

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION MEETING

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FRIDAY,  
MARCH 18, 2005

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The Commission convened at 9:30 a.m. in  
Room 540 of 624 Ninth Street, N.W., Washington,  
D.C., GERALD A. REYNOLDS, CHAIRMAN, presiding.  
PRESENT:

GERALD A. REYNOLDS, CHAIRMAN  
ABIGAIL THERNSTROM, VICE CHAIRMAN  
JENNIFER C. BRACERAS, COMMISSIONER  
PETER KIRSANOW, COMMISSIONER  
ELSIE M. MEEKS, COMMISSIONER  
ASHLEY L. TAYLOR, COMMISSIONER  
MICHAEL YAKI, COMMISSIONER

KENNETH L. MARCUS, STAFF DIRECTOR

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STAFF PRESENT:

TERESA BROOKS  
CHRISTOPHER BYRNES  
DEBRA CARR, Esq., General Counsel  
IVY L. DAVIS, Chief, Regional Programs  
Coordination Unit  
BARBARA DELAVIEZ  
TERRI DICKERSON, Assistant Staff  
Director  
PAMELA DUNSTON, Chief, Administrative  
Services and Clearinghouse Division  
BARBARA FONTANA  
LATRICE FOSHEE  
DORELLE GRAY  
GEORGE M. HARBISON, Chief, Budget and  
Finance Division  
SETH JAFFE  
SOCK-FOON MacDOUGAL  
TINALOUISE MARTIN, Director, Human  
Resources Division  
EMMA MONROIG, Solicitor/Parliamentarian  
ANA MARIA ORTIZ  
JENNY PARK  
BERNARD QUARTERMAN  
AONGHAS ST. HILAIRE  
DEBBIE VAGINS  
VANESSA WILLIAMSON  
AUDREY WRIGHT  
TIFFANY WRIGHT  
MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

JACK DALY  
PATRICK DUFFY  
CHRISTOPHER JENNINGS  
LISA NEUDER  
KIMBERLY SCHULD  
MELISSA SHARP

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

(9:28 a.m.)

CHAIRMAN REYNOLDS: The meeting should come to order now. We have a quorum.

I. APPROVAL OF AGENDA

CHAIRMAN REYNOLDS: The first item on the agenda is the approval of the agenda. May I have a motion to approve the agenda?

VICE CHAIRMAN THERNSTROM: So moved.

CHAIRMAN REYNOLDS: May I have a second?

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Okay. All in favor? (Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

CHAIRMAN REYNOLDS: Okay. No responses, no opposition. The motion passes.

II. APPROVAL OF MINUTES OF

FEBRUARY 18, 2005 MEETING

CHAIRMAN REYNOLDS: Next, approval of the minutes of the February 18th meeting. May I have a motion?

COMMISSIONER BRACERAS: So moved.

VICE CHAIRMAN THERNSTROM: Second.

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1 CHAIRMAN REYNOLDS: Any discussion?

2 (No response.)

3 CHAIRMAN REYNOLDS: Okay. All in favor  
4 please say "aye."

5 (Whereupon, there was a chorus of "ayes.")

6 CHAIRMAN REYNOLDS: Any in opposition?

7 (No response.)

8 CHAIRMAN REYNOLDS: Okay. The motion  
9 passes.

10 VICE CHAIRMAN THERNSTROM: I have lost  
11 my assistant and, therefore, all of my materials. I  
12 am going to look over your shoulder until she shows  
13 up.

14 CHAIRMAN REYNOLDS: That's fine.

15 VICE CHAIRMAN THERNSTROM: There she is.  
16 Thank you. Okay. Thank you very much.

17 III. ANNOUNCEMENTS

18 CHAIRMAN REYNOLDS: At this point we're  
19 going to go through a few announcements. The first  
20 item on the agenda, as everyone knows, Commissioner  
21 Redenbaugh has elected to resign. The resignation  
22 is effective April 1st. Russell has served on the  
23 Commission for approximately 15 years. Russell has  
24 been an asset to the Commission. And his insights

1 will be missed.

2 I was under the impression that Russell  
3 would be attending this hearing. Does anyone have  
4 better information than me?

5 COMMISSIONER KIRSANOW: Mr. Chair, I  
6 spoke to Russell. And he indicated he was not going  
7 to be attending today.

8 CHAIRMAN REYNOLDS: Okay. And I would  
9 also like to announce the retirement of a former  
10 Commission employee: Art Palacios. On behalf of  
11 the Commission, I'd like to state that he is one of  
12 our longest-serving Commission employees. He  
13 retired on March 1st from the Western Regional  
14 Office, where he worked as a civil rights analyst.

15 He had over 31 years of civilian  
16 governmental service. Of those 31 years, Art spent  
17 26 of those years with the Commission. Art started  
18 at the Commission as an equal opportunity specialist  
19 for 8 years and spent the last 18 years as a civil  
20 rights analyst.

21 On behalf of the Commission, I would  
22 like to thank Art for his long and dedicated service  
23 to the Commission and wish him all the best in his  
24 retirement.

1 The second item on the agenda, I am  
2 pleased to announce that March is Women's History  
3 Month. During Women's History Month, we celebrate  
4 the achievements of our nation's women.

5 For generations, American women have  
6 helped to build our great nation through their  
7 leadership as writers, mathematicians, attorneys,  
8 teachers, artists, doctors, scientists, and in other  
9 professions. As mothers, daughters, and sisters,  
10 women have supported, led, and strengthened American  
11 families and communities. We celebrate those who  
12 have broken down barriers for women.

13 We commemorate Women's History Month.  
14 The U.S. Commission on Civil Rights encourages all  
15 Americans to celebrate the extraordinary  
16 contributions and accomplishments of American women.

17 Finally, I would like to announce that  
18 on March 6th of 2005 we celebrated the 40th  
19 anniversary of the march over the Edmund Pettis  
20 Bridge in Selma, Alabama. That march contributed to  
21 the passage of the Voting Rights Act of 1965.

22 The brave actions of those who chose to  
23 march at great personal risk calls out to us today  
24 and requires us to honor and commemorate their

1 courage.

2 Now, are there any other announcements  
3 by other commissioners? Yes?

4 COMMISSIONER KIRSANOW: I would just  
5 like to make a point with respect to Commissioner  
6 Redenbaugh. He served on the Commission for such a  
7 long time.

8 I got a chance to know Commissioner  
9 Redenbaugh the three years that I served on the  
10 Commission. I viewed him as extremely bright, the  
11 most temperate of the commissioners, clearly much  
12 more temperate than myself.

13 In the Post article a couple of days ago  
14 with respect to his resignation, I was quoted as  
15 saying that I thought his IQ was twice mine. I  
16 think I lied. It's clearly three to four times  
17 mine.

18 And I agreed with much of what he had to  
19 say in terms of his assessment of the Commission,  
20 structural problems related to the Commission, that  
21 significant reforms needed to be made. In fact, 99  
22 percent of what he had to say I think I agreed with.

23 He was a consistent voice on reform. He  
24 had noted the fact that this Commission was in

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1 extraordinary disarray, that we had informational  
 2 vacuums that prevented us from implementing certain  
 3 reforms, that we were possibly -- because we don't  
 4 have fundamental controls in place to elicit the  
 5 information necessary to determine the whole REN, we  
 6 don't even what kind of whole REN.

7 He was a consistent voice in terms of  
 8 reform and had recommended certain reforms.  
 9 However, where I disagree with Commissioner  
 10 Redenbaugh is with his conclusion that somehow  
 11 because of structural problems within the Commission  
 12 or maybe other reasons, that this Commission was not  
 13 going to be moving expeditiously on reform.

14 This is something, a hole, that we have  
 15 inherited that was engendered over a period of a  
 16 number of years. It's a significant hole. It's  
 17 something that is going to require prodigious  
 18 efforts on all of us.

19 And I have not seen anything to this  
 20 point that would indicate that we're not going to be  
 21 moving forward. In fact, I know that the staff  
 22 director has moved quite quickly to implement at  
 23 least 20 of the 29 GAO recommendations.

24 My departure from Commissioner

1 Redenbaugh I think is that we will be moving  
2 expeditiously. I know we are going to be  
3 considering reforms today. In fact, I think the  
4 reforms that Commissioner Redenbaugh and I authored  
5 a while back are reforms that everyone agrees with.

6 As opposed to what he has to say in  
7 terms of his doubt that it may be implemented, I  
8 would be surprised, in fact, if we didn't have  
9 unanimity on implementing reforms basic to the  
10 structural integrity of this Commission.

11 So I am saddened that Commissioner  
12 Redenbaugh has resigned. He was a valuable member  
13 of this Commission. We I think will be using some  
14 of his ideas in the future. And I think that it's a  
15 new day at the Commission. We're going to be making  
16 some significant progress.

17 CHAIRMAN REYNOLDS: Okay. I would just  
18 like to add to that. There is no higher priority at  
19 the Commission than getting our house in order. The  
20 programmatic work that we do here is extremely  
21 important, but if we don't have operational and  
22 financial controls in place, then this organization  
23 cannot be effective.

24 The hole that we inherited, as

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1 Commissioner Kirsanow phrased it, yes, we inherited  
2 some significant challenges. But all of us around  
3 this table have accepted the challenge. We intend  
4 to remedy the structural problems that exist at the  
5 Commission today.

6 So to the extent that anyone is  
7 entertaining the notion that we are not committed to  
8 reforming this agency, I am here to tell you that  
9 you are wrong.

10 Ken, you --

11 STAFF DIRECTOR MARCUS: Mr. Chairman, I  
12 am delighted to announce that we were joined since  
13 the last meeting by a new employee, my new attorney  
14 adviser and special assistant, Mr. Christopher  
15 Byrnes, who will stand, please. He had previously  
16 been attorney adviser in the Office for Civil Rights  
17 at the Department of Education. And we're delighted  
18 to have him in the Office of the Staff Director.  
19 Thank you, Mr. Byrnes.

20 And also, to add that Mr. Seth Jaffe,  
21 who joined us last fall but might not have been  
22 introduced at that time, is a relatively new member  
23 of the Office of General Counsel, who has recently  
24 joined us temporarily as a special assistant in the

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1 Office of the Staff Director. And we're delighted  
2 to have him as well.

3 CHAIRMAN REYNOLDS: All right. At this  
4 point -- well, I guess, Ken, you could continue.  
5 We're up to the staff director's report.

6 STAFF DIRECTOR MARCUS: Thank you.

7 IV. STAFF DIRECTOR'S REPORT

8 STAFF DIRECTOR MARCUS: Mr. Chairman,  
9 Madam Vice Chairman, commissioners, if it please the  
10 Commission, I would like at this time to supplement  
11 my written report with additional remarks regarding  
12 the financial condition of the agency, GAO  
13 implementation, congressional compliance, and any  
14 matters of concern to the commissioners.

15 During our last meeting, I was asked to  
16 address the state of the budget during this meeting.

17 And I believed as recently as earlier this week  
18 that I would be able to explain to the commissioners  
19 the extent of the budget problem that we have.

20 During the last meeting, I indicated  
21 that this would be a particularly austere year for  
22 the Commission. Now, those who are familiar with  
23 the Commission know that we have had very tight  
24 years before, but this is earlier than in most years

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1 to have gotten the message of that kind from the  
2 staff director. It has been my intent to be as  
3 transparent as possible as we identify the problems  
4 that we have inherited and as we try to turn them  
5 around.

6 Unfortunately, I am not able to speak  
7 with the specificity that I had hoped to about the  
8 extent of the problem. So what I propose to do is  
9 to tell you what we do know; what we don't know; why  
10 we don't know what we don't know; and, to the extent  
11 we are able to, how we got here; and to answer  
12 questions on that, for which if there are some  
13 details, I may need to be joined by career staff as  
14 well.

15 I had hoped as recently as earlier this  
16 week to be able to give you a specific number. And  
17 I believe that that number was going to be  
18 approximately \$150,000.

19 Based on our best estimates earlier this  
20 week, it appeared that we were on track to overspend  
21 our appropriations by approximately \$150,000 if  
22 serious changes were not made.

23 Now, that may sound like a small number  
24 relative to other government agency budgets, but it

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1 is a large number relative to the \$9 million budget  
2 of this agency. Moreover, it is a large number  
3 relative to the rather minimal amount of  
4 discretionary spending available to this agency. It  
5 is a large number relative to the nonsalaried,  
6 non-benefit, non-rental money available to us. And  
7 that is why we have been looking at what might be  
8 some very painful decisions that would have to be  
9 made in rather short order.

10 At this point, unfortunately, I cannot  
11 tell you that we have that figure for certain, that,  
12 instead, what we have is a range of numbers which  
13 will require I think considerable explanation.

14 Over the course of the day yesterday, I  
15 looked at a variety of numbers that were prepared by  
16 staff, all of which for the most part showed a  
17 rather substantial budget deficit based on the  
18 assumption that we continue to spend, as we spend  
19 now.

20 All of them showed that we would be in  
21 the deficit by at least \$45,000. Some of them,  
22 however, showed that it could be as high as \$200,000  
23 or more.

24 Now, that is an extraordinarily large

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1 range. And we are, of course, really late in the  
2 fiscal year not to know the answer for sure. So I  
3 am going to take a little bit of time, if it please  
4 the commissioners, to talk a little bit about the  
5 background to the situation we're in and why it is  
6 that in March of the fiscal year that began last  
7 October 1, we know that we are in significant  
8 difficulty but we are not sure exactly what that  
9 difficulty is.

10 During an earlier meeting, I discussed  
11 the relationship that we had had with the Bureau of  
12 the Public Debt, which provided full accounting  
13 services for us. And so you may recall that they  
14 were our accounting service until fiscal 2004.

15 The commissioners were given a variety  
16 of explanations for why the relationship between the  
17 Bureau of the Public Debt and this agency was  
18 terminated. At the time, it was explained that the  
19 Bureau of the Public Debt would have been more  
20 expensive than what this agency was prepared to pay.  
21 And, in fact, it appears from the record that I have  
22 seen that the Bureau of the Public Debt did want  
23 this agency to put into place some controls or  
24 protections that would have been expensive.

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1           But I have also shared with the agency  
2 correspondence that I have received from the  
3 Department of Treasury indicating that the Bureau of  
4 the Public Debt made the decision to terminate our  
5 contract based on their determination that we were  
6 at such significant risk of violating the  
7 Anti-Deficiency Act that they did not feel that they  
8 would be able to continue to service our account.  
9 That explanation has been confirmed to me in  
10 conversations with employees of the Bureau of the  
11 Public Debt.

12           As a result of that decision by BPD, my  
13 predecessor was forced during the midst of fiscal  
14 2004 fiscal year to obtain a new accounting service  
15 provider. It is I understand always difficult to  
16 switch service providers in the middle of the fiscal  
17 year.

18           Moreover, the amount of money that we  
19 had budgeted for accounting services was evidently  
20 small relative to the needs of accounting service  
21 providers. It appears that there were not very many  
22 choices to be had.

23           We retained Booth Management Company at  
24 that time in the middle of the fiscal year. And it

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1 is a service provider which, by their admission, did  
2 not have much experience with respect to providing  
3 full accounting services to federal agencies.

4 At the same time, our budget and  
5 financial services staff has dwindled to the point  
6 that we had only one full-time employee in that  
7 staff, Mr. George Harbison, who has subsequently  
8 transferred to be our Director of Personnel and who  
9 is acting as Director of Budget and Finance.

10 We now have difficulties in terms of  
11 even analyzing the extent of the numbers. In terms  
12 of the most recent data set that we were reviewing  
13 over the course of the day yesterday, there were  
14 different sorts of assumptions that made it  
15 difficult to know exactly what the deficit is.

16 For example, the largest single  
17 variation in the numbers that I have seen is  
18 attributable to a variance in the amount of benefits  
19 that we are or should be paying to Commission  
20 employees.

21 The initial numbers that I had received  
22 from the Budget and Finance Office were based on an  
23 assumption that benefits that we are paying to  
24 employees are 23.8 percent of salary.

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1 Mr. Harbison has subsequently determined  
2 that the numbers that these are using are lower than  
3 that. They are 20.8 percent. This has been a  
4 source of confusion among our budget and finance  
5 staff, who cannot so far determine the discrepancy  
6 between those two numbers.

7 The most recent set of numbers I have  
8 seen has used the 21 percent figure, as what I  
9 explained is a compromise between those two figures  
10 as well as a rounding off.

11 The difference between the 20.8 percent  
12 figure and the 23.8 percent figure, that 3 percent  
13 is an enormous amount of money relative to our  
14 budget and could explain an entire budget shortfall.

15 I have not yet been able to get an explanation from  
16 Budget and Finance as to why it is that this  
17 variation exists.

18 The Booth numbers are purported to be  
19 actual figures. As a general rule, I like using  
20 actual figures. On the other hand, we have not been  
21 able to understand why those actual figures appear  
22 so low relative to what we know of actual figures in  
23 prior years given what we understand about the  
24 increases in health insurance and other benefits.

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1           The 20.8 percent appears low to our  
2 internal budget staff. We have a host of questions  
3 arising from that. Are those really the actual  
4 numbers? If they are the actual numbers, are we  
5 paying the right amount of benefits or are we  
6 underpaying benefits? If they are the right  
7 numbers, does that mean the numbers we have from  
8 prior years are wrong? Why is it that we cannot  
9 have an agreement between our internal and external  
10 providers of accounting services?

11           When I first arrived in December, I was  
12 initially told that we did not know whether we were  
13 on track for the budget because budget matters had  
14 been centralized within the Office of the Staff  
15 Director and our career staff were not privy to all  
16 of the information they would need to know in order  
17 to determine whether we were overspending our  
18 appropriations.

19           For example, when I arrived in December  
20 -- and keep in mind that the fiscal year began  
21 October 1 -- it was still not clear to any of the  
22 staff that I could speak to whether we had renewed  
23 contracts with major vendors, including, for  
24 example, McKinney and Company.

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1           It took quite some time in order to get  
2 clarity as to the extent to which we have incurred  
3 financial obligations during the prior management  
4 which would bind us today.

5           There was a large number of questions  
6 about our obligations, which simply were not known  
7 at that time. For instance, I am now told that  
8 there were some \$75,000 in rental payments from last  
9 year that were deferred until this year. Now, that  
10 is a portion of last year's rent, but it is a  
11 significant amount of money which was deferred by my  
12 predecessor from last fiscal year until this fiscal  
13 year.

14           It was only in the January-February  
15 period that I started seeing data that indicated  
16 that we might be at risk of a shortfall. And that's  
17 why I indicated immediately in the last meeting that  
18 this was an extremely austere year.

19           What we are now in the midst of doing is  
20 having all of our resources intensely focused on  
21 coming up with the answers to the sorts of questions  
22 that I just described. We know that we have a  
23 significant financial problem, but we also have  
24 accounting weaknesses that have made it impossible

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1 so far to know the extent of the problem.

2 Even the more optimistic scenarios  
3 suggest that we need to make very strong changes  
4 very rapidly. I have been asked by staff and others  
5 whether that means that we would have to consider  
6 such matters as office closures, reductions in  
7 force, and/or furloughs. Now, the answer, of  
8 course, is going to depend on the exact extent of  
9 our shortfall.

10 Under most of the analyses that I have  
11 seen, under all but the most optimistic, we will  
12 need to make very serious decisions of that sort.  
13 And they will need to be made in very short order.

14 Given the realities of the fiscal year  
15 ending in September and the appropriate notice  
16 periods that are, of course, required in law by  
17 collective bargaining agreements and are simply  
18 right, we would need to make decisions rather  
19 rapidly in order for certain of our options to  
20 remain on the table.

21 So we will be looking very intensely  
22 over the coming days at what sorts of changes can be  
23 made so that we know the exact data. But it is  
24 clear that there will need to be very tough

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1 decisions on those sorts of matters.

2 Now, I have been asked about  
3 discretionary types of expenditures that I have  
4 added to the budget. And I will say that I have  
5 subtracted one and added two.

6 I have not requested any services from  
7 McKinney and Associates in the public relations area  
8 since my arrival. And we have been doing that work  
9 in-house and budgeting that all PR would be done  
10 in-house, which is a significant savings.

11 On the other hand, we have budgeted  
12 additional monies for a full-service audit as well  
13 as additional audit services. Those are the  
14 discretionary expenditures. And it is a total of  
15 approximately 62,000 that were budgeted for those 2  
16 amounts. That figure is not terribly different from  
17 what we were planning to spend on McKinney.

18 Other than that, given the shortfalls  
19 that we have had in recent years, there is not a lot  
20 of wiggle room left for us. Moreover, we have to be  
21 prepared for future years. This is not an agency  
22 that has done a lot of future planning financially.

23 But we understand that if we receive the  
24 President's budget this year; in other words, if we

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1 received the same \$9 million that we have received  
2 over the last several years, the extent of the  
3 shortfall we're looking at this year, will be  
4 considerable expanded next year. So we have to look  
5 at cost-saving situations this year that will not  
6 send us in a similar sort of problem a year from  
7 now.

8 What that means is that even if the  
9 extent of the shortfall is on the more conservative  
10 line of the spectrum, we still have to look at the  
11 additional pressures, which the 2006 fiscal year  
12 budget will place on us this year and make sure that  
13 we are creating solutions that deal with both.

14 I have a few other topics on the staff  
15 director's report. And I don't know if it is the  
16 preference of the chairman and the commissioners  
17 that I continue through to the others or to see if  
18 there are questions with respect to financial  
19 conditions.

20 CHAIRMAN REYNOLDS: Well, I think at  
21 this point, we should entertain some questions.  
22 Commissioner Kirsanow?

23 COMMISSIONER KIRSANOW: Staff Director,  
24 you had indicated that we had to make some decisions

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1 with some alacrity.

2 VICE CHAIRMAN THERNSTROM: I'm sorry. I  
3 can't hear you.

4 COMMISSIONER KIRSANOW: The staff  
5 director had indicated that we had to make some  
6 decisions with some alacrity. And, second, because  
7 we don't have I think institutional controls to  
8 divine the kind of information necessary to get us  
9 budgetary information, we're not even sure to what  
10 extent certain monies may have been deferred from  
11 the present fiscal year to future fiscal years.

12 So my question is, can you give us a  
13 more definitive time frame or what the window is  
14 within which we must act to forestall what you  
15 currently believe may be the range of deficit given  
16 the fact that we are halfway through the fiscal  
17 year?

18 And, second, is, do you believe that  
19 there may be other items or issues that have been  
20 deferred from prior years to the present fiscal year  
21 that we haven't yet gotten our hands on?

22 STAFF DIRECTOR MARCUS: Let me try both  
23 of those questions, Commissioner Kirsanow, in  
24 reverse order. With respect to the question of

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1 costs that were deferred to this year, the rent is  
2 the one major item that I would describe as a  
3 deferral, although I may need to defer myself to  
4 career staff if there are any additional ones.

5 I will say that there are significant  
6 expenditures that we have to pay for this year based  
7 on things that were done in the past. For example,  
8 we are paying this year for EEO claims that had been  
9 resolved in prior years. That is a significant  
10 drain on the budget of some \$188,000 this year.

11 I have not seen this as a specific  
12 deferral but, rather, as a matter of we're finally  
13 going to have to pay the bill on what was done in  
14 the past during the prior management.

15 Similarly, there may be other sorts of  
16 decisions that were made in the past; for instance,  
17 new hires and other obligations that we're paying  
18 for now, but rent is the largest.

19 COMMISSIONER KIRSANOW: But would it be  
20 fair to say that we still don't have our hands  
21 around the scope of expenditures that may have to  
22 fall on our watch that have incurred on a prior  
23 watch?

24 STAFF DIRECTOR MARCUS: What I would say

1 is that I was given new information about  
2 expenditures that staff wasn't available into  
3 January and February.

4 It's always hard to know what you don't  
5 know. I am not expecting to get more surprises of  
6 that sort, but I have gotten certainly a number of  
7 surprises over time with expenditures that I haven't  
8 known about until fairly late in the fiscal year.

9 So what I would say is we are not  
10 expecting to hear any more. And, as far as we know,  
11 we have seen all of it, but we have been surprised  
12 before.

13 COMMISSIONER KIRSANOW: And the second  
14 question with respect to what is our window of  
15 opportunity for making decisions on budgetary items?

16 STAFF DIRECTOR MARCUS: That's a good  
17 question, Commissioner Kirsanow. I believe that it  
18 is very short because with the fiscal year ending in  
19 September and given the notice periods, the  
20 three-four-month notice periods with respect to  
21 different sorts of decisions that have to be made,  
22 there are certain options that either disappear or  
23 become more limited after even April 1.

24 So what I would say is we have to really

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1 focus over the next several days and the next few  
2 weeks on figuring out whether we need to make any  
3 decisions that have to be made in advance of April  
4 1.

5 After that, there remain things that can  
6 be done in the future that don't require so much  
7 notice, but we really have a window over the next  
8 couple of weeks that has options that we won't have  
9 after this.

10 CHAIRMAN REYNOLDS: Commissioner Meeks?

11 COMMISSIONER MEEKS: Well, as I listen  
12 to this, you know, I completely agree that whatever  
13 financial controls weren't in place or whatever can  
14 be improved should be, but the whole conversation  
15 really is about we have had a flat line budget for  
16 15 years.

17 And our mandate hasn't changed. There  
18 are many good projects that went forward, but with  
19 inflation and the fact that our mandate hasn't  
20 changed, this Commission is starved. Its budget is  
21 starved.

22 I don't see that that is going to change  
23 in the near future. So, I mean, I think this brings  
24 up a real question about how do we do meaningful

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1 work.

2 I mean, get the controls in place,  
3 absolutely. But then I think it is a very serious  
4 question about what kind of projects or how many  
5 projects even or how we can fulfill our mandate.  
6 And I think that is the big question.

7 And it hasn't been just this  
8 administration, by any means. It's been many  
9 administrations that have starved the Commission.

10 CHAIRMAN REYNOLDS: I'd like to respond,  
11 Ken. Commissioner Meeks, you raise a very important  
12 question. I am in full agreement with you.  
13 Ultimately the budget for this agency needs to be  
14 tied to inflation.

15 But the only way we are going to get  
16 there, I believe that we are going to have to get  
17 our financial house in order. We are going to have  
18 to demonstrate to members of Congress and the  
19 administration that we can be good stewards.

20 So the first order of business in my  
21 view is to implement all of the reforms that are  
22 necessary to enable us to track our expenditures.

23 COMMISSIONER MEEKS: No, no. I mean, I  
24 absolutely agree with that, absolutely. There is no

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1 doubt about that. I am just saying that that can be  
2 fixed. Financial controls can be put in place. And  
3 it sounds like they are. But in the end, with  
4 inflation and with our mandate, we still have very  
5 serious issues of how we really fulfill our mandate.

6 CHAIRMAN REYNOLDS: I agree with you. I  
7 guess I'm making a small point. And that point is  
8 that our ability to go and make the case for an  
9 increase in our budget, it depends on what we do in  
10 terms of reform.

11 The faster we implement meaningful  
12 reform, the sooner we will be in a position to go to  
13 Congress and to go to the administration --

14 COMMISSIONER MEEKS: Absolutely.

15 CHAIRMAN REYNOLDS: -- to seek increases  
16 in our appropriation.

17 COMMISSIONER MEEKS: Absolutely. I  
18 couldn't agree more.

19 CHAIRMAN REYNOLDS: Yes, Commissioner  
20 Kirsanow?

21 COMMISSIONER KIRSANOW: I have a  
22 question for the staff director. Based on what I am  
23 hearing, is there any prospect at this point --  
24 again, we don't know what we don't know, but do you

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1 think there is any prospect that this Commission can  
2 embark upon any projects beyond a statutory report?

3 STAFF DIRECTOR MARCUS: Yes,  
4 Commissioner Kirsanow.

5 Now, I would say in response both to  
6 that question and also Commissioner Meeks that we  
7 have reached a point with respect to the difficulty  
8 in dealing with the structural and financial issues  
9 that I have had to divert some resources from  
10 Adarand projects into financial matters. And I'm  
11 probably going to have to do a little bit more of  
12 that.

13 There are some people, including, for  
14 instance, in the Office of General Counsel, who  
15 might otherwise be working on legal reports who are  
16 focused, instead, on either legal analysis or  
17 supporting the financial side. So it is certainly  
18 the case that the financial and structural  
19 challenges that we have, even this year, are having  
20 an impact on our capacity to complete projects.

21 Nevertheless, under these very difficult  
22 circumstances, our staff is moving forward on a  
23 number of projects. The highest priority by law has  
24 to be the statutorily mandated enforcement project.

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1       And the Office for Civil Rights Evaluation is  
2 working on an Adarand project, which has, of course,  
3 been talked about within the Commission since at  
4 least 2030.

5               Additionally, however, work is going on  
6 for other projects. The Office for Civil Rights  
7 Evaluation continues to do work to look at minority  
8 employment issues, for instance. Moreover, the  
9 Office for Civil Rights Evaluation continues to  
10 analyze federal funding for civil rights agencies.

11               Additionally, analysis has been ongoing  
12 regarding Voter Act reauthorization issues. So we  
13 have not stopped work on important projects. And  
14 what I would say, in addition, is this. Our staff  
15 had been under extremely difficult circumstances as  
16 they have been hearing about the budget, as they  
17 have been under tight financial straits, and as this  
18 week we received yet another threat to the employees  
19 combined with a threat to the President in the form  
20 of a purported anthrax attack, which is the third  
21 one that we have received recently.

22               So we are dealing with some very  
23 difficult circumstances for staff, but people are  
24 committed to doing their work and, even under

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1 difficult circumstances, are engaged in those  
2 projects.

3 CHAIRMAN REYNOLDS: Vice Chair  
4 Thernstrom?

5 VICE CHAIRMAN THERNSTROM: Well, first I  
6 want to say that I know how difficult a period this  
7 is for the staff as they listen to these numbers, as  
8 they contemplate possible actions that must be  
9 taken.

10 And I know that the staff director is  
11 committed to trying to protect the staff, and I  
12 think every commissioner here is concerned about  
13 morale at the Commission and appreciative of the  
14 fact that the staff under difficult circumstances is  
15 moving forward on the projects that are already on  
16 the pipeline.

17 With respect to projects not already in  
18 the pipeline, will we be able to attach a cost to  
19 each project or at least have an estimate of the  
20 cost before we vote on those projects, on those  
21 proposed projects?

22 STAFF DIRECTOR MARCUS: Vice Chairman  
23 Thernstrom, if the Commission would like an  
24 estimate, we can provide an estimate. I have to say

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1 we don't have one available today.

2 VICE CHAIRMAN THERNSTROM: No. I  
3 understand that. Yes.

4 STAFF DIRECTOR MARCUS: We can generate  
5 one in the future. Now, most of the costs of  
6 projects are staff salary and benefits, and very  
7 little is out of pocket. So it's largely a matter  
8 of estimating based on the number of staff per  
9 project. But we can provide that if requested.

10 Now, of course, some of the work on that  
11 would have to be done by the same person or people  
12 who are urgently trying to figure out the extent of  
13 the financial hole we're in and solve it. So it's  
14 also a matter of making sure that we extinguish the  
15 fire that we've got first.

16 CHAIRMAN REYNOLDS: Ken, when you put  
17 together these estimates, what I would like to see  
18 is something that -- I want you to red flag the  
19 projects that are going to cause you to take away  
20 resources from projects related to reform. To the  
21 extent that we can avoid redirecting resources away  
22 from reform efforts, that's the way we should go in  
23 my view.

24 Yes?

1                   COMMISSIONER BRACERAS:       Excuse me.  
2       Well, I have two questions. The first, piggybacking  
3       on this current discussion, it seems to me that the  
4       relevant consideration is how much will a project  
5       cost above and beyond the staff, the cost of the  
6       staff and the benefits because those people are  
7       already here. And presumably, you know, if they're  
8       not working on one project, they're working on  
9       another, they're working on reform efforts.

10                   So what would be helpful to me in  
11       deciding whether to go forward with certain projects  
12       or whether we anticipate any costs beyond that in  
13       terms of hearings or public service announcements  
14       that might go along with the project or consultants  
15       that might need to be retained. And if that could  
16       be at least broken out and itemized, that's the  
17       relevant figure to me.

18                   VICE CHAIRMAN THERNSTROM:       Yes,  
19       absolutely. And I should have stated it as such.

20                   COMMISSIONER BRACERAS:       Because in terms  
21       of the allocation of resources that are already in  
22       place and whether or not particular staff are  
23       working on A or B substantive project or whether  
24       they're working on reform, that's a matter that I

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1 believe is within the staff director's discretion,  
2 how to allocate staff time.

3 But what we need to know is whether a  
4 project we might be voting on might cost more than  
5 what we are already paying, how many hours somebody  
6 is going to --

7 CHAIRMAN REYNOLDS: Yes. Basically  
8 out-of-pocket expenses.

9 COMMISSIONER BRACERAS: Right,  
10 out-of-pocket expenses, but knowing how many hours a  
11 particular staff person is going to devote to --

12 CHAIRMAN REYNOLDS: Right.

13 COMMISSIONER BRACERAS: -- A as opposed  
14 to B is irrelevant to me in terms of -- it's not an  
15 additional cost. That's a priority issue that's for  
16 the staff director.

17 VICE CHAIRMAN THERNSTROM: And I should  
18 have made that clear that that is the question.

19 STAFF DIRECTOR MARCUS: We would be very  
20 pleased to do it that way with the one caveat that I  
21 would add that it would be my order of priorities to  
22 the extent that financial analysis is required to  
23 have the financial people first focusing on making  
24 sure we know the parameters of the problem and

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1 dealing with that; and then, second, looking at the  
2 out-of-pocket expenses of potential projects.

3 COMMISSIONER BRACERAS: I agree. I  
4 agree with that.

5 My second question has to do with how we  
6 got here. And that is you mentioned that the career  
7 staff had been kept in the dark about a number of  
8 matters or that they didn't have the information  
9 because budgetary issues were consolidated in the  
10 Office of the Staff Director.

11 Presumably, if accurate records have  
12 been kept by the prior staff director, when you came  
13 in, you would then have access to that information.

14 But what I am inferring from what you said is that  
15 budgetary information is consolidated in the Office  
16 of the Staff Director under the prior regime and  
17 that no records were left behind for you to access  
18 or limited records were left for you to access.

19 STAFF DIRECTOR MARCUS: That's correct,  
20 Commissioner Braceras. And I can tell you what I  
21 have found. And if you want more specifics about  
22 what happened before my arrival, I will have to  
23 defer to career staff.

24 What I will say is this. Most of the

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1 questions that I have had about the finances of the  
2 agency were not answerable to the career staff  
3 because they indicated that finance and budgetary  
4 matters were centralized within the office of my  
5 predecessor, the prior staff director.

6 Moreover, we have not been able to  
7 locate the records of the prior staff director, nor  
8 has he been willing to speak with us about what  
9 happened with the budgeting and finances.

10 COMMISSIONER BRACERAS: Right. So that  
11 indicates to me that either: A) records weren't  
12 kept or B) they were kept and something was done  
13 with them. They were either removed or destroyed.

14 STAFF DIRECTOR MARCUS: I can't think of  
15 any other explanation, Commissioner Braceras.

16 CHAIRMAN REYNOLDS: Commissioner  
17 Kirsanow?

18 COMMISSIONER KIRSANOW: First of all, I  
19 concur with Commissioner Braceras in terms of the  
20 cost breakdown. It seems to me only those costs  
21 above the operational baseline are relevant to us.

22 And it goes to a subsidiary question I  
23 have. And that is I asked earlier about projects,  
24 whether or not we could implement projects, in terms

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1 of the current projects.

2 I'm presuming the projects we're  
3 currently working on do not incur costs above our  
4 operational baseline. In other words, there are no  
5 extraordinary costs beyond wages, salaries,  
6 benefits, rent, et cetera, et cetera. Is that  
7 correct?

8 STAFF DIRECTOR MARCUS: I have allowed  
9 limited expenses connected with these projects. The  
10 expenditures have not been extraordinary. There  
11 have been some out-of-pocket expenses.

12 For example, staff used the telephone,  
13 including long distance calls. Moreover, they used  
14 the mains and occasionally have had to use other  
15 means of transmitting documents.

16 So there have been low-level  
17 expenditures with respect to those projects, but  
18 there have not been significant expenditures  
19 relating, for instance, to significant travel or  
20 other out-of-pockets of that sort.

21 Now, there is one large expenditure  
22 relating to the projects I mentioned earlier that  
23 was made, but it was authorized prior to my arrival.

24 I referred to a project regarding Voter

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1 Reauthorization Act.

2 My predecessor apparently authorized a  
3 contractor to do a considerable amount of the legal  
4 and policy analysis. So that was outsourced. And  
5 that has had to be paid by the Commission.

6 CHAIRMAN REYNOLDS: Ken, do you know,  
7 what's that figure?

8 STAFF DIRECTOR MARCUS: I don't. I am  
9 told that that figure is \$20,000.

10 CHAIRMAN REYNOLDS: Okay. Thank you.

11 COMMISSIONER BRACERAS: And that was  
12 something that was incurred on the watch of the  
13 prior administration, but the bill came to you under  
14 your administration?

15 STAFF DIRECTOR MARCUS: It was  
16 authorized by prior management. And I will have to  
17 check to find whether that was paid during this  
18 fiscal year or last.

19 The general counsel is informing me that  
20 it was paid in three stages. And I could defer to  
21 her for further explanation if you would like.

22 CHAIRMAN REYNOLDS: Ms. Carr, would you  
23 please provide us with whatever information you  
24 have?

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1 VICE CHAIRMAN THERNSTROM: Yes. And has  
2 it been paid in full at this point?

3 MS. CARR: The contractor was billing in  
4 three stages. The first two stages, I believe, were  
5 billed under the prior staff director. The third  
6 stage was billed post-transition. And I do believe  
7 that final bill has been paid.

8 CHAIRMAN REYNOLDS: Thank you.  
9 Commissioner Yaki, you have been patient.

10 COMMISSIONER YAKI: I'm the new guy. I  
11 figure I always get picked last.

12 I wanted to go back to the central  
13 question, which dealt with the short window of time  
14 that we have to sort of figure out what the real  
15 numbers are and what actions we have to take. I  
16 think it is very important for the integrity of the  
17 Commission and for the staff who work here that we  
18 make that as transparent as we possibly can.

19 I think whatever number we come up with  
20 has to be scrubbed, double checked, and triple  
21 verified so that there can be no question about  
22 where it came from, how it came to be, and what that  
23 final number is because that number, whatever it is,  
24 is going to going to be the determinant of very

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1 tough decisions made very quickly, either by the  
2 Commission or by the staff director.

3 So I think it is very important that  
4 that number, whatever, have immense amount of  
5 integrity attached to it so no one can question that  
6 it was this or that because ultimately when we talk  
7 about -- and we have been dancing around it during  
8 this entire discussion -- how the majority of our  
9 budget is salaries and benefits, I think everyone  
10 can kind of read between the lines -- and I am even  
11 still dancing around it -- about what the  
12 implications of that could be.

13 And I think we owe it to the people who  
14 have been working under terribly adverse conditions  
15 over the past years here doing yeoman's work in  
16 terms of producing reports, responding to  
17 commissioners, responding to document requests from  
18 whatever that number, have a very, very solid  
19 backing.

20 I also think it is important that we  
21 communicate very clearly in the actions that we do  
22 that reform is different from emergency measures.  
23 Somehow they are connected.

24 But any emergency measures we may take

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1 are not a consequence of the agency continuing to  
2 spiral out of control. It is simply a short-term  
3 immediate remedy as a consequence of other things  
4 beyond our control, which reforms on a longer-term  
5 basis going forward are going to be addressing  
6 because, you know, I can just see the headlines  
7 coming out of the papers depending on what happens.

8 So I think it is very important that we  
9 make that distinction because, again, people can  
10 confuse things that any agency would have to do in a  
11 similar situation. No matter how good, no matter  
12 how well it is being run at the time, something may  
13 happen that causes you to have to do something  
14 drastic. But I don't think it necessarily means  
15 that the agency is spiraling out of control.

16 Finally, going forward when we talk  
17 about the fact that -- and, by the way, I was  
18 privileged to be at the hearing yesterday. And I  
19 heard very clearly -- I believe it was even from the  
20 chair -- that he was hoping that when we have our  
21 financial and management house in order, he would be  
22 very supportive of getting the block off of the  
23 appropriations and getting it retied and getting it  
24 starting to go up. So I think that that was very

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1 encouraging.

2 But certainly if we can't solve this in  
3 six months and we're faced with fiscal year '06 with  
4 a level budget, then I think that we should start  
5 thinking very hard about the fact that nothing  
6 should really be sacred in how we look at it and we  
7 have to do it from a mission-oriented analysis, what  
8 is it that we need the most, what is it that we  
9 don't need the most and go from there in terms of  
10 how we prioritize staffing and whatever for the  
11 coming year.

12 I have heard about all of the concerns  
13 about projects going forward. And at a later time  
14 today, I will discuss a project that I was talking  
15 about with the director while we were waiting for  
16 during one of the 44 breaks we had during the  
17 hearing as the committee recessed as to move on to  
18 other interesting issues.

19 STAFF DIRECTOR MARCUS: Commissioner  
20 Yaki, I very much agree with your points. And I  
21 would like to respond separately to as many of them  
22 as I can.

23 First, you began by calling for a  
24 transparency with respect to the determination of

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1 our financial condition. I strongly believe that.  
2 And I'm sure that everyone --

3 COMMISSIONER YAKI: I know. And I  
4 wasn't accusing you of not.

5 STAFF DIRECTOR MARCUS: I understand  
6 that.

7 COMMISSIONER YAKI: I was simply  
8 restating what I thought was the obvious.

9 STAFF DIRECTOR MARCUS: I suspect that  
10 everyone in this room can agree that I have provided  
11 a greater degree of financial transparency than they  
12 have ever seen before in this Commission. And I --

13 COMMISSIONER BRACERAS: A hundred  
14 percent.

15 COMMISSIONER KIRSANOW: Let me tell you  
16 in one meeting alone, you have provided more  
17 information than I have gotten in three years by a  
18 magnitude of three or four-fold.

19 COMMISSIONER BRACERAS: Yes. I would  
20 like to join in that. I joined the Commission three  
21 years ago and Pete around the same time. From the  
22 time we joined, we were continuously asking for this  
23 type of information.

24 And you came before us in the first

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1 meeting and confirmed what we had long suspected but  
2 never really knew because nobody would tell us. So  
3 the increase in transparency is greatly, greatly  
4 appreciated.

5 VICE CHAIRMAN THERNSTROM: And I second  
6 that. I've been here for five years -- no -- four.  
7 I can't remember.

8 STAFF DIRECTOR MARCUS: Thank you,  
9 commissioners. I am a strong believer and I will  
10 continue to provide it. And I tried to provide it  
11 to staff even between the last two meetings.

12 Now, there is a cost to it in the sense  
13 that it may cause premature concern in the event  
14 that the more optimistic scenarios turn out to be  
15 the case. But I, nevertheless, think that it is  
16 important to provide that transparency to the  
17 commissioners, the staff, and our stakeholders in  
18 Congress and elsewhere as well as to the public.

19 A related but separate point that you  
20 made, Commissioner Yaki, deals with the solid basis  
21 for the answer that we have. And I think that that  
22 is critically important. As I provided what I think  
23 was an unusually candid description of not just our  
24 financial condition but our uncertainty right now,

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1 it occurred to me that I would be thinking if I were  
2 on the staff, "My God, they're making difficult  
3 decisions that will affect me. And they don't yet  
4 know the exact situation."

5 I think it's, nevertheless, important  
6 that they know exactly what they know and what we  
7 don't know, but I will provide you my assurance that  
8 as we go forward to making difficult decisions, we  
9 will have the most solid possible basis that we can  
10 prior to making those decisions.

11 Now, I earlier referred to the fact that  
12 some of our options will be foreclosed as time goes  
13 by. But I would also say that we will not  
14 prematurely make decisions that could adversely  
15 affect employees in the event that we do not have  
16 sufficient information and time.

17 We will make decisions on a deliberate  
18 basis. We will take all measures in order to be  
19 able to make decisions while options are still  
20 available, but we will not take actions unless we  
21 are able to do so clearly.

22 I will also say, as I have said to  
23 staff, that we are committed to ensuring that before  
24 we take any measures that would adversely impact

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1 staff, that we will look for all other available  
2 avenues for cost cutting, but I have also said with  
3 candor that we do not have a lot of those options.

4 Finally, with respect to your comment  
5 that reform measures are different from emergency  
6 measures, I would say that that is a very good  
7 point. And I will say they are very different. In  
8 fact, I will have to tell you that the time we are  
9 dedicated to solving this emergency is delaying us  
10 somewhat in undertaking some of the reform measures  
11 that we would like to take.

12 I would like to be focused 100 percent  
13 on structural reforms right now, but I have had a  
14 very significant amount of my time diverted towards  
15 working with our financial people, not on the  
16 long-term solutions but on the short-term  
17 emergencies. So while the two are connected, they  
18 are competing for scarce resources.

19 CHAIRMAN REYNOLDS: I have a question  
20 for you, Ken. This uncertainty, our inability to  
21 quantify the deficit, what are we doing in terms of  
22 putting an accounting system in place that will  
23 enable you to answer these types of basic questions?

24 STAFF DIRECTOR MARCUS: We continue to

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1 have largely the same accounting systems, largely  
2 the same accounting systems, that we had a few  
3 months ago.

4 Now, we have put pressure on various  
5 individuals, including our outside contractors, to  
6 solve certain other problems. But the fundamentals,  
7 unfortunately, probably can't be changed during the  
8 midst of the fiscal year. We still --

9 CHAIRMAN REYNOLDS: What's the nature of  
10 the problem? I mean, we have a system in place now.

11 Is that correct? We have a ledger. We have a  
12 system in place. Are we going to run into this  
13 problem again in the future? Do we have all that we  
14 need to avoid being in the situation now a year from  
15 now?

16 STAFF DIRECTOR MARCUS: I believe that  
17 serious changes in the accounting system will be  
18 difficult to impose in the midst of the fiscal year,  
19 which is to say we will continue at least until the  
20 end of this year to have significant challenges in  
21 understanding our finances. We need to make  
22 changes, but some of the changes probably can't even  
23 be begun before October 1.

24 I will also say that one of the key

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1 components of the changes that I have planned to  
2 make has been the creation of a new budget sheet  
3 position at a GS-15 grade level.

4 We have announced that position. So far  
5 we have had difficulty attracting, even at a  
6 relatively high rate of pay, the sorts of candidates  
7 that we have wanted.

8 At this point, while the announcement is  
9 open and we have been more aggressive in our efforts  
10 to recruit a strong new person, we also are  
11 challenged with a prospect of a potential hiring  
12 freeze, which might be connected with certain of the  
13 options that we have to take. So we do have some  
14 real challenges as we look to change the accounting  
15 systems.

16 CHAIRMAN REYNOLDS: Okay. Commissioner  
17 Braceras?

18 COMMISSIONER BRACERAS: Again this goes  
19 to Commissioner Yaki's point about the difference  
20 between dealing with immediate financial emergencies  
21 and reforming our systems for the future.

22 As all of you know, we have had a  
23 working group on reform put together to deal with  
24 some of the procedural issues with the Commission

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1 going forward. And the mandate of the working group  
2 that we set up in January was to examine our  
3 policies on internal and external communications and  
4 as well as project planning and implementation.

5 And we have at this point come up with a  
6 series of recommendations relating to our external  
7 and internal communications. We have had a lengthy  
8 discussion about project planning and  
9 implementation. Although we have not committed our  
10 recommendations to specific proposals yet, that is  
11 something we hope to be working on in the next few  
12 weeks going forward.

13 But the idea with respect to project  
14 planning and implementation is basically to  
15 implement reforms that will improve both the  
16 integrity and the quality of our work product.

17 We specifically did not include budget  
18 and financial reform within the jurisdiction of the  
19 working group in order to give the staff director  
20 time to: A) compile the information that we needed  
21 to find out where we stand currently but also to  
22 give the staff director some discretion in dealing  
23 with the financial problems.

24 So I don't know if this is the right

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1 time to move to extend the jurisdiction or the time  
2 frame for the working group because previously we  
3 had said we were going to come forward in March with  
4 our proposals.

5 We do have a series of 14 proposed  
6 reforms, but they deal exclusively with external and  
7 internal communications. And we would like more  
8 time to basically put our project planning and  
9 implementation thoughts into specific proposals.  
10 And I don't know if we want to extend the  
11 jurisdiction to cover budgetary issues. That's  
12 something we can discuss.

13 We had four commissioners as members of  
14 the group. Commissioner Redenbaugh has resigned.  
15 So we need to replace a commissioner.

16 I don't know if this is the proper time  
17 to take up these issues about the working group, but  
18 I just wanted to raise them.

19 VICE CHAIRMAN THERNSTROM: I do have a  
20 question before we take them up continuing from the  
21 prior discussion, Mr. Chairman. So I would at least  
22 like to postpone the working group discussion to get  
23 to ask one more question with respect to the staff  
24 director's report and Commissioner Yaki's very, very

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1 I think good comments.

2 This is directed to the staff director.

3 Commissioner Yaki said we've got a very short  
4 window of time. And he also said whatever numbers  
5 we're working with have to be triple verified so  
6 there are no questions about what they are and he  
7 added how we got there.

8 Is there in your view any tension  
9 between the short window of time and the necessity  
10 to have these, as it were, triple verified numbers?

11 That is, you've been having a lot of difficulty  
12 getting your arms around the basic numbers here.

13 And while I agree with the sentiments  
14 that Commissioner Yaki expressed, the question, I'm  
15 not sure it's realistic to have those triple  
16 verified numbers before you have to make some  
17 decisions.

18 COMMISSIONER YAKI: Well, I'll take  
19 double.

20 (Laughter.)

21 VICE CHAIRMAN THERNSTROM: You'll take  
22 double?

23 STAFF DIRECTOR MARCUS: Well,  
24 Commissioner Yaki, you can correct me if I'm wrong,

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1 but I believe that what you intended was that we use  
2 the best information available?

3 COMMISSIONER YAKI: Right.

4 VICE CHAIRMAN THERNSTROM: Yes, but it  
5 is going to be short of that perfection that  
6 Commissioner Yaki -- of the perfect picture that you  
7 drew of indisputable data.

8 CHAIRMAN REYNOLDS: Well, you both raise  
9 points, but I think that the bottom line is that we  
10 do have a short time. But we do have an obligation  
11 to use the best data available.

12 So will it be perfect? No. Nothing we  
13 do will be perfect. But we are going to use the  
14 best available numbers that we can come up with.

15 VICE CHAIRMAN THERNSTROM: Well, I  
16 simply wanted it on the record that what we will be  
17 working with is the best available numbers and not  
18 the triple verified ones in all likelihood.

19 CHAIRMAN REYNOLDS: Okay. But let me --  
20 go ahead.

21 STAFF DIRECTOR MARCUS: If I may just  
22 briefly respond? I believe I agree with that, Vice  
23 Chairman Thernstrom. What I will say is we will act  
24 on the best available information but that before we

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1 take any action that would adversely affect any  
2 single member of the staff, I will make sure that  
3 that information is stronger than any information I  
4 have seen so far.

5 There is no way to get perfect  
6 information, but I will want to make sure that it is  
7 verified to a greater extent than what we have seen  
8 in the numbers today.

9 CHAIRMAN REYNOLDS: Okay. And I'd like  
10 to go back to Jennifer's point. Jennifer, I think  
11 that we should just hold off and finish with Ken's  
12 report and then revisit the issue on the table.

13 COMMISSIONER BRACERAS: Right. I just  
14 wanted to make it clear for the record that the  
15 emergency measures that the staff director is taking  
16 and may need to take going forward does not preclude  
17 reform.

18 And we are in the process of reform. We  
19 started that process in January. And I recognize  
20 that Commissioner Redenbaugh was disappointed with  
21 the pace of that reform. However, it's only been  
22 two months, and we have already tackled a whole host  
23 of issues. And we are going forward to tackle more  
24 of them. And all of us here are committed to

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1 reforming the agency's processes going forward.

2 So I just want to make clear that that  
3 is on the agenda for today and for the indefinite  
4 future, that nothing we're talking about right now  
5 precludes the ongoing work of reform, of  
6 institutional reform.

7 CHAIRMAN REYNOLDS: Sure. Commissioner  
8 Kirsanow?

9 COMMISSIONER KIRSANOW: I was just going  
10 to say that I think, as Commissioner Yaki said, we  
11 have been kind of dancing around an issue, and that  
12 is layoffs.

13 I've had the unpleasant task of having  
14 to counsel hundreds of companies on that very issue.

15 And you never get perfect information. It never  
16 happens.

17 The unpleasant truth is that sometimes  
18 any of these enterprises, companies have got to take  
19 actions with the best information they have. And,  
20 unfortunately, I think in this circumstance, you are  
21 between a rock and a hard place, which dictates that  
22 you err on the side of making sure that we come in  
23 within budget.

24 That is a difficult prospect. It is a

1 difficult thing to discharge for any staff director,  
2 for anybody in an executive position. But I think  
3 that is the ultimate mandate.

4 STAFF DIRECTOR MARCUS: Thank you.

5 Let me just say quickly in response to  
6 Commissioner Kirsanow that I agree with that but to  
7 emphasize that we have been trying to provide an  
8 extraordinary amount of candor, including discussing  
9 potentialities that may not come to fruition, and  
10 that everyone should understand that while we are  
11 looking at all possible alternatives, certainly no  
12 decisions have been made yet with respect to layoffs  
13 or anything else. But we are looking at some very  
14 tough issues.

15 If those are the questions with respect  
16 to the financial condition, I will continue with the  
17 staff director's report.

18 CHAIRMAN REYNOLDS: Yes.

19 STAFF DIRECTOR MARCUS: Commissioner  
20 Kirsanow had referred earlier to administrative  
21 instructions that I have issued which have not  
22 previously been discussed in a Commission meeting.  
23 And I'd like to say just a word about it because I  
24 think this relates very much to Commissioner

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1 Braceras' concern that we not stop in our reform  
2 efforts just because we have an emergency going on.

3 I think it is important to say that in  
4 just the first brief three months, we have already  
5 tackled a large number of problems based on findings  
6 of the GAO.

7 Now, I can't in open session go into too  
8 much detail about how our reforms deal with  
9 recommendations of GAO. What I will say is this.  
10 We are implementing over 20 reform measures that  
11 relate to recommendations of the GAO in that at  
12 least some of them not only address findings of GAO  
13 but address findings of GAO that are not yet even  
14 final and formally announced.

15 So we are trying to be as aggressive as  
16 possible, not just reacting to what has happened in  
17 the past but looking at the best information we have  
18 available and trying to get ahead of them.

19 I think that this is an indication that  
20 we are so serious about reform that we are tackling  
21 issues that haven't even yet become finally public  
22 in order to make sure that we can bring our house  
23 into order.

24 Commissioner Yaki had pointed out a few

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1 moments ago that there is a difference between  
2 emergency planning and long-term structural reform.

3 And I had indicated in response to that that, in  
4 fact, dealing with this emergency may cause some  
5 difficulty in dealing with the long-term structural  
6 problem.

7 One way in which I have anticipated that  
8 problem is by creating a new senior-level position  
9 of a person at a high level who can focus on some of  
10 the long-term structural needs.

11 As I am focusing with our director of  
12 management and other of our management and financial  
13 staff on the emergencies, it is important that there  
14 be at least one high-level person who is looking at  
15 the long term in helping in reforms.

16 So I do have a new position that I am  
17 creating of associate deputy staff director, which  
18 will be a management-level person who will be  
19 looking at such matters as GAO implementation. The  
20 hope is that there will be one person who is not  
21 diverting attention to emergencies and who can help  
22 focus on the long term.

23 Finally, I have been asked to say a word  
24 about congressional compliance. We continue to work

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1 as hard as we can, not only to meet the obligations  
2 imposed on us by our oversight committees but to  
3 exceed them.

4 I had indicated in prior meetings that  
5 staff had been working around the clock to try and  
6 meet deadlines. Fortunately, at least for a little  
7 while, that has slowed down.

8 But I would say that, even since the  
9 last meeting, there have been multiple document  
10 productions given to Congress because we think it is  
11 so important to cooperate with the oversight  
12 committees.

13 In fact, not only have we been meeting  
14 our deadlines for document production, but over the  
15 last few weeks, we have gone ahead of time based on  
16 a concern expressed to me by House oversight counsel  
17 that they would like it quicker if possible.

18 And we have delivered to Congress some  
19 documents that they asked us to provide by April.  
20 And I believe some of the documents have met at May  
21 timetable. So we have, in fact, not only been  
22 working to meet but also to exceed our deadlines  
23 from Congress, thanks to extraordinary work from a  
24 large number of staffers, including our custodian of

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1 records, Barbara Fontana, and solicitor, Emma  
2 Monroig.

3 We are aware now, as of yesterday, that  
4 there will be another subpoena issued to the  
5 Commission. As I understand it, it is likely to  
6 look like the last one except that it will be  
7 renewed.

8 I anticipate that this will involve  
9 potentially substantial additional work in order to  
10 make sure that we comply with the last one.

11 Now, some have asked me, "Well, if you  
12 have already handed over virtually all of the paper  
13 you have got and this is a renewal, how could it be  
14 more?" The problem that we have is that since my  
15 arrival, we have done everything we can to fully  
16 respond to those pending document requests for which  
17 we're responsible as well as to attempt to go back  
18 and certify our completion.

19 However, the fact is that we do not  
20 entirely know what my predecessor did and didn't  
21 produce prior to my arrival. We do not have records  
22 indicating what was produced, what wasn't produced.

23 So with respect to those portions of the  
24 subpoena that were dealt with earlier, we may have

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1 additional need for resources to be diverted to  
2 comply with that portion of the subpoena.

3 CHAIRMAN REYNOLDS: Commissioner  
4 Kirsanow?

5 COMMISSIONER KIRSANOW: Just a question.  
6 Are the remaining documents Bates stamped?

7 STAFF DIRECTOR MARCUS: We are Bates  
8 stamping all documents, keeping a record and an  
9 extra copy currently.

10 COMMISSIONER KIRSANOW: Good.

11 STAFF DIRECTOR MARCUS: As for the prior  
12 production, we do not have a complete record. And I  
13 might have to defer to career staff to address  
14 whether there was Bates stamping and, if so, whether  
15 it was page by page or document by document. I will  
16 defer to our solicitor, Emma Monroig.

17 MS. MONROIG: Yes. Good morning. The  
18 documents that were produced to Congress before mid  
19 December were not Bates stamped. And we don't know  
20 what they were because copies were not kept or  
21 identified as a production, nor was there a list of  
22 the documents produced.

23 The production in late December done by  
24 the General Counsel was Bates stamped, and there are

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1 copies. And the ones afterwards that have been done  
2 during the current year are also Bates stamped. And  
3 we know what was produced because we have a copy of  
4 them.

5 But the initial ones, we have, you know  
6 -- and some of the notes of the documents that have  
7 been left have said that the production in some  
8 categories were incomplete. That is why there is an  
9 element of uncertainty.

10 COMMISSIONER BRACERAS: I'm sorry. Who  
11 was responsible for supervising the production, the  
12 earlier productions?

13 MS. MONROIG: Well, apparently the  
14 assistant to the staff director, Alex Sun, was a  
15 person responsible. And the letters going out are  
16 signed by the staff director, Les Jin.

17 COMMISSIONER BRACERAS: Okay.

18 COMMISSIONER KIRSANOW: So would it be  
19 fair to say that we may be duplicating at this  
20 point?

21 STAFF DIRECTOR MARCUS: It's a little  
22 premature without actually seeing the subpoena and  
23 communicating with staff, but my hope is that we  
24 will be able to work together with them to be able

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1 to determine from their records what they have and  
2 what they don't have.

3 I don't know yet entirely what sort of  
4 indexing they might be able to share with us, but my  
5 hope is they will work with us to minimize the  
6 additional cost and expense. And I'm certainly  
7 seeing from facial expressions that oversight  
8 counsel is agreeable to that.

9 CHAIRMAN REYNOLDS: Well, before you go  
10 on, going forward, I think it is extremely important  
11 that we have good communication with the Oversight  
12 Committee to ensure that the documents that we  
13 provide are satisfactory.

14 And if we cannot provide a complete  
15 response, then we should be prepared to offer up our  
16 reasons for being unable to provide a complete  
17 response.

18 Yes?

19 VICE CHAIRMAN THERNSTROM: Do we know  
20 the condition of the records of the subcommittee, as  
21 opposed to our records?

22 STAFF DIRECTOR MARCUS: I think we're  
23 going to have to have further discussions with the  
24 subcommittee.

1           The one last point that I intended to  
2 make in my report with respect to congressional  
3 compliance was to answer a question posed to me last  
4 meeting by Commissioner Yaki. He asked me if we  
5 could determine the costs that we have incurred  
6 during congressional compliance.

7           That cost is, in part, a matter of out  
8 of pocket that we can determine with actual numbers  
9 and is, in part, a matter of staff time, which we  
10 have needed after the fact in some cases to estimate  
11 based on beliefs about hours worked.

12           The analysis that we have done estimates  
13 that we have had to incur costs of approximately  
14 \$123,000 in complying with the congressional  
15 subpoena.

16           That is my report.

17           CHAIRMAN REYNOLDS:           Commissioner  
18 Kirsanow?

19           COMMISSIONER KIRSANOW: I think before I  
20 had some additional questions, and I know Jennifer  
21 has got some motions and so do I.

22           A few things. One is with respect to  
23 the cost of complying with oversight, I view that as  
24 part of reform, frankly. I view that as a cost that

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1 is unavoidable. And I think we're going to comply  
2 with that, regardless of the cost. It causes  
3 problems possibly, but that is something that we  
4 will see.

5 Second, it strikes me that this  
6 informational vacuum that we have places us in a  
7 very difficult position you have indicated. I guess  
8 I'm repeating what you said, but I'm very concerned  
9 that we're going to be able to make accurate  
10 assessments about the measures that we need to take  
11 on an agency basis because of that informational  
12 vacuum.

13 Does the staff director have any idea as  
14 to how we are going to make these assessments given  
15 that informational vacuum?

16 STAFF DIRECTOR MARCUS: Commissioner  
17 Kirsanow, you are asking me whether I know how we  
18 will be able to get the accurate information we need  
19 in order to take the emergency measures to deal with  
20 the financial?

21 COMMISSIONER KIRSANOW: Right, right.

22 STAFF DIRECTOR MARCUS: Well, I have  
23 already begun adding additional staff to look at the  
24 financial numbers and to check and double check. In

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1 some cases, these are not financial staff, but  
2 they're smart people who can work with me on it.

3 And we are doing the best we can now  
4 focusing all of our attention on this and making  
5 this emergency measure first priority to essentially  
6 be our top priority and even at the expense of some  
7 of the more long-term plans that we are doing.

8 CHAIRMAN REYNOLDS: Commissioner Taylor?

9 COMMISSIONER TAYLOR: I want to put on  
10 the table I think something that has been implicit  
11 in everything that has been discussed today. And I  
12 know it has been the subject of discussion between  
13 the chair and the staff director. But it's  
14 something that we haven't stated. The only person I  
15 saw that stated this was Commissioner Yaki in his  
16 testimony yesterday.

17 And so when he wanted us to be aware of  
18 and at least articulate the difference between our  
19 emergency measures and our reform measures, given  
20 what he said yesterday, I know he was talking about  
21 doing something in the context of enduring that we  
22 consider the context. And that is, whatever we do  
23 should be narrowly tailored so that it does not  
24 materially hinder the public function of our

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1 Commission.

2 I'm simply paraphrasing what he said  
3 yesterday because, as I view, we're not going to be  
4 judged in the short term. We're going to be judged  
5 in the long term on whether or not we are able to  
6 produce a quality product over the long term.

7 So what I would like for the staff  
8 director is that I'm not going to micromanage you,  
9 and you know that. What I want, though, is some  
10 assurance when you make recommendations to tell us  
11 that it will not materially hinder our public  
12 function and if you ever make a recommendation that  
13 you think will, that you tell us that and we put  
14 those issues on the table because that, from my  
15 perspective, is important and I don't want to lose  
16 sight of that as we discuss these important  
17 short-term issues.

18 STAFF DIRECTOR MARCUS: Commissioner  
19 Taylor, my plan as we go forward on these reforms is  
20 to institute measures that will strengthen the  
21 institution so as to improve its ability to achieve  
22 its mission.

23 I don't see a tension between reform  
24 measures and mission accomplishment. I believe that

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1 the long-term measures that we are doing will make  
2 this a stronger agency that will be better able to  
3 accomplish its long-term measures.

4 For that matter, I also see our  
5 compliance with a congressional request as being in,  
6 as Commissioner Kirsanow indicated, a part of our  
7 reform. And I believe that as we work together with  
8 them, that that, too, will enable us better to  
9 achieve our mission.

10 CHAIRMAN REYNOLDS: Commissioner  
11 Braceras?

12 COMMISSIONER BRACERAS: I'm wondering  
13 now if it wouldn't be wise to move up items 6 and 7  
14 on the agenda, before we launch into program  
15 planning, to sort of continue our discussion of  
16 reform and operations, --

17 CHAIRMAN REYNOLDS: Yes.

18 COMMISSIONER BRACERAS: -- instead of  
19 totally switching gears for project planning.

20 CHAIRMAN REYNOLDS: Project planning,  
21 after this discussion today, it seems to me that the  
22 new ideas that we have been considering, that we  
23 should not move forward until we know whether they  
24 will entail additional costs.

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1           We have a statutory obligation to  
2 produce one report a year. And that report will be  
3 the Adarand report. That decision was already made  
4 in the past.

5           COMMISSIONER BRACERAS: Well, there was  
6 a motion circulated that we do need to address  
7 related to the Adarand report, --

8           CHAIRMAN REYNOLDS: Right.

9           COMMISSIONER BRACERAS: -- which is to  
10 expand the focus of the report. And this body needs  
11 to discuss that and decide whether or not to  
12 authorize that.

13          CHAIRMAN REYNOLDS: Under program --

14          COMMISSIONER BRACERAS: My question here  
15 was only what order we should do that in.

16          CHAIRMAN REYNOLDS: Well, what I'm  
17 suggesting is that program planning, that the  
18 initial plan was to discuss all of the programmatic  
19 activities, all of the concepts --

20          COMMISSIONER BRACERAS: Right.

21          CHAIRMAN REYNOLDS: -- that we have been  
22 considering. I'm suggesting that that has been  
23 narrowed until we get a handle on the costs  
24 associated with each of those projects.

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1 COMMISSIONER BRACERAS: So are we moving  
2 to defer that discussion? Is that --

3 CHAIRMAN REYNOLDS: With the exception  
4 of the statutory report, the Adarand report.

5 VICE CHAIRMAN THERNSTROM: But, as  
6 Commissioner Braceras has just said, the Adarand  
7 report, there are motions to amend it. Those have  
8 to be discussed.

9 CHAIRMAN REYNOLDS: Yes, yes. What I am  
10 saying is --

11 COMMISSIONER BRACERAS: Right. Let me  
12 make a motion, then. I move to -- hold on. I've  
13 just been handed something. Okay. I move to defer  
14 discussion of program planning until the April  
15 meeting with the exception of the change in focus on  
16 the Adarand project.

17 COMMISSIONER KIRSANOW: Second.

18 CHAIRMAN REYNOLDS: Okay. Any  
19 discussion?

20 COMMISSIONER YAKI: Point of  
21 clarification. Tied in that motion, Commissioner,  
22 was a change of the agenda to move it to the back of  
23 the agenda today or --

24 COMMISSIONER BRACERAS: I was just going

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1 to do that in a separate motion.

2 COMMISSIONER YAKI: Okay.

3 COMMISSIONER BRACERAS: So the first  
4 motion is simply to defer program planning with the  
5 exception of Adarand until April.

6 CHAIRMAN REYNOLDS: Any discussion?

7 (No response.)

8 CHAIRMAN REYNOLDS: All in favor?

9 (Whereupon, there was a chorus of "ayes.")

10 CHAIRMAN REYNOLDS: All in opposition?

11 (No response.)

12 COMMISSIONER BRACERAS: Okay. So my  
13 second motion, then, is to first move the discussion  
14 of the Adarand project until after the management  
15 and operations discussion and the working group on  
16 reform discussion.

17 CHAIRMAN REYNOLDS: A second?

18 COMMISSIONER KIRSANOW: Second.

19 CHAIRMAN REYNOLDS: Discussion?

20 (No response.)

21 CHAIRMAN REYNOLDS: All in favor?

22 (Whereupon, there was a chorus of "ayes.")

23 CHAIRMAN REYNOLDS: Any opposition?

24 (No response.)

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1 CHAIRMAN REYNOLDS: Motion passes. Yes?

2 COMMISSIONER KIRSANOW: Still not done  
3 with the staff director's report. I just have a few  
4 more questions with respect to the staff director.

5 COMMISSIONER BRACERAS: Oh, I'm sorry.  
6 I thought that --

7 COMMISSIONER KIRSANOW: That's okay. I  
8 want to go back to operational baseline, where we  
9 are right now. I think earlier on, you made  
10 reference to some of the reports that we're  
11 currently working on and that one was the voting  
12 rights report. We're using a contractor to  
13 discharge that function?

14 STAFF DIRECTOR MARCUS: Yes, in part,  
15 Commissioner Kirsanow. The Commission previously,  
16 as I understand it, approved a two-part Voting  
17 Rights Act authorization study. The first part for  
18 fiscal year 2005 is an OGC project looking at legal  
19 aspects of voter rights authorization.

20 The fiscal year 2006 is an Office of  
21 Civil Rights Evaluation project dealing with such  
22 matters as access to voting by persons of limited  
23 English proficiency and persons with disabilities.

24 The first part, which OGC is responsible

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1 for, was contracted out to a contractor.

2 COMMISSIONER KIRSANOW: Who is the  
3 contractor?

4 STAFF DIRECTOR MARCUS: The contractor's  
5 name is Mark Posner.

6 VICE CHAIRMAN THERNSTROM: And his work  
7 is done. Is that correct?

8 STAFF DIRECTOR MARCUS: He has issued us  
9 a document that is characterized as a final report,  
10 yes.

11 CHAIRMAN REYNOLDS: And I believe all  
12 payments have been made.

13 Okay. All right. Next up, management  
14 and operations. And have some motions from  
15 Commissioner Kirsanow.

16 COMMISSIONER KIRSANOW: I think  
17 Commissioner Braceras had a motion with respect to  
18 extending the time frame for working group on  
19 reform. And I'll let her go forward on that one  
20 before I enter my motions.

21 CHAIRMAN REYNOLDS: That's fine.

22 VII. REPORT OF THE WORKING GROUP ON REFORM

23 COMMISSIONER BRACERAS: Okay. Well, as  
24 I said before, the working group on reform was

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1 established at the January meeting. Its  
2 jurisdiction was to discuss external and internal  
3 communications and project, process, and  
4 implementation.

5 I noted earlier that we have completed  
6 our work on two of the three of those items. And  
7 I'd like to move now that we extend the time frame  
8 for the working group on reform until May.

9 We have put together a list of  
10 recommended rule changes on the first two agenda  
11 items, but I think perhaps it would be best to bring  
12 forward all of our proposed rule changes at one  
13 time. And we can do that in May, at which point we  
14 will have detailed project planning or project  
15 implementation template to bring forward as well.

16 CHAIRMAN REYNOLDS: Okay. Is there a  
17 second?

18 COMMISSIONER KIRSANOW: Second.

19 CHAIRMAN REYNOLDS: Discussion?

20 (No response.)

21 CHAIRMAN REYNOLDS: All in favor?

22 (Whereupon, there was a chorus of "ayes.")

23 CHAIRMAN REYNOLDS: Any in opposition?

24 (No response.)

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1 CHAIRMAN REYNOLDS: The motion passes.

2 COMMISSIONER BRACERAS: Since  
3 Commissioner Redenbaugh has resigned by the  
4 Commission and he was a member of the working group  
5 on reform, I'd like to move at this time that we add  
6 a new commissioner to the working group.

7 CHAIRMAN REYNOLDS: Second?

8 VICE CHAIRMAN THERNSTROM: I don't think  
9 it was actually a motion we voted on originally, but  
10 I could be wrong.

11 COMMISSIONER KIRSANOW: I think wasn't  
12 it the chair?

13 VICE CHAIRMAN THERNSTROM: The chair  
14 simply --

15 COMMISSIONER KIRSANOW: I think the  
16 chair should just --

17 VICE CHAIRMAN THERNSTROM: The chair  
18 simply appointed it. And I suggest --

19 COMMISSIONER BRACERAS: Okay. So then  
20 I'd like to suggest that the chair appoint a new  
21 member of the working group. And I would like to  
22 suggest that it be Commissioner Yaki.

23 CHAIRMAN REYNOLDS: Commissioner Yaki,  
24 are you agreeable to being drafted?

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1 COMMISSIONER YAKI: I really have no  
2 choice.

3 (Laughter.)

4 COMMISSIONER BRACERAS: Sure, you do.

5 COMMISSIONER YAKI: I'm the new guy.

6 COMMISSIONER BRACERAS: You could

7 VICE CHAIRMAN THERNSTROM: Yes. And --

8 COMMISSIONER BRACERAS: You could  
9 suggest someone else --

10 COMMISSIONER YAKI: A player to be named  
11 later.

12 VICE CHAIRMAN THERNSTROM: And I wonder  
13 if you would also designate Jennifer Braceras as the  
14 chair of the working group, of the reconstituted  
15 working group.

16 CHAIRMAN REYNOLDS: Okay. Jennifer, do  
17 you have any objections?

18 COMMISSIONER BRACERAS: No objections.

19 CHAIRMAN REYNOLDS: All right. It's  
20 done.

21 Commissioner Kirsanow?

22 VI. MANAGEMENT AND OPERATIONS

23 COMMISSIONER KIRSANOW: Yes. I do have  
24 a few motions of my own, as stipulated earlier,

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1 about a week ago. There were some questions with  
2 respect to them, and I am prepared to answer them.

3 What I will do is I think everyone has a  
4 copy of it. Again, this was e-mailed to everybody  
5 in terms of the proposed motion. I will read them  
6 into the record and then try to explain or answer  
7 some of the questions that were posed offline and  
8 probably have discussion on it.

9 As a preface to these motions, they are,  
10 in large part, a function of some of the things that  
11 were raised by the staff director in his report in  
12 terms of transparency, lack of information.

13 We don't know where we are on a number  
14 of matters because it appears as if records are  
15 incomplete. Institutional controls have not been in  
16 place.

17 In addition, these are matters that we  
18 have been discussing for quite some time now. I  
19 think that many commissioners were in agreement that  
20 some form of this motion was imperative.

21 I think that going to Commissioner  
22 Braceras' point about Commissioner Redenbaugh was  
23 frustrated with the pace of reform when we have only  
24 been working on this for a couple of months now

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1 when, frankly, there hasn't been any reform,  
2 significant reform, in 12 years. And now we are I  
3 think moving forward on such matters.

4 Let me just read this. And then I will  
5 answer some of the questions that --

6 COMMISSIONER BRACERAS: I'm sorry. You  
7 said "motions," plural, but this appears to be just  
8 one. You handed them out separately?

9 COMMISSIONER KIRSANOW: Yes. They're  
10 going to go out one by one so that you --

11 COMMISSIONER BRACERAS: Okay.

12 COMMISSIONER KIRSANOW: This is actually  
13 one motion.

14 CHAIRMAN REYNOLDS: Commissioner  
15 Kirsanow?

16 COMMISSIONER KIRSANOW: Yes?

17 CHAIRMAN REYNOLDS: Now, what I have  
18 here, I have a motion with three subparts.

19 COMMISSIONER KIRSANOW: Right.

20 CHAIRMAN REYNOLDS: Okay.

21 VICE CHAIRMAN THERNSTROM: And that is  
22 one motion? You're not breaking that down into  
23 three motions?

24 COMMISSIONER KIRSANOW: Right, yes.

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1 Financial and operational controls. The Commission  
2 shall take all steps necessary and proper to: A)  
3 implement on an expedited manner a time schedule all  
4 outstanding and forthcoming recommendations from the  
5 Governmental Accountability Office and the Office of  
6 Personnel Management certified by the Commission at  
7 its April 2005 meeting; B) pertain I have here  
8 "exceptionally" qualified accounting firm to conduct  
9 the comprehensive financial audit of the  
10 Commission's books for fiscal years 2003, 2004 to be  
11 submitted no later than January 1, 2006; and C)  
12 solicit the Office of Personnel Management to  
13 conduct a desk audit for the Commission's  
14 headquarters and regional offices.

15 Now, based on some of the discussions we  
16 had today, I think some of these motions, subpart C  
17 motions, need to be rejiggered a bit. I'd also like  
18 to address some of the concerns that were raised  
19 before related to these motions. There were some  
20 questions related to them.

21 First of all, the staff director has  
22 already gone a long way toward implementing some of  
23 these measures, most notably the GAO  
24 recommendations. I commend the staff director for

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1 doing that.

2 Commissioner Thernstrom had expressed a  
3 concern that the staff director given all of the  
4 other labors that he is facing may not be able to  
5 implement these reforms in a nine-month schedule.

6 I trust the staff director to be able to  
7 do that since he was able to do 20 of 29 in fairly  
8 short order. Even if the other nine are a little  
9 bit more draconian or difficult to implement, I also  
10 think that this Commission is one that would respect  
11 the staff director's report to us at any point  
12 asking for more time. But I think that these things  
13 can be implemented within nine months.

14 I think given the circumstances that the  
15 Commission is in, that it is important for us to  
16 move as expeditiously as possible. And when I say  
17 "forthcoming recommendations from the Government  
18 Accountability Office," we have a draft  
19 recommendation from the GAO. There may be others  
20 coming down the pike.

21 And when I say "certified," this is  
22 another question that was raised by Commissioner  
23 Thernstrom, what does that mean? What I mean by  
24 that is we don't necessarily know all of the

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1 recommendations that GAO may come up with.

2 I don't want to be delegating to GAO  
3 also the prerogatives of the Commission. So we will  
4 look at those GAO recommendations, certify them as  
5 recommendations that we are going to implement. And  
6 then at that point, the staff director would move  
7 forward to implement them.

8 COMMISSIONER BRACERAS: Well, you didn't  
9 formally enter a discussion period, correct?

10 CHAIRMAN REYNOLDS: That's right.

11 COMMISSIONER BRACERAS: It needs to be  
12 moved. It needs to be seconded. And we need to --

13 CHAIRMAN REYNOLDS: And also, Pete, I  
14 would suggest --

15 COMMISSIONER BRACERAS: I want to be  
16 heard first when we discuss.

17 CHAIRMAN REYNOLDS: Okay. Pete, are you  
18 sure you want to have a package deal in here?

19 COMMISSIONER KIRSANOW: Yes, I do.

20 CHAIRMAN REYNOLDS: Okay.

21 COMMISSIONER KIRSANOW: With respect to  
22 retaining an exceptionally qualified accounting firm  
23 to conduct a comprehensive financial audit, a few  
24 points.

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1 Commissioner Thernstrom had a question  
2 as to what constitutes exceptionally qualified. I  
3 would leave that to the staff director.

4 CHAIRMAN REYNOLDS: I'm sorry. How  
5 about this, Pete? Why don't we have a motion, have  
6 it seconded, start the discussion, and vote on it?

7 COMMISSIONER KIRSANOW: If you wish. I  
8 was trying to address some of the concerns that were  
9 e-mailed in the e-mail traffic so that we could get  
10 ahead.

11 COMMISSIONER BRACERAS: Right. My  
12 assistant just reminds me that the maker of the  
13 motion always has the first opportunity to discuss  
14 the motion. So why <sup>do</sup> don't we just make the motions,  
15 second them, and then you can continue.

16 COMMISSIONER KIRSANOW: Well, I would  
17 make the motion that the motion I have just read  
18 into the record be adopted.

19 CHAIRMAN REYNOLDS: Second?

20 COMMISSIONER BRACERAS: Second.

21 CHAIRMAN REYNOLDS: Discussion?

22 COMMISSIONER KIRSANOW: Okay. With  
23 respect to B, I would leave it to the discussion of  
24 the staff director to come up with what he considers

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1 to be an exceptionally qualified accounting firm.  
2 And I think he is perfectly suited to make that  
3 determination. I don't think we need to  
4 micromanage.

5 This is not a reflection on the  
6 accounting firm that we're currently using. I had a  
7 discussion with that person, who I think is very  
8 well-suited to doing what he is doing right now.  
9 And I think he had indicated that he may not be in a  
10 position to undertake a full-scope audit.

11 In discussions also with the chair,  
12 there was a suggestion made that this be a forensic  
13 audit. I am agnostic about that. Based on what I  
14 have heard today, that might be something that makes  
15 sense, but I have no handle on how much that would  
16 cost, what that would entail. And so at this point,  
17 I would simply go with a full audit, as generally  
18 understood by the account industry.

19 Third, solicit the Office of Personnel  
20 Management to conduct a desk audit of Commission  
21 headquarters and regional offices. I will say to  
22 you that after I made this motion and based on  
23 discussion we had today, this one, this subpart,  
24 might suitably be deferred until such time as this

1 so-called window, decisional window, that the staff  
2 director faces right now as either closed or become  
3 a little bit more transparent, no pun intended. I  
4 think until such time as that decision is made,  
5 possibly subpart C should be held in abeyance. I'm  
6 willing to retain that if others think that that is  
7 appropriate.

8 CHAIRMAN REYNOLDS: Okay. Commissioner  
9 Braceras?

10 COMMISSIONER BRACERAS: Okay. First of  
11 all, I would like to say that I agree wholeheartedly  
12 with the spirit of this motion. And I hope that we  
13 can pass if not this particular motion, then  
14 something similar.

15 I also want to say, however, that in  
16 passing a motion relating to financial and  
17 operational controls or in voting for such a motion,  
18 I in no way mean to suggest that the staff director  
19 isn't already taking strenuous actions to address  
20 these concerns.

21 I understand why it might be wise to  
22 formally adopt this motion, but I want to be  
23 perfectly clear that the staff director has my full  
24 confidence. I know that he has been tackling this.

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1 He hit the ground running from the second he got  
2 here and has been struggling to grapple with the  
3 financial and operational mess that the previous  
4 administration left us in. So I just want to make  
5 clear my confidence in and support for the staff  
6 director's ongoing efforts in this regard.

7 I would also like to offer some  
8 amendments to this motion. With respect to the all  
9 outstanding and forthcoming recommendations from  
10 GAO, I really don't think we can say all forthcoming  
11 recommendations when we do not know what it is they  
12 could conceivably recommend down the road.

13 All forthcoming means in perpetuity  
14 years from now. So I think I would recommend  
15 changing the language to say "all final and draft  
16 recommendations" because we know what they are.

17 I guess still with respect to A, I would  
18 ask the staff director before voting to approve this  
19 language, which I think I can do, I would want to  
20 hear from the staff director on whether there are  
21 any final or draft recommendations of the GAO that  
22 he believes are either not feasible or with which he  
23 disagrees or that there is any reason why he thinks  
24 they might be difficult or unwise to implement. If

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1 there aren't, then --

2 CHAIRMAN REYNOLDS: Commissioner  
3 Kirsanow?

4 COMMISSIONER BRACERAS: -- just for the  
5 effect of the manager, I'd like to know if he  
6 anticipates any difficulty with any particular  
7 recommendations.

8 VICE CHAIRMAN THERNSTROM: And  
9 especially within the nine-month period.

10 COMMISSIONER KIRSANOW: Just to clarify,  
11 Commissioner Braceras -- and I have no problems with  
12 substituting "final" and "draft," but that is why I  
13 said as certified by the Commission.

14 I don't think that we're here to certify  
15 any of these things at this point. I think if the  
16 staff director wants to take a look at it, make a  
17 determination, report back to us. I don't want to  
18 delegate necessarily to GAO recommendations.

19 COMMISSIONER BRACERAS: That's fine.  
20 That's fine.

21 COMMISSIONER KIRSANOW: Certification  
22 also means that anything that is forthcoming -- and  
23 it's going to have to be forthcoming before the  
24 April meeting -- are things that we adopt or at

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1 least discuss the possibility of adopting.

2 COMMISSIONER BRACERAS: That's fine.

3 COMMISSIONER KIRSANOW: But you don't  
4 substitute "final" and "draft." That's --

5 COMMISSIONER BRACERAS: I think, just to  
6 clarify, I would like to substitute the words  
7 "final" and "draft" for the words "outstanding" "and  
8 forthcoming." And I would like to insert the word  
9 "as" after "Office of Personnel Management" and  
10 before "certified." So it would read "All final and  
11 draft recommendations from the GAO and OPM as  
12 certified by the Commission at its April 2005  
13 meeting."

14 COMMISSIONER KIRSANOW: I'm agreeable to  
15 that.

16 CHAIRMAN REYNOLDS: Okay. At this  
17 point, Ken, would you respond to Commissioner  
18 Braceras' --

19 COMMISSIONER BRACERAS: Hold on. I  
20 think Commissioner Meeks wanted to --

21 COMMISSIONER MEEKS: Yes, please. I  
22 mean, C I think needs to be deferred. A, I would  
23 suggest that the commissioners do not need a motion  
24 that the staff director certainly probably appends.

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1 I mean, I don't have any objection.

2 COMMISSIONER BRACERAS: Right.

3 COMMISSIONER MEEKS: But I would assume  
4 that he shouldn't be the staff director if he's not  
5 going to implement these things without  
6 commissioners passing a motion to do that. B fine.  
7 That will be fine.

8 COMMISSIONER KIRSANOW: Just to respond  
9 to Commissioner Meeks, I think it's important for  
10 the Commission to provide direction to the staff  
11 director on some of these GAO matters which impact  
12 on policy. That is our prerogative.

13 I am in full agreement with what the  
14 staff director has done so far. I concur with  
15 Commissioner Braceras that the staff director has  
16 done more in three months than I have seen in three  
17 years.

18 But this is also a matter of our  
19 statutory framework and who does what. Maybe I'm  
20 being a little bit too technical, but I do believe  
21 it's the prerogative of the Commission to instruct  
22 the staff director on matters pertaining to GAO  
23 recommendations.

24 And I also think, without getting too

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1 esoteric about it, there are constitutional concerns  
2 with respect to the delegation of power. We don't  
3 simply adopt things from GAO. We make an  
4 independent assessment as to what recommendations  
5 we're going to implement. That's a policy issue  
6 that falls within the prerogative of the Commission.

7 CHAIRMAN REYNOLDS: Commissioner Yaki?

8 COMMISSIONER YAKI: Yes. Just one quick  
9 clarification and then a comment. So the author of  
10 the motion and the author of the amendment, if I  
11 understand it correctly, what we will do in April is  
12 we will decide of the final and draft which ones we  
13 will wish to adopt?

14 COMMISSIONER KIRSANOW: Correct.

15 COMMISSIONER YAKI: It goes to the point  
16 that Commissioner Taylor raised that I raised  
17 yesterday, which is I want to make sure that there  
18 is nothing in there that unduly inhibits our mission  
19 in there as well. Then I am comfortable. Then I am  
20 very comfortable.

21 COMMISSIONER BRACERAS: I don't think  
22 that is clear from this particular language. And I  
23 agree with you. I'm comfortable with the way you  
24 just phrased it, but I don't think it's clear from

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1 the way it is drafted that we're going to have a  
2 discussion in April and we will vote on the  
3 particular recommendations that we want to  
4 implement.

5 CHAIRMAN REYNOLDS: Okay.

6 COMMISSIONER YAKI: I just had a  
7 comment, but if you wanted to finish my  
8 clarification, go ahead. That's fine.

9 VICE CHAIRMAN THERNSTROM: Well, I want  
10 to ask you whether you have got in mind some  
11 specific language that would make that that would  
12 clarify.

13 COMMISSIONER YAKI: I would offer a  
14 friendly amendment that to implement on the next  
15 nine months' schedule all final and draft  
16 recommendations from the Government Accountability  
17 and Office of Personnel Management adopted by the  
18 Commission at its April 2005 meeting.

19 COMMISSIONER KIRSANOW: I'm agreeable to  
20 that. Just a point. I am as a lawyer in favor of  
21 precision, but two points with respect to that. The  
22 first is, again, I think these are all fine  
23 amendments. I am agreeable to them.

24 On a forward basis with respect to these

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1 motions, I think we should offer motions with  
 2 precision, but we should also keep in mind that  
 3 these are not motions made through a court and we  
 4 are not drafting legislation.

5 COMMISSIONER YAKI: I understand.

6 COMMISSIONER KIRSANOW: And I say that  
 7 because I think it's imperative that we not get too  
 8 bogged down in minutiae. We are a collegial body  
 9 here. I think on the record, the transcript will be  
 10 reflective of the intent of this body.

11 I don't want to go back to the old days  
 12 of just kind of freewheeling motions being made, no  
 13 one remembering what the motions were about. But,  
 14 by the same token, I think that there is a balance  
 15 to be struck.

16 COMMISSIONER YAKI: May I take back my  
 17 time?

18 CHAIRMAN REYNOLDS: Yes.

19 COMMISSIONER YAKI: But I agree. I was  
 20 just simply responding to Commissioner Thernstrom's  
 21 request. But I was fully in agreement that I  
 22 thought the intent was very clear.

23 The only concern I have about the  
 24 package has to do with B. And B I'm just worried

1 about we are deferring project planning because we  
2 want to make sure we have costs allocated, we are  
3 sure what the budget is available for each of those  
4 things. I understand the spirit of B. I am just  
5 worried about the cost of B given this particular  
6 time in our agency's budgetary drama.

7 CHAIRMAN REYNOLDS: That's a good point.

8 And it seems to me that the first thing that we  
9 have to do is decide that we want to do it. And  
10 then as to the cost associated with having a  
11 full-blown review conducted, we're going to have to  
12 get some cost estimates. And we may have to revisit  
13 this issue. And we may have to go and try to seek  
14 additional funds in order to get a full-blown review  
15 completed.

16 Yes?

17 VICE CHAIRMAN THERNSTROM: And does that  
18 suggest perhaps a rewording of point B? And again I  
19 turn to Commissioner Yaki for suggested rewording  
20 that takes into account the fact that there will be  
21 costs associated and they need to be known.

22 CHAIRMAN REYNOLDS: Well, at this point,  
23 though, I think that Pete, Commissioner Kirsanow,  
24 makes a good point. We cannot nail down all of the

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1 nuances. I think that we're going to have to trust  
2 each other in that -- I mean, I think that all  
3 around the table here, I think that we all  
4 understand that if we determine that we can't afford  
5 to do this, then the issue, we must revisit the  
6 issue.

7 It seems to me that we are going to have  
8 to find the money somewhere. Either we will have to  
9 seek additional funds from Congress or we will have  
10 to review the '06 budget.

11 But the bottom line is that I don't  
12 think that we should spend a lot of time trying to  
13 nail down all of the variables because we can't  
14 because as long as there is not an indication that  
15 there is a different understanding amongst the  
16 commissioners, I think that we understand that this  
17 is going to cost us money and that we may have some  
18 difficulty paying for it.

19 COMMISSIONER KIRSANOW: Yes, Mr. Chair.

20 I mean, I drafted this fully cognizant of the fact  
21 that we're in financial straits but also with an  
22 understanding that there are certain imperatives.

23 Getting a handle on the nature of the  
24 financial straits is one of those imperatives. I

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1 also trust the staff director based on my brief  
2 association with him to be able to report back to us  
3 pretty quickly as to what constraints we may have in  
4 terms of this financial audit. So we can revisit  
5 this particular issue.

6 Nonetheless, having said all of that, I  
7 can't emphasize enough how important I think based  
8 on the reports given by the staff director that we  
9 engage in full financial audit of this organization  
10 for, if no other reason, we don't even know what we  
11 don't know.

12 VICE CHAIRMAN THERNSTROM: Commissioner  
13 Yaki has his hand up.

14 COMMISSIONER YAKI: Based on the  
15 representation of Commissioner Kirsanow and the  
16 Chair, then I have no problem with B at this point.

17 CHAIRMAN REYNOLDS: Commissioner  
18 Braceras?

19 COMMISSIONER BRACERAS: I guess I am  
20 just wondering whether we should separate out A, B,  
21 and C at this point and vote on them separately and  
22 discuss them separately.

23 CHAIRMAN REYNOLDS: Well, I posed that  
24 question to Commissioner Kirsanow once before. Have

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1 you --

2 COMMISSIONER KIRSANOW: I would like to  
3 do them as a package --

4 COMMISSIONER BRACERAS: Okay.

5 COMMISSIONER KIRSANOW: -- with one  
6 exception. I think, as I indicated before, I'm  
7 amenable to C being backed on this only because I'm  
8 not sure. I still think we are in a informational  
9 vacuum that makes discussion of this perhaps  
10 premature, although we could implement it on a  
11 contingent basis. That is, you know, as of the  
12 April meeting, we could possibly implement this.

13 VICE CHAIRMAN THERNSTROM: And as a  
14 friendly amendment, does this mean you would accept  
15 a friendly amendment based on what Commissioner  
16 Meeks has said, that we defer C until --

17 COMMISSIONER KIRSANOW: I would defer it  
18 until April.

19 VICE CHAIRMAN THERNSTROM: Until April.

20 COMMISSIONER KIRSANOW: As quickly as  
21 possible.

22 VICE CHAIRMAN THERNSTROM: Okay. So  
23 that C, then, is off the table for this meeting.

24 COMMISSIONER KIRSANOW: Yes. Let's back

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1 this out until April. I will reintroduce it in  
2 April because I think by that time, we will have a  
3 handle on what the transition is like.

4 VICE CHAIRMAN THERNSTROM: So that the  
5 package becomes simply A and B.

6 COMMISSIONER BRACERAS: And just to be  
7 clear what we're voting on right now, we're deleting  
8 C from what we're voting on now. And I still have  
9 problems with the language of A. And I am sorry. I  
10 am a lawyer. I feel that what I vote on has to be  
11 precise.

12 I think what you're really saying is  
13 that at the April 2005 Commission meeting, we will  
14 vote on the implementation of GAO and OPM  
15 recommendations and that all recommendations  
16 approved at that meeting will be implemented within  
17 nine months.

18 COMMISSIONER KIRSANOW: Right.

19 COMMISSIONER BRACERAS: And I guess I  
20 would just like to phrase it that way because I'm  
21 uncomfortable with the way it is right now. It just  
22 seems to give the impression that we're voting to  
23 approve recommendations that we haven't yet  
24 discussed. And I just would rather have it phrased

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1 in a way that I am comfortable with.

2 CHAIRMAN REYNOLDS: Commissioner  
3 Kirsanow, do you have any objections to the language  
4 that she used?

5 VICE CHAIRMAN THERNSTROM: Could you  
6 repeat that language, Jennifer?

7 COMMISSIONER BRACERAS: Yes. At the  
8 April 2005 Commission meeting, the Commission will  
9 vote to adopt recommendations of the General  
10 Accounting Office and Office of Personnel  
11 Management. All recommendations that are adopted at  
12 the April meeting will be implemented within a  
13 nine-month time frame.

14 COMMISSIONER KIRSANOW: That's fine. I  
15 think, you know, the transcript reflects that. I  
16 don't have a problem with that.

17 VICE CHAIRMAN THERNSTROM: I think  
18 Commissioner Meeks said something.

19 COMMISSIONER MEEKS: And does that leave  
20 B in, then, too?

21 COMMISSIONER KIRSANOW: Yes, B is --

22 COMMISSIONER BRACERAS: I was just  
23 trying to tackle them one at a time.

24 COMMISSIONER MEEKS: Yes. Well, I --

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1 never mind.

2 COMMISSIONER BRACERAS: No. Please.

3 COMMISSIONER MEEKS: Well, I was just  
4 thinking and sort of contemplating making a motion  
5 to table this until April. And at that time, we  
6 will know what GAO's recommendations are probably.  
7 And we possibly could know what the cost of B will  
8 be.

9 I mean, there are just so many  
10 uncertainties right now about this motion, that it  
11 could get changed. I mean, I'm --

12 CHAIRMAN REYNOLDS: Yes, Commissioner  
13 Kirsanow?

14 COMMISSIONER KIRSANOW: I understand  
15 Commissioner Meeks' point. And she makes an  
16 interesting point. I don't think that there is a  
17 reason to table at this point. I think we all  
18 understand what is being proposed here. And I think  
19 there are only a few uncertainties.

20 We do know, in large part, what GAO is  
21 going to do. We have the draft. We know what that  
22 is about. We doubt that it is going to change  
23 significantly.

24 I think we will be prepared by April to

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1 do it. I'd like to move as quickly as possible. I  
2 think one of the problems that we have had on this  
3 Commission, at least in the three years that I have  
4 been here, is we have deferred things, whether it be  
5 expenses, motions. And I think we need to act  
6 quickly.

7 I don't think we're acting peremptorily.

8 I don't think we're acting hastily. I think we are  
9 acting appropriately in adopting these motions now  
10 so the minute we can hit the ground running, I don't  
11 think there is any uncertainty as to what is being  
12 adopted.

13 COMMISSIONER BRACERAS: Yes. I think  
14 with respect to A now, all we are doing is agreeing  
15 to take up the recommendations in April. And the  
16 ones we agree to we're setting the time frame.

17 VICE CHAIRMAN THERNSTROM: And is my  
18 understanding correct that the definition of  
19 exceptionally qualified is that which the staff  
20 director arrives at in the context of our budgetary  
21 constraints and any other considerations,  
22 professional judgment?

23 COMMISSIONER KIRSANOW: In his  
24 professional judgment, whoever is exceptionally

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1 qualified to do this. You know, I am not someone  
2 who can go down a list of accountants or auditing  
3 firms and tell you who is the best. I leave that to  
4 the staff director.

5 COMMISSIONER BRACERAS: Okay. Should we  
6 move the question?

7 CHAIRMAN REYNOLDS: Any other comments,  
8 concerns, questions?

9 COMMISSIONER YAKI: I move it as  
10 amended.

11 VICE CHAIRMAN THERNSTROM: Second.

12 CHAIRMAN REYNOLDS: Okay. Let's vote.  
13 All in favor?

14 (Whereupon, there was a chorus of "ayes.")

15 CHAIRMAN REYNOLDS: Any in opposition?

16 (No response.)

17 CHAIRMAN REYNOLDS: The motion passes.

18 COMMISSIONER KIRSANOW: I have a second  
19 motion. And I would also give an explanation of  
20 this one also based on I think Commissioner  
21 Braceras' question related to -- I'll read it into  
22 the record and then explain.

23 COMMISSIONER YAKI: Is this the IG one?

24 COMMISSIONER KIRSANOW: Yes, this is the

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1 Inspector General motion. Commissioner Yaki, you  
2 don't have this one because this one reflects some  
3 of the concerns that were raised by Commissioner  
4 Braceras in e-mail traffic but also substantially  
5 what the staff director had said in discussions I  
6 had with him and also what he said today.

7 This has to do with governance and  
8 accountability. As soon as practical, the staff  
9 director shall take all steps necessary and proper  
10 to retain the services of an Inspector General to  
11 identify: one, whether the Commission unlawfully  
12 deferred any payments that properly should have been  
13 paid in fiscal year 2004 to fiscal year 2005 in  
14 violation of the Anti-Deficiency Act; -- and that is  
15 a colloquialism -- two, whether the Commission  
16 deferred any payments that properly should have been  
17 paid in the fiscal year 2003 to fiscal year 2004 or  
18 2005 in violation of the Anti-Deficiency Act; and,  
19 three, report findings and recommendations to the  
20 Commission on a schedule to be determined by the  
21 Inspector General in conjunction with the chairman  
22 and staff director.

23 The original motion had contemplated the  
24 appointment of an Inspector General. And the staff

1 director had already gone to great lengths  
2 investigating the ability of the Commission to do  
3 so, both financially, legally, and practically, what  
4 Inspector Generals are able to do.

5 Commissioner Braceras was concerned that  
6 there may not be legal underpinnings. I researched  
7 that in terms of having an Inspector General or  
8 having one detailed.

9 My understanding is under the Economy  
10 Act of 1932 and by provision with the General  
11 Services Administration, it is standard practice or  
12 at least it is commonplace to have an Inspector  
13 General detailed from another agency. It's done on  
14 a fairly regular basis. We have got a memorandum of  
15 understanding with the General Services  
16 Administration to do just that.

17 I have narrowed the focus of this  
18 because the staff director had indicated that, first  
19 of all, getting an Inspector General to do all of  
20 the things that were in the original motion; that  
21 is, frankly, turn the place upside down, is  
22 something that he was not able to convince anybody  
23 to do.

24 It seems based on some of the

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1 discussions we have had already today that a lot of  
2 people run screaming from this agency faced with the  
3 prospect of trying to help us out because they think  
4 that it is something that might not even be  
5 feasible.

6 So I have narrowed the focus because I  
7 do have concerns that one of the reasons we are in  
8 the fix we are in is because payments are being  
9 placed in our watch, so to speak, and also because  
10 we don't know to what extent those payments have  
11 been placed on our watch. We don't have those  
12 controls in place. The forensics aren't there. And  
13 I would at least like to get that cleaned up.

14 Again, the staff director says we don't  
15 know what we don't know. And that's one of the  
16 reasons why we're in the position that we're in  
17 today.

18 CHAIRMAN REYNOLDS: Okay. Someone  
19 refresh my memory. Where are we in the process?

20 VICE CHAIRMAN THERNSTROM: This needs a  
21 motion.

22 STAFF DIRECTOR MARCUS: Need a motion  
23 and a second.

24 COMMISSIONER KIRSANOW: I move that we

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1 adopt this motion as I read into the record.

2 CHAIRMAN REYNOLDS: Is there a second?

3 COMMISSIONER BRACERAS: Second.

4 CHAIRMAN REYNOLDS: Discussion?  
5 Commissioner Yaki?

6 COMMISSIONER YAKI: I'm going to oppose  
7 the motion. I understand the spirit in which it was  
8 made by Commissioner Kirsanow, but I have seen when  
9 IGs come into an agency: one, they're not cheap;  
10 and, two, they tend to turn things upside down.

11 And I think that this goes to my concern  
12 about how in some ways we need to move on, get on  
13 with the future, rather than keep on going into the  
14 past and allocating scarce staff resources to comply  
15 with an IG time, money, resources.

16 I think it would be nice to know. I  
17 don't know if we need an IG to do it. And I just  
18 will oppose.

19 CHAIRMAN REYNOLDS: Commissioner  
20 Braceras?

21 COMMISSIONER BRACERAS: When this motion  
22 was originally circulated, I had some concerns  
23 because it seemed to be proposing that we create a  
24 new position or have someone detailed over here

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1 indefinitely to look at everything.

2 I do think that this revised motion  
3 addresses those concerns in that it seems to ask the  
4 IG to look at discrete issues and it seems to limit  
5 the role and the duration of the Inspector General's  
6 work here to these particular things. And when the  
7 work is done, that will be the end of his services,  
8 his or her services.

9 So I do think, Pete, that you have  
10 addressed those concerns. I wasn't clear on the  
11 legal questions that I had raised in the e-mail  
12 traffic, how that is resolved here.

13 I think I can support this motion, but I  
14 just wanted some clarification.

15 COMMISSIONER KIRSANOW: At least based  
16 on preliminary research that I have done and  
17 discussions or at least looking at what the staff  
18 director had, my understanding is that this is  
19 something that is done on if not a regular basis,  
20 it's not uncommon, that there are authority under  
21 the Economy Act, that the General Services  
22 Administration typically does things like this for  
23 an agency like this. So I think I have addressed  
24 those concerns. I don't have at this point any

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1 concerns with respect to the legality of it.

2 I think when we talk about emergency  
3 reforms and structural reforms, I think there is a  
4 cost savings involved in getting out front on an  
5 issue and addressing it. Sometimes there is some  
6 pain involved there, but I think we need to know  
7 where we stand right now, how we got into this fix.

8 And I understand Commissioner Yaki's  
9 point. I'd prefer to move on also. But we don't  
10 know where we have been. One of the reasons why we  
11 can't even discuss some of the things that we would  
12 like to do or how much we are in the hole is because  
13 we don't know where we have been.

14 I think we need to make a clean brush of  
15 it by first assessing where we have been, how we got  
16 into that position, to what extent we may be in the  
17 hole.

18 The staff director has worked  
19 prodigiously to get us out of this hole. It's  
20 unfair to him that we not assess exactly what  
21 happened before we got here.

22 CHAIRMAN REYNOLDS: Commissioner Taylor?

23

24 COMMISSIONER TAYLOR: I agree with the

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1 spirit of the motion. I have just a couple of  
2 questions. And I apologize in advance. This may be  
3 obvious to everyone else.

4 Someone just please explain to me. Are  
5 these issues that GAO can't address for us? And I'm  
6 thinking primarily of the fiscal issues that we all  
7 understand. Is there a reason they can't do it?

8 COMMISSIONER KIRSANOW: Yes. Well, I  
9 don't know that they can't but two issues with  
10 respect to that. GAO is something that is more  
11 periodic. I view this as something, a surgical  
12 strike to come in, address this discrete problem.

13 I don't know when GAO could get around  
14 to coming and doing something like this. I think  
15 this is something we have to do as quickly as  
16 possible.

17 I had another point, which conveniently  
18 I've forgotten, but I think that when you have got  
19 an individual charged with doing a discrete  
20 assessment like this, I have more confidence in  
21 someone who is charged with a finite function than  
22 somebody coming in and just kind of deciding, "Well,  
23 let's figure out what we're going to do," making it  
24 part of a package of reforms.

1 COMMISSIONER BRACERAS: If I could  
2 answer?

3 CHAIRMAN REYNOLDS: Commissioner Meeks?

4 COMMISSIONER MEEKS: And I have a  
5 similar question. I mean, why would the IG be able  
6 to do something that this audit firm could not?

7 COMMISSIONER BRACERAS: Can I?

8 COMMISSIONER KIRSANOW: I'll defer to  
9 Commissioner Braceras.

10 COMMISSIONER BRACERAS: I think one way,  
11 just to speak to the concerns raised by  
12 Commissioners Taylor and Meeks, I think one way that  
13 this differs from what GAO does is that this  
14 particular motion asks for an opinion on whether any  
15 laws were violated.

16 COMMISSIONER MEEKS: But the audit will  
17 do that, too, the financial.

18 COMMISSIONER BRACERAS: The financial  
19 audit also does that?

20 VICE CHAIRMAN THERNSTROM: Yes.

21 COMMISSIONER BRACERAS: Because GAO does  
22 not do that. And that was when --

23 COMMISSIONER MEEKS: An audit does.

24 COMMISSIONER BRACERAS: Right.

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1                   COMMISSIONER MEEKS:  And audit looks for  
2 ways to --

3                   COMMISSIONER KIRSANOW:  The second point  
4 now I remember was timing.  I think that if the  
5 audit is something that is going to be done and I  
6 don't believe that they're going to get a report  
7 back to us anytime in the near future of the limited  
8 audit that was begun in November, was supposed to  
9 last for about three weeks.  Is that correct?

10                  STAFF DIRECTOR MARCUS:  Logistics was  
11 supposed to be for a few weeks.

12                  COMMISSIONER KIRSANOW:  Right.  And it  
13 lasted and has lasted for several months.  That's a  
14 limited audit.  This scope audit I believe will take  
15 much longer.

16                  I think an Inspector General can come  
17 here -- again, I don't know this, but I believe that  
18 he can come in, surgical strike, get this assessed,  
19 give us an opinion or recommendations, and then we  
20 can move forward.

21                  I don't know that we have got enough  
22 time to wait for an audit to include -- I think we  
23 need to get these questions addressed as quickly as  
24 possible.

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1                   COMMISSIONER TAYLOR:       One follow-up  
2 question, if I may.

3                   CHAIRMAN REYNOLDS:   Yes?

4                   COMMISSIONER TAYLOR:   To be clear, I am  
5 in favor of the essence of this motion. My only  
6 concern is, quite frankly, fiscal. I just want to  
7 make sure we have considered all of our options and  
8 to make sure that to the extent that we need the  
9 expertise and someone is not in a position because  
10 of the lack of the expertise or because of the  
11 timing, which I also think is important, simply  
12 can't be done.

13                   My concerns are addressed, in large  
14 part, by the qualifying phrase "as soon as is  
15 practicable." If that were not in there, it was  
16 something that I would suggest we place in there.  
17 And I don't necessarily think that this is  
18 inconsistent with the concerns raised by  
19 Commissioner Yaki because I think it is something we  
20 need to do in order to effectively move forward,  
21 which we don't repeat the mistakes of the past, but  
22 my concern is fiscal in nature only and that we  
23 consider all of the options and that we're smart as  
24 we go about it.

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1 VICE CHAIRMAN THERNSTROM: Well, the  
2 questions that Commissioner Yaki raised I also had  
3 in mind. And I would like to ask the staff director  
4 to answer the basic question of whether he thinks an  
5 Inspector General is essential to identifying  
6 precisely the matters that Commissioner Kirsanow,  
7 which are obviously important, has identified in  
8 one, two, and three.

9 STAFF DIRECTOR MARCUS: Vice Chairman  
10 Thernstrom, I do not know at this point whether it  
11 is essential. I had previously identified these  
12 issues as being potential issues for an Inspector  
13 General to look at.

14 And I have asked for research, which is  
15 ongoing, to determine such issues as whether this  
16 conduct, if true, would be unlawful before  
17 determining for sure whether we would retain an IG.

18 If it turns out that such an audit, even if true,  
19 would not be unlawful, then my inclination is that  
20 it's not essential.

21 Then the other question I have is  
22 whether this would be within a full scope audit,  
23 which we're still not sure of and would require  
24 conversations with an auditor. And if either it

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1 would be encompassed by an audit or, alternatively,  
2 if an auditor would identify this issue or do some  
3 of the groundwork, whether we should do that first.

4 So I would say at this point I cannot  
5 say that it is essential. There are still some  
6 questions that we have been looking at.

7 VICE CHAIRMAN THERNSTROM: Well, I mean,  
8 in lieu of that, in light of that answer and in  
9 light of the two points that I think are correct  
10 that Commissioner Yaki that, one, IGs are not cheap;  
11 and, two, they tend to turn agencies down, I wonder  
12 if we shouldn't postpone a decision on the IG until  
13 we have more information about what an audit would  
14 accomplish.

15 CHAIRMAN REYNOLDS: Commissioner  
16 Kirsanow?

17 COMMISSIONER KIRSANOW: Mr. Chair,  
18 without belaboring the point, first of all, I don't  
19 believe the Inspector General is going to turn this  
20 place upside down because it's for an extremely  
21 narrow scope.

22 Second, I think that if we retain an IG,  
23 I think the staff director indicated he was  
24 uncertain as to whether or not it's essential if, in

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1 fact, there is no legality. Can the GAO do this?

2 Well, that is one of the questions we  
3 don't know. We don't know what we don't know. It's  
4 one of the things I think an IG is perfectly suited  
5 to address.

6 I am sensitive to the concern that maybe  
7 we're duplicating efforts. Could a full scope audit  
8 address the same thing? I think it goes to the  
9 previous point. There is a timing imperative here,  
10 and I think that that needs to be addressed.

11 I would like to say once again I think  
12 that this is a reform, but I think it goes into the  
13 rubric of one of those emergency reforms. I have  
14 absolutely no doubt based on the three reports that  
15 we have gotten from the staff director that we're in  
16 extraordinarily bad shape. And I think we have  
17 extraordinary measures to dig us out of it.

18 I don't believe this is extraordinary.  
19 I think this is one of the minimal steps necessary  
20 to get this agency back on the road toward the  
21 fiscal and operational integrity which we hope it  
22 would have.

23 CHAIRMAN REYNOLDS: Commissioner  
24 Braceras?

1                   COMMISSIONER BRACERAS:    I'm going to  
2 support this motion.    I do think it's discrete  
3 enough that the concerns raised aren't particularly  
4 concerning to me.

5                   I guess the one thing is I'm not an  
6 accountant.    I'm a lawyer.    I don't understand with  
7 the specificity that some others do how these audits  
8 work.

9                   I personally have never heard of a  
10 financial audit reaching a legal conclusion or  
11 making a legal recommendation.    If I'm wrong on that  
12 --

13                   COMMISSIONER MEEKS:        You're wrong.  
14 You're wrong.

15                   COMMISSIONER BRACERAS:    Okay.    So they  
16 typically make legal recommendations?

17                   COMMISSIONER MEEKS:        Absolutely.    If  
18 they find illegal use of funds, it's part of an  
19 audit.

20                   COMMISSIONER BRACERAS:    Okay.    Because  
21 the one concern I'm left with is the duplicative  
22 nature of it, but other than that, on the merits, it  
23 seems perfectly reasonable to me to look at these  
24 questions.

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1 CHAIRMAN REYNOLDS: Well, we have some  
2 additional information. Ken has some information  
3 regarding his efforts to get an IG to look into  
4 this.

5 STAFF DIRECTOR MARCUS: I've had  
6 preliminary discussions with an IG's office about  
7 whether this specific topic would be doable, whether  
8 it's the sort of thing that they could take, whether  
9 it's the sort of thing that they would be inclined  
10 to take on if asked.

11 I have not gotten a final or definitive  
12 answer, but the preliminary responses that I got was  
13 that this does look like the sort of thing that an  
14 IG could do upon our request if we pay for it.

15 COMMISSIONER KIRSANOW: Yes. I think  
16 you had expressed that to me before. That's one of  
17 the reasons why I tailored it in this fashion.

18 CHAIRMAN REYNOLDS: And I'd also like to  
19 add that it's normal. When these types of issues  
20 come up, it's normal that the IG conducts the  
21 investigation.

22 I don't know whether these allegations  
23 are tantamount to illegality, but if it goes down  
24 that road, typically it's the IG that investigates.

1 And at the end of that investigation, there may or  
2 may not be a referral to the Justice Department.  
3 That's just been my personal experience working in  
4 the government.

5 Commissioner Yaki?

6 COMMISSIONER YAKI: Yes. Just a final  
7 comment. I just want to follow up on what the chair  
8 just said. This is not an inconsequential action  
9 because the IG when they come in is not restricted  
10 by what we ask them to do but, really, by what they  
11 believe their duty is to enforce the laws of the  
12 United States.

13 I have seen them go into agencies. It  
14 is not a pretty sight. It takes a lot of time. It  
15 will cost a lot of money. I understand the  
16 sentiment behind Mr. Kirsanow's thing, but the  
17 concerns operationally to this agency at this time  
18 still compel me to pose it at this time. And I call  
19 the question.

20 CHAIRMAN REYNOLDS: Any other questions  
21 or concerns before we vote?

22 COMMISSIONER BRACERAS: Well, I just  
23 have a question. What is the advantage of doing  
24 basically the same thing through an auditor versus

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1 an IG? What are the advantages and disadvantages of  
2 having one do it versus the other if what you're  
3 saying is they do the same thing?

4 COMMISSIONER MEEKS: Not being an  
5 absolute expert on this, an audit would  
6 systematically go through and give you balances so  
7 that you know where you are starting.

8 COMMISSIONER BRACERAS: Okay.

9 COMMISSIONER MEEKS: They would also  
10 identify issues that we all even raised. I mean, if  
11 we gave a mandate to the auditor to do what you're  
12 suggesting the IG do, I mean, an auditor would do  
13 that, too.

14 But they go and they make sure that  
15 things are balanced. And so it's a more  
16 comprehensive -- I'm not convinced an IG can  
17 surgically cut to the chase on this because they  
18 also have to systematically cut through things to  
19 come up with anything that is definitive.

20 CHAIRMAN REYNOLDS: Commissioner  
21 Kirsanow?

22 COMMISSIONER KIRSANOW: Chair, I think I  
23 have made my case a number of times with respect to  
24 all of these issues. In the interest of

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1 collegiality and seeing if we can move forward,  
2 though, I would for the moment move to table this  
3 pursuant to what Commissioner Thernstrom said until  
4 next month's meeting. We can look at this issue a  
5 little bit more.

6 And I would propose a substitute motion.

7 And I would explain it. This doesn't necessarily  
8 require us to do anything at this point but goes to  
9 I think and incorporates the concerns that I have  
10 heard around the table.

11 I'll wait until everybody has a copy of  
12 it, but this is similar to the motion that was  
13 originally sent around last week, but it has a  
14 contingency attached to it.

15 This is governance and accountability  
16 again. The staff director and Office of General  
17 Counsel shall investigate the cost and legal  
18 requirements relating to retaining an Inspector  
19 General, either as an independent contractor,  
20 employee, or detailed from another agency to do the  
21 things I mentioned before.

22 This is more expansive, but this is to  
23 get an understanding as to what the consequences  
24 are: one, identify any instance of fraud, waste,

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1 abuse, or mismanagement of tax dollars by the  
2 Commission; two, evaluate the efficiency of the  
3 Commission, eliminate effectiveness of the  
4 Commission also pursuant to an objection by  
5 Commissioner Braceras; three, report findings and  
6 recommendations to the Commission on a regularized  
7 schedule to be determined by such general in  
8 conjunction with the chairman and staff director and  
9 the staff director and Office of General Counsel  
10 report its findings to the Commission by no later  
11 than its April 2005 meeting.

12 In other words, let's get more  
13 information. And then if it's the sentiment of the  
14 Commission that, in fact, an Inspector General is  
15 warranted in the limited scope that was contained in  
16 the second motion that I proffered, then we can have  
17 a vote on it.

18 CHAIRMAN REYNOLDS: Is there a second?

19 VICE CHAIRMAN THERNSTROM: I second it.

20 CHAIRMAN REYNOLDS: Okay. Vice Chair  
21 Thernstrom?

22 VICE CHAIRMAN THERNSTROM: I very much  
23 appreciate the revision of this motion. And I think  
24 it makes a very important point that has been lost

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1 in some recent press on the Commission. It  
2 underscores the commitment to collegiality on the  
3 part of all commissioners sitting, the commitment to  
4 collegiality without compromising its commitment to  
5 reform. And I'm very pleased by this process and  
6 thank Commissioner Kirsanow for this revision.

7 CHAIRMAN REYNOLDS: Commissioner Meeks?

8 COMMISSIONER MEEKS: Well, in the spirit  
9 of fiscal responsibility, I would actually ask,  
10 then, that there be an amendment to this that  
11 examines the scope of an audit, the time period, and  
12 the cost so that there can be a comparison and so  
13 that it's not duplicative. I mean, I would offer  
14 that amendment.

15 VICE CHAIRMAN THERNSTROM: Say it  
16 exactly again. How do you want to change the  
17 wording?

18 COMMISSIONER MEEKS: Let's see. "Staff  
19 director and Office of General Counsel shall  
20 investigate the cost and legal requirements related  
21 to retaining an Inspector General, either as an  
22 independent contractor, employee, or detailed from  
23 another agency."

24 I would also like to say, amend it to



1 say, somehow that within this amendment or within  
2 this motion that there be investigation of what an  
3 auditing firm's cost, scope of work, and time frame  
4 would be so that there could be a comparison.

5 COMMISSIONER YAKI: To accomplish the  
6 same task.

7 COMMISSIONER MEEKS: To accomplish the  
8 same task, yes.

9 COMMISSIONER BRACERAS: That would be  
10 helpful.

11 CHAIRMAN REYNOLDS: I guess my concern  
12 is it's not clear to me that the Inspector General  
13 and the accounting firm that we would eventually  
14 retain to conduct an audit, that they're going to be  
15 doing the same thing. There may be some overlap.  
16 There may be some overlap.

17 COMMISSIONER BRACERAS: Well, that's the  
18 question.

19 VICE CHAIRMAN THERNSTROM: But that's  
20 the question.

21 COMMISSIONER TAYLOR: That should be I  
22 think incorporated into what we hear in our April  
23 report from the staff director.

24 COMMISSIONER MEEKS: The Inspector

1 General may not be doing as wide a scope as the  
2 auditing firm, but the auditing firm may be doing  
3 that same scope as the Inspector General.

4 And given that we're going to be paying  
5 a lot of money for an IG as well as an auditing  
6 firm, which we have already passed that motion for,  
7 I think it's worth exploring the cost and the scope  
8 of work. And if time is the issue, I mean, I think  
9 that is a question for the IG also. You know, what  
10 is the time frame around this?

11 And if it clearly shows that an IG can  
12 better with less cost --

13 CHAIRMAN REYNOLDS: Pete, it's a  
14 friendly amendment.

15 COMMISSIONER KIRSANOW: Look, I think we  
16 need as much information as possible. I'm not  
17 looking to duplicate efforts, but, as I said, I  
18 think I made my points, which I'll stand by, in  
19 terms of it will be reflected on the transcript as  
20 to what we will be doing if, in fact, the report  
21 comes back with respect to cost, with respect to  
22 legal requirements. I think it's going to be narrow  
23 in scope. I'm satisfied that we can do that.

24 I still think that Inspector General is

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1 -- based on everything that I have read and have  
2 been led to believe -- an imperative. I would think  
3 that in April, we are going to be looking at the  
4 real prospect of retaining an Inspector General.

5 If, in fact, the staff director  
6 concludes or reports back to us that the audit will  
7 accomplish the same objective, will do so in a  
8 cost-effective fashion, and do so expeditiously, I  
9 trust us here to do the right thing.

10 CHAIRMAN REYNOLDS: Do you accept the  
11 friendly amendment?

12 COMMISSIONER KIRSANOW: Absolutely.

13 CHAIRMAN REYNOLDS: Okay. Commissioner  
14 Braceras?

15 COMMISSIONER BRACERAS: Yes. I'd just  
16 like to say that I think that all of us here are  
17 committed to finding out the answers to the  
18 questions posed by Commissioner Kirsanow in his  
19 first motion, you know, questions one, two, and  
20 three, whether the Commission unlawfully deferred  
21 any payments that properly should have been paid in  
22 fiscal year 2004 to fiscal year 2005 in violation of  
23 the Anti-Deficiency Act, et cetera, et cetera. I  
24 think we're all committed to having those questions

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1 answered.

2 The only question here is the best way  
3 to do so, whether it makes sense to do it through an  
4 auditor, through an Inspector General, or to retain  
5 both and have them have different mandates, separate  
6 mandates.

7 So I just want to be clear that, at  
8 least from my perspective, we're all committed to  
9 getting to the bottom of these questions. We're  
10 just grappling with the most economical and  
11 efficient way to get to the bottom of these  
12 questions.

13 I don't want there to be any impression  
14 left that by deferring this to April, that somehow  
15 we are not interested in getting to the bottom of  
16 this. We are.

17 CHAIRMAN REYNOLDS: Yes?

18 VICE CHAIRMAN THERNSTROM: And that was  
19 my point by saying, look, this whole process  
20 underscores the commitment of the collegiality on  
21 the part of commissioners without compromising the  
22 Commission's dedication to reform, absolutely.

23 CHAIRMAN REYNOLDS: The staff director  
24 has comments.

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1                   STAFF DIRECTOR MARCUS:   If I may, staff  
2                   have just reminded me that between now and our April  
3                   meeting, we have three weeks, rather than the usual  
4                   four, and that much of that time will be devoted to  
5                   handling the emergency issues that I have discussed  
6                   earlier.   So I would just ask that commissioners  
7                   keep in mind that between now and then, most of the  
8                   time will be focused on that.

9                   COMMISSIONER    KIRSANOW:           Ken,    I  
10                  appreciate you've got subpoenas to answer and you've  
11                  got all kinds of things going.  You're putting out  
12                  fires everywhere.

13                  Everyone around here has made their  
14                  point.  It's on the record.  This is a new day.  
15                  It's not 2004.  We're not going to hang you out to  
16                  dry if we don't feel like you come up with some  
17                  super-duper report.

18                  But I would also say at the same time  
19                  that this is an imperative.  Everything that the  
20                  staff director has reported to us has indicated that  
21                  we had better get our act together very quickly.  We  
22                  only have a small window of opportunity.

23                  We have got to get our act together for  
24                  other reasons, if for no other reason than to

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1 satisfy Commissioner Yaki's concern that we still be  
2 able to discharge our statutory imperatives and that  
3 we make sure that we do the best we can to limit any  
4 draconian cuts or changes to the Commission. And I  
5 think this is the best way of doing it.

6 If we get ahead of the curve, we can  
7 limit the damage financially, operationally, and  
8 still possibly do our best to discharge our  
9 statutory mission.

10 COMMISSIONER YAKI: Move as amended.

11 CHAIRMAN REYNOLDS: Okay.

12 VICE CHAIRMAN THERNSTROM: I second to  
13 move as amended.

14 CHAIRMAN REYNOLDS: Let's vote. All in  
15 favor?

16 (Whereupon, there was a chorus of "ayes.")

17 CHAIRMAN REYNOLDS: Any in opposition?

18 (No response.)

19 CHAIRMAN REYNOLDS: The motion passes as  
20 amended.

21 Yes, Commissioner Kirsanow?

22 COMMISSIONER KIRSANOW: I've got one  
23 last thing. And this is not a motion, but  
24 Commissioner Bracer's working group on reform is

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1 entertaining a variety of issues with respect to  
2 projects. I have something that I would just like  
3 them to consider when considering the manner in  
4 which projects are planned.

5 I'm not going to address this. This has  
6 to do with something we discussed in the past.

7 COMMISSIONER BRACERAS: Yes. Can I just  
8 speak to this briefly?

9 CHAIRMAN REYNOLDS: Yes.

10 COMMISSIONER BRACERAS: I believe this  
11 is at least drawn from proposals that Commissioner  
12 Redenbaugh put forward last year.

13 COMMISSIONER KIRSANOW: Right.

14 COMMISSIONER BRACERAS: And we did  
15 discuss that at our last meeting that we wanted to  
16 see those again and that we wanted to work from that  
17 template. So thank you very much.

18 CHAIRMAN REYNOLDS: Okay. Let's see  
19 what's next. Adarand.

20 VICE CHAIRMAN THERNSTROM: I was going  
21 to say take a five-minute break. Okay.

22 CHAIRMAN REYNOLDS: Okay. Let's take a  
23 five-minute break.

24 (Whereupon, the foregoing matter went off the record

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1 at 11:51 a.m. and went back on the  
2 record at 12:11 p.m.)

3 V. PROGRAM PLANNING

4 CHAIRMAN REYNOLDS: Let's wrap this up.  
5 We have, actually, two issues left. Now, what's  
6 scheduled, the Adarand proposal, we're scheduled to  
7 discuss that, but Commissioner Taylor has an idea he  
8 would like to discuss. Commissioner Taylor?

9 COMMISSIONER TAYLOR: It's an idea that  
10 I just want to put on the table for discussion. If  
11 it's not feasible or practical, for whatever reason,  
12 that's fine. But if I were in a situation where I  
13 were representing a client that had entered into an  
14 agreement to make a payment -- and I'm referring  
15 specifically to the EEOC settlement that I  
16 understand we'll be making a payment on in this  
17 fiscal year of some \$188,000. Is that not true?

18 STAFF DIRECTOR MARCUS: I've avoided  
19 characterizing the payment as being either one or  
20 more than one and avoided characterizing it as  
21 either a settlement or a claim that has been fully  
22 resolved because of concerns that the more specific  
23 one gets about it, the closer one gets to a  
24 confidentiality agreement, which is not anything



1 which we've entered into.

2 COMMISSIONER TAYLOR: Okay.

3 STAFF DIRECTOR MARCUS: What I can say  
4 is we have an obligation this year in the amount of  
5 \$188,000 based on EEO matters from the past.

6 COMMISSIONER TAYLOR: Putting my private  
7 hat on for a moment, if I were in a situation where  
8 I represent a company that had an obligation of that  
9 amount but also had some serious financial concerns,  
10 it would not be inappropriate for me to go back to  
11 plaintiff's counsel and seek some type of  
12 accommodation.

13 The accommodation would not be  
14 substantial. It would require a delay perhaps of  
15 the obligation. And we could put some other issues  
16 on the table.

17 But that would I think put us in a much  
18 stronger position in the short term if we could  
19 reach an accommodation with plaintiff's counsel, if  
20 that's possible.

21 VICE CHAIRMAN THERNSTROM: This  
22 accommodation would involve simply timing.

23 COMMISSIONER TAYLOR: Timing is all it  
24 would involve.

1           STAFF DIRECTOR MARCUS: May I interpret  
2 that, Commissioner Taylor, as a request for legal  
3 analysis between now and the next meeting as to  
4 whether that is something that could be --

5           COMMISSIONER TAYLOR: It's feasible,  
6 correct. Yes. I just want to determine whether  
7 it's feasible, not knowing the details of the  
8 arrangement.

9           STAFF DIRECTOR MARCUS: We'll look into  
10 whether it's feasible and what can be --

11           COMMISSIONER TAYLOR: Even if it's a  
12 partial relief, that would certainly I think put us  
13 in a different position in the short term.

14           COMMISSIONER KIRSANOW: Was this an EEOC  
15 or was this the private attorney?

16           STAFF DIRECTOR MARCUS: We have incurred  
17 over \$300,000 in EEO settlements and adjudications  
18 over the last 5 years or so, of which \$188,000 is  
19 due this year.

20           I think I can answer any questions about  
21 this if this were in closed session. As for what I  
22 can say in open, we're somewhat limited because as a  
23 small agency, we have had only a small number of  
24 them. And I don't want to say something that could

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1 make everyone aware of which one I'm talking about.

2 COMMISSIONER KIRSANOW: Yes. I would  
3 say that I'm sensitive to the spirit of Commissioner  
4 Taylor's comment is understood by all. We're in  
5 dire straits.

6 I would also say, though, there is a  
7 competing interest. That competing interest is that  
8 this is the U.S. Commission on Civil Rights. It's  
9 an embarrassment that we have EEO judgments against  
10 us.

11 If I had the money and it were up to me,  
12 if I had control of the congressional  
13 appropriations, I'd make sure that that's the first  
14 thing that the U.S. Commission on Civil Rights  
15 discharges.

16 That being said --

17 CHAIRMAN REYNOLDS: Okay. So it is my  
18 understanding that --

19 STAFF DIRECTOR MARCUS: May I just  
20 briefly respond to Commissioner Kirsanow? We have  
21 taken measures just in the last three months to try  
22 and correct any problems we have in that area.

23 Of course, I have issued to all staff a  
24 restatement of the agency's commitment to protecting

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1 the equal employment opportunity rights of all  
2 employees.

3 In addition, we have also instituted the  
4 practices that would protect the integrity of the  
5 EEO practice. For instance, we have ensured that  
6 there will be a firewall between different parts of  
7 the agency that are involved with different aspects  
8 of the EEO process that hadn't been there before and  
9 also have ensured that the director of EEO reports  
10 directly on EEO matters to the staff director as  
11 required by EEO practices.

12 Both of these are matters that the EEOC  
13 has urged on all agencies but which we had not  
14 previously been doing. But it is certainly for the  
15 civil rights agency a priority to make sure that we  
16 are putting that in order. And that is something  
17 that we have proactively done.

18 COMMISSIONER KIRSANOW: And I commend  
19 the staff director for doing just that.

20 CHAIRMAN REYNOLDS: Okay. On to our  
21 end. Pete, would you like to --

22 COMMISSIONER KIRSANOW: I don't have the  
23 motion. I'm sorry. Actually, why don't you move  
24 this?

1 COMMISSIONER BRACERAS: Okay. I move  
2 that the OCRE project assessing the federal  
3 government's role in implementing the Supreme Court  
4 decision in *Adarand v. Peña* focus on government  
5 compliance with the court's holding that when any  
6 racial classification is imposed by a government  
7 actor, the classification must serve a compelling  
8 governmental interest and be narrowly tailored to  
9 further that interest.

10 Specifically, I move that OCRE evaluate  
11 governmental compliance with the requirement that  
12 agencies consider race-neutral alternatives in  
13 contracting under the Small Business Administration  
14 programs.

15 CHAIRMAN REYNOLDS: Is there a second?

16 (No response.)

17 CHAIRMAN REYNOLDS: No second?

18 COMMISSIONER TAYLOR: I'll second it.

19 CHAIRMAN REYNOLDS: Okay. Thank you.

20 Discussion? Yes, Commissioner Yaki?

21 COMMISSIONER YAKI: I have first a point  
22 of information. This is a motion to change the  
23 concept and scope of the previously approved  
24 project.

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1 COMMISSIONER BRACERAS: Expand the focus  
2 of it.

3 COMMISSIONER YAKI: Expands it.

4 COMMISSIONER BRACERAS: I would say yes.

5 COMMISSIONER YAKI: Expands it. If I  
6 may be so dense, what is the previously approved  
7 project?

8 COMMISSIONER BRACERAS: Yes. We --

9 VICE CHAIRMAN THERNSTROM: We all need a  
10 copy of that.

11 COMMISSIONER BRACERAS: Is it in the  
12 materials?

13 CHAIRMAN REYNOLDS: Now, we're talking  
14 about the original motions? This proposal was  
15 established prior to December?

16 COMMISSIONER YAKI: Yes.

17 CHAIRMAN REYNOLDS: And so I don't have  
18 any personal knowledge.

19 COMMISSIONER MEEKS: I have it.

20 COMMISSIONER BRACERAS: Share.

21 CHAIRMAN REYNOLDS: Okay.

22 COMMISSIONER MEEKS: I guess I have to  
23 say that I think -- I mean, maybe I'm  
24 misunderstanding that this is an expansion because

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1 it looks to me like it's a change and a narrowing.  
2 I'm not sure.

3 VICE CHAIRMAN THERNSTROM: I'm sorry. I  
4 need the text of the original.

5 COMMISSIONER MEEKS: Okay.

6 VICE CHAIRMAN THERNSTROM: Do you have  
7 it, Elsie, that we could photocopy it quickly?

8 COMMISSIONER YAKI: Just for  
9 clarification, Mr. Chair, point of information.  
10 This is a project proposal that had been previously  
11 approved, I believe, in 2004, before you came along,  
12 Mr. Marcus, and before you came along, Mr. Reynolds

13 CHAIRMAN REYNOLDS: That's correct.

14 STAFF DIRECTOR MARCUS: Commissioner  
15 Yaki, if I may, I believe it was approved during the  
16 planning session in 2003. That would have been in  
17 early 2003.

18 COMMISSIONER YAKI: The reason I am  
19 asking is that I got confused by what was in our  
20 project planning materials in February that talked  
21 about Adarand in the context of disparity studies.  
22 And then this was attached, this motion was  
23 attached, on top of that, when we received it in the  
24 binders.

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1 Is the disparity study issue completely  
2 separate and apart from the Adarand study, what  
3 we're doing for September 30th?

4 STAFF DIRECTOR MARCUS: Yes,  
5 Commissioner Yaki. There are two different  
6 proposals. There's the Adarand proposal. And then  
7 there's a separate additional proposal on disparity  
8 studies. There are different potential projects.

9 COMMISSIONER YAKI: Okay. Well, one  
10 already has been approved. That would have been the  
11 original Adarand study.

12 STAFF DIRECTOR MARCUS: That's correct.

13 COMMISSIONER YAKI: Okay. And so what  
14 appeared in the February binder is in addition to,  
15 not a substitute for, the ongoing Adarand study?

16 STAFF DIRECTOR MARCUS: I would view  
17 that as well. Yes, that's correct.

18 COMMISSIONER YAKI: And so the motion  
19 only applies to the previously approved Adarand  
20 project of 2003?

21 STAFF DIRECTOR MARCUS: That's how I  
22 interpret the motion as well.

23 VICE CHAIRMAN THERNSTROM: Yes. Elsie,  
24 why don't you read the text here?

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1 COMMISSIONER BRACERAS: This is the  
2 original?

3 VICE CHAIRMAN THERNSTROM: Yes. This is  
4 the scope of the original.

5 COMMISSIONER MEEKS: Okay. The year  
6 2005 will mark the tenth anniversary of the Adarand  
7 decision and, as such, offers an opportunity to  
8 review the decision's effect on contracting levels  
9 of women and minority-owned firms.

10 Through literature reviews, data  
11 analysis, and interviews, the Commission will  
12 analyze Adarand's effect based on the number of  
13 minority and women-owned firms that have received  
14 federal contracts to analyze the amount of federal  
15 procurement funds awarded to these businesses;  
16 examine whether the SBD certification process has  
17 reached the levels initially projected and whether,  
18 in turn, certified businesses have benefitted by  
19 securing federal contracts; examine the role of  
20 federal agencies, including SBA, the Department of  
21 Commerce, and the Department of Justice in  
22 implementing procurement programs for women and  
23 minority-owned businesses; and examine why the goal  
24 of awarding five percent of federal contracts to

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1 women-owned businesses has not been reached and  
2 measure the extent to which the contract assistance  
3 for women-owned business programs is making strides  
4 in that direction.

5 COMMISSIONER YAKI: Just a point of  
6 clarification again. The amendment that I made that  
7 is contained in the agenda for this term, it's  
8 motion number three under tab five, the Yaki-Meeks  
9 motions. Number three basically is a restatement of  
10 the original Adarand study.

11 The reason for my confusion -- and this  
12 is I think a very sensitive and interesting subject  
13 -- is that I received a copy last night -- actually,  
14 no; I'm sorry -- this morning of a project concept  
15 for an Adarand study that was sent to different  
16 departments of the federal government that came from  
17 the Commission that is different from what Ms. Meeks  
18 just read, is different from what Commissioner  
19 Braceras read, and different from what I had amended  
20 and different from the disparity study in the  
21 February 18th proposal. And I'm just trying to  
22 figure out how --

23 VICE CHAIRMAN THERNSTROM: Do you know  
24 the date of that?

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1                   COMMISSIONER YAKI:     I think it was  
2 February 8th.     It's entitled "U.S. Commission on  
3 Civil Rights Race-Neutral Federal Contracting  
4 Project Concept." And it is --

5                   COMMISSIONER BRACERAS:  It was sent from  
6 whom to who?

7                   COMMISSIONER YAKI:     It was sent out to  
8 different departments of the federal government.  It  
9 contains within it interrogatories and document  
10 requests.  The deadline was February 28th of this  
11 year.

12                  COMMISSIONER BRACERAS:  Okay.

13                  COMMISSIONER YAKI:     But the wording of  
14 this is distinctly different than that which  
15 Commissioner Meeks read.  And I'm just wondering had  
16 there been a change approved by this Commission in  
17 the interim that I am unaware of between -- because  
18 I thought that -- I did not see anything in the  
19 records of January, December concerning February.

20                  COMMISSIONER BRACERAS:  So why don't we  
21 let the staff director bring us up to date on the  
22 project and its focus?

23                  STAFF DIRECTOR MARCUS:  There were a  
24 series of interrogatories that have been issued

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1 regarding the race-neutral alternatives issues with  
2 respect to Adarand. Those issues are in a sense  
3 encompassed within the previously approved proposal.

4 There was an early draft of the  
5 potential interrogatories that would go with the  
6 first proposal that dealt with a number of different  
7 issues along the lines that Commissioner Meeks just  
8 described. They were somewhat broad and covered a  
9 lot of areas but not in considerable depth.

10 We focused on the interrogatories that  
11 went out more recently on the race-neutral  
12 alternative issue, which originally could be  
13 construed as a part of the 2003 proposal but which  
14 is largely within the scope of the current proposal.

15 The intention in issuing these interrogatories was  
16 to fall within the scope of the current motion.

17 COMMISSIONER YAKI: My concern is not so  
18 much with the interrogatories as the fact that there  
19 was an attached project concept that in my view had  
20 some deviation from what the Commission had  
21 previously approved.

22 I understand that the Commission has the  
23 authority and the obligation and the right to make  
24 those changes, as is evidenced by Commissioner

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1 Braceras' motion. My concern is that we somehow the  
2 Commission sent out -- and I think this went to many  
3 departments, not just one. Is that correct? It  
4 went to a number --

5 STAFF DIRECTOR MARCUS: To a number of  
6 agencies.

7 COMMISSIONER YAKI: -- a number of  
8 different agencies attaching --

9 STAFF DIRECTOR MARCUS: If I may, the  
10 interrogatories went to a number of different  
11 agencies.

12 COMMISSIONER YAKI: Right.

13 STAFF DIRECTOR MARCUS: I can't say for  
14 certain whether the document you were referring to  
15 went to another agency.

16 COMMISSIONER YAKI: Well, it was  
17 attached to the cover letter to the agency. And,  
18 again, it's a project concept. You know, I  
19 understand that there are going to be disagreements  
20 in philosophy and characterizations as we go along.

21 And I will always be sure to express mine, as I am  
22 sure you will be to express yours, in a collegial  
23 and decorous manner.

24 But my concern is that here this is a --

1 it seems to be a substantive redefinition of a  
2 previously approved project that went out to federal  
3 agencies where in some ways it's almost misleading.

4 I want to speak substantively on  
5 Commissioner Braceras' motion, but here we talk  
6 about although some of the text mitigates a little  
7 bit some of the title itself, it still doesn't go  
8 toward the actual goals, when I was looking at  
9 these, the actual goals that were stated in the  
10 original proposal.

11 For example, when I was going through  
12 looking in the interrogatories, there was no special  
13 mention of the women-owned business compliance  
14 efforts that was referenced in that. There are  
15 other issues involved as well.

16 I am just concerned that we've sent a  
17 lot of information out that may not: A) be as  
18 complete as it should have been for the original  
19 concept; and then, B) if we shift it to where this  
20 would be in addition to what you're talking about,  
21 that it may not be as -- we may have to send a whole  
22 other set to some of these agencies. I just want to  
23 make sure that we do it properly.

24 I guess I want to know where this came

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1 from, how it came about, and under what authority  
2 was given to change how the project was defined in  
3 the letters that went out to departments in early  
4 February of this year.

5 STAFF DIRECTOR MARCUS: I issued the  
6 interrogatories according to the process for  
7 issuance of interrogatories for the Commission and  
8 followed the form for insurance of interrogatories.

9 So we're familiar with the way in which it was  
10 done. This is the way in which it was done.

11 The interrogatories were done in such a  
12 way that they would be consistent with the project  
13 as I best estimated it would be agreed to in the  
14 February meeting, at a time when it appeared that  
15 the Commission might look at this during the  
16 February meeting. But I also believe that the  
17 interrogatories would be pertinent to either the  
18 original 2003 proposal or the one which is on the  
19 table today.

20 COMMISSIONER BRACERAS: May I be heard?

21 CHAIRMAN REYNOLDS: Commissioner  
22 Braceras?

23 COMMISSIONER BRACERAS: I think what  
24 happened was that the motion to expand the focus of

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1 the project was supposed to come up in February and  
2 it was deferred and then the interrogatories went  
3 out.

4 And that is why I insisted that we still  
5 discuss this motion today, even though we were  
6 deferring other aspects of project planning. I  
7 think it was a mistake to defer this particular  
8 motion last time because I agree that if the  
9 Commission wants to expand or change the focus of a  
10 project, that has to be decided by all of us by a  
11 majority vote and that the staff cannot change the  
12 focus of a project or expand the focus of a project  
13 without our consent.

14 So I think it may have been a mistake  
15 and an oversight that certainly I had come to the  
16 February meeting expecting to vote on this -- or not  
17 come to but come to via telephone. But I had  
18 expected to vote on this, and then it was deferred.

19 And I think the next thing we knew, there were  
20 interrogatories that were going out.

21 So that is why I wanted to make sure  
22 that we at least retroactively authorize the  
23 expansion of the project today. And I fully agree  
24 with Commissioner Yaki that that is not the best way

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1 to do business going forward. I want to see any  
2 changes come before us as a body before actions are  
3 taken in the future.

4 COMMISSIONER YAKI: Mr. Chair, I  
5 appreciate Commissioner Braceras' remarks. My  
6 concern I guess is that I have read with a lot of  
7 alarm how business was conducted in prior years.  
8 And I know that there is a lot of good faith and  
9 good will amongst my fellow commissioners to not  
10 repeat the mistakes of the past when it comes to  
11 process. So that's why I bring this up rather  
12 gently, rather than going screaming and foaming at  
13 the mouth.

14 My problem continues to be that this was  
15 at least the one letter I have is dated February  
16 8th, which is ten days prior to our meeting on the  
17 18th. And I understand that if the staff director  
18 believes that the interrogatories cover the original  
19 scope, then I would ask that he demonstrate that  
20 because I have some difficulty with it. But if he  
21 could show how --

22 CHAIRMAN REYNOLDS: I think it was clear  
23 --

24 COMMISSIONER YAKI: If it was in

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1 pursuing the original project, I have no problem.  
2 But the fact that a different project's scope was  
3 attached with a different title, with a different  
4 emphasis concerns me because we had not as a  
5 Commission been allowed to make that change. And I  
6 have no doubt that the Commission would have made  
7 that change.

8 CHAIRMAN REYNOLDS: Commissioner Yaki, I  
9 think that it's clear that those interrogatories  
10 should not have gone out the door. They were sent.

11 And this process, at least with respect to this  
12 particular project, has been tortured. There are a  
13 number of different types of Adarand proposals  
14 floating about. There's been the postponement of  
15 discussion.

16 A mistake was made. It shouldn't have  
17 happened. And I am sure that the staff director  
18 will take steps to ensure that going forth this  
19 particular type of mistake doesn't happen again.

20 VICE CHAIRMAN THERNSTROM: A question  
21 for the staff director. What is this February 8th  
22 memo that went out that doesn't seem to conform --

23 COMMISSIONER BRACERAS: Yes. I haven't  
24 seen it. I don't --

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1                   COMMISSIONER YAKI: I just got it. I  
2 would like to be able to redact to whom it was sent  
3 so no one gets in any trouble, quite frankly. And I  
4 will do that today, but it is dated February 8th,  
5 2005 from this office. It is signed by the chair.  
6 It directs that any questions go to members of OCRE.  
7       And then there were four pages of attachments. One  
8 was the project concept and three pages of  
9 interrogatories.

10                   Again, because I don't want to get  
11 anybody in trouble -- I mean, this just sort of  
12 landed on my doorstep. And I'm not trying to cause  
13 it. I just want to make sure that this is something  
14 that -- I accept your word that it was an honest  
15 mistake.

16                   I just would like to know that: one,  
17 the relationship between these interrogatories and  
18 the original Adarand proposal, I'd like to see where  
19 the correlation is; and then, you know, that's as  
20 far -- I just wanted to bring that up. That's as  
21 far as I want to go with that.

22                   I'd rather talk about Commissioner  
23 Braceras' substitute at this point, but I think it  
24 is important in terms of how we move forward that I

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1 get some explanations about this.

2 COMMISSIONER BRACERAS: I agree with you  
3 100 percent. Obviously I support the substance of  
4 the motion to expand the project, but certainly I  
5 never had the intent to begin to expand the project  
6 before this body had a chance to vote on that. And  
7 I didn't know that that was being done until I  
8 received copies of the interrogatories in the mail  
9 at the same time that everybody else did.

10 The larger point, however, is that this  
11 was an ongoing project. The interrogatories were an  
12 attempt to move forward in a way that the Commission  
13 was inevitably going to go. And, as a matter of  
14 process, though, you are 100 percent right in that  
15 that shouldn't happen again.

16 But with respect to the substance of the  
17 motion that I have just made, my intention would be  
18 for it to be an expansion of the work that is going  
19 on and the data that has previously been collected.

20 I think that one of the problems with  
21 our work product in the past has been a lack of  
22 balance. And I think that the integrity of our work  
23 product has come into question because of the lack  
24 of balance.

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1 I think that adding this additional  
2 element to the project will produce a more balanced  
3 report.

4 CHAIRMAN REYNOLDS: Commissioner Yaki?

5 COMMISSIONER YAKI: Then if the intent  
6 of Commissioner Braceras' motion is to add to and  
7 not subtract from the original Adarand report, I  
8 have less concern except for the word "focus."

9 COMMISSIONER BRACERAS: Yes, I agree  
10 with that change.

11 VICE CHAIRMAN THERNSTROM: It should be  
12 "look at."

13 COMMISSIONER YAKI: Or "examine."

14 COMMISSIONER BRACERAS: Yes.

15 VICE CHAIRMAN THERNSTROM: Or "examine."  
16 Better.

17 COMMISSIONER BRACERAS: I accept that.

18 COMMISSIONER YAKI: Okay.

19 COMMISSIONER BRACERAS: And I apologize  
20 for the imprecise wording.

21 VICE CHAIRMAN THERNSTROM: It's not  
22 imprecise. It's just misleading.

23 COMMISSIONER YAKI: And when you speak  
24 about the Small Business Administration programs,

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1 which ones are you referring to? Are you referring  
2 to the certification process for federal  
3 contracting? Are we talking about the 8(a) program?

4 I guess I just want to make sure that  
5 staff has some specificity because there are two  
6 different creatures in terms of what the standards  
7 are.

8 COMMISSIONER BRACERAS: Well, what are  
9 your thoughts on --

10 COMMISSIONER YAKI: I don't know because  
11 I am not the world's greatest Adarand expert, but I  
12 do know that if we're looking at the 8(a) programs,  
13 I think -- I don't even know if 8(a), if that would  
14 even -- yes.

15 It sort of starts there but not really  
16 because the SBA, SDB does the certification for the  
17 entire government contracting program, which I think  
18 is what you are talking about.

19 COMMISSIONER BRACERAS: What would be  
20 your preference?

21 COMMISSIONER YAKI: I don't know. I  
22 just want to make sure that -- I mean, substantively  
23 with your motion I have a concern, but I think it is  
24 less of a concern because the intent of the

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1 examination, I understand what you're trying to do.

2 But I would just say that for purposes  
3 of the record that Commissioner Braceras is  
4 absolutely correct that the Supreme Court decision  
5 in Adarand talked about the classification serving  
6 compelling government interests be narrowly tailored  
7 to further that interest and that there is a  
8 requirement that agency consider race-neutral  
9 alternatives in contracting.

10 But there is a second part, which I  
11 don't think needs to be stated in the motion but  
12 just for clarification that under Adarand, which has  
13 been upheld by the Eighth and the Tenth Circuits,  
14 that agencies are still able to use race-conscious  
15 remedies in certain circumstances.

16 But I understand what you are trying to  
17 do with this. And, as amended, I would have no  
18 objection to it being appended to the original  
19 Adarand proposal that was read by Commissioner  
20 Meeks.

21 COMMISSIONER BRACERAS: That is the  
22 intention. We just changed the word "focus" to  
23 "examine."

24 VICE CHAIRMAN THERNSTROM: To "examine."

1 COMMISSIONER BRACERAS: That's the --

2 CHAIRMAN REYNOLDS: Okay. We have a  
3 problem. We have a date by which we have to submit  
4 our statutory project. And the staff director just  
5 indicated that certain changes are likely to cause  
6 us to miss that deadline. Ken, would you like to  
7 elaborate?

8 STAFF DIRECTOR MARCUS: After discussion  
9 with staff, it was their impression that in order to  
10 be able to meet our statutory enforcement deadline,  
11 interrogatories would have to go out by  
12 approximately the time that the February  
13 interrogatories went out.

14 If additional document requests or  
15 interrogatories of any sort go out, even today, it  
16 has certainly been staff's impression that it would  
17 be unlikely that the results could be integrated  
18 into a project that could be completed within this  
19 fiscal year.

20 COMMISSIONER BRACERAS: I'm confused  
21 because I thought that work had commenced several  
22 months ago and that data had been collected already  
23 on the first part of the project that Commissioner  
24 Meeks read into the record.

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1 STAFF DIRECTOR MARCUS: No.

2 VICE CHAIRMAN THERNSTROM: Well, I'm  
3 further confused, Ken, additionally confused. I  
4 thought that the most recent interrogatories that  
5 went out were tied to what would be an expansion of  
6 the program that we would be voting on today.

7 STAFF DIRECTOR MARCUS: The  
8 interrogatories that went out in February were based  
9 on our best expectation of what the Commission would  
10 be able to approve.

11 Under the time constraints that if  
12 interrogatories were not to go out by early  
13 February, it was extremely unlikely that we would be  
14 able to complete the project within the period.

15 We have a few different practical  
16 challenges in terms of completing projects within --

17 COMMISSIONER BRACERAS: I'm sorry. I  
18 appreciate the time constraints, but my question is  
19 what work had been prior to them.

20 VICE CHAIRMAN THERNSTROM: And haven't  
21 all necessary interrogatories already gone out if,  
22 in fact, we vote on this expansion of the project?

23 STAFF DIRECTOR MARCUS: No. Only one  
24 set of interrogatories has gone out, although it

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1 went out to multiple recipients. It went out in  
2 early February, and it was directed to the sorts of  
3 issues that are addressed in the motion that has  
4 been made today regarding narrow tailoring and  
5 race-neutral alternatives. That is the  
6 interrogatory that has gone out.

7 CHAIRMAN REYNOLDS: Staff Director, are  
8 you saying that we may not have enough time to  
9 complete the report that was originally proposed?

10 STAFF DIRECTOR MARCUS: Within this  
11 fiscal year. We could do the original project as a  
12 non-statutory report. We could do the original  
13 report for next fiscal year. We could do it in a  
14 way that combined this fiscal year and next fiscal  
15 year.

16 CHAIRMAN REYNOLDS: If we were to do  
17 that, do we have another report that we can offer up  
18 as our statutory report?

19 STAFF DIRECTOR MARCUS: I don't believe  
20 so. The bind we have been in since the new members  
21 came on board and since I came on board is that  
22 there was an older project that was underway, which  
23 appeared to be less likely to be what would be  
24 approved.

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1           There is a different concept here that  
2 relates to narrow --

3           COMMISSIONER BRACERAS:    But that's my  
4 question.   If it was underway, that presumes that  
5 work had been done.   I had been led to believe that  
6 data had been collected, that the idea that it was  
7 underway meant that data had been collected and that  
8 this was an expansion of the project that would  
9 attempt to balance it out and would attempt to make  
10 it more palatable to a bipartisan commission.

11          STAFF DIRECTOR MARCUS:    Analysis had  
12 been done but not data formally collected.

13          COMMISSIONER BRACERAS:    Okay.   Because  
14 my interest is in seeing a balanced report and  
15 seeing a report that a bipartisan commission can  
16 support, not in putting forward a report that looks  
17 at issues that are only of interest to one side or  
18 the other.

19          COMMISSIONER YAKI:    Let me interject.   I  
20 fully appreciate and understand what Commissioner  
21 Braceras has just said.   My concern goes, again, to  
22 process.

23                                    What has alarmed me in some of the  
24 statements that I have heard, not from you,

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1 Commissioner Braceras, in the past few minutes is  
2 that the interrogatories were promulgated under the  
3 theory that this motion was going to pass and it was  
4 sent prior to that passage by at least a full ten  
5 days. That's a problem that I have.

6 The second problem that I have is that  
7 if -- and I was not on the Commission at the time.  
8 I understand that there were some interesting  
9 difficulties when you first met in December and  
10 January just sort of getting accustomed to new faces  
11 and everything like that.

12 But knowing that this project was on the  
13 F.Y. 2005 calendar for September 30th, it appears  
14 that there was a holdback on -- excuse me for using  
15 that phrase but that somehow work either had not  
16 been done or has been done or perhaps has not.

17 I just need to know. Was there any work  
18 done at all prior to this?

19 STAFF DIRECTOR MARCUS: Yes.

20 COMMISSIONER YAKI: Because, again, I  
21 understand what Commissioner Braceras says. She  
22 wants to make sure that the report has the ability  
23 to have a balance to it. And her objection is that  
24 the prior approved report may not have reflected any

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1 balance.

2 I would be willing to support her  
3 efforts to do that if the other part of the study  
4 were also being done, but what I heard -- and this  
5 is what is disturbing -- is that there was no such  
6 intent to do the other part of the study. And it  
7 was simply to fulfill the intent of the motion that  
8 was going to be brought by Commissioner Braceras ten  
9 days after the interrogatories were actually sent  
10 out in relationship to that proposal.

11 That I have more than a little concern  
12 about because I have been and will continue to work  
13 in good faith with the Commission on process. I  
14 understand that the numbers have changed, the  
15 reality of who is in charge has changed. I  
16 understand all of that.

17 All I want to make sure is that as we go  
18 forward, it is my intent to be respectful, fair, and  
19 process-oriented, and not to engage in the vitriol  
20 of the past.

21 I am a little perturbed about the fact  
22 that Commissioner Braceras and I had a nice colloquy  
23 about the fact that this would be in addition to the  
24 report, it would provide balance to the report from

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1 her perspective. That's fine with me. But now I  
2 discover that, despite our colloquy, we hear that  
3 there won't be anything on the other section of the  
4 report. That disturbs me greatly.

5 CHAIRMAN REYNOLDS: Commissioner Yaki,  
6 we had a problem. Yes, the mistake was made. But  
7 what we do now is if we cannot do the Adarand  
8 project as amended, then we're going to have to find  
9 another project to do for '05 to satisfy our  
10 statutory obligation.

11 COMMISSIONER BRACERAS: May I ask a  
12 question about how much longer it would take because  
13 I do believe in the past with the environmental  
14 justice report, maybe you remember, Commissioner  
15 Meeks, we were about a month or two late with that  
16 project. And that seemed to be okay.

17 VICE CHAIRMAN THERNSTROM: That's  
18 correct.

19 COMMISSIONER BRACERAS: And so if it's  
20 only a matter of a few more months, maybe we can do  
21 that.

22 CHAIRMAN REYNOLDS: Okay.

23 COMMISSIONER BRACERAS: I don't know.

24 STAFF DIRECTOR MARCUS: Staff are

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1 indicating that that may not have been a statutory  
2 report.

3 COMMISSIONER BRACERAS: It was not a  
4 statutory report?

5 STAFF DIRECTOR MARCUS: Not a statutory  
6 report.

7 CHAIRMAN REYNOLDS: Commissioner Meeks?

8 COMMISSIONER MEEKS: I would just like  
9 to echo what Michael has said. I, for one, having  
10 been part of the old regime, actually very much  
11 appreciate the sort of openness that you all have  
12 brought, then to find that these interrogatories  
13 really do not reflect what was approved that I read  
14 earlier.

15 And given that there has already been  
16 work done on this, I am very willing to vote on that  
17 expansion. I mean, that is going to be additional  
18 information we have to gather when the work already  
19 has been done on the one that has already been  
20 approved or at least some of the work.

21 So I don't know how much more time that  
22 this expansion will take, but I am willing to vote  
23 on that and --

24 CHAIRMAN REYNOLDS: Well, for me, can we

1 expand the project and complete the project during  
2 this fiscal year? Can we meet our deadline? If the  
3 answer is no, it seems to me that we have to find a  
4 project that we can start and complete before the  
5 deadline.

6 COMMISSIONER BRACERAS: I need some more  
7 information on why the answer seems to be no.

8 VICE CHAIRMAN THERNSTROM: No. Wait a  
9 minute. I need an answer to the question of, well,  
10 is there a problem simply in completing the project  
11 if we expanded or is there a problem in completing  
12 the project, period?

13 COMMISSIONER BRACERAS: Right. Good  
14 question.

15 STAFF DIRECTOR MARCUS: Let me, if I  
16 may, speak generally to that. And then I may need  
17 additional more detailed information on that from  
18 our director of civil rights evaluation.

19 My understanding was at the time that we  
20 arrived in December-January, that we would have  
21 difficulty completing, really, any project other  
22 than exactly what had been approved before. That's  
23 how tight the timetable was.

24 Even back in early February, trying to

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1 either expand or alter the project would create  
2 timetable difficulties. We're now certainly after  
3 that. And so it's even more difficult in terms of  
4 the work flow and the amount of time required to get  
5 data.

6 But I'm certainly not the expert on what  
7 is required in order to get the statutory report  
8 out. So if the commissioners are interested in  
9 hearing more, --

10 COMMISSIONER BRACERAS: Yes.

11 VICE CHAIRMAN THERNSTROM: Yes.

12 STAFF DIRECTOR MARCUS: -- that's an  
13 OCRE issue. And I would defer to --

14 CHAIRMAN REYNOLDS: Ms. Dickerson, we  
15 need your help.

16 VICE CHAIRMAN THERNSTROM: Yes. Where  
17 are we with this?

18 CHAIRMAN REYNOLDS: Now, as originally  
19 crafted, as originally crafted, can we complete the  
20 project?

21 MS. DICKERSON: Part of what we run into  
22 is that we issue interrogatories to agencies. And  
23 we depend on their timely response in order to get  
24 the data and documents that we need in order to

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1 write the report.

2 Even with the interrogatories that were  
3 sent in early February, we still don't have all of  
4 those back. That is even after a great deal of  
5 effort on our part working with agencies.

6 The interrogatories themselves contain  
7 probably a couple of dozen questions directed to  
8 each agency and document requests as well. It's a  
9 good bit of work that we ask them to undertake in  
10 order to respond and to respond on time.

11 I don't believe we had any -- we had  
12 requests for extensions from every agency. I don't  
13 believe we had any by the deadline. We have faxed,  
14 worked with staff since February 8th to get all of  
15 the interrogatories back. And we have almost all of  
16 them now, but we don't have them all.

17 So when we start to talk about issuing  
18 even other interrogatories to agencies, that we  
19 would request more documents and depending on  
20 getting that information and being able to go  
21 through it, we're not talking in terms of just  
22 getting a reply that's a few pages long. In  
23 significant instance, it may be several boxes long.

24 And the staff still has to go through all of these

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1 documents and analyze them and prepare them to be  
2 part of the report.

3 CHAIRMAN REYNOLDS: Okay. How much work  
4 was done on this project, December? How much work  
5 had we --

6 MS. DICKERSON: We had done all of our  
7 preliminary research. And we had as well prepared  
8 interrogatories based on the concept for all of the  
9 agencies. And those had gone to the front office,  
10 but they weren't signed yet. And then when the new  
11 staff director came, you know, it became a matter of  
12 presenting those to him in December.

13 CHAIRMAN REYNOLDS: Okay.

14 VICE CHAIRMAN THERNSTROM: What form  
15 does this project have to take in order for it to be  
16 completed by the deadline?

17 MS. DICKERSON: Well, at this time, it  
18 would be very difficult to have the original scope  
19 plus an appended scope. We haven't requested -- we  
20 don't have the data and information to do all of  
21 that. So it would have to be some subset of the  
22 original at this point.

23 VICE CHAIRMAN THERNSTROM: A subset of  
24 the original. So we narrowed down the original is

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1. what you're saying?

2 MS. DICKERSON: Well, that wasn't my  
3 decision, but --

4 VICE CHAIRMAN THERNSTROM: Well, but, I  
5 mean, that's what you're saying is --

6 MS. DICKERSON: -- in response to --

7 VICE CHAIRMAN THERNSTROM: I'm asking  
8 what's manageable. And what you're saying --

9 MS. DICKERSON: Yes. In response to  
10 your question, yes, only some subset because if you  
11 back into the deadline, I mean, the Commission  
12 doesn't meet in August. And the report has to be  
13 produced and delivered to Congress, per my  
14 understanding, and the White House by September  
15 30th. So there is production time in there as well.

16 There is time for the commissioners to receive it,  
17 to read it, to discuss it, et cetera.

18 At this point, there hasn't even been a  
19 draft that has gone to the staff director because we  
20 are waiting for the interrogatories.

21 VICE CHAIRMAN THERNSTROM: Is there in  
22 theory a possibility of dividing this project into  
23 two parts, in effect, so that we produce part A as  
24 meeting the statutory requirement and we go on to

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1 part B subsequently? Is that a possibility?

2 MS. DICKERSON: In a subsequent fiscal  
3 year?

4 VICE CHAIRMAN THERNSTROM: Yes.

5 MS. DICKERSON: Certainly the --

6 VICE CHAIRMAN THERNSTROM: I mean,  
7 obviously we have to turn this into something  
8 manageable in order to meet the statutory  
9 requirement. I'm just trying to get at a possible  
10 method of doing so.

11 CHAIRMAN REYNOLDS: It sounds like that  
12 we need to take a look at the document and see how  
13 we can slim it down. I don't see any other way to  
14 produce this document in a timely fashion unless we  
15 narrow the scope.

16 Commissioner Yaki?

17 COMMISSIONER YAKI: Yes. I

18 OCRE

19 CHAIRMAN REYNOLDS: Is there

20 VICE CHAIRMAN THERNSTROM: Yes. I would  
21 suggest that -- and I think this is the last thing I  
22 want to say about what happened before. I mean, I  
23 understand, you know, people do things and mistakes  
24 can be made. I appreciate that. I'm not so

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1 concerned about that. I think that the spirit of  
2 good will is still here.

3 Since the interrogatories have gone out  
4 that relate to Commissioner Bracer's motion, I  
5 would ask that table this until the April meeting  
6 and ask the director of OCRE to come back and  
7 recommend what aspects of the original proposal she  
8 believes could still be doable by the statutory  
9 deadline. I think I need that information before I  
10 am ready to proceed.

11 I would accept a proposal that had  
12 elements of both. I am not prepared to simply  
13 accept a substitute, which is really what is on the  
14 table instead. But I would appreciate it if the  
15 person who has to do the work but also knows the  
16 federal agency process can come back and say, "Well,  
17 these things we could do. And the other ones we  
18 might have to push off to another time."

19 CHAIRMAN REYNOLDS: Is there a second?

20 VICE CHAIRMAN THERNSTROM: Yes. I  
21 second that. I like that very much. But I assume  
22 -- and I think this falls into a rhetorical  
23 question, but I assume that in the meantime, between  
24 now and April, you can continue to go full speed

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1 ahead on this project to get as much work done as  
2 possible.

3 You're not being held up by this. You  
4 would not be held up by this motion, would you?

5 MS. DICKERSON: We have a team working  
6 on it full-time. And we have the interrogatories to  
7 go through. I will say that it is significant to  
8 lose, I guess someone said three weeks, you know,  
9 about having a definitive target of where we are  
10 going since there is a full-time team working on it.

11 VICE CHAIRMAN THERNSTROM: Yes. But, I  
12 mean, that's my concern. Is your work compromised  
13 significantly by accepting what I think is a very  
14 good motion here or suggestion by Commissioner Yaki?

15 COMMISSIONER YAKI: I am not ready to  
16 have Commissioner Braceras' motion be approved  
17 today, but I would be willing to state that for the  
18 purposes of the work of the Commission -- and let me  
19 just say this. I understand the realities under  
20 which I operate.

21 So I think as a gesture of good faith, I  
22 think that to the extent that she has  
23 interrogatories that were promulgated that has data  
24 that she must go through, she should be allowed to

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1 continue on that pathway without any deal while she  
2 looks in it to see what elements of the original  
3 proposal she could still manage to do if she can in  
4 the time period. At that point in April, then we  
5 can vote up or down, but I would not want her to  
6 stop any work on that.

7 CHAIRMAN REYNOLDS: Commissioner Meeks?

8 COMMISSIONER YAKI: And I think the  
9 staff director can have that discretion to do that,  
10 rather than through a formal motion.

11 COMMISSIONER MEEKS: And I suggest in  
12 April, then, that -- I mean, I think that this  
13 project will probably -- I mean, it will sift out to  
14 be what is doable, that you will be able to get some  
15 sense of that and that we be willing to go forward  
16 with that so that we can fulfill our statutory  
17 requirements and then in the next year look at doing  
18 things --

19 COMMISSIONER BRACERAS: Right.

20 COMMISSIONER YAKI: So I would not  
21 object if the staff director said she could continue  
22 doing the work that she is doing.

23 COMMISSIONER MEEKS: But I think, I  
24 mean, if we're going to approve this project, I

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1 mean, I completely agree with Jennifer's motion if  
2 it's an expansion.

3 But I don't think it's up to the staff  
4 director to -- I mean, it's already been done. I  
5 understand that. But changing the whole process,  
6 why it wasn't approved by the --

7 COMMISSIONER BRACERAS: I agree.

8 CHAIRMAN REYNOLDS: Again, that was a  
9 mistake. And I was involved in that mistake. I was  
10 not aware that we had deviated from the project.  
11 Now, after saying that, though, we need to come up  
12 with a better plan for meeting our statutory  
13 obligations. And I think that we have one.

14 COMMISSIONER BRACERAS: Yes. I mean, I  
15 would just like to have a report in the end that  
16 discusses some aspect of race-neutral alternatives.

17 And I'll leave it to Terri to tell us next month  
18 what aspect of the race-neutral alternative side of  
19 things she can bite off and do. And if that's part  
20 of the project, then I'm happy with that.

21 CHAIRMAN REYNOLDS: Vice Chair  
22 Thernstrom?

23 VICE CHAIRMAN THERNSTROM: But I also  
24 completely agree with Commissioners Yaki and Meeks

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1 that we cannot -- this is not a substitute. This  
2 has to be clearly an addition and that if this  
3 report is to have integrity, the questions that were  
4 originally posed and voted on by this Commission  
5 have to be, at least some subsection of them, that  
6 subsection which is doable, have to be part of this  
7 report. And, therefore, you also have to feel, as  
8 it were, that you own this report.

9 COMMISSIONER BRACERAS: Yes. That was  
10 my intention.

11 CHAIRMAN REYNOLDS: Well, Terri, I'm  
12 sorry for dropping this in your lap at this late  
13 date, but this is where we find ourselves.

14 VICE CHAIRMAN THERNSTROM: Good luck.

15 COMMISSIONER BRACERAS: May the force be  
16 with you.

17 CHAIRMAN REYNOLDS: Okay. So there is  
18 nothing to vote on here.

19 VICE CHAIRMAN THERNSTROM: No.

20 VIII. FUTURE AGENDA ITEMS

21 CHAIRMAN REYNOLDS: Okay. Future agenda  
22 items?

23 COMMISSIONER YAKI: Why is the new guy  
24 talking so much. Let me just say this --

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1 VICE CHAIRMAN THERNSTROM: Give it  
2 another month.

3 COMMISSIONER YAKI: I know. One of the  
4 things, during one of the breaks at the hearing  
5 yesterday, I was talking to the staff director about  
6 what is it that we could do that would not cost a  
7 lot of money but be very informative and important  
8 to the Commission.

9 One of the things that Commissioner  
10 Redenbaugh said is that we have no clear purpose.  
11 There is no clear purpose. And his solution, of  
12 course, was to detonate it and start all over again.  
13 Mine was to not do that. But I'm just wondering.  
14 I just throw this out for people to think about, and  
15 maybe we can discuss them next time.

16 I think in terms of how we think of the  
17 agenda in going forward that it would be I think  
18 very cost-effective to have a series of hearings  
19 here in Washington, D.C. that would basically be  
20 almost like an open mike for civil rights  
21 organizations of every ilk and stripe to come forth  
22 and give us five or ten minutes of what they believe  
23 are cutting-edge or interesting or new or neglected  
24 or what have you civil rights issues that they're

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1 concerned about.

2 It would be just a way to -- I think it  
3 would be invigorating. I think it would be a  
4 positive sign of outreach by the Commission as a  
5 whole to every single organization in this country  
6 who could or would want to participate. I just  
7 throw it out there to think about.

8 CHAIRMAN REYNOLDS: Commissioner Yaki, I  
9 think it's a great idea. I think that it gives us  
10 an opportunity. Well, one issue that I have been  
11 wrestling with is what does civil rights means in  
12 the Twenty-First Century.

13 There are different conceptions of what  
14 civil rights should be. And a lot of the friction,  
15 a lot of the disagreements among the different  
16 schools of thought flow from different first  
17 principles. And I think it would be healthy if we  
18 were to invite various groups in to articulate a  
19 particular vision. So I think it's a great idea.

20 Vice Chair Thernstrom?

21 VICE CHAIRMAN THERNSTROM: I actually  
22 also think it's a great idea, but I would not want  
23 the people from whom we hear to be limited to the  
24 organized civil rights communities. There are also

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1 scholars who work --

2 COMMISSIONER YAKI: Exactly.

3 VICE CHAIRMAN THERNSTROM: -- as  
4 individuals --

5 COMMISSIONER YAKI: I agree.

6 VICE CHAIRMAN THERNSTROM: -- on civil  
7 rights-related issues. And I would want to hear  
8 from them as well.

9 COMMISSIONER YAKI: One of the concerns  
10 that was brought up -- and as someone who used to  
11 chair committees in San Francisco, I can truly  
12 appreciate it -- is when people come up and, instead  
13 of talking about you, start calling you names.

14 And my solution to that was that if you  
15 were to do something on that, you were to put out an  
16 order that they're -- at the first mention of an ad  
17 hominem attack on any member of the Commission, you  
18 will be removed. Your testimony will be stricken  
19 from the record, and you will be barred. That's a  
20 powerful chill on people going up and trying to make  
21 a mockery out of the proceedings, just to let you  
22 know.

23 I used to throw people out of committee  
24 hearings all the time.

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1 (Laughter.)

2 CHAIRMAN REYNOLDS: Okay. Well, should  
3 we entertain a motion to adjourn?

4 VICE CHAIRMAN THERNSTROM: Yes. I so  
5 move.

6 CHAIRMAN REYNOLDS: Okay.

7 (Whereupon, at 1:06 p.m., the foregoing matter was  
8 adjourned.)

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