlling for voting technology. And we have to take Dr. Lichtman's word about even those results, since he does not supply the details. Competent social scientists can have long arguments about the interpretations of the results of a regression analysis. It is regrettable that the Civil Rights Commission expects us to take its claims on faith.

What about all the other variables that might have influenced rates of ballot spoilage? Poverty levels would be one good example. Senator McConnell asked Dr. Lichtman specifically about the possible role of poverty at the June 27 hearing of the Senate Committee on Rules and Administration, and received a completely non-responsive answer that dealt not with poverty but with education. This seemed puzzling to us. Dr. Lichtman, after all, is no absent-minded professor who has never learned to listen to questions carefully. He has served as an expert witness in federal court on more than five dozen voting rights cases. We could be wrong, but we suspect that the honest answer to the question was that Dr. Lichtman had no idea whether poverty influenced ballot spoilage rates because he had failed to include it as a variable in his regression analysis.

The supposed refinements in Dr. Lichtman's regression analysis did not include using poverty rates as a variable, as far we can tell. Nor did they include measures of median family income, population density, proportions of first-time voters, or age structure, to name a few about which census data is readily available. So when the report declares that the answer to the question of whether other factors could have produced the ballot is "no," it is deceptive. In fact, Dr. Lichtman has no idea what role "other factors" like poverty may have played, because he did not take them into account in his analysis.

Although the commission refused—and still refuses—to provide us the machine readable data Dr. Lichtman used in his analysis, we were able to assemble the necessary material for our own analysis. We were fortunate in being able to enlist the help of a first-rate economist, Dr. John Lott of the Yale Law School. Dr. Lott agreed to evaluate the work of the commission and of Dr. Lichtman, and even to gather additional data of his own to further extend the analysis. Dr. Lott's report, with accompanying figures and tables, appears as an appendix to this statement.

Dr. Lott ran a series of regressions, varying the specifications in an effort to replicate Dr. Lichtman's results. Using all the variables reported in Appendix I in the majority report, he was unable to find a consistent, statistically significant relationship between the share of voters who were African American and the ballot spoilage rate. He found that the coefficient on the percent of voters who were black was indeed positive, but it was statistically insignificant. The chance that the relationship was real was only 50.3 percent, just about the chance of getting tails to come up on any one coin toss and far below the 95 percent significance level commonly demanded in social science.

Furthermore, when Dr. Lott analyzed the data using a specification that implied that the share of African American voters in a county *was* significantly related to the level of ballot spoilage, he found that it explained hardly any of the overall vari-

ance. Removing race from the equation but leaving in all the other explanatory variables only reduced the amount of ballot spoilage explained by his regression from 73.4 percent to 69.1 percent, a mere 4.3 percentage point reduction (see Lott's Table 3 in the attachment).

Indeed, in none of the other specifications provided in Dr. Lott's Table 3 did taking racial information out of the analysis but leaving in other variables reduce by more than 3 percent the amount of variance in the spoiled ballot rate that is explained. *Consequently, it simply is not true that the best indicator of whether or not a particular county had a high or low rate of ballot spoilage is its racial composition.* Dr. Lichtman's claims to the contrary appear to be based on a very narrow and incomplete analysis that failed to control for hardly any variables but race.

### *Was Education the Problem?*

Although it does not take a high level of literacy to follow the instruction, "Vote for ONE of the following," or "Fill in the box next to the name of the candidate you wish to vote for," it does take some reading ability. We know that some Americans today, regrettably, find it extremely difficult to understand even the simplest written instructions. And, unfortunately, this group is disproportionately black. The U.S. Department of Education's 1992 Adult Literacy Study found that 38 percent of African Americans—but only 14 percent of whites—ranked in the lowest category of "prose literacy," which was defined as being unable to "make low-level inferences based on what they read and to compare or contrast information that can easily be found in [a] text."<sup>17</sup>

Black Americans, the study found, were 2.7 times as likely as whites to have the lowest level of literacy skills. Likewise, the 1998 National Assessment of Educational Progress found that 43 percent of African American 12th-graders had reading skills that were "Below Basic," as compared to just 17 percent of whites.<sup>18</sup> Black students were 2.5 times as likely as whites to lack elementary reading skills. Among adults employed full-time, blacks are 4.1 times more likely than whites to be in the lowest prose literacy category.<sup>19</sup>

National studies provide no data on Florida specifically. However, we know from the National Assessment of Educational Progress that black 4th- and 8th-graders in Florida (no state-level data is available for 12th-graders) are no better readers than their counterparts elsewhere. Indeed, their scores are below the national average for African Americans.<sup>20</sup> No fewer than 57 percent of Florida's black 8th-graders in 1998 were Below Basic in reading, 10 points above the national average for African Americans, and 2.7 times as high as the white figure.

The majority report, though, denies that racial differences in literacy levels could be the source of the problem. It devotes only a brief paragraph to the matter, claiming that "a multiple regression analysis that controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category failed to diminish the relationship between race and ballot rejection."<sup>21</sup>

But the regression results themselves are not provided for the critical reader to assess. When one turns to Dr. Lichtman's actual report for greater illumination, one finds nothing more than the exact language used in the commission report. This is a cavalier way to treat an issue as serious as this one. We have specifically and repeatedly asked the commission to provide us with the details of this regression analysis performed by Dr. Lichtman and the data on which it was based. But our requests have been denied.

Anyone uncomfortable with being asked to take at face value Dr. Lichtman's claim that literacy is irrelevant in explaining ballot spoilage should examine the very different analysis of the question presented in Judge Richard Posner's new study. Describing the results of his regression analysis in full detail, Judge Posner reaches the conclusion that it was "not because black people in Florida are racially distinct, but because they are poorer and less literate on average, that they are likely to encounter greater difficulty than whites in coping with user-unfriendly voting systems."<sup>22</sup>

<sup>17</sup>National Center for Education Statistics, *Adult Literacy in America: A First Look at the Results of the National Adult Literacy Survey*, National Center for Education Statistics (Washington, D.C.: U.S. Government Printing Office, 1993), 18, 113.

<sup>18</sup>National Center for Education Statistics, *NAEP 1998 Reading Report Card for the Nation and the States*, NCES 1999-500 (Washington, D.C.: U.S. Department of Education, 1999), 70.

<sup>19</sup>National Center for Education Statistics, *Literacy in the Labor Force: Results from the National Adult Literacy Survey*, NCES 1999-470 (Washington, D.C.: U.S. Department of Education, 1999), 57.

<sup>20</sup>NAEP 1998 Reading Report Card, 260, and data from the NAEP website.

<sup>21</sup>Report, 22; Lichtman Report, 6.

<sup>22</sup>Posner, *Breaking the Deadlock*, 81.

The claim that the incidence of ballot spoilage or voter error is unrelated to education is counter-intuitive. It is also extremely puzzling, because just a few pages later in the same chapter the report addresses possible solutions to the problem. It urges the adoption of optical scanning systems with immediate feedback, what the report terms a "kick out" feature to advise the voter that the ballot is not complete—that it gave no vote or too many votes for president, for example.<sup>23</sup> The point of a "kick out" system is thus to reduce *voter error*, although the Commission Report studiously avoids any mention of that term. Voters who are able read and follow the simple directions on the voting machine do not need any "kick out" system to advise them of their mistakes.

The report then goes on to say that even this reform would not completely "eliminate the disparity between the rates at which ballots cast by African Americans and whites are rejected." It estimates that it would only cut the disparity by about half. What else could be done? The Commission's answer is "effective programs of education for voters, for election officials, and for poll workers."<sup>24</sup>

The commission majority seems to be declaring both that:

1. The lower average level of literacy among Florida's blacks has nothing to do with the allegedly higher rate of voter error by blacks; and
2. The solution to this problem is for the state of Florida to launch a huge new program designed to educate black voters on how to vote successfully, and to better instruct election officials and poll workers how to assist them.

The logic eludes us.<sup>25</sup>

#### *How Many of the Spoiled Ballots Were Cast by First-time Voters?*

A closely related and complementary explanation of what the majority report claims was a racial difference in rates of ballot spoilage is that an unusually high proportion of the blacks who voted in Florida in 2000 were first-time voters. According to estimates widely cited in the press, as many as 40 percent of the African Americans who turned up at the polls in Florida in November had never voted before.

It is not clear whether this was indeed true. Recently released figures from Florida's Division of Elections indicate that 10 percent of the voters who cast a ballot in November 2000 were African American, up only slightly from the 9.5 percent in 1996.<sup>26</sup> Earlier estimates that blacks accounted for as much as 15 percent of the electorate were based on exit polls conducted by the Voter News Service, yet another indication of the fallibility of estimates coming from that organization. This evidence suggests that if an unusually large number of blacks voted for the first time in 2000, their numbers must have been largely offset by a unusually large drop in the numbers of more experienced black voters turning out, which seems unlikely.

<sup>23</sup> Report, 37.

<sup>24</sup> Report, 34.

<sup>25</sup> It should be noted that the data that are available on literacy as so crude that it is hard to draw any solid conclusions by looking at variations across counties. The data are "synthetic estimates of adult literacy proficiency" derived from the U.S. Department of Education's 1992 National Adult Literacy Survey, available in National Institute for Literacy, *The State of Literacy in America: Estimates at the Local, State, and National Levels* (Washington, D.C.: 1998), and on a number of web sites. The best electronic source for them is <<http://www.casas.org>>, where they may be found by doing a search for adult literacy. The estimates for Florida counties are "synthetic," because the 1992 NALS did not include enough sample members living in Florida to allow for any conclusions about the state, much less about individual counties.

They have wide confidence intervals—an average of 6 percent. More important, the literacy data are *not* broken down by race. So they cannot tell us anything about whether the small fraction of a county's voters who failed to cast a ballot successfully were people who had difficulty reading and *what the racial composition of that group might be*. Remember that the highest rate of ballot spoilage in any county was 12.4 percent, and that it was below 5 percent in nearly two-thirds of the counties. So we are talking about a very small group, and one whose presence is not likely to show in county-wide averages. Palm Beach County, for example, led the state in the number of spoiled ballots—nearly 30,000. Some 6.4 percent of all the ballots cast there were invalid. The proportion of Palm Beach residents who ranked in the bottom literacy category was 22 percent, a little below the state average of 25 percent. And the proportion who had attended college was 48 percent, again above the state average. But this does not allow us to conclude that the 6.4 percent of Palm Beach voters who failed to complete their ballots successfully were not primarily people who had difficulty in reading, comprehending, and following ballot instructions. The only reliable way of assessing the impact of literacy on ballot spoilage would be to administer the 45-minute NALS test to a representative sample of voters in each geographic unit used in the analysis.

<sup>26</sup> Frank J. Murray, "Florida's Black Voter Turnout Grossly Overstated," *Washington Times*, July 11, 2001.



Nevertheless, Dr. Lichtman did not know what the figures only released in July of 2001 would show. He must have been aware of widespread reports in the press that a flood of inexperienced black voters came to the polls in Florida last year, and that many had problems figuring out how to cast their ballots. It is thus startling and revealing that neither the majority report nor Dr. Lichtman's report even *mention* this as a possible source of voter error, much less choose to investigate it. Certainly, it was a variable of possible relevance, and there were data available that could have been used in a regression analysis.

*The Missing Dimension: The Failure to Analyze Change Over Time*

All of the statistical analysis developed by Dr. Lichtman concerns one moment in time-election day, November 2000. It is purely "cross-sectional" analysis. Most social scientists and historians recognize that the interpretation of social patterns on the basis of observations at just one point in time is fraught with peril. Relationships suggested by such analyses often do not hold up when the dimension of change over time is added. Earlier data concerning the same phenomenon should be examined. It is curious that a professional historian like Dr. Lichtman did not choose to place the 2000 election results in broader perspective by examining prior Florida elections. Surely he did not think that there was never an undervote or an overvote in Florida before *Bush v. Gore*.

Dr. Lott did two analyses that take the time dimension into account. First, he looked at spoilage rates by county for the 1996 and 2000 presidential races and asked how they might have been affected by changes in the racial demographics of those counties.

If the Commission's report's simple link between race and "disenfranchisement" were true, counties that had a sharp rise in the proportion of African American residents would be expected to also see a strong increase in rates of ballot spoilage, and those in which the black population was shrinking proportionally would be expected to have a declining rate of ballot spoilage.

But when you look at the scatter plots in Dr. Lott's report (Figures 1-4), the picture looks quite different. There appears to be *little relationship at all between racial population change and ballot spoilage*, and the one correlation that he finds runs counter to the majority report's argument: An increase in the black share of the voting population is linked to a slight decrease in spoilage rates, although the difference is not statistically significant.

For a second analysis, Dr. Lott compiled data on voting in the 1992 and 1996 as well as 2000 presidential elections. In the set of regressions he provides in his Table 5, the "percent of voters in different race or ethnic categories is never statistically related to ballot spoilage." In the analysis supplied in his Table 6, which groups voters by age and sex and well as race, he found a very complex picture, with a positive link between the size of black population in five of ten age and sex categories, but just the opposite with the other five. To explain this strange pattern would require further research. Suffice it to say here that it is hard to imagine how discrimination could work against African American females in the 30-39 age bracket but in favor of black males of the same age.

*Are the Precinct-level Estimates Any More Reliable? And What Do They Reveal?*

Dr. Lichtman devotes considerable space to a discussion of precinct-level variations of in rates of ballot spoilage for three of the Florida's largest counties. His machine-readable data was not made available to us, regrettably, despite our repeated requests for it, and neither were we provided the details of his regression analysis. We suspect that if we had been able to reanalyze Dr. Lichtman's treatment of precinct-level data, we would have found it just as problematic as his work at the county level. But even in its absence we can offer a number of critical observations.

First, the only variables considered in this analysis are race (crudely dichotomized into the categories "black" and "nonblack") and voting technology. Dr. Lichtman has no precinct-level data at all on poverty rates, literacy levels, years of school completed, or other socioeconomic variable. So what he is really doing is the equivalent of his county-level simple correlations of race with rates of ballot spoilage, with no controls for any of the many other variables that could have influenced the pattern observed. The method is too simplistic to yield meaningful results with county-level data, and the same objection applies when it is employed with precinct-level data.

The precinct-level analysis presented in the majority report, we have already noted, can yield mistaken and misleading results, because it also depends upon averages calculated for geographic units and yields findings tainted by the ecological fallacy. However, precincts are much smaller units than counties and are usually more homogeneous, so the results are likely to be somewhat closer to the truth than

estimates based on intercounty variations. The report claims that the precinct-level analyses Dr. Lichtman conducted for Duval, Miami-Dade, and Palm Beach counties simply confirm the estimates derived from county-level data. A careful comparison of the figures, however, yields a quite different conclusion.

If the results of the precinct-level regression analysis in three counties are assumed to be accurate—and we repeat the caution that they too are open to serious question—we note that they show something quite interesting. They indicate that the *racial disparity in rates of ballot rejection was apparently much smaller* than it appeared from the county-level analysis.

As the table below indicates, using county-level data produces the estimate that black ballots were *nine times* as likely to be rejected as those cast by non-blacks. This estimate was given much play in the report and in press reports about it. But when you apply a more high-powered microscope to the election returns, and examine the evidence as reported by precinct, it turns out that this disparity was nowhere near nine to one. Instead, it ranged from 2.7 to 4.3. Thus it was from 52 percent to 70 percent *lower* than the statewide estimate about which so much was made in the report.

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Estimated Racial Disparities in Ballot Rejection Rates: Percent Votes Rejected by Race and Ratio of Black to Non-Black Rejection

County-level estimates

	<u>Black</u>	<u>Non-Black</u>	<u>Ratio</u>
Florida	14.4	1.6	9.0

Precinct-level

Duval	23.6	5.5	4.3
Miami-Dade	9.8	3.2	3.1
Palm Beach	16.3	6.1	2.7

Extreme Case Precincts (90%+ black vs. 90%+ non-black precincts)

Duval	22.1	5.8	3.8
Miami-Dade	9.1	3.2	2.8
Palm Beach	16.1	6.2	2.6

[Derived from Tables 1-2 and 1-3 of Majority Report]

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Further, the racial disparity ratios are narrower still in the precincts Dr. Lichtman examined as “extreme cases”—precincts that were 90 percent black (or 90 percent “non-black”). This is noteworthy. First, extreme case analysis should get us closer to the truth because it gets us closer to measuring the variable of interest—in this case, race. If almost everyone in these select precincts is black, the problem of the ecological fallacy intrudes much less. *That the relationship of ballot spoilage with race weakens instead of growing stronger is very telling.*

In addition, extreme case analysis tends to sharpen and exaggerate estimated group differences. Blacks who live in all-black or virtually all-black neighborhoods are likely to be poorer and less educated, for example, than African Americans in precincts that have a broader racial mix, and are thereby more likely to spoil their ballots. And nonblacks who live in areas with few black neighbors may be above average in their income and educational levels, and less likely to make a mistake voting for that reason. If these factors were taken into account in the analysis, the racial difference might well vanish altogether.

Remarkably, Dr. Lichtman managed to discuss the relationship between his county-level and his precinct-level findings at the June 8, 2001 meeting of the Commission without ever calling attention to these striking (and inconvenient) facts. After mentioning the much publicized nine-to-one estimate that was so prominently featured in the report, he declared before turning to the precinct-level results that he didn’t “like dealing with ratios because they don’t tell you about people.”<sup>27</sup> This is a very curious statement, since the report’s best sound bite—that blacks were nine times as likely as nonblacks to cast ballots that were rejected—is a statement about

<sup>27</sup> Transcript of June 8, 2001 Meeting, 44.

a ration. Dr. Lichtman's report is filled estimates of the alleged relationship between race and ballot rejection rates without reference to a shred of evidence about the experience of any individual person.

Instead of considering the *ratio* of estimated ballot spoilage for black and non-black voters, Dr. Lichtman chose to look at percentage point differences. The estimated difference for the state as a whole was 12.8 points (14.4–1.6); for Duval it was 18.1; for Miami-Dade it was 6.6; for Palm Beach it was 10.2. Dr. Lichtman apparently averaged these when declared that the difference was "about 13 percent. It was a "double digit difference," he declared.<sup>28</sup> However, Miami-Dade's 6.6 percentage points is not a "double digit difference." More important, shifting the focus from *ratios* (9 to 1) to *percentage point differences* served to obscure a crucial fact: If precinct-level analysis yields better estimates than county-level estimates, the *actual* racial disparity in rates of ballot spoilage in Florida as a whole was far below nine to one. In fact, it was about three to one, and thus corresponded closely with the racial gap in literacy rates that we called attention to earlier.

#### *Whose Fault Was It?*

A reader of the majority report would be led to think that many tens of thousands of Floridians tried to register their vote for president and failed to have it count because Governor Jeb Bush and Secretary of State Katherine Harris didn't want their votes to count and failed in their responsibility to ensure that they did. "State officials," the report declares, "failed to fulfill their duties in a manner that would prevent this disenfranchisement." Chair Berry, introducing the report at the June 8 meeting of the Commission, charged that the Governor and Secretary Harris had been "grossly derelict" in fulfilling their responsibilities.

But which officials were responsible for the conduct of elections in Florida's constitutionally decentralized system of government? Power and responsibility were lodged almost entirely in the hands of county officials, the most important of them the 67 county supervisors of elections. If anyone was intent on suppressing the black vote or to "disenfranchise" anyone else, it would have required the cooperation of these local officials.

Thus, it seems natural to inquire about the political affiliations of Florida's supervisors of elections. If the U.S. Commission on Civil Rights seeks to show that the presidential election was stolen by Republicans, led by the governor and the secretary of state, it would be logical to expect that they had the greatest success in those counties in which the electoral machinery was in the hands of fellow Republicans. Conversely, it is very difficult to see any political motive that would lead Democratic local officials to try to keep the most faithful members of their party from the polls and to somehow spoil the ballots of those who did make it into the voting booth.

The report never asks this question, though it seems an interesting hypothesis to explore. The data with which to explore it are readily available. When we examined the connection between rates of ballot spoilage across counties and the political affiliation of the supervisor of elections, *we found precisely the opposite of what might be expected*. There was indeed a relationship between having a Republican running the county's election and the ballot spoilage rate. But it was a negative correlation of  $-.0467$ .

Having a Democratic supervisor of elections was also correlated with the spoilage rate—by  $+0.424$ . Dr. Lott has found that the ballot spoilage rate in counties with Democratic supervisors were three times as high as in those with Republican supervisors (see Lott's Table 3). Should we conclude that Republican local officials were far more interested than Democrats in making sure that every vote counted?

Of the 25 Florida counties with the highest rate of vote spoilage, in how many was the election supervised by a Republican? The answer is zero. All but one of the 25 had Democratic chief election officers, and the one exception was in the hands of an official with no party affiliation.

Dr. Lott provides a fuller examination of the possible impact of having a Democratic supervisor of elections in his Table 3, and adds another related variable—whether or not the supervisor was African American. Having Democratic officials in charge increases the ballot spoilage rate substantially, and the effect is stronger still when that official is African American. (All African American supervisors of elections are Democrats.) Lott estimates that a 1 percent increase in the black share of voters in counties with Democratic election officials increases the number of spoiled ballots by a striking 135 percent.

We do not cite this as evidence that Democratic officials, for some bizarre reason, sought to disenfranchise blacks, and that black Democratic officials were even more

<sup>28</sup> *Ibid*, 44.

eager to do so. That is manifestly absurd. It is worth noting for two reasons. First, it nicely illustrates the limitations of ecological correlations. Would anyone want to draw the conclusion from this correlation that the solution was to elect more Republican supervisors of elections?

Second, it has important bearing on the question of *who is to blame* for the large numbers of spoiled ballots in minority areas. The majority report argues that much of the problem was due to voting technology—the use of punch card machines or optical scanning methods that did not provide feedback to the voter produced a higher rate of ballot spoilage. But *who decided* that the voters of Gadsden County (the state's only black-majority county and the one with the highest rate of spoiled ballots) would use an optical scanning system in which votes were centrally recorded? *Who decided* that Palm Beach and Miami-Dade county voters would use punch card machines? Certainly it was not Jeb Bush or Katherine Harris. Nor was it Lawton Chiles. It was *Democratic local officials in those heavily Democratic counties who made those choices*.

It is worth noting that after these findings were mentioned at the June 27, 2001 hearing of the Senate Committee on Rules and Administration, the Chair of the Commission on Civil Rights professed to feeling no surprise. The Commission's Report, she maintained, had noted that local as well as state officials had responsibility for the conduct of the election. The report, though, devotes far more attention to Governor Jeb Bush and Secretary of State Katherine Harris than to county supervisors of elections who have primary responsibility for election day procedures. Furthermore, there is no hint in the report that the local officials in those counties that accounted for a large majority of the spoiled ballots were Democrats who had no conceivable interest in suppressing the black vote. It is true that the party affiliation of Governor Bush and Secretary of State Harris are not mentioned either. But that hardly matters because everyone knows what party they belong to, while few are aware of the fact that Florida's electoral machinery is largely in the hands of county officials who are Democrats.

It is easy, of course, to say with hindsight that Florida should have had a uniform system of voting and a common technology for all elections. The Commission recommends that. But if Governor Bush and Republican legislators had proposed adopting such a system before the 2000 election, we can imagine the outcry from their political opponents, who would have seen such a move as an improper attempt by the governor to control election procedures. Indeed, it might well have been argued that such a decision would have had a disparate impact on minority voters, since centralizing the electoral system would have diminished the power of the Democratic local officials they had chosen to put in office. It could even have been argued that this transfer of power from officials who had the support of most minority voters would be a violation of the Voting Right Act, yet another attempt to deprive minorities of their opportunity to exercise political power!

Furthermore, it is inappropriate to be playing the blame game when there is no evidence that anyone understood that the use of certain voting technologies might increase the rate of voter error for some groups. Those who charge that African Americans were "disenfranchised" in Florida have never asked why it is that no one raised this issue *before* the election. If punch card balloting, for instance, has a racially discriminatory effect, why had not the NAACP, the Urban League, or any other organization belonging to the Leadership Conference on Civil Rights ever uttered a peep about it before November 2000? If civil rights leaders had understood that different voting systems are conducive to different rates of voter error, and that some can serve to disadvantage groups with below-average literacy skills, why didn't they raise the issue publicly and demand electoral reforms? If they did not grasp this fact, it is hard to see why we should assume that public officials did.

### *The Exclusion of Hispanics*

The majority report speaks repeatedly of the alleged "exclusion" and "disenfranchisement" of "minorities" or "people of color." One section is headed "Votes in Communities of Color Less Likely to be Counted."<sup>29</sup> But what information are we actually given about all those "communities of color"? We were amazed and disturbed to find that the crucial statistical analysis provided in Chapter 1 is narrowly focused on just one of the state's "communities of color"—African Americans. The discussion completely ignores *Florida's largest minority group*—people of Hispanic origin.

This is revealing of the Commission's constricted vision. The 2000 Census counted 2.3 million African Americans in Florida, approximately 15 percent of the total pop-

<sup>29</sup> Report, 141.

ulation. But the state had 2.7 million Latinos, almost 17 percent of its population.<sup>30</sup> Astonishingly, Hispanics hardly get a mention in the majority report. How many Hispanics in Miami cast ballots that were “rejected”? An obviously important question that the authors of the report never asked. They include a few hasty references to correlations between the total minority population of the counties and the rate of ballot spoilage. But they provide no separate analysis at all of the state’s largest minority group, or of any other minority group except African Americans.

Indeed, the analysis conducted by Dr. Lichtman treats not only Hispanics but Asians and Native Americans as well as if they were, in effect, part of the majority. He dichotomizes the Florida population into two groups, blacks and “nonblacks.” The “nonblack” population includes, in addition to whites, the 2.7 million Hispanics, and almost half a million other residents who listed their race as Asian American or American Indian.<sup>31</sup>

A federal agency devoted to the protection of minority rights and to the inclusion of all thus seems to have an extraordinarily narrow and exclusive conception of who belongs in the minority population. In this report, the Commission majority in fact has *excluded more Floridians of minority background—quite a lot more—than it has included*. Whenever the report speaks broadly about “minorities,” it must be remembered that the supporting statistical analysis it provides ignores *all* minorities but blacks, and indeed merges most Floridians of minority background into the “nonblack” category along with the white majority.

An examination of the role of race in election procedures in the Florida 2000 election that completely ignores the voting experience of Hispanics, Asian American and Native Americans cannot be considered a valid investigation. From the perspective of the majority report, anyone who is not African American is just an undifferentiated part of the vast “nonblack” population, which comprises 85 percent of the total.

In presenting his findings at the June 8, 2001, meeting of the Commission, Dr. Lichtman remarked that after he concluded his report he had made an effort to examine the Hispanic vote. But, as of this date, the statistical analysis in the majority report still ignores Hispanics completely and retains its simplistic dichotomy between black and “nonblack” Floridians. It includes in an appendix one new graph produced by Dr. Lichtman (Appendix II-F), and yet makes no comment on it. Dr. Lichtman’s revised report includes only one new paragraph on the subject. In sum, any attention given to Florida’s Latinos was only as an afterthought.

## II. THE TESTIMONY OF WITNESSES FAILS TO SUPPORT THE CLAIM OF SYSTEMATIC DISENFRANCHISEMENT

The report includes anecdotal evidence based on the testimony of a handful of individuals. It maintains that is has made a *prima facie* case that many Floridians were denied the right to vote, African Americans in particular.

These claims are not supported by the testimony the Commission received in Florida. The Commission heard from a total of 26 fact witnesses, representing only 8 of Florida’s 67 counties. During the post-hearing review, local election officials provided information which discredited significant portions of that testimony, but those corrections and clarifications were usually ignored in the final report.

Nonetheless, based on witnesses’ limited (and mostly, uncorroborated) accounts, the Commission majority insists that there were “countless” allegations involving “countless numbers” of Floridians who were denied the right to vote. Without verifiable and quantifiable evidence to support its predetermined conclusion that “disenfranchisement” took place, the report falls back on vague assertions that, “it is impossible to determine the total number of voters who were unable to vote on election day.”

There is no question that some voters did encounter difficulties at the polls, as would doubtless be the case with any election in which six million people cast a bal-

<sup>30</sup>U.S. Census Bureau, *Profiles of General Population Characteristics, 2000 Census of Population and Housing: Florida*, May 2001, Table DP-1. We state that the black population was approximately 15 percent of the total because its exact size depends upon the definition you use. Some 14.6 percent of Floridians reported that their sole race was black. If you add in people who considered themselves both black and something else, the figure increases to 15.5 percent, still substantially smaller than the Hispanic population.

<sup>31</sup>*Ibid.* In addition to the 2.7 million Hispanics and the 450,000 Asians or American Indians, another 697,000 Floridians reported that they were of “other race,” meaning other than white, black, American Indian, Asian, or Pacific Islander. Most of these “other race” respondents were, in all likelihood, Latinos, and thus cannot be fairly added to the total excluded from attention because it would entail double counting. All Hispanics were excluded from the Commission’s analysis unless they identified as African Americans on the census race question, which hardly any did.

lot. But not a shred of evidence found by the Commission suggests any systematic attempt to deprive any voter, minority or otherwise, of his or her right to vote.

Most of the complaints the Commission heard in direct testimony at the two hearings involved individuals who arrived at the polls on election day to find that their names were not on the rolls of registered voters. The majority of these involved bureaucratic errors (a lack of proper assistance from misinformed or understaffed poll workers); inefficiencies within the system (insufficient phone lines to verify registration status); and/or error or confusion on the part of the voters themselves. Some voters did not know the location of their precinct before going to vote. Some did not bring proper identification to the polling station. Others were confused or uncertain about their right to request and receive assistance or to ask for another ballot if they believed they had made a mistake.

According to the testimony of a majority of the witnesses at the hearings, there was no "systematic disenfranchisement or widespread discrimination" in Florida. Although the following facts are either buried in the text of the report or omitted altogether, they are representative of the testimony the Commission heard throughout the three days of hearings:

- Florida's Attorney General testified that of the 2,600 complaints his office received on the election, 2,300 were related to the confusing butterfly ballot, and only three alleged discrimination on the basis of race.
- An expert on voting rights and election law, Professor Darryl Paulson, testified that the problems in Florida were due to "a system failure without systemic discrimination." He also observed that "across the United States, there were 2.5 million votes that were not counted. And whenever you have an election system that requires 105 million people to vote essentially in a span of 12 hours, you have created a system guaranteed to have voting problems."
- Professor Paulson later added: "If the intent of state officials was to discriminate against African-Americans, I would argue it was a dismal failure. The 1990s have . . . seen a tremendous explosion in the number of black elected officials throughout the state. We now have a record number of African-Americans in the state legislature [and on] city councils, school boards, [and] county commissions. Florida now has a competitive two-party structure that . . . in many ways makes it extremely difficult for a systematic type of discrimination to occur."
- A representative of the League of Women Voters testified that there had been many administrative problems, but stated: "We don't have any evidence of race-based problems, well actually I guess don't have any evidence of partisan problems."
- Florida's Commissioner of Agriculture, a designee to the Elections Canvassing Commission, testified regarding the relationship of voting problems to race and ethnicity: "I don't think it's a party issue or a racial issue. I think it's a breakdown in the system."
- A witness from Miami-Dade County, who said she attributed the problems she encountered not to race but rather to inefficient poll workers, stated: "I think [there are] a lot of people that are on jobs that really don't fit them or they are not fit to be in."
- Another witness from Miami-Dade claimed she could not vote because poll workers were unable to find her name on the voter list: "In light of everything that's come out it's kind of hard for me to say whether or not it was discriminatory or whether or not it was just an inadvertent mistake."
- A witness from Broward County who alleged she was not allowed to vote by affidavit because her name was not on the list of registered voters said: "I don't think it was a racial situation. [The poll workers] were mostly white and they were still trying to help me. [The system] was just not equipped to handle the job that we had over there a lot of people were misinformed and were not being helped. It was like a big chaotic place over there. It was not about a racial thing."

### III. THE COMMISSION'S REPORT FAILED TO DISTINGUISH BETWEEN BUREAUCRATIC PROBLEMS AND ACTUAL DISCRIMINATION

Other than the "quantitative evidence" of its flawed statistical analysis, the report claims that, "the only evidence that exists is the testimony of those who have stated publicly that they were denied the right to vote and the credibility of their testimony." However, while the first-hand accounts of witnesses were helpful in describ-

ing election-day problems, they did not point to what the majority report calls a "disturbing trend of disenfranchisement."

The majority of those witnesses who experienced problems and who came before the Commission testified that they were ultimately able to cast their vote, despite the problems they described; only a handful were not. The majority report fails to distinguish between mere inconvenience, difficulties caused by bureaucratic inefficiencies, and instances of possible discrimination. For instance, a complaint from a white male voter who got mud on his shoes on the path to his polling place is accorded the same degree of seriousness as the case of the seeing-impaired voter who required—but was denied—assistance in reading the ballot, or the African American voter who claimed she was turned away from the polls at closing time while a white man was not.

For the most part, those who testified before the Commission told of problems in voting, not of being prevented from voting. The most frequent problems mentioned included the following:

### 1. *Inability of some poll workers to confirm eligibility status*

The report argues that in the last election, "many people arrived at their polling places expecting to cast their ballots for the candidates of their choice, but many left frustrated after being denied this right." To support this charge, the report points to "consistent, uncontroverted testimony regarding the persistent and pervasive inability of election poll workers to verify voter eligibility during the November 7 presidential election."

It is true that the Commission heard several complaints about jammed phone lines that, in many cases, prevented poll workers from getting through to headquarters to confirm the eligibility of voters whose names did not appear on the rolls. Some voters found that their names had been left off the voting lists because of bureaucratic error and through no fault of their own. In a perfect world, things like this would never happen. But we know of no state in which problems of this kind are utterly unknown.

Furthermore, many of these complaints were from voters who failed to verify the location of their assigned precinct or polling place before going to vote on election day. Some had failed to notify their elections board of a change in address. Some neglected to bring the necessary proof of eligibility to vote, and still others did not correctly fill out their mail-in applications through "motor voter" registration.

Neither voters nor poll workers testified that the problems they experienced amounted to widespread disenfranchisement in Florida. In fact, according to researchers at the *Miami Herald*, some poll workers who struggled with insufficient phone lines admitted that they erred on the side of including, rather than excluding voters. When they were unable to get through to headquarters, they simply went ahead and let the person vote despite the questions about their status.

What we learned in Florida was that all of these factors can contribute to an overloaded communications system on election day, and that there is no substitute for greater voter awareness and better trained elections staff to handle inquiries.

### 2. *Polling places closed early or moved without notice*

The Commission received no evidence that this was more than a trivial problem. There is absolutely no evidence upon which to conclude, or even suggest, that there was a pattern of closings or movement designed to disenfranchise voters. One county supervisor testified that in some cases there are urgent reasons for moving a polling facility—for example, one polling place had burned down on the Saturday before election day. But the public is notified of the change in all such cases. The Palm Beach County supervisor testified that, "Nobody has come to me to give me specifics on which precinct they were turned away from so that I could do the investigation to see what exactly happened."

The Commission did hear testimony from one poll worker about a gated community where the gates had shut automatically at 6:15 p.m. and had to be reopened by police officers. The Palm Beach supervisor asserted that this incident was "never reported" to her but that it did not seem likely, given that the facility in question was located at a water works facility that would have had a government staff person there to open the gates. As the supervisor explained, "I've heard many people tell me things and then I asked them whether they themselves experienced it and they said, no, they heard it from somebody else. And I wonder if this person [the witness about the gated community] actually experienced that themselves."

In a letter to the General Counsel during the affected agency review, David Leahy, the Supervisor of Elections for Miami-Dade has challenged the testimony of several witnesses, including one (Felix Boyle) who insisted that his voting place had

been changed without prior notice. After investigating this matter, Mr. Leahy affirmed in a letter that "Felix Boyle stated that the polling place for Precinct #36 was in a different building than was used in the 2000 primary election. The same building was used for both elections." Ignoring this rebuttal altogether, the report cites Mr. Boyle's case as an instance of "polling places moved without notice."

If the Commission had been truly interested in the important issue of uniform polling-place hours, it might have made more than a single, passing mention of one of the more widely-publicized problems that emerged during the last election: the announcement by all five television networks at 7:00 p.m. Eastern time that the polls in Florida had closed, when the polls in the Panhandle counties were still open for another hour. There is no way of knowing exactly how many voters were discouraged from going to the polls because of this misinformation, but a close review of the turnout figures by John Lott estimates that it likely cost George W. Bush at least 10,000 votes.<sup>32</sup> The majority's lack of interest in exploring this issue suggests that its research was shaped by its preconceptions and political predispositions.

### 3. Accessibility issues

Some of the most compelling and direct testimony in Florida were accounts of the problems of accessibility for disabled voters. Although the disabled voters who testified before the Commission claimed that they themselves ultimately voted, they described a range of difficulties facing the disabled on election day, including insufficient parking, inadequate provision for wheelchair access, and other difficulties involving ballots and voting technology. The barriers they described appear to constitute a long-standing problem that was not just confined to Florida or to this presidential election. It is unfortunate that the report does not examine the ongoing efforts of Florida state officials Governor Bush's ADA working group and a task force working under the Secretary of State to address these concerns.

In the same chapter on "accessibility issues," the report addresses allegations that an "overwhelming number" of Haitian-American voters, "many Latino voters," and "many persons who were not literate" were "denied adequate assistance" in casting their ballots. Here, the discussion of accessibility problems is much less clear. Much of the testimony was from advocacy group and based on second-hand, anecdotal information.

For instance, the Commission heard from a representative of a Haitian-American organization in Miami-Dade that, in addition to the problems of long lines and understaffed polling facilities, there were problems regarding a lack of bilingual ballots. However, few details were presented to help gauge the extent of this problem, and no attempt was made to properly investigate the seriousness of these alleged problems.

When the Miami-Dade County supervisor was questioned about the allegations of this witness, he referred to a county ordinance that requires the supervisor to determine which precincts have a significant Haitian American voter population and to provide bilingual ballots in those precincts. He testified that, for purposes of the November 2000 election, he determined there were 60 precincts with a significant Creole population. In addition to providing bilingual ballots, Miami-Dade also did sample ballots in English and Creole and publicized those in Haitian-American newspapers. The Miami Dade supervisor maintained that the earlier witness might have lived in a precinct that did not have a significant Haitian American population. The report makes no attempt to explore the issue more deeply.

### 4. "Motor Voter" Problems

The report asserts that "[m]any Floridians alleged that they registered to vote through the Department of Motor Vehicles (DMV) and learned later that they were not registered. Many of these disappointed citizens filed complaints with the attorney general's office and/or the Democratic Party." The allegation here appears to be that Republicans in Florida somehow engineered a "motor voter" conspiracy. There is no evidence to support that claim. The report itself concedes that, according to the testimony of the director of the Division of Driver Licenses, problems arose because voters failed to complete their motor/voter applications correctly and/or in a timely manner. References to one such individual were stricken from the report when the affected agency's responses determined that this individual had submitted an incomplete registration form. The report does not mention the concern that the "motor voter" system frequently tends to err on the side of letting voters vote when in fact they are not be eligible.

<sup>32</sup> John R. Lott, Jr., "Documenting Unusual Declines in Republican Voting Rates in Florida's Western Panhandle Counties in 2000," unpublished paper, May 2001.



### 5. Confusing Ballots

Although some witnesses testified about the confusion caused by the "butterfly ballot" in Palm Beach County, no evidence was presented that the butterfly ballot was targeted to particular groups, as the Commission originally suggested in its "preliminary" report of March 9. During the hearings, the Commission heard varying accounts regarding "defective" ballots. A rabbi from Palm Beach County testified that when he spoke with a group of 500 people within his congregation in Palm Beach County, about 20 percent complained that they had problems with the butterfly ballot ("their arrows did not line up with the holes"); the rest of the group experienced no such problems and "simply laughed."

The supervisor of elections for Palm Beach County later testified that, in some cases, it appeared that voters using the butterfly ballot failed to properly line up the ballot in the voting machine. The supervisor also explained that certain community groups may have mistakenly instructed voters to "punch the second hole" for Gore "when he was not the second hole; he was the third hole." Others had been told to "vote for Lieberman," but "if they followed the line where Lieberman's name was, it punched another hole down because the President and Vice President are grouped together."

The supervisor also testified that, "In Palm Beach, sample ballots were sent out to all registered voters," and she contested earlier charges regarding defective ballots. She explained that she herself had never been alerted to or received any complaints about the actual card not fitting into the machine properly: "The ballot cards are all purchased from the same company and they're all printed at the same time. They all come off the same press. They're all printed on the exact same size paper. You've got the candidate's name, the arrow pointing to the number and then the hole if you follow straight across then you'll hit the hole."

In Palm Beach County, the major problem was a ballot printed in large type for the benefit of older voters. In Duval County, a major problem was faulty instructions to voters by Democratic party workers, provided with the intention of maximizing Democratic votes lower down on the ballot. The biggest problem with ballots of all kinds was the fact that there were ten candidates on the ballot for President, compared with only three or four in previous years.

Another significant issue, which the report virtually ignores, concerns the problems of first-time voters, many of whom received faulty how-to instructions from the very groups that urged them to vote in the first place. As Isiah Rumlin, head of the NAACP in Duval County, has recently stated: "We didn't do any voter education. We didn't know we needed to. In retrospect, we should have done a better job."

As a result of the election-day confusion in Florida and many other states, there is a new emphasis on voter education initiatives and the role that can be played by advocacy groups and community organizations. In Broward County, for example, the new supervisor of elections, Miriam Oliphant, has launched a program to involve local churches in the efforts to better educate voters, recruit new ones, and prevent many of the difficulties that occurred during the 2000 election.

#### IV. THE MAJORITY REPORT'S INTERPRETATION OF THE VOTING RIGHTS ACT DISTORTS THE LAW

The majority report argues that election procedures in Florida violated the Voting Rights Act. Its interpretation bends the 1965 statute totally out of shape.

It is absolutely correct, as the Commission report asserts, that violations of the 1965 Voting Rights Act do not need to involve intentional disenfranchisement. Section 2 of the act was amended in 1982 in an effort to circumvent the Supreme Court's decision in *Bolden v. City of Mobile*, 1980. *Bolden*, in insisting that plaintiffs in an equal protection suit demonstrate discriminatory intent, had brought the statute in conformity with Fourteenth Amendment standards in general. The amended provision allowed minority voters nationwide to challenge methods of election on grounds of discriminatory "result."

The concern at the time was that plaintiffs, in the wake of *Bolden*, would have to find a smoking gun—unmistakable evidence that public officials deliberately, knowingly set out to deprive minority voters of the Fourteenth and Fifteenth Amendment rights.

No witness, however, from the civil rights community argued that all voting mechanisms or procedures with a disparate impact on black or Hispanic voters would violate the law. Thus, the 1982 Senate Judiciary Committee Report, in explaining the newly amended Section 2, defined a jurisdiction in violation of the law as one in which "racial politics dominate[d] the electoral process." At the 1982 Senate Hearings, a distinguished civil rights attorney testified that claims of voter dilu-

tion would rest on "evidence that voters of a racial minority are isolated within a political system . . . 'shut out,' i.e. denied access . . . [without] the opportunity to participate in the electoral process."

If all voting procedures with a disparate impact on minority voters violated the statute, then all registration processes, in jurisdictions with black and Hispanic residents, would be legally questionable. As you know, less affluent, less educated citizens tend to register and vote at lower rates, and many of those educationally and economically disadvantaged citizens are members of those minority groups.

Voter error is analogous to low registration rates; it is more likely to occur among the less educated and the less affluent. And thus, despite the thousands of voting rights cases on the books, the majority report cannot cite any case law that suggests punch card ballots, for instance, are potentially discriminatory. Or that higher error rates among black voters suggest disenfranchisement.

The disparate impact test is actually very complicated, and always has been. For instance, a multimember district in which whites are a majority may have a disparate impact on minority voters. But as the Supreme Court has said (*Whitcomb v. Chavis*, 1971), the candidates supported by black voters may consistently lose, but that disparate impact upon black representation (and officeholding) is not necessarily a violation of minority voting rights. In *Whitcomb*, black voters were Democrats in a Republican County. It was not exclusion, but the process of party competition and the principle of majority rule that denied blacks the representation they sought. Political party, not race, determined the electoral outcome.

This same logic still runs through the complicated process by which a judicial determination is made in a section 2 Voting Rights Act case. Courts must determine whether minority voters have had "less opportunity" to participate in the electoral process, a finding that requires plaintiffs to meet a multifaceted test. Plaintiffs must show, for instance, that there has been "a significant lack of responsiveness of the part of elected officials to the particularized needs of the members of the minority group"; that "political campaigns have been characterized by overt or subtle racial appeals; and that voting is "racially polarized." These are just a few items off the list of so-called "factors" to which courts are instructed to refer in judging the merits of a vote dilution suit; disparate impact alone never settles the "equal opportunity" question.

There is another important point. The question of a Section 2 violation can only be settled in a federal court. Plaintiffs who charge discrimination must prevail in a trial in which the state has a full opportunity to challenge the evidence. There is a reason why, in contrast to Section 5 in the Act, Section 2 requires a trial in a federal court. Section 5 claims can be settled in the Justice Department itself, through the process of administrative review. That is because they pose simpler questions—namely, whether a new election procedure or practice is clearly intentionally discriminatory, or whether its impact is such as to leave minority voters worse off than they had been. A typical Section 5 question would thus be: Are newly drawn redistricting lines likely to result in fewer black officeholders than before?

Section 2, on the other hand, demands an inquiry into the complex issue of racial fairness. Adjudicating competing claims about equal electoral opportunity, as the Supreme Court has noted, requires an "intensely local appraisal"—the specific, detailed knowledge that only a court can obtain. And it demands the chance that only a trial can provide for the challenged jurisdiction to answer the charges. As the Chair herself has conceded many times, the Commission is: "not a court" and cannot arrive at verdicts that belong exclusively to the judiciary. Yet, while the majority report does admit that the Commission cannot determine whether violations of the Voting Rights Act have actually occurred, in fact it unequivocally claims to have found "disenfranchisement," under the terms of the statute.

The Commission's findings are likely to inspire some people to call for federally-mandated election procedures of one sort or another. This would be a grievous error. The architects of the Constitution left matters of suffrage almost entirely in state hands, although subsequent Amendments prohibited a poll tax and denial or abridgment of the right to vote on account of race, gender, or age (after eighteen). It is true that in 1965 the Voting Rights Act broke with constitutional tradition, but that was a uniquely draconian response necessitated by the persistent and egregious infringements of basic Fifteenth Amendment rights that pervaded the Jim Crow South.

None of the Commission's findings establish that we are confronting a national emergency in any way resembling that in 1965. Florida itself (unlike the states of the Deep South in the 1960s) has readily acknowledged the need for reforms to its voting procedures, and has already acted to remedy problems evident in the November election. State action is appropriate; federal intrusion is not.

More voter education is clearly needed—a job for the states themselves, for political parties, and for other interested organizations. Donna Brazile, Al Gore's campaign manager, recently lamented the inadequate voter education in preparation for the last election. "I take full responsibility for the lack of voter education resources that could have helped us," she said.<sup>33</sup> While we think Ms. Brazile blames herself excessively, we do look forward to a greater effort to prepare voters to cast their ballots in the future. That effort is not mandated by the Voting Rights Act, but is certainly much to be desired.

#### V. THE REPORT MISTAKENLY HOLDS FLORIDA STATE OFFICIALS RESPONSIBLE FOR THE CONDUCT OF ELECTIONS

The Commission's report makes a highly politicized attack against Florida state officials. As previously noted, the report asserts that "State officials failed to fulfill their duties in a manner that would prevent this disenfranchisement," and calls on the U.S. Department of Justice to "institute formal investigations . . . to determine liability and to seek appropriate remedies."

The charges the majority has directed against the Governor and the Secretary of State and other officials in Florida are particularly disturbing. At the Commission's interrogation in Tallahassee, the Governor was *the only witness* during the entire set of hearings to be denied the opportunity to make an opening statement. The report criticizes the Governor for giving too much deference to local authorities. If, instead, Governor Bush had before the election had called for a more centralized electoral system with greater power for state officials, he undoubtedly would have received criticism from the same political quarters for trying to grab power in order to manipulate the election returns to favor his brother.

The majority report admits grudgingly that it found no "conclusive evidence" of a state-sponsored conspiracy to keep minorities from voting. But as several independent observers have pointed out, this is maliciously misleading phrasing, since there was in fact no evidence whatsoever of a conspiracy at all, conclusive or otherwise.

Contrary to what the majority has asserted, state and local officials have refuted in detail the serious allegations the Commission has made against them.

The testimony in Florida clearly explained and delineated the delegation of authority and decentralized responsibility for elections, under Florida's constitution. Testimony from all the public witnesses with jurisdiction over these matters provided no evidence of criminal misconduct in connection with the Florida 2000 elections. Testimony also revealed the seriousness accorded to the work of the Governor's bipartisan task force on election reform. Ignoring all of this available evidence, the Commission insists that Florida state officials are guilty of "gross neglect" in fulfilling their responsibilities regarding election matters. This charge in the majority report again violates fundamental concepts of due process. Not only are its conclusions not based upon evidence contained in the record of the hearings. They are in direct conflict with the testimony of the witnesses who were most knowledgeable about such matters.

The report refuses to accept a key point that emerged in testimony during the hearings—that the elections supervisors are "independent, constitutional officers." That is why, as a recent piece in *The Economist* points out, "laying so much blame on the governor and secretary of state is unrealistic."<sup>34</sup> The article goes on to explain that, "Most of the key decisions were made in Florida's 67 counties rather than in Tallahassee," and, "Many of the counties with the highest number of voter errors were under Democratic control." Indeed, our statistical analysis reported above makes plain that the problem the Commission report focuses on was very largely confined to counties in which the electoral machinery was in Democratic hands.

The majority report criticizes Governor Bush for having "apparently delegated the responsibility" for the conduct of the election. It fails to grasp that this is precisely what Florida law provides. The Secretary of State is criticized for having taken a "limited" role in election oversight, supposedly contradicting the position she took before the Supreme Court" in *Bush v. Gore*. The majority report fails to explain, however, that *Bush v. Gore* (which addressed the issue of "recounts" and the certification of the results of the election) had *nothing to do* with the authority of county officials over the conduct of elections at the local level in Florida. The report glosses over the inconvenient fact that, under Florida law, Governor Bush has virtually no

<sup>33</sup> Stan Simpson, "Report Inspires Gore Aide," *Hartford Courant*, June 11, 2001.

<sup>34</sup> "Unfair, Again," *The Economist*, June 9, 2001.

authority over the voting process, and the Secretary of State's role is mainly to provide non-binding advice to local officials.

The report's claim that the governor and other officials are to be blamed (and investigated) for not having taken full responsibility for all of the problems that occurred during the Florida election cannot be reconciled with the actions of Commission's own general counsel in conducting the "affected agency" review. On June 8, when questioned as to why state officials were given only portions of the report to review, the general counsel explained that, "we selected the portions that are relevant . . . based on activities and responsibilities." The general counsel went on to say that, "we just thought it would be a bad idea [to send the full report] because there are responsibilities and activities that don't pertain to the governor's office." Since the general counsel sent the governor only about 30 pages of a 200-page report, this would seem a tacit recognition that in fact the governor's responsibilities for the conduct of elections are quite limited.

It is also ironic that the Chair chose to berate Secretary Harris during the Tallahassee hearing for not having assumed more responsibility for the problems that occurred on election day. At the hearing, the Chair explained that, even though Commission on Civil Rights delegates to the staff director the authority to run the day-to-day operations of the Commission, she herself—as Chair—must assume ultimate responsibility for everything that happens at the Commission. That explanation stands in stark contrast to the statements issued by the Chair in the wake of the unauthorized leak of this report, when the Chair asserted that she was "only one vote" on the Commission.

The report charges that the governor, the secretary of state and other state officials should have acted differently in anticipation of the high turnout of voters. What the Commission actually heard from "key officials" and experts was that the increase in registration, on average, was no different than in previous years; that since the development of "motor voter" registration, voter registration is more of an ongoing process and does not reach the intensity it used to just prior to an election; and that, in any event, registration is not always a reliable predictor for turnout.

One expert who has studied voter turnout and participation for 25 years testified that, "The Florida turnout was not particularly high"—only 2.2 percent over 1996. Several supervisors of elections testified that the highest turnout occurred in 1992 (which had an 80 percent turnout compared to the 64 percent turnout in 2000).

The majority report also faults Florida state officials with having failed to provide the 67 supervisors of elections with "adequate guidance or funding" for voter education and training of election officials. It fails to mention the Commission also learned that, under Florida's Constitution, requesting and allocating resources is a local responsibility, one which belongs to the supervisors of elections. The county supervisors are independent, constitutional officers who make their budget requests to the Boards of county commissioners. It is up to the county commissioners to approve or reject those requests, and there is currently no process for appealing to the state government. The majority of the supervisors of elections who came before the Commission testified that they themselves *did not* request additional resources prior to the election but, that even if they had, such a request would have properly been directed to their county commissioners, not to the governor or to the Division of Elections.

#### VI. THE COMMISSION'S ANALYSIS OF THE FELON LIST QUESTION IS SLANTED

The Majority Report suggests that one important instrument of black "disenfranchisement" was the so-called "purge list," a list of persons who should be removed from the voting rolls because they had a felony conviction. Regrettably, the list supplied to state officials by the firm hired to do the work mistakenly included the names of some persons who had no felony convictions.

The Majority Report implies that this was no innocent mistake, but another effort to suppress the black vote. The sole piece of supporting evidence it cites is a table with data on Miami-Dade County. Blacks were racially targeted, according to the report, because they account for almost two thirds of the names of the felon list but were less than one-seventh of Florida's population.

This might seem a striking disparity. But it ignores the sad fact that African Americans are greatly over-represented in the population of persons committing felonies—in Florida and in the United States as a whole. The Majority Report never bothers to ask what the proportion is. Without demonstrating that considerably *less than* two-thirds of the previously convicted felons living in Miami-Dade County were African American, the racial disproportion on the felon list is completely meaningless.

It is not only meaningless but irrelevant. The vast majority of the people on the felons' list were properly listed. It was illegal for them to vote according to Florida law. The Commission may not like that law, but it is not its business to opine on the matter.

The only possible civil rights violation here is the allegation that disproportionately large numbers of African Americans were put on the felon list falsely. Had the Commission bothered to examine its own data supplied in the report, it would have found that the truth was just the opposite of what it claims.

The table reveals that 239 for the 4,678 African Americans on the Miami-Dade felons' list objected when they were notified that they were ineligible to vote and were cleared to participate. They represented 5.1 percent of the total number of blacks on the felons list. Of the 1,264 whites on the list, 125 proved to be there by mistake—which is 9.9 percent of the total. Thus, the error rate for whites was almost double that for blacks.

If we accept the conspiratorial view that the errors on the felons list must have been targeted so as to reduce the voting strength of some group, it was whites, not blacks, who were targeted. The error rate for Hispanics was almost as high as that for whites—8.7 percent. Since the data are from Miami-Dade, with its huge Hispanic population, one might conclude that someone hoped to suppress both the the non-Hispanic white vote and the Hispanic vote.

Why was a "purge list" created in the first place? At the hearing in Miami, the Commission received testimony from DBT/Choicepoint, Inc., the company which provided the state with a list of individuals who might be convicted felons, registered in more than one county or even deceased. The compilation of the list was part of an anti-fraud measure enacted by the Florida legislature in the wake of Miami's 1997 mayoral election, in which at least one dead voter and a number of felons cast ballots.

The Commission heard from DBT that approximately 3,000 to 4,000 non-felons (out of approximately 174,000 names) were mistakenly listed on this so-called "purge" list provided to the state. The list identified 74,900 potentially dead voters, 57,770 potential felons, and 40,472 potential duplicate registrations. Under Florida law, the supervisors of elections were required to verify the ineligible-voter list by contacting the allegedly ineligible voters. Some supervisors believe the list to be unreliable, and did not use it to remove a single voter. It is regrettable that the Commission made no effort to determine how many of the 67 supervisors of elections did or did not use the list. According to recent studies, the total number of wrongly-purged alleged felons was 1,104, including 996 convicted of crimes in other states and 108 who were not felons at all. This number contradicts the Commission's claim that "countless" voters were wrongly disenfranchised because of inaccuracies in the list.

Most notably, the Commission did not hear from a single witness who was prevented from voting as a result of being erroneously identified as a felon. One witness did testify that he was erroneously removed from the voter list because he had been mistaken for another individual on the felon list whose name and birth date were practically identical to his. However, he was able to convince precinct officials that there had been a clerical error, and he was allowed to vote.

In pursuing its attack on the purge list, the Commission completely ignored the bigger story. Approximately 5,600 felons voted illegally in Florida on November 7, approximately 68 percent of whom were registered Democrats. On June 8, General Counsel Hailes was asked why the report failed to address the issue of ineligible voters who cast ballots on election day. His response was: "That's not part of the scope of our report."

Based on extensive research, the *Miami Herald* discovered that, "among the felons who cast presidential ballots, there were 62 robbers, 56 drug dealers, 45 killers, 16 rapists, and 7 kidnapers. At least two who voted were pictured on the state's on-line registry of sexual offenders." According to the *Herald*, the biggest problem with the felon list was not that it wrongly prevented eligible voters from voting, but rather that it ended up allowing ineligible voters to cast a ballot:

Some . . . claim that many legitimate voters—of all ethnic and racial groups, but particularly blacks—were illegally swept from the rolls through the state's efforts to ban felons from voting. There is no widespread evidence of that. Instead, the evidence points to just the opposite—that election officials were mostly permissive, not obstructionist, when unregistered voters presented themselves.<sup>35</sup>

<sup>35</sup> Merzer, *Miami Herald Report*, 105.

The *Palm Beach Post* conducted its own extensive research into the problems with the flawed exceptions list.<sup>36</sup> The Post's findings, which corroborate the major conclusions of the Herald's investigation, include the following:

- Most of the people the state prevented from voting probably were felons.
- Of the 19,398 voters removed from the rolls, more than 14,600 matched a felon by name, birth date, race and gender.
- More than 6,500 were convicted in counties other than where they voted, suggesting they would not have been found by local officials without the DBT list.
- Many of these felons were convicted years ago, and they had no idea that they did not have their civil rights [to vote].
- Many had been voting and unwittingly breaking the law for years.

The report's message is that nobody in authority did enough data verification. But the Commission itself failed to verify key arguments made in its report. The letter (submitted per the affected agency review) from Michael R. Ramage, General Counsel for the Florida Department of Law Enforcement, provides a lengthy clarification of the FDLE's role in verifying the felon status of voters whose names had been forwarded by the local supervisor. (Note that, according to Mr. Ramage's letter to Mr. Hailes, the FDLE was allowed to review *only three pages* of the 200-page report, despite the prominence the report gives to this controversial issue.) In his letter to General Counsel Hailes, dated June 6, 2001, Mr. Ramage maintains that the Commission's findings are "wrong and based on erroneous assumptions," and places undue emphasis on "anecdotal examples of problems." His letter later goes on to detail FDLE's efforts regarding verification of the "exceptions" list:

[I]t is important to note that during the pertinent time frame, FDLE responded effectively to nearly 5,000 voters whose names matched those of convicted felons in Florida's criminal history records. (It is not unusual for criminals when arrested to use a name, date of birth, address, social security number, etc., other than their own). . . . A number of those who believed they had been wrongfully identified as not being able to vote were ultimately found to be incorrect. They were, in fact, *not* eligible to vote. Likewise, a number of those who raised a concern were ultimately found to be eligible to vote. The process worked to resolve issues. Of those voters who contacted FDLE to appeal the notice from a local supervisor of elections that they were ineligible to vote, approximately 50 percent were confirmed to be Florida convicted felons, and 50 percent were determined not to have a conviction in Florida for a felony.

While the General Counsel on June 8 indicated that some revisions would be made to acknowledge the "extraordinary efforts" by the FDLE, no revision has been made in the conclusions, which are still wrong and based on erroneous assumptions. Certainly, no eligible voter should be wrongly prevented from doing so, but at the same time, election officials have a compelling interest in preventing voter fraud committed by convicted felons. The Commission majority failed to look at all the facts regarding the felon list. Instead of focusing on what it calls "the reality" of list maintenance, it uses anecdotes to support its call for an extensive and unwarranted investigation by the U.S. Department of Justice.

There is also the additional question of voter fraud. On June 8, the Chair explained that the report did not look at the issue of voter fraud, since "fraud does not appear to be a major factor in the Florida election," and that, in any event, this was "beyond the scope" of the Commission's investigation. Thus, the report single-mindedly pursues only one kind of vote dilution (allegations that eligible voters were denied the right to vote) while completely ignoring the other (allegations that ineligible voters were allowed to vote).

Only in the report's introduction is there a brief mention of Complaints of Voter Fraud, "listed along with the Western Florida Time Zone Controversy and Absentee Military Ballots as "other factors" that "could have contributed to voter disenfranchisement in Florida." (In other words, the main concern is with voting irregularities that could be interpreted as having a disparate impact on Democratic voters. Factors that were more likely to have had a disparate impact on Republican voters were simply shoved aside.) The report then goes on to explain that, "while recognizing that the above factors do raise concerns of voting irregularities, the Commission did not receive many complaints or evidence during its Tallahassee and Miami

<sup>36</sup>Palm Beach Post, "Felon Purge Sacrificed Innocent Voters," May 27, 2001.

hearings pertaining to how these issues created possible voter disenfranchisement in Florida.”

This explanation is incorrect and disingenuous. . . . First of all, at the Commission’s meeting of December 8, 2000, when the Commission reached its decision to conduct an investigation of the Florida election, there was lengthy discussion of the Commission’s statutory responsibility to investigate “any patterns or practice of fraud.” Chair Berry herself explained that “if there are people who engaged in fraud or violated the laws, we would hand them over for prosecution.” The Chair assured Commissioners that, “[e]very single allegation should be systematically pursued.”

Second, if the Commission “did not receive” evidence regarding fraud, it is because, contrary to the Chair’s assurances in December, it chose not to seek any testimony on the widely-publicized allegations of fraud. Given the report’s emphasis on the so-called purge list, this is an egregious omission. In Florida, there were various reports regarding thousands of ballots cast by ineligible felons and unregistered voters, fraudulent absentee ballots in nursing homes, and precincts where more ballots were cast than the number of people who were registered. That the Commission made no effort to look at these problems is unconscionable.

#### VII. UNWARRANTED CRITICISM OF FLORIDA LAW ENFORCEMENT

The Commission report discusses at length a motor vehicle check conducted in Leon County on election day, and portrays the police presence there as an effort to intimidate prospective black voters in the area and keep them from going to the polls. This is a wildly distorted interpretation of what actually happened.

As the chief of the Florida Highway Patrol, Colonel Charles C. Hall, testified in Tallahassee, there was one motor vehicle checkpoint, in Leon County on election day. That checkpoint was not adequately authorized and resulted in one complaint. The equipment checkpoint operation lasted about 90 minutes (between 10:00 a.m. and 11:30 a.m.) and occurred more than two miles away and on a different roadway from the nearest polling facility. Of the approximately 150 cars stopped at the checkpoint, a total of 18 citations or notices of faulty equipment were issued to 16 different individuals, 12 of whom were white. The citizen who lodged the complaint testified that she had contacted the NAACP after she returned from voting, but she refused to meet with the FHP to assist their investigation. Despite this one highly publicized incident, there has been no evidence whatsoever of police intimidation of voters.

Writing in response to the affected agency review, the general counsel for the State of Florida’s Department of Highway Safety and Motor Vehicles, Enoch J. Whitney, has supported the account given by Colonel Hall at the hearing:

Colonel Hall’s testimony conclusively demonstrates that there was no intent by members of the Florida Highway Patrol to delay or prohibit any citizen from voting on Election Day. All pertinent evidence shows that in fact no one was delayed or prohibited from voting by virtue of the equipment checkpoint operation.

The Commission majority’s willingness to perpetuate a gross misperception of this issue is a disservice to the public’s confidence in America’s electoral and law enforcement systems, and an insult to the dedicated officers of Florida’s law enforcement community.

#### VIII. PROCEDURAL IRREGULARITIES AT THE U.S COMMISSION ON CIVIL RIGHTS

In writing this report, the Commission majority has ignored not only the rules of evidence, but the agency’s own procedures for gathering evidence. The procedural issues are important to the extent they relate to the policy and politics driving this report. By pretending to investigate procedural irregularities while engaging in procedural irregularities of its own, the Commission majority undermines its credibility and diminishes the value of its work. By arguing that “every voice must be heard” while in fact stifling the voice of others, the Commission is guilty of hypocrisy.

Republican and Independent Commissioners were never asked if they would like to call witnesses. Hearings were completely controlled by the Chair and the General Counsel, and commissioners did not even know who the witnesses were to be at one Miami hearing; thus they could not properly prepare questions.

When the hearings failed to provide any evidence of widespread voter disenfranchisement, the Chair unilaterally approved a last-minute procurement of the services of an outside “statistician,” Professor Allan Lichtman. Commissioners were never asked to approve this arrangement, nor were they contacted regarding any suggestions they might have for additional or alternate experts.

At its June 8, 2001 meeting the Commission voted that Dr. Lichtman would be asked to prepare a rejoinder to any dissent that was filed, and that the dissent was not to be made available on the commission's web site until it could be accompanied by Dr. Lichtman's response. It is astonishing and unprecedented that the commission would take the position that the views of its minority members could not be circulated to the public until a rebuttal of them was prepared. Is the dissent a document that is too dangerous for the public to read unless accompanied by an immediate rebuttal? Furthermore, to date, Dr. Lichtman's rejoinder has not materialized, and it was stated at the July 13, 2001 meeting of the commission that it was not clear whether he would be writing any response to this dissenting opinion, with unclear consequences for the fate of the dissent.

At the July 13 monthly Commission meeting, members of the commission staff and some commissioners argued that this document is not a proper "dissent," and that the commission should not allow its publication. One commissioner asserted that a "two or three or five page statement" would be an acceptable dissent, but something more than that would be out of bounds. In a July 10 memo, the staff director stated that the Commission "does not envision any Commissioner 'engag[ing] in a complete reanalysis of the staff's work.'" But it is obviously impossible to write a thorough dissent without reanalyzing the quantitative and other evidence upon which important claims have been based.

As a result of such objections, at its July 13, 2000 meeting the Commission majority refused to authorize the publication of our work pending further negotiation. Whether it will actually appear under the Commission's imprimatur remains an open question at this time. Astonishingly, many of the commissioners seem to believe that it is appropriate for them to dictate the form any disagreement with their views should take.

We feel fortunate to be living in a time in which technological progress renders futile the attempts of those in power to silence the expression of minority views. Any interested member of the public can already find our a full draft on our dissenting opinion on the Web, on both the Manhattan Institute and the National Review web sites. And of course it will be available in print in the published hearings of the Senate Committee on Rules and Administration. But it is nonetheless deeply troubling that a body whose mission is to explore unpopular truths would keep from public scrutiny a dissenting opinion written by two of its duly-appointed members.

#### *1. Failure to follow statutory requirements for fair and objective proceedings*

Under the Commission's regulations, all proceedings are to be conducted in a fair and objective manner. During its hearings in Florida, however, the Commission failed to ensure fair, equal and courteous treatment of witnesses. The secretary of state was treated in an insulting manner, and the governor was the only witness during the proceedings who was denied the opportunity to deliver an opening statement.

#### *2. Conclusions issued before all of the evidence was received*

The Commission reached its verdict long before it had even completed its review of the evidence. On March 9, the Chair introduced a "preliminary assessment" that was not shared with Commissioners beforehand and that did not provide Florida officials with an opportunity to respond to the charges against them. These procedures are sadly reminiscent of Alison in Wonderland's court of the Red Queen: "Verdict first, trial later!"

#### *3. Denial of "defame and degrade" review*

Section 702.18 of the Code of Federal Regulations requires the Commission to give parties that might be defamed or degraded by its reports a chance to respond. The majority report states that "the Commission followed its procedures by conducting a defame and degrade review." It fails to state that the Commission's general counsel denied the governor's request to be given the requisite 30 days, under defame and degrade, to review the report in its entirety (instead of select portions) and the requisite 20 days to submit a "timely, verified response." The general counsel's explanation on June 8 was that there was "no statement [in the report] that would constitute defame and degrade." In light of the Chair's statement on June 8 that the governor, the secretary of state, and other state officials were "grossly derelict in fulfilling their responsibilities," the general counsel's decision appears to indicate that the Commission has been "grossly derelict" in its treatment of those who assist its investigations.

#### *4. Inadequate affected agency review and consideration of affected agency comments*

The report also claims that "affected agencies were afforded an opportunity to review applicable portions." The Commission's project management system normally



requires at least 30 days for affected agency review, yet the governor and other officials were given only 10 days to review the report, and the report was given to the press before affected parties could respond. In an interview with the *New York Times*, the general counsel claimed that anyone wishing to respond to the Florida report would have 20 days to do so. Few of the affected agency comments have actually been factored into the final report.

To compound the seriousness of these procedural improprieties, the Commission handed out copies of the draft report at the June 8 meeting and posted the draft on its web site, thereby widely disseminating a version of the report that included none of the affected agency comments or any of the corrections and amendments discussed at the June 8 meeting.

Affected agency review is an essential procedure to ensure fairness and accuracy of Commission reports. Contrary to the Chair's statement on June 8, it is not a mere "courtesy" that is granted or denied at the whim of the Chair or the staff. In this case, the procedure was mooted by the leak to the press and the public dissemination of a preliminary, uncorrected draft.

##### *5. No management controls for this agency in disarray*

A 1997 investigation by the GAO found the Commission to be an "agency in disarray" and cited, in particular, the lack of communication and effective management controls regarding the Commission's projects. Pursuant to the GAO investigation, the Commission implemented its management information system to specify timelines for completion of the Commission's work product. In the case of the Florida report, however, no clear or consistent timeline has been maintained for this project and Commissioners' inquiries to both the Chair and the staff director have been routinely ignored.

For example, at the March 9 meeting, instead of taking up a status report on the project (as the agenda announced), Commissioners were asked to approve, without any advance notice at all, the Chair's own personal statement of preliminary findings. At the same meeting, the Chair advised Commissioners that, "in April we expect to have the draft of the voting rights in Florida, the actual draft, in front of us." In April, however, Commissioners were given only an "Outline of the Final Document" and were advised that the draft report would be considered at the June 8 meeting. At no time were Commissioners advised they would be given only three days to read the report prior to the June 8 vote. The Chair dismissed any criticism in this regard, asserting that Commissioners should have known "that we would receive it when we did receive it."

Instead of taking responsibility for the question of agency leaks, the Chair now proposes to legitimize the premature disclosure of Commission reports, by suggesting a change in policy for Commission reports. Specifically, the Chair proposes, for future reports, "that we release the draft of the report publicly as soon as it's available without waiting [until] even when we give it to the Commissioners." While releasing drafts of a report as they are written makes much sense, since it would allow commissioners to discuss the findings with the staff before the document is finished, it's not clear why the Chair would give the press, but not the commissioners themselves, copies of such a draft.

##### *6. Selection of Allan Lichtman as the Commission's Sole Statistical Analyst for the Florida Report*

As we have argued, we believe that a rigorous statistical analysis of the available data clearly and convincingly contradicts Dr. Lichtman's alleged findings. Dr. Lichtman's conclusions are so unsupportable, in fact, that it is first worth pausing to discuss the Commission's selection of him as its sole statistical analyst to carry out such crucial work.

The choice of Dr. Lichtman to carry out this work is problematic. When he appeared at the June 8, 2001, meeting of the commission to present his findings, he took pains to present himself as a scholar above party, who had "worked for Democratic interests . . . and for Republican interests."<sup>37</sup> At the time, the American University web site identified him as a "consultant to Vice-President Albert Gore, Jr."<sup>38</sup> His partisan commitment was evident in his media appearances throughout the campaign and the period of post-election uncertainty.

Moreover, although Dr. Lichtman claimed (at the June 8 Commission meeting) that he began his study of possible racial bias in the Florida election with an open—even "skeptical"—mind, in fact, evidence suggests the contrary. As early as January

<sup>37</sup> Transcript of United States Commission on Civil Rights meeting, Washington, D.C., June 8, 2001, 46.

<sup>38</sup> <<http://www.american.edu/cas/faculty.shtml#HISTORY.WMA>>.

11, at the very beginning of his investigation and prior to conducting any detailed statistical analysis of his own, Dr. Lichtman stated publicly that he was already convinced, on the basis of what he had read in the *New York Times*, that in Florida "minorities perhaps can go to the polls unimpeded, but their votes are less likely to count because of the disparate technology than are the votes of whites." He concluded: "In my view, that is a classic violation of the Voting Rights Act."<sup>39</sup> Long before he examined any of the statistics, Dr. Lichtman had already concluded that Florida had disenfranchised minority voters and violated the Voting Rights Act.

A social scientist with strong partisan leanings might conceivably still conduct an even-handed, impartial analysis of a body of data. Unfortunately, that is not the case in the present instance.

#### CONCLUSION

America's journey on the road to racial and ethnic equality is far from over. We have traveled far, and still have far to go. But the Commission's majority report positively sets us back. By crying "disenfranchisement" where there was confusion, bureaucratic mistakes, and voter error, the report encourages public indifference. Real civil rights problems stir the moral conscience of Americans; inflated rhetoric depicting crimes for which there is no evidence undermines public confidence in civil rights advocates and the causes to which they devote themselves.

The U.S. Commission on Civil Rights was once the moral conscience of the nation. Under the direction of the Chair, Mary Frances Berry, it has become an agency dedicated to furthering a partisan agenda. After six months of desperately searching for widespread disenfranchisement in Florida, the Commission produced a 200-page report based on faulty analysis and echoing vague and unsubstantiated claims.

The shoddy quality of the work, its stolen-election message, and its picture of black citizens as helpless victims in the American political process is neither in the public interest nor in the interest of black and other minority citizens. Do we really want black Americans to believe there is no reason to get to the polls; elections are always stolen; they remain disenfranchised? There is important work the Commission can do. But not if its scholarly and procedural standards are as low as those in this Florida report.

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#### TERNSTROM-REBENBAUGH REJOINDER TO LICHTMAN

SEPTEMBER 3, 2001

We are pleased that, in his July 16, 2001 statement to the Committee on Rules and Administration of the United States Senate, Dr. Lichtman has, very belatedly, made available some of the details of his analysis that we have been seeking for months. When a majority of the members of the United States Commission on Civil Rights voted on June 8, 2001 to endorse his conclusions about the Florida 2000 elections, Dr. Lichtman's statistical report—which was absolutely central to the Commission's report—was grossly inadequate. It failed to provide the regressions that he claimed to have done, regressions that any scholar would require before they could assess the quality of his analysis.

This material was not made available to us until very recently, despite our repeated request, in violation of current scholarly norms in the social sciences. And what finally appeared on the Commission's web site on August 10 is dated July 16 but was never sent to us when it was first completed. Why not? Why keep information pertinent to an ongoing controversy from its own members who have advanced serious criticisms of its report? The answer, we suggest, is that the Commission fears that providing us with this document will allow us to advance additional unwelcome criticisms.

It is also noteworthy that much of the analysis Dr. Lichtman describes here was apparently done long *after* his original inadequate statistical report and his oral presentation of his findings at the Commission meeting of June 8. The Commission's report was not based on what is to be found in Dr. Lichtman's July 16 statement.

It is not clear when this additional work was done. At a hearing of the Senate Committee on Rules and Administration on June 27, we were struck by Dr. Lichtman's very odd response to Senator McConnell's question about the possible influence of poverty on rates of ballot spoilage. In answering the Senator, Dr. Lichtman spoke at length about his analysis of the significance of education, not of

<sup>39</sup>Transcript of U.S. Commission on Civil Rights hearing, Tallahassee, Florida, January 11, 2001.

poverty. As a highly experienced expert witness, Dr. Lichtman surely knew the importance of listening carefully to questions in such situations, and we suspect that he was being deliberately evasive. Could it be that as late as the end of June Dr. Lichtman had not yet in fact run any regressions that used county-level *poverty rates* as a variable, for example, despite suggestions to the contrary in his original report?

Dr. Lichtman's rejoinder is very brief, and it fails to address most of the objections we raised about his June report. We had neither the advantage of being able to obtain assistance of the Commission's sizable staff or the ability to hire experts of our own. Nonetheless, we developed a thorough critique of the Commission's statistical analysis, running to more than 8,000 words, more than a third of our entire long document. We had expected that Dr. Lichtman's rejoinder would address our chief criticisms of statistical issues. To our surprise and disappointment, it fails even to mention many of them. Before we assess what Dr. Lichtman has to say now, it will be useful to sum up the major points that he has not ever attempted to refute.

These matters, it should be noted, involve only a portion of our dissent. Close to two-thirds of the dissent is devoted to other flaws in the Commission's report. None of these criticisms has been answered by the authors of the report, although we believe that they are sufficient to lead any disinterested reader to conclude that the report is riddled with error and that its main conclusions are unproven.

#### I. KEY POINTS IN OUR CRITIQUE OF HIS STATISTICAL ANALYSIS THAT DR. LICHTMAN CHOSE TO IGNORE

Apparently uncontested, at least for now, are the following, spelled out in detail in our dissenting opinion on the Commission's report.

1. When a voter who turned in a ballot at the November election failed to register a valid vote for President of the United States, it is absurd to conclude that this proves that he or she was "disenfranchised." A good many voters do not vote for all offices on the ballot, and some deliberately abstain from making a choice in the presidential race. Substantial numbers also deliberately vote for more than one candidate for some bizarre reason. Indeed, Civil Rights Commission Chair Mary Frances Berry herself has said in public that she sometimes deliberately "overvotes."
2. Undoubtedly, though, substantial numbers of Floridians who wanted to register a choice in the presidential contest and actually cast a ballot failed to turn in one that included a presidential vote that was actually tabulated. This is a common feature of elections everywhere. What could explain this? Amazingly, both the Commission report and the report of Dr. Lichtman on which it heavily rests studiously avoid the term "voter error," even though that is the only credible description of what happened. The Commission tries to absolve such voters of all blame by referring to ballots that were "rejected" or "spoiled," as if someone or something had improperly "rejected" or "spoiled" these ballots. But the long and elaborate investigation the Commission conducted in Florida yielded not a shred of evidence to contradict the obvious fact that the only people who "spoiled" any ballots cast in Florida last November were the individual voters who failed to fill them in in compliance with established electoral procedures. Their ballots were "rejected" because they were not properly completed.
3. We cannot determine with any precision exactly *who* cast the ballots in which a valid choice for president could not be determined by the counting machines, or in many places by canvassing boards conducting manual recounts. Dr. Lichtman tries to draw conclusions about the matter by looking at variations from county to county in rates of ballot spoilage and then relating those variations to variations in other characteristics of those counties, chiefly as their racial composition. Counties, though, are crude units for analysis, and his method is highly vulnerable to what statisticians term "the ecological fallacy." Many leading statisticians and social scientists, some of them cited in our dissenting report, believe this method yields unreliable conclusions. Dr. Lichtman, regrettably, has chosen to pretend this serious methodological issue does not exist.
4. The estimate in the Commission report that received most attention in the press is the sensational claim that black voters were nine times as likely as whites to cast votes that did not count; in some places it even claims that the figure is ten to one. That figure was an absurd extrapolation that failed to control for any other variables that may have been correlated with race, such as poverty and literacy rates. We note with great interest that this esti-

mate does not reappear in Dr. Lichtman's July 16 statement, and that the author fails to provide any explanation as to why it does not reappear. His claim that the racial disparity in ballot spoilage rates was nine to one has been silently abandoned.

5. In addition to county-level data, Dr. Lichtman also originally examined precinct-level for three Florida counties. Although precincts are much small units than counties and superior in that respect, the difficulty with this part of the analysis is that *no socioeconomic variables other than race* were examined by Dr. Lichtman. No sophisticated social scientist would ever draw conclusions about how race influenced some social phenomenon from an analysis that used race as the *only* independent variable. The proper question is what effects may be attributed to race when other possibly relevant variables are held constant in the analysis. Dr. Lichtman made only a feeble stab at doing this in his analysis of county-level data; he failed to do it at all in his precinct analysis. In his July 16 statement, Dr. Lichtman reports on the findings of his subsequent analysis of two additional Florida counties—Broward and Escambia. This new material has precisely the same glaring defect as his earlier work on precinct data: it looks only at the relationship between race and ballot spoilage without taking other variables into account.
6. One of the oddest, and to us most offensive, features of the analysis that Dr. Lichtman did for the Commission was his decision to dichotomize the Florida population into the categories of black and "non-black." We would have thought that everyone today understood that there are very significant distinctions between non-Hispanic whites, Hispanics, Asian Americans, and American Indians. Casually lumping all these groups together as "non-blacks" obscures important cultural differences that we would expect the U.S. Commission on Civil Rights, of all bodies, to recognize and respect. After all, people of Hispanic descent outnumber African Americans in Florida today, and the state has sizable numbers of Asian Americans and American Indians as well. It is incredible, but readers of the Commission's report would never know that. Dr. Lichtman's July 16 statement offers no explanation for this egregious failure, and indeed presents further estimates that employ the indefensible "non-black" category.
7. In a separate statistical analysis, Dr. Lichtman examined the so-called "purge list" used by some county officials to remove from the registration lists persons convicted of a felony and hence ineligible to vote by law. Our dissent examined his data carefully, and concluded that it proved just the opposite of what the Dr. Lichtman and the Commission claimed. On this issue too, Dr. Lichtman has not provided any answer to our critique.

Any thoughtful reader with an open mind, we believe, would find these unanswered criticisms extremely damaging to the case the Commission attempted to make. They won't go away simply because defenders of the report pretend they don't exist.

## II. LICHTMAN'S ARGUMENTS IN HIS JULY 16 STATEMENT

We now turn to matters that Dr. Lichtman's July 16 document does address.

First, it should be noted that some of these issues are highly technical, and that readers without advanced training in statistics will find them very difficult to sort out. Our own expert, Dr. John Lott, goes into these matters in detail in his August 25, 2001 "Response to Lichtman's Comment." We will allude to some of Dr. Lott's main arguments below, but his observations should be read in their entirety.

What new evidence is presented in Dr. Lichtman's July 16 statement? Its opening pages report on his further work on precinct-level data from Broward and Escambia counties. As we have already observed above, Lichtman's failure to examine any socioeconomic or demographic variables other than race renders this exercise of little value.

Furthermore, Lichtman's discussion focuses on extreme cases—precincts that were either 90 percent or more African American or 90 percent or more "non-black," to use Lichtman's awkward and offensive term. As pointed out in our original dissent, this method exaggerates differences between groups. Florida blacks who live in nearly all-black neighborhoods cannot be assumed to be representative of the state's black population as a whole. They very likely are poorer and less educated, on the average. And whites or other "non-blacks" who lived in neighborhoods with very few or no African American residents may not be representative of the state's white population either. No careful scholar would extrapolate a statewide pattern from inspection of such extreme cases.

Perhaps most important, even his extreme case analysis—which clearly exaggerates differences—does not support his estimate that black voters were nine times as likely as non-blacks to cast invalid ballots. The extreme case analysis he has done in five counties, in fact, show that the average disparity was *not nine to one but three to one* (3.1:1 to be precise). We offered this criticism in our dissent, and Dr. Lichtman has provided no answer to it. The precinct-level data from the two additional counties does not alter the results at all.

In addition, Dr. Lichtman provides three regression tables that he claims support his contention that race alone is what determined the pattern of ballot spoilage in the 2000 election in Florida. Dr. Lott has examined these very carefully, and finds many flaws in them. The findings are very sensitive to the precise specifications used, and Dr. Lott argues that those specifications are arbitrary and lack adequate explanation and justification. Even when Dr. Lott reran the numbers using Dr. Lichtman's specifications, his results come out significantly different than those reported by Dr. Lichtman. Dr. Lott's own regressions are technically superior, we believe, and they yield entirely different conclusions.

Other experts will have to assess the technical aspects of this controversy. Instead of plunging into it more deeply, we will now shift ground and explore two vital issues that should be fully comprehensible to the lay reader. These involve the role of education and literacy levels in explaining rates of voter error, and the effect of the partisan affiliations of election officials

### III. THE QUESTION OF EDUCATION AND LITERACY LEVELS

Our original report argued that the voters who mistakenly spoiled their ballots in the November election were largely people who had trouble reading and following the simple instructions provided with the ballots. African Americans would fall into this category in disproportionate numbers, because the average literacy level of the black population is much lower than that of whites. The 1992 National Adult Literacy Study found that 38 percent of African Americans ranked at the lowest level in "prose literacy," Level 1. Persons at level one were defined as lacking the reading skill to be able to "make low-level inferences based on what they read and to compare or contrast information that can easily be found in [a] text."<sup>1</sup> Since blacks were nearly three times as likely as whites to be at the lowest literacy level, it would not be surprising to find that greatly disproportionate numbers of them were unable to meet the challenge of figuring out how to register a choice for a particular candidate. It hardly seems coincidental that the racial disparity in the Florida ballot spoilage rate and in levels of illiteracy nationally are so similar.

Dr. Lichtman maintains that his regressions disprove that hypothesis. He claims to have measured the effect of literacy by using two county-level measures—the proportion of county residents who were classified at the lowest literacy level and the proportion who had less than nine years of schooling. However, the most sophisticated regressions in the world will not yield meaningful results if the underlying data they employ are inadequate measures of the phenomenon they are supposed to represent. In this case, the data are grossly deficient for a number of reasons. We pointed out some of their deficiencies in our dissent, and it is disappointing that Dr. Lichtman ignores the issue altogether, blithely proceeding to crank out numbers that obscure rather than illuminate reality.

It is astonishing that Dr. Lichtman would use county-level estimates of the proportion of residents reading at Literacy Level 1 without telling his readers that the 1992 survey from which the data were drawn did not include enough cases from Florida to permit direct estimates of literacy levels. What he relied upon was a series of "synthetic estimates" that amount to guesses about what the level would be in light of each county's demographic characteristics.

Even worse, the way Dr. Lichtman that uses these county-level estimates ignores the crucial fact emphasized above—that African Americans are far more likely than whites to be at the lowest literacy level. If we had good data that would permit county-level estimates of literacy broken down by race, we are confident that a "percent black at Literacy Level 1" would prove highly significant in a regression equation.

A similar objection applies to Dr. Lichtman's other related variable, the proportion of county residents with less than nine years of schooling. These figures are not *broken down by race*, so they are useless for testing the proposition that racial differences in literacy levels are the major cause of the disparities in ballot spoilage.

<sup>1</sup>National Center for Education Statistics, *Adult Literacy in America: A First Look at the Results of the National Adult Literacy Survey*, National Center for Education Statistics (Washington, D.C.: U.S. Government Printing Office, 1993), 18, 113.

Furthermore, this is a poor measure because less than a tenth of Florida's population (9.6 percent) had this little education at the time of the 1990 Census, the data Lichtman uses, and the figure would have been even lower in 2000. Very few people under the age of 50 have so little education these days.

Dr. Lichtman's introduction of this variable is very puzzling. His original report and the Commission report both claim that he did a regression that included both literacy and percent who were not *high school graduates* as variables. We have repeatedly requested to see the actual regression, to no avail. We still do not have it, because Dr. Lichtman has changed the schooling variable from "percentage of high school graduate" to "percent under 9th grade" education. Why the switch? Do these two measures yield different results? Surely the matter requires some explanation.

In denying that literacy and educational levels have anything to do with the pattern of non-voting he is attempting to explain, Dr. Lichtman would have us believe that prosperous and well-educated African Americans living in the suburbs or relatively integrated neighborhoods were just as likely to cast spoiled ballots as those living in inner city slums and voting in precincts that were 90 percent or more black. How could this possibly happen? We can only imagine two scenarios in which this might be true:

- a. It could be true if local election officials had somehow figured out which ballots were cast by black voters and how to alter them behind the scene so as to render them invalid. This seems frankly impossible, and the Commission never found a shred of evidence even hinting at such fraudulent manipulation of ballots in its long investigation in Florida. This scenario is even harder to take seriously when we recall that the vast majority of spoiled ballots were cast in jurisdictions in which Democrats controlled the electoral machinery (a point Dr. Lichtman denies unconvincingly as we shall see shortly). These officials lacked both the means and the motive to carry out such a scheme. The idea is simply ludicrous.
- b. That leaves voter error. Dr. Lichtman apparently believes—or at least would like us to believe—that well-educated African Americans do no better than functional illiterates when confronted with the challenge of reading ballot instructions and following simple directions like "VOTE FOR ONE AND ONLY ONE." This proposition is also ludicrous.

#### IV. THE PARTISAN AFFILIATIONS OF LOCAL ELECTION OFFICIALS

We have criticized the Commission report for its partisanship. Its errors, distortions, and dubious interpretations all have same slant. The report, quite simply, was clearly designed to support the "stolen election" theory. George W. Bush only won Florida, and hence the presidency, it holds, because "countless numbers" of black residents of Florida were somehow "disenfranchised." It was all the fault of Governor Jeb Bush and Secretary of State Katherine Harris, who supposedly orchestrated the effort. The Commission report concluded that its investigation had not uncovered "conclusive evidence" that state officials were involved in a conspiracy to keep minorities from voting. This formulation makes the Commission's bias unmistakable. In fact, the Commission not only found no "conclusive evidence"; it found no evidence whatever to support this lurid charge.

In our dissent, we went beyond this obvious point and reported that Dr. Lott's statistical analysis had yielded very important findings that were impossible to square with the "stolen election" theory. We noted that in 24 of the 25 Florida counties with the highest rates of ballot spoilage, the electoral machinery was in the hands of *Democratic* local officials, and in the 25th the supervisor of elections was an Independent. The choice of voting technology and of counting procedures, that is, had nothing to do with Governor Bush and Secretary of State Harris. It was made by people with the same partisan affiliations as more than nine out of ten African Americans who were allegedly disenfranchised. The same holds when you look at all the state's 67 counties, as Dr. Lott did. Having a Democrat in charge of the election sharply increased the ballot spoilage rate; having a Republican in charge lowered it dramatically.

This is such a damning blow to the stolen election theory supported by the Commission report that Dr. Lichtman could not ignore it. One of his new regressions, reported in his Table 2, does include the political party of the supervisor of elections as a variable. But taking the party of the supervisor into account, he assures us, "has no discernible influence on ballot rejection rates."

Why do Dr. Lott's regressions show a very powerful influence for this variable and Dr. Lichtman none at all? The answer is Dr. Lichtman engages in a nice bit of statistical legerdemain here. He does it by slyly introducing, along with the party of

the supervisor of elections, *another new variable*—the proportion of Democratic voters in the county. Adding this into the equation removes the effect of party of supervisor that Lott found. Why? Because the percent Democratic among voters is, of course, very strongly correlated with the likelihood that the supervisor was Democratic. Dr. Lichtman is thus saying, in effect, that “the ballot spoilage rate was much higher in counties in which Democrats controlled the electoral machinery, but they controlled the elections only because there were so many Democratic voters in those counties.”

True, but utterly irrelevant. This does nothing to undermine Dr. Lott’s original analysis. Dr. Lott pointed out a devastating weakness in the argument that the black vote was diluted, in some unknown fashion, by the actions of Republican state officials. It happens that the ballot spoilage rate in general, and the estimated spoilage rate for black voters, was highest in places where the people who ran the elections—the only ones in a position to do anything to discourage voters or deface ballots—were from the same party as the overwhelming majority of the state’s African American voters. The fact that those same counties tended to be heavily Democratic does nothing to alter that undeniable fact.

#### V. CONCLUSION

Our harsh assessment of the U.S. Commission on Civil Rights’ report on the Florida elections in 2000 remains unchanged. In its earlier history, under very different leadership, the Commission did distinguished work that was applauded by people of widely different political persuasions. The imprimatur of the Commission carried weight, and deservedly so.

The Florida report, alas, lacks credibility, and further tarnishes the Commission’s once-splendid reputation. Beneath the patina of scholarship provided by Dr. Lichtman, it nothing more than a tendentious brief written to support preconceived partisan conclusions. It consistently distorts data and ignores evidence that does not fit its argument.

Furthermore, the Commission has failed miserably in its responsibility to give a respectful hearing to the voices of Commissioners who disagree with its present leadership. Repeated requests for information, most notably Dr. Lichtman’s machine-readable data and the regressions he performed using it, have been stonewalled. We have been told that Dr. Lichtman had no data in his possession, suggesting either that he made up his statistical estimates out of whole cloth or that he unaccountably destroyed all his statistical files once he had done his calculations. Testifying before the Senate Rules Committee on June 27, 2001, Commission Chair Mary Frances Berry suggested that Dr. Lichtman had obtained all of his data from the Web, and that it had somehow flown back up to the Web once he had produced his tables, an absurdity no one familiar with quantitative social science could possibly believe. A few weeks later, when the material was still not forthcoming, we heard another excuse from Chair Berry. Dr. Lichtman did have what we sought, but it was scattered on four or five different computers and would be too much trouble to assemble for us. These were simply pathetic efforts to conceal the truth: that the commission sought to shelter Dr. Lichtman’s shoddy and slanted analysis from the severe criticism it so richly deserved.

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UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

April 2, 2002

Memorandum for Les Jin, Staff Director

From: Commissioner Abigail Thornstrom

Re: Your response to my memorandum dated March 20

I received your memorandum dated April 1 which was written in response to my memorandum dated March 20.

Your memorandum alludes to my being "confused about the nature and purpose of briefings." I am not, I believe, confused about the nature of briefings. Further, I agree with you that a "briefing is meant to inform members of the Commission on the current debate on this topic." My asking for adequate notice only reflects my desire to understand issues fully. We are now eleven days away from the briefing and I have yet to receive any preparatory materials nor the name of the expert or speaker conducting the briefing. And, as I said in my memorandum to you, IDEA is an enormously complicated issue.

It is obviously true that "there is no expectation [on *your* part] that Commissioners have prepared beyond the work the Commission staff has completed on a briefing memo that will be given to you." But I find this extraordinarily low expectation a betrayal to the noble beginnings of this Commission and condescending to the Commissioners who are willing to prepare adequately, contribute, learn and listen to all sides.

Further, if the agency is so understaffed, why not use the expertise of all the Commissioners? Please do call, write or e-mail and ask me for names and suggestions for upcoming briefings. It would take a five-minute phone call from one of your three special assistants to my special assistant to do this. Or simply e-mail me directly, I am always happy to reply right away. It seems apparent that some commissioners are left out of the planning process because the leadership of the Commission has no interest in a variety of opinions, not because the Commission is understaffed or underfunded.

For instance, on March 8, Commissioners Edley, Braceras and I offered to help in various different ways to plan an educational accessibility hearing, briefing or forum. Our offer was rejected. However, Commissioner Edley suggested that "the report be prepared in a process that...enables the commissioners to react to a draft." He further suggested that the staff "circulate in advance a list of some of the experts with whom the staff is going to have a conversation in preparing it" so that commissioners have an opportunity to make other suggestions. The Chairperson said this system was already in existence. If so, the system has



never been put into use in the time I have served at the Commission. Would you please indicate the best manner to contact the staff. I have many times made suggestions and no one on staff has availed themselves with the opportunity to talk to me whether on the phone or in person about any substantive matter.

You state that "the briefing is merely an update for the Commission and a possible basis for deciding what else we might do on this subject." How can we decide what to do on this complicated subject with three-week notice and perhaps seven days to read a briefing memo I have yet to receive? That is an example of bad management and planning that no amount of appropriation increase would remedy. If there is indeed a tight budget, why not plan ahead rather than try to catch up?

Your answer to my memorandum is also incomplete. Please address the following five issues which were included in my last memorandum:

1. Please inform the Commissioners why, in spite of several on the record statements about having thirty-day notice before any briefing, the Commission has decided for the second time this year to ignore this. Also, the Chairperson said the bioterrorist expert was a "speaker" rather than a briefer. Yet, the agenda stated that he was conducting a "briefing." Please indicate the difference between the two.
2. Please inform the Commission about the status of the briefing on welfare reform which was originally scheduled for March 8.
3. Please indicate what other briefings you project holding this year.
4. The Chairperson has stated repeatedly that any Commissioner can request a briefing. I would like to request a balanced briefing on educational accessibility. I would like to contribute names to this briefing and have it composed of more than one advocate proposing one side. Which members of the staff should I contact regarding this matter?
5. If the Commission is thinking of hiring an expert or consultant to help it prepare any aspect of the report on education, I want a full discussion of the matter at a regular Commission meeting. Has the Commission hired a consultant, expert or other outside source to assist with the education report? And, if so, at what cost. There are already educational experts at the Commission itself.

Finally, on an administrative note, I have yet to have a dedicated fax line installed in my house. I am more than happy to do without a fax machine, but the Commission insists on not using e-mails. And, the Chairperson herself suggested during the January meeting that I request a dedicated fax line. I sent you a memorandum on this matter on January 14. I have since received a fax machine but have yet to get an answer on why it is taking so long to set up the line. The only response my assistant received was that Administrative Services were "working on it." Could you please ask the staff to at least explain to me what is taking so long?

Thank you.



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624 Ninth Street, N.W.  
Washington, D.C. 20425

March 20, 2002

Memorandum for Les Jin

From: Commissioner Abigail Thornstrom

*Abigail Thornstrom*

Re: Briefing on IDEA

I received your memorandum dated March 19 indicating that there would be a briefing on IDEA on April 12. This is less than three weeks advance notice and brings up a number of issues having to do with management and balance.

Clearly, this is not the manner in which the Commission should be addressing this complicated and important topic.

First, once again, the Commission has decided to hold a briefing without adequate notice. On at least two other occasions, when Commissioners have protested changes in the agenda or last minute briefings, the chairman has stated unequivocally that all commissioners will have at least one full period between Commission meetings to prepare.<sup>1</sup>

Furthermore, before the last Commission meeting we were told that there would be a briefing on welfare reform, but a week before the meeting we received a memorandum informing us of a briefing on bioterrorism instead. Both the agenda and the press release characterized this as a briefing, which requires 30 days notice. However, the chairperson said it was "a speaker." I would like to know the difference between the two.

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<sup>1</sup> On Friday, November 15, 1996, Chairperson Berry stated: "Well, you will know at least at the meeting before the meeting, if there's some emergency thing added." Commissioner George asked: "So nothing will be added unless it's added at a meeting before that meeting at which the briefing will be held." And the Chairperson replied: "Yes, Yes. And if it's an emergency and we have to for some other way do it that way, somebody will call you and tell you. Okay? The staff director. How's that?"

On June 18, 1999, Chairperson Berry stated: "There may be emergencies from time to time, or items that happened and that Commissioners would be notified when they occurred....we will try to make sure that in the future....the staff director will be instructed to make sure that people know a month in advance if there is a briefing scheduled for already for something." She reiterated: "So the general rule then, as I understand it, will be that Commissioners will be notified a month in advance."

As to IDEA, it is an intellectual outrage to cover such a serious topic in a one-day briefing. A proper look at IDEA, an immensely complicated statute, requires months of work, and all Commissioners should have the opportunity to prepare fully for such an inquiry. Moreover, the panel assembled to address the issue should have a wide spectrum of views. Last month the Commission voted to do away with incredibly important and potentially beneficial hearings on education because the staff had not time to prepare for hearings. Yet, the staff found time to invite a speaker (or speakers) on IDEA.

These once-over-lightly briefings on issues that professionals in the field can barely get their arms around further undermine the credibility of the Commission.

Please inform the Commission about the status of the briefing on welfare reform. Also, please indicate what other briefings you project holding this year. I would like to request a balanced briefing on educational accessibility. And if the Commission is thinking of hiring an expert or consultant to help it prepare any aspect of the report on education, I want a full discussion of the matter at a regular Commission meeting. We should not be embarrassed by the appearance of another consultant of whom we had no notice.

Finally, in spite repeated memoranda and verbal and on the record requests, it still takes too long to get transcripts. I have yet to receive the February 8 transcript on Environmental Justice or the March 8 Commission meeting transcript. Surely, it does not take twelve days to verify a three-hour meeting transcript.

Thank you.



UNITED STATES  
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624 Ninth Street, N.W.  
Washington, D.C. 20425

March 1, 2002

Memorandum to Les Jin

From: Commissioner Abigail Thernstrom

*Abigail Thernstrom*

Re: Agenda for Commission meeting March 8

I was stunned to receive the agenda today—exactly a week before our next meeting—and discover that you decided to unilaterally change the topic of the briefing from “welfare reform” to “bioterrorism and access to healthcare.”

Since 1995, it has been a well-established practice at the Commission that Commissioners should have at least one month before a briefing in order to prepare and make contributions. The only exception to this 30-day notice, as I understand it, is an emergency. Although bioterrorism is an interesting topic, it hardly qualifies as an emergency since this is something this nation has faced for the last six months.

Please inform me:

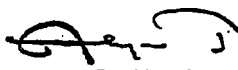
1. When precisely was the speaker invited?
2. Which staffer became ill and why didn't you call the Commissioners or send us an e-mail or a quick fax notifying us of the change?
3. In January, it was determined that this month we would have a hearing on education. What is the status of that hearing?
4. Why wasn't I contacted after I suggested small changes to the Senator Daschle's letter. At a minimum I should have been called and told there were no plans to make changes. Further, if the Commissioners did not unanimously approve the letter as written, the phrase “for the Commissioners” at the end of the letter should have been deleted.

Some of these questions I have addressed in previous memoranda. I can't help but think that every attempt I make at communication with your office is met with either hostility or inefficiency or both.

UNITED STATES  
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Washington, D.C. 20425

February 25, 2002

Memorandum for: Les Jin, Staff Director

From: Commissioner Abigail Thernstrom 

Re: Transcript for February 8 meeting, letter to Senator Daschle and press clippings.

Two weeks have passed since the last Commission meeting and I have yet to receive any version of the transcript. Please e-mail the February 8 transcript to [thernstr@fas.harvard.edu](mailto:thernstr@fas.harvard.edu).

On February 19, I sent you suggestions and a vote on the letter to Senator Daschle, however, I have never been notified about the final resolution nor sent a copy of the final version of that letter.

In two weeks we will be having a briefing on welfare reform. Commissioner Braceras and I sent you a list of experts to be invited. Precisely which experts were invited to attend?

Finally, I appreciate all the hard work that goes into clipping and photocopying all the articles related to civil rights issues. From now on, I would like to receive, via e-mail, a list with the titles of the articles and a link to that article. This could reduce dramatically the amount of paper used every week and the cost to mail an average of two reams of paper, every week, to eight commissioners. Once again, I remind you that most organizations are now using e-mail to save staff time, mail costs and paper usage.

Thank you very much.



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624 Ninth Street, N.W.  
Washington, D.C. 20425

February 19, 2002

Memorandum for Les Jin

From: Commissioners *Abigail Thornstrom* and *Jennifer C. Braccas*  
Jennifer C. Braccas

Re: February 2002 letter addressed to Senator Tom Daschle on election reform

First, thank you for running this letter past us before sending it out.

We request some small changes which would enable us to sign on to this letter.

Paragraph 2, last sentence, change to:

Congress should act to address this problem in order to ensure that the right to vote and subsequently have that vote counted is secured for all citizens throughout the nation.

(That is, we are eliminating the phrase: "Regardless of why this disparity exists;" we are changing "must" to "should," and deleting "ultimately eliminate.")

2. Paragraph 3, last sentence change to:

We hope Congress can formulate a strategy that includes greater responsiveness to the voting rights of all Americans.

(That is, we are eliminating: "We hope that these two reports have assisted the Congress.")

Thank you very much.



UNITED STATES  
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624 Ninth Street, N.W.  
Washington, D.C. 20425

February 14, 2002

TO: Les Jin  
Staff Director

FR: Commissioner Jennifer Braceras  
Commissioner Abigail Thernstrom

RE: SUGGESTED EXPERTS ON WELFARE REFORM and WELFARE-TO-WORK

We would like to recommend the following experts for the March 8, 2002 briefing on Welfare Reform:

COMMUNITY-BASED WELFARE EXPERTS

Clarence Carter  
Director, Office of Community Services  
Dept. of Health and Human Services  
*\* Former Secy. of Community Services for  
Commonwealth of Virginia*

Robert L. Woodson Sr.  
President, National Center for  
Neighborhood Enterprise  
1424 16th Street, N.W., Suite 300  
Washington, DC 20036  
Phone: 202-518-6500  
Fax: 202-588-0314  
E-mail: info@ncne.com

Eloise Anderson  
Director, Program for the American Family  
Claremont Institute  
1127 11th Street, Suite 206  
Sacramento, CA 95814  
Phone: 916-446-7924  
Fax: 916-446-7990  
*\* Advised former Governor Pete Wilson on  
welfare issues*

Star Parker  
President, Coalition for Urban Renewal  
6033 West Century Boulevard, Suite 400  
Los Angeles, CA 90045  
Phone: 949-361-1647  
Fax: 949-361-6567

## POLICY EXPERTS

Douglas Besharov  
 Professor, University of Maryland  
 Resident Scholar, American Enterprise  
 Institute  
 1150 17th Street, N.W.  
 Washington, DC 20036  
 Phone: 202-862-5904  
 Fax: 202-862-7177

Edward Potter  
 President, Employment Policy Foundation  
 1015 15th Street, N.W., Suite 1200  
 Washington, DC 20005  
 Phone: 202-789-8618  
 Fax: 202-789-8684  
 E-mail: epotter@epf.org  
*\* EPF evaluates employment trends, non-  
 traditional work, welfare-to-work programs*

Robert Rector  
 Senior Research Fellow  
 The Heritage Foundation  
 214 Massachusetts Avenue, N.E.  
 Washington, DC 20002  
 Phone: 202-608-5213  
 Fax: 202-544-5421  
 E-mail: info@heritage.org

Michael Tanner  
 Director of Health and Welfare Studies  
 Cato Institute  
 1000 Massachusetts Avenue, N.W.  
 Washington, DC 20001  
 Phone: 202-842-0200  
 Fax: 202-842-3490  
 E-mail: mtanner@cato.org

## ACADEMIC

Bradley Schiller Ph.D.  
 Professor, School of Public Affairs  
 American University  
 4400 Massachusetts Avenue, N.W.  
 Washington, DC 20016  
 Phone: 202-364-1138  
 Fax: 202-364-8501






UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

U.S. GOVERNMENT PRINTING OFFICE  
Washington, D.C. 20425

January 29, 2002

Memorandum for: Les Jin, Staff Director  
 From: Commissioner Abigail Thernstrom   
 Re: Access to documents and timeliness in delivery

During the last Commission meeting I brought up the subject of timeliness in handling Commission transcripts and other documents. Eighteen days have passed since the last Commission meeting and I have yet to receive a copy of the transcript. I know you obtain copies of the transcripts a day or two after the meeting. Even though I have been told the reporter took longer than expected this time, you could have circulated the meeting portion of the transcript and then the longer afternoon hearing portion. I can only conclude that my repeated requests are ignored purposefully. Not only are the transcripts necessary to prepare for the following meeting, the hearing record closes on February 11. I would like to have adequate time to prepare questions for the hearing participants.

This is not the only problem I have had this month accessing documentation in a timely manner. I have repeatedly requested to receive copies of press releases before they are issued. I just found out about a press release the Commission issued for Martin Luther King day over seven days ago. I never received a copy of the press release nor was I ever informed my name would be included.

A week ago, Chairperson Berry sent a letter, on behalf of the Commission, to Governor John Ellis Bush. The letter is dated January 14. Your office has yet to send a copy of the letter to the Commissioners.

Finally, on January 28 someone called the main number in your office to ask for my assistant's telephone number. This person was treated rudely and was given the wrong extension. She had to call again to find out the right extension. This is not the first time this has happened. On September 14, another person called your office and asked for my assistant's extension. She was told your office did not have it. Only after explaining why she was calling was she given my assistant's telephone number. My assistant addressed this informally with Kim Alton and was assured that this was an anomaly and it would not happen again. I find it disrespectful that any caller—whoever it is—would be treated with disdain and be given the wrong extension, seemingly deliberately. I doubt your staff treats calls directed to any of the other assistants in this fashion.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

January 17, 2002

MEMORANDUM FOR

LES JIN  
Staff Director

DEBRA A. CARR  
Deputy General Counsel

FROM:

Commissioner Abigail Thornstrom  
Commissioner Jennifer C. Braceras  
Commissioner Peter Kirsanow

*JC Braceras / JH*  
*Peter Kirsanow / JH*

RE:

Environmental Justice draft report timeline

To avoid the series of misunderstandings that occurred during the hearings and drafting of the Florida report, we hereby request that you submit to us in a timely manner your written answers to the following nine questions.

1. When will we get a transcript of the January 11 Commission meeting? As per Chairman Berry's directive at the last Commission meeting, please provide us the machine-readable version of this and the other transcripts we have requested.
2. How much time do we have to submit questions to the speakers?
3. Who has been asked to testify at the next hearing?
4. Who issued those subpoenas and under whose authority?
5. What is the anticipated schedule for a full draft report?
6. What is your precise projected timeline for this process? We expect to receive the draft report at least a month before we vote on it.
7. When precisely does the record close for each of the hearings held?
8. Does the Commission intend to issue a preliminary report before the record is closed as it did for the Florida report?
9. How does this change the projected schedule for this year? Specifically, when will the educational hearing take place and who has been invited to participate?

Thank you.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

January 14, 2002

Memorandum for Les Jin, Staff Director

From: Commissioner Abigail Thornstrom

A handwritten signature in black ink, appearing to read "Abigail Thornstrom".

Re: Dedicated fax line and plain paper fax

At Chairperson Berry's suggestion during the January 11 Commission meeting, I am writing to request the installation of a dedicated fax line and the purchase of a plain paper facsimile machine.

Please advise me of any further steps I should take arrange for the line and facsimile.

I still need to receive the machine-readable discs for Commission meeting transcripts for July, September, October, November and December 2001. Are those discs misplaced or lost? In your last memorandum you note that Kim Alton responded to this request. However, the only message my assistant got from Kim Alton is that Audrey had given the discs to her "sometime before Thanksgiving" and that she would give them to my assistant. She has not received them as of today.

Thank you.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

January 4, 2002

Hon. Mary Frances Berry  
Chairman  
U.S. Commission on Civil Rights  
624 9th Street, N.W.  
Washington, D.C. 20425

Dear Chairman Berry:

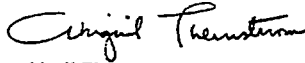
I write on behalf of myself and Commissioners Braceras and Kirsanow, both of whom have authorized me to send this joint letter. In light of the pending litigation in the U.S. District Court for the District of Columbia concerning Victoria Wilson's refusal to acknowledge that her statutory term of membership on the Commission has ended, we hereby request that you postpone the meeting of the Commission currently scheduled for January 11, 2002 at 8:30 a.m.

As you may know, all parties to the litigation and the presiding judge have agreed to an expedited briefing schedule. Final briefs are due to be filed on January 14, 2002. Holding a meeting on January 11, just days before a court will be asked to reach a final decision on this matter, would clearly not be in the best interest of the Commission or the public we are charged with serving.

Hon. Mary Frances Berry  
January 4, 2002  
Page 2

In light of the consensus among independent observers, expressed most recently by the career staff of the non-partisan Congressional Research Service, that Ms. Wilson's term has ended, convening a meeting with Ms. Wilson participating would serve only to sow discord. We should instead be working to forge a bipartisan alliance. We therefore urge you to postpone the January 11 meeting.

Sincerely,

A handwritten signature in cursive script that reads "Abigail Thornstrom".

Abigail Thornstrom

cc: Jennifer Braceras, Esq.  
Peter Kirsanow, Esq.



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

January 4, 2002

MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM

FROM:

LES JIN <sup>N</sup>  
Staff Director

SUBJECT:

Response to December 19, 2001 Memorandum

I regret that your busy schedule will make it difficult for you or your special assistant to meet with me and/or the appropriate Commission staff members to discuss the status of the upcoming environmental justice and education hearings. Despite this being the holiday season, appropriate staff and I have been available to meet during the entire period since I wrote you on December 17. In the event that your schedule may change, my office is available to set-up a conference call or in-person meeting to discuss your views and receive your input.

As the Staff Director, I work to achieve the goals outlined and approved by the Commission. My responsibility is to implement the decisions and priorities of the Commission as a body. My role is to serve the Commissioners as a group, as opposed to working for individual Commissioners. This was discussed at length at our April 2001 meeting. Nevertheless, I also try to accommodate individual Commissioner requests, and disagree with the assertions contained in your December 19 memorandum regarding my responsiveness to your requests.

In fact, many instances where you claim I have failed to respond appear to be situations where the responses were in the form of conversations between Kim Alton, one of our special assistants, and your assistant, Kristina Arriaga. That our responses are often verbal, either directly to the Commissioner or indirectly through his/her special assistant, is not unusual. I can assure you that you and the other Commissioners are treated similarly in this regard. This approach is consistent with past Commission practices and was discussed at our April 2001 meeting also.

I regret that you disapprove of how I have managed the Commission. I hope you will change your mind once you have a chance to review this letter. Regardless, however, as noted during prior discussions at Commission meetings, my job is not to respond to the preferences of individual Commissioners, but rather to ensure that I am responding appropriately to the Commissioners as an entity. Unfortunately, this does leave open the possibility that, at any given time, one or more Commissioners would disapprove of

how I handle my duties. Certainly, if the Commissioners as an entity determine that I have incorrectly judged its guidance and need to make changes, I assure you that I will make those changes immediately. Thus, if you remain dissatisfied with my general performance or with any specific matters, I can only suggest that you take the matters up with the Chairperson or the Commissioners, in conformity with Commission policy.

In the meantime, my suggestion that we schedule a meeting to discuss the upcoming hearings remains open and I do hope that your schedule will permit such a meeting to take place in the near future. Regardless, I assure you that the dedicated Commission staff will continue to work over the upcoming weeks and months to ensure that these projects are ready for presentation at the appointed time.

- cc: Mary Frances Berry, Chairperson
- Cruz Reynoso, Vice Chairperson
- Jennifer C. Braceras, Commissioner
- Christopher Edley, Jr., Commissioner
- Elsie M. Meeks, Commissioner
- Russell G. Redenbaugh, Commissioner
- Victoria Wilson, Commissioner

UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS624 Ninth Street, N.W.  
Washington, D.C. 20425

January 3, 2002

**BY FAX AND REGULAR MAIL**

The Honorable Les Jinn  
Staff Director  
U.S. Commission on Civil Rights  
624 9th Street, N.W.  
Washington, D.C. 20425

*Re Motion to Intervene in Kirsanow v. Wilson. C.N. 1:01-CV-02541-GK,  
U.S. District Court for the District of Columbia*

Dear Mr. Jinn:

I write on behalf of myself and Commissioners Peter Kirsanow and Abigail Thornstrom in response to your memorandum of December 21, 2001 (a copy of which I attach) and the subsequent filing of a motion to intervene on behalf of the Commission in the above-referenced lawsuit against Victoria Wilson.

Specifically, you claim in your memorandum that the Commission voted at its December 7, 2001 meeting to "reaffirm[] its position" that "all Commissioners serve six-year terms" and that "Victoria Wilson's term did not expire on November 29, 2001." You further indicate that someone (unnamed) has retained the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison to "vindicate" the "Commission's position" on this matter. Paul, Weiss has now filed a motion on behalf of the Commission to intervene in the lawsuit between Ms. Wilson and Commissioner Kirsanow currently pending in the U.S. District Court for the District of Columbia. In taking these actions, you have acted far outside the scope of your authority as staff director, and we strenuously object.

To begin with, we believe you have mischaracterized the record. The Commission did not vote prior to December 7, 2001 on the length of Commissioners' terms or on Ms. Wilson's tenure at the Commission (nor is the Commission empowered to make such a determination). Your suggestion, therefore, that the Commission had ever taken a "position" that could have been "reaffirmed" is incorrect. In truth, the Commission has never voted on the question of when Ms. Wilson's term expired and, indeed, it is not authorized to do so. Moreover, the Commission was not properly constituted pursuant to 42 U.S.C. § 1975 *et seq.* when it purportedly met on December 7, 2001. Accordingly, any vote relating to this matter in which Ms. Wilson's view was registered is non-binding and *ultra vires*.





UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

January 3, 2002

**BY FAX AND REGULAR MAIL**

The Honorable Les Jin  
Staff Director  
U.S. Commission on Civil Rights  
624 9th Street, N.W.  
Washington, D.C. 20425

*Re: Motion to Intervene in Kirsanow v. Wilson, C.N. 1:01-CV-02541-GK,  
U.S. District Court for the District of Columbia*

Dear Mr. Jin:

I write on behalf of myself and Commissioners Peter Kirsanow and Abigail Thornstrom in response to your memorandum of December 21, 2001 (a copy of which I attach) and the subsequent filing of a motion to intervene on behalf of the Commission in the above-referenced lawsuit against Victoria Wilson.

Specifically, you claim in your memorandum that the Commission voted at its December 7, 2001 meeting to "reaffirm[] its position" that "all Commissioners serve six-year terms" and that "Victoria Wilson's term did not expire on November 29, 2001." You further indicate that someone (unnamed) has retained the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison to "vindicate" the "Commission's position" on this matter. Paul, Weiss has now filed a motion on behalf of the Commission to intervene in the lawsuit between Ms. Wilson and Commissioner Kirsanow currently pending in the U.S. District Court for the District of Columbia. In taking these actions, you have acted far outside the scope of your authority as staff director, and we strenuously object.

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UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

January 3, 2002

**BY FAX AND REGULAR MAIL**

The Honorable Les Jin  
Staff Director  
U.S. Commission on Civil Rights  
624 9th Street, N.W.  
Washington, D.C. 20425

*Re Motion to Intervene in Kirsanow v. Wilson. C.N. 1:01-CV-02541-GK,  
U.S. District Court for the District of Columbia*

Dear Mr. Jin:

I write on behalf of myself and Commissioners Peter Kirsanow and Abigail Thornstrom in response to your memorandum of December 21, 2001 (a copy of which I attach) and the subsequent filing of a motion to intervene on behalf of the Commission in the above-referenced lawsuit against Victoria Wilson.

Specifically, you claim in your memorandum that the Commission voted at its December 7, 2001 meeting to "reaffirm[] its position" that "all Commissioners serve six-year terms" and that "Victoria Wilson's term did not expire on November 29, 2001." You further indicate that someone (unnamed) has retained the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison to "vindicate" the "Commission's position" on this matter. Paul, Weiss has now filed a motion on behalf of the Commission to intervene in the lawsuit between Ms. Wilson and Commissioner Kirsanow currently pending in the U.S. District Court for the District of Columbia. In taking these actions, you have acted far outside the scope of your authority as staff director, and we strenuously object.

To begin with, we believe you have mischaracterized the record. The Commission did not vote prior to December 7, 2001 on the length of Commissioners' terms or on Ms. Wilson's tenure at the Commission (nor is the Commission empowered to make such a determination). Your suggestion, therefore, that the Commission had ever taken a "position" that could have been "reaffirmed" is incorrect. In truth, the Commission has never voted on the question of when Ms. Wilson's term expired and, indeed, it is not authorized to do so. Moreover, the Commission was not properly constituted pursuant to 42 U.S.C. § 1975 *et seq.* when it purportedly met on December 7, 2001. Accordingly, any vote relating to this matter in which Ms. Wilson's view was registered is non-binding and *ultra vires*.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

December 19, 2001

Memorandum to Les Jin, Staff Director

From: Commissioner Abigail Thernstrom

RE: Memorandum date December 17, 2001

I am writing in reference to your memorandum dated December 17 entitled "Upcoming Briefings." You invite me or my special assistant to meet with you or appropriate staff members to discuss an environmental justice briefing that will take place roughly three weeks from now--with the holidays in between and everyone extremely busy or away.

On April 17--eight months ago!--I sent you a memorandum suggesting two names for the environmental justice briefing. I never received a response to that memorandum nor was I ever informed if the suggested participants were ever approached. Further, on August 29, I sent you another memorandum regarding the environmental justice briefing.<sup>1</sup> I never received an answer. Considering the fact that the briefing has been postponed several times, there has been plenty of opportunity to invite the suggested speakers.

On September 23, I sent a memorandum regarding the educational hearing.<sup>2</sup> I have yet to hear from anyone on staff who is actually working on this project. Nor have you answered any of my specific questions regarding the hearings.

<sup>1</sup> Excerpt from August 19 memorandum for Les Jin from Commissioner Thernstrom: On July 19<sup>th</sup> Commissioner Thernstrom sent a memo requesting specific information about the Environmental Justice briefing which has been repeatedly rescheduled and finally announced for September 14<sup>th</sup>. On July 27<sup>th</sup> Commissioner Thernstrom's assistant received a call from your office confirming the briefing would take place and was told more details were forthcoming. Last week and this week she left messages requesting the additional information to no avail. Since April 17<sup>th</sup> we have expressed in writing a particular interest in this topic and have sent the biographical information of two experts. Have these experts been invited? Is the Environmental Justice briefing taking place?

In addition, is anyone else invited to speak, participate or present a report or paper at the forthcoming Commission meeting on any topic? Has the Commission retained any consultants in association with any upcoming project?

<sup>2</sup> Excerpt from September 23 memorandum for Les Jin from Commissioner Thernstrom: I would like the Commission to invite the following expert to participate in the upcoming education hearing to take place in

Your memorandum of December 17 is thus ridiculously late, as well as willfully incomplete.

Moreover, this is not a first. For the last nine months I have sent memoranda to you suggesting the names of participants for various hearings.

On October 5, I sent you a detailed list of experts on immigration for a projected briefing on October 12. You never responded to my memorandum nor invited any of the suggested experts.

In addition, you failed to respond to any of the other issues addressed in the memorandum I sent you on December 4, 2001. For instance, I have repeatedly<sup>3</sup> requested the Commission meeting transcripts either be available on-line on the USCCR website or be sent to me in machine-readable form. However, I have yet to receive discs for July, September, October and November. I know that transcribers and court reporters routinely have these transcripts ready a few days after the Commission meeting. Why this is even an issue I should have to bring up repeatedly is baffling. Our last Commission meeting took place December 7, I do not understand why it would take weeks to get a copy of a transcript.

Nor do I understand why you would want to run an office that is literally the worst-run in my long experience dealing with agencies and organizations across the political spectrum.

Please respond to this memorandum in writing or have someone in your staff e-mail me with answers to the specific questions I have asked. The Commission is in the business of bringing a balanced view to the public, I do not understand why there is resistance to include differing academic opinions on the important topics the Commission is about to consider.

Suggesting that my special assistant meet with yours is futile since I cannot even get the most basic information from your office.

My e-mail address is [thernstr@fas.harvard.edu](mailto:thernstr@fas.harvard.edu)

December. Ms. Kati Haycock/ Director/ Education Trust/ 1725 K Street, NW/ Suite 200/ Washington, D.C. 20006/ Tel. (202) 293-1217/ Her assistant's name is: Ivy Herndon

I understand your office is working on setting up this hearing. This is a topic of particular interest to me. Please let me know in which ways I can assist your office in preparing a balanced panel for this hearing.

<sup>3</sup> Excerpt from August 29 memorandum: As Commissioner Thernstrom has noted before, it would save the Commission resources if these transcripts and commission meeting transcripts were posted on-line on the website. Which office is handling maintenance of the website. Has this or any other service associated to the website provided by an outside entity? Commissioner Thernstrom would be happy to contact the transcriber services directly and request that her transcripts be sent by e-mail.

**Thank you.**

**CC: The Honorable Steve Chabot  
The Honorable Jerrold Nadler  
The Honorable Dick Armev  
Mary Frances Berry, Chairman  
Cruz Reynoso, Vice Chairman  
Jennifer C. Braceras, Commissioner  
Christopher Edley, Jr., Commissioner  
Elsie M. Meeks, Commissioner  
Peter Kirsanow, Commissioner**




UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

December 17, 2001

**MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM**

**FROM:** LES JIN   
Staff Director

**SUBJECT:** Upcoming Hearings

In response to your requests for information on the upcoming environmental justice and education hearings, I invite you and/or your special assistant to meet with me and/or the appropriate Commission staff members to discuss the status of these two projects.

Please have your special assistant contact Kim Alton in my office with convenient meeting dates and times and I will work to have this scheduled as soon as possible.

Thank you.

cc: Hon. Steve Chabot  
Hon. Jerrold Nadler  
Hon. Dick Armey  
Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Jennifer C. Braceras, Commissioner  
Christopher Edley, Jr., Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Victoria Wilson, Commissioner



**UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS**

624 Ninth Street, N.W.  
Washington, D.C. 20425

December 4, 2001

Memorandum for Les Jin

From: Commissioner Abigail Thernstrom

Re: Various

1. Commission meeting transcripts

Since I arrived to the Commission in January, I have repeatedly asked that materials, particularly meeting transcripts, be sent to me electronically. It seems to me that this is a simple and reasonable request.

I am missing the machine-readable version of the transcripts for July, September, October and November. I have been requesting these transcripts through my special assistant since July and reiterated my request in writing on November 2.

I would also like to request electronic versions of the transcripts for the years 1995 through present.

I have repeatedly asked why these transcripts are not posted on the USCCR website for easy access but your office has never answered.

2. Upcoming hearings

In your memorandum dated November 19, you indicate that the planning meeting will take place in December. How does this rearrange the schedule for next year?

- a. Briefing on Environmental Justice  
If there is going to be a hearing or a briefing in January, no doubt you started planning this already. Is the environmental briefing taking place in January? If so, who has been invited?
- b. Educational hearing and subpoenas  
Have there been any subpoenas sent out to request witnesses or documentation for the education hearing? If so, under whose authority were these issued?
- c. Request for list of witnesses invited

Please send all Commissioners a list of the witnesses invited for these hearings and the list of documentation requested while planning the hearings rather than a few days before the hearing when it would be impossible to make any suggestions.

For every single hearing or briefing that has taken place this year, your office has either denied me access to a witness list until a few days before the briefing or hearing or simply ignored any suggestion I have made with regard to speakers. I have a particular interest in the education hearing and have offered in writing to participate in the planning process.

No one on staff has availed himself of the opportunity to meet, speak, or e-mail me on any planning aspect of the educational hearing in spite of my explicit offer to assist and my interest and knowledge of this topic.

3. Press releases

I have never received an answer to my repeated requests to remove my name from any press release sent out by the Commission without my previous approval. Please address this issue in writing.

cc: The Honorable Steve Chabot, Chairman, Subcommittee on the Constitution, Committee on the Judiciary  
 The Honorable Dick Armey, House Majority Leader  
 Chairman Mary Frances Berry  
 Vice Chairman Cruz Reynoso  
 Commissioner Christopher Edley  
 Commissioner Elsie Meeks  
 Commissioner Russell Redenbaugh





UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

November 2, 2001

TO: Les Jin, Staff Director

FROM: Commissioner Abigail Thornstrom

*Abigail Thornstrom/HS*

Re: Various

I request your assistance on the following matters:

1. Letter to the subcommittee on the Constitution. On Friday, October 26, after 6:00 pm, I received a copy of a letter sent to the Subcommittee on the Constitution. I would like to know why this letter was sent to the Subcommittee. Was it in response to a request for information?
2. Verification of receipt. On an administrative note, as I travel often, I would like these communications to be preceded by a phone call or an e-mail to verify receipt. In addition, I would like my special assistant to receive copies of all the documentation I receive by fax.
3. Commissioner Redenbaugh's assistant. As you know, presently Commissioner Redenbaugh does not have an assistant. Ms. Arriaga will be helping him until he finds a new assistant and should receive all communications directed to him.

On Monday, October 29<sup>th</sup>, Ms. Arriaga asked your staff why she had not received the fax dated October 26<sup>th</sup>, which had been sent to Mr. Redenbaugh former assistant. She was told she must put in writing that she was now functioning as Mr. Redenbaugh's assistant. I find it curious, however, that before she was asked to notify you of her new duties, your office had already assumed she would help him fill out forms (the foreign gifts form), and yet did not make any attempt to communicate with her on the more substantive matter of the letter to the subcommittees.

4. Commission meeting transcripts. I reiterate my request to receive all Commission transcripts in electronic form. I am presently missing transcripts for September and October. As I have also asked in the past, why are these transcripts not posted on the website for easy access.

5. Press Releases. I also repeat my request that all press releases be sent to me before they are issued. I have seen older press releases that reflect consensus building and previous notice. I often find out days later that the Commission has issued a press release. I am sure that someone in the staff director's office has e-mail. This seems to be a simple, inexpensive and effective way to communicate.

Even press releases that seem uncontroversial should be run past me before my name is appended to them. I may be in disagreement with them. For instance, there was a release recently that made some reference—as if it were fact—that the American population in 2050 would be majority-minority. As a social scientist, such statements offend me. The Census Bureau has no idea what the composition of the population will be a half century from now. It cannot predict immigration rates, fertility rates, or patterns of self-identification on the part of respondents to census questionnaires. I do not want my name associated with intellectually incorrect assertions.

6. As of 10:30 am this morning I have yet to receive the agenda for next Friday meeting.

Thank you.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

October 9, 2001

**MEMORANDUM FOR LES JIN**

Staff Director

**FROM:**

**RUSSELL G. REDENBAUGH**  
**ABIGAIL THERNSTROM**  
Commissioners

*Russell / KA*  
*Abigail Thernstrom / KA*

**SUBJECT:**

**Poll Vote on "Education Accountability Project"**

In response to your memorandum dated October 3, 2001, we hereby vote "no" on the "Education Accountability Project," as proposed.

We strongly support a Commission hearing on education issues, but this proposal is fundamentally misguided.

First, the problems to which the proposal refers are not just "alleged" or based on "general perception"; they are real and backed up by hard evidence. America's public schools are, indeed, "failing," as demonstrated by "declining test scores" and "studies that show American children lagging behind in knowledge acquisition compared to their peers in other developed countries." American students, particularly those who are black and Hispanic, are not being prepared for the world of work or further education in the K-12 years. Black and Hispanic students, on average, at the end of high school read at a junior high level. The picture is not fundamentally different in other subjects.

This is a national scandal, a national crime, a moral failing. But rather than addressing these problems head-on, the proposal would have us attack the messenger: standards-based systems and accountability testing.

Second, the proposal appears to reach what we regard as a profoundly mistaken foregone conclusion--namely, that support for accountability testing is antithetical to basic civil rights. In fact, as Secretary Rod Paige said in an address to the NAACP: "The scores speak for themselves. These are OUR children who are being left behind... If you think test scores are overrated, let me ask: Are good jobs overrated? Let me ask another question: How many young people in your communities are getting jobs in the high-tech sector?"



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

October 10, 2001

MEMORANDUM FOR LES JIN  
Staff Director

FROM: COMMISSIONER ABIGAIL THERNSTROM *Abigail Thernstrom/ps*  
SUBJECT: REPORTS OF "ETHNIC INTIMIDATION"

On October 8, the Associated Press reported that from "Sept. 11 to Oct. 1, the U.S. Commission on Civil Rights received 381 reports nationwide of ethnic intimidation aimed at Arab-Americans. In all of September 2000, 106 such complaints were reported."

However, AP also reported in a local wire: "Nationally, the U.S. Commission on Civil Rights received 692 reports of ethnic intimidation of all types between from Sept. 11 to Oct. 1. Of them, 381 were aimed at Arab-Americans, compared with 108 complaints during all of September 2000."

I would like to prepare for our next Commission meeting by looking at the complaint reports. Could you have your office photocopy them and send them to me by Federal Express for early morning arrival. Also, please indicate the methodology used to gather these reports and the amount of phone calls that were referred to other agencies.

If it is not possible to send me the reports, please arrange for my assistant to look at them on Thursday, October 11 before close of business.

As always, I would appreciate a copy of any press release sent on this or any other matter before I have to read the report in the press.



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20542

OFFICE OF STAFF DIRECTOR

## FACSIMILE COVER SHEET

DATE:

Oct 5, 2001

TO:

Kristina Arriaga

FROM:

OFFICE OF THE STAFF DIRECTOR Les Jai

COMMENTS:

NUMBER OF PAGES INCLUDING COVER PAGE:

0

PERSON TO CONTACT IF PROBLEM:

Audrey  
OFFICE OF THE STAFF DIRECTOR  
(202) 376-7700  
FACSIMILE NO.: (202) 376-7672

UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS624 Ninth Street, N.W.  
Washington, D.C. 20425

September 23, 2001

MEMORANDUM FOR LES JIN, Staff Director

FROM: Commissioner Abigail Thernstrom

RE: Hearing on Education

A handwritten signature in black ink, appearing to read "Abigail Thernstrom", written over the "FROM:" line of the memorandum.

I would like the Commission to invite the following expert to participate in the upcoming education hearing to take place in December.

Ms. Kati Haycock  
Director  
Education Trust  
1725 K Street, NW  
Suite 200  
Washington, D.C. 20006

Tel. (202) 293-1217

Her assistant's name is: Ivy Herndon

I understand your office is working on setting up this hearing. This is a topic of particular interest to me. Please let me know in which ways I can assist your office in preparing a balanced panel for this hearing.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

August 30, 2001

MEMORANDUM FOR LES JIN  
Staff Director

FROM: ABIGAIL THERNSTROM  
RUSSELL G. REDENBAUGH  
Commissioners

SUBJECT: Preparations for September 14, 2001, Commission Meeting

To assist our preparations for the Commission's upcoming meeting on September 14, we ask that you provide us with the following:

*Status report on the Environmental Justice briefing* — On July 19, Commissioner Thernstrom sent a memo requesting specific information about the Environmental Justice briefing which has been repeatedly rescheduled and finally announced for September 14. On July 27<sup>th</sup> Commissioner Thernstrom's assistant received a call from your office confirming the briefing would take place and was told that additional details were forthcoming. Last week and this week she left messages requesting the additional information, to no avail. Since April 17, we have expressed in writing a particular interest in this topic and have sent the biographical information of two experts. Have those experts been invited? Is the Environmental Justice briefing taking place on September 14, as announced at our July meeting?

*Status report on the Commission's budget request to OMB* — Last Friday we sent you a memo detailing our questions and concerns on the budget preparation process. We have received no acknowledgement of or response to our questions. Considering the requirement that the Commission's budget request and annual performance plan must be sent to OMB in September, it is imperative that Commissioners receive adequate time to review these materials before our discussion on September 14.

*Additional materials for the Florida report* — Commissioner Thernstrom also previously requested copies on July 19<sup>th</sup> of any further reports that Dr. Lichtman has submitted to the Commission. We note that the USCCR website features work beyond his presentation on June 8. Please provide Commissioners with a copy of all reports that Dr. Lichtman has sent to be posted on the website and/or any report he has sent to the Commission beyond June 8. We intend to respond to his remarks on our dissent.

***The August 23-24 State Advisory Committee forum in Alaska*** – We have followed the recent Alaska meetings with great interest. We were puzzled to see, however, that several press reports characterized the SAC forum as a “Civil Rights Commission meeting.” On August 25, the Anchorage Daily News stated: “Discrimination victims at a federal hearing on racism in Alaska criticized the U.S. Civil Rights Commission for letting invited panelists testify for hours but doling out only minutes to the general public.” Even though we were assured by the Chair and your office that this was not a Commission meeting, was there a statement made about the nature of this meeting and the Commission’s participation? Please send us a copy of the transcript of the Alaska meeting.

***Updating the Commission’s website*** – As Commissioners have previously discussed, it would save the Commission resources if the transcripts of all Commission meetings and discussions could be posted on-line, on the Commission’s website. Which office is handling maintenance of the website? Is this or any other service associated with the website being provided by an outside entity?

***Additional topics for September 14 meeting*** – In addition to the matters listed here, are there any other topics that will be discussed on September 14? Has anyone been invited to speak, participate or present a report or paper at the September 14 meeting on any topic? Has the Commission retained any additional consultants or contractors in association with any upcoming project?

We thank you for your prompt attention to these questions and look forward to your response.

cc: Chairperson Mary Frances Berry  
Vice Chair Cruz Reynoso  
Commissioner Christopher Edley  
Commissioner Yvonne Lee  
Commissioner Elsie Meeks  
Commissioner Victoria Wilson





UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

August 25, 2001

MEMORANDUM FOR LES JIN  
Staff Director

FROM:

RUSSELL G. REDENBAUGH  
ABIGAIL THERNSTROM  
Commissioners

*Russell*

*Comp for A. Thornstrom*

SUBJECT: Budget Preparation Requirements

We have several questions and concerns regarding the status of the Commission's budget preparation process.

According to Administrative Instruction 3-1 (Section 2), Commissioners are to "approve the final version of the Commission Budget for submission to the Office of Management and Budget (OMB). They also approve the Strategic Plan and the Annual Performance Plan [mandated by the Government Performance and Results Act] for submission to both OMB and the Congress."

Under the timeline specified in the AI's (Section 4), the agency's proposed budget and the Annual Performance Plan program proposals "should be submitted to the Commissioners for approval" *during June*. The proposed budget "should reflect the Commissioners' decisions regarding the scope, content, performance, and quality of programs proposed to meet the agency's goals and objectives." The Annual Performance plan proposals "should be submitted to the Commission clearly showing for each program the issues, the resources needed, realistic milestones, and the cost of each program. Programs should be prioritized by the Commissioners so that if the actual amount appropriated by Congress is smaller than the amount of the proposed budget, modifications and adjustments to the plan can be made efficiently and effectively." The AI's go on to stipulate that Commissioners' approval of the final OMB request should occur *in July*. In accordance with OMB Circular No. A-11, the budget estimate and Annual Performance Plan must be sent to OMB *in September*.

Contrary to these guidelines governing the budget preparation process, the Commission held no discussion in June regarding the proposed budget and Annual Performance Plan, nor was there any program planning discussion at all in July. With the September 14 meeting only a few weeks away, Commissioners have yet to conduct the kind of in-depth project analysis that is essential before this agency can submit its annual budget estimate to OMB.

We ask that you provide Commissioners with a full status report regarding the agency's budget and Annual Plan. We also ask that you provide Commissioners with a copy of all budget materials now being prepared for OMB.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

824 Ninth Street, N.W.  
Washington, D.C. 20425

August 22, 2001

**MEMORANDUM FOR RUSSELL G. REDENBAUGH AND  
ABIGAIL THERNSTROM**  
Commissioners

**THROUGH:**

LES R. JIN *LJ/KK*  
Staff Director

**FROM:**

EDWARD A. HAILES, JR. *E. Hailes, Jr.*  
General Counsel

**SUBJECT:**

August 17, 2001 Memorandum from Commissioners  
Russell G. Redenbaugh and Abigail Thornstrom

I regret that you are offended by my attempt to speak clearly about the plain meaning of the statutory prohibition on the use of voluntary services. I stand by my legal opinion on this subject. I take note of your request to seek an opinion on this matter from the Office of Legal Counsel of the U. S. Department of Justice. This request constitutes a policy matter that is beyond the purview of the Office of General Counsel to address. Moreover, it is inconsistent with the mission and independence of the Commission.

cc: Mary Frances Berry, *Chairperson*  
Cruz Reynoso, *Vice Chairperson*  
Christopher Edley, Jr.  
Yvonne Y. Lee  
Elsie M. Meeks  
Victoria Wilson  
Hon. Ralph Boyd, Assistant Attorney General for Civil Rights,  
U. S. Department of Justice  
Office of Legal Counsel, U. S. Department of Justice  
Hon. Dick Army  
Hon. Steve Chabot



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

August 17, 2001

Memorandum for Edward A. Hailles, Jr., General Counsel

Through: Les Jin, Staff Director  
 From: Russell G. Redenbaugh and Abigail Thornstrom, Commissioners  
 Subject: August 10, 2001 Memorandum from Edward A. Hailles, Jr. through Les R. Jin.

We are deeply offended by the patronizing tone of your August 10, 2000 memorandum, and by the suggestion that we consider ourselves above the law. We are also astonished and outraged by the statement on the Commission web site that we have failed to avail ourselves of the opportunity to "work" with you to resolve this issue.

We do not, and never have, considered ourselves above the law. We differ in how the statutory provision in question should be interpreted and applied, and we remain unaware of any case law supporting your position. The repetition of your prior position does nothing to add to its validity. Indeed, at stake here is not a particular dissent or the substance of its argument, but the rule of law itself.

We have a suggestion for resolving this dispute: the Commission should ask the Office of Legal Counsel of the U.S. Department of Justice for an opinion on the matter. Again, there is no case law and no precedent in practice suggesting that your interpretation is the correct one; we do not believe it is, and have received much legal advice on the question. But we would be happy to agree to be bound by the interpretation of the OLC, provided you also agree to be so bound.

As long as this dispute remains unresolved, one of us is acting outside the law, and we think we can all agree that is not a desirable state of affairs. Moreover, if Dr. Berry and others in the past have violated the law, we certainly want that history clarified, so that we can make sure it does not happen again.

Your unprecedented and highly doubtful reading of the statutory provision, if allowed to stand, would set an appalling precedent, as we stated in our letter published August 16, 2001 in the Wall Street Journal. The commission's majority would continue to employ its chosen experts and pay for their services. Members with different views in the future will be unable to obtain help from other scholars who volunteer their time. Nothing could do more to discourage high-level debate about the complex issues with which the commission deals.

If future Commission reports are on a long-established, well-worn topic such as busing or minority set-asides, there will be an existing literature to turn to, and no need to use "uncompensated" help. But that was not the case with respect to the Florida report, and would not be the case any time the Commission wanted to work on a topic that had not been already thoroughly covered by scholars. If the Commission's rule (no uncompensated experts) governs today and in the future, the hands of all commissioners who wished to examine closely a report that deals with a fresh question will be tied.

And thus, if the Commission, in the future, were to hire a statistical expert to work on a question on which there is no scholarly literature, a commissioner who wanted to write a dissent would have no way of responding to that expert work unless the commissioner himself or herself happened to be a statistician.

You have offered to publish the dissent as part of the Senate Rules Committee record. To do so, however, is to strip the dissent of its legitimacy as a dissent, published in the space that dissents belong in. Publication in an appendix denies our work the imprimatur of a dissent. And the next time, of course, there will be no Senate record from which to draw, and a dissent that is an important contribution to the national debate on a civil rights issue will be totally unavailable to those looking for it in the official Commission publication and on its web site.

Your offer thus amounts to another form of suppression. This is a matter on which we will not negotiate.

You seem to believe, however, that we should have entered into negotiations: "The Commission provided the dissenting Commissioners with an opportunity to work with the General Counsel to address the illegality so that a dissenting statement could be included, but the Commissioners did not avail themselves of the opportunity," you state on the web site. As you well know, we have been in constant contact via memoranda with you; in other words, we have been "working" with you. At no point, in any of your communications, did you suggest that our dissent was being suppressed because we had failed, in some mysterious manner, to "work" with you. The Commission should post accurate statements on its web site.

cc: Hon. Ralph Boyd, Assistant Attorney General for Civil Rights, U.S. Department of Justice  
 Office of the Legal Counsel, U.S. Department of Justice  
 Rep. Dick Armey, Majority Leader  
 Rep. Steve Chabot, Chairman, Subcommittee on the Constitution  
 Chairperson Mary Frances Berry  
 Vice Chair Cruz Reynoso  
 Commissioner Christopher Edley  
 Commissioner Yvonne Lee  
 Commissioner Elsie Meeks  
 Commissioner Victoria Wilson



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

August 17, 2001

Memorandum for Edward A. Hailes, Jr., General Counsel

Through: Les Jin, Staff Director  
 From: Russell G. Redenbaugh and Abigail Thernstrom, Commissioners *ka*  
 Subject: August 10, 2001 Memorandum from Edward A. Hailes, Jr. through Les R. Jin.

We are deeply offended by the patronizing tone of your August 10, 2000 memorandum, and by the suggestion that we consider ourselves above the law. We are also astonished and outraged by the statement on the Commission web site that we have failed to avail ourselves of the opportunity to meet with you and resolve this issue.

We do not, and never have, considered ourselves above the law. We differ in how the statutory provision in question should be interpreted and applied, and we remain unaware of any case law supporting your position. The repetition of your prior position does nothing to add to its validity. Indeed, at stake here is not a particular dissent or the substance of its argument, but the rule of law itself.

We have a suggestion for resolving this dispute: the Commission should ask the Office of Legal Counsel of the U.S. Department of Justice for an opinion on the matter. Again, there is no case law and no precedent in practice suggesting that your interpretation is the correct one; we do not believe it is, and have received much legal advice on the question. But we would be happy to agree to be bound by the interpretation of the OLC, provided you also agree to be so bound.

As long as this dispute remains unresolved, one of us is acting outside the law, and we think we can all agree that is not a desirable state of affairs. Moreover, if Dr. Berry and others in the past have violated the law, we certainly want that history clarified; so that we can make sure it does not happen again.

Your unprecedented and highly doubtful reading of the statutory provision, if allowed to stand, would set an appalling precedent, as we stated in our letter published August 16, 2001 in the Wall Street Journal. The commission's majority would continue to employ its chosen experts and pay for their services. Members with different views in the future will be unable to obtain help from other scholars who volunteer their time. Nothing could do more to discourage high-level debate about the complex issues the commission deals with.

If future Commission reports are on a long-established, well-worn topic such as busing or minority set-asides, there will be an existing literature to turn to, and no need to use "uncompensated" help. But that was not the case with respect to the Florida report, and would not be the case any time the Commission wanted to work on a topic that had not been already thoroughly covered by scholars. If the Commission's rule (no uncompensated experts) governs today and in the future, the hands of all commissioners who wished to examine closely a report that deals with a fresh question will be tied.

And thus, if the Commission, in the future, were to hire a statistical expert to work on a question on which there is no scholarly literature, a commissioner who wanted to write a dissent would have no way of responding to that expert work unless the commissioner himself or herself happened to be a statistician.

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cc: Hon. Ralph Boyd, Assistant Attorney General for Civil Rights, U.S. Department of Justice  
 Office of the Legal Counsel, U.S. Department of Justice  
 Rep. Dick Armey  
 Rep. Steve Chabot  
 Chairperson Mary Frances Berry  
 Vice Chair Cruz Reynoso  
 Commissioner Christopher Edley  
 Commissioner Yvonne Lee  
 Commissioner Elsie Meeks  
 Commissioner Victoria Wilson



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 North Street, N.W.  
Washington, D.C. 20425

August 16, 2001

MEMORANDUM FOR RUSSELL G. REDENBAUGH AND  
ABIGAIL THERNSTROM  
Commissioners

THROUGH:

LES R. JIN *L. Jin*  
Staff Director

FROM:

EDWARD A. HAILES, JR. *E. Hailes, Jr.*  
General Counsel

SUBJECT:

August 8, 2001 Memorandum from Commissioners  
Russell G. Redenbaugh and Abigail Thornstrom to  
Chairperson Mary Frances Berry

Chairperson Mary Frances Berry asked me to respond to the above-captioned memorandum, a copy of which was forwarded to me. The memorandum includes an awkward interpretation of the statutory prohibition on the use of services by voluntary and uncompensated persons. [42 U.S.C. 1975 states: The Commission shall not accept or use the services of voluntary or uncompensated persons.] You appear to argue that the voluntary services that were secured to assist in the preparation of your dissenting statement are not covered by the statute because these services were not directly provided to the Commission.

It is fundamental that a commissioner acting in his or her capacity as a member of the Commission is bound by the statutes and rules governing the Commission. Members of the Commission are clothed with the indicia of the Commission. They cannot strip themselves of the responsibility of complying with a statute that does not provide a distinction between the Commission and its members in the context of the use of voluntary services.

The question here, moreover, is not whether the stated prohibition applies to individual members of the Commission; rather, the question is whether the prohibition applies to the official acts of the Commission with regard to its publication responsibilities. The Commission decided that it would not serve the best interests of the agency to ratify your actions with regard to the prohibited use of voluntary services. Ratification of your acts would constitute official action by the Commission. This decision against publishing your dissenting statement as a part of the official Commission report concerns your acts, not your viewpoints.

The following points must also be made. The Commission is not hidebound to past practices, particularly those that do not conform to its governing statute. We do not know how publication decisions were made in 1988 involving "The Economic Status of Americans of Asian Descent: An Explanatory Investigation. We hope, however, that the Commission did not receive voluntary services in violation of the law. We do know that in 1988, the Government Accounting Office (GAO) reported that the Commission suffered from "management and administrative improprieties." [See 1988 GAO Report: "U.S. Commission on Civil Rights: Concerns About Commission Operations."]

In your memorandum you mention that "Commissioner Redenbaugh filed a dissent in the "2000 publication entitled "Revisiting Whose (sic) Guarding the Guardians, in which he explicitly cited to work that was specifically performed for him by uncompensated Heritage Foundation experts." Commissioner Redenbaugh did not acknowledge at the time that he was assisted by the voluntary services of the Heritage Foundation. In a single footnote of his dissenting statement, there is a benign reference to "Heritage Foundation calculations based on data from the Federal Bureau of Investigation's Uniform Crime Reporting Program...." There is no reference to voluntary services provided to Commissioner Redenbaugh in his dissenting statement. Therefore, the Commission had no notice upon which to raise any questions about these services. The fact that his dissenting statement was published demonstrates that the Commission routinely publishes statements of Commissioners when there are no discernible violations of a statute.

In the final analysis, members of the Commission are not above the law. Members of the Commission should forcefully state their views within the boundaries of the law.

cc: Mary Frances Berry, *Chairperson*  
 Cruz Reynoso, *Vice Chairperson*  
 Christopher Edley, Jr.  
 Yvonne Y. Lee  
 Elsie M. Meeks  
 Victoria Wilson





UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

August 8, 2001

TO: Mary Frances Berry, Chairperson

From: Commissioners Abigail Thornstrom and Russell Redenbaugh

RE: Response to your August 1, 2001, Memorandum to Russell Redenbaugh & Abigail Thornstrom regarding publication of the dissent to the Florida Report.

This memorandum is in response to your refusal to publish our complete dissenting statement in the Florida Report and to include it on the Commission's website. Your proposal to publish "portions" of the Senate Report including our dissent in the appendix to the Florida Report is unacceptable to us.

Your claim that publication in the Florida Report of our dissenting statement would violate the "statutory obligation to avoid the use of volunteers" is not persuasive. The provision in question, 42 U.S.C. § 1975b(c), states that "the Commission shall not accept or use the services of voluntary or uncompensated persons." (emphasis added). We are not "the Commission." As the Commission's own regulations make clear, "The Commission is composed of eight members, not more than four of whom may be of the same political party." 42 C.F.R. § 701.10(a). We are not aware of any authority suggesting that the actions of two Commissioners constitute the official acts of the Commission. Indeed, we very much doubt that you would accept the position that any two Commissioners are able to invoke the power of "the Commission" to issue subpoenas under 42 U.S.C. § 1975a(e)(2). It is therefore difficult to see why the same word should be read differently for purposes of § 1975b(c).

Moreover, the Civil Rights Commission has a long history of allowing Commissioners to rely on reports by uncompensated experts. Indeed, Commissioner Thornstrom's husband, Stephan Thornstrom, has on many occasions provided services to members of the Commission without compensation. For example, he provided substantial voluntary support for the study that resulted in the 1988 publication *The Economic Status of Americans of Asian Descent: An Explanatory Investigation*. Likewise, Commissioner Redenbaugh filed a dissent in the 2000 publication entitled *Revisiting Whose Guarding The Guardians*, in which he explicitly cited to work that was specifically performed for him by uncompensated Heritage Foundation experts. It also should be pointed out that our dissent parallels the statement you filed to the 1988 report, in that you explicitly referred to—and appended—what you described as "materials prepared by Professor Amado Cabezas of the University of California at Berkeley." The materials in question were a detailed critique of the statistical analysis of the report, very similar to the critique provided by Professor Lott. There is no evidence to suggest that the Commission allocated funds to a minority member to hire Professor Cabezas.

For these reasons, the assertion by the Commission's majority that we are prohibited from publishing our dissent as written, and the request that we water it down so as to completely erode its impact, is untenable. Given the Commission's prior practice, its refusal to publish our complete dissent in the Florida Report is a naked political act of silencing the voice of dissenting members of the Commission.

cc: Les Jin, Staff Director  
Christopher Edley  
Yvonne Y. Lee  
Elsie Meeks  
Cruz Reynoso  
Victoria Wilson  
Les Jin, Staff Director  
Edward Hailes, Jr., General Counsel



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

August 7, 2001

TO: Les Jin, Staff Director  
From: Commissioner Abigail Thernstrom  
Re: Request for information

A handwritten signature in black ink, appearing to read 'Abigail Thernstrom', with a small 'KA' written at the end of the signature.

In the process of preparing a response to your memorandum dated August 1, I have come across a 1988 study entitled "The Economic Status of Americans of Asian Descent: An Exploratory Investigation."

I would like to know if Professor Amado Cabezas was compensated in any way for his review of the report which is appended to a dissenting statement made by then-Commissioners Mary Frances Berry, Francis S. Guess and Blandina Cardenas Ramirez.

In consideration to the fact that I must respond to your memorandum by tomorrow, I request that this information be made available today. Please feel free to call me at home, (781) 861-7834, or send me an e-mail.

Thank you.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 North Street, N.W.  
Washington, D.C. 20426

August 1, 2001

MEMORANDUM FOR COMMISSIONERS RUSSELL REDENBAUGH  
ABIGAIL THERNSTROM

FROM: MARY FRANCES BERRY *Mary Frances Berry*  
Chairperson

SUBJECT: Your Dissent from the Florida Report

In the event that you do not submit a revised copy of your dissent to the Staff Director by the August 8, 2001 due date, I have asked that he publish portions of the Senate Rules and Administration Hearing Report which contain your dissenting statement, along with the other materials, in the Appendix to the Commission's Florida report. In this way we will avoid any impression that the Commission is interested in suppressing your views. Taking advantage of the Report of the Senate Committee on Rules and Administration, on this occasion, will permit the Commission to avoid violating the statute while serving the public interest.

The statutory obligation to avoid the use of volunteers, who may simply come from advocacy groups, and to require that anyone who produces a Commission work product is a Commission employee was enacted by Congress upon the establishment of the Commission. I hope you share my view that, whether an individual agrees with a particular law or not, it is the law, and unless and until Congress changes it we must all abide by it.

cc: Christopher Edley  
Yvonne Y. Lee  
Elsie Meske  
Cruz Reynoso  
Victoria Wilson  
Les Jin, Staff Director  
Edward Hailes, Jr., General Counsel



OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

August 1, 2001

MEMORANDUM FOR THE CHAIRPERSON  
VICE CHAIRPERSON  
COMMISSIONERS

FROM:

LES JIN   
Staff Director

SUBJECT:

Additional Statements to the Florida Report

Please find attached a memorandum from the General Counsel on the legal issue surrounding the dissenting statement submitted by Commissioners Redenbaugh and Thornstrom. Any and all Commission statements will be submitted to our copy editor next Wednesday, August 8, for final editing and formatting, and the entire report will be sent to the printer as soon as that editing is completed.

Pursuant to the legal analysis contained in the General Counsel's memorandum, the Commission will only publish Commissioners Redenbaugh and Thornstrom's dissent if a copy, revised in accordance with the analysis, is received in the Office of the Staff Director by 5 P.M. E.S.T. August 8, 2001. Otherwise, the report will note the violation of the Commission's statutory prohibition to explain its absence.

Any Commissioner who has questions or concerns about these matters should contact the General Counsel immediately.



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20545

OFFICE OF STAFF DIRECTOR

July 27, 2001

MEMORANDUM FOR LES R. JIN  
Staff Director

FROM: EDWARD A. HAILES, JR. *E. Hailes Jr.*  
General Counsel

SUBJECT: Separate Statement of  
Commissioners Redenbaugh and Thernstrom

I spoke by telephone last week with Commissioner Russell G. Redenbaugh, who had arranged this telephone conference following the July 13, 2001 Commission meeting. At that meeting, Commissioners agreed that Commissioners Redenbaugh and Abigail Thernstrom would meet with the General Counsel to discuss any revisions to their separate statement that are necessary for it to be a part of the Commission's publication, consistent with the statutory prohibition on the use of voluntary and uncompensated services.

I indicated to Commissioner Redenbaugh that the Office of General Counsel found no case law that contradicted the plain meaning of the prohibition on the use of voluntary or uncompensated services by the Commission found in 42 U.S.C. § 1975. This statute governs the operations of this agency and provides in pertinent part: *The Commission shall not accept or use the services of voluntary or uncompensated persons. As a general rule, government agencies are prohibited from accepting voluntary services under 31 U.S.C. § 1342. There is an exception to the general prohibition on the use of voluntary services that is found in 5 U.S.C. § 3111, but that exception does not apply to the use of voluntary experts by individual commissioners. Rather, the exception permits the head of the agency to accept voluntary service for the United States if the service - (1) is performed by a student... as part of an agency program established for the purpose of providing educational experiences for the student; (2) is to be uncompensated...*" See 60 Comp. Gen. 456 (1981). The Comptroller General emphasized in that decision that "in the absence of specific statutory authority, Federal agencies are prohibited from accepting voluntary service from individuals except in certain emergencies."

In addition, the legislative history of § 1975 is instructive as to the intent of Congress in applying this prohibition to the Commission. The bill to establish the Commission was reported out of the House Committee on the Judiciary authorizing the use of up to 15

volunteers.<sup>1</sup> Several members of the House and Senate disapproved of the Commission's proposed authority to use volunteers arguing that representatives of special interest groups would occupy these positions and attempt to influence the Commission.<sup>2</sup>

In response to these concerns, an amendment was introduced which stated, "The Commission shall not accept or utilize services of voluntary or uncompensated personnel." Senator Knowland stated in introducing this amendment:

"The intent of that amendment is to make sure persons who might have a particular interest in some phase of the problem ... will not be employed by the Commission on a voluntary basis in connection with something that should be impartial, and that any persons employed on a voluntary basis will carry on their work on an impartial basis. That is the reason for that amendment."<sup>3</sup>

It is clear, therefore, that beyond the general protection against budgetary deficiencies that is afforded by the government-wide ban on voluntary services, Congress intended to ensure that employees and not volunteers performed the work of the Commission.

The procedures and requirements for the appointment of experts and consultants to assist with the work of the Commission are set forth in Administrative Instruction 2-15. These procedures were followed and these requirements were met in the appointment of Dr. Allan J. Lichtman to perform the services needed by the Commission for its voting rights investigation. The same procedures were not followed, nor were the same requirements met in connection with the acknowledged assistance provided to Commissioners Redenbaugh and Thernstrom by Dr. John R. Lott, Jr. and other voluntary persons whose assistance is not self evident.

In our telephone conversation, I asked Commissioner Redenbaugh to identify portions of the separate statement in which voluntary assistance had been provided. He indicated that he would report this request to Commissioner Thernstrom. To date, I have not received a response to this request.

After a careful consideration of the foregoing points, I submit that the separate statement of Commissioners Redenbaugh and Thernstrom should not be included in the Commission's published hearing report, *Voting Irregularities in Florida during the 2000 Presidential Election*, unless the portions of their statement that were prepared with the assistance of voluntary persons are identified and removed.

<sup>1</sup> H.R. Rep. No. 291, 85<sup>th</sup> Cong., 1<sup>st</sup> Sess. At 20 (1957).

<sup>2</sup> *Id.* At 43.

<sup>3</sup> 103 Cong. Rec. 12,450 (1957).

**Memorandum**

**To: Les Jim and Edward Hailes**  
**From: Abigail Thernstrom and Russell Redenbaugh**

**July 23, 2001**

We received your memo addressed to Abigail Thernstrom and faxed to both of us at 6:50 p.m., July 20.

The facts as stated in that memo are incorrect.

You say that "you [Commissioner Thernstrom] did not participate in the meeting General Counsel Hailes had yesterday [July 19] with Commissioner Redenbaugh...."

In fact, there was no meeting between Commissioner Redenbaugh and the General Counsel. There was a brief, preliminary phone conversation, at the end of which Commissioner Redenbaugh said he would convey the substance to Commissioner Thernstrom.

The purpose of that brief preliminary phone conversation (which the two of us agreed on beforehand) was to obtain the General Counsel's considered legal opinion after he had reviewed the case law, which he had not done at the time of the Commission meeting.

We have not yet prepared our response, nor could we have done so until after one of us had had a preliminary conversation with the General Counsel.

We both object strenuously to your characterization of this phone conversation as a "meeting."

We also object strenuously to the staff director's conclusion that "any discussion [we] wanted on the matter had to occur this week...The deadline has passed..."

On that matter you direct us to see the transcript on page 131; there is nothing relevant on that page. However, on pages 112-113 there is the following statement by Chairperson Berry:

**CHAIRPERSON BERRY:** If you wish. However, also, we had that issue laying on the table of Lichtman analyzing the dissent, but that will depend upon how the dissent turns out once these discussions have gone forward and time is of the essence and we would like these discussions to go forward some time in the next week if possible, to at least begin the discussion, because we'd like to print the reports, so we're not talking about next year or some time like that. That should be the understanding that everybody has



As you can see, Chairperson Berry simply states what she would "like," "if possible," so that "we're not talking about next year or some time like that" to "at least begin the discussion." There is no reference to an immediate deadline of any sort, as is readily evident. There is only a wish to "begin" the conversation—which we have done—and to make sure it didn't drag into "next year or some time like that."

Thus, we have conformed precisely to her wishes. No "deadline has passed." And indeed to decide the matter this week would conflict directly with the Chairperson's explicit directive on this matter.

The next step, in our view, should be a memo from the General Counsel outlining his interpretation of the statute and the reasoning behind that interpretation. The matter was discussed briefly in the phone conversation, but obviously it needs further elucidation. We will respond to that interpretation.

We can then discuss the question further. Arrangements should be made through our assistants. Further conversation would certainly have to be with both us together.



OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

July 20, 2001

Memorandum for COMMISSIONER ABIGAIL THERNSTROM

FROM: LES JIN ~~IN~~  
Staff Director

SUBJECT: Meeting with OGC on Florida Voting Rights Dissent

In your July 16, 2001 memorandum to me, you requested a transcript of the July 13 Commission meeting so that you could prepare for a meeting with the General Counsel and Commissioner Redenbaugh "in the next few days." As noted in your July 19 memorandum, we provided the transcript to you immediately. However, I just learned that you did not participate in the meeting General Counsel Halles had yesterday with Commissioner Redenbaugh, nor have you otherwise met or sought to meet with Mr. Halles this week.

As you know, the Commissioners agreed at its July 13 meeting that time was of the essence and that the legal issues pertaining to the dissent had to be addressed expeditiously so that the full report could be finalized and printed. This meant that any discussion you and Commissioner Redenbaugh wanted on the matter had to occur this week. (See transcript, at page 131.)

Since the deadline has passed, please contact the General Counsel immediately as he will be rendering his final decision on the matter by the end of next week.

cc: Chairperson Berry  
Vice Chairperson Reynolds  
Commissioner Edley  
Commissioner Lee  
Commissioner Meeks  
Commissioner Redenbaugh  
Commissioner Wilson



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

July 19, 2001

Memorandum for Les Jin

From: Commissioner Abigail Thernstrom

*Abigail Thernstrom / ka*

Re: Various issues

Thank you for your time on Monday and for sending me the July 13th transcript so quickly. And thank you for calling this morning in response to my question, posed in a phone call on July 17, about releasing that transcript.

Today I received a package with the Commission's response to Rep. Steve Chabot. In it, the Commission refers to the work of Dr. Philip A. Klinkner. Although I do not agree with his conclusions, Dr. Klinkner's work is careful and sophisticated, as his statistical analysis makes evident. We can evaluate it because, as a responsible scholar, he has provided us with all his regressions. The scholarly community that is working on the Florida data cannot understand why Lichtman has not done the same.

My own request for those regressions still stands. As we discussed at the Commission meeting of July 13, 2001, the focus on a "disk" or "disks" was literally silly; it was perfectly clear that I wanted the regressions and the machine-readable data that went into them from Lichtman in any form he chose to provide them. Again, without the regressions, his report has no credibility. I refer to this issue in my memorandum addressed to you dated July 6<sup>th</sup> which has not been answered.

I am also writing to follow up on various issues that were not discussed at the last Commission meeting.

It is my understanding that there will be a briefing on environmental justice on September 14th. When will the speakers Commissioner Redenbaugh and I suggested we include be sent an invitation? As I am sure you know, these speakers are busy and normally set their schedule weeks in advance. I know they would appreciate some notice.

I would like to know if Professor Lichtman has submitted a response to our dissent. If so, could you please send it to me: (I asked these questions on July 5th but received no response.)

Because the Commission did not hold a vote on the proposed voting rights project, will we be voting at the next Commission meeting on whether or not to pursue this project? When and who

will be deciding which states to visit next? Will there be a formal selection process? How and when will we discuss the effect this project will have on the budget. How will the other projects be affected.

I am also interested in obtaining a copy of the transcript of the briefings on immigration that occurred sometime in the year 2000 before I was appointed to the Commission. The library does not have copies and they referred my assistant to your office. Could you please forward the transcripts of those hearings or meetings on disk?

I also understand from the last Commission meeting that some Commissioners will be traveling to Alaska to participate in the SAC meetings from August 23 to 24th. Will this meeting constitute an official Commission meeting or are they going in support of the State Advisory Committee? I would like to get a copy of the hearing transcript whenever it is available.

In the past month I also received a confidential paper on charitable choice. Will there be a briefing on this project in the near future?

Finally, I wish to reiterate that I would like to see any Commission statement or press release before it is sent out--particularly if it includes my name. In one of the packages I received in preparation for the July 13<sup>th</sup> meeting, there was a copy of a Commission press release issued on June 27th. The statement alluded to the "dissenters" without ever mentioning which Commissioners dissented. Regrettably, my name was included in the bottom on the press release. A reasonable but uninformed reader or journalist may conclude all the Commissioners endorsed the press release and thus all Commissioners object to the dissenters. I think this is an understandable request and is one I already made on May 8th.

Thank you.



OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

July 16, 2001

**MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM**

**FROM:**

LES JIN *LJ*  
Staff Director

**SUBJECT:**

July 13<sup>th</sup> Commission Meeting Transcript

Per your request, please find enclosed a computer disk containing the unedited transcript from the July 13, 2001 Commission meeting.

Enclosure



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

July 16, 2001

MEMORANDUM TO LES JIN

From: Commissioner Abigail Thernstrom

A handwritten signature in black ink, appearing to read 'Abigail Thernstrom'.

Re: July 13 Commission transcript

I am preparing for a meeting with the General Counsel and Commissioner Russell Redenbaugh in the next few days. Therefore, I request that the transcript of the July 13<sup>th</sup> meeting be sent to me in electronic form as soon as possible.

It is my understanding that one can get a transcript on disk as soon as 2 calendar days after a meeting. For instance, the transcript for the June 8th meeting was already available on disk by the afternoon of June 11th.

You can give the disk to my assistant or e-mail me the transcript text. This would save the Commission the time and expense it would take to print and photocopy it.

My e-mail address is [thernstr@fas.harvard.edu](mailto:thernstr@fas.harvard.edu). My assistant's e-mail address is: [kariaga@aol.com](mailto:kariaga@aol.com).

Thank you very much.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

July 11, 2001

MEMORANDUM

TO: LES JIN, Staff Director

FROM: ABIGAIL THERNSTROM, Commissioner

Subject: Commissioners' independent research

I write in reference to your memorandum dated July 10, 2001. Although I would like to address all the subjects discussed in the memo later on, I will just touch on a few points in this one.

You state that "Commissioners are entitled to have dissenting or concurring statements" appended to a Commission report, but the Commission "does not envision any Commissioner "engag[ing] in a complete reanalysis of the staff's work."

It is impossible to write a dissent without reanalyzing the quantitative and other evidence upon which important claims have been based.

Are you saying that the staff's numbers and method of analysis are unimpeachable, and thus not open to any re-assessment? And that dissenting Commissioners thus cannot be permitted access to the raw material as compiled in machine-readable form and to the details of the analysis upon which the Commission's conclusions rest? If so, this is an astonishing claim.

You also say that "neither Dr. Lichtman nor anyone else at the Commission possesses what the dissenting Commissioners have requested."

Dr. Lichtman in his report refers to the multiple regressions upon which he based his conclusions.

Am I to understand that these multiple regressions and the machine-readable data that were used in them do not exist? And if so, upon what basis did he draw his conclusions?

cc: All Commissioners



OFFICE OF STAFF DIRECTOR

 UNITED STATES COMMISSION ON CIVIL RIGHTS  
 WASHINGTON, D.C. 20425

July 10, 2001

 MEMORANDUM FOR CHAIRPERSON  
 VICE CHAIRPERSON  
 COMMISSIONERS

 FROM: LES JIN, <sup>A</sup>  
 Staff Director

SUBJECT: Florida Voting Rights Report Issues

In the past month or so, a number of issues have been raised in different forums that pertain directly or indirectly to the staff. While my preference is not to let these distractions sidetrack my responsibilities or that of the staff, I now believe that it is important to try to set the record straight.

Role of Staff vs. Role of Commissioners on Work Products

The Commissioners set policy for the agency and hold hearings, as it deems desirable. The staff director plans and implements the agency's program in accordance with the policy direction of the Commissioners and is responsible for managing its day-to-day operation. The staff is responsible for the actual work of the agency, which ultimately is endorsed or rejected by the Commissioners, or sent back to the staff for more work. In that regard, the staff is responsible for providing the Commissioners with quality products in a timely manner that are acceptable to at least a majority of the Commissioners, although we always hope for unanimous approval.

Under this longstanding approach of doing business, it is neither envisioned nor proper for individual Commissioners to research or write reports. Similarly, while Commissioners are entitled to have dissenting or concurring statements appended to the report, the Commission's way of doing business does not envision any Commissioner, whether s/he be a member of the majority or the dissenting side of an issue, to conduct original research or engage in a complete re-analysis of the staff's work.

Especially since I am newer than all but one of the Commissioners, I certainly do not want to give the impression that I am speaking as the expert on Commission rules, customs or traditions. However, because such tangential issues raised in recent weeks appear to have been premised on a misunderstanding of the respective roles of the Commissioners and staff, it has become necessary to



raise the subject. Certainly, if I have misstated or misunderstood the relationship, I would be happy to stand corrected at the upcoming meeting. Otherwise, it is important that everyone operates from this same understanding.

**The Claim that the Staff Has Acted Improperly By Not Providing Materials to Commissioners Writing Dissents**

The most persistent claim appears to be that somehow the staff is hiding part of Dr. Lichtman's work product and refusing to provide it to the dissenting Commissioners. That is simply not true. Whether it is in disk form or any other machine-readable format, neither Dr. Lichtman nor anyone else at the Commission possesses what the dissenting Commissioners had requested. At a minimum, to produce what has been requested, Dr. Lichtman would have to create a product that does not exist.

I want to make clear that I do not object to having the staff's work tested. If it is good work, it will stand that test. In addition, the issue is not about the routine of scholars or scholarly convention or what happens in an academic setting. Rather, it is having a common understanding on how the Commission operates. Even if it is proper for a Commissioner to attempt to run a statistical analysis independent of the staff's work, I have no doubts that it would be inconsistent with a Commissioner's role to insist that staff create databases that do not exist so that an entirely separate analysis can be conducted. Such an approach is not provided for in either the rules or customs of the Commission. Once the Commission has accepted a report by majority vote, it is the Commission's report. Commissioners may offer supplemental statements, concurrences and dissents. However, the Commission's rules and practices do not provide an opportunity for any Commissioner to have the Commission's resources utilized to write a competing report. Recognizing the above also makes it easy to understand why individual Commissioners should not approach Dr. Lichtman, who is working for the Commission as an intermittent appointment employee.

**The Claim that Some Commissioners Were Prevented From Having a Proper Role in Writing the Original Report**

In my view, this "issue" would quickly dissolve also if everyone remembers the respective roles of Commissioners and staff. The staff researches, puts together hearings, and writes reports. None of the Commissioners do any of these things. Thus, the suggestion that Commissioners should have been "consulted" during the report writing process is inconsistent with my understanding of the respective roles of Commissioners and staff. Nevertheless, as Dr. Berry mentioned during the April Commission meeting, Commissioners may raise questions with me and, when appropriate, arrange to speak with other staff.

However, to the extent there is a lingering question about whether some Commissioners were barred from participation that was afforded to other

Commissioners, I want to set the record straight once and for all. My staff and I had virtually no conversations outside of Commission meetings with any of the Commissioners about the work or progress of the report, except for the Chairperson, who is responsible for setting the agenda for Commission meetings. Thus, ongoing conversations between the Chairperson and staff director are essential for the effective and proper operation of the Commission. Again, all similarly situated Commissioners were treated the same.

**The Claim That We Violated Our Internal Processes Regarding the Florida Voting Rights Report**

We followed all laws, regulations, rules, and procedures in conducting the Florida hearings and writing the report. This includes our obligations to affected agencies and to anyone who had rights under our defame and degrade procedures. Thus, suggestions in some media accounts to the contrary are false. Moreover, some accounts have suggested that we failed to comply with our Administrative Instructions. First of all, AIs serve one purpose only: to give guidance to staff as it goes about its business of providing the Commissioners with a quality product in a timely manner. They are not rules and regulations and, thus, have built-in flexibility when needed. Nevertheless, staff adhered to these AIs during our handling of the Florida hearings and writing the report although, frankly, I don't believe the AI timelines were written with the Florida report scenario in mind: two hearings and a comprehensive report within six months.

**The Suggestion That We Have Not Protected Commissioner Redenbaugh's Rights Under ADA**

We believe we have treated Commissioner Redenbaugh over the years in a manner consistent with the ADA, decency and his wishes. However, as a civil rights agency, we certainly want to be at the forefront of doing both what is legally necessary and what is right. If Commissioner Redenbaugh or anyone else who has a disability needs an accommodation, we will respond positively.

I hope this memorandum lays to rest matters that divert us from the substance of the Florida Voting Rights Report. As I stated at the last meeting, I am proud that the staff was able to deliver the report in an expeditious and timely manner. I believe it is a quality report and I know the entire staff that worked on it is eager to have further discussions and accounts focus on the merits of the report, rather than having that discussion diverted by allegations that our processes have been unfair or improper.

1445 Massachusetts Avenue  
Lexington, MA 02420  
781.861.7634  
Fax: 781.860.9045  
thernstr@fas.harvard.edu

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July 6, 2001

Memorandum for: Les Jin

From: Commissioner Abigail Thernstrom



Subject: Response to July 5 memorandum

It appears you do not to understand the routine scholarly request we have repeatedly made in recent weeks.

In your July 5 memo, you state: "there is no disk, nor was there every any disk or disks of Professor Lichtman's data." We did not refer, in our July 2 letter, to "a disk or disks." We requested his regression results so we can understand *exactly* what he did to produce his estimates.

That is, we are asking to see the actual regressions and—in machine-readable form—the data that was used to arrive at the conclusions contained in the Commission's report. I have been contacted by a number of scholars; no one understands why these regressions, to which he refers in his report, have not been made available to us.

Dr. Lichtman has these data and results on his hard drive. No one who knows any social science would believe for a minute that he does not have the data and the actual regression models. What, exactly, is the problem?

CC: All Commissioners



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

July 5, 2001

Memorandum for: Les Jin, Staff Director

From: Commissioner Abigail Thernstrom

Re: Commission Meeting on July 13<sup>th</sup> and other matters

I would like to know if Dr. Allan Jay Lichtman has already submitted a response to the dissent I co-wrote with Commissioner Redenbaugh. If so, please send me a copy by Federal Express or by e-mail.

I would also like the agenda for the next meeting. As you know, the statute requires that the Commission "provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time." The statute also indicates that "In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place and subject matter of the meeting...."

"One week," it seems to me, is the lowest possible standard for the Commission. Because all Commissioners have a professional and personal life outside of the Commission, in order to prepare adequately, the agenda should be sent out at least three weeks in advance of the Commission meeting.

The statute also states "(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes [...] of the discussion of any item on the agenda or any item of the testimony of any witness received at the meeting[...]" From now on, I suggest that we post the transcripts on our website so that anyone can download it. I also request that the transcript for each meeting be sent to me and my special assistant on disk. It would save the Commission a considerable amount of paper and time to do so.

I also request advance notice of any briefing that may take place. Last meeting, for instance, I was unaware that Dr. Lichtman would be briefing us until he entered the room. Also, please indicate the new date for the briefing on environmental justice that was scheduled to take place on May 13<sup>th</sup>.

Thank you very much.

CC: Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, Commissioners Russell Redenbaugh, Yvonne Lee, Victoria Wilson, Christopher Edley, and Elsie Meeks.



OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

July 5, 2001

## MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM

FROM: LES JIN   
Staff Director

SUBJECT: Response to July 2 letter

This is in response to your July 2 letter, received in OSD on July 3, 2001. I think you misread my June 29 memorandum regarding Dr. Lichtman's report. He provided a final report to the Commissioners before the June 8 meeting, which he augmented slightly during the Commission meeting. The Commission adopted this slightly amended version before its final vote. (See pages 89 to 90 of the June 8, 2001 meeting transcript, attached.) Thus, Dr. Lichtman's report was final as of that vote. The reference in my June 29 memorandum about Dr. Lichtman finishing his analysis referred to the Commissioners' decision to allow Dr. Lichtman an opportunity to comment on the dissent's analysis. Thus, I reiterate what we stated in the memorandum dated June 19, 2001 from General Counsel Edward Halles to you, through me, regarding additional data: there is no disk, nor was there ever any disk or disks, of Professor's Lichtman's data. (See copy of the June 19 memorandum, attached.)

Also, I would like to point out that your references to a "majority" report and a "minority" report of the Commission are incorrect. There is no such thing as a majority or minority report of the Commission. The report is prepared by civil service staff, who work for the entire Commission, under the supervision of the Staff Director. Once a report is agreed to by the Commission, it is the Commission report. Commissioners may have any dissents, concurrences, or additional statements commenting on the report published along with the report. However, Commissioners do not prepare or submit reports. There is only one report on any subject by the United States Commission on Civil Rights and that is what is agreed to by majority vote.

4 to study it this week so we could have this discussion.  
5 There was absolutely no objection and in fact an expression  
6 of pleasure on the part of this Commission, I believe  
7 unanimously, that it would be ready for our discussion  
8 today.

9 CHAIRPERSON BERRY: Now, let's go on to -- I  
10 had a question for Professor Lichtman, but I don't see  
11 Professor Lichtman so I'll ask him afterwards. I'll hold  
12 the question.

13 We need to do the findings and  
14 recommendations for this chapter. Let's go to the findings  
15 and recommendations for Chapter 1. And also let me remind  
16 you, General Counsel, that where you have made a change,  
17 since we received this as a result of the Affected Agency  
18 Review, remind us of that as you go along.

19 GENERAL COUNSEL HAILES: Okay.

20 CHAIRPERSON BERRY: And where you have made  
21 any change that we don't know about, if you could do that  
22 as we go along.

23 Here is Professor Lichtman, and the point  
24 that I wanted to ask you about, Professor Lichtman, is your  
25 analysis of the Hispanic -- the last analysis that you said  
26 you did last night.

27 DR. LICHTMAN: Yes.

28 CHAIRPERSON BERRY: We would like to, without

an  
objection, include that in the report -- include it in your  
report.

DR. LICHTMAN: Okay. I'll have to double  
check it, because I did it last night.

5 CHAIRPERSON BERRY: And also what I was  
6 struck by -- if you could just quickly in one sentence say  
7 what it showed.

8 DR. LICHTMAN: It showed that there was not a  
9 positive relationship at the precinct level between the  
10 percent of Hispanics in a precinct and the percent of  
11 rejected ballots, that, in fact, the relationship was  
12 slightly negative. And the reason is because you've got  
13 these precincts that are heavily African-American that have  
14 virtually no Hispanics in them, and those are the precincts  
15 that have the extraordinary high rates of ballot rejection.

16 And the point of this was if it was -- you know, going a  
17 little beyond my original study because this has been so  
18 controversial, if it really was education that was driving  
19 this, because Hispanics and African-Americans have  
20 comparable education levels, you would not see this  
21 negative relationship. Clearly, there is a racial effect  
22 going on here.

23 CHAIRPERSON BERRY: Okay. I just wanted to  
24 -- yes, Vice Chair?

25 VICE CHAIRPERSON REYNOSO: I'm sorry, I just

Document #16



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

524 Ninth Street, N.W.  
Washington, D.C. 20425

Via Facsimile and Federal Express

June 19, 2001

MEMORANDUM FOR ABIGAIL THERNSTROM  
Commissioner

THROUGH: LES R. JIN *LRJ*  
Staff Director

FROM: EDWARD A. HAILES, JR. *E. Hailes, Jr.*  
General Counsel

SUBJECT: Data for Lichtman Study

This is in response to your request for "a copy of the disk (or disks) containing any data Professor Allan Jay Lichtman used to issue his report on the Florida election." I understand that you were correctly informed that the Office of General Counsel does not possess any disk or disks that you are seeking. In attempting to comply with your request, however, the staff promptly contacted Professor Lichtman to ask him to release to us any disk or disks containing the data he used to issue his report. Professor Lichtman told us that he did not and does not possess any disk or disks containing data that he used to prepare his report. The publicly available sources of data that he used to prepare his analysis are cited throughout the report, a copy of which was provided to you.

Apart from your specific request, there is a copy of a disk containing data that was used by former Commission staff member, Dr. Rebecca Kraus, who briefly provided assistance to our office until she left the agency for a promotional opportunity. The disk was forwarded to Professor Lichtman. He possesses it, but he did not use these data to issue his report. I will make that disk available to your special assistant, if you believe that it would be helpful.

You have also requested, "a copy of the contract (or contracts) issued to hire Professor Lichtman or any other statistician, social scientist or professional associated with the Florida report." Professor Lichtman was not hired under a contract for his services. He was appointed to serve in an expert position under agency personnel procedures. He is an intermittent appointee of the Commission. No other statistician, social scientist or other professional has been hired to assist with this project. Thus, there are no existing contracts to provide pursuant to your request.



**Please feel free to contact me if you have any questions.**

**cc: Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Victoria Wilson, Commissioner**

1445 Massachusetts Avenue  
Lexington, MA 02420  
781.861.7634  
Fax: 781.860.9045  
themstr@fas.harvard.edu

Mr. Les Jin, Staff Director  
U.S. Commission on Civil Rights  
624 9th Street NW  
Washington, D.C. 20001

July 2, 2001

Dear Les:

I am writing in response to your memorandum dated June 29th which I received today by facsimile. In it you state: "As the Commission agreed, before it [the dissent] can be placed on the web site, Dr. Lichtman's analysis must be concluded."

It was my understanding on June 8, that Dr. Lichtman had concluded his analysis. That day, Chairperson Berry stated to Commissioner Rebenbaugh: "the majority of report of this Commission, by a vote of six to two, is a report which includes a particular statistical analysis."

"A particular statistical analysis" certainly suggests finality to me. Nowhere in the transcript of the meeting, which included a very lengthy account by Dr. Lichtman of the statistical work he had done and statements by majority commissioners endorsing his conclusion, can I find the slightest suggestion that Dr. Lichtman's analysis was incomplete, tentative, or subject to further revision. Furthermore, Dr. Lichtman testified at a June 27 hearing of the U.S. Senate Rules Committee that there was nothing whatever in the draft minority report that challenged his analysis in the least, further suggesting finality. Chairperson Berry said something similar to the Senate committee, as did Commissioner Edley in a C-SPAN debate with me on June 28.

However, since our June 8 meeting, Dr. Lichtman has added to his report a new chart (Chart 7) and a new paragraph discussing it. Since Dr. Lichtman has not concluded his analysis, we are unable to conclude our dissent. We want to see the actual regressions and—in machine-readable form—the data that was used to calculate the aforementioned new chart and the rest of his analysis.

In any case, after we have asked repeatedly, verbally and in writing, for Dr. Lichtman's regressions, we have not seen a single one. Thus we could not completely respond to his work. By now Dr. Lott, by taking considerable time and trouble, has been able to put together most of the data files that were clearly already in Dr. Lichtman's possession. However, there still remain a few items that we need for our analysis.

The items we are still requesting are the following.

1. The Majority Report and Dr. Lichtman's report to the Commission refer to a "multiple regression analysis that controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category." We request that we be given the machine-readable data that was used in the analysis leading to this result and be provided with the actual regression results. We want not only the different regressions that he carried out, but also the information to know which regression goes with which discussion in the text. We need to know all the numbers used and precisely how Dr. Lichtman used them. In any respectable social science journal, no author would be allowed to make an important analytical claim like this without providing actual regression results that can be evaluated by other scholars. Here we have been asked to take Dr. Lichtman's statement as a matter of faith, and that is unacceptable.
2. Dr. Lichtman refers in the new section added after June 8th to "a multivariate ecological regression equation that includes the percentage of Hispanics as well as blacks in the precincts of Dade Count." Furthermore, note 14 makes a claim about how inserting data on Hispanics "into the county-level regression equations used for statewide estimates" affects the results. We need to see those regressions.

All the regression results and the data used to develop them can be supplied to me quickly and painlessly as an electronic file or files

I should add that according to the pages of the transcript of the June 8 meeting that you enclosed with your memo, the plan was for us to submit the dissent and for Dr. Lichtman then to submit his analysis of the dissent—a rejoinder. On the next page, it was made plain that I would be free to provide an analysis of Dr. Lichtman's comments on the draft minority report.

Our dissent was written in response to a "complete" analysis; Dr. Lichtman now proposes to construct a moving target that would make our own analysis "incomplete." Again, if his analysis was not "complete" as of the June 8 meeting, then the dissent we prepared for June 27 was certainly not complete.

In any case, your refusal to provide us with the machine-readable data that was used in his analysis, including the actual regression results, as well as clear information as to which regression goes with which discussion in the text, makes our report, by definition, "incomplete." We need to know all the numbers used and precisely how Dr. Lichtman used them in order to have a finished analysis. In all my years as a scholar, never before has any scholar denied such basic data to me.

Of course, as soon as we have received the information we request, we will send you the data you requested.

Sincerely,



Abigail Thernstrom  
Commissioner




OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20542

June 29, 2001

MEMORANDUM FOR COMMISSIONERS ABIGAIL THERNSTROM  
AND RUSSELL G. REDENBAUGH

**FROM:** LES JIN   
Staff Director

**SUBJECT:** Concerning Proposed Dissent

I have received your proposed dissent. As the Commission agreed, before it can be placed on the web site, Dr. Lichtman's analysis must be concluded. (Please see page 142 of the June 8, 2001 Commission meeting transcript) I expect that this process will be completed in a timely manner.

In order to complete his analysis, Dr. Lichtman request a printout of all of your data, including an exact specification to all sources, including web sites where the data were obtained. In particular, Dr. Lichtman needs the 1992 and 1996 spoiled ballot results, as well as information on the race of election supervisors.

Attachment

cc: Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Erlie M. Meeks, Commissioner  
Victoria Wilson, Commissioner

## U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

## MEETING

+ + + + +

Friday, June 8, 2001

+ + + + +

The Commission convened in Room 540 at 624  
Ninth Street, Northwest, Washington, D.C. at 9:30 a.m.,  
Mary Frances Berry, Chairperson, presiding.

PRESENT:

MARY FRANCES BERRY, Chairperson  
CRUZ REYNOSO, Vice Chairperson  
CHRISTOPHER EDLEY, JR., Commissioner  
YVONNE Y. LEE, Commissioner  
ELSIE M. MEEKS, Commissioner  
RUSSELL G. REDENBAUGH, Commissioner  
ABIGAIL THERNSTROM, Commissioner  
VICTORIA WILSON, Commissioner  
LESLIE R. JIN, Staff Director  
  
DR. ALLAN J. LICHTMAN, Consultant

1 pleasure, ladies and gentlemen? We will make available to  
2 the press the thing is on our web site and in a draft form  
3 that we've been discussing here. And we will put up  
4 another draft on the web site after all these changes are  
5 made so it will be available to people.

6 COMMISSIONER THERNSTROM: If you could give  
7 me till --

8 CHAIRPERSON BERRY: Just a moment,  
9 Commissioner Thernstrom.

10 COMMISSIONER THERNSTROM: I'm sorry, I'm  
11 sorry.

12 CHAIRPERSON BERRY: That will be up early  
13 next week, like Monday, for people, by the latest. And  
14 then we can wait after that to get the dissent and  
15 Professor Lichtman's analysis of the dissent before we put  
16 anything else up on the web site. So there will be  
17 something on the web site. So it's not as if there won't  
18 be anything. And there will be copies of that available to  
19 people who want them; that is hard copies. So how about if  
20 we said -- how about the week of June 29? Is that long  
21 enough?

22 COMMISSIONER THERNSTROM: That's fine. I  
23 would appreciate that very much.

24 CHAIRPERSON BERRY: Close of business on June  
25 29.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

June 28, 2001

MEMORANDUM FOR LES JIN  
Staff Director

From: Commissioner Abigail Thornstrom

*Abigail Thornstrom/ks*

Re: Request for Data

My special assistant tells me Kim Alton called after receiving our dissent and appendix requesting further information. Please send me your request in writing so I know exactly what you need. I assure you I will be delighted to send you any data I have.

I would also like to ask: When will our dissent and appendix be posted on the USCCR website? During a Washington Journal/C-Span debate this morning, Christopher Edley announced it would be posted right away.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

June 20, 2001

MEMORANDUM FOR LES JIN  
Staff Director

From: Abigail Thornstrom *A. Thornstrom/jes*

Subject: Data for Lichtman Study

Via facsimile

I was puzzled by your memorandum dated June 19, 2001 in which you state "circumventing this organizational structure can only create confusion and disorder within the agency." You "urge me to contact you." However, my attempts to direct questions to you so far have proved most unsuccessful. (See several memoranda in April regarding access to materials). And, you have refused to respond in writing to my memoranda.

Guidelines about the relationship between individual Commissioners and the staff director are indeed confusing. Last time I asked for information you said my questions addressed policy issues and that I had to ask the Chair. Furthermore, you indicated you work for the Commission as a body and not for individual Commissioners.

Take the Lichtman information request, for example. As of June 8<sup>th</sup>, you and your staff knew that I would be writing a dissent and should have understood that I would need the machine-readable data that Lichtman used to run his correlations and regressions. That is what I have requested. But instead of immediately providing it, you provided, after a five-day delay some woefully incomplete information in the form of hard copy only that it took my assistant 10 minutes to photocopy. Bear in mind I have 20 days to respond to a study it took the entire Commission six months and almost a hundred employees to draft.

As of last Friday, June 15<sup>th</sup> at 1:30 pm the information I received from your office was that OGC did not have the disks with the machine-readable data Lichtman used. My special assistant called your office and asked if she needed to file a FOIA request in order to get the essential disks that contain taxpayer-funded information that should be in the public domain. Ms. Alton replied that to invoke FOIA was not appropriate since I merely wanted the same information I had requested in a different format. My assistant



explained that it was not a matter of convenience, the disk was simply what was needed to run the statistical analysis. She waited all weekend and all day Monday for the courtesy of a reply to her requests for the disks and Professor Lichtman's contact information. At 3pm on Tuesday June 19<sup>th</sup> she again called your office. Kim Alton said again that OGC did not have a disk.

Responsible scholars routinely make all their data available in the machine-readable form in which they used it. I have never before encountered any resistance to the request I am now making. In addition, under FOIA I am entitled to receive the information in any form that I ask for. As you may know FOIA was amended in 1996 to include a section requiring agencies to provide information "in any form or format requested," including in electronic form.

I agree with you that it is sad that I had to file a FOIA request to receive the information I needed and am entitled to have. But, I waited 10 days before doing so.

As to my contacting Professor Lichtman, any Commissioner should be free to contact any expert in their field for professional consultation. This is particularly true in the case of an academic who serves "in an expert position under agency personnel procedures" and who will be reviewing the statistical analysis in my dissent.

Dr. Lichtman sent me an e-mail saying he was forwarding the disks to you today. My assistant will pick them up this afternoon.

Cc: Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Victoria Wilson, Commissioner



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

Via Facsimile and Mail

June 20, 2001

MEMORANDUM FOR ABIGAIL THERNSTROM  
Commissioner

THROUGH: LES R. JIN *LJ*  
Staff Director

FROM: EDWARD A. HAILES, JR. *E. Hailes, Jr.*  
General Counsel

SUBJECT: Data for Lichtman Study

Today, Professor Lichtman provided a copy of the disk containing data that was used by former Commission staff member, Dr. Rebecca Kraus. I referred to this same disk in my memorandum to you on yesterday. I was told that Professor Lichtman informed you that he would pass this disk back to the staff with the understanding that it would be passed on to you. Just so it is abundantly clear, I am reminding you that Professor Lichtman indicated to the staff that he did not use these data to issue his report. Pursuant to your request, however, the disk is available for your special assistant to pick up today.

Please let me know if you need further information or assistance.

cc: Mary Frances Berry, *Chairperson*  
Cruz Reynoso, *Vice Chairperson*  
Christopher Edley, Jr.  
Yvonne Y. Lee  
Elsie M. Meeks  
Russell G. Redenbaugh  
Victoria Wilson

Document #16



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

000113

Via Facsimile and Federal Express

June 19, 2001

**MEMORANDUM FOR ABIGAIL THERNSTROM**  
Commissioner

**THROUGH:**

LES R. JIN *A*  
Staff Director

**FROM:**

EDWARD A. HAILES, JR. *E. Hailes, Jr.*  
General Counsel

**SUBJECT:**

Data for Lichtman Study

This is in response to your request for "a copy of the disk (or disks) containing any data Professor Allan Jay Lichtman used to issue his report on the Florida election." I understand that you were correctly informed that the Office of General Counsel does not possess any disk or disks that you are seeking. In attempting to comply with your request, however, the staff promptly contacted Professor Lichtman to ask him to release to us any disk or disks containing the data he used to issue his report. Professor Lichtman told us that he did not and does not possess any disk or disks containing data that he used to prepare his report. The publicly available sources of data that he used to prepare his analysis are cited throughout the report, a copy of which was provided to you.

Apart from your specific request, there is a copy of a disk containing data that was used by former Commission staff member, Dr. Rebecca Kraus, who briefly provided assistance to our office until she left the agency for a promotional opportunity. The disk was forwarded to Professor Lichtman. He possesses it, but he did not use these data to issue his report. I will make that disk available to your special assistant, if you believe that it would be helpful.

You have also requested, "a copy of the contract (or contracts) issued to hire Professor Lichtman or any other statistician, social scientist or professional associated with the Florida report." Professor Lichtman was not hired under a contract for his services. He was appointed to serve in an expert position under agency personnel procedures. He is an intermittent appointee of the Commission. No other statistician, social scientist or other professional has been hired to assist with this project. Thus, there are no existing contracts to provide pursuant to your request.

*Memorandum for Commissioner Abigail Thernstrom*  
*RE: Data for Lichtman Study*  
*June 19, 2001*  
*page two*

000174

If you need further information or assistance, please direct your inquiries to the staff director.

cc: *Mary Frances Berry, Chairperson*  
*Cruz Reynoso, Vice Chairperson*  
*Christopher Edley, Jr.*  
*Yvonne Y. Lee*  
*Elsie M. Meeks*  
*Russell G. Redenbaugh*  
*Victoria Wilson*

Document #15



OFFICE OF STAFF DIRECTOR

 UNITED STATES COMMISSION ON CIVIL RIGHTS  
 WASHINGTON, D.C. 20542

000117

Via Facsimile and Federal Express

June 19, 2001

**MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM****FROM:**
 LES JIN   
 Staff Director
**SUBJECT:**

Request for Materials on the Florida Report

I recently learned of your Freedom of Information Act request for data pertaining to the Florida Report. Frankly, the request surprised me. I do recognize that time is of the essence as it pertains to this matter and that is why the staff responded by providing you with the materials you requested in your June 11<sup>th</sup> correspondence as soon as each item was available. We spoke with your special assistant shortly after we received your correspondence and provided the materials on June 12<sup>th</sup> and 13<sup>th</sup>, explaining why the materials provided on the 13<sup>th</sup> were not available on the 12<sup>th</sup>. Given our responsiveness to your requests, I do not believe that the use of the FOIA is necessary or appropriate. The staff has worked diligently and in a cooperative spirit in order to respond to your requests in a timely manner, and will continue to do so. In the future, if you think there is a problem that is not being handled properly, I urge you to contact me to discuss the problem as an alternative to filing a FOIA request.

As for the information that is the subject of your FOIA request, see the attached letter from General Counsel Edward Hales. It is fully responsive to your concerns.

Additionally, I understand that late last week your special assistant called Professor Lichtman and that earlier today you sent him an e-mail requesting the data you are seeking. As the Commission rules provide, and I believe Chairperson Berry has stated in a recent meeting, Commission requests of that nature must be directed to the Staff Director. Commission staff, including someone in Professor Lichtman's status, works for the Commission and under the direction and supervision of the Staff Director or one of his managers. As the Staff Director, I serve as the liaison between the staff and the Commissioners. As I am sure you can understand, circumventing this organizational structure can only create confusion and disorder within the agency.

**Please feel free to contact me if you have any questions.**


**cc: Mary Frances Berry, Chairperson  
Cruz Reynoso, Vice Chairperson  
Christopher Edley, Jr., Commissioner  
Yvonne Y. Lee, Commissioner  
Elsie M. Meeks, Commissioner  
Russell G. Redenbaugh, Commissioner  
Victoria Wilson, Commissioner**



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

June 18, 2001

TO: Edward Halles, General Counsel  
From: Commissioner Abigail Thornstrom   
Re: Disk containing data for Professor Lichtman's study

Pursuant to the Freedom of Information Act, please give my assistant a copy of the disk (or disks) containing any data Professor Allan Jay Lichtman used to issue his report on the Florida election.

I understand from Kim Alton that OGC does not have the data in disk form. However, I am sure you will agree that the report Professor Lichtman issued was funded by taxpayers. Therefore, the disks he used should also be available to the Commission and its Commissioners.

Also, please provide me with a copy of the contract (or contracts) issued to hire Professor Lichtman or any other statistician, social scientist or professional associated with the Florida report.

Please provide this information as soon as possible.

Document #13



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

000.09

June 12, 2001

**MEMORANDUM FOR RUSSELL G. REDENBAUGH**  
Commissioner

FROM:

**EDWARD A. HAILES, JR.** *E. Hailes, Jr.*  
General Counsel

SUBJECT:

Request for Documents on Florida Documents

This is in response to your request for documents relating to the Commission-approved report on "Voting Irregularities in Florida During the 2000 Presidential Election." You submitted a similar request to the Staff Director on yesterday, June 11, 2001. The Office of Staff Director had already made arrangements to collect and deliver materials to you, before I received your request.

Today, the Staff Director forwarded to your Special Assistant, Charlie Ponticelli, an unverified copy of the entire June 8, 2001 meeting transcript and Professor Lichtman's report. A revised report, which will include the editorial changes that are submitted by Commissioners on or before Friday, July 15, 2001, will be forwarded to Ms. Ponticelli by the middle of next week.

You are also requesting "copies of all communications between the Commission and affected agencies and individuals pursuant to the "affected agency" review, as well as copies of all responses and documents received thereto." I will gladly compile this information and arrange for it to be delivered to you through Ms. Ponticelli.

I will be out of the office tomorrow, June 13, 2001, but I will leave directions for these materials to be sent to Ms. Ponticelli.

If you have a need for further assistance, please let me know.

Attachments



Document #12



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

001108

June 12, 2001

**VIA FAX - URGENT AND TIME SENSITIVE**

**MEMORANDUM FOR EDWARD HAILES**  
General Counsel

**FROM: RUSSELL G. REDENBAUGH** *Russell*  
Commissioner

**SUBJECT: FOIA Request for Documents on Florida Report**

Yesterday, my Special Assistant delivered a memorandum to the Staff Director, on my behalf, requesting the following documents to assist me in writing my dissent to the Commission's report on alleged voting improprieties in Florida.

The documents I have requested include:

- (1) A copy of Professor Allan Lichtman's analysis submitted to and discussed by the Commission on June 8, 2001.
- (2) A copy of the transcript of the Commission's meeting of June 8, 2001.
- (3) A copy of the Commission's report on the Florida election, as amended by the Commission on June 8, 2001.

Since I have received no response to my request, and in light of the fact that the Commission has set a deadline of June 29, 2001, for submitting dissents, I hereby request that these documents be provided to me, as soon as possible, under the Freedom of Information Act. Under the Freedom of Information Act, I also ask that you provide me with copies of all communications between the Commission and affected agencies and individuals pursuant to the "affected agency" review, as well as copies of all responses and documents received thereto.

I look forward to receiving these documents at the earliest possible opportunity.

Document #10



OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20428

00-100

June 12, 2001

**MEMORANDUM FOR COMMISSIONER ABIGAIL THERNSTROM****FROM:****LES JIN**  
Staff Director**SUBJECT:**

Request for Materials on the Florida Report

In response to your June 11, 2001 letter to me, please find enclosed a copy of Professor Lichtman's report. Due to today's absence of an OGC staff member, I was not able to obtain the statistical data that the staff provided to Professor Lichtman. However, I will give this information to you tomorrow once the staffer returns to the office. The additional data that Professor Lichtman utilized in preparing his report are subsumed or referenced within his document.

Please feel free to contact me if you have any questions.

Thank you.

Enclosures

Document #8



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

U.S.C. 000108  
OSD 624 Ninth Street, N.W.  
RECEIVED Washington, D.C. 20425

01 JUN 11 AM 12:23

June 11, 2001

Mr. Les Jin, Staff Director  
U.S. Commission on Civil Rights  
624 9<sup>th</sup> Street NW  
Washington, D.C. 20001

Dear Les:

This is a formal request that you provide me with a copy of all the statistical data that the Commission staff provided to Professor Alan Lichtman in order that he could prepare his analysis of the Florida voting in the 2000 election.

I am also requesting a copy of the actual report that Prof. Lichtman gave you, as well as any additional data that he utilized in writing his report.

I intend to review this material in writing my dissent. Since the deadline for submitting dissents to the Commission's report is fasting approaching, you will appreciate my need for this information immediately.

I will be in Washington on Tuesday, in part on Commission business, and will be glad to pick it up from you personally. Otherwise, Kristina Arriaga can get it from you and bring it to me. I am sure that you recall that the Chair specifically invited Commissioners to contact you directly.

Thank you.

Sincerely,

Abigail Thernstrom  
Commissioner



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

824 North Street, N.W.  
Washington, D.C. 20425

May 24, 2001

MEMORANDUM FOR MARY FRANCES BERRY  
Chairperson

FROM: RUSSELL G. REDENBAUGH *Russell*  
Commissioner

SUBJECT: Lack of Response to Requests on Florida Report

I object to the lack of response to Commissioners' recent requests for information regarding the report on alleged "voting improprieties" in Florida, which the Commission is to consider on June 8.

First, I have not received a response to my May 21 memorandum to the Staff Director in which I requested a copy of a letter you were reported to have sent to Senators Graham and Nelson relaying "preliminary" conclusions on behalf of this Commission.

Second, the memorandum that I co-signed with Commissioner Thornstrom on May 22 asked for your response to two specific questions: (1) When exactly will Commissioners be given a copy of the Florida report? (2) What is the status of the required "affected agency review." I have received no response, other than a rather vague message from the Staff Director's Office that Commissioners should refer to the April transcript.

That kind of response does not meet the standards we have at the Commission. Also, with respect to the Florida report, the timelines have been anything but clear and consistent: For example, at the March 9 meeting, instead of taking up a "status report" on the project (as the agenda announced), Commissioners were asked to approve, without any advance notice at all, your own statement of "preliminary" findings on Florida. At that same meeting, you advised Commissioners that "in April we expect to have the draft of the voting rights in Florida, the actual draft, in front of us." In April, however, Commissioners were given only an "Outline of the Final Document." It is now May 24, and there is not yet a draft report for us to review in preparation for a major vote that is supposed to occur in just two weeks time.

Unless we have the report by tomorrow, May 25, there is really no way Commissioners will be prepared to discuss it on June 8; and, of course, unless the affected agency review is completed by the time of our meeting, we cannot discuss it.

CC: Hon. Les Jim, Staff Director



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

May 22, 2001

**MEMORANDUM FOR MARY FRANCES BERRY**  
Chairperson

**FROM: RUSSELL G. REDENBAUGH**  
**ABIGAIL THERNSTROM**  
Commissioners

*Russell*

**SUBJECT: Florida Elections Report**

As you have indicated over the past several months, the Commission is scheduled to consider the report on the Florida elections probe at our meeting on June 8. Considering that the meeting is only a little more than two weeks away, and Commissioners have yet to receive even the draft document, we are concerned that there will be an effort to rush this through without the careful deliberation it deserves.

It is imperative that Commissioners be given adequate opportunity to review the Commission's findings and recommendations before the June 8 discussion and the vote on the final report. It is also imperative that the Office of General Counsel comply with the requirements for legal sufficiency and affected agency review, as set forth in the agency's regulations, before the Commission takes up this report.

The purpose of this memo is to ask that you inform Commissioners, as soon as possible, when exactly we can expect to receive the Florida report. Also, please advise as to the status of the "affected agency review" (i.e., when the report was sent out for review by affected individuals and when the review was/will be completed).

We look forward to your response.

CC: Vice Chair Cruz Reynoso  
Commissioner Christopher Edley, Jr.  
Commissioner Yvonne Lee  
Commissioner Elsie M. Meeks  
Commissioner Victoria Wilson



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

May 8, 2001

MEMORANDUM FOR Chairperson Mary Frances Berry

cc: Les Jin, Staff Director

From: Commissioner Abigail Thernstrom

Re: Letter to members and statements by the Commission

I do not wish to endorse the letter that is being sent to Congress on behalf of the Commission. Furthermore, I would like this and all future statements to reflect my objections or the objections of any of the Commissioners. For instance, my vote and my objections to the recent statement on Florida's voting system overhaul were not noted. The statement could have easily included a lead that reflected the final vote.

In addition, any future statement made on the letterhead of the Commission should be discussed during Commission meetings and taken to a vote. On April 27<sup>th</sup> the Commission issued a statement on "Anti-Asian Comments" that was not distributed to the Commission members until May 7<sup>th</sup>. Even though I had never seen the statement until after it had been distributed to the press, my name and the name of every Commissioner appeared in the last paragraph.

UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS624 Ninth Street, N.W.  
Washington, D.C. 20425

April 23, 2001

MEMORANDUM FOR Dr. Mary Frances Berry

FROM: Commissioner Abigail Thornstrom

*Abigail Thornstrom/ks*

Re: Speakers for Environmental Justice Briefing

In response to your request during the April 13th meeting, on April 17th I submitted a memorandum to the staff director with the names of two experts to be included in the environmental briefing. The next day, Commissioner Redenbaugh also requested that the Commission invite the same two experts: Dr. Christopher Foreman and Dr. Bonner R. Cohen.

Kim Alton told my assistant that as of Friday, April 20th no one had been invited to the briefing. Because the brief is only two weeks away, I would like to know when the experts will be invited. I would also like to receive confirmation that Dr. Foreman and Dr. Cohen were invited.

Thank you very much.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

April 10, 2001

MEMORANDUM FOR LES JIN

From: Commissioner Abigail Thernstrom

*Abigail Thernstrom /ka*

Re: Memoranda dated April 3, April 5 and April 6

I have yet to receive a written response to my previous memoranda. I hate to be reiterating a point that I have made before—namely that the staff director works for all the commissioners, not simply for the chair. And that the commission is by statute bipartisan.

So far, the only response I have had from your office regarding the issues addressed in the April 6th memorandum was a phone call from Ms. Kim Alton to my special assistant. During that conversation she stated that my questions were mostly "policy" questions that must be addressed to the chair. However, the Administrative Instructions clearly state in Section 4 (e) that the Office of the Staff Director is responsible for "monitoring project progress to assure that approved purpose, scope, methodology, and schedule are followed." All my questions clearly fall within that parameter.

Please respond in writing. An accurate record of conversations between us is in your interest as well as mine. It may protect both of us in the future.

Thanks very much.



April 6, 2001

MEMORANDUM FOR LES JIN

From: Commissioner Abigail Thornstrom *Abigail Thornstrom/jkj*

Re: Agenda with attachments for April 13<sup>th</sup> meeting

Thank you for sending me the agenda for April 13<sup>th</sup>. I have several questions about it.

First of all, the package does not contain the draft report on Florida voting issues as discussed during our last meeting. The agenda for April 13<sup>th</sup> indicates that there will be a discussion of an "Outline of the Final Document." Will that document be sent to Commissioners prior to the April 13<sup>th</sup> meeting? If not, could you please state who has had access to that document so far. Have there been internal revisions? Have any Commissioners participated in any stage of the drafting process? Also, the Staff Director's report for February 21-March 27, 2001, indicates that interrogatories have been sent to Miami Hearing witnesses. It is essential that Commissioners receive copies thereof and any responses thereto. Please advise when we will receive that information.

On a separate issue, I note that we have received a briefing paper for the April 13<sup>th</sup> briefing on Equal Educational Opportunity. However, there is no witness list attached. How was it decided who would participate in the briefing? Also, please provide all Commissioners with the list of participants and their biographical information as soon as possible.

Also, will the Commission or any contractor be issuing a press release on any the topics which will be discussed on April 13<sup>th</sup> prior to the meeting? If so, please send all the Commissioners a copy of the press release before the meeting so we can prepare properly for any press queries.

Finally, I noticed that no timeline has been provided for the staff's work on the Voting Rights Project. (We did get a timeline for the Discrimination in Sports Project which the Commission decided not to proceed on during the Project Planning discussion last month. Was this project reinstated?)

Please respond to this memorandum in writing.

Thank you for prompt assistance on these matters.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

April 5, 2001

MEMORANDUM FOR LES JIN

From: Commissioner Abigail Thernstrom

*Abigail Thernstrom /ks*

Re: Florida Interim Report and Access to Documents

Thank you for asking Kim to respond to my memorandum dated April 3.

Her voice mail message to my Special Assistant indicated that "no report, no interim report has been sent to any Commissioner by OSD (Office of Staff Director)." However, she does not say whether perhaps another office within the USCCR has mailed such documents to other Commissioners.

So far, I have received contradictory answers to my requests regarding access to documents. Initially, on March 19<sup>th</sup>, your voice mail message to my Special Assistant stated: "With regard to the questions about the documents referenced in the transcript that you mentioned. I just talked to Eddie Hailes. He said that the way they view it, is that the record is not closed... that as long as the report is not out...the documents are not available for public to view or to examine, however, the Commissioners' situation is different. As long as it is understood that these documents are to remain confidential and not released. He feels that the proper thing to do is to allow the Commissioners to see the documents if they want. So, if you or Commissioner Thernstrom want to see a specific document the easiest thing to do is to identify the documents and I think that the staff could get them for you. That's the way we want to handle the document question..."

However on March 23<sup>rd</sup>, Kim Alston left a voice mail message for my Special Assistant: "Les asked me to give you a call back in response to the message he got today. The first issue is regarding the [educational] briefing deadline.....Second issue is regarding materials...at this time those documents are attorney work products that are not accessible to the Commissioners so that's something we would not be able to give you."

I would like to have a written response to this and all future memoranda, so that we have a clear record and do not have to rely in future discussions on fallible memories. Responses can be sent to my Special Assistant, and she will forward them to me.

UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS624 Ninth Street, N.W.  
Washington, D.C. 20425

April 3, 2001

TO: Les Jin, Staff Director

Through: Kristina Arriaga de Bucholz *Kristina Arriaga de Bucholz*  
Special Assistant to Commissioner Thornstrom

From: Commissioner Abigail Thornstrom

Re: Established Procedures

I understand, perhaps erroneously, that the Florida interim report was sent to all the Commissioners with the exception of Commissioner Redenbaugh and myself. I hope this is not so.

As a new Commissioner, it is my clear understanding that according to established procedures information or reports given to one Commissioner must be given to all, at the same time. Scrupulous adherence to this procedure is necessary to maintain the credibility of this Commission. I know you would agree this is a non-partisan Commission and the staff works for all the Commissioners without regard to party affiliation.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

March 27, 2001

MEMORANDUM FOR: Les Jin  
Staff Director

From: Kristina Arriaga de Bucholz  
Special Assistant

A handwritten signature in cursive script, reading "Kristina Arriaga de Bucholz".

Re: Documents

As per our conversation on March 19, I request your assistance in obtaining a copy of the Administrative Instruction Manual and copies of any other documentation of rules, regulations or statutes that legislate any aspect of the process or the procedures of the work of the Commission. I would also like to request your assistance in obtaining a copy of all the interview reports pertaining to the Tallahassee (1/11) and Miami (2/16) hearings and any documentation received as a result of those hearings.

Thank you for your prompt assistance in this matter.

## Rights Panel Chief Warns Florida on Elections

By KATHARINE Q. SEELYE

WASHINGTON, March 8 — The chairwoman of the Civil Rights Commission put Florida on notice today that the commission would be watching to see what election changes came out of the state's legislative session.

The chairwoman, Mary Frances Berry, sent Gov. Jeb Bush of Florida a letter saying that the commission intended to hold more hearings in Florida this spring to follow up on the state's response to the electoral problems last fall.

Ms. Berry said in an interview that she expected the commission to use its subpoena power to call Florida officials, including the governor, to assess the changes after the Legislature's eight-week session. She said she would seek the consent of her fellow commissioners for the hearings at their monthly meeting here on Friday.

Although the commission's final report has not been prepared, Ms. Berry said today, "We know there was discrimination, but we don't know yet precisely whether it was intentional or unintentional."

She said, for example, that state officials knew that voter turnout, es-

*Waiting to see how legislators change the voting system.*

pecially among minorities, would be higher in 2000 than in previous elections but did nothing to ensure that all precincts had enough resources to handle that increase. She also said some eligible voters had been purged from the registration rolls in the mistaken belief that they were felons.

The lone Republican on the commission, Abigail Thornstrom, has said no evidence of discrimination has been presented.

The commission, which can make recommendations to Congress, has no enforcement authority and little power beyond compelling public testimony. But it has already proved a thorn in the side of Florida officials, holding two hearings after the Nov. 7 election. Elizabeth Hirst, a spokeswoman for Governor Bush, said the office had not seen the commission letter and could not comment on it.

Governor Bush, the president's brother, appointed an election task force, which has recommended that all counties switch to optical-scan voting machines by the 2002 election to avoid the problems of the punch-card systems. The task force also recommended that the state set up voter education programs, hire more qualified poll workers and make county election supervisors nonpartisan jobs.

Governor Bush mentioned the issue briefly in his opening speech to the Legislature this week.

"I ask that we dedicate the resources that are needed to modernize our voting systems and move forward with confidence into the next election cycle," he said.

Ms. Berry's letter said she was disappointed that his speech had not given election changes greater priority. She said that based on the commission's "preliminary assessment" of the election, new technology alone would be "insufficient to address the significant and distressing issues and barriers that prevented qualified voters from participating in the recent presidential election."

**STATUS REPORT ON PROBE OF ELECTION PRACTICES  
IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION**

**STATEMENT OF MARY FRANCES BERRY**

*Chairperson*

**U. S. COMMISSION ON CIVIL RIGHTS**

The Commission has undertaken a formal investigation into allegations by Floridians of voting irregularities arising out of the November 7, 2000 Presidential election. The Commission has held two fact-finding hearings in Florida to examine whether eligible voters faced avoidable barriers that undermined their ability to cast ballots and have their ballots counted in this closely contested election. The probe is intended to uncover, for example, who made the critical decisions regarding resource allocations for Election Day activities, why were these decisions made and what specific impact these decisions had on distinct communities.

Voter disenfranchisement appears to be at the heart of the issue. It is not a question of a recount or even an accurate count, but more pointedly the issue is those whose exclusion from the right to vote amounted to a "No Count."

The voting technology reforms and assurances that uniform and accurate standards for counting and recounting ballots shall be implemented are encouraging and significant. These measures standing alone, however, are insufficient to address the significant and distressing issues and barriers that prevented qualified voters from participating in the Presidential election. It is my hope that Florida officials, as well as officials in other jurisdictions, will promptly resolve these major problems, which they allowed to occur, instead of hoping with the passage of time the public will forget.

In total, over 100 witnesses testified under oath before the Commission, including approximately 65 scheduled witnesses who were selected for the two hearings due to their knowledge of and/or experience with the issues under investigation. The Commission heard testimony from top elected and appointed state officials, including the Governor, the Secretary of State, the Attorney General, the Director of the Florida Division of Elections and other Florida state and county officials. A representative of Database Technologies, Inc. [Choicepoint], a firm involved in the controversial, state-sponsored removal of felons from the voter registration rolls also testified.

We also heard the sworn testimony of registered voters and experts on election reform issues, election laws and procedures and voting rights. Additionally, the Chair and Executive Director of the Select Task Force on Election Reforms established by Governor Jeb Bush testified before the Commission. Testimony was also received from the supervisors of elections for several counties, county commission officials, law enforcement personnel, and a states attorney. In addition to the scheduled witnesses, the Commission extended an opportunity for concerned persons, including Members of Congress and members of the Florida State Legislature, to submit

testimony under oath that was germane to the issues under investigation. Significantly, the Commission subpoenaed scores of relevant documents to assist with this investigation.

The evidence points to an array of problems, including those in the following categories:

- *Key officials anticipated before Election Day, that there would be an increase in levels of voter turnout based upon new voter registration figures, but did not ensure that the precincts in all communities received adequate resources to meet their needs;*
- *At least one unauthorized law enforcement checkpoint was set up on Election Day resulting in complaints that were investigated by the Florida Highway Patrol and the Florida Attorney General;*
- *Non-felons were removed from voter registration rolls based upon unreliable information collected in connection with sweeping, state sponsored felony purge policies;*
- *Many African Americans did not cast ballots because they were assigned to polling sites that did not have adequate resources to confirm voting eligibility status;*
- *College students and others submitted voter registration applications on a timely basis to persons and agencies responsible for transmitting the applications to the proper officials, but in many instances these applications were not processed in a timely or proper manner under the National Voter Registration Act ("motor-voter law");*
- *Many Jewish and elderly voters received defective and complicated ballots that may have produced "overvotes" and "undervotes;"*
- *Some polling places were closed early and some polling places were moved without notice;*
- *Old and defective election equipment was found in poor precincts;*
- *Many Haitian Americans and Puerto Rican voters were not provided language assistance when required and requested;*
- *Persons with disabilities faced accessibility difficulties at certain polling sites;*
- *Too few poll workers were adequately trained and too few funds were committed to voter education activities;*

The Commission's probe proceeds under the statutory duty and authority of the Commission to investigate allegations in writing under oath or affirmation relating to deprivations of the right of citizens of the United States to vote or have votes counted" (PL 103-419). This investigation is also conducted pursuant to our statute which requires the Commission to investigate allegations that "citizens of the United States are being deprived of their right to vote and have

that vote counted by reason of their color, race, religion, sex, age, handicap, or national origin....”

In its investigation, the Commission uses as its standard the requirements of Section 2 of the Voting Rights Act for determining whether disparate impact or disparate treatment amounting to disenfranchisement has occurred. I understand clearly that violations of the Voting Rights Act do not require proof of deliberate or intentional discrimination against citizens, if differential results, disenfranchising those who the statute was designed to protect are the result. Practices can be illegal when they have the effect of restricting opportunities for people of color, language minorities, persons with disabilities, and the elderly to participate fully in the political process and to elect candidates of their choice.

The Voting Rights Act of 1965, as amended, was aimed at subtle, as well as obvious, state regulations and practices that had the effect of denying citizens their right to vote because of their race. Perhaps the most invidious barriers to the right to vote were the seemingly neutral restrictions developed by states that had debilitating and devastating results on black voter registration.

Congress has enacted additional measures to further protect the voting rights of persons of color, immigrants, the elderly, and those with disabilities from invidious discrimination. For example, an amendment to the Voting Rights Act in 1975 permanently restricted the use of tests and devices for voter registration nationwide. The 1975 amendments also include rights for language minorities, mandating bilingual ballots and oral assistance with voting. In 1983, the Voting Rights Act was amended to clarify that the proof of discriminatory intent is not required under Section 2 claims, thus making disparate impact claims valid. Congress also enacted the National Voter Registration Act after finding that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.” Further, several laws have been enacted pertaining to the accessibility of the election process to persons with disabilities

*[These laws are described in an appendix to this statement].*

I am deeply troubled by a preliminary review which points to differences in resource allocations, including voting technology, and in voting procedures that may have operated so that protected groups may have had less of an opportunity to have their votes counted. We will conduct complete disparate impact and treatment analyses before the report is completed, and our final conclusions will take into account the results of these analyses.

However, it appears at this phase of the investigation that the evidence may ultimately support findings of prohibited discrimination. Two particular sources of fruitful inquiry are the questionable uses of Choicepoint data and resource allocation issues. We are attempting to document whether and, if so, how long state, county and local officials knew that certain differences in resources and procedures might impact more harshly African Americans and members of other protected groups.



The staff is continuing their analysis of the voluminous testimonial and documentary evidence compiled during this investigation. Ultimately, the Commission will pinpoint whether each of the problems identified resulted from deliberate, or harmful, yet not deliberate, discrimination, or were caused by neither.

I emphasize that the implementation of voting technology reforms and uniform and accurate standards for counting and recounting ballots would be encouraging and significant. These measures standing alone, however, will not address the significant and distressing issues and barriers that prevented qualified voters from participating in the Presidential election.

In the final analysis, new recounts of old ballots are an academic exercise. Voting is the language of our democracy and regrettably, when it mattered most, real people lost real opportunities to speak truth to power in the ballot box. This must never occur again. As Dr. Martin Luther King, Jr. once stated: Social justice shall not roll in on wheels of inevitability. It is our hope that Florida officials, as well as officials in other jurisdictions- where barriers existed, will promptly resolve these major problems that occurred on their watch.

FOR IMMEDIATE RELEASE

Contact: Ronnie J. Kweller 202-833-9771

**US COMMISSION ON CIVIL RIGHTS CONCLUDES  
THAT "NO COUNT" IS REAL ISSUE  
IN FLORIDA VOTE**

*Voter Disenfranchisement is at the Heart of the Issue*

WASHINGTON, DC, MARCH 9 – Supported by approximately 30 hours of sworn testimony from some 100 witnesses, the US Commission on Civil Rights determined that the Florida presidential elections appear to have been marred by voter disenfranchisement.

"It is not a question of a recount or even an accurate count, but more pointedly those whose exclusion from the right to vote amounted to a "No Count,"" concluded a statement issued today by the Commission. The preliminary assessment was released in a rare departure from the Commission's more deliberative procedures. Commission Chair Mary Frances Berry said she hopes the Commission's findings will hasten reforms.

"In the final analysis," the statement said, "new recounts of old ballots are an academic exercise. Voting is the language of our democracy and, regrettably – when it mattered most – real people lost real opportunities to speak truth to power in the ballot box. This must never occur again.

"Voting technology reforms and the conclusion of recounting procedures alone are insufficient to address the significant and distressing issues and barriers that prevented qualified electors to cast ballots and have their ballots counted. It is our hope that Florida, as well as other jurisdictions, would promptly address these major problems instead of hoping that with the passage of time, the public will forget," the statement continued.

The Commission released the statement at its regular March meeting. It maintained that the evidence points to an array of problems. These ranged from Florida election officials' failure to provide adequate resources to handle increased voter turnout to at least one unauthorized law enforcement checkpoint. The Commission also flagged the removal of non-felons from the voter registration rolls on the basis of unreliable information collected during a sweeping, state-sponsored felony purge.

- more -

The Commission cited other problems in Florida which prevented voters from exercising their franchise, including the assignment of many African Americans to polling sites that lacked sufficient resources to confirm voter eligibility; failure to process voter registration applications under the "motor voter" law in a timely manner; use of defective and complicated ballots that caused many "overvotes" and "undervotes"; early closing of polling places; relocation of polling places without notice; use of old and defective election equipment in poor precincts; failure to provide requested language assistance to Haitian American and Latino American voters; and failure to ensure access for voters with disabilities.

The Commission also found that the state failed to provide adequate training to its poll workers and committed inadequate funds to voter education.

The Commission plans to release a draft report on the Florida voting probe by early April and the final report in early June.

By a unanimous vote, the Commission decided to return to Florida late this summer after the state legislative session, in order to assess what changes have taken place at the state and local level. This vote follows a March 8 letter from Chairperson Berry to Governor Jeb Bush that expressed her disappointment with his statement of priorities to the Florida legislature in which he emphasized voting technology reforms and not the additional barriers that prevented qualified voters from participating in the election.

The Commission also discussed a survey today reviewing election procedures nationwide, including all 50 states and the District of Columbia. That review was aided by State Advisory Committees and the Commission's regional representatives.

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## *Sins of the Commission*

**I**T IS A MARK OF how low the prestige of the U.S. Commission on Civil Rights has sunk that it's hard to care much whether U.S. District Judge Gladys Kessler was correct to rebuff an effort by the White House to install a lawyer named Peter Kirsanow. The administration argued that the seat was vacant; the commissioners claimed that it was lawfully occupied by a holdover appointee of former President Clinton. Judge Kessler agreed with the commissioners, and the administration is appealing. This might be a significant legal dispute were the commission a forum for serious discussion of civil rights. But the commission has long since become a partisan battleground. Whether its majority is Democratic or Republican only indicates which party's caricature of civil rights it will support.

It wasn't always this way—and needn't be so now. When the commission was established during the Eisenhower administration, it used its investigative powers to shed light on systemic civil rights problems, and it spoke with great moral authority. That authority began breaking down during the 1970s, and the decline hastened during the Reagan administration, which sought to turn the commission's ideological direction around and make it a voice for conservative policies. The result was a pitched ideological battle. And the battle has continued, even worsened, under the commission's current

chair, Mary Frances Berry, whose investigation of the Florida election controversy was highly politicized and contributed little, beyond noise, to the national discussion of the problems in the 2000 election.

The commission, unlike other federal agencies, has no law enforcement responsibilities. Its only function is to inform and elevate the debate. If it cannot do this, it is not worth having. It is certainly not worth spending \$9 million of public money each year to inflame passions further. There are plenty of areas where a serious commission could be useful. To cite one contemporary example, it might examine how various counterterrorism policies are affecting the civil rights of Arab Americans, and what alternatives might mitigate that effect. It might examine how alternatives to university affirmative action have worked. Yet the commission's forays in these areas have been unimpressive. A serious, rigorous commission could create breathing space for creative civil rights dialogue un beholden to the orthodoxies of either the left or the right. Unfortunately, though, the political pressure on presidents and congressional leaders—each of whom name some commissioners—comes from groups invested in the orthodoxies, not in questioning them. As long as those responsible for naming commissioners are unwilling to buck the pressure, the commission's contributions will be negligible.

*Wash Post 2/11/02 A24*

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PROMOTIO

## Can the U.S. Commission on Civil Rights Be Saved?

Beset with internal squabbling and a loss of credibility, the historic commission faces an uncertain future

BY ANDREW GOLDSTEIN

Saturday, Feb. 09, 2002

In the 1960s the U.S. Commission on Civil Rights was hailed as "the conscience of the nation." Its systematic public exposure of segregation was crucial to the passage of the Civil Rights Act of 1964. But today, petty political squabbles threaten to condemn the body to irrelevance.

The latest ruckus involves the makeup of the commission itself. The dispute centers around Peter Kirsanow, an intense Cleveland labor lawyer with a smooth-shaven head and Salvador Dali moustache. In December George Bush appointed Kirsanow, the former head of the conservative Center for New Black Leadership, to fill the seat of Victoria Wilson, a liberal former book publisher who is best known for editing the vampire novels of Anne Rice. The move threatened liberal Mary Frances Berry's control of the commission: with Wilson seated, there are five liberals and three conservatives; Kirsanow would even the votes at four each.

Wilson had been appointed in January, 2000, upon the death of commissioner Leon Higginbotham. The Bush administration contends Wilson was simply completing Higginbotham's term; White House records say she was appointed "for the remainder of the term expiring November 29, 2001." Berry says the records are mistaken, that the law guarantees all commissioners full six-year terms. She also charges Bush is trying to muzzle the commission in response to its Florida election report, which accused Jeb Bush of being "grossly derelict" in enforcing the law. In December Berry told the Justice Department it would take federal marshals to seat



&gt; WORLD ST.

The Hornets  
Could Change  
A Hornets man

Kirsanow. Last week a federal judge sided with Berry; the Justice Department is appealing.

But regardless of who wins, there are real questions about whether the group will still be taken seriously. When the group went to New York in 2000 to examine racial profiling, critics dismissed its findings, calling them a thinly veiled attack on Rudolph Giuliani: the commission leaked its report just as Giuliani was announcing his campaign for Senate. Conservatives have called the Florida report "scandalously biased," and even some liberals have questioned its statistical findings.

Most recently, the commission's hotline for reporting incidents of hate crimes or discrimination in the wake of the September 11 tragedy — which should have been an uncontroversial public service — began as a joke and ended as a potential tragedy. The initial press release listed the wrong 800-number, sending callers not to the commission but to a love connection service. Then, once calls began to pour in, the commission did not forward to Justice the reports it collected. In a scathing letter to the commission, assistant attorney general for civil rights Ralph Boyd wrote: "Simply put, your refusal prevents the Department of Justice from investigating or otherwise following up these reports in order to ensure that people who need protecting are, in fact, protected." Les Jin, the commission's staff director, responded that the commission doesn't keep a written record of every phone call, and that complainants are given the phone number of the appropriate agency to call themselves. At a contentious hearing on the matter, Berry said, "People around the country have expressed their gratitude, so I think we ought to be proud that we're doing this rather than worrying about whether it's helping anybody."

The series of controversies has even begun to cast doubt on the credibility of future reports. In April the commission plans to examine the impact of standardized testing on minorities; critics say Berry is looking for an excuse to criticize the president's education bill. Says Jennifer Braceras, the most recent Republican appointee: "the commission has outlived its usefulness."

After 22 years on the panel, Berry is undeterred. "We don't serve the pundits in Washington," she says. "We serve the under-represented, the disenfranchised. They tell us we're still needed." Kirsanow thinks so, too. That's why he says he'll continue to fight for his seat. "There are very important issues that still need to be addressed," he says. "In the end, I do believe we all want the same thing."

## FINDING RACIAL BIAS WHERE THERE WAS NONE

**I**t started right after the election. The indispensable Jesse Jackson muttered about "a pattern of irregularities and intimidation" in Florida in which "African-American voters were substantially targeted." By December 8, he was claiming that the Bush brothers had "stolen" the election by "schemes of disenfranchisement." Other "leaders" were not far behind. "Police checkpoints were set up in and around polling places to intimidate black men," imagined NAACP Chairman Kwesi Mfume, adding, "It was all part of some grand conspiracy" to keep blacks from the polls. "There was a systematic disenfranchisement of people of color and poor people," hallucinated Donna Brazile, Al Gore's campaign manager. Gov. Jeb Bush of Florida and others put up police roadblocks to stop blacks from voting and "tampered with the results in Florida," oozed Democratic National Committee Chairman (and Clinton moneyman) Terry McAuliffe.

These were all, at best, recklessly false exercises in racial demagoguery. There was never any credible evidence for any of them. But the charges have had a big effect. Amplified in the media, this disinformation campaign has left a great many African-Americans in Florida and elsewhere believing that they were deliberately "disenfranchised" last year. In reality, the 13 percent of Florida's registered voters who are black succeeded in casting a disproportionately large (15 percent) share of the nearly 6 million ballots there last year, and the black vote soared to 65 percent above the 1996 total. Rarely have so many been so dishonestly inveigled into so utterly unfounded a sense of victimization.

Now comes the U.S. Commission on Civil Rights—whose Clinton-appointed chairwoman, Mary Frances Berry, runs it as a propaganda mill for the victimology wing of the Democratic Party—with a rekindledly partisan 200-page "staff report" that was leaked this week and which will be discussed at the June 8 meeting of the eight

commissioners. It catalogs every complaint that could be lodged from the unhappy Democrats who could be found as evidence of "disenfranchisement" falling "most squarely on persons of color"; implies that there were massive violations of the Voting Rights Act by Jeb Bush and others; and calls for a Justice Department investigation.

While trashing Gov. Bush and the hapless Katherine Harris (Florida's elected Secretary of State) as disenfranchisers for failing to run a perfect election, the report glosses over the inconvenient facts that, under Florida law, Bush has virtually no authority over the voting process, and the Secretary of State's role is mainly to provide nonbinding advice to local officials. The report also ignores the fact that the local officials who run the process and are thus directly responsible for most of the problems detailed in the report—bureaucratic errors, poorly designed ballots, jammed phone lines, and other inefficiencies that caused long delays and unfortunately prevented an unknown number of voters from casting ballots—are mostly Democrats.

There were plenty of problems in Florida. Their combined effect was to block perhaps one-tenth of 1 percent of all those who went to the polls from casting votes at all. They also contributed to the confusion of the disproportionately black 2.9 percent of voters who spoiled their presidential ballots by punching or marking them erroneously. Indeed, the somewhat confusing "butterfly ballot" in Palm Beach County (designed by a Democratic official), combined with voter error, probably cost Vice President Gore some 6,000 votes—more than enough to overcome George W. Bush's 537-vote margin.

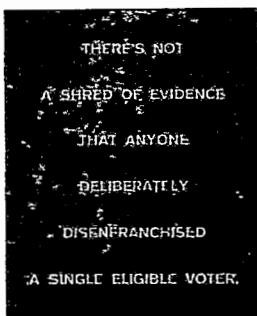
But all of that has been known for many months. The most important (but least emphasized) revelation in this error-littered report is that Berry's investigators have been unable to find even a shred of evidence that anyone deliberately disenfranchised a single eligible voter.

Consider the post-election clamor about "roadblocks" and police "intimidation." All that's left of it is a pathetic four-page passage famously faulting the Florida Highway Patrol for conducting a single, routine vehicle checkpoint "within a few miles of a polling place in a predominantly African-American neighborhood," and preposterously suggesting that the occasional presence of troopers "in and around polling places" [was] arguably in direct violation of Florida law."

But while the report stresses the complaint of one Roberta Tucker that she felt "intimidated" and "like it was sort of discriminatory" when stopped by white officers at this checkpoint while on her way to vote, the vast majority of the drivers stopped were white. Tucker acknowledged that the troopers let her proceed after briefly inspecting her driver's license. And according to un rebutted testimony, the only reason why any troopers visited any polling places was to vote.

The report does detail one widely reported episode of gross insensitivity to voting rights that led foreseeably to the erroneous disenfranchisement of "countless" people: State officials implemented a badly written 1998 anti-fraud law in a way that contributed to the purging from the rolls of eligible voters.

The 1998 law was designed to remove ineligible felons (and dead people) from the rolls. But in their zeal to ensure that no ineligible felon go unpunished, officials in Harris's office, with input from the staff director of the state clemency board (which Bush heads), urged an overinclusive approach that led local officials to remove 1,104 eligible voters—108 from the rolls who were not felons at all, and 996 whose civil rights had been restored in other states after they had served their sentences for felony convictions there. (These numbers come from an analysis in *The Palm Beach Post*, which cites other media reports that "thousands" of people were wrongly disenfranchised.)



Forty-four percent of these people (and 49 percent of all Florida felons) were black. This racial disparity is, as the report stresses, troubling. But the roughly 500 African-American voters wrongly disenfranchised by the felon purge come to less than one one-thousandth of the 934,000 registered black voters in Florida.

Might these 500 and the rest of the 1,104 wrongly purged voters nonetheless have swung the election to Gore had they been able to vote? Possible, but doubtful. Assuming a relatively high 68 percent turnout in this group, about 750 of the 1,104 would actually have voted. They would have given Gore a net gain of 538 votes only if they had chosen him over Bush by at least 644 to 106. The felon vote may be Democratic—but not that Democratic. And, by the way, some 5,600 ineligible felons—68 percent of them registered Democrats—voted illegally in Florida last year, according to *The Palm Beach Post*. If officials had succeeded in purging all ineligible felons—and only ineligible felons—Bush's 537-vote margin would have been well over 1,000.

Florida's law disenfranchising felons who have served their sentences is a bad law that has been badly enforced. Florida is out of step with the 40 states that restore felons' civil rights after they have served their sentences. The law should be

repealed. And the wrongful disenfranchisement of 1,104 eligible voters was a gross injustice. But Bush and Harris have plausibly denied involvement in the felon purge. And even Mary Frances Berry does not claim that it was a Republican plot to steal the election.

The draft report also makes an elaborate but self-discrediting effort to imply that some kind of illegal racial discrimination must underlie the familiar fact that a far higher percentage of black voters in Florida (and elsewhere) spoil their ballots than do white voters. Contrary to the media-fostered myth that black voters are disproportionately stuck with punch-card voting machines that have higher spoilage rates than the machines used in predominantly white areas, the report notes (in passing) that the majority of white voters in Florida used the same punch-card machines as most black voters last year. It also says that the racial disparities in spoilage rates are attributable only "in a very small part" to differences among machines.

So what does explain these racial disparities? Some cite the well-known racial disparities in education and literacy rates and the unusually high percentage of first-time black voters in Florida last year. But the report rejects the first possibility (unconvincingly) and ignores the second, while offering no explanation of its own. Instead, it asserts that "persons living in a county with a substantial African-American or people-of-color population are more likely to have their ballots spoiled or discounted than persons living in the rest of Florida"—an odd way of summarizing evidence that black voters are more likely to make mistakes filling out their ballots than are white voters, even when using identical ballot and voting machines.

Are we supposed to think that the machines themselves are racist, that they set traps for unwary black voters while indulgently helping whites along? Or, perhaps, that the disparities in voter-error rates involve no racial discrimination at all? ■





The Florida recount

## Unfair, again

WASHINGTON, DC

A stinging report on the shenanigans in Florida is too partisan to be credible

THE Florida recount is like one of those monsters in a horror film that, just when you think it is dead, pops up again in yet another mutation. This time the monster is in the form of a searing report from the Commission on Civil Rights.

It says that Florida's conduct of the 2000 election was characterised by "injustice, ineptitude and inefficiency". A combination of unequal access of up-to-date voting equipment and "overzealous efforts" to purge voter lists of ineligible voters such as felons hit blacks harder than any other group. Blacks were ten times as likely as whites to have their ballots rejected. A full 54% of the votes rejected during the Florida election were cast by them.

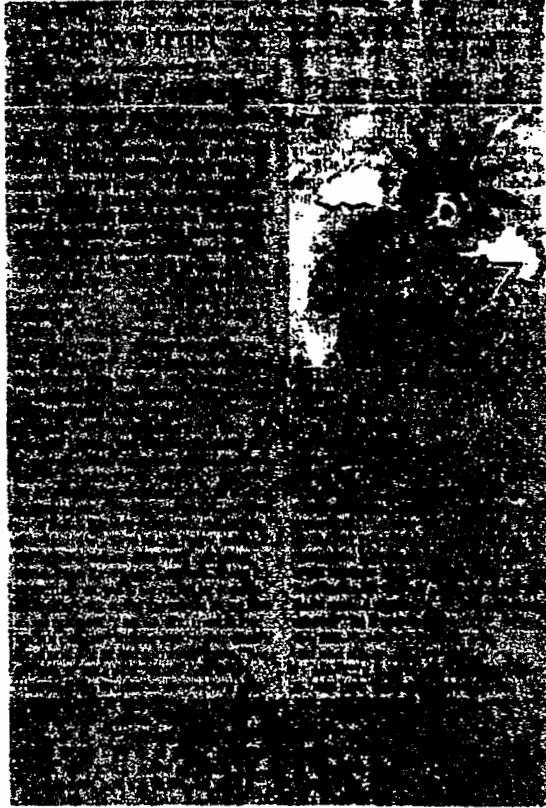
The report criticises both Jeb Bush, the governor who also happens to be the president's brother, and Katherine Harris, the secretary of state. The commission is poised to ask the Department of Justice and the Florida attorney-general's office to investigate whether federal or state civil-rights laws were violated.

Much of this is old hat. Everybody knows that much of America's voting machinery is a disgrace. And everybody knows that the worst voting machinery is concentrated in poor areas. But the Civil Rights Commission report still matters for two reasons. First, the commission has spent longer studying the subject than anybody else. Second, it has focused exclusively on the most explosive charge in the whole Florida fiasco: that minorities were systematically punished.

But the commission has left itself open to the charge of partisanship. It consists of four Democrats, three independents and one Republican. And two of the nominal independents were appointed by Democrats, including the commission's chair, Mary Frances Berry, who has contributed to both Hillary Clinton's and Al Gore's political campaigns. Abigail Thernstrom, the commission's lone registered Republican, has no hesitation in dismissing the report as "totally partisan".

The commission also failed to give either Governor Bush and Ms Harris, or indeed its own members, the customary 30 days to consider their replies. Mr Bush had to reply to a flurry of (leaked) newspaper headlines before he received the full report. Ms Thernstrom was only given three days to read the report.

The substance is also questionable on three counts. First, the commission con-



centrates on race at the expense of education levels and voting experience. Spoiled ballots were concentrated in areas with high levels of illiteracy and with large numbers of first-time voters. Levels of illiteracy are roughly twice as high among blacks than whites, and 40% of the blacks in Florida were first-time voters. (And despite all the loose talk about structural racism, it is worth remembering that blacks made up 16% of voters, though they account for 21% of the registered voters.)

Second, laying so much blame on the governor and secretary of state is unrealistic. The voting system in the United States is highly decentralised. Most of the key decisions were made in Florida's 67 counties rather than in Tallahassee. Many of the

counties with the highest number of voters were under Democratic control.

Third, the commission is far from even-handed when it comes to dealing with felons. It focuses on the 1,000 or so ex-offenders who were erroneously kept off of voting roles. But two Florida newspapers have demonstrated that more than 5,000 felons who are not legally entitled to vote managed to do so anyway.

Democrats will seize on the report to question the legitimacy of George Bush's presidency. It will also fan fears among blacks. But even the commission admits that there is no "conclusive evidence" that officials "conspired" to disenfranchise minority voters. That could have done with slightly more prominence. ■



THE WASHINGTON POST

*Michael Getler*

## When Leaks Backfire

"Leaking" a story is probably as old as journalism. The leaker provides information or a document to a news outlet that he or she believes will give the story favorable coverage. Leaks frequently are important and can lead to significant disclosures for the public. But they are tricky for the leaker because they can backfire, and they impose a responsibility on the leakers to dig deeper so they are not just carrying someone's water, to extend the metaphor.

Last week the U.S. Commission on Civil Rights and *The Post* demon-

### Ombudsman

ed the pitfalls of leaking and reporting on leaks.

The commission, which looks into possible violation of federal civil rights protections, has been investigating and holding hearings on the Florida presidential voting last November that led to allegations of unequal treatment of the state's minority voters.

On Tuesday's front page, *The Post* reported that the commission had concluded, in its "167-page final draft report obtained by *The Washington Post*," that Florida's electoral conduct was marred by "injustice, ineptitude and inefficiency" that unfairly penalized minority voters, and that Gov. Jeb Bush and State Secretary Katherine Harris had allowed disparate treatment of voters.

As it turns out, *The Post* "obtained" the draft report along with the *New York Times* and the *Los Angeles Times*. But readers in the Washington area who looked at the *New York Times* found a different treatment of the report. The *Times*, under a headline noting that this was a "divided" civil rights panel, reported that not all members of the eight-member commission were involved in putting together the report and that the two Republican-appointed members had not been consulted. The *Times* quoted one of the Republican appointees as saying the evidence does not support the conclusions; he linked the findings to the political agenda of the chairwoman, Mary Frances Berry, who supported former vice president Al

Gore. The other Republican described the timing of the leak—before consultation with other commissioners—as "a procedural travesty." None of this was in *The Post*. The *Times* also pointed out that Florida officials were to be given 30 days to review the draft, but that was demolished by the leak.

In case you missed the *New York Times*, you could have read the *Washington Times*. Its reporters didn't obtain the report but, not surprisingly, knew of the budding controversy.

The next day, while *The Post* was catching up, but not on the front page, with the disident Republican-appointed members of the commission (which has a majority of four Democrats, with the others Republicans and independents), the *New York Times* had moved on to Gov. Bush's scathing letter to the commission denouncing its findings. Not a word in *The Post*. By Wednesday, the handling of the report was also front-page news in the *Washington Times* and the subject of a critical editorial in the *Wall Street Journal*.

The cynical reader might say: "Well, what else is new about that line-up?" But that is way too cynical. The question of what really happened to Florida's minority voters is one of the most important and profound issues still lingering from the unprecedented confusion of the 2000 election. This was a stupid and destructive leak, no matter where it originated. It undermines the credibility of the commission and politicizes and diverts attention from what should have been an authoritative and inclusive final report. It also may diminish and distort the coverage that comes after the official release.

*The Post* didn't distinguish itself either. It should have done more reporting about this certain-to-be controversial report and, in a case like this, should not have been a party to non-disclosure about who did the leaking.

*ombudsman@washpost.com*

FROM PAGE ONE

6/10/1



U.S. Civil Rights Commission Chairman Mary Frances Berry listened as commissioners discuss the report on the Florida election yesterday.



Commissioner Abigail Thernstrom expressed objections to the report, which she described full of "discrepancies and inaccuracies."

## Rights panel report slams Florida vote

### Two Republican appointees dispute findings as 'simply false,' 'full of holes'

By Steve Mäer  
THE MIAMI HERALD

The U.S. Commission on Civil Rights continued its assault on Florida officials yesterday by formally approving a report that claimed federal voting-rights laws may have been violated in November's presidential election.

The report was approved over the protests of the two Republican appointees to the eight-member panel.

The commission, which claims to have completed the most extensive public investigation on record, said in its report that Florida Gov. Jeb Bush and Secretary of State Katherine Harris failed to discharge their duties and thus shared blame for the election debacle.

The report also said that black voters were hindered to have their ballots discarded because of errors made in casting the vote.

However, the report stopped short of calling the troubled election a conspiracy, noted commission Chairman Mary Frances Berry.

"But there is a strong basis that Section 2 of the Voting Rights Act of 1965 was violated," Mrs. Berry said.

Section 2 reads: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

Republican appointees Abigail Thernstrom and Russell Redenbaugh promised to file a dissent and yesterday continued their dispute

#### THE REPORT'S FINDINGS

The following are quotes from "Voting Irregularities in Florida During the 2000 Presidential Election" by the U.S. Commission on Civil Rights. The eight-member board approved a draft of the 200-page report yesterday.

■ "A wide variety of concerns have been raised regarding Florida's voting system controls during the 2000 Presidential election. Many Floridians were delayed at the polls or denied their opportunity to vote in what proved to be a historic election."

■ "The U.S. Department of Justice should immediately and uniformly investigate whether state election officials either through their actions or failure to act, violated the Voting Rights Act of 1965, as amended, by failing to allow voters to cast ballots through the use of affidavit procedures prescribed in the election code."

■ "Florida voters in poorer communities, as well as voters in communities where the majority of residents are people of color, were more likely to use voting systems that cause higher spoilage rates. It is clear that every voter did not have an equal opportunity to have his or her vote counted."

■ Concerning the felon voter law and list, which seeks to remove convicted felons from the eligible-voter list: "The commission is duty-bound to report, without equivocation, that the analysis presented here supports a disturbing impression that Florida's reliance on a flawed voter-exclusion list had the result of denying African-Americans the right to vote."

■ A summary issued by the commission yesterday, which was not ratified by a vote, stated: "The most dramatic uncertainty in the election was the noncasted ballots of the countless unknown eligible voters, who were wrongfully purged from the voter-registration rolls, turned away from the polls, and by various other means prevented from accessing the ballots."

with the Democrats on the commission.

"Many of the well-publicized and hyperbolic claims are simply false," Mrs. Thernstrom wrote in a news release issued before yesterday's commission meeting. "The statistical foundation of the report is filled with holes. The correlation between race and the proportion of ballots that were invalid explains at best only one-quarter of the variations

between counties."

She said the high number of first-time voters was the cause of the mistake-filled ballots in some black-dominated counties.

Ballots can be tossed for any number of reasons, but most rendered invalid in Florida were those with either two votes for president or none.

Both Mr. Bush and Mrs. Harris responded this week to the report;

Mr. Bush's legal counsel, former Rep. Charles Canady, said the commission had produced a "biased and sloppy report aimed at delegitimizing the outcome of the November 2000 presidential election."

Mrs. Harris is quoted in a Florida newspaper as saying the report "unless built on accusations that directly contradict the evidence."

But yesterday, unswayed by the response, the commission also called on the Justice Department to investigate the Florida vote.

The department has its own office devoted to voting rights that has investigated "thousands" of complaints in Florida since the election, said spokesman Dan Nelson. He said 12 of those cases remain open.

The report has been widely discussed this week, after it was released to several news agencies — several of which heavily censored its contents — before Mrs. Thernstrom or Mr. Redenbaugh had had an opportunity to review it.

During a debate with Mrs. Thernstrom on ABC's "Nightline" this week, Miss Berry called the dispute over the report a "hood fight."

Republicans said the report is a partisan attack on a lost election, which Miss Berry dismissed yesterday.

"The report rises and falls on its substance," said Miss Berry — a stated political independent, but a heavy contributor to Democratic causes — including the Gore campaign. "I hope that people will read it. And if it doesn't make sense, they can reject it."

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## VIEWPOINT

### An Uncivil Agenda: Race Commission Is Propagandistic, Say Two Members

BY JOHN J. MILLER

If every product put out by the U.S. Commission on Civil Rights displayed the scholarly rigor and intellectual candor seen in the dissenting statement attached this week to the panel's recent report on the Florida vote, then perhaps the agency would be worth its annual price tag of \$9 million. It would function as a sort of federal think tank on race relations, issuing fair-minded assessments of what may be our country's most frustrating dilemma.

The dissent, written by commissioners Abigail Thernstrom and Russell G. Redenbaugh, calls the U.S. Commission on Civil Rights' report on the November presidential election in Florida "a dangerous and divisive document."

The Thernstrom-Redenbaugh statement is a blistering attack on the report that has consumed the commission all year. It offers strong evidence that there is a single solution to the commission's troubled: complete abolition of it.

#### A Splitting Commission

The liberals who currently control the commission generated headlines around the country earlier this month when they leaked a report claiming to have unearthed evidence of "widespread disenfranchisement and denial of voting rights" in the Sunshine State. Yet as Thernstrom and Redenbaugh show in compelling detail, this attention-grabbing report was merely "a partisan document that has little basis in fact."

When the commission was created in 1957, one of its fundamental missions was

the investigation of voting-rights abuses. This made sense, given that so many blacks were denied access to the ballot box throughout the Deep South.

But now — 36 years after the passage of the landmark Voting Rights Act — the commission has botched its handling of the most important voting-rights controversy in a generation. Instead of performing its noble purpose, the commission has become an embarrassing farce.

The person most responsible for its downward spiral is Mary Frances Berry, its chair. She strongly supported Al Gore during the presidential election. When the result of that race was still uncertain, she told an audience, "We are either in a position in the next few weeks — those of us who believe in the cause of human rights near and far — of having to mobilize, stride and use our elbows to make sure that Al Gore stays on the right path."

Right before President Bush's inaugural, she declared, "The fundamental bedrock of our country has been torn asunder." She also called Bush's victory "a threat to our domestic institutions."

Berry nevertheless maintained that she was capable of leading an objective probe of the Florida balloting, where Bush narrowly defeated Gore and earned enough electoral votes to become president. Yet time and again, she has demonstrated herself unfit for the job. She recently compared Florida Gov. Jeb Bush and Secretary of State Katherine Harris to "Pontius Pilate just washing their hands of the whole thing." This is a revolting comment, especially coming from a person who scheduled one of the commission's monthly public meetings this year on Good Friday.

The Thernstrom-Redenbaugh dissent, 57 pages in length, is an exhaustive and devastating critique of the commission's report. It also offers fascinating new interpretations of what happened in Florida, thanks in part to a detailed analysis performed by John Lott, an economist at Yale Law School.

#### Berry's Bogus Claim

Lott, for instance, shows that there does not appear to be a statistically significant relationship between the share of Florida voters who were black and the ballot-spoilage rate. What's more, he reveals that the incidence of ballot spoilage increased when a Democrat supervised the local election — and went up even further when that Democratic official was black.

This is powerful evidence undercutting Berry's claim that something akin to a racist conspiracy was afoot last fall. An honest report on what happened in Florida would have admitted what Lott found.

But honesty is an endangered species at the commission, which has spent more than a decade rendering itself irrelevant to the civil rights debate. In 1997, the General Accounting Office labeled it "an agency in disarray" for a series of organizational problems that still lack a fix.

When Bill Clinton announced that he would convene a new commission on race, he bypassed the one he already had — no doubt because even the political left believes the existing commission is a useless organ.

With the Florida report, though, the commission has sprung back like a wounded animal, inflicting actual harm on American race relations. As Thernstrom and Redenbaugh note, "The shoddy quality of its work, its stolen-election message and its picture of black citizens as helpless victims in the American political process is neither in the public interest nor in the interest of black and other minority citizens."

This is worse than irrelevant, and it's final proof that the commission has outlived whatever usefulness it once had.

John J. Miller is a writer for *National Review*.

# Panel's report is flawed

## Opposing view:

**Many questions raised by Florida election remain unanswered.**

By Ben Wattenberg

USA Today  
6/8/01 BA

So the U.S. Commission on Civil Rights wants one more Justice Department investigation into whether the Florida election was fairly conducted, based on no evidence of wrongdoing and a tarnished report, leaked before it was shown to Republican members of the commission.

It would be far more appropriate to investigate the commission itself, which has been used for several decades as a partisan political toy and personal megaphone for its rather radical chairwoman, Mary Frances Berry. How quaint that the leaked executive summary of the report, which charges "disenfranchisement" of African-Americans, beats up only on the Republican governor and secretary of State while not mentioning that the vast majority of the irregularities cited occurred in majority Democratic districts, with Democrats in charge.

Does America need some serious fact-finding about its election system, keyed to the 2000 election? Yes, indeed, but not in a legal setting to play a blame game. It is a topic worthy of serious, scholarly, non-partisan study, perhaps with foundation support.

Among the many questions I'd like to see explored are these:

► Is there anything that can be done to prevent the television networks from barging into the election process with their deeply flawed "projections?" (Early calling may depress turnout in later-voting states.)

► Should ex-felons be given the right to vote? (A serious question, raised in the commission's report.)

► Can the election polling system be reformed? (Fewer and fewer people respond to pollsters' questions; exit polling can't measure the rise of absentee ballots.)

► On the matter of African-American voting: What are the best ways to ensure that blacks do not make the sorts of voting errors that cost them dearly in the 2000 election? (Rising black turnout is to be celebrated, not squandered, but uneducated and disorganized voting is certainly not "disenfranchisement.")

► If all of the charges about disproportionate irregularities were true, what would be the national effect? If blacks, mostly Democratic, are much more likely to be ineligible to vote than whites but there are eight times more whites, disproportionately Republican, than blacks, who ends up benefiting in a national vote count?

*Ben Wattenberg is a senior fellow at the American Enterprise Institute.*

# Civil rights panel meets amid censure

## Critics from right term U.S. commission's decisions biased toward left

By Steve Miller  
THE WASHINGTON TIMES

The U.S. Commission on Civil Rights will hold its monthly meeting today to discuss its report on the Florida election in the midst of the latest attacks on the group as a partisan body.

The panel's two conservative members already have vigorously attacked as unfounded the conclusions of the 198-page report, leaked early to three newspapers, that political leaders in Florida, mostly Republicans, disenfranchised minorities in the November presidential election.

Originally created in 1957 as a bipartisan group that would investigate civil rights abuses in the era of Jim Crow segregation laws, the panel stands accused by detractors of being a politicized body that now leans to the left, reflecting the appointments made by President Clinton.

"It is simply a political football," Susan Prado, the commission's acting staff director in the 1980s, says of the panel.

"It is a political football the size of a golf ball," adds Michael Fumento, a conservative who served as assistant general counsel at the commission during the '80s.

Part of the explanation is that four commissioners are appointed by the president and four by Con-

gress; observers say their leanings are bound to reflect their patrons' politics.

The current chairman, Mary Frances Berry, 63, was appointed by Mr. Clinton. Though a declared political independent, she has donated \$19,000 to Democratic causes since 1992.

The panel also includes four registered Democrats — Vice Chairman Cruz Reynoso, Victoria Wilson, Yvonne Lee and Elsie Meeks. The other members are Republican Abigail Thornstrom and Russell Redenbaugh, a declared independent who often sides with Mrs. Thornstrom.

The commission has 76 employees and an annual budget of \$9 million.

Though it has no legal standing, save for subpoena powers, several media outlets herald its pronouncements.

"They use these reports for political purposes. It is more about politics than about scholarship," said Miss Prado, who now heads a private business in Los Angeles. "For a very long time, the reports have been highly politicized to advance the agenda of whoever has a majority. And that's on both sides."

"Nothing has changed," said Miss Prado, who arrived at the commission in 1984 after working for Sen. Daniel Patrick Moynihan, New York Democrat. She served as acting

staff director and assistant to two chairmen before moving on five years later to the Equal Employment Opportunity Commission (EEOC) because, she said she wanted to go "where I could do some real good."

"It serves no further useful purpose," said former staff director J. Al Lasker Jr., a Reagan appointee who adds that was his opinion of the panel even when it was Republican-heavy. "Its mission was to facilitate the end of Jim Crow and segregation, an honorable and distinguished achievement."

Defenders say the commission is still needed and has helped many who may not have had a voice without it.

But politicization of the agency has drawn fire from both sides, depending on the ruling party in Washington.

In the 1980s, President Reagan attempted to rein in the commission by naming conservative Democrats and sacking three of the more radical members, recalls one insider who has worked there for more than a decade.

"But it got worse after that, when I got here," recalls one employee speaking on the condition of anonymity — as did several current and former staffers, citing possible repercussions.

"Who wants to bad-mouth an organization that is supposed to

have such noble intentions?" one asks.

Mr. Fumento recalls that the agency often was mistaken for the EEOC.

"The conservatives wanted to get rid of it, then the Democrats were irate," he said. "And now, nobody takes these guys seriously."

The agency constantly suffered from internal political and personal strife, Mr. Fumento said.

"They do nothing. And if the New York Times and The Washington Post and those newspapers take them seriously, they still accomplish nothing."

In 1996, an audit by the General Accounting Office, conducted at the behest of four Democratic House members, found financial irregularities and mismanagement.

At that time, the panel was accused of failing to monitor the enforcement of civil rights policies, of course, were blamed for the "unfair, inaccurate and incomplete" report, then-Chairman Clarence Pendleton Jr. said.

In 1996, the Office of Personnel Management investigated. This inquiry, supported by Rep. Charles Canady, Florida Republican, called the commission "laxly in need of managerial attention."

Since the Reagan years, there have been many cries to disband the commission, perhaps none so succinct as those of a prominent liber-

### COMMISSION CASH

The following are the political contributions made by the members of the U.S. Commission on Civil Rights since 1992:

Mary Frances Berry		Cruz Reynoso	
Hilary Rodham Clinton	\$1,250	Seis for Congress	\$800
Keen Hope Alvin PAC	\$6,000	Beerra for Congress	\$1,000
Democratic Senatorial Campaign Committee	\$300	Ray Romero Committee	\$700
Gore 2000	\$525	Dolores Briones for Congress	\$250
Ralph Nease for Congress 2000	\$3,600	Friends of McCarthy for Seis	\$1,000
Carol Mosley Braun for U.S. Senate 1998	\$625	Democratic State Central Committee of California — Federal	\$1,000
Carol Mosley Braun for U.S. Senate 1992	\$400	Abigail Thornstrom	
Democratic Congressional Campaign Committee	\$1,150	Dush for President	\$1,000
Paul Wellstone for Senate	\$1,200	Russell Redenbaugh	
Harvey Gantt for Senate	\$400	Freedom and Free Enterprise PAC (Jack Kemp)	\$6,000
Stanford Bishop for Congress	\$1,000	Elsie Meeks	
Jesse Jackson Jr. for Congress	\$1,000	None on record	
Friends of Dick Durbin Committee	\$750	Christopher Edley Jr.	
Clinton/Gore '98 Primary Committee	\$500	Hilary Rodham Clinton for U.S. Senate Committee	\$1,000
Victoria Wilson		Gore 2000	\$1,000
None on record		Committee to Elect Alex Rodriguez	\$250
Yvonne Lee		Ralph Nease for Congress	\$250
Unverifiable		Los Jim, staff director	
Source: Federal Election Commission		Democratic National Committee	\$500

The Washington Times

al — former Rep. Patricia Schroeder.

"How can we explain to our con-

stituents the fact that we give this sleazy outfit \$12 million to waste?" the Colorado Democrat said.



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS624 Ninth Street, N.W.  
Washington, D.C. 20425

August 14th 1968

MEMORANDUM TO MARY K. MATHEWS, Staff Director  
FROM ROBERT P. GEORGE, Commissioner R.P.G.  
SUBJECT: Commission News Releases

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From time to time the Chairman has issued news releases stating his or her own view as to some matter pertaining to civil rights. It is not clear to me whether other commissioners are entitled to the same privilege. Please let me know whether this is a unique prerogative of the Chair or whether other commissioners are entitled to issue news releases through the Commission's Public Affairs office. If in your opinion this power is confined to the Chairman, please provide me with the statutory or regulatory basis for the limitation.

I would appreciate having a reply by next Tuesday, August 15th. If this is not possible, please let my special assistant know by the end of this week when I can expect a reply.

cc: Commissioners

THE UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS  
624 Ninth Street, N.W.  
Washington, D.C. 20425  
Public Affairs  
(202)-376-8312

# NEWS RELEASE

For Release:

Contact:

## Anniversary of Civil Rights Milestone Noted

WASHINGTON, DC--U.S. Commission on Civil Rights Chairperson Mary Frances Berry today (March 6) urged Americans to join in celebrating the 35th anniversary of Presidential Executive Order 10825, an early milestone in the modern civil rights movement.

The Order, issued by President John F. Kennedy on March 6, 1961, emphasized the Federal Government's commitment to end discrimination based on race, color, religion, or national origin in its own workforce, strengthened efforts against such employment discrimination by Federal contractors, and created a central President's Committee on Equal Employment Opportunity to oversee both tasks, replacing earlier, separate committees. The President's Committee was a forerunner of the present Equal Employment Opportunity Commission (EEOC) and other Federal efforts against discrimination.

At a press conference announcing Executive Order 10825, President Kennedy asserted, "I have dedicated my Administration to the cause of equal opportunity in employment by the Government or its contractors."

It also was important that President Kennedy named Vice President Lyndon B. Johnson to head the new committee. "Vice President Johnson may have been reluctant to become involved in the politically explosive role, but once involved, he carried it out with determination and energy," explained Chairperson Berry.

As Chairman of the President's Committee on Equal Employment Opportunity, Vice President Johnson has been portrayed by historians as gaining new insight into the problems of discrimination. As President, Johnson was to press for, and sign into law, such landmark civil rights laws as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968.

Although much of the substance of Executive Order 10825 was carried forward by President Kennedy from his Republican and Democratic predecessors, the Order provided for such innovations as requiring Federal contractors to submit compliance reports, leading to the collection of useful statistics and opening the way for enlarged efforts against discrimination. It also contained an early mention of "affirmative action," as an obligation of contractors in the fight against discrimination.

In stressing the significance of executive orders and laws against discrimination, Chairperson Berry added, "To realize the intended benefits of those measures, we must continue to have vigorous enforcement."

The U.S. Commission on Civil Rights is an independent, bipartisan fact-finding agency. Its members are Chairperson Berry, Vice Chairperson Cruz Reynoso, and Commissioners Carl A. Anderson, Robert P. George, A. Leon Higginbotham, Jr., Constance Homer, Yvonne Y. Lee, and Russell G. Redenbaugh. Mary K. Mathews is Staff Director.

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# NEWS RELEASE

For Release: IMMEDIATELY

Contact: CHARLES R. RIVERA  
OR  
BARBARA J. BROOKS

## FURLOUGHS IMPEDED CIVIL RIGHTS ENFORCEMENT

WASHINGTON, D.C. - An informal survey of Federal agencies and offices with responsibilities under civil rights laws indicates that the two Government furloughs have severely interrupted rights enforcement.

In commenting on the results of the survey, Commission Chairperson Mary Frances Berry stressed that the continuing enforcement of civil rights laws are important to all Americans and that minorities, women, the elderly, and people with disabilities especially suffer when the agencies and offices with civil rights enforcement responsibilities are unable to perform their duties.

Berry said the partial Government shutdowns were even more troublesome in that Federal funding of civil rights enforcement has for years lagged far behind the growth in workloads of the involved agencies and offices, as documented in a June 1995 Commission report, "Funding Federal Civil Rights Enforcement".

"A bipartisan consensus supported the enactment of our civil rights laws," Berry said. "According to the survey, the national commitment to equal opportunity for all Americans was severely affected by the recent furloughs of Federal employees during the two Government shutdowns. The budget crisis continues to inhibit the enforcement of civil rights."

The precise details of the effect of the furloughs on the civil rights agencies may not be identified for months, Federal officials told the Commission. Many Federal employees involved in civil rights enforcement were among those furloughed for a total of 27 days during the current fiscal year.

At the U.S. Equal Employment Opportunity Commission, which already has a daunting backlog of age discrimination and other civil rights complaints, 1,500 enforcement and administrative employees in the Office of Program Operations were reduced to 164 during the furlough. About 6,500 discrimination charges went unresolved and about 300 proposed settlements were held up or withdrawn. The EEOC's Office of General Counsel, responsible for enforcement litigation, had its staff of 413 reduced to 43 and reported crucial interruptions in trial preparations and in trials themselves. EEOC officials estimated that it will take seven to eight months to regain the ground lost on the administrative process for discrimination complaints within the Federal Government.

The Office of Fair Housing and Equal Opportunity at the U.S. Department of Housing and Urban Affairs, staffed for emergency situations only during the furloughs, estimated that almost 500 fair housing complaints would have been filed had the office been receiving them and that 450 pending complaints would have been closed. The office was also unable to respond to inquiries about possible discrimination. The office reported that the furloughs had created a difficulty in meeting its statutory mandate of processing complaints within 100 days.

At the Office of Civil Rights at the U.S. Department of Education, which provides equal opportunity for students to learn, 102,576 staff hours were lost during the furloughs, the equivalent of closing a mid-size regional office for a full year.

The Office of Civil Rights at the U.S. Department of Health & Human Services, which is responsible for seeing that nursing homes, hospitals, and other institutions avoid discrimination in patient care, reported that more than 500 complaints, investigations and other actions that could have been completed were not because of furloughs. It also estimated that as many as 1,000 queries from the public went unanswered.

The Office of Federal Contract Compliance Programs at the U.S. Department of Labor reported that during the furloughs it was unable to conduct any "glass-ceiling" discrimination reviews that could have involved 160,000 American workers and had to put on hold 1,739 reviews to ensure that employers were complying with EEO goals affecting 1.9 million workers.

At the U.S. Commission on Civil Rights, which is responsible for monitoring the civil rights enforcement activities of all the Federal agencies, no more than five staff members remained on the job. 527 complaints of non-enforcement of discrimination laws went unprocessed during the furloughs.

Because of the shutdowns, the Commission had to cancel two hearings, one on affirmative action and the other on racial and ethnic tensions.

The U.S. Commission on Civil Rights is an independent, bi-partisan fact-finding agency, its members are Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Carl A. Anderson, Robert P. George, A. Leon Higginbotham, Jr., Constance Homer, Yvonne Y. Lee, and Russell G. Redenbaugh. Mary K. Mathews is Staff Director.

**U.S. COMMISSION ON CIVIL RIGHTS  
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**SECTION:** DOMESTIC NEWS

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**HEADLINE:** Civil Rights commission PR expenditures questioned

**SOURCE:** Scripps Howard News Service

**BYLINE:** JENNIFER SERGENT

**BODY:**

The U.S. Commission on Civil Rights has paid \$135,000 to a private public-relations firm since last year to improve its image as it has come under fire for a number of controversial reports, including those critical of the New York City Police Department and the Florida voting process.

Payments made during the current fiscal year are more than double the amount that the panel is allowed to pay to outside consultants, according to the requirements of its 2001 spending allocation from Congress.

The commission has used the public-relations services at the same time it's paid the salaries of two full-time spokesmen in its internal public affairs office. Other government officials considered such a move highly unusual. A Scripps Howard News Service survey of 12 other independent government commissions of similar size found only one instance where a commission said it had ever hired a public-relations firm, and that was for one specific project five years ago.

"I don't see how a government agency can go out and hire a public-relations firm," said Charles Atherton, secretary for the Commission on Fine Arts.

Atherton's panel has come under repeated attacks in the past year because of a controversial new design for the World War II memorial on the National Mall. He said it was "tough" rebutting the disinformation that was put out, but he never would have gone to a public-relations firm.

"The federal government is not in the business of polishing its image. It's in the business of providing information to the American people," he said.

The civil rights commission's total public-relations spending was spread over five separate contracts of \$25,000 to \$30,000, according to its records, which were obtained through the Freedom of Information Act.

All the payments went to the Washington firm of McKinney and McDowell. Owners Gwen McKinney and Lella McDowell are known for their work in the civil rights arena. Past clients include U.S. Del. Eleanor Holmes Norton, D-D.C.; Lani Guinier, who was formerly nominated to be the assistant attorney general for civil rights; and exiled Haitian President Jean-Bertrand Aristide.

According to the first purchase order, the commission hired McKinney and McDowell on April 13, 2000, to provide Commission Chairwoman Mary Frances Berry with advice on media outreach surrounding a controversial commission report on police practices and civil rights violations in the New York City Police Department.

The commission also needed help to promote its report on Florida's "One Florida" education plan that sought to replace the state university system's affirmative action policy with a new system that would instead award the top 20 percent of each high school's graduating class with automatic admittance to one of the state's universities.

More contracts followed later in the year and into this year as the commission embarked on other

controversial projects, such as holding hearings and preparing a report on alleged voting improprieties in Florida.

Reporters who covered these issues were referred to McKinney and McDowell rather than to the commission's press office.

The public-relations contracts state that services were to be provided to Berry, the chairwoman, and to the commission staff.

Berry was traveling Wednesday and could not be reached for comment. Other commissioners, were only vaguely aware of the contracts and the expenditures made under them.

Democratic Commissioner Yvonne Lee said this summer that she knew something about the firm, but was not familiar with its activities.

Republican Commissioner Abigail Thernstrom, a frequent critic of Berry, said she was angered by the use of McKinney and McDowell's services.

"I had no idea this was going on. This has never been discussed. I've never seen the contracts," Thernstrom said Wednesday. "I would think that this is something that the commission should sign off on."

The commission even declined to tell a congressional panel about the public-relations expenditures as the panel investigates the commission's procedures surrounding the release of the Florida voting report.

The House Judiciary Subcommittee on the Constitution sent two letters this summer asking for all documents relating to McKinney and McDowell. Twice, in letters of response, the commission declined to send any.

Since the investigation is centered on the premature leaks of the Florida report, commission Staff Director Les Jin wrote that he wasn't turning over any documents about the firm because none of them were related to the report's release.

In general, Jin has said that the commission retains McKinney and McDowell because its own public affairs unit is so short-staffed. There is no current director there, he said, and only two staff members are working in that office.

"We decided at some point that we needed to buttress their work. None of them are really media people in the traditional sense," said Jin, whose signature appears on the purchase orders.

Several other commissions with equally small staffs, however, said it was not their policy to look outside for public-relations help.

"We're a small agency. We have a small budget, and we don't have the money to throw around like that," said David Grinberg, a spokesman for the Equal Opportunity Employment Commission.

Timothy McGrath, the staff director for the U.S. Sentencing Commission, said his agency's appropriations prevented him from hiring public-relations consultants, similar to the restriction in the civil rights commission's budget. "We're not allowed to do that," he said.

And Claudia Boume Farrell, a spokeswoman for the Federal Trade Commission, said her agency does all its own press work, no matter how controversial its activities.

"We do all of that ourselves. We take the bullets like the men we are."

(Visit SHNS on the Web at <http://www.shns.com>.)

**LOAD-DATE:** August 16, 2001





UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

December 17, 1993

MEMORANDUM FOR MARY FRANCES BERRY  
Chairperson

FROM: CARL A. ANDERSON, Commissioner  
ARTHUR A. FLETCHER, Commissioner  
ROBERT P. GEORGE, Commissioner  
CONSTANCE HORNER, Commissioner  
RUSSELL G. REDENBAUGH, Commissioner

SUBJECT: Commissioner Assistants' Offices

We were concerned to hear that, at your December 6 meeting with headquarters staff, you expressed discomfort at having Commissioner assistants located at Commission headquarters, and indicated you may take action to remove them.

Although Commissioners use their assistants in different ways, you should know from experience that assistants located at headquarters provide a valuable service, helping busy Commissioners organize our Commission work and focus our attentions on pressing issues in the most timely manner.

To our knowledge the presence of Commissioner assistants at headquarters is in no way interfering with the work of the Civil Service staff, or the running of the Commission. We do not believe the removal of assistants from headquarters offices would in any way advance the work, effectiveness, or mission of the Commission, the Commissioners, or the staff. To the contrary, our experience over the last year is that the presence of Commissioner assistants at the headquarters has advanced the effectiveness and timeliness of Commission activities by establishing more direct channels of communication.

We advise against your recommending that any action be taken to remove special assistants from their headquarters offices.

cc: Vice Chairman Reynoso  
Commissioner Wang  
Office of the Staff Director



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 North Street, N.W.  
Washington, D.C. 20425

March 7, 1994

MEMORANDUM FOR OGC STAFF

SUBJECT: Document Submission

All documents prepared in this office are to be submitted to the Acting General Counsel before distribution to the Acting Staff Director, or Commissioners' Staff Assistants. No documents from this office are ever submitted directly to Commissioners. There is no exception to this rule. Memoranda, letters, reports and evaluations are to be prepared sufficiently in advance to allow for adequate review or modification in this office and timely submission to the Acting Staff Director.

Previously you have been advised concerning his policy. Future infractions will result in appropriate discipline.

  
ROSALIND D. GRAY  
Acting General Counsel



UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20542

OFFICE OF STAFF DIRECTOR

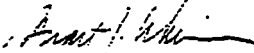
March 9, 1994

MEMORANDUM FOR ALL STAFF

SUBJECT: Requests for Information and Communication with  
Commissioners

A number of recent events make me reiterate my December 22, 1993 memorandum to all staff regarding the established policy on requests for information and communication with Commissioners and their assistants. Please continue to direct all requests for assistance from Commissioners and their assistants to my office.

Violations of this policy could result in appropriate disciplinary action.

  
STUART J. ISHIMARU  
Acting Staff Director

Attachment: Memo of December 22, 1991 *not forwarded to the  
Commissioners*



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

624 Ninth Street, N.W.  
Washington, D.C. 20425

**MEMORANDUM FOR MARY FRANCES BERRY, CHAIR**

**FROM: COMMISSIONERS CARL A. ANDERSON,  
ARTHUR FLETCHER  
ROBERT GEORGE  
CONSTANCE HORNER  
RUSSELL REDENBAUGH**

**SUBJECT: REQUESTS FOR INFORMATION AND COMMUNICATION  
WITH COMMISSIONERS**

**DATE: MARCH 18, 1994**

In regard to Mr. Ishimaru's memorandum to the Commission staff dated March 9, 1994, we request that a memorandum be issued immediately, rescinding the statement that "violations of this policy could result in appropriate disciplinary action." The policy directing requests for assistance from us and our assistants through the staff director's office should remain as the rule of reason it has been since it was established by Bobby Doctor in May of 1993. However, it must not be used to chill routine, everyday communication between the staff and ourselves. It is inappropriate that Commission staff be threatened; to the contrary, cooperation between Commission staff and our assistants should be encouraged. Mr. Ishimaru should be directed to take this action under the Commissioners' statutory "power to make such rules and regulations as are necessary to carry out the purposes of this Act [establishing the Commission]" (Sec. 6(f)(1)).

We also ask that the matter of requests for information and communication of commissioners and assistants with other Commission staff be placed on the agenda for our next meeting.



OFFICE OF STAFF DIRECTOR

UNITED STATES COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C. 20425

September 9, 1997

MEMORANDUM FOR CHAIRPERSON MARY FRANCES BERRY  
VICE CHAIR CRUZ REYNOSO  
COMMISSIONER CARL A. ANDERSON  
COMMISSIONER ROBERT P. GEORGE  
COMMISSIONER A. LEON HIGGINBOTHAM  
COMMISSIONER CONSTANCE HORNER  
YVONNE Y. LEE  
RUSSELL G. REDENBAUGH

FROM:

RUBY G. MOY  
Staff Director

A handwritten signature in dark ink, appearing to read "R. Moy", written over the printed name "RUBY G. MOY".

SUBJECT:

Contact with the Staff

In order to better serve your needs, I would appreciate it if you or your special assistant would contact me whenever you have any concerns or issues.

In the past two Commission meetings, the Chair indicated that Commissioners contacting staff directly would impede my knowing how to assist you.

It would also interfere with my accountability for the day-to-day operations of this Agency.

I look forward to hearing from you.

By Lloyd Grove

# Civil Rights Commission? Hardly!

**T**he U.S. Commission on Civil Rights—in recent months a hornet's nest of intrigue and infighting—has run headlong into another controversy, this one over a book review (that was scheduled for the next issue of the agency's magazine, *Civil Rights Journal*).

Last week the *Journal* decided to kill University of Maryland professor Christopher Foreman Jr.'s review of Boston University professor Glenn Lasry's book, "The Anatomy of Racial Inequality"—apparently because the review mentions commissioners AMgal Thernstrom and Christopher Edley. Yesterday the flap turned ugly as Thernstrom, a House Republican appointee and affirmative action foe, accused longtime chairman Mary Frances Berry, a Bill Clinton appointee, of ordering the review's death because it treats Thernstrom favorably.

Mary Frances Berry is a totalitarian. She's a book-burner, and she constantly lies," Thernstrom told us, adding that the killing of the review is evidence "that she just will not allow dissenting voices if she can possibly help it." Berry didn't return repeated phone calls yesterday.

Foreman, a self-described "card-carrying liberal Democrat," called Berry and commission staff director Les Jin "corrupt." We hear that it was Jin who Friday ordered *Journal* editor David Aronson to reject Foreman's already-accepted review. Aronson declined to comment, referring us to Jin and Berry. Yesterday afternoon, alter



Mary Frances Berry, Christopher Foreman Jr. and Abigail Thernstrom are all in a nasty hull over Foreman's rejected review.

Foreman circulated an angry e-mail about the situation and we repeatedly phoned the commission for comment. Jin faxed us a letter saying the review "will be published" under certain conditions. The letter was dated Jan. 22 and copied to Aronson. Jin said he sent it to Foreman on Tuesday, though no one acknowledged receiving it.

Jin writes Foreman that his review will be printed if he follows general *Journal* "practice" and deletes "references to sitting Commissioners." But past issues of the *Journal* contain numerous references to commissioners, notably a fall 1999 interview with commissioner Elsie Weeks. Jin, acknowledging that he is a lawyer and not an editor, told us he

sees a distinction between mentioning commissioners in interviews and news items, which is good, and mentioning them in book reviews, which is bad. Jin, who is known at the commission to consult closely with Berry about executive decisions, told us that she was not involved in this one.

Foreman was not impressed. "This is an outrageous attempt by a corrupt leadership to fool people into thinking that they're a legitimate operation," Foreman told us. "This letter was clearly produced once it was clear the public was going to find out about the intellectual tyranny that Mary Frances Berry is engaging in." As for the proposed deletions, "No way!"

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<b>Subj:</b> A Book Review Banned by the U.S. Commission on Civil Rights <b>Date:</b> 1/18/02 11:15:10 AM Eastern Standard Time <b>From:</b> cf103@umail.umd.edu (Christopher H. Foreman, Jr.) <b>To:</b> JOSEPH.FOREMAN@WCOM.COM
--

January 18, 2002

Dear Colleagues and Friends:

You have no doubt heard of the United States Commission on Civil Rights. You may be unaware, as I was until recently, of a commission periodical called the Civil Rights Journal. Some weeks ago I was asked by the editor of the journal to review a forthcoming Harvard University Press book "The Anatomy of Racial Inequality" by Glenn Loury. I read the book (which I generally liked) and then wrote and submitted a balanced review (which the editor generally liked). However, after routine revisions, the review has been rejected at the insistence of persons to whom the editor must report. I have learned that this occurred because some persons in the commission leadership (acting within or through the office of the commission staff director) objected that the review mentions work by Abigail and Stephan Thernstrom, specifically their 1997 book "America in Black and White: One Nation, Indivisible." Elements of the commission leadership, I have learned, insist that no reference be made to the Thernstroms' work. (I should note that Abigail Thernstrom, herself a member of the commission, played no role whatsoever in the inclusion of the references to her work or in the subsequent insistence on deleting those references.)

I recount this episode to explain why you will never read the review that follows in the Civil Rights Journal for which I wrote it. Whatever the merits of Loury's book, of my review, or of the Thernstroms' earlier work, I find this decision by elements of the commission leadership extremely disturbing, for several reasons. I suspect that many of you will be disturbed as well.

Chris Foreman  
 Professor  
 4105 Van Munching Hall  
 School of Public Affairs  
 University of Maryland  
 College Park, MD 20742  
 (301) 405-0442 (office)  
[cf103@umail.umd.edu](mailto:cf103@umail.umd.edu) (email)

Friday, January 18, 2002 America Online: KimUSCCR

**TO: The Civil Rights Journal**  
**RE: Review of "The Anatomy of Racial Inequality" by Glenn Loury (Harvard University Press, forthcoming)**

In America's cottage industry of writing on race a few non-fiction categories predominate: history; biography; personal memoir; journalistic exposé. But most stimulating and useful for raising the level of public discourse are social science-based commentaries that aggressively invite sophisticated general readers to reconsider what they know (or think they know) about the condition and prospects of African Americans. Examples include recent work by sociologist Orlando Patterson, historians Stephan and Abigail Thernstrom, and political scientist Paul Sniderman. Whether one remains optimistic or pessimistic about America's enduring racial problems we are indeed blessed with a broad spectrum of researchers and thinkers, from Thomas Sowell on the right to Lani Guinier and Christopher Edley on the left, who remain eagerly and productively focused on this important intellectual work.

Economist Glenn Loury offers us a fascinating new addition, this one posing a direct challenge to the Thernstroms' impressively comprehensive and influential 1997 volume "America in Black and White: One Nation, Indivisible." Once favored by conservatives for his willingness to question racial preferences – he was briefly considered for a political appointment in the Reagan administration – Loury's arguments now place him closer to those "racial liberals" with whom he still has his differences.

While Loury doubtless *feels* strongly about his subject, "The Anatomy of Racial Inequality" is a remarkable (if not in every respect fully persuasive) effort to *reason* rigorously. The presentation, though accessible to the general reader, is crafted to pass muster with professional peers, who want to know not what Loury feels but what he can demonstrate. This concise volume, based on a series of lectures delivered at Harvard, is not easily



sampled, skimmed, or summarized. It is nevertheless well worth the effort it demands. The reader will find no new data but rather "a novel conceptual framework for assimilating the evidence at hand." The argumentative style is partly deductive and frequently interdisciplinary, though strongly anchored (especially near the opening) in the economic analysis that is Loury's intellectual home turf.

Loury sets forth the core of his argument in three chapters on racial stereotyping, racial stigma, and racial justice. Quite early in the book Loury begins laying the groundwork for his position that "taking race into account" is not an invidious practice *per se*. Indeed, doing so turns out to be something of a moral imperative. He comes to this conclusion even though he begins by positing "race" as a construct grounded only in the simple (if universal) need of human beings to organize, cope with, and gather information about the world they find themselves in. But the "body markings" we construe as "race" are of importance to Loury (and to the rest of us) as bearers of "social meaning." These markings, he says, "signify something of import within an historical context."

Loury is interested in the potential for stereotypes to be "reasonable" in the sense that they are "self-confirming." As human beings we are both burdened by limited information about the world around us and inclined to make generalizations. More particularly, someone having limited information about "marked" persons may draw unwarranted inferences about individuals that are grounded in the generalization. Persons about whom inferences have been made may then adjust their actions in ways that confirm the stereotype. Thus a sequence of mutually supportive belief and behavior emerges. By way of example Loury posits an employer who, believing that black trainees are more likely than others to perform poorly, sets a lower tolerance threshold for errors by such trainees. The black trainees, in turn, are more likely than others to read this employer behavior as a disincentive to perform well. "Knowing they

are more likely to be fired if they make a few mistakes, an outcome over which they cannot exert full control, more black than other workers may find that exerting high effort during the training period is, on net, a losing proposition for them." They thus behave so as to confirm the expectations held of them.

Loury offers additional examples: black automobile buyers and black students applying to professional schools. These "thought experiments," as Loury presents them, likewise conclude with the buyers and students behaving so as to confirm expectations. What is most interesting and pernicious here is that this dynamic derives entirely from mutual expectations rather than from the underlying capacities of the parties to the relationship.

Some readers may reasonably ask, however, whether the perverse patterns Loury presents are actually telling us everything we need to know. Might even the conscientious "thought experimenter" easily (if unintentionally) rig an experiment? Within the world as Loury posits it, his logic seems impeccable. But what if inconvenient additional facts (such as genuinely lower skill or motivation on the part of his hypothetical trainee) are present, as they might indeed be in a real workplace? In that event the negative outcome could not reasonably be held to stem entirely from the perverse stereotyping dynamic Loury wants to illuminate. (The notion that low teacher expectations induce low performance is a familiar one in debates about education reform. But is this all we need to know to raise minority test scores?)

This reservation stated, however, Loury's reasoning performs an important social and intellectual service by alerting us to the possibility that some unknown fraction of unwholesome interaction across the racial divide might derive importantly from the kind of perverse expectations logic he lays out. A theory that is not universally applicable is not worthless. Indeed, Loury's argument might prompt useful work on two fronts. Academics might subject Loury's argument to careful scrutiny, including hard empirical

research. Meanwhile the rest of us might profitably reconsider the roots of our own behavior regarding persons bearing "body markings" other than our own, especially when that difference is amplified by other disparities in social or organizational standing.

But, if Loury is right, such reconsideration by ordinary people will be unusual, if not exceedingly rare. Explicitly considering the possibility that such a self-confirming feedback mechanism could be unveiled and discredited, Loury believes this a tall order for most persons. Given the deeper realm of "nonrational factors – in particular, the taken for granted meanings that may be unreflectively associated with certain racial markers" in which their cognitive processes are anchored, such detached reflection may be unrealistic to expect.

In theorizing about "the mental processes underlying . . . cognitive acts" economist Loury may be on thin ice. (One anticipates that social psychologists, whose experiments continue to signal disparities in the treatment received by blacks and whites, will want to weigh in here.) But it is there that he must go to pursue the next (and perhaps the most challenging) part of his argument, which centers on the notion of racial stigma. While Loury's discussion of stereotyping centers on *information*, stigma is all about *meaning*. Bodily "markings" (or any visible characteristic of any person or thing, for that matter) may become strongly imbued with a significance and association. "[T]he symbols we call 'race' have through time been infused with social meanings bearing on the identity, the status, and the humanity of those who carry them." If this is so, the obvious charge to the racial reformer is to create new meaning, if such a thing is possible. Loury anticipates an equally obvious objection from, if not the Thernstroms themselves, then surely from readers familiar with their recitation of survey evidence. Isn't the social meaning of race changing (such a reader might ask) as reflected both in the long-term trend data showing increased tolerance of blacks by whites and in the proliferation of widely-

admired persons of color? Loury's insistence that probes of popular "attitudes" cannot capture what he's getting at (i.e. "meaning") is a claim likely to generate some resistance. Empirically-minded critics who will insist on knowing (and debating) whether one can observe and measure (as distinct from personal attitudes) "an entrenched if inchoate presumption of inferiority, of moral inadequacy, of unfitness for intimacy, of intellectual incapacity, harbored by observing agents when they regard the race-marked subjects." One can see what Loury is getting at here: a reflexive, unquestioned "us" and "them." (I believe I have detected such "cognitions" myself, from time to time, in persons who wouldn't dream of behaving inhospitably, much less abrogating my rights.) Yet I am relieved that it is not my job to assay this terrain convincingly for others.

Where does all this take us as a policy enterprise? For one thing we get here a new analytic vocabulary justifying an equal opportunity emphasis, a distinction between *reward bias* (under which "productivity is rewarded differently for members of distinct racial groups") and *development bias* (which makes "opportunity to acquire productivity . . . unequally available to the members of distinct racial groups"). For Loury the former is classic discrimination, and worthy of less emphasis in our racial discourse than the latter, which lies more deeply embedded in a foundation shaped powerfully by stigma. If anti-black reward bias has declined, a crippling development bias lingers that, unfortunately, is anchored strongly in an informal, non-governmental realm that our political culture places largely off-limits to even determined efforts at social justice policy entrepreneurship. Even when formal rights of access and patterns of contract are reformed to impede reward bias, lingering momentum may have been imparted to development bias through enduring patterns of contact. Loury's analysis here calls to mind Patterson's focus on informal social networks as crucial channels for group advancement that are less viable among blacks --

a collective disability justifying (for Patterson at least) affirmative action (at least for a limited time). The isolation of the urban ghetto is more significant for the collective development bias it sustains (and that sustains it) than for the reward bias its residents may face.

Loury, by his own account, is adamant that he is not up to "some over-theorized discourse in defense of affirmative action policies." In finding both liberal individualism and his own discipline's analytic emphasis on atomized individuals wanting, Loury has far more on his mind than the battle over diversity in corporations and universities. Rather, he suggests that since race matters as a profound and subtle generator of inequality, so should it be allowed also to matter in the conception and implementation of ameliorative policies. He is less interested in "reaching beyond race" (as Sniderman and his collaborators would have us do) than in facing up to the social freight that racial "markings" force a significant slice of the American population to carry. For Loury the tenacious pursuit of "race blindness" may ironically make us morally blind as well. Distinguishing among policy implementation, policy evaluation, and "civic construction" (the domain where "we are building monuments, constructing public narratives, enacting rituals and . . . pursuing policies that have an inescapably expressive as well as directly instrumental face") Loury argues that the race-blindness of liberal individualism in the first and second realms is both "ahistorical and sociologically naïve." Only in the last, he believes, "should some notion of race-blindness be elevated to the level of fundamental principle."

This is, of course, a startling policy stance from a scholar once so welcome in Republican-dominated salons. For those of us who have been reading and watching Loury for a while, his alienation from more "conservative" brands of thinking about race is not news. He repeats the critique he launched in the "Atlantic Monthly" some four years ago against the Thernstroms' "America in Black and

White." In the mid-1980s political scientist Donald L. Horowitz coined the phrase "the figment of the pigment" to describe a mistaken belief in race and ethnicity as fundamentally different. The Thernstroms approvingly cite the phrase in describing "the myth that racial groups are sealed compartments, impervious to change." Loury says that the Thernstroms "blame race-conscious public policies for what they take to be an excess of racial awareness among blacks," a view he thinks "gets it exactly backward." For him "it is the historical fact and the specific nature of blacks' racial otherness that causes affirmative action [for blacks] to be so fiercely contested . . ." (Along the way Loury himself misstates the Thernstroms' argument. They don't suggest that African American belief in the myth is the specific problem but rather that a widespread susceptibility to this belief is.) Loury also categorizes the Thernstroms as "conservatives," but that has always seemed to me a peculiar label for two old-fashioned Ivy League liberals who happen to take a skeptical stance toward affirmative action and certain delusional varieties of black nationalism. Indeed "America in Black and White" explicitly attacks, in plain black and white, the conservative reluctance to "acknowledge the ugliness of our racial history and the persistence of racism" only two paragraphs before the Horowitz reference.

On the whole, however, Loury serves us well by directing us toward "the enigma of the stigma." He brings a keen and subtle mind to bear on a set of issues that sorely need it. "The Anatomy of Racial Inequality" is thoughtful, provocative and demanding (in both the intellectual and political sense). It is sure to be at the center of all sophisticated discussion of race for years to come.

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# CIVIL RIGHTS

US COMMISSION ON CIVIL RIGHTS JOURNAL

Fall 1999  
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## Close Up

### Elsie Meeks: First Native American To Serve on Commission

*Elsie M. Meeks was born in Kadoka, S.D. in 1953 and raised on the Pine Ridge Reservation. She is an enrolled member of the Oglala Lakota Sioux Tribe. After studies at Oglala Lakota College, Ms. Meeks applied her skills as assistant manager and bookkeeper at the Cedar Pass Lodge and served as finance officer and accountant for the newly formed Lakota Fund, a non-profit community development corporation which provides financial and housing assistance, business classes, and start-up counseling to small business owners and micro-enterprises on the Pine Ridge Reservation. She was appointed Executive Director of the Fund in 1991. Under her supervision the Fund has seen substantial growth. In 1995, she and a partner opened the Long Creek Store at Wanblee, a grocery store that also sells fast food and gasoline. She serves on various boards and community associations.*

*In 1994, Ms. Meeks was named Minority Small Business Advocate of the Year by the South Dakota Small Business Administration and a Woman of the Year by Ms. Magazine. In 1998, she was selected by Senator Bernie Hunhoff, the Democratic candidate for governor of South Dakota, to run with him for the office of lieutenant governor.*

*She and her husband live and ranch south of Interior, South Dakota, providing stock for western South Dakota rodeos. They have seven children and four grandchildren. Three of their sons are rodeo competitors.*

*Summer intern Jennifer Terfinko spoke with Commissioner Meeks in July, 1999.*



**CRJ: How do you feel your education and experience prepared you for your position as a Commissioner?**

Although I was raised on a reservation for most of my life, my life experiences have given me a very broad perspective. I have been involved in community development for nearly 15 years and have seen firsthand the barriers that exist for minority people.

**CRJ: What interests or issues do you feel you personally bring to the Commission?**

I think my being involved in community development at the grassroots level brings a certain perspective. In addition, firsthand knowledge of reservation life and Native American interests have been absent from the Commission.

**CRJ: What do you hope to accomplish as a commissioner during your six-year term?**

During my six-year term I hope that I can bring a deeper understanding of Native and minority issues. Because I have been involved in development and other pursuits, both off and on the reservation, I know that most prejudices come from a lack of knowledge and experiences with different people.

**CRJ: How did you become interested in civil rights?**

As I have been involved in economic and community development, it is apparent that economic issues are at the heart of civil rights issues. As people become self-sufficient, they become less oppressed.

**CRJ: What do you see as some major goals or issues for the Commission on Civil Rights as we move into the 21st century?**

A major goal, as I see it, as we move into the 21st century is that minorities have fair access to education and economic opportunities.



## Close Up

### **CRJ: What do you see in the future for the civil rights movement?**

I truly believe that future progress in the civil rights movement will only come about as we (minority people) take control over our own lives and communities. Of course, this can only happen if education and economic opportunities are available at the community level.

### **CRJ: The Commission on Civil Rights has traditionally considered itself the moral conscience of the nation on civil rights. How do you see it fulfilling that role in the future?**

In my view, the Commission must continue to monitor and examine issues concerning fair practices in education, public safety, lending, etc. I also think that the Commission needs to keep a watch on public programs to ensure that education and economic opportunities are available to communities.

### **CRJ: What specific areas or issues would you like to see the Commission focus on?**

I do believe that we must continue discussion on affirmative action. My personal belief is that people that have been oppressed for many generations, as have most minorities. In order for them to have an equal place in society, must be given special opportunities. This does not mean that standards must be lowered. It may mean, though, that particular programs should be implemented in the community to ensure readiness.

### **CRJ: What types of programs?**

For instance the Lakota Fund, because we are a community-based organization, we make the commitment to our community members that we will provide them whatever steps are necessary to get to the point where they can be good business people. We are committed to getting people to the

### **"Firsthand knowledge of reservation life and Native American interests have been absent from the Commission"**

point where they can own their own business even if they enter with no prior management experience—basically any type of program that will provide equal access to education and economic opportunities.

### **CRJ: Which civil rights leaders do you feel have made the greatest impact on the nation?**

Of course, Martin Luther King Jr. has had the most impact on the civil rights movement. There were others such as Cesar Chavez. For Native Americans, I would have to say that Russell Means, Dennis Banks and Clyde Bellecourte had the most impact. I think the most important role they all played was to raise people's sights; to give them a vision of not accepting oppression.

### **CRJ: Do you believe that the problems of Native Americans are seen as being in the mainstream of the civil rights movement?**

No, I do not believe that problems of Native Americans are seen as being in the mainstream of the civil rights movement. I am always appalled at the lack of knowledge by most people of Native American issues.

There are certain legal issues that are at the heart of Native American issues such as treaties that were legally binding and then were violated. The trust imposed on Native Americans by the Federal govern-

ment (Bureau of Indian Affairs) has been habitually mismanaged. In addition, still today, rights that were given to Indians are being diminished.

### **CRJ: What could communities do to assist their members with the promotion of entrepreneurship and small business development in this area?**

Communities do need to get involved in their own development. It will only be through community development organizations that community members will have access to educational and economic opportunities because of a community organization's commitment to its community.

### **CRJ: What would you suggest citizens do that would promote a better situation for all Native Americans in this country?**

First of all, I would suggest people educate themselves and by doing that people might come to an understanding, especially of treaty issues, and how badly Native Americans were treated. The government issued binding documents, binding agreements, and then completely did not honor them.

### **CRJ: If you could wave a wand to solve one civil rights issue, which would it be and why?**

It would be for people to be more tolerant of each other, because if they were, we would not have all of the issues that we have right now. ■