U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION MEETING

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FRIDAY,
JUNE 20, 2003

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WASHINGTON, D.C.

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The Commission convened at 9:30 a.m. in Conference Room of the U.S. Civil Rights Commission, Room 540, 624 Ninth Street, NW, Washington, D.C., Chairperson Mary Frances Berry, presiding.

PRESENT:

MARY FRANCES BERRY, CHAIRPERSON
CRUZ REYNOSO, VICE CHAIRPERSON
JENNIFER C. BRACERAS, COMMISSIONER
CHRISTOPHER EDLEY, JR., COMMISSIONER
PETER N. KIRSANOW, COMMISSIONER
ELSIE M. MEEKS, COMMISSIONER
RUSSELL G. REDENBAUGH, COMMISSIONER (via teleconference)
ABIGAIL THERNSTROM, COMMISSIONER

LESLIE R. JIN, STAFF DIRECTOR

STAFF PRESENT:

KIMBERLEY ALTON
TERESA BROOKS
MARGARET BUTLER
DEBRA CARR, ESQ., Deputy General Counsel
KI-TAEK CHUN
EDWARD DARDEN
IVY DAVIS, Chief, Regional Program Coordination
TERRI DICKERSON, Assistant Staff Director for Civil Rights Evaluation
PAMELA DUNSTON
LATRICE FOSHEE
SHELDON FULLER
GEORGE M. HARBISON
WANDA JOHNSON
SOCK FOON MACDOUGAL
TINALOUISE MARTIN
MARC PENTINO
KWANA ROYAL
MICHELLE ROYSTER
EILEEN RUDERT
JOYCE SMITH, Parliamentarian
ALEXANDER SUN
DAWN SWEET
DEBORAH VAGINS
AUDREY WRIGHT
MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

KRISTINA ARRIAGA
LAURA BATIE
PATRICK DUFFY
MATTHEW FOGARTY
JOY FREEMAN
MELISSA SHARP
KRISHNA TOOLSIE

SUMMER INTERNS PRESENT:

DEEPIKA BAINS
AIMEE CUPELLI
JENNIFER FEINSTEIN
GILBERT GONZALEZ
DANA NAKANO
ANTHONY NGUYEN
TILIA M. PARKS
DAWINDER (DAVE) S. SIDHU
ADAM STELLA
SARAH WHITFIELD

I-N-D-E-X

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

9:31 a.m.

CHAIRPERSON BERRY: The meeting will come to order. First -- Commissioner Redenbaugh is with us on the phone.

COMMISSIONER REDENBAUGH: Yes.

I. Approval of Agenda

CHAIRPERSON BERRY: The first item on the agenda is approval of the agenda. Could I hear a motion to approve the agenda?

VICE CHAIRPERSON REYNOSO: So moved.

CHAIRPERSON BERRY: Can I get a second?

COMMISSIONER REDENBAUGH: Second.

CHAIRPERSON BERRY: All in favor indicate by saying aye.

(Chorus of ayes.)

CHAIRPERSON BERRY: Opposed.

(No response.)

CHAIRPERSON BERRY: So ordered.

II. Approval of Minutes of May 9, 2003 Meeting

CHAIRPERSON BERRY: The second item is approval of the minutes from May 9, 2003. Could I get a motion, please?

VICE CHAIRPERSON REYNOSO: So moved.

CHAIRPERSON BERRY: Could I get a second?

COMMISSIONER REDENBAUGH: Second.

CHAIRPERSON BERRY: Any discussion, any changes, anything anybody would like to do to the minutes? Okay.

All in favor indicate by saying aye.

(Chorus of ayes.)

CHAIRPERSON BERRY: Opposed?

(No response.)

CHAIRPERSON BERRY: So ordered. And we agreed last time to have a closed session to discuss a personnel matter. However, in order to do that I have to read some stuff and somebody has to say something. So I'm about to read that.

The agenda reflects that a portion of this meeting should be closed to discuss with the Staff Director a personnel matter. Is there any further discussion before I go through the rest of it about whether we should do that? Okay. All parties participating in the closed portion of this meeting are under a legal obligation and duty to refrain from disclosing any information revealed in the closed portion of this meeting to anyone not participating in the closed portion of this meeting. Do I have a motion to close this portion of the meeting and withhold information pertaining to the closed portion

from public disclosure in order to discuss a personnel matter? I need a motion.

COMMISSIONER THERNSTROM: So moved.

CHAIRPERSON BERRY: Then there's no need for a second it says here. Discussions regarding the vote may be entirely confidential. Will the Parliamentarian issue an opinion regarding coverage under the Sunshine Act as to whether we can discuss this personnel matter in closed session?

MS. SMITH: Yes, Madam Chair. Based on today's motion, I certify that pursuant to Exemptions 2 and 6 of the Government in the Sunshine Act and Section 702.53 of the Commission's regulations which permit closure if a matter relates solely to the internal personnel rules and practices of an agency, that's Exemption 2, or concerns information of a personnel nature where disclosure would constitute a clearly unwarranted invasion of personal privacy, that's Exemption 6, the discussion of internal management and personnel practices may be closed to the public.

CHAIRPERSON BERRY: Thank you. Based on the motion and certification of the parliamentarian, we will take a roll call vote on closing this portion of the meeting or we can just say if there's no

objection, we don't have to do a roll call. Is there any objection to going into a closed session?

(No response.)

CHAIRPERSON BERRY: Okay. Without objection, this portion of the meeting will be closed. Only commissioners, the Parliamentarian, the Staff Director, Deputy General Counsel and the stenographer may remain in the room. All others please leave until we reconvene in public session. And just for your information, we expect to reconvene in no more than half an hour, so please be alerted.

COMMISSIONER THERNSTROM: The assistants to the commissioners are also leaving.

CHAIRPERSON BERRY: Right. That's what it says. The commissioners, the Parliamentarian, Staff Director, Deputy General Counsel and the stenographer may remain in the room.

COMMISSIONER BRACERAS: Which one are you reading from?

CHAIRPERSON BERRY: The rules that somebody gave me.

(Laughter.)

COMMISSIONER BRACERAS: Okay.

CHAIRPERSON BERRY: I'm being honest. It says Revised OCC 6-2003, whatever it is, I don't know.

It says, "Script for closing a portion of a meeting." As soon as everyone has left, we can close.

(Whereupon, the foregoing matter went off the record at 9:35 a.m. and went back on the record at 10:20 a.m.)

IV. Announcements

CHAIRPERSON BERRY: Let me go on with the agenda and first make the announcements. The announcements I'd like to make -- I'll wait till everyone comes in before I announce the interns in case any of them are here. The former Chair of our D.C. State Advisory Committee, Dr. Duncan Howlett, who has passed, he was Chairman of our D.C. SAC from 1962 to 1965, and he was a local leader in the cause for civil rights, and we are saddened to learn of his passing.

The other is that Burke Marshall who was a key strategist for civil rights policy during the civil rights movement and who had a rather controversial tenure, as I recall personally, because he tried to enforce civil rights, but he had a very strong concern about not interfering with what states were doing, which he and I used to argue about all the time. But he was a great guy and made enormous contributions and said only political power not court

orders or other federal law will ensure the election of fair men, I guess he would say women too if he were alive now, sheriffs, school board members, police chiefs, mayors, county commissioners and state officials.

It's also the 40th anniversary of the slaying of Medgar Evers, Mississippi's first field secretary for the NAACP, and a year later, of course, at this same time Cheney, Goodman and Schwerner's bodies were found.

It is also on the 19th, yesterday was the 22nd anniversary of the brutal death by beating of Vincent Chin, the 27-year-old Chinese American who was beaten to death outside a McDonald's restaurant in Detroit where people thought he was Japanese and this was at a time of decline of the American automobile industry. This had enormous impact on stimulating greater activity, political and civil rights activity in the Asian-American community and also stimulated the introduction of hate crimes legislation, which on a bipartisan basis was passed in the Senate in June of 2000 but has still -- a federal hate crime law which still has not passed.

It is also the month in which Title IX was enacted 31 years ago, which forbids sex discrimination

in educational programs, and there has been enormous progress since that time educationally. I remember in my law school class we had nine women out of like 700 people because it was during the Vietnam War. Now a majority of the folks in the class are women, which is interesting.

The other is that Juneteenth, which is a day celebrating the termination of slavery when people in Texas were first told on June 19, 1865 that there had been an emancipation proclamation that was issued by the President two years before, but they realized that they were freed and it has now become a celebration in many communities. So it is the month and the day of Juneteenth.

The other thing is the summer interns. To the extent that they are here, we have Adam Stella from Brown University. Are you here, Adam.

PARTICIPANT: He's back there.

CHAIRPERSON BERRY: We have Sarah Whitfield from St. John's College. Amy Cupelli from the College of Rochester. Hi, Amy. In OGC, we've got Jennifer Feinstein from George Mason University School of Law who must be here somewhere. Where is she?

COMMISSIONER EDLEY: Doing research?

CHAIRPERSON BERRY: She's doing research.

(Laughter.)

CHAIRPERSON BERRY: Gilbert Gonzalez from St. Mary's University School of Law. In the Office of Staff Director, we have Dana Nakano who is here from the University of Pennsylvania. Anthony Nguyen of Rice University and Deepika Bains of University of Southern California. And in the Regional Office, Eastern Regional, we have Dave Sidhu of George Washington University Law School and Tilia Parks of Morgan State University, who is over there. And there are a couple more interns that have not come yet. I'll also announce that Sheldon Fuller who has been here for this year as a special assistant will be leaving, this is his last meeting. He's going off to law school in the fall, and we've enjoyed having you here, Sheldon.

COMMISSIONER BRACERAS: Whereabouts?

CHAIRPERSON BERRY: To Penn. Okay. Now, we'll --

COMMISSIONER BRACERAS: I'm sorry.

CHAIRPERSON BERRY: Yes. Do you have an announcement?

COMMISSIONER BRACERAS: Sort of. I also was planning on announcing the passing of Burke Marshall if you had not done so, and I have to object

a little bit to your characterization of him. I think that we should all take a moment to remember that probably the Civil Rights Act would not have been passed without the efforts of Burke Marshall. And despite any policy disagreements the Chair may have had with him at certain points in time, all civil rights activists should be grateful for that. And in any great movement there are activists and there are -- who apply pressure from the outside, and there are those who work from the inside --

(Audio failure for ten seconds.)

COMMISSIONER BRACERAS: -- work with that to achieve real results. And so I want to remember him for that.

CHAIRPERSON BERRY: Well, nothing I said would be meant to indicate that I didn't have enormous respect for him and loved intellectual combat with him and respected his contributions. And he will be sorely missed.

The next item on the agenda is Staff Director's report.

COMMISSIONER REDENBAUGH: May I make an announcement, Mary?

CHAIRPERSON BERRY: Yes, yes, please, Commissioner Redenbaugh.

COMMISSIONER REDENBAUGH: Thank you. This is National Homeowners Month, I believe, and I wanted to call attention to pending legislation which will increase home ownership of first-time homeowners, particularly minorities. And I encourage this as another step toward reducing the income and wealth gap that we have been studying and concerned with for some time.

CHAIRPERSON BERRY: All right. Okay. Well, we should all encourage that. And I don't know what the numbers are on home ownership now, but maybe with the low interest rates it's increasing.

COMMISSIONER REDENBAUGH: Yes, it's very much increasing.

CHAIRPERSON BERRY: Yes. I also want to acknowledge the presence in the audience of the Chair of our New Jersey SAC who has just come in, Ms. Leanna Brown. Welcome to you. Thank you for all you do; we appreciate it.

V. Staff Director's Report

CHAIRPERSON BERRY: The next item on the agenda is the Staff Director's Report. Does anyone have any questions or comments or anything else about the Staff Director's Report? Okay. Hearing --

COMMISSIONER MEEKS: I just have one.

CHAIRPERSON BERRY: Yes.

COMMISSIONER MEEKS: When you mentioned, it's under the OGC, the Native American Health Care Project, I just wonder, you say briefings and report and if that includes -- if it's necessary to have a hearing?

STAFF DIRECTOR JIN: I'm sorry, which project is this?

COMMISSIONER MEEKS: The Native American Health Care Project.

STAFF DIRECTOR JIN: Is it both, Debra, briefing and report? It's a briefing, right?

MS. CARR: It's currently scheduled as a briefing and report. That does not, however, limit the commissioners from deciding to supplement that briefing and report in any other way.

STAFF DIRECTOR JIN: I mean we're certainly going to do supplemental research. The briefing will be -- will help us in that regard.

COMMISSIONER MEEKS: Okay.

CHAIRPERSON BERRY: And the briefing is you will hear from witnesses and presenters. The only difference is you won't follow the normal hearing procedures. Is that right or am I --

MS. CARR: That's correct. The only

difference is we won't be issuing subpoenas. We will, however, invite the participation of all government officials, state, local representatives from organizations, policymakers, thinkers on the issue.

CHAIRPERSON BERRY: And there will be an opportunity for public comment?

MS. CARR: There will be an opportunity for the public to speak. Commissioners, as usual, will engage the panelists, witnesses.

CHAIRPERSON BERRY: If you want to talk more to the Staff Director about that and how you think it should go, please do. Because we had -- in an earlier meeting had sort of left a lot of the ideas about this on how to do it to you, Commissioner Meeks. So we would invite you if you still have some concerns to discuss those with the Staff Director and the appropriate staff, and anyone else who has any concerns may feel free to do that. Can we leave it at that?

COMMISSIONER MEEKS: Yes, that's fine.

CHAIRPERSON BERRY: Okay. And if you see a need for us to do anything else, let us know. Yes, Commissioner Edley?

COMMISSIONER EDLEY: I'm sorry. While I had stepped out of the room, did you mention racial

profiling and Benton Harbor?

CHAIRPERSON BERRY: Did not. Did not. Please mention them, please.

COMMISSIONER EDLEY: Thank you. There have been I think some very important developments, and it might be helpful I think if the staff took a look at two things in particular. One is that we have this new announcement of guidelines on racial profiling by the Justice Department. This is a topic that the Commission has discussed a few times, and I have a vague recollection of our having had a discussion and perhaps even written a letter that was critical of the half measures or perhaps I should say quarter measures taken by the Clinton Administration with respect to racial profiling.

But I find it interesting maybe if the staff could take a look back at whatever we said and whatever policy discussions we had in connection with the Clinton effort and do an informal analysis, nothing elaborate, but just take a look at whatever it is that the Ashcroft Justice Department has just released and perhaps give us a little information and assessment of that.

The second was that the recent disturbances in Benton Harbor, which at least are

supported by the press, have something to do with a breakdown in police/community relations. Some people characterize them as race riots. I'm sure there's a lot of hyperbole mixed in with that, but I thought it might make sense to perhaps ask the SAC or the Regional Office to tell us what they think about what's happened and just give us an informal assessment as to whether or not there's anything that the Commission ought to take a look at out there.

CHAIRPERSON BERRY: We have, as you know, Commissioner Edley and others, we have a policy in which we object to racial profiling, that's number one; we already have a policy. And the second is we have a policy, a long established policy on matters of police/community relations, which has been the subject of extensive hearings and reports and everything else from the Commission. I told a reporter yesterday who asked me about -- who said that she was going to ask me about something else but did like reporters often do and asked me about the thing she didn't say she was going to ask me about, but anyway she asked me what I thought of the policy guidance from the Department of Justice -- on racial profiling that's just been issued, and I said that it was encouraging that something was issued, because we had tried to get

Clinton to do some stuff but that my current understanding was that he did not solve the problems that concerned us and that concerned the forums that we had and that the staff was looking into it and left it at that.

But I do think it's right, and I do recall the discussion in which -- as a matter of fact we castigated Bill Clinton for not actually issuing some kind of executive order or something. So I look forward to seeing what the staff finds out about this. And if there's no objection, then we will proceed to do the two things that Commissioner Edley suggested we do on this.

Does anyone else have anything else under Staff Director's Report before we go to the next item? Yes, Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes, Madam Chair. First of all, I want to commend the Staff Director for giving us advance notice of the different topics we're going to be discussing. As you know, over the last couple of months, at least I've been very concerned about getting advance notice of what we're going to be talking about so that we could accurately prepare. Along those lines, I think it's important, and I know staff works very hard at this, and I think

Abigail Thernstrom raised this issue months ago, that we have as much balance as we can whenever we have briefings or hearings in terms of whatever the topic may be that we have individuals who may be on one side of an issue, another side of an issue, in the middle of an issue so I think that we can properly address an issue across the spectrum and not get input or fail to get input from relevant sources. I would encourage the Staff Director to maybe solicit from each of us in our other lives we have individual areas of expertise where we could possibly get suggestions as to who the speakers who might be on any given topic so we could have a more robust debate on whatever the given issue of the day may be. And that's what I want to say on that particular issue.

CHAIRPERSON BERRY: Okay. All right. We heard that.

COMMISSIONER KIRSANOW: And Commissioner Redenbaugh and I know some of our other commissioners had some suggestions with respect to July's meeting on credit access and capital accumulation, and I think we've prepared a memo to that effect and we'll present that to you.

STAFF DIRECTOR JIN: Okay. The sooner you get it to me the better.

CHAIRPERSON BERRY: Commissioner Kirsanow, did you introduce your assistant?

COMMISSIONER KIRSANOW: No, I didn't, I'm sorry. I was out of the room. This is Matthew Fogarty. Matt's an all-around superstar. He does all kinds of things except leap tall buildings with a single bound.

(Laughter.)

CHAIRPERSON BERRY: Okay.

VI. State Advisory Report

CHAIRPERSON BERRY: The next item on the agenda is the State Advisory Report, Civil Rights Concerns in the Metropolitan Washington D.C. Area in the Aftermath of the September 11, 2001 Tragedies. The Washington, D.C., Maryland and Virginia State Advisory Committees prepared this report, and the question on the floor is whether we received it, right?

STAFF DIRECTOR JIN: For printing purposes.

CHAIRPERSON BERRY: Yes. Could I get a motion that we received the report?

VICE CHAIRPERSON REYNOSO: So moved.

CHAIRPERSON BERRY: Could I get a second that we received the report?

COMMISSIONER BRACERAS: Second.

COMMISSIONER REDENBAUGH: Second.

CHAIRPERSON BERRY: Discussion?

COMMISSIONER BRACERAS: I have a question.

CHAIRPERSON BERRY: Yes.

COMMISSIONER BRACERAS: There's a dissent to this report, and it's my understanding that the individual who wrote the dissent is here today; is that true?

MR. TOPPING: I'm sorry. I'm here. I'd like to associate -- there are a large number of us who agreed with the dissent.

CHAIRPERSON BERRY: You're not recognized.

MR. TOPPING: A lot of us are associated with the dissent, but I'm a member of the SAC but Steve Kirzman is not here.

CHAIRPERSON BERRY: Okay. The vote on the report, as I recall -- what was the vote on the report?

STAFF DIRECTOR JIN: Thirty-seven to one.

CHAIRPERSON BERRY: Thirty-seven to one. But, anyway, proceed, ma'am.

COMMISSIONER BRACERAS: Well, I guess I was interested in hearing from those who had concerns as to why they had concerns, if they're here. That

was my understanding, but I don't know that.

CHAIRPERSON BERRY: Commissioner Meeks, did you want to say something?

COMMISSIONER MEEKS: Well, I just -- I'm not sure what the order is on that. And since the letter is here, I mean I think it speaks for itself.

CHAIRPERSON BERRY: Okay. Commissioner Thernstrom?

COMMISSIONER THERNSTROM: I'm not sure that I understood the gentleman's statement just now. Did I understand that the 37 to one vote in fact is deceptive in that there was a much larger group, and maybe you could estimate the number what the split in fact was, there was a much larger group that had concerns about the report. And if that's so, why was it a 37 to one vote?

CHAIRPERSON BERRY: I am going to let him speak, but we should not privilege a one-person vote as opposed to 37 person. I understand that the Virginia SAC Chair is here also.

COMMISSIONER THERNSTROM: No. I just want to get this history.

CHAIRPERSON BERRY: If the Commission would like to have a discussion of why the one person voted that way --

COMMISSIONER THERNSTROM: No, no.

CHAIRPERSON BERRY: -- and why the 37 voted that way, we'll ask the Chair to come up to make a presentation. Then we'll --

COMMISSIONER BRACERAS: I'm not privileging anything. I'm just curious as to the concern.

COMMISSIONER THERNSTROM: The last statement I have not understood.

CHAIRPERSON BERRY: Why don't we ask the Regional Director, first of all, who is in charge of these people, or at least he gives support to them -- nobody's in charge of them because they are private citizens who do whatever they feel like doing -- what the facts are as he understands them since he's our staff person. And then if there's a need to hear from other people -- and as I understand the comment that was made, that the person who wrote the dissent isn't here anyway, but could we hear from the Regional Director?

COMMISSIONER THERNSTROM: I just wanted a clarification on the comment.

CHAIRPERSON BERRY: Right. Right. And then if we need to have further presentations, we'll have them, but let's hear what the Regional Director

has to say. Is that all right Staff Director?

STAFF DIRECTOR JIN: Sure.

CHAIRPERSON BERRY: Unless you want to answer it. I mean I don't -- we're just trying to get some facts. Now let's hear -- the factual question that was asked by Commissioner Thernstrom, do you remember -- could you tell him what the question was?

COMMISSIONER THERNSTROM: Well, I mean I did ask directly the person who spoke to clarify his statement so that I understood it fully. I don't think anybody but he can clarify that statement. And so -- and then once that statement was -- his own statement was clarified, maybe I can -- there will be further questions directed --

CHAIRPERSON BERRY: Could you read back, please, stenographer, what the gentleman said?

COMMISSIONER THERNSTROM: Well, I wanted to give him an opportunity to clarify.

CHAIRPERSON BERRY: And we will do that as soon as we hear from the stenographer what was actually said. Even though it was not recognized, it's in the record, so --

COURT REPORTER: It may be in the record. He's off-mic so it will be hard to hear.

COMMISSIONER THERNSTROM: I don't see what

the harm is in letting the gentleman speak himself.

CHAIRPERSON BERRY: Because we do not, as a matter of course, let people from the audience just simply speak and recognize them --

COMMISSIONER THERNSTROM: But he --

CHAIRPERSON BERRY: -- without some kind of order. The gentleman was not recognized. If he is going to be recognized, out of respect we should recognize the Chair of the SAC who represents the 37 people who voted rather than having an explanation about the others and what they had to say before we have an explanation.

COMMISSIONER THERNSTROM: All right.

CHAIRPERSON BERRY: And we can hear from him. We should also hear from our own Regional Director --

COMMISSIONER THERNSTROM: I don't object to that.

CHAIRPERSON BERRY: -- who is the person who has responsibility for this.

COMMISSIONER THERNSTROM: But his having spoken, I simply wanted clarification of what he said.

CHAIRPERSON BERRY: Right. We're going to have it read back and then if we need clarification, we'll get it. Yes. Go right ahead.

(Topping comment played back.)

CHAIRPERSON BERRY: Okay. That's relevant. Now, Ki-Taek, give us a little bit of -- just try to direct your remarks toward the 37 to one and who's here and not, and then if we need to hear from them, we will, and you can recognize them and tell us who they are.

MR. CHUN: During the planning, it was a tri-SAC endeavor so we had a 12-member planning committee -- three chairpersons and the three members from each SAC constituting a 12-member Planning Committee. And the plans that were adopted by the Planning Committee was a basis, a copy of which you all shared at one point in the past.

During the drafting stage, we had established a six-member Editorial Committee -- a chairperson from each committee and one person who was recommended by the chairperson. And that Editorial Committee was given the responsibility of overseeing the automated reports appropriate for the purpose. During the period of preparing drafts at least once, my recollection is twice, but so we just looked at the dates, and at least once we have shared -- distributed in-progress draft to all the members for their comments, suggestions and what not, and we diligently

accommodate those. And then the final draft that the Editorial Committee signed off on was sent to all the members for their votes, and the result of that vote was 37 to one.

CHAIRPERSON BERRY: And then the one vote was a dissent.

MR. CHUN: That's right. And that person in casting his no vote said he had some concerns, that he would be interested in writing a dissenting opinion, and he so did following a sort of deadline. And speaking about the inclusion or not excluding dissenting opinion, when the Editorial Committee had reports, dissenting opinion and unanimously the Editorial Committee for substantive reasons they owe it to the report to prepare a response to the dissenting opinion, which was called the Editorial Committee's clarifications. We went through many versions of it till finally they were happy with a draft, which is included as an appendix.

CHAIRPERSON BERRY: Is all of this in the report?

MR. CHUN: Absolutely.

CHAIRPERSON BERRY: Okay.

MR. CHUN: And there was a question as to whether the dissenting opinion and Editorial

Committee's clarifications should be made available upon request from the reader or they should be appended as part of the report. And we had a very strong split among the Editorial Committee members, three, three, and we just couldn't persuade each other, and of course regional staff members do not have any votes, so we have to be guided by their votes, and it was three, three. So what the Editorial Committee decided was we went back to the entire membership, 38 members of the three committees, asking here are two options. One is to append the dissenting opinion along with the Editorial Committee's clarifications as part of the report -- append as part of the report. Or we indicate availability of those documents in the report, and upon request we will make copies of those two outside parts available. So those are two options. All the members in the three committees were given a copy and the final count was 17 in favor of appending and 13 -- 14, excuse me, 14 no and seven abstentions. So recording then we have appended those, say, parts; that is dissenting opinion and the clarifications.

CHAIRPERSON BERRY: Now, what has happened since then?

MR. CHUN: Since the vote has taken place

and the decision has been made by the members, entire membership as to the disposition of the dissenting opinion. And then recently we have heard that a person, not Mr. John Topping who is with us this morning, wanted to join the dissenting opinion.

CHAIRPERSON BERRY: So there would be two then.

MR. CHUN: Right, but that means changing the original votes. So the question really boils down to do we revisit the original votes? And my position has been, I may be mistaken on this, but my position has been the final vote, once officially counted, is sacred in one sense. We cannot revisit. That being the case, I was not as Regional Director willing to change votes at the request of certain members, and that's I think where we stand, and Mr. John Topping is here. He's the person who wanted to change his original vote to join the dissenting opinion, and Mr. Richard Patrick, the Chairperson of the Virginia SAC, who has been acting as a leader in this entire tri-SAC is here in case you have any questions.

CHAIRPERSON BERRY: Okay. Well, does the Commission now feel a need to hear from the Chair of the Virginia SAC and from the dissenter who has now decided he was a dissenter? Or does the Commission

have enough information based on what you have in the report, you have the dissent, you have the memo, and you've heard from Ki-Taek. Would you like to ask Ki-Taek some questions or are you ready to vote on whether you accept or receive, not approve, the report, which is what you do is receive it. Yes, Commissioner Thernstrom?

COMMISSIONER THERNSTROM: I would still like -- because I did not understand what the gentleman said, I would still like him to restate it, and I suppose it would help to have a microphone to restate it so I simply understand the point.

CHAIRPERSON BERRY: Ki-Taek, did you understand what he said or would you like him to restate it? It's up to you if you want him to restate it.

COMMISSIONER THERNSTROM: I wonder if you would allow that so that I could understand the point he made.

CHAIRPERSON BERRY: And if we do that, then we have to allow the Virginia SAC Chair to respond.

COMMISSIONER THERNSTROM: That's fine. I have no problem with responses.

CHAIRPERSON BERRY: And then what happens

is we'll be here all day because everybody will be responding to the question.

COMMISSIONER THERNSTROM: No, I hope that we wouldn't be here all day. There was a statement made, I would simply like to understand it if you would allow that.

MR. CHUN: Well, if he can be brief, he could in deference to you, but his contention is --

COMMISSIONER BRACERAS: Can he state his own contention?

COMMISSIONER THERNSTROM: Yes. I'd like to hear his own --

CHAIRPERSON BERRY: We'll let him do that, but let me just point out that no one, as I understand it, Ki-Taek, you aren't saying that he can't change his vote. He can change his vote however he wants to as an individual, but you're saying that you can't revisit the whole vote again and take the whole vote over again and start all over from the beginning with a report. Is that what you're saying?

MR. CHUN: I think I'm saying if he can change -- if he's allowed to change, that would be an exception we can live with but that is unusual.

CHAIRPERSON BERRY: But you're not -- but as I heard you, you're saying that you don't think you

should do the whole vote over again from the beginning --

MR. CHUN: No.

CHAIRPERSON BERRY: -- and start all over from scratch.

MR. CHUN: That would make a mockery of the entire process, and I'd have to --

CHAIRPERSON BERRY: Okay. Well, why don't you recognize him and let him say whatever he has to say, so long as it's not extended. Could you repeat what you said, please, and then I ask the Virginia SAC Chair to indulge us. As you can, we're getting ourselves --

MR. TOPPING: Thank you, Madam Chair and members of the Commission. My name is John Topping, and I've been a member of the D.C. SAC since 1974. I regret actually having to come forward on this because this is the kind of thing that normally we've been able to handle very much by communicating very well, and I think our own SAC has had remarkable success. But the concern we had was the following: In the drafting process, Steve Kurzman had raised the concerns that there was some imbalance in the report, and while Steve and I held different views, we have different view of the Middle East and other things and

so forth there, I think he made a remarkably compelling dissent that made a lot of us really look at the report much more carefully.

We thought we had when the report was drafted that his concerns were, in effect, going to be addressed. It wasn't until we saw his dissent that a large number of us, there were at least of the D.C. SAC there were a total of Steve and myself, Ann Heuer, Donnie McKethan and Steve Sims, I think, who found ourselves not only wanting to defend his right to have his dissent published but also finding ourselves largely in concurrence with the substance if not every word of it the overall the substance of that.

And at that point, I tried to see what we could do to open up the process so that before this report would be published it would be taken seriously. Because I believe very strongly in the need to look out for the interests of members of the Islamic faith. For the last 15 years, the environmental group that I've headed had about a third of our staff have been members of the Islamic faith, and I mean I think they're critical concerns, but the current imbalance of the report as it's drafted right now is not going to let these things be seriously considered.

I mean I think it's going to end up being

discredited by that, and I had hoped that we could actually open up this -- put a few paragraphs at the beginning of the report, for example, that would recognize the remarkable actions that were taken in the first days by national leaders and leaders in New York City and so on in this country in a way that probably no other country in the world would have done to try to avoid violence, something of this sort. But it doesn't at all detract from the importance of these other issues. But I had hoped that we could have had some of that balance added into it.

Short of that, if we're not able to have opened up that in the report, at least allow some of us to put a paragraph or so that might associate ourselves so that we don't have this 37 to one sort of lockstep that doesn't at all reflect our overall sentiments. I think if we had put this to a vote in the D.C. SAC, and those are the only people I've been able to communicate with, because up until about two or three days ago I haven't had e-mails from anyone else, and I had great difficulty in being able to get e-mails from the Maryland and Virginia SACs. We have five members -- five or so in total or whatever who already indicated that, and for all I know we may have had a majority who essentially found themselves in

agreement with Steve's rather than the majority opinion, even though we had voted that way. So that -- I think this report would be far stronger if we had that.

And at a minimum, just as judges are able to make a -- when they see another opinion, a judge -- when a draft opinion is circulated, a judge is able to change and so on. We were in that same position when we saw Steve's, in effect, draft dissent, and I think we should certainly have that. And I was outraged at the whole idea that the report could be published with the dissent essentially deleted on the grounds -- and I think the principal reason that they wanted to delete it was that Steve essentially eviscerated the logic or just demolished the logic of the overall report.

CHAIRPERSON BERRY: Commissioner Edley?

COMMISSIONER EDLEY: Point of order. I'm worried procedurally here that the accident of who comes to the meeting makes it very irregular for the way in which we consider what the SACs have presented here. And it's certainly setting, I think, an unfortunate procedural precedent, and I'm at a loss as to how to proceed, but I just want to say I'm very troubled -- I don't know how many people from the

various SACs are here, whether we should listen to all of them, whether we should postpone the panel that we've set up for a briefing.

CHAIRPERSON BERRY: Yes. You must recognize yourselves. Do you want to speak to his comment or some other point?

COMMISSIONER BRACERAS: No. I just want to say for the record that I'm concerned about a pattern of a lack of balance at the Commission and with the SACs and the pattern, frankly, of (audio gap) which I find to be very disturbing, and that's why I asked that we hear more about it.

CHAIRPERSON BERRY: Let me just say that I have the same -- I share your concern. First of all, we haven't quashed any dissents, but, secondly, I share your concern, Commissioner Edley. This is decidedly irregular, just on the accident that you happen to be here and there are 37 other members or something, 36, who aren't here. You get to have a privileged discussion about a dissent which is in the report, and the Chair of the SAC hasn't even spoken, of the Virginia SAC, and he's got members, and all those volunteers out there who volunteer to be on these SACs and to do this work who don't get a dime for it, they're just public-spirited citizens. And

some of them and your colleagues are on the D.C. SAC who aren't here.

And, therefore, the entire discussion is about a vote that was taken, you all participated, the dissent is in there, the rebuttal is in there, and they have no opportunity to be heard. Your Chair isn't even here to represent your SAC, and yet your discussion gets to be the privileged part of the whole -- the enterprise. If I were a member of one of the SACs and the Commission decided to prefer your comments to all the rest of us, then I'd have no alternative but to quit, because, you know, I mean this is just irregular. So we're not going to do it. I'll bear the responsibility for saying we're not going to do it.

What we're going to do is we're going to either vote to accept or reject your report, just like we do every other report that comes along here, knowing that 37 to one and that now you've changed your vote because you're here, and it's 36 to whatever, two or whatever on the SACs, as I understand from the Staff Director. And if we refuse to accept your report on the grounds that some people don't like it because you and others didn't like it, then that's just the way it has to go because that's the

procedure, and we have to follow the procedure unless somebody's got some reason why we shouldn't. Commissioner Redenbaugh, do you have a reason why we shouldn't follow the procedure?

COMMISSIONER REDENBAUGH: Well, I have a -- yes.

CHAIRPERSON BERRY: Okay.

COMMISSIONER REDENBAUGH: So let me see if I can do this very quickly. I have no background on this issue. This is the first this has come to my attention. So I'm without the facts. I would characterize this situation as it appears, as a matter of first impression, differently than you, and that is that the gentleman speaking -- I think what he's trying to do is raise a concern about the process that was followed, not the outcome that was produced, but I'm not sure about that.

Having been the Commissioner who took the lead on defining the process for the preparation of SAC reports, before I can go through this report I want to satisfy myself that that process was followed, and that's independent of whether I like the outcome or not. So I can't vote for this report until I've done that, and I have not yet done that. This does look very controversial, but as a process person

that's the concern I've got.

CHAIRPERSON BERRY: Well, it's indeed controversial because we wouldn't be here discussing it.

COMMISSIONER REDENBAUGH: Right.

CHAIRPERSON BERRY: But as the Regional Director described the process, as he described it for the record, it sounds exactly like the process that the Commission said they would have, which everybody looks at the drafts, if I heard him right. But --

COMMISSIONER REDENBAUGH: Well, it did sound like that to me as well, and having written the process, it sounds -- yes, but --

CHAIRPERSON BERRY: But maybe it didn't, but that's what he sounded like he was saying.

COMMISSIONER REDENBAUGH: Right.

CHAIRPERSON BERRY: But let me hear just briefly from the, since you're sitting there, the SAC Chair from the Virginia.

MR. PATRICK: Good morning, Chair, good morning, members of the Commission --

CHAIRPERSON BERRY: And thank you for your service, and we're sorry to put you through this.

MR. PATRICK: Mindful of the Commission's time and the others in the audience I'll be very

brief. In effect, I like what the Chair said: This is about a changed vote. I'm not going to bore the Commission with getting into the details as to what happened, simply to say that at each step of the way the regional staff was circumspect in sending out drafts of this report to everyone, to all the members by e-mail. I communicated with all of the members of the Virginia SAC and the Editorial Committee. Had every opportunity, four, five, at least six times everyone had an opportunity to vote to say, "I don't like the report, it is trash, I'm not going to vote this way." Mr. Kurzman did; Mr. Topping did not. Actually, the first I heard of this was yesterday after the meeting that suddenly Mr. Topping wanted to change his vote, and he speaks on behalf, he tells us, of four members of the SAC whom we have not heard from who, as far as we know, voted officially that this report be published.

So here we are imposing on the Commission, taking up the Commission's time, because on reflection or after having read the report thoroughly, somebody decided, "Well, I don't like this paragraph, and I can tell the Commission that there are members on the other side, Virginia and Maryland, who feel just as strongly, so it's a collaborative among all the SACs.

We spent copious -- actually, we spent more time on Mr. Kurzman's dissent than on the report itself. We took votes. We actually revoted to have Mr. Kurzman's dissent put before the entire membership of all the committees, and they voted, "Yes, we ought to include it," because I was concerned that I didn't want someone saying, "You buried his report, we quashed his dissent." That's not what we're about, and so Mr. Topping's comment when put largely within the confines of what we did, we bent over backwards to make sure that everyone got a fair shake in this process. We put it to a vote. The 37 to one vote that Ki-Taek talked about was accurate until members of the D.C. SAC, having read Steve Kurzman's dissent and then perhaps going back and reading the report for the first time, decided, "Aha, Here's something I don't like." It makes us look as if the federal government is not doing its job.

CHAIRPERSON BERRY: What we're going to have to do is -- I hope somebody will call for the question.

VICE CHAIRPERSON REYNOSO: Yes. I'll call for the question.

CHAIRPERSON BERRY: Because we need to vote on this. We have heard that the vote, if we

assume that the gentleman wants his vote changed to one, would be 36 to two, and if we believe that he represents four other people, which we don't know whether that's true or not, it would be 32 to, what was that, six. And we have heard from the Virginia SAC Chair. And the question that we're being asked is whether according to the way we operate and the way we accept other people's reports will we accept this report from the combined SACs? So that's the question before us.

All those in favor of --

COMMISSIONER REDENBAUGH: Madam Chair, one clarification.

CHAIRPERSON BERRY: Yes.

COMMISSIONER REDENBAUGH: The dissent is published as an appendix.

CHAIRPERSON BERRY: Right. It is in the report.

COMMISSIONER REDENBAUGH: Okay. Very good. Thank you.

CHAIRPERSON BERRY: All those in favor of voting to receive this report indicate by saying aye.

(Chorus of ayes.)

All those opposed to receiving the report indicate by saying no.

(Chorus of noes.)

COMMISSIONER EDLEY: Madam Chair?

CHAIRPERSON BERRY: Yes.

COMMISSIONER EDLEY: Can I just make a suggestion to the Staff Director?

CHAIRPERSON BERRY: The vote was one, two, three, four, five to three, and the report is accepted. And we thank you SAC members, all of you, for your work, but just next time before you send it up here think it all through and have all the discussions you want so that when we get it we can reply, and then when a group of you wants to do something let us know ahead of time and we'll arrange for it and so on. We'd be happy to, okay, because we love you and we're happy for the work you do. Thank you very much. Yes?

COMMISSIONER EDLEY: Madam Chair, I just want to say this was very difficult, I think, for the Commission, because almost any way we went on this there were going to be hardworking SAC members who might have felt abused, disrespected in some way. So I think we were damned in either direction there's going to be problems.

CHAIRPERSON BERRY: Right. And the fact that it's published, yes.

COMMISSIONER EDLEY: I'd just suggest that maybe the Staff Director might want to just take a look at what the procedures are and see if his experience suggests a need for changes in the way voting in the SACs takes place and the way dissents are handled, et cetera, just think it through and lessons to be learned.

CHAIRPERSON BERRY: Could you do that? And you might consult with Commissioner Redenbaugh. Did you hear what I said, Russell?

COMMISSIONER REDENBAUGH: Yes, I did.

CHAIRPERSON BERRY: And see if you guys can propose any tightening up of the rules, yes.

COMMISSIONER THERNSTROM: Yes. And just to add to that, and, Russell, I'm talking to you as much as anybody or more than anybody else, I mean it seems to me one of the questions here that was raised was whether the analogy between a Supreme Court vote is apt, that is once members of the SAC look at the dissent and then have in their own minds question raised whether the matter should not be revisited and whether that shouldn't be built into the process, and I mean I voted no because I still found this process procedurally questionable, and it was precisely because of that question that was raised, isn't this

analogous to a dissent within the Supreme Court being raised and people switching votes on the basis of it.

CHAIRPERSON BERRY: So you guys consider all that when you decide whether we should have some other rules. And thank you very much, and thank you, Ki-Taek.

VII. Funding Federal Civil Rights Enforcement: 2004 Report

CHAIRPERSON BERRY: The next item on the agenda is Funding Federal Civil Rights Enforcement: The 2004 Report. Could I get a motion to approve?

VICE CHAIRPERSON REYNOSO: So moved.

CHAIRPERSON BERRY: Could I get a second?

COMMISSIONER REDENBAUGH: Second.

CHAIRPERSON BERRY: This is an update on the previous report which every year is done by Terri and her -- Terri Dickerson, Ms. Dickerson and her -- Dr. Dickerson and her Office of Civil Rights Evaluation. Does anyone have any questions for Terri about this update? And if not -- it's rather straightforward -- if not, then could we get a call for the question and just vote on accepting it?

COMMISSIONER REDENBAUGH: May I have clarification?

CHAIRPERSON BERRY: Yes, sure.

COMMISSIONER REDENBAUGH: Thank you. This is not the statutory report, right?

CHAIRPERSON BERRY: No, no, no. This is just --

COMMISSIONER REDENBAUGH: Okay. This is --

CHAIRPERSON BERRY: -- every year she does this update on what the budgets were and what the funding is for all these civil rights agencies.

COMMISSIONER REDENBAUGH: Right. Okay. Well, then I'm -- then I wanted to make a statement. I intend to vote for this report, but I want to complain to myself and to us. I voted for the original from which this is derivative work, or of which.

CHAIRPERSON BERRY: Right.

COMMISSIONER REDENBAUGH: I think this report executes the instructions that we gave staff. I think we gave the staff rather poor instructions in that this report really focuses on inputs, not on outputs. I'm going to vote for it but with the reservation that we, commissioners, did a poor design on this one.

CHAIRPERSON BERRY: Well, maybe what you should do is in voting for it why don't you give some

thought while you're thinking about the SAC rules to other things that you might want to suggest in terms of how they do this. That would be very much appreciated.

COMMISSIONER REDENBAUGH: I will do so. Thank you.

CHAIRPERSON BERRY: Okay. All those in favor of this year's report indicate by saying aye. Oh, yes, I'm sorry.

COMMISSIONER KIRSANOW: Commissioner Braceras is not here right now. Maybe we should wait a moment. I think someone went out to get her.

CHAIRPERSON BERRY: Oh, okay. I guess she'll be right back. Why don't we -- let's see. Okay, we'll wait a minute.

COMMISSIONER EDLEY: I'd just say, Madam Chair, I think that Russell's point is an interesting one. It might make for an interesting Commission discussion at some point in the future. I think it's very tough analytically, very tough methodologically to hear about how one would do it, but I think it would be interesting.

COMMISSIONER THERNSTROM: You mean to emphasize the outputs --

CHAIRPERSON BERRY: We could have inputs

and outputs.

COMMISSIONER EDLEY: Figure out what the outputs are, right. And I think there may be some learning from some of the agencies who've been struggling to implement GPRA, the Government Performance and Results Act, and maybe they've come up with strategies for measuring outputs that don't simply relate to cases closed. There's also a National Academy of Sciences Panel on the Measurement of Discrimination that's about to issue its report. That might provide something. So I commend Russell for raising a question. It's a non-trivial thing to do, so that's all.

CHAIRPERSON BERRY: So we appreciate your doing this job, Russell, and you are perfectly suited to do it.

COMMISSIONER REDENBAUGH: Yes, of course, I am.

(laughter.)

COMMISSIONER REDENBAUGH: I saw that briar patch.

CHAIRPERSON BERRY: Okay. All those in favor of this year's -- publishing this year's funding report indicate by saying aye.

(Chorus of ayes.)

CHAIRPERSON BERRY: Opposed?

(Chorus of noes.)

CHAIRPERSON BERRY: Who said no? Did I hear nay?

COMMISSIONER BRACERAS: Yes.

CHAIRPERSON BERRY: Oh, okay. The report is --

COMMISSIONER KIRSANOW: I'm abstaining for the reasons mentioned by Russell.

CHAIRPERSON BERRY: Commissioner Kirsanow abstains, and the vote is 5:2 and one abstention.

COMMISSIONER BRACERAS: And do we have an opportunity to file a short dissenting paragraph?

CHAIRPERSON BERRY: If you would like -- well, dissent to this? Okay.

COMMISSIONER BRACERAS: Or comments?

CHAIRPERSON BERRY: As Russell pointed out when he -- yes, he pointed out all it is is inputs and listing how much budgets are. But, yes, if you'd like to --

COMMISSIONER BRACERAS: Great. And what is the time frame for submitting that?

CHAIRPERSON BERRY: What is the time frame? When would you normally publish this, Terri?

CHAIRPERSON BERRY: As soon as possible.

STAFF DIRECTOR JIN: Yes. As soon as possible but there's no defined deadline.

CHAIRPERSON BERRY: How many days do you need?

STAFF DIRECTOR JIN: Two weeks?

COMMISSIONER BRACERAS: That's great.

CHAIRPERSON BERRY: Two weeks. Two weeks. Two working day weeks from now. Okay?

COMMISSIONER EDLEY: Now, if her dissent leads us to want to change our vote on the --

(Laughter.)

CHAIRPERSON BERRY: We'll come back here and discuss it again and then we'll see.

VIII. Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations?

Volume III

CHAIRPERSON BERRY: Now we have the Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? This is a statutory report that we had part of last year of some other agencies and this year we have these agencies. And Terri is here if anyone has any -- could I first get a motion to approve it and then we'll discuss it?

VICE CHAIRPERSON REYNOSO: So moved.

CHAIRPERSON BERRY: Could we have a

second? Could I get a second?

COMMISSIONER EDLEY: Second.

CHAIRPERSON BERRY: Okay. Does anyone have any questions for Terri about this?

COMMISSIONER THERNSTROM: Well, I have a general -- Russell, are you still on the phone?

COMMISSIONER REDENBAUGH: Yes, I am.

COMMISSIONER THERNSTROM: It was my understanding that you would like to postpone this vote?

COMMISSIONER REDENBAUGH: Yes. I wanted to ask that we do that. I received this seven days ago and being not diligent I'm unprepared. I think I have substantial areas that I want to ask questions but I'm not prepared with my questions. Also, I'm going to be in person for the next meeting --

CHAIRPERSON BERRY: Oh, in person.

COMMISSIONER REDENBAUGH: -- instead of by phone, which I feel disadvantaged by only being by telephone. So if no great harm would come to the nation --

(Laughter.)

COMMISSIONER BRACERAS: To the nation?

CHAIRPERSON BERRY: Commissioner Meeks is going to point out the harm to the nation. Yes,

Commissioner Meeks?

COMMISSIONER MEEKS: Yes. Well, I don't know if that means that we need to amend to when we approve the budget on the agenda or not, but, okay.

CHAIRPERSON BERRY: So you agree with that?

COMMISSIONER MEEKS: I'm fine with postponing it.

CHAIRPERSON BERRY: Well, even though Terri will now have to take down her Powerpoint presentation, which I always love to see these Powerpoints, we should act on it at the next meeting, though.

STAFF DIRECTOR JIN: Yes, because that's about the last --

CHAIRPERSON BERRY: Right. It's a statutory report, and we have to turn it in every year.

COMMISSIONER REDENBAUGH: That's right, it's a serious report.

CHAIRPERSON BERRY: Yes. All right. Terri, we apologize to you, and we defer. And if there's no objection, we'll put if off until the next meeting.

COMMISSIONER REDENBAUGH: I also, if I

might ask, that on the --

CHAIRPERSON BERRY: In the meanwhile, Russell -- Commissioner Redenbaugh?

COMMISSIONER REDENBAUGH: Yes.

CHAIRPERSON BERRY: Could you in the meanwhile have a conversation -- once you know what you are concerned about talk with Les or have your assistant talk with Les and maybe Terri and whoever to see whether there are some things that could be changed, these are always open, or suggestions that you have for language or whatever or things that you want done? Could you do that, please, in the interim?

COMMISSIONER REDENBAUGH: Yes, I will.

CHAIRPERSON BERRY: All right. We really very much -- anybody else can do that too if you want to, obviously.

COMMISSIONER REDENBAUGH: Also, Madam Chair?

CHAIRPERSON BERRY: Yes.

COMMISSIONER REDENBAUGH: I might ask that on statutory reports we have more than a week to review them. I think their seriousness is --

CHAIRPERSON BERRY: Yes.

STAFF DIRECTOR JIN: Yes. Commissioner Redenbaugh, I just wanted -- yes. We did send a

revised to you at the mailout but --

COMMISSIONER REDENBAUGH: Oh.

STAFF DIRECTOR JIN: -- we did send a first version the week before, so, yes, ideally, we would have given even more time, but the revised version was fairly minor revisions to the first one. So there was a couple of weeks, but I still understand the point you're making.

COMMISSIONER REDENBAUGH: Even two weeks is short. I mean I'm a slow reader.

STAFF DIRECTOR JIN: Yes. Well, I think given that Terri got this report ready a month earlier than normal, that gives us the latitude to push it back, but we wanted to get it to you as soon as we could.

COMMISSIONER REDENBAUGH: All right.

CHAIRPERSON BERRY: Okay. Well, if there are -- that's the last item we're going to consider today before the briefing.

IX. Briefing on Racial and Cross-National Disparities in Prisoner Incarceration Rates

CHAIRPERSON BERRY: So we are now going to go to the briefing. And the briefing is on racial and cross-national disparities in prisoner incarceration rates from two experts in the area of criminal

justice, and I would ask you to please come forward, Mr. Marc Mauer of the Sentencing Project and Professor Paul Butler of George Washington University Law School. Is that right, staff? Who's the staff on this?

COMMISSIONER REDENBAUGH: And, Madam Chair, I'm going to leave the call now. Thank you.

CHAIRPERSON BERRY: All right. Thank you. Thank you. Who is the staff on this?

STAFF DIRECTOR JIN: Where's Mr. Butler?

CHAIRPERSON BERRY: All right. Well, we'll go ahead and start with you, Marc, if that's okay. Is that okay? Because I understand you have a time problem. This topic is particularly salient considering the Washington Post just recently reported that 625,000 former prisoners will be released and coming back having paid their debt to society, the U.S. society, this year, if that number is -- if I've got it right. And this is a part of a record flow of inmates. And this discussion I remember having with the Justice Department on several occasions over the last 15 or 20 years about what would happen when all these people got out of prison and what was the impact on them. And there were talks from various attorney generals about great plans they had to see what they

could do about this, but I'm not aware of what anybody did. But it clearly is a crucial issue, and we are very much interested in it. We've had a number of reports on criminal justice issues, and it's one of the areas of our particular responsibility.

So Mr. Mauer is Assistant Director of the Sentencing Project, which is based here in Washington and promotes criminal justice reform and develops alternative sentencing programs. He's directed programs on criminal justice reform for the past 25 years and is the author of some widely cited reports, "Young Black Men in the Criminal Justice System," "Americans Behind Bars: A Series," and we want to hear from you and be advised about what we can do and make sure we're informed about these issues.

Aha, Professor Butler is a Professor of Law at the George Washington University Law School, and before that he was a clerk in the U.S. District Court for the Southern District of New York. He has worked for Williams & Connolly law firm here. He was a federal prosecutor whose specialty was public corruption. He teaches and writes in criminal law and race and law and has published the usual law review articles, has appeared on various television shows and the likes doing this. He writes and lectures

frequently on this subject, and so we thank you very much for being willing to come too. Mr. Mauer, we'll start with you, please.

MR. MAUER: Sure. Well, thank you very much for the invitation to be here, and obviously these are very important issues and ones that are receiving the attention they deserve now, I think. My testimony focuses on the international aspects of incarceration and essentially the fundamental question of why the United States imprisons more of its citizens than do comparable nations, other industrialized democracies. And I want to try to trace a little bit of what those developments look like and to try to look at how the United States does compare with other nations and explore some of the factors, some of the theories about why we incarcerate more of our citizens than other nations do and then discuss a bit about what I believe some of the implications and what some of the impacts are of the high rate of incarceration in the United States.

To begin with in terms of an overview, if we were to look at much of the history of the 20th century, the picture we initially see in terms of imprisonment in the U.S. is one of relative stability. Beginning in the 1920s, for a period of about 50

years, there was no significant change in the U.S. prison population. There was a bit of a rise during the Depression, somewhat of a decline during World War II but roughly a relatively stable number of people in prison, hovering around 200,000 people or so.

Beginning in the early 1970s, what we've seen is a dramatic and unprecedented rise in the prison population nationally. Today, we have more than six times the number of people in prison and jails we did just 30 years ago. We've recently reached a total of two million Americans behind bars, and the United States has now become the world leader, both in absolute numbers in terms of our rate of incarceration, in terms of the proportion of our citizens that we have behind bars. If you compare the U.S. with the other industrialized nations that we're most similar to, Canada, western Europe, we incarcerate at about five or eight times the rate of those other nations.

I think we know as well that incarceration has had very disproportionate effects particularly on communities of color in this country. We see the most extreme figures showing up in terms of African-American males. As we sit here today, for black males in your late 20s, one of every eight is locked up as

we speak, either in prison or jail. If we look over the course of a lifetime, data from the Justice Department tell us that a black male born today has a 29 percent chance of doing time in state or federal prison at some point in his lifetime. So, essentially, nearly three of every ten black boys born today can expect to go to prison if current trends continue.

Now, the overall picture, it strikes me, is a strange one. Here we are the wealthiest society in human history and yet we've also come to rely on incarceration to a degree that's really been unknown in the history of any democratic society up until this time. And so, obviously, these are very profound questions we need to explore.

Now, in terms of thinking about why we have such a high rate of incarceration, the first factor that often comes to mind for most people is that we must have a higher rate of crime and therefore we have more people in prison, and, certainly, over the last 30 years when we've seen this sixfold increase in the prison population, we may have seen a similar increase in crime that would have contributed to this rise. So the question is what do we know about crime rates in the United States compared to

other industrialized nations?

Well, over the last 15 years or so, the best data, and it's difficult to measure these things sometimes because of differences in definitions and reporting, but the best data come from a series of victimization studies that have been done in about 17 industrialized nations including the United States that attempt to analyze the actual rate of crime and victimization in different nations. And what we find here is interesting.

First, for property crimes or non-violent crimes, the United States does not particularly stand out among these other nations. Our rates of property crime are roughly in the general range of other countries, and in fact in some categories Americans are even safer than some other people are in other places. For example, if you live in New York City, you're now less likely to be a victim of theft or burglary than if you live in London, and we see similar comparisons elsewhere. So we don't see any dramatic differences that would explain the rate of incarceration there.

If we look at violent crime, we do see some significant differences at that rate. Homicide is the easiest crime to document and compare across

national lines, and here's what we see is that despite the very significant decline in homicide in the U.S. over the last decade, our rate of homicide today is still about four times that of most European nations. So we've had a very sustained decline in homicide and yet still four times the rate of comparable countries.

And I will say, too, if we look at homicide, if we break it down, a good part of the issue there has to do with firearms. Essentially, guns are much more widely available in the United States than other industrialized nations. Without getting into a major debate around gun control issues, the simple fact is when you have more guns in circulation at least some people will use them for bad purposes, and it's much easier to kill someone with a gun than it is with a knife, fist or other object. So if you take away the homicides committed with the firearms, then the differential between the U.S. and other nations is more or less cut in half. So we still have a higher rate of violence and homicide but not nearly to the extent as when you put guns into the equation.

So we have a higher rate of certain types of crimes, violence in particular, and then the question becomes what's been going on over the last 30

years, and to what extent does this explain what we're seeing? Well, if we go back to the early part of the rise in imprisonment of the early 1970s, there was an actual increase in crime, roughly from the mid-60s to the early '70s. There are a number of reasons for that rise in crime, but there was a measurable increase in crime during that time. And so this probably explains some of the initial rise in the prison population that we saw in those early years. All things being equal, the more crime you have, the more people are likely to end up in prison.

Since that time, though, there is very little evidence to suggest that a continuing rise in crime has contributed to this sixfold increase in the prison population. If we go back to 1980, the most sophisticated research has been done by criminologist Alfred Blumstein and Alan Beck at the Justice Department. They looked at the near tripling of the prison population from 1980 to 1996. Their conclusion was that changes in crime explained about 12 percent of the increase and that changes in sentencing policy and practice explained 88 percent of the increase. Essentially, it became far more likely that if one was convicted of a crime, you would be sentenced to prison, and if you were sentenced to prison, you would

go for a longer period of time. So changes in policy and practice.

We see this most dramatically in the so-called "War on Drugs" of the last 20 years or so where we've had a very focused, very sustained increase in law enforcement incarceration focused on drug offenses. It's actually been -- if you look at incarceration rates, there's been a 1,000 percent increase in the number of drug offenders in prison. We go from a point in 1980 about 40,000 people in prison or jail for a drug offense. Today that figure is 450,000 locked up for a drug offense. And the number in prison or jail for a drug offense today is almost equal to the total number of inmates back in 1980. So a very remarkable rise in a relatively short period of time.

Now, other ways of looking at the international comparisons, one question is, well, what happens to a person convicted of a felony in the United States compared to England or France or Canada or some other country? What do our sentencing practices look like? Here, too, there's not an awful lot of research but the research that has been done shows a couple of things. First, for violent offenses, we don't see dramatic differences in

sentencing practices and not surprisingly violent offenses are treated very seriously in most countries. Most violent offenders are going to go to prison and often for a considerable amount of time.

When it comes to property or drug offenses that's where we begin to see some significant differences, and, essentially, if you're convicted of one of these offenses in the U.S., you're far more likely to spend more time in prison than if you live in Canada or England or a number of other nations.

And I would stress here that these are essentially policy choices. There's nothing written in stone that suggests that two years is the appropriate amount of time for a second-time burglar to spend in prison or one year or three years or anything else. These are matters of policy and practice use of resources and how different societies develop these practices over time. We also see even in the United States we have 50 criminal justice systems, and if you compare sentencing practices among the 50 states, you'll see considerable variations as well. So it suggests that policy initiatives and policy directives have much to do with what goes on in the prison system, what the size of the prison population looks like.

We can see this again internationally. If you look at changes in prison populations over the last 20 years or so, probably the most significant countries to see a very dramatic change have been Finland and the former West Germany, both of which accomplished a very dramatic reduction in their use of imprisonment over a period of ten or 15 years. And, essentially, in both cases, policy makers, leaders in the country came to believe for a variety of reasons that their incarceration rates were too high. In Finland, for example, they're essentially used to comparing themselves to the other Scandinavian nations and they had a rate of incarceration that was roughly double that of Sweden, Norway, Denmark, and they felt it was just inappropriate regardless of crime rates.

So both in Finland and West Germany a number of initiatives were taken essentially to divert more offenders from prison to a community-based sentence, to shorten the length of incarceration for a number of offenses, to make use of a wider variety of alternative sentencing options, changes in sentencing, life in prison, and they made these policy changes, achieved a reduction in the prison population with no substantial impact on crime one direction or another and no significant backlash from the public

either, so a policy initiative that resulted in those changes.

Here in the United States I think we've also seen some very significant policy changes over the last 20 years, generally under the heading of the "Get tough" movement, basically to get tough on crime by getting tough on offenders and putting more people in prison. The particulars have been the War on Drugs policies, such as mandatory sentencing, three strikes and you're out, truth-in-sentencing, all of which have achieved a very dramatic rise in the number of people locked up in prison.

Probably the most extreme has been the three strikes and you're out laws that now exist in about half the states. California has the most extreme three strikes and you're out law, which also includes a two strikes provision with well over 40,000 people have been subject to its provisions. Most of you are aware the Supreme Court recently ruled on the California three strikes laws this session and upheld the law.

One of the two cases that came before the Court from California involved a man whose third strike, his third felony involved on two occasions within the same week stealing videotapes from a K-Mart

store, the value of the videotapes was $153. He's now doing 50 years to life in California prisons under the three strikes law, and this is one of the cases the Court rules constitutional and upheld the law.

So the legislators of California have chosen to spend I think conservatively well over a million dollars to lock up this videotape thief for at least 50 years as their crime control policy. I don't think that's what the voters of California believe they were voting on when they approved this policy. No one ever said, "Should we lock up videotape thieves for 50 years and spend $1 million," but essentially that's one outcome of the law that they've achieved.

Well, so we've had this very dramatic rise in prison population, much more dramatic than any other nation, and it's really unprecedented. And I think you will find, I think the evidence I presented, whether you talk to liberal or conservative criminologists, I think there's a very broad consensus that it has been a change in policy and not a change in crime rates that explains the rise in the prison population. Some people think this has been a conscious policy because this is what we chose to do, and this will have a positive effect on crime, and other people think that it's an ineffective policy but

nonetheless I think it's a pretty broad consensus that it's not a sixfold increase in crime but rather change in public policy that's led us to this situation.

So, therefore, it seems to me, the questions we want to ask are what we have achieved by these policies, what kinds of differences has this made, particularly in terms of the rate of crime but also in terms of other impacts that we may see?

Well, just briefly, if we look at the crime situation today, there's different ways to measure crime and different trends in crime, but about the best that one can say in terms of crime today is that despite the very significant decline over the last ten years or so, crime rates today are roughly where they were about 30 years ago at the time that the prison increase began. So if we had been having a discussion back in 1972 and said we've got a problem of crime, what should we do about it, and the proposal on the table was to have a sixfold increase in the prison population at a cost of some $40 billion a year with wide-ranging impacts and at the end of that experiment of incarceration we would have exactly the same crime rate as we would today, I don't think we'd have terribly broad support for such a policy. But, in effect, this is exactly what we've done over the

last 30 years.

Now, if you look at this last decade or so and the decline in crime and we say, well, how much is this going to do to rising incarceration, the best studies suggest that maybe a quarter of the decline over the last decade has been due to locking up more people in prison, about 25 percent. Well, the question then is is this good news or bad news? Twenty-five percent decline is a significant number of crimes that did not take place as a result of higher incarceration, but it also tells us that 75 percent of the decline was not due to increased imprisonment.

So what else was going on? Well, there's an ongoing debate about this, but I think most people believe it was a combination of factors that were changing in recent years. First, we had an improved economy, more of a sort of trickle-down effect, better low-wage jobs available for some people getting out of prison. We had changes in drug use and the drug trade after the crack epidemic of the late 80s. That waned by the early '90s and you had less of the violence associated with that. We had changes in policing in some cities, more strategic policing. That probably helped somewhat. Some urban anthropologists believe that there's been changes in behavior, particularly

the young people and their families, basically young people getting themselves out of situations that are likely to lead to conflict and violence, and so we see them taking some control over their lives. So we have a number of things that are beginning to change which suggests that there are different approaches to dealing with crime, different kinds of investments we might want to make.

I think we're also seeing in the broad picture in terms of the crime control impact to the extent that prison, whether through incapacitating people --

CHAIRPERSON BERRY: Now, Marc, you've got about five more minutes because we've got to hear Mr. Butler and then ask you questions.

MR. MAUER: No problem at all. Thank you. No problem. To the extent that prison may have some impact on crime, I think we're very much at a point now of diminishing returns. The prison will have some impact on crime for some people but expanding the prison population endlessly is not necessarily always a wise strategy. One quick way to think about this is think of two different offenders in prison. One is a serial rapist who's terrorizing a community, the police finally catch the person, convict him, put him

away for a long time. In that case, we've brought some real safety to the community. The second is a kid on the street corner who's selling drugs, gets caught up in a drug sweep, is put away in prison on a mandatory drug charge for five years. In this case, we've also increased the prison population, but it's not at all clear we've done anything about the drug problem. That street corner where he was just picked up probably now has somebody else who stepped up to meet the demand for drugs in that community, and meanwhile we're spending $20,000 a year to keep someone else locked up in prison.

Let me close by saying that I think when we evaluate the impact of incarceration beyond just the crime control impact, we also need to look at what I would call the social impact or the collateral consequences of imprisonment. And this is that the effect of incarceration goes well beyond just the individual but we're now seeing impacts that affect families and communities in a broad sense. To begin with, we know there are about a million and a half children today who have a parent who's locked up in prison. In the African-American community, the figures are about one of every 14 black children has a parent in prison. This is the next generation of

children growing up dealing with the stress, the stigma, the shame of having a parent who's incarcerated. This doesn't mean that all their parents should necessarily be let out of prison, but it does suggest that we have the makings of a whole other problem being developed here.

We also see as a result of policy changes in recent years that there's a whole range of additional barriers that are placed on former offenders trying to come out of prison and make it in the community, and particularly we see this for drug offenders. So depending on the state in which one lives, if you've been convicted of a felony drug offense, even a first-time, non-violent offense, when you get out of prison now, you may be barred from getting welfare benefits for life, you may be prohibited from living in public housing, you can lose your right to vote for life, if you want to go to college, you can be denied access to student loans, employment barriers, we can go on and on.

The irony of many of these policies is that many of them apply only to drug offenders. So I might be a three-time armed robber, get out of prison today and I can immediately move into public housing or apply for welfare benefits. Someone else just a

single felony drug possession conviction is barred from all those same kinds of benefits. And it's not so much of a question of access to benefits but it's a public safety, a reintegration issue, how we bring people back into the community.

The question, let me just conclude by saying, we often get into a discussion of the relationship between incarceration and crime and what effects are we achieving. I don't want to suggest that's an inappropriate discussion to have but I think our discussion about how to promote a better crime policy needs to be much broader than that. Most of us instinctively when it comes to raising our children or when it comes to looking at community issues, we know that building strong families and communities is essentially how most people would like to raise children and build safer communities. We don't normally think of relying on a prison system as a way to teach people about values, teach people about obeying the law, teach people about rewards in life. And I think until we have that broader conversation, we risk really missing the boat in terms of how we can bring about much more public safety.

CHAIRPERSON BERRY: Okay. There will be some questions in a minute. Hang on. Thank you.

Professor Butler, please.

PROF. BUTLER: Good morning. I appreciate the opportunity to discuss this important issue, and it's a particular honor to discuss it in front of my Administrative Law Professor, Commissioner Edley.

(Laughter.)

PROF. BUTLER: I'm going to emphasize the domestic part of what Mr. Mauer talked about. We're talking about disparities in criminal justice so Mr. Mauer discussed international disparities. I'm going to talk about disparities within the United States, and those numbers are dramatic and they're disturbing.

There are more young black men in prison than in college. Black women are five times more likely to be incarcerated than white women. Hispanics are about 13 percent of the population, and they're 18 percent of people who are incarcerated. African-Americans are about 12 percent of the population, and they're 44 percent of people who are locked up. As Mr. Mauer said, a black man has one in three chance of going to prison in his lifetime.

If you look at young black men who haven't completed high school, nearly 50 percent are locked up right now. About 50 percent, 44 percent to be exact, of young black men who are high school dropouts are

locked up. Black women are the fastest growing segment of the prison population.

One final fact just to give you a sense of the disparity. Think of these numbers: 600, 1,700 and 4,000. For every 100,000 white men, 600 are locked up; for every 100,000 Hispanic men, 1,700 are in prison; for every 100,000 African-American men, 4,000, actually close to 5,000 are locked up. And for women those numbers are 68, 137 and 349. So for every 100,000 white women, 68 are in prison; 100,000 Hispanics women, 140 in prison; 100,000 African-American women, 350 in prison.

Now, these numbers are not only dramatic they've recently increased, so I want to briefly describe a few theories about why that is and to end by discussing the dramatic impact on race relations that this disparity is having.

Now, one explanation for the disparity is that African-Americans and Hispanics commit more crime or they disproportionately commit the kinds of crimes for which people go to prison. Criminologists believe that that is so, and they think that because they look at arrest rates, but they also caution that arrest rates don't tell the whole story. Arrest rates are also about police practices and presences, so they're

not entirely reliable for determining the actual rates of crime among groups.

But most criminologists concede that African-Americans and Hispanics do disproportionately commit some kinds of crime. Why is that? Most of the scholars who look at the issue say, "Well, we have to think about opportunities, we have to think about education, we have to think about poverty." For example, much street crime is committed by people who haven't completed high school. Blacks and Hispanics disproportionately do not finish high school. They're disproportionately poor as well. We know that there's a high correlation between crime and residence in a low-income neighborhood. So when we think about racial disparities in criminal justice, we also have to think about racial disparities in wealth. In other words, blacks and Hispanics don't commit crimes disproportionately because they're black and Hispanic; they commit crimes for the same reasons that other people commit crimes: inadequate education, lack of opportunity, lack of hope. Blacks and Hispanics are particularly likely to be victims of those maladies. In the United States, almost half of black children are born in poverty, 39 percent of Hispanic children are born in poverty, 16 percent of white children are.

Now, if you saw those statistics anywhere in the world, you could predict who's going to be in prison and who's going to go to college. The vast majority of people of color are law-abiding, productive citizens, but a disturbingly high number of them come into the world with the odds stacked against them.

Now, some of that disparity then is explained by disproportionate crime by blacks and Hispanics, but it doesn't explain all of it, and it also doesn't explain why the disparity is rising. I teach criminal law, so I tell my students that prison is for people in our society who are the most dangerous or the most immoral. If you think that's right, then that means that black women are significantly more immoral and dangerous now than they were in 1980. If you think that we're using prison correctly, that means that of all of the immoral and dangerous people in the United States, about half are African-American, because almost half of the people who are in prison are African-American. If you don't think that we're using prison correctly, if you don't think that that corresponds with your sense of the United States, then you might wonder why those statistics are so dramatically disparate.

Well, one important explanation brings us back to the selective enforcement of drug crimes, the "War on Drugs." There's compelling evidence that drug crimes are selectively enforced in minority communities. According to the Justice Department, for example, black people don't use drugs any more than whites do. The most recent statistics are based on this black and white paradigm which hopefully we'll get away from in future statistics. But according to the Justice Department, African-Americans are about 13 percent of people who use drugs. If you look at people who are locked up for drug use, about 70 percent -- 70 percent of people who are in prison for drug use are African-American.

Now, we don't have good statistics about the sellers, but criminologists sense that drug transactions are like most other informal social transactions in the United States; that is they're intraracial. Among people who do report buying drugs, most of them say they bought drugs from people of their same race. So 13 percent of offenders, 70 percent of people who are locked up for the offense.

How do you explain that? It's, again, probably the most important reason for this rising disparity in incarceration. So particularly before

September 11 the War on Drugs was the most important law enforcement priority in the United States, and this war was selectively waged on the black and brown communities, and thus we get those ugly statistics.

Now, why is that? In part, in large part, it's because of racial profiling. Racial profiling is a result of this rather un-American concept called racial incongruity that suggests that when we see people in areas or situations where we don't expect people of their race to be, we're suspicious, law enforcement should be suspicious. So, thus, an Asian or a white person in a white -- I'm sorry, in a black or Hispanic neighborhood is suspicious; the police should pay more attention to them. That's what law enforcement tool of racial incongruity says. Racial profiling also results in the suspicion of blacks and Hispanics in virtually every corridor of public life -- on I-95, in the airport, in the rail station, on public streets. If you're black and Hispanic, that goes into this indicia of suspicion that you might be using or selling drugs, kind of like if you're driving a big, expensive car or if you're paying for a transaction with a lot of cash, if you look black or you look Hispanic, that's also suspicious.

Well, it turns out that there is this

important relationship between looking for things and finding things. And so when the police are authorized to look particularly at African-Americans and Hispanics for drugs, they disproportionately find them there.

Now, I went to Harvard Law School and Yale College, and I can guarantee you that if the drug laws were selectively enforced in those communities the way they are in the black and brown communities, then there would be a high percentage of Yale College students and Harvard law students under criminal justice supervision. I won't ask Professor Edley to comment on that.

(Laughter.)

COMMISSIONER EDLEY: Just stay away from the faculty, that's all.

(Laughter.)

PROF. BUTLER: Racial bias on law enforcement is another important explanation of the disparity. Now, there are dramatic examples of this bias, such as the recent case in Texas where the testimony of one racist police officer resulted in many African-Americans being wrongly imprisoned, and those men and women were released this week only because they had the benefit of extraordinary lawyers

from Washington, from the NAACP, the Legal Defense Fund in New York and law firms in New York. Most defendants, including those who are wrongly convicted, don't get the benefit of those resources.

But most of the bias that results in some of this disparity doesn't have to be that blatant, and in fact it doesn't even have to have an evil intent. Some police and prosecutors admit that they selectively enforce the drug laws in African-American communities. I'm a former prosecutor. I've had a number of conversations with police officers and my fellow prosecutors who say, "Yes, it's good for the African-American and Hispanic communities to have their criminal law selectively enforced in those communities." Police and prosecutors have huge discretion with who they charge with a crime, and so when a white teenager through the policy is found with a marijuana cigarette gets told, "Go home," the police officer throws away the cigarette and doesn't lock up the young woman, a young black woman, on the other hand, might get locked up. When that happens over and over because of the great discretion that prosecutors and police have, that results again in some of these disparities, even if the police officers and prosecutors are not intentionally racist.

In the penalty context, we know that jurors, judges, prosecutors and police officers treat as the most serious kind of crime one that's committed by a black against a white. Race still matters in the United States, and it matters in terms of who gets locked up and who goes free.

Finally, the effects. What are the effects of this dramatic disparity, and what are the effects that they have on race relations? Well, if you read any of the newspapers or watched TV this morning, you see more dramatic evidence of the effects in Benton Harbor, Michigan, yet another civil uprising because of a perception that criminal justice is unfair, is biased against people of color. Other evidence of this perception in some predominantly minority communities, think of the Bronx, think of Washington, D.C., some jurors have refused to convict people who they know are guilty of drug crimes because they don't want to send another minority person to prison when they know that white people don't go to prison for these crimes. Polls after polls show that minorities lack confidence in the criminal justice system. Fourteen percent of black men can't vote in the United States, because they have felony conviction. In Alabama and Florida, that number is 30

percent -- 30 percent of black men can't vote.

Now, this ought to be considered a national emergency. It affects the minority communities and the majority community equally. In some minority communities now there's almost an expectation that young people, particularly young men, will go to prison. If prison becomes a right of passage, if there's no stigma attached to doing time, then the criminal law basically loses its effectiveness. The way that the criminal law works is we obey the law because we don't want to be punished. If you expect to be punished, then the criminal law, the very theory behind it, is undermined.

And finally there's the matter of cost. Locking up all of these people and particularly such a large minority, African-American and Hispanic people, is hugely expensive. Imagine that, two million people in prison, roughly $25,000 a year per inmate to keep them locked up there. In the current economic environment, many states just can't afford that; they have to cut. Now, unfortunately, the most common area where they cut is education and thus this vicious cycle continues. Some citizens don't get a decent education, some of them turn to a life of crime, and then they go to prison where they don't get drug

counseling or rehabilitation or vocational training; they sit in a box for five or ten years and what do you think happens when they get out?

Now, some minority citizens have said that if prison were truly rehabilitative, they'd still be concerned about the disparity but they wouldn't be as concerned, because they would think that the inmates were being helped, because they know when they get out they're going to come right back to their communities. Where prison now mainly serves as a finishing school for criminals and it mainly perpetrates this vicious cycle of hopelessness and lack of opportunity.

CHAIRPERSON BERRY: Could you finish up, please?

PROF. BUTLER: On a more hopeful note -- I certainly will, because there is some good news. President Bush we know this week prohibited federal policy agencies from engaging in gross racial profiling in most cases, including, importantly, in drug cases. And we also know that we can help keep people out of prison by doing practical things, including teaching people how to be parents, how to be better parents, giving kids incentives to stay in high school, including financial incentives to stay in high school and also vocational training. September 11 has

focused our attention on safety in a more fundamental urgent sense, and one of the lessons of September 11 may be that we're not safe when we focus on locking up African-American and Hispanic people. So I hope that that will be the beginning of a more responsible criminal justice policy that will reduce these dramatic racial disparities that we see.

CHAIRPERSON BERRY: Thank you very much. I'm going to recognize people but I've just got a burning question for you, if you don't mind. You were talking about the comparison between -- both of you did -- incarceration rates and crime rates. Wouldn't a better comparison be to figure out the comparing drug use and incarceration rates? In other words, the policy, as you described it, is directed mainly, when you look at what's happening, toward enforcing the drug laws for people in there because of drug offenses. Wouldn't it be appropriate to measure whether or not this policy has resulted in fewer people using drugs, drugs being taken out of communities? Leaving aside whether there should be such a policy, which is debatable, but wouldn't that be a better --

MR. MAUER: Yes. No, that's absolutely correct. Certainly, if we look over the period of the

War on Drugs beginning roughly in the mid-1980s till today and the dramatic rises in the prison system I've documented, one would think first that if you think of it as sort of a supply and demand issue, if you have heavy enforcement first, the cost of drugs should go up considerably, because there's a bigger price to be paid for them and you're trying to interrupt the flow of drugs. And we don't see that. If anything, the price of drugs generally has been going down, so drugs are still readily available for those who want to use them.

If you look in terms of drug use rates and drug abuse rates, we see fluctuations over the last ten, 15 years or so. It goes up a little, it goes down a little. There are different ways one can measure it. I don't think anyone can point to any dramatic declines in either abuse or general use that corresponds with the inception of the War on Drugs in particular. And I think much of this has to do with how we address the problem.

Again, if you think of supply and demand, two-thirds of federal funds to deal with drug issues are going into the enforcement side, to police and incarceration, just one-third into prevention and treatment, and we know that there's an enormous gap

between the number of people who need treatment and the readily available treatment slots. So I think it's policies that have essentially exacerbated the problem, and I think that the results we see are not very encouraging.

CHAIRPERSON BERRY: Yes. Commissioner Edley?

COMMISSIONER EDLEY: One comment and then two quick questions. Thank you both for your presentations and the documents. Really, thank you very much.

The quick comment is that I think that a couple of points that both of you made in terms of the incidence of incarceration, if you will, the incarceration risks, I'd simply made the observation that if you don't -- if instead of looking at the aggregate one looks at particular communities, then it shoots way up. So as bad as three in ten is, if you just look at kids in particular neighborhoods, I'm sure it's dramatically worse.

The first question is can either of you just tell us has a lot of work on this issue been done in recent years by the National Academy of Sciences, National Research Council, because it occurs to me that one thing we might think about doing, I don't

know if we've ever done this, is that we as a Commission might write a letter to the President of the National Academy of Sciences asking them to undertake some kind of literature synthesis on a set of these questions, just as a way to try to help frame public understanding by expressing whatever scientific consensus there is about some of the issues which you've touched upon. But it doesn't make any sense for us to write the letter if in fact they have in recent years done substantial work.

And, lastly, the other thing is I think we've seen something of a breakthrough in the last ten years or less with respect to appreciating the strategies for trying to monitor, detect and hence address racial profiling by police, in part because of the consent orders that have arisen out of litigation. And it's not all there yet, but there's been a lot of work put into this over the years. And I'm wondering whether in particular, Paul, some of the things that you spoke about in the exercise of discretion in the selective prosecution, the selective enforcement and so forth where are we with respect to evolving the appropriate strategies in data collection structures, et cetera, for defining and then measuring the extent to which there is an appropriate exercise of

discretion in these other realms? Do you see the point I'm making?

PROF. BUTLER: I do understand, yes.

COMMISSIONER EDLEY: Okay.

CHAIRPERSON BERRY: So could you address both of those questions?

MR. MAUER: I can take the first one.

PROF. BUTLER: Sure.

MR. MAUER: The National Research Council did a fairly comprehensive set of reports. My recollection is the early '90s there was a series of -- I think it was a four-volume series on violence, essentially, and took a pretty broad-ranging look, including looking at the inception of the criminal justice system as well as other areas of policy. So I think it would be worth reviewing that. My sense is there's been a good deal of research done since then that a lot of the dynamics we're talking about have changed since then. So how extensive an update would need to be done I'm not sure, but I think that was the last major time they've looked at that. So building on that, I think it would be an appropriate question to say what's happened since then?

COMMISSIONER EDLEY: So at a minimum we could ask them to consider an update.

MR. MAUER: Exactly, yes. I think it would be very appropriate right now.

CHAIRPERSON BERRY: Okay. So that's something -- do you agree with that?

PROF. BUTLER: Yes, I do.

CHAIRPERSON BERRY: So I'm just telling the staff that that's something that they should work on. Okay. Go ahead.

PROF. BUTLER: Regarding Professor Edley's first comment, he's absolutely right about numbers being more disturbing when one looks at specific communities. There were studies done in Washington, D.C. and Baltimore in the late '80s and early '90s, and there the numbers were around 50 percent of young black men being under criminal justice supervision in a year. So in a year in Baltimore and Washington, D.C., about half of young black men were either in prison, on probation or parole or awaiting trial.

Regarding racial profiling, there is kind of bad news on the political front but good news on the practical, experiential front. The bad news on the political front just preceded or actually comes after today's or this week's good news with President Bush outlawing racial profiling other than for national security. Now, some people are concerned

about that being an exception that will eat up the rule but to the extent that it seems to outlaw racial profiling for drug crimes is good news for people who are concerned about these disparities. Now, President Bush -- the rule only applies to federal law enforcement agencies, so they're not the main law enforcement agencies who will enforce and prosecute drug crimes, but it's a good beginning, especially as an expression of political purge, because the President has gone much further than the Congress has been willing to go, and that's where the bad news on the political front comes from. Congressman Conyers has proposed a bill that would not outlaw racial profiling but merely require law enforcement agencies to monitor the races of the people who they stop. And thus far Congress has been unwilling to go that far.

The good news, though, on the experiential front, and this is very encouraging, comes from the Customs Department. In the Customs Department, President Clinton issued an order which forbade them from engaging in racial profiling, and they had used racial profiling in the past. They thought that race was a useful indicia of who was likely to bring drugs into the country. When they stopped doing that, guessed what happened? Their hit rate went way up;

that is, when they stopped using race to determine suspicion and started using more scientific law enforcement factors, they got better at law enforcement. There's a lesson in there.

CHAIRPERSON BERRY: Yes, Vice Chairman?

VICE CHAIRPERSON REYNOSO: I have one comment and two questions, one specific and one general. My comment is that after studies have been done by police departments, somebody has to go back and double check it. I've got a student who's black who was given a ticket the other day and her racial designation was white by the police officer. She says she knows one other black person who had the same thing happen and one Filipino. So some studies need to be done in that regard.

My two questions are these. The specific one is this: During the Clinton Administration, if I remember correctly, there was an anti-drug campaign, a publicity campaign that I believe cost something like a billion dollars going on television and saying, "Don't use drugs," et cetera, et cetera. My question is have studies been made to see whether or not that many millions of dollars spent did any good? Even the daily newspapers have reported some of these statistics. I remember the Sacramento Bee where I

live, for example, had a report on the great disparities internationally, and yet somehow that hasn't convinced either politicians or the public, and I wonder what your thoughts are why that's true.

CHAIRPERSON BERRY: And you've been doing this a long time.

MR. MAUER: Well, a couple quick responses. In terms of the drug campaign, I think it wasn't quite a billion dollars but it was in the range of a couple hundred million on the advertising campaign. The current Office of National Drug Control Policy essentially said that they don't think it was terribly effective. They've done some evaluations themselves where essentially they've discontinued that. So whether or not it was a good idea to begin with, there's not a lot of evidence that shows that that particular campaign was successful.

In terms of changing attitudes and policy, I think that public attitudes on crime and public safety are much more nuance than many political leaders often recognize. You know, we have political campaigns and we engage in sound bite debates, and we have three strikes and you're out or two strikes and you're out, and that seems to be the range of discussion. I think there's good evidence that when

the public is presented with viable, well thought out options for handling things in a somewhat different way, that we see very reasonable responses.

So, for example, if you look in the State of California, the voters in California approved a three strikes and you're out law. Now, I happen to think it was overbroad and all, but they believe this was for serious violent offenders and they wanted to lock them up for a long time. Several years after that the voters in California also approved Proposition 36, which was designed to divert low-level drug offenders into treatment rather than incarceration.

Now, some people think that's contradictory. They're tough on crime here and they're soft on crime there. I don't think that's the message. I think the message is the public is willing to make distinctions between people who they're afraid of because they're potentially dangerous and violent and people who need help and need treatment and for whom a prison cell is not the answer.

We see similar results with the drug courts that have been spreading very rapidly around the country. Judges love them, communities love them. The message is very simple: If you get someone with

an addiction into treatment rather than a prison cell, everybody gains. So I think this kind of understanding and this kind of discussion would help us to flesh out how we could better use prison, how we could better use other kinds of options too.

CHAIRPERSON BERRY: I had a number of questions, if I may. First of all, Professor Butler, I assume you have -- from your comments, you've already analyzed and studied the racial profiling statement. We said earlier before you came in that the staff should look at what was issued as guidance on racial profiling, and I, yesterday, told some of the press that I thought it was encouraging that this had been issued, because we had tried to get Clinton to do more on this stuff and he didn't do it, we as a Commission. But that we were analyzing it to see how far it went and that there were some concerns about it not being mandatory and that it was simply guidance and that it didn't seem to be broad enough in scope. But have you -- while the staff is analyzing it, I'm taking advantage of you being here. Do you think that it goes far enough and that it is mandatory or am I confused or can you just tell me what you know about that, if anything?

PROF. BUTLER: Yes. I mean I don't have a

sense from the language whether the President intends to require every federal law enforcement agency to comply with it. Certainly, the spirit of his public comments suggest that he thinks that they will. Now, whether they view it in that light is a different question, but hopefully they will. The argument that he makes -- the President makes against racial profiling is a moral argument that people ought not to be judged on things they cannot help, like their race or gender, but rather judged based on things that they do. It's a classic moral argument. And given the strength of that argument, one would expect that it would apply to every federal agency.

CHAIRPERSON BERRY: Okay. And we also have done a lot of work here at the Commission, including a New York report we did which included racial profiling where we discovered that on Staten Island most of the people who got arrested by the police were either black or Hispanic even though they didn't live there but the fact what you said about racial incongruity --

PROF. BUTLER: Right.

CHAIRPERSON BERRY: -- the fact that they were there --

PROF. BUTLER: Exactly.

CHAIRPERSON BERRY: -- they got arrested. Most of the time they weren't charged with anything. But the question I wanted to ask is, first, for you, Marc, you mentioned in part things that might have caused a decline in crime rates, if I recall it correctly, and you listed a bunch of things that policy people have talked about. And one was more good jobs in the 1990s which sort of trickled down, if I heard you right. So does that mean that whether or not what happened in the '90s was a bubble, as some economists who criticize it, it was good for the crime rates of these poor people who got jobs. Would that be the point? So if --

MR. MAUER: Yes.

CHAIRPERSON BERRY: -- there was a bubble, maybe we need another one or something?

MR. MAUER: Right. I mean none of these things are simple correlations but, generally speaking, people coming out of prison we have two sets of issues there. One is that they generally have weak ties to the legitimate labor market, and so at best they're often going to get into the minimum wage sector. So in the long run that's not healthy for any of us because people don't like flipping hamburgers for very long, and it doesn't pay all your bills. But

in the short run, to the extent that those kinds of opportunities are available, it's a lot better than having people out on the street with no income whatsoever. So having a job is obviously the most critical element of trying to reenter the community successfully and staying away from crime. So economic issues are very critical, and the health of the economy in the next several years is --

CHAIRPERSON BERRY: So whatever the macroeconomic picture is, as long as there are jobs for people, jobs that they can do that are legal jobs --

MR. MAUER: Right.

CHAIRPERSON BERRY: -- then that seems to help with the crime rate.

MR. MAUER: Certainly. I mean not for everybody across the board. Some people commit crimes despite the fact they have very high paying jobs, but, obviously, in general terms, it's going to be very important.

CHAIRPERSON BERRY: Then the other thing, Professor Butler, when you were talking I was reminded by a law enforcement officer who was driving me around when I went to give a commencement address at a university down in Alabama, and we got to talking

about these issues, and he told me that what I didn't understand was that the young black or Hispanic who gets arrested is really a target of opportunity for a number of people. They're like a mark that's set up and a whole lot of people are sucking off them. And I said, "What do you mean by that?" He said, "First of all, law enforcement officials now get these grants to run these drug policy drug task forces like the one in Tulia, and we get paid overtime to work on trying to find these folks, so that's extra money in our pockets, so we like that. And we know where to go and we know that it's okay to do it, so we go find the blacks and Hispanics who are doing it and we're not going to get much grief from that."

Also, he said, "You don't understand that whenever you talk about the cost of people being in prison," because I kept telling him that, it's more than going to college and blah, blah, blah, he said, "Well, for some of these communities, they still like to have these prisons, because out here in this rural area prisons are jobs." And then I remembered a hearing we had here on young black men, a crisis among young black men, where somebody told us, a scholar, that there was this giant sucking sound of resources coming from the inner city black and Hispanic

communities going out to these areas where they have these prisons, where people get the jobs and they get counted for grants and all kinds of stuff.

So this guy was saying that in fact I should look at this as an economic windfall for certain people, having the kind of drug policy we have, having the kind of law enforcement that is selective means that the most vulnerable people, the blacks and Latinos that you're talking about, are being preyed upon by all these other people who are benefitting from them, and that is why we don't have alternatives or redirect our resources towards something else. I don't know, what do you think about that?

PROF. BUTLER: Well, it's true that prison construction and the employment that prisons occasion are short-term benefits to some communities, and often those are rural communities based on prison policy. But in the long term they're probably not that productive, because the money has to come from somewhere, right; it's not a zero sum game. So the money to build the prisons and to pay the prison employees comes from the economy, and it comes often from resources that are devoted to education.

We saw this vividly in California which

has the nation's best public institutions of higher education for years. And prison as a result of the three strikes -- in California, that is, as a result of the three strikes laws that Mr. Mauer mentioned, starting needing more prison space. There was almost a direct correlation between the money that was taken away from California's elite private universities and devoted to prison construction. So I think it's short-sighted to look at it solely as a boom for economics that's prison construction, because, again, the money comes from other important government services.

CHAIRPERSON BERRY: So if we changed our drug policy, if I understood you right, Mr. Mauer, that would go a long way toward -- and these sentencing policies that put people in jail for a certain length of time, but focusing on the drug policy, if we were, for example, to legalize certain kinds of drugs, then that would help to solve this problem.

MR. MAUER: Well, we could have --

CHAIRPERSON BERRY: Change the sentencing and divert people from sentencing to prison to some alternative.

MR. MAUER: Yes. We could have a debate

about legalization and obviously it would be a very heated debate. I think we could do an awful lot short of legalization if we think of it in terms of public health terms, a lot short of legalization that would help us end up with a much more effective approach to the issues. Essentially, if we decided to invest primarily as a first step in prevention and treatment rather than incarceration, we would direct resources directly at the problem rather than waiting until something very terrible has happened and then having a prison cell to deal with that after the fact. We'd have a better effect on drug abuse itself and resolving that. We'd free up lots of funds because incarceration's been very expensive, and I think overall we'd have a much better balance that we'd achieve.

CHAIRPERSON BERRY: Well, I hasten to add that I suggested one time to Jocelyn Elders that she announce that she wanted a study of the legalization of drugs, a mere study. I said, "You won't get into any trouble about that," and I said, "Just say you want a study," and you know what happened to her. So don't take any of my advice. Okay. Does anyone else have any -- yes, Commissioner Meeks?

COMMISSIONER MEEKS: Well, I'm sure that

there's been studies or there's data that shows the effect rehabilitation programs have had, I assume; is that right?

MR. MAUER: Yes. Yes. Sure, in a variety of ways.

COMMISSIONER MEEKS: And there was probably some numbers put to this what the savings are.

MR. MAUER: Yes.

COMMISSIONER MEEKS: I was just wondering sort of it seems like that message doesn't get out very clearly, that anybody that wants to look at the effects of sentencing -- but then you're either labeled as soft on crime or whatever. And I just wondered that in this economy with the states' budgets being hit so hard, that maybe this is the time to get this message out to really show the difference for savings and -- I mean everybody ought to know it, but --

MR. MAUER: Well, I think it is a good question. I think if anything we have a real opportunity right now. States have to balance their budget, very difficult fiscal times now. Many of them are recognizing that the top policies of the last two decades are part of the problem that they're facing

now because prisons are very expensive. Some states I think are using as an opportunity to end up with more effective policies that also save them money.

Washington State, for example, recognized that they had an inordinate number of drug offenders serving very long terms in prison, mostly lower level, non-violent people. The key people leading an effort of reform were the Commissioner of Corrections and the leading prosecutor in the state, both of whom recognized, both of whom are tough on crime. This isn't a good way to conduct crime control. So they've helped to get through a package of bills through the legislature essentially shortening the amount of time that many drug offenders serve in prison with some of the savings investing that in community-based drug treatment and supervision instead. And so the idea is, yes, we can save money and we can also do something constructive about this problem with the money we save.

So it seems to me if we're creative, we may be able to use the fiscal crisis as an opportunity to do some things that politically they wouldn't have considered when it seemed like they had all the money in the world.

CHAIRPERSON BERRY: I would actually have

just one last question. I've got to ask you this: Why is it that African-American and Latino leaders, to a certain extent, political leaders, usually support the existing policy or they seem to? For example, when we had all the debate about the disparity between crack cocaine and powder cocaine and then we had the debates about long sentences for people and when we had debates about these issues, very often African-American and Latino political leaders, that is meaning elected people, will stand up and argue for, and whenever anybody talks about drug legalization or whatever it is, if they know all the same stuff you just told us, unless they don't know it, why would they be in favor of just sort of keeping what's going on now? I don't understand it.

PROF. BUTLER: Well, the fact is when they learn it they change their minds. So that many of the members, for example, of the Congressional Black Caucus who supported the harsher punishment for crack offenses compared to powder offenses have now changed their minds and come out in favor of equalization. We have to remember that the War on Drugs was in large part a propaganda war so that people who seemed in favor of less strict sentencing for drugs were seen as soft on crime.

One of the lessons of September 11 has been a refocus of law enforcement priorities for public safety. We understand now that the main thing we'd like the police to do is to keep us safer. And it turned out that locking up people for using drugs and even for selling drugs didn't really keep us that much safer. So when we get law enforcement focused on again public safety as opposed to a War on Drugs, a war of propaganda, it turns out we're safer. I think that many people understand this better now as a result of the War on Drugs, so that now the NAACP, the Urban League, the Congressional Black Caucus are all against that disparity. President Bush was asked about it during the campaign, asked about the differing punishment for powder and crack, and he said that he thought it was discriminatory and that it should be changed. President Clinton's drug czar said the same thing. So, again, people learn from experience, and that's good news.

CHAIRPERSON BERRY: Okay. Were you about to say something?

VICE CHAIRPERSON REYNOSO: No, that's fine.

CHAIRPERSON BERRY: Okay. I want to thank you very much for doing this. I think in particular

there is probably an artifact in the data that we need to look at when we ask the Academy of Sciences the point you made, Cruz, about people being stopped. I had read that somewhere, and being recorded as being racially what they weren't even though they obviously were black or Latino or whatever so that the statistics would look better. Maybe there needs to be some testing in that area and some kind of report or something on what happens.

But, anyway, we very much appreciate your being willing to come and subject yourselves to our questioning. It will help us enormously in our work. And thank you very much for taking the time to be with us.

PROF. BUTLER: Thank you.

CHAIRPERSON BERRY: All right. We appreciate it.

MR. MAUER: Thank you very much.

CHAIRPERSON BERRY: If there is no -- yes? If there is no further work to be done and there is no objection, I would ask for a motion to adjourn.

VICE CHAIRPERSON REYNOSO: So moved.

CHAIRPERSON BERRY: Second? It's non-debatable. All in favor indicate by saying aye.

(Chorus of ayes.)

CHAIRPERSON BERRY: So ordered. Thank you very much.

(Whereupon, 12:23 p.m., the Commission Meeting was concluded.)