

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING  
TELECONFERENCE

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Friday, July 22, 2005

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The Commission convened by teleconference  
at 3:00 p.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A REYNOLDS, Chairman

ABIGAIL THERNSTROM, Vice Chairman

JENNIFER C. BRACERAS, Commissioner

PETER N. KIRSANOW, Commissioner

ASHLEY L. TAYLOR, JR., Commissioner

MICHAEL YAKI, Commissioner

KENNETH L. MARCUS, Staff Director

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STAFF PRESENT:

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MARGARET BUTLER

CHRISTOPHER BYRNES

DEBRA CARR, ESQ., Associate Deputy Staff Director

IVY DAVIS, Director ERO/Acting Chief, Regional

Programs Coordination Unit

TERRI DICKERSON, Assistant Staff Director

PAMELA A DUNSTON, Chief, Administrative Services and

Clearinghouse Division

LATRICE FOSHEE

GEORGE M. HARBISON, Director, Human Resources

Division/Acting Chief, Budget and Finance Division

SETH JAFFE

TINALOUISE MARTIN, Director for Management, Office of

Management

EMMA MONROIG, Solicitor/Parliamentarian

EILEEN RUDERT

AUDREY WRIGHT

MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS

LISA NEUDER

KIMBERLY SCHULD

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A-G-E-N-D-A

Roll Call ..... 4

I. Approval of Agenda ..... 7

II. Approval of Minutes of  
June 17, 2005 Meeting ..... 10

III. Announcements ..... 11

IV Program Planning

- Motion to Alter Scope of OCRE Study..... 15
- Motion on publication of Adarand report. 31
- Motion on FY 2006 federal funding of civil  
rights enforcement report..... 64

V. Staff Director's Report ..... 65

VIII. Management and Operations

- Motion to approve the OMB FY 2007 budget 74

Recess

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

2 CHAIRMAN REYNOLDS: Okay. This is  
3 Chairman Reynolds.

4 This is a telephonic meeting with all  
5 commissioners participating, and a meeting from  
6 different locations.

7 I will call the name of each commissioner  
8 in order to determine if there is a quorum to hold a  
9 meeting.

10 Vice Chair Thernstrom.

11 VICE CHAIRMAN THERNSTROM: I'm here.

12 CHAIRMAN REYNOLDS: Commissioner Taylor.  
13 Commissioner Taylor.

14 COMMISSIONER TAYLOR: I'm here. Can you  
15 hear me?

16 CHAIRMAN REYNOLDS: Yes.

17 COMMISSIONER TAYLOR: Okay.

18 CHAIRMAN REYNOLDS: Commissioner Braceras.

19 (No response.)

20 CHAIRMAN REYNOLDS: Commissioner Braceras?

21 (No response.)

22 CHAIRMAN REYNOLDS: Ken Marcus, are you"  
23 is Ken Marcus on the line?

24 STAFF DIRECTOR MARCUS: Yes, this is Ken

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1 Marcus.

2 OPERATOR: I apologize. I think we're  
3 having a little bit of difficulty. Give me just a  
4 moment, and you should be able to hear her.

5 There you go. You should have her on the  
6 line now.

7 CHAIRMAN REYNOLDS: Commissioner Braceras?

8 COMMISSIONER BRACERAS: Yes.

9 CHAIRMAN REYNOLDS: Thank you.

10 Commissioner Yaki.

11 COMMISSIONER YAKI: Present.

12 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

13 (No response.)

14 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

15 (No response.)

16 CHAIRMAN REYNOLDS: Last time,  
17 Commissioner Kirsanow?

18 (No response.)

19 CHAIRMAN REYNOLDS: Okay, well,  
20 Commissioner Kirsanow indicated that he would " that he  
21 might be joining us later in the conversation. And I  
22 do believe that that's the case.

23 Okay, the meeting will come to order.

24 VICE CHAIRMAN THERNSTROM: Mr. Chairman,  
25 is someone going to keep trying to get him? I'm

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1 obviously eager that he do join us.

2 How is this going to work?

3 CHAIRMAN REYNOLDS: Ken, please have  
4 someone continue to try to track down Commissioner  
5 Kirsanow.

6 STAFF DIRECTOR MARCUS: Mr. Chairman, this  
7 is Ken Marcus, and since we're on the phone, we'll  
8 make an effort to identify ourselves when we speak.

9 We do have someone who is trying to get  
10 Commissioner Kirsanow on the line.

11 I might ask, Mr. Chairman, if you also  
12 verified that the court reporter is on the line?

13 CHAIRMAN REYNOLDS: Is the court reporter  
14 on the line?

15 COURT REPORTER: Yes, we are on line.

16 CHAIRMAN REYNOLDS: Okay.

17 Okay, whenever a commissioner wants to  
18 make a statement, please identify yourself first by  
19 name so that the transcriber can know who is talking.

20 And whenever it's necessary to take a  
21 vote, the following procedure will be followed: I  
22 will call out the names of each commissioner. The  
23 commissioner should then answer yes, no, or abstain.

24 After the voting has concluded, I will  
25 read out how each one of you has voted in order to

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1 ensure that the tally is correct.

2 If we are unable to conclude the meeting  
3 today, the meeting will be recessed and continued  
4 until a date in August to be determined after proper  
5 consultation with the commissioners.'

6 **I. Approval of Agenda**

7 The first item on the agenda is the  
8 approval of the agenda.

9 May I have a motion to approve the agenda?

10 VICE CHAIRMAN THERNSTROM: So moved. This  
11 is Abigail Thernstrom.

12 CHAIRMAN REYNOLDS: Okay, Jennifer.

13 COMMISSIONER BRACERAS: I'm sorry, do we  
14 need a second before we discuss or no?

15 CHAIRMAN REYNOLDS: Commissioner Braceras  
16 indicated that she wanted to rearrange the order of  
17 the agenda.

18 COMMISSIONER BRACERAS: Yes, I'd like to  
19 move that we move up this Adarand discussion so that  
20 it immediately follows the announcements and goes  
21 before the staff director's report.

22 CHAIRMAN REYNOLDS: Okay.

23 VICE CHAIRMAN THERNSTROM: Commissioner  
24 Braceras, are you willing to alter that slightly so  
25 that both Adarand and the federal funding report be

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1 discussed before the staff director's report?

2 COMMISSIONER BRACERAS: Yes, that's fine.

3 CHAIRMAN REYNOLDS: Okay, is there a  
4 second? Is there a second?

5 COMMISSIONER TAYLOR: This is Commissioner  
6 Taylor.

7 CHAIRMAN REYNOLDS: Okay, do you second  
8 Jennifer's motion?

9 COMMISSIONER TAYLOR: I do.

10 CHAIRMAN REYNOLDS: Okay, discussion?

11 COMMISSIONER YAKI: Yes, this is  
12 Commissioner Yaki.

13 The purpose of it is what?

14 VICE CHAIRMAN THERNSTROM: Is to make sure  
15 that everybody is on there. People are having to drop  
16 off.

17 CHAIRMAN REYNOLDS: The purpose as I  
18 understand it is to make sure that these two important  
19 items be discussed when as many commissioners are on  
20 the line as possible.

21 Any additional comments? Okay, when I  
22 call your name, please indicate how you vote.

23 Vice Chair Thernstrom.

24 VICE CHAIRMAN THERNSTROM: Yes.

25 CHAIRMAN REYNOLDS: Commissioner Taylor?

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1 COMMISSIONER TAYLOR: Yes.

2 CHAIRMAN REYNOLDS: Commissioner Braceras?

3 COMMISSIONER BRACERAS: Yes.

4 CHAIRMAN REYNOLDS: Commissioner Yaki?

5 COMMISSIONER YAKI: Aye.

6 CHAIRMAN REYNOLDS: And I also support the  
7 motion.

8 The tally is as follows. There are --

9 COMMISSIONER KIRSANOW: Kirsanow here.  
10 Mr. Chairman?

11 CHAIRMAN REYNOLDS: Oh, okay.

12 COMMISSIONER KIRSANOW: What was the vote  
13 about?

14 COMMISSIONER KIRSANOW: Okay, Jennifer  
15 moved that we move the Adarand report and the federal  
16 funding of civil rights report, that we move that  
17 discussion right after the announcement and before the  
18 staff director's report.

19 COMMISSIONER KIRSANOW: Okay.

20 CHAIRMAN REYNOLDS: And so you support "  
21 you're supporting it?

22 COMMISSIONER KIRSANOW: Yes.

23 CHAIRMAN REYNOLDS: Okay. The tally is  
24 six in the affirmative.

25 There are no votes against the motion, and

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1 there are no abstentions.

2 So the motion is approved.

3 **II. Approval of Minutes**

4 Next up is the approval of the minutes of  
5 the minutes of a June 17th, 2005, meeting.

6 May I have a motion to approve the minutes  
7 of a June 17th meeting?

8 VICE CHAIRMAN THERNSTROM: So moved. This  
9 is Commissioner Thernstrom.

10 CHAIRMAN REYNOLDS: Is there a second?

11 COMMISSIONER YAKI: Second by Commissioner  
12 Yaki.

13 CHAIRMAN REYNOLDS: I'm sorry?

14 COMMISSIONER YAKI: Second by Commissioner  
15 Yaki.

16 CHAIRMAN REYNOLDS: Any discussion?

17 Okay, at that point, Vice Chair  
18 Thernstrom, how do you vote?

19 VICE CHAIRMAN THERNSTROM: Yes.

20 CHAIRMAN REYNOLDS: Commissioner Taylor?

21 COMMISSIONER TAYLOR: Aye.

22 CHAIRMAN REYNOLDS: Commissioner Braceras?

23 COMMISSIONER BRACERAS: Aye.

24 CHAIRMAN REYNOLDS: Commissioner Yaki?

25 COMMISSIONER YAKI: Aye.

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1 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

2 COMMISSIONER KIRSANOW: Yes.

3 CHAIRMAN REYNOLDS: Okay. And I also vote  
4 in the affirmative.

5 Okay, six in favor, none against, no  
6 abstentions.

7 **III. Announcements**

8 At this point I'd like to read some  
9 announcements.

10 I'm saddened to announce that earlier this  
11 month Arthur Abe Fletcher, a former chairman of this  
12 commission, died.

13 Dr. Fletcher served in the Nixon  
14 Administration as the Assistant Secretary of Wage and  
15 Labor Standards.

16 He advised Presidents Ford, Reagan and  
17 George H.W. Bush.

18 Dr. Fletcher was an ardent spokesman for  
19 civil rights, especially in employment and  
20 contracting. In 1972, as executive director for the  
21 United Negro College Fund, he coined the now familiar  
22 phrase, quote, "a mind is a terrible thing to waste,"  
23 close quote.

24 President George H.W. Bush appointed Dr.  
25 Fletcher to the commission in 1990, where he served

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1 until 1993 as chairman. At the time of his death he  
2 was an active teacher and speaker.

3 Dr. Fletcher will be missed.

4 The second item, I would like to announce  
5 that this month marks the 41st anniversary of the  
6 landmark Civil Rights Act of 1964, a law that has  
7 helped dismantle a racial caste system that was in  
8 place for much of this nation's history.

9 The sweeping success of the act can be  
10 measured by how many of its major features are taken  
11 for granted today including voter registration  
12 requirements that are free of racial classifications;  
13 rules that prohibit racial discrimination in public  
14 accommodations; and rules against discrimination in  
15 employment on the base of race, national origin, sex  
16 or religion.

17 All commission staff and the members of  
18 the commission should be proud as I am to serve on a  
19 commission that helped to put this law on the books,  
20 and continues to serve the stated goal of the act " to  
21 protect all Americans regardless of race from  
22 discriminatory conduct.

23 I would also like to announce that on July  
24 25th, 1990, President George H.W. Bush signed into law  
25 the Americans with Disabilities Act. This law

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1 protects individuals with disabilities from  
2 discrimination in public accommodations, commercial  
3 facilities, employment, transportation, and government  
4 services.

5 By striving to ensure that no American is  
6 denied access to employment, education or other vital  
7 activities because of a disability, we strengthen our  
8 nation.

9 On behalf of the U.S. Commission on Civil  
10 Rights I applaud this goal.

11 At this point I would like to announce the  
12 names of some of our new interns. On July 11th,  
13 Christopher Anderson began an internship in the office  
14 of the staff director.

15 Christopher is a third-year law student at  
16 the University of Tulsa College of Law. Last summer,  
17 Christopher interned in the House Majority Whip's  
18 Office of Congressman Roy Blunt.

19 The Department of Employment Services,  
20 Office of Youth Programs, office D.C.'s teenage youth  
21 an opportunity to explore the working world. This  
22 summer the Commission is hosting five high school  
23 students under the auspices of this program.

24 Ashley Menkins will serve in the Eastern  
25 regional office.

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1 Stefan Suber will work in the library.

2 And Talia Edwards will be in the budget  
3 and finance division.

4 And finally, Nicholas White will be in  
5 OCRE.

6 Okay, we have switched the " oh, I'm  
7 sorry, I'm sorry, I left one individual out. Leonard  
8 Harding will work in the administrative services and  
9 clearinghouse division.

10 And I just wanted to remind everyone that  
11 the order has changed. At this point we will be  
12 hearing a discussion about the Adarand report.

13 And so at this point, Abbey, will you take  
14 care of the motions?

15 VICE CHAIRMAN THERNSTROM: I will indeed.  
16 Just let me get the first one here.

17 Mr. Chairman, we've got two-thirds of a  
18 page here, I presume given the fact that this is a  
19 phone meeting, I need to read it in its entirety.

20 CHAIRMAN REYNOLDS: That's correct.

21 **IV. Motion to Alter Scope of OCRE Study**

22 VICE CHAIRMAN THERNSTROM: All right.

23 Well, this is a motion to alter the scope  
24 of the OCRE Adarand enforcement study. And it reads:

25 In order to make the project more

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1 manageable, I move that the scope of the OCRE Adarand  
2 study and its resulting proposed final report, Federal  
3 Procurement After Adarand, focus on evaluating  
4 government compliance with the requirement in Adarand  
5 v. Pena that agencies consider race-neutral  
6 alternatives in their procurement activities.

7 In Adarand v. Pena the Supreme Court held  
8 that when a government actor imposes any racial  
9 classification, the classification must serve a  
10 compelling government interest and be narrowly  
11 tailored to further that interest.

12 Specifically under this proposed scope the  
13 project would ask, one, whether agencies seriously  
14 consider workable race-neutral alternatives in their  
15 procurement activities as required by Adarand.

16 Two, whether federal agencies sufficiently  
17 promote and participate in practices such as  
18 Mentor/Protégé programs, outreach, and financial and  
19 technical assistance.

20 Three, whether federal agencies employ and  
21 disclose to each other the specific best practices for  
22 consideration of race-neutral alternatives.

23 Four, how federal agencies measure the  
24 effects of race-neutral programs on federal  
25 contracting.

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1           And five, what mechanisms exist to ensure  
2 federal government contracting is not discriminatory?

3           Under this proposed scope, the project  
4 would not evaluate existing disparity or study,  
5 whether or which aspects of the federal contracting  
6 process disparately affects minority-owned firms.

7           I understand that this would substantially  
8 alter the scope that was approved during our meeting  
9 on April 8th, 2005, and bring us closer to the project  
10 that Commissioner Braceras suggested in her motion on  
11 March 18th, 2005.

12           We have now seen various draft reports  
13 prepared to comply with different project scopes and  
14 concept papers. In general our attempts to cover too  
15 much ground in too little time have not been  
16 successful.

17           The proposed final report, presented by  
18 the staff director, complies with the scope that I am  
19 asking the Commission adopt by this mission and is in  
20 my view more successful than prior efforts.

21           CHAIRMAN REYNOLDS: Is there a second?

22           COMMISSIONER BRACERAS: Second.

23           CHAIRMAN REYNOLDS: Discussion?

24           COMMISSIONER YAKI: This is Commissioner  
25 Yaki.

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1 I have some serious issues with this  
2 proposed motion. First and obviously is the fact that  
3 I'm trying to grapple with the fact that we are now  
4 changing the scope of a project to fit the results  
5 that came out of the project rather than trying to  
6 adhere to the original scope of the project that was  
7 approved.

8 I think a little history for those people  
9 on the line would be useful.

10 In 2004, the Commission unanimously  
11 approved for its 2005 statutorily mandated enforcement  
12 report. Ten years after Adarand, the title was The  
13 Effective Change of Federal Procurement Standards on  
14 Women and Minority Owned Businesses.

15 There was some concern that in the  
16 aftermath of Adarand what impact did it have on some  
17 of the federal programs that called for federal  
18 contracting and procurement with minority and  
19 disadvantaged businesses.

20 And then what happened is that in March of  
21 2005, we found out that the scope had been changed.  
22 And we don't need to go over the history of how the  
23 scope had changed, but interrogatories were sent out  
24 with a different project scope in mind.  
25 Coincidentally? I think not. The same project scope

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1 that we are approving here today. But what bothers me  
2 is that in April of 2005, on a motion by Commissioner  
3 Braceras, we did allow for the change in scope of the  
4 Adarand enforcement study to include information,  
5 quote, on federal agencies' use of residential  
6 contracting vehicles in addition to elements of the  
7 original project proposal.

8 The resulting study will, one, report the  
9 amount of federal procurement funds going to small,  
10 disadvantaged, and (hot zone) businesses.

11 Two, analyze continuing barriers facing  
12 socially and economically disadvantaged firms.

13 Three, examine the role of federal  
14 agencies including SBA in implementing procurement  
15 programs for these firms following the Supreme Court  
16 decision.

17 And finally, specifically, OCRE research  
18 into how federal contracts or federal agencies change  
19 procurement practices to fulfill the compelling  
20 interest and narrow tailoring components of the  
21 Adarand decision.

22 This was a motion brought by Commissioner  
23 Braceras. It was passed unanimously by us. At that  
24 time we asked questions of the OCRE director who  
25 indicated that this scope was achievable. And in fact

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1 that scope was achieved in the very first draft of  
2 this report.

3 It is only through subsequent drafts when  
4 entire sections have been eliminated that went toward  
5 the original scope of this project that we come before  
6 us now with a considerably slimmed down report that is  
7 now going to be changed to conform to what was  
8 initially tried, without Commission consent, in  
9 February of 2005.

10 I object strenuously to the fact that we  
11 are " that we are essentially reshaping .the scope of  
12 this project.

13 I think that in terms of what we have  
14 represented to the public, and represented to  
15 Congress, this report does not track to that. It does  
16 not include the data that was mentioned in the  
17 original scope.

18 And I will talk more about the merits of  
19 the report later, but I think that it is a disservice  
20 to the public for us to attempt to simply change the  
21 scope to fit " change the scope after the fact to fit  
22 the conclusion that we're already foreseen in February  
23 of 2005.

24 I object strenuously to this motion, and  
25 those are my views.

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1 VICE CHAIRMAN THERNSTROM: May I speak to  
2 that, Mr. Chairman?

3 CHAIRMAN REYNOLDS: Yes, Vice Chair  
4 Thernstrom, please.

5 VICE CHAIRMAN THERNSTROM: Unless you want  
6 to do so first.

7 CHAIRMAN REYNOLDS: You go first.

8 VICE CHAIRMAN THERNSTROM: Look,  
9 Commissioner Yaki, I'm sympathetic to what you're  
10 saying. I understand it. And it's not " I don't  
11 dismiss it casually.

12 But the fact is, I think you misconstrue  
13 this history when you say that the scope was changed  
14 in order for us " it was reshaped as it were for a  
15 political agenda.

16 That was your implication unless I  
17 misunderstood.

18 COMMISSIONER YAKI: I never used the word,  
19 political agenda. I simply said that it was changed  
20 to fit the " I think " preordained conclusions. That's  
21 not political. That has nothing to do with political.

22 VICE CHAIRMAN THERNSTROM: Okay, illogical  
23 or whatever. But it amounts to the same thing it  
24 seems to me.

25 And I think a more accurate telling of

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1 this story is that once the entire report came to us,  
2 in a draft I should say, the entire report came to us,  
3 it was the chapters that we eventually deleted were in  
4 my view in such poor shape that given the time  
5 constraints they could not be fixed.

6 And I guess there is a lesson here, that  
7 we really need to define these topics in a more  
8 manageable way.

9 This turned out not to be a manageable  
10 topic, and the draft very clearly indicated that.

11 But I think what was driving this was a  
12 concern about quality, and not a concern about shaping  
13 this to fit an agenda.

14 I would have been delighted to have had  
15 those chapters if I could have signed on to their  
16 quality.

17 COMMISSIONER YAKI: Well, with all due  
18 respect, Commissioner Thernstrom, I appreciate  
19 everything that you're saying. And certainly, I am  
20 not impugning anyone's motives here.

21 But my concern, you brought up one of my  
22 concerns. And that is, a decision was made to  
23 eliminate sections from one of the drafts, a decision  
24 by the way of which I was told after the fact.

25 There was no notational vote. There was

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1 no telephone conference about that. It was simply " by  
2 fiat they were removed. I don't know how. I was  
3 simply told they were gone.

4 No one enunciated the reason why. No one  
5 told me what the purposes were for the elimination of  
6 those chapters.

7 I was not afforded the opportunity to  
8 confer with the staff director or the head of OCRE as  
9 to what were the issues. So perhaps no argument could  
10 be made as to why they would be put in, they were  
11 simply gone, and they have been gone for quite a long  
12 time.

13 So I respect what it is, you're trying to  
14 say, Commissioner. It's just that for me, this  
15 particular process did not go the way it is.

16 And I think that, you know, from reading  
17 some of what you went through under a prior regime,  
18 you would understand my frustration.

19 VICE CHAIRMAN THERNSTROM: Does anybody  
20 else want to speak to this?

21 COMMISSIONER BRACERAS: Yes, this is  
22 Commissioner Braceras.

23 CHAIRMAN REYNOLDS: Yes, Commissioner  
24 Braceras.

25 COMMISSIONER BRACERAS: I, too, want to

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1 echo Vice Chair Thernstrom's comments that this was  
2 done for reasons of quality, not ideology.

3 When I received the report, I felt that  
4 the chapters that were ultimately removed needed a  
5 substantial amount of work. And given the time  
6 constraints, I realized that there was no way we would  
7 be able to turn them around in time to get a report to  
8 meet our statutory obligations in terms of submitting  
9 a report by the end of the fiscal year.

10 So in my mind it came down to a question  
11 of not having a report that was able to garner  
12 majority support, or having a trimmed down report.  
13 And I felt that in this situation it'd be better to  
14 have a smaller report than no report at all.

15 So I do appreciate Commissioner Yaki's  
16 concerns. I think, and the staff director can speak  
17 to this more fully, the reason that the chapters were  
18 omitted without any type of vote is that I believe the  
19 staff director realized that in its original form it  
20 didn't have the votes to pass, and therefore, the  
21 edits were made by the staff, and in fact it garnered  
22 majority support for the report.

23 Some of the problems, just for the record,  
24 that I found in the chapters that were ultimately  
25 deleted were both problems of accuracy, as well as

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1 problems that I thought were problems of tone and  
2 bias. Those chapters were filled with assumptions and  
3 unsupported premises that I could not buy into.

4 The data, the raw data that was contained  
5 in those reports, I'm happy to have that in the public  
6 domain. And indeed, if you would like to include them  
7 in a dissenting statement, Commissioner Yaki, I'd be  
8 happy to have the data in the public domain.

9 But I personally did not feel I could sign  
10 on to those chapters as they were written, including  
11 the assumptions and the premises that were in the  
12 narrative of those chapters.

13 CHAIRMAN REYNOLDS: This is Chairman  
14 Reynolds. I just want to make two quick points.

15 The first is, when we agreed to try to  
16 accommodate both approaches, at the time we thought  
17 that it was possible.

18 Once we got the first draft, maybe it  
19 would have been possible if we'd had more time to  
20 incorporate both approaches.

21 But looking at the amount of time we have  
22 to complete our statutory report, and looking at the  
23 amount of work that would have been required, it just  
24 wasn't possible.

25 And finally, I just want to respond to the

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1 statement that we changed it to " so in order to  
2 guarantee a particular outcome " well, at the time we  
3 didn't have data. At the time we didn't know what the  
4 agencies were going to provide us in terms of the  
5 response to the interrogatories that eventually went  
6 out.

7 So I guess those are my two points.

8 STAFF DIRECTOR MARCUS: Mr. Chairman, this  
9 is Staff Director Marcus.

10 CHAIRMAN REYNOLDS: Yes.

11 STAFF DIRECTOR MARCUS: By way of context  
12 I'd like to point out that this report is the  
13 statutory enforcement report. That means it is the  
14 one report which we are statutorily required to not  
15 only produce but to approve and to publish and  
16 distribute to Congress and the White House by the end  
17 of the fiscal year.

18 While efforts were made to produce a  
19 report that complied with the scope approved in the  
20 spring, it became clear from the commissioners  
21 comments that that report would not garner a majority  
22 of the votes, if indeed it would garner any votes at  
23 all.

24 Now the commissioners recall that  
25 distributing this draft was essentially a new process

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1 . We were trying to get as much input from  
2 commissioners as possible, and to do so to a greater  
3 extent than the Commission has done in the past.

4 When we distributed an early version that  
5 complied with the former scope, no commissioner  
6 expressed that they appreciated the scope or thought  
7 that it was successful, and several commissioners  
8 indicated that they intended to dissent.

9 In fact, there were so many commissioners  
10 indicating that they intended to dissent that it  
11 became clear that if we continued to pursue the  
12 previously approved scope we would not have a report  
13 by the end of the fiscal year that would garner a  
14 majority of the votes.

15 I did speak with a number of commissioners  
16 to explain to them the input that I was getting from  
17 the Commission.

18 For instance I personally called  
19 Commissioner Yaki to let him know that I had been  
20 hearing concerns from other commissioners including in  
21 particular about Chapter 2.

22 I might also mention concerns about  
23 Chapter 3.

24 And I indicated that there might have to  
25 be cuts or other changes.

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1           That was unusual in that that sort of  
2 information, input, hadn't been made in the past. But  
3 I thought it would be useful for people to know that.

4           Through a process of communicating with  
5 various commissioners on both parties, we were able to  
6 determine that altering the scope of the report would  
7 enable us to get to the point at which there were at  
8 least several commissioners who would be comfortable  
9 with the direction in which we were going.

10           And that is how we got to the version that  
11 we're looking at today.

12           COMMISSIONER KIRSANOW: Mr. Chairman, this  
13 is Commissioner Kirsanow.

14           CHAIRMAN REYNOLDS: Yes, Commissioner  
15 Kirsanow.

16           COMMISSIONER KIRSANOW: I want to echo  
17 what the staff director articulated when asked how he  
18 got to this particular pass.

19           We frankly didn't have much choice or much  
20 recourse. And I think that all of the appropriate  
21 due process measures were taken into account in making  
22 sure that we crafted the best possible report given  
23 the constraints that we obviously faced.

24           I think we were at a point " and again,  
25 I'm repeating what the staff director said " but I

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1 think we were at a point where the time constraints  
2 would dictate that we would either violate our  
3 statutory obligation to issue a statutory report or  
4 because we wouldn't have the consensus of  
5 commissioners necessary and we wouldn't be issuing a  
6 statutory report, or we'd be issuing a fundamentally  
7 flawed report.

8 I appreciate what Commissioner Yaki had to  
9 say with respect to experience in a prior composition  
10 of the Commission.

11 I will say that despite the fact that  
12 we're under enormous time constraints, and despite the  
13 fact that we've had to edit certain portions of the  
14 report, and this report went through various  
15 iterations, and I think the staff did a remarkable job  
16 in trying to accommodate the wishes or needs  
17 pertaining to this particular report.

18 In spite of that, this particular process  
19 was preferable and was better than the process we've  
20 seen in previous reports when reports would be  
21 presented to us as a fait accompli without any kind of  
22 comment on the part of commissioners.

23 And in fact, despite the fact that this  
24 particular report has a sense of having " where sausage  
25 is being made, you don't want to see it done " it was

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1 nonethless superior in the process to previous  
2 reports where we didn't have any kind of heads up, and  
3 there wasn't as much input, and there wasn't as much  
4 commissioner involvement.

5 So I think this will be avoided in the  
6 future, because we won't have the similar time  
7 constraints. Was this a perfect process? Probably  
8 not. But it was still superior to processes that I've  
9 been involved with " actually, haven't been involved  
10 with, have observed at the Commission in my three  
11 years.

12 COMMISSIONER BRACERAS: This is  
13 Commissioner Braceras.

14 I'm just wondering if we could move the  
15 discussion along to the substance and call the  
16 question, because I'm going to need to get off the  
17 phone soon.

18 VICE CHAIRMAN THERNSTROM: I do call the  
19 question. I do, but before I do so just want to  
20 underscore the fact that I think this is really going  
21 to be a unique experience in that it was driven by the  
22 time constraints here.

23 But I call the question.

24 CHAIRMAN REYNOLDS: Okay, at this point,  
25 Vice Chair Thernstrom, how do you vote?

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1 VICE CHAIRMAN THERNSTROM: Aye.

2 CHAIRMAN REYNOLDS: Commissioner Ashley "  
3 I'm sorry, Commissioner Taylor.

4 (No response.)

5 CHAIRMAN REYNOLDS: Commissioner Taylor.

6 (No response.)

7 CHAIRMAN REYNOLDS: Commissioner Braceras.

8 COMMISSIONER BRACERAS: Aye.

9 CHAIRMAN REYNOLDS: Commissioner Yaki.

10 COMMISSIONER YAKI: No.

11 CHAIRMAN REYNOLDS: Commissioner Kirsanow.

12 COMMISSIONER KIRSANOW: Abstain.

13 CHAIRMAN REYNOLDS: I'm sorry?

14 COMMISSIONER KIRSANOW: Abstain.

15 CHAIRMAN REYNOLDS: Okay, and I vote in  
16 favor of the change.

17 Staff Director Marcus, please have someone  
18 try to contact Mr. Taylor.

19 STAFF DIRECTOR MARCUS: We'd be pleased to  
20 do that, Mr. Chairman.

21 CHAIRMAN REYNOLDS: Okay, this is how it  
22 shakes out.

23 Commissioners Thernstrom, Braceras, and  
24 Reynolds voted in favor; Commissioner Yaki voted  
25 against; and Commissioner Kirsanow abstained.

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1 The motion passes.

2 Commissioner Thernstrom, please read the  
3 next motion.

4 **V. Motion on Publication of Adarand Report**

5 VICE CHAIRMAN THERNSTROM: The next motion  
6 is approval of federal procurement after Adarand for  
7 publication, very simple.

8 Simply reads, I move that the Commission  
9 approve --

10 CHAIRMAN REYNOLDS: Commissioner  
11 Thernstrom, we voted just now to alter the scope. Now  
12 we have to vote to approve the publication of the  
13 Adarand report.

14 VICE CHAIRMAN THERNSTROM: That is what  
15 I'm doing.

16 CHAIRMAN REYNOLDS: Oh, okay. Sorry.

17 VICE CHAIRMAN THERNSTROM: That's how it  
18 reads.

19 I'm simply reading the motion as written.

20 I move the Commission approve the proposed  
21 " we have done that already " for publication as our  
22 statutory enforcement report for FY 2005 in the form  
23 presented by the staff director.

24 CHAIRMAN REYNOLDS: Okay, I'm with you  
25 now. Sorry about that.

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1 Is there a second?

2 COMMISSIONER BRACERAS: Second.

3 CHAIRMAN REYNOLDS: Discussion?

4 Okay, Vice Chair Thernstrom, how do you

5 vote?

6 VICE CHAIRMAN THERNSTROM: Aye.

7 CHAIRMAN REYNOLDS: Commissioner Taylor?

8 (No response.)

9 CHAIRMAN REYNOLDS: Okay, Commissioner

10 Braceras?

11 COMMISSIONER BRACERAS: Aye.

12 COMMISSIONER YAKI: Wait, wait wait.

13 Point of information.

14 This is the motion to approve the report,

15 right?

16 VICE CHAIRMAN THERNSTROM: No, it's a

17 motion simply to put it up for publication, to post

18 it. And it's just badly worded, frankly.

19 CHAIRMAN REYNOLDS: It is my understanding

20 that it is a motion to approve the proposed final

21 report.

22 VICE CHAIRMAN THERNSTROM: For

23 publication.

24 CHAIRMAN REYNOLDS: Yes.

25 COMMISSIONER YAKI: No, but it's to

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1 approve the report, which therefore, I would want  
2 discussion on.

3 STAFF DIRECTOR MARCUS: Mr. Chairman, this  
4 is Staff Director Marcus.

5 It would be appropriate at this time if  
6 there were a motion to approve the report not only for  
7 publication but for all purposes, and to consider this  
8 to be an approved report.

9 CHAIRMAN REYNOLDS: Okay.

10 COMMISSIONER BRACERAS: This is  
11 Commissioner Braceras.

12 I just think there was some confusion. I  
13 believe that called for a discussion, and no one said  
14 anything. And we'd happy to have a discussion.

15 CHAIRMAN REYNOLDS: That is correct. But  
16 Commissioner Yaki expressed his desire to have some  
17 discussion.

18 So at this point, Commissioner Yaki,  
19 please start the discussion.

20 COMMISSIONER YAKI: I have a couple of  
21 points of information first on this motion.

22 Is this the " are we voting on the draft  
23 that we just received this morning with the last  
24 changes of the red line version?

25 CHAIRMAN REYNOLDS: I'm not exactly sure

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1 which version you're talking about. But yes, we are  
2 voting to approve --

3 COMMISSIONER YAKI: Not for release  
4 7/22/05 redline version, Mr. Staff Director, is that  
5 what we're voting on?

6 CHAIRMAN REYNOLDS: I suspect that there  
7 have been some amendments to that document. I know  
8 that I faxed some documents to the staff director,  
9 which were distributed to the commissioners.

10 And I don't know if other folks have made  
11 edits to that red line version.

12 COMMISSIONER YAKI: Well, I just " one of  
13 the reasons why I have an issue with the process, and  
14 I appreciate the fact that it is " at least from  
15 reports I have been receiving " light years ahead of  
16 what used to be the process.

17 But I am just coming from my own point of  
18 view, which was, as a former elected official and  
19 former congressional staffer who had to respect  
20 process and transparency as much as possible, my  
21 concern is that now I am being asked to vote, this is  
22 a matter of principle, because I definitely am not  
23 going to be voting to support this project.

24 But as a matter of principle and  
25 transparency, how can we be voting on a final version

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1 if the last version that I received on this was sent,  
2 let's see, at 10:35 a.m. your time, if there are  
3 versions or red lines subsequent to 10:35 a.m. our  
4 time, I believe that all the commissioners should be  
5 entitled to see it.

6 This also goes to the point that I raised  
7 in correspondence earlier in the week, and that is,  
8 for the public who is listening in, notwithstanding  
9 the fact that they don't have access to the report to  
10 even look at or follow along to understand what the  
11 heck we're talking about, even if they did, it would  
12 be compounded by the fact that apparently changes are  
13 made up to the very last minute, if there have been  
14 anything since past 10:35 a.m., I may be unaware of  
15 it, and other commissioners may be unaware of it.

16 And I think for a transparency issue,  
17 there is a significant issue. So I pose as a point of  
18 information, not to speak on the main motion yet, but  
19 as a point of information, is what we're voting on the  
20 10:35 or 10:19 a.m. draft, or a subsequent draft with  
21 subsequent revisions?

22 CHAIRMAN REYNOLDS: It is the red line  
23 version that was sent this morning, plus my handful of  
24 edits that were I believe faxed to all the  
25 commissioners.

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1 COMMISSIONER YAKI: I did not receive a  
2 fax.

3 VICE CHAIRMAN THERNSTROM: Mr. Chairman,  
4 I'd like to hear the staff director on this. I think  
5 that Commissioner Yaki brings up a serious issue here,  
6 I'm afraid to say.

7 STAFF DIRECTOR MARCUS: Mr. Chairman, this  
8 is Staff Director Marcus.

9 The only proposed changes that we have  
10 received from any commissioner since the red line  
11 version was distributed this morning were the proposed  
12 changes from Chairman Reynolds.

13 It is my understanding that those proposed  
14 changes were faxed to all commissioners earlier today.

15 Since I've just heard that Commissioner Yaki doesn't  
16 believe that he's received the chairman's recent  
17 proposed changes, we'll confirm to make sure that they  
18 are faxed around.

19 Just as a reminder to the commissioners,  
20 the only changes that were in the red line version  
21 this morning as compared to the version distributed a  
22 week ago consisted of comments received from the Small  
23 Business Administration as an affected agency, or  
24 comments suggested by an expert, Dr. George LaNoue,  
25 who we retained to review the proposed final draft for

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1 quality purposes.

2 The current draft has not been changed to  
3 incorporate the chairman's proposed changes that were  
4 just received and distributed earlier today.

5 COMMISSIONER YAKI: So while we figuring  
6 if those changes were sent, what should we do?

7 COMMISSIONER BRACERAS: Excuse me, this is  
8 Jennifer Braceras again.

9 I have previously informed the staff  
10 director that I would need to get off the call at 4:00  
11 o'clock, and it is now approaching 4:00 o'clock.

12 I apologize for that. I do have a family  
13 situation that I need to attend to. So in light of  
14 Commissioner Yaki's concern and my need to depart, I  
15 would just ask the chairman what he thinks is the best  
16 course of action.

17 CHAIRMAN REYNOLDS: Okay, Commissioner  
18 Yaki, if we were to discuss my changes right now,  
19 would that be sufficient?

20 COMMISSIONER YAKI: I think that would be  
21 sufficient. I still reserve the right to comment on  
22 the entire report, though, which I have not had the  
23 opportunity to do.

24 CHAIRMAN REYNOLDS: Sure.

25 Okay, if that is the case then, I will

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1 just discuss my changes.

2 COMMISSIONER BRACERAS: Excuse me, Mr.  
3 Chairman.

4 Given that Commissioner Yaki has a number  
5 of comments I think that he wants to make on the  
6 substance of the draft, it does not look like I will  
7 be able to be on the line for the vote on this report.

8 CHAIRMAN REYNOLDS: I understand.

9 COMMISSIONER BRACERAS: So I want to  
10 apologize to the other commissioners, and I want to  
11 apologize to the public, but I have a family  
12 obligation I need to attend to. I was hoping we could  
13 have voted on this report and wrapped it up before  
14 4:00 o'clock.

15 But if that's not going to be able to  
16 happen, I'm going to hang up at this time.

17 CHAIRMAN REYNOLDS: Okay.

18 COMMISSIONER BRACERAS: Before I do,  
19 though, I'd just like to say for the record that I do  
20 support the report in its latest draft.

21 As I said, I had many concerns with it at  
22 the beginning. But I think that in its current form  
23 it is a high quality work product of which we can be  
24 proud, and I look forward to seeing Commissioner  
25 Yaki's dissenting statement, because I do encourage a

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1 robust debate on this and every other issue upon which  
2 this Commission will decide.

3 CHAIRMAN REYNOLDS: Okay.

4 COMMISSIONER BRACERAS: So thanks, and  
5 have a good weekend.

6 CHAIRMAN REYNOLDS: Okay, Michael, would  
7 you like to discuss your concerns, or my edits first?

8 COMMISSIONER YAKI: Your edits first.

9 CHAIRMAN REYNOLDS: Okay, just turning to  
10 Chapter 3, Findings and Recommendations. The second  
11 paragraph, first sentence, it reads, prior to my edit  
12 it reads: Ten years ago in the landmark case of  
13 Adarand Constructors, Inc. v. Pena, the Supreme Court  
14 held that programs that use racial criteria must be  
15 subject " well, I deleted criteria and inserted  
16 classifications.

17 And the footnotes, footnote number three  
18 is, it says Adarand at page 239, I believe that's  
19 wrong, I believe it's 237 and 238.

20 COMMISSIONER YAKI: Do you carry Adarand  
21 around in your back pocket?

22 CHAIRMAN REYNOLDS: It's near and dear to  
23 me. It's always close.

24 Now going to page two of Chapter 3, the  
25 third full paragraph, last sentence, it reads: Lack

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1 of data collection rendered impossible the efforts  
2 this study made to measure the effectiveness of race  
3 neutral and race conscious programs independently.

4 In general, agencies do not seriously  
5 consider whether new race-neutral initiatives could  
6 provide adequate alternatives to current programs. I  
7 changed that to current race-conscious programs.

8 The following paragraph, the sentence that  
9 I changed reads, effective race-neutral procurement  
10 systems would include elements that ensure equal  
11 access, comma. I changed that to ensure access on a  
12 nondiscriminatory basis.

13 Page three of Chapter 3, fourth paragraph  
14 from the top, the sentence I changed reads: an  
15 integrated race-neutral approach would ensure focused  
16 reliance on race-conscious programs.

17 I changed that to, an integrated race-  
18 neutral approach would ensure less reliance on race-  
19 conscious programs. I believe that is just a typo.

20 Flipping to page four of Chapter 3, the  
21 third paragraph, it reads, DOJ and SBA should without  
22 delay facilitate agency development and implementation  
23 of prominent civil rights enforcement policy.

24 I deleted the word, prominent.

25 The next sentence reads, agencies must

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1 establish strong enforcement systems to provide a  
2 means for victims of discrimination to file and  
3 resolve complaints.

4 I changed that to, agencies must establish  
5 strong enforcement systems to provide individuals a  
6 means to file and resolve complaints of discriminatory  
7 conduct.

8 That same paragraph, last sentence, it  
9 reads: Doing so will help ensure that potential  
10 contractors and subcontractors have equal opportunity  
11 to compete for federal funds.

12 I changed it to: Doing so will help  
13 ensure that potential contractors and subcontractors  
14 have an opportunity to compete for federal funds  
15 without fear of discrimination.

16 Now I'm on page five of Chapter 3, looking  
17 at the last sentence, which reads: Agencies have not  
18 established procedures to re-assess presumptions of  
19 disadvantage and instead generally rely on Congress to  
20 decide what programs are permissible.

21 I changed it to read, Agencies have not  
22 established procedures to re-assess presumptions of  
23 disadvantage, period.

24 Finally, turning to page eight of  
25 paragraph " I'm sorry, of Chapter 3, the last sentence

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1 of the conclusion that reads: To achieve that goal  
2 federal agencies should demonstrate sincere efforts to  
3 equalize outcomes through race-neutral procedures.

4 I changed it to read, to achieve that goal  
5 federal agencies should demonstrate sincere efforts to  
6 expand minority-owned firms' access to federal  
7 contracts through race-neutral procedures.

8 Those are all of my edits.

9 COMMISSIONER YAKI: I have another point  
10 of information for the staff director.

11 Staff Director Marcus, are you there?

12 STAFF DIRECTOR MARCUS: Mr. Chairman, I am  
13 here, this is Staff Director Marcus.

14 COMMISSIONER YAKI: In the last set of  
15 documents there is reference to the fact that we have,  
16 or the Commission had retained George LaNoue as a  
17 technical expert.

18 For what reason was he retained, and how  
19 was that done?

20 STAFF DIRECTOR MARCUS: Commissioner Yaki,  
21 he was retained in order to review the proposed final  
22 document, and to provide us quality assurance to  
23 review the technical aspects of the document and let  
24 us know whether there were flaws that he saw, and  
25 provide comments to us about whether there were

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1 problems with the document.

2 COMMISSIONER YAKI: And how was he  
3 retained? Was this a no-bid at the suggestion of  
4 somebody, or how did that come about?

5 STAFF DIRECTOR MARCUS: This was at my  
6 direction, I believe the term is a micro purchase. It  
7 is well below the dollar requirement on competitive  
8 bidding. He was hired based on his reputation for  
9 experience in the area of federal procurement and on  
10 issues relating to Adarand v. Pena. Because the  
11 amount at issue was well below "I believe the amount  
12 is \$2,500 " because it was well below that amount, this  
13 process did not require competitive bidding.

14 COMMISSIONER YAKI: Mr. Chair?

15 CHAIRMAN REYNOLDS: Yes?

16 COMMISSIONER YAKI: May I speak to the  
17 main motion, then?

18 CHAIRMAN REYNOLDS: Yes.

19 COMMISSIONER YAKI: Mr. Chair, just to  
20 follow up from what the staff director said, I am  
21 disturbed that a technical expert who has written  
22 extensively on the need to abolish all use of race in  
23 public contracting was brought in to determine the  
24 sufficiency of our report.

25 And indeed, if I believe " if some of

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1 those last-minute changes that I saw in the draft were  
2 attributable to him, I would say that they seem to be  
3 in violation of the proposed altered scope that we  
4 just approved, that the majority just approved, in  
5 which it said that the project would not evaluate  
6 existing disparity studies, or whether or which aspect  
7 of the federal contracting process disparately affects  
8 minority-owned firms since in Chapter 1 a new sentence  
9 has been added that basically questions the disparity  
10 studies and the benchmark studies done by the  
11 Department of Commerce, and recommends the National  
12 Academy of Sciences to conduct one, which Mr. LaNoue  
13 has published in before.

14           That to me sets the tone and the framework  
15 for my concerns about this report. I was supportive  
16 of the original report, because I believe that the  
17 data we would receive, and certainly the " everyone  
18 brings their own experiences to this. I " when I was a  
19 member of the Board of Supervisors in San Francisco, I  
20 helped author and shepherd through our MBE/WBE  
21 contracting program through, which has survived legal  
22 challenges. We did disparity studies. We collected  
23 anecdotal evidence.

24           What I see here today in this  
25 reconstituted study is a step backwards from what we

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1 have been doing for the last half century as a  
2 commission and as a nation. And under the cloak of  
3 the term, race neutrality, this report I believe seeks  
4 the termination of all race-conscious programs and  
5 remedies from federal contracting and procurement.

6 I have a problem with that, given that in  
7 our hearing last week both Dr. Besharov and Harry  
8 Holzer said, from the left and from the right, or from  
9 the conservative and the liberal point of view, that  
10 discrimination persists in our society; that it has  
11 not gone away.

12 And I believe that the challenge of the  
13 Commission has been, and always should be, to engage  
14 in fact finding, in figuring out ways how best to  
15 combat invidious discrete intention discrimination in  
16 our country.

17 And I believe that this has been our  
18 challenge. And with this report today we failed in  
19 that challenge.

20 It is so ironic that when we mentioned  
21 today in the beginning, that in the announcements  
22 about Dr. Arthur Fletcher, who was called the father  
23 of affirmative action, who helped put together the  
24 revised Philadelphia plan, that withstood court  
25 challenge, that did goals and timetables and created

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1 racial categories; that today is the anniversary of  
2 the '64 Civil Rights Act; that at this time, we would  
3 present a report that basically tells the federal  
4 government to put a halt to race-conscious programs,  
5 and to instead engage in a race-neutral analysis that  
6 I think actually has no foundation in the cases that  
7 are cited in the report.

8 CHAIRMAN REYNOLDS: Commissioner Yaki,  
9 this is Chairman Reynolds. I have a different read of  
10 the report. I must say that my view is radically  
11 different from yours.

12 I believe that the theme that you object  
13 is the notion that the " that there is an  
14 interpretation through the document of Adarand that "  
15 the document states that Adarand stands for the  
16 proposition that you must consider race-neutral  
17 alternatives; that that is a part of the process; that  
18 is what judges must look to to determine the  
19 constitutionality of the use of racial  
20 classifications.

21 Now that is my read of not just Adarand  
22 but Paradise and a long line of other cases that  
23 discuss this notion of race neutrality " I'm sorry,  
24 race-neutral alternatives.

25 And by citing George LaNoue's work, George

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1 LaNoue's did not make many edits of the document. So  
2 his personal views on the legality or appropriateness  
3 of the use of racial classifications, that's one  
4 thing. But in this document, the few comments that he  
5 made did not address that particular issue.

6 COMMISSIONER YAKI: Well, I was about to  
7 address that.

8 CHAIRMAN REYNOLDS: Okay.

9 COMMISSIONER YAKI: And yes, I have read,  
10 and I understand " I may not have it in my back pocket,  
11 the Adarand decision, but I believe that the report,  
12 as it is drafted, seriously misconstrues what the  
13 mandate of Adarand is.

14 The report for example page " Chapter 1, I  
15 believe it's still page 17, it may have changed "  
16 states that Adarand requires the agency to consider an  
17 employee race-neutral strategy before resorting to a  
18 race-conscious one.

19 That is simply a reading of Adarand that  
20 does not exist in the text. To the contrary, when you  
21 read Adarand, you see that Justice O'Connor wrote that  
22 when race-based action is necessary to further a  
23 compelling interest, such action is within  
24 constitutional constraints if it satisfies the narrow  
25 tailoring test.

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1 I don't " I do not believe that we can  
2 simply take and lift examples, for example, let me  
3 just go to the methodology, I do not think that we can  
4 simply lift for example what the Department of  
5 Education does in applying Grutter, which is not "  
6 which is not a contract discrimination case, but has  
7 to do with law school admissions " or university  
8 admission " and apply that to the complexities of  
9 federal procurement and contracting, especially when  
10 the Department of Education in a relative scale is not  
11 a large player in the contracting arena.

12 Yet the majority report seems to indicate,  
13 seems to lift verbatim, Department of Education  
14 policies that I believe have no " that A, I think take  
15 an absurd reading of Grutter, much narrower than I  
16 think anyone could reasonably interpret it, and then  
17 from there, apply it to the instances of contracting.

18 I don't believe " I think that is flawed  
19 from the beginning, and because of that flaw, I think  
20 that this report is fatally flawed.

21 I mean they talk about the six practices,  
22 as if that's a talisman for determining whether  
23 federal agencies meet or engage on the serious  
24 consideration test. And you know, when I objected to  
25 the removal of the two chapters that had data in it, I

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1 did not see much data put back in to it from other  
2 sources, much less whether or not anything that DOED  
3 has done has resulted in any actual data collection  
4 that would show that those six practices have any  
5 application in the real world, much less application  
6 to multi-year, multi-employer, multi-contract  
7 procurements that DOT or DOD do.

8 It's one thing to talk about university  
9 admissions on a yearly scale done by individual  
10 universities, than it is to say, we're going to  
11 analyze what procurement was on the big dig, multi-  
12 year, multi-year funding, several levels of contractor  
13 levels.

14 I just don't think it's as easy as the  
15 majority would have it say.

16 And when it comes right down to it, I  
17 think that the fact that we have omitted substantial  
18 amounts of data from this report, data that suggests  
19 that African-American businesses, for example, lag  
20 substantially well behind all others in terms of  
21 revenue, in terms of growth, in terms of  
22 survivability, those are issues that I think the  
23 Commission needs to address.

24 But by eliminating that data, it's as if  
25 it's never there. Instead, we're talking about

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1 application of criteria that is theoretical only, and  
2 criticizing the Clinton post-Adarand reforms, which  
3 the majority says, well, the agencies haven't followed  
4 them.

5 Well, that may be true. It may be true.  
6 But is a necessary example then to say, let's junk it  
7 and start all over? Or, let's figure out how better  
8 to ensure that agencies are following the DOJ post-  
9 Adarand instructions of 1996?

10 VICE CHAIRMAN THERNSTROM: Can I jump in  
11 here?

12 COMMISSIONER YAKI: I just want " these  
13 are just " this is just --

14 VICE CHAIRMAN THERNSTROM: I didn't  
15 realize you weren't finished; I'm sorry.

16 COMMISSIONER YAKI: This is just touching  
17 the surface of what I think are serious substantive  
18 flaws in how this report is produced; the methodology  
19 upon which it relies; the legal theories upon which it  
20 stands; and why I cannot in any way, shape or form  
21 subscribe to it.

22 I appreciate that we are going to differ  
23 on this, and I'm not saying that I am right and you  
24 are wrong, or you are right and I am wrong. What I am  
25 saying though is, I think from my own point of view,

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1 there are serious methodological and legal " legal  
2 underpinnings of this that are fundamentally flawed  
3 and I think lead to the wrong conclusions.

4 And finally, I fail to see how this is a  
5 civil rights enforcement report. We are talking about  
6 " to me an enforcement report, and maybe this is just  
7 my point of view " is one that says, how can we do  
8 better to ensure " to ensure the promotion of economic  
9 opportunity to end racial discrimination, what have  
10 you.

11 And while that may be the intent of the  
12 report, as written, I think the practical application  
13 of the report, especially in its recommendation of an  
14 acting nondiscrimination legislation for contracting  
15 would have the absolute contrary result. Because all  
16 that will do is create a private right of action for  
17 people who feel that there should be no race-conscious  
18 programs in SBA, in DOG, in DOD. They should have a  
19 prior right of action to kill it.

20 I do not think " I would not think that's  
21 what the majority intended. But that to me is the  
22 natural result of nondiscrimination legislation  
23 specifically on federal procurement.

24 CHAIRMAN REYNOLDS: Commissioner Yaki,  
25 this is Commissioner Reynolds.

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1           You've made some points there that I think  
2           are good, and I look forward to reading your dissent.

3           But I guess I just want to go back to the  
4           constitutional question.

5           Is it your position that the Constitution  
6           does not require federal agencies to use race-neutral  
7           approaches when they are available and just as  
8           effective as race-conscious approaches?

9           COMMISSIONER YAKI: I think that what the  
10          Constitution says, as interpreted by the Supreme  
11          Court, is that the government agencies must give  
12          serious consideration to the use of workable race-  
13          neutral alternatives. However, it does not require  
14          exhaustion of every alternative that could be there,  
15          and it does not certainly not accommodate for what has  
16          been certainly Supreme Court at least dicta in three  
17          or four different cases, which is the relevant  
18          differences between individual programs.

19          I just don't see this " I don't see a  
20          cookie cutter working on this.

21          CHAIRMAN REYNOLDS: Well --

22          COMMISSIONER YAKI: What we've created is  
23          a cookie cutter --

24          CHAIRMAN REYNOLDS: Do you believe that  
25          the report requires an exhaustion of race neutral

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1 remedies before race conscious remedies could be used?

2 COMMISSIONER YAKI: I think that the word,  
3 exhaustion, may not be used. But I would certainly  
4 say that the six practices that are enunciated, put  
5 together a process that is unwieldy, cumbersome, and  
6 in the end destructive to the ability of many of these  
7 agencies, particularly the SBA, to continue its  
8 mission and fulfill its statutory mandate.

9 And it may be that this report is very  
10 careful not to say, we have to exhaust everything,  
11 because they know that it can't stand under the  
12 Adarand or the Grutter test. And by the way, I still  
13 wonder how you're going to apply education standards  
14 to contracting.

15 But nevertheless, the standards put forth,  
16 the kind of burdens that agencies must assume, the  
17 mere fact that it said rather blithely that you could  
18 do it by annual review of your programs because the  
19 Department of Education says you can, well, that might  
20 be okay for Harvard University. I doubt it's okay or  
21 workable for DOD or DOT.

22 And yet it's said as if it's easy to do.  
23 So I think that is there any complete erroneous  
24 reading? Well, I do think that there is some  
25 erroneous reading of Adarand and Grutter in this.

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1           But I also believe that the procedures,  
2 the recommendations that have been put forth create  
3 such a burden for federal agencies who are working,  
4 one, with statutory mandates like Congress to fulfill;  
5 two, have been working with " who have experience in  
6 their own measure. And may I " and I might add that  
7 the report continually rips the Department of  
8 Transportation as being " well, they tried, but they  
9 are only partially successful. Yet DOT has survived,  
10 at least so far, a challenge all the way up to the  
11 Supreme Court once, and many of the other DBE programs  
12 have survived facial challenges in other circuits as  
13 well.

14           So to say that they're somehow doing it  
15 wrong when the Supreme Court didn't see a reason to  
16 call it up and knock it out is just going a step too  
17 far.

18           CHAIRMAN REYNOLDS: Now, did the court  
19 take up the case, or did it just deny cert?

20           COMMISSIONER YAKI: Denied cert, but it  
21 let stand a lower court ruling. And other circuits  
22 have let " have allowed " have disallowed facial  
23 challenges on DBE programs post- Adarand.

24           So maybe John Roberts might change all  
25 that. But the fact is that I think that this report

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1 takes Adarand and Grutter, and takes part of them, and  
2 then puts the threshold bar so high that it's  
3 inconceivable that federal agencies are going to be  
4 able to meet it without a massive reallocation of  
5 resources that should go toward ensuring that they're  
6 doing what they can to promote equal opportunity and  
7 economic opportunity in procurement and contracting.

8 CHAIRMAN REYNOLDS: Commissioner  
9 Thernstrom, you were about to say something?

10 VICE CHAIRMAN THERNSTROM: Yeah. All of  
11 this, much of what Commissioner Yaki has to say can't  
12 be dismissed; let's put it that way.

13 The whole problem here, we're back to the  
14 problem of this report being the time constraint that  
15 we were under. And I don't think, or I hope not " I  
16 hope " that with respect to the Adarand decision  
17 specifically that no one would disagree that all that  
18 decision said was that federal racial classifications  
19 have to serve a compelling government interest and be  
20 narrowly tailored.

21 Okay, it was remanded to determine whether  
22 that test had been met. Adarand itself, as I remember  
23 it, did not go beyond that.

24 So as Commissioner Yaki suggests, we are  
25 cobbling together here Crozen and other decisions.

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1 I would like a really good report. I do  
2 not know how, on a really careful report, I don't know  
3 how to do that.

4 CHAIRMAN REYNOLDS: This is Chairman  
5 Reynolds. We don't have time to produce the type of  
6 report that I would like.

7 VICE CHAIRMAN THERNSTROM: Yeah, well,  
8 that's what I was about to say.

9 CHAIRMAN REYNOLDS: Yes, and Commissioner  
10 Yaki raises some good points. I think that his points  
11 on what Adarand means, I think that he made some  
12 legitimate points. Whether it's appropriate now,  
13 after Adarand, to look at Crozen and Paradise and  
14 other cases, interpreting what strict scrutiny means,  
15 whether that is appropriate or not.

16 I would like to have a fully fleshed out  
17 conversation about that issue and many others. But I  
18 don't have time.

19 VICE CHAIRMAN THERNSTROM: Let me make a  
20 suggestion here if I may, which is, that we at least  
21 hold a briefing on this whole issue such that we can  
22 further explore with more care and nuance the  
23 complexities that Commissioner Yaki rightfully pointed  
24 to.

25 CHAIRMAN REYNOLDS: Well, I agree, I think

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1 that that would be a great idea.

2 That doesn't relieve us of what we have to  
3 do here today, which is to vote up or down.

4 Are there any other comments from other  
5 commissioners?

6 (No response.)

7 CHAIRMAN REYNOLDS: Okay. I take that as  
8 a no.

9 So at this point then I would like to call  
10 a vote.

11 Commissioner Thernstrom?

12 VICE CHAIRMAN THERNSTROM: Well, I will  
13 vote aye on it because of the time constraints. But I  
14 very much appreciate what Commissioner Yaki has said.

15 CHAIRMAN REYNOLDS: Commissioner Taylor.

16 COMMISSIONER TAYLOR: This is Commissioner  
17 Taylor. I am going to vote aye and the debate that " I  
18 apologize for the background noise.

19 CHAIRMAN REYNOLDS: Are you ordering  
20 lunch?

21 COMMISSIONER TAYLOR: No, I'm traveling  
22 with my family, so I apologize. But I wanted to make  
23 one brief comment. Because I do think it's important  
24 that we discuss the issues raised by Commissioner  
25 Yaki.

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1           But I will tell you, I feel very  
2 comfortable, given our time constraints. If we are  
3 viewed as setting the bar very high relative to (audio  
4 cuts out 4:20:10) federal agencies seriously  
5 considering race-neutral targets in 2005, I feel very  
6 comfortable with that position.

7           And I think it is too easy for a  
8 governmental agency " too difficult. It requires us to  
9 re-shift our resources to accomplish that task.

10           It would be much easier if we could simply  
11 establish racial categories.

12           So I have no problem particularly given  
13 our time constraints with standing behind this report  
14 in its current form for that reason.

15           CHAIRMAN REYNOLDS: Okay.

16           Commissioner Yaki, shall I mark you down  
17 for a no?

18           COMMISSIONER YAKI: No.

19           CHAIRMAN REYNOLDS: Commissioner Kirsanow?

20           COMMISSIONER KIRSANOW: Yes, Mr.  
21 Chairman. I would like to echo what Commissioner  
22 Taylor had to say. But toward a very narrow point, I  
23 do think that when it comes to race-neutral  
24 alternatives, there is a little bit of gamesmanship,  
25 it strikes me.

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1                   And I'm not sure that those alternatives  
2                   are adequately explored.

3                   Having said that, for reasons other than  
4                   the commentary I just made, I'm going to abstain.

5                   CHAIRMAN REYNOLDS:   Okay, and I vote in  
6                   favor of it.

7                   So what we have is we have three votes  
8                   from Commissioner Thernstrom, Taylor and the Chairman  
9                   in favor.

10                  One abstention, and one no vote.

11                  So the motion carries.

12                  At this point Vice Chair Thernstrom, would  
13                  you please read the next motion.

14                  VICE CHAIRMAN THERNSTROM:   The next motion  
15                  involves approving the funding of federal civil rights  
16                  enforcement report.

17                  And I move that the Commission approve the  
18                  proposed final report [*Funding Federal Civil Rights*  
19                  *Enforcement:   The President's 2006 Request,*] for  
20                  publication in the form presented by the staff  
21                  director.

22                  COMMISSIONER YAKI:       Commissioner Yaki,  
23                  second.

24                  CHAIRMAN REYNOLDS:   Okay, discussion.

25                  COMMISSIONER YAKI:       Commissioner Yaki

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1 here.

2 I would just like to say, to follow up on  
3 comments that I made at the last meeting, I think this  
4 is a very valuable report. It is one of the few means  
5 of collating data from all the federal agencies with  
6 regard to their civil rights enforcement budgets and  
7 activities that can be made available to the public  
8 for review.

9 I would hope that we would consider doing  
10 this, as it has been a practice every year, and urge  
11 its passage.

12 VICE CHAIRMAN THERNSTROM: I have a point  
13 of order here.

14 I have made the motion because you have  
15 asked me to make this series of motions. In fact I'm  
16 going to abstain on this, and I wonder if I was the  
17 appropriate person to make the motion given the fact  
18 that I'm going to abstain.

19 CHAIRMAN REYNOLDS: I don't see a problem.  
20 Staff Director Marcus, does that pose a  
21 problem?

22 STAFF DIRECTOR MARCUS: Mr. Chairman, I  
23 see no problems in the rules. I might defer to our  
24 parliamentarian, Emma Monroig, to advise as to whether  
25 there is any parliamentary problem would arise in the

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1 event that the commissioner who advances a motion then  
2 abstains on the vote.

3 I don't know if the court reporter was  
4 able to hear that?

5 MS. MORNING: As far s I can tell, there  
6 is no problem.

7 CHAIRMAN REYNOLDS: Okay, any other  
8 comments?

9 COMMISSIONER KIRSANOW: Mr. Chair, I just  
10 want to say, I think I made this comment last time  
11 around, a comment that I believe was consistent that  
12 something that Commissioner Yaki " I just want to  
13 commend the staff on this particular report.

14 One of the things that we always I think  
15 must keep in mind is, we've got a number of  
16 commissioners, we have a number of different points of  
17 view on this particular commission.

18 The topics we address, the topics we  
19 attempt to tackle, are sometimes enormous, very  
20 important topics, topics that are likely to cause a  
21 great amount of friction and disagreement.

22 And we leave it to staff to try to come up  
23 with the data, collate the information that goes into  
24 these reports. And it's a daunting task.

25 And I think that while no report can be

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1 perfect obviously, the staff goes to great lengths to  
2 try to come up with a report that will serve the  
3 nation.

4 And I think that this report, while not  
5 perfect, is a remarkable improvement over the caliber  
6 of reports of the same ilk that I've seen in the past.

7 And I just want to commend staff for their  
8 vigorous efforts, their attention to detail, in  
9 putting together this report.

10 CHAIRMAN REYNOLDS: Hear, hear.

11 Okay, Commissioner Kirsanow, is that a  
12 yea?

13 COMMISSIONER KIRSANOW: Yes.

14 CHAIRMAN REYNOLDS: Okay.

15 All right, Commissioner Taylor?

16 (No response)

17 CHAIRMAN REYNOLDS: Commissioner Taylor?

18 COMMISSIONER TAYLOR: That's an aye.

19 CHAIRMAN REYNOLDS: Okay.

20 CHAIRMAN REYNOLDS: Commissioner Yaki.

21 COMMISSIONER YAKI: Aye.

22 CHAIRMAN REYNOLDS: Okay, and initially I  
23 was going to abstain from voting on this. I too agree  
24 that the staff has done a very good under the  
25 circumstances. But the type of document I'm looking

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1 for is not merely a collection of data points.

2 I think that ultimately once we have the  
3 appropriate benchmarks, we should judge I believe any  
4 administration and Congresses in terms of the amount  
5 of money that is provided to federal civil rights  
6 enforcement.

7 I do believe that it is possible to starve  
8 the federal civil rights agency to death. So I'm  
9 going to vote for it, but I do have some reservations  
10 about the approach used. I think that once we get our  
11 benchmarks, and get a working framework for talking  
12 about what's a sufficient amount of money, what's an  
13 effective use of federal funds, at that point I would  
14 want to change the direction of the report.

15 But after saying that, though, I vote in  
16 favor of it.

17 So there is one abstention, and four votes  
18 in favor of the report: Commissioners Taylor, Yaki,  
19 Kirsanow, and the Chairman voted in favor.

20 The motion carries.

21 Okay, could someone tell me, where are we  
22 now?

23 **VI. Motion on FY 2007 Budget Request to OMB**

24 VICE CHAIRMAN THERNSTROM: We're at the  
25 motion to approve the FY 2007 budget request of OMB.

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1 COMMISSIONER YAKI: No, no, according to  
2 the motion, we're back to the staff director's report.

3 We just moved those two items up out of  
4 order on the agenda.

5 VICE CHAIRMAN THERNSTROM: I'm sorry, you  
6 are perfectly right.

7 **VII. Staff Director's Report**

8 CHAIRMAN REYNOLDS: Okay, Staff Director  
9 Marcus.

10 STAFF DIRECTOR MARCUS: Mr. Chairman,  
11 Madam Vice Chairman, Commissioners, thank you.

12 If it please the Commission I would like  
13 to revise my written staff director's report with  
14 brief additional remarks regarding the financial  
15 condition of the agency; auditor provider issues;  
16 accounting services provider issues; human capital  
17 management; and commissioner review of SAC reports.

18 First, with respect to the financial  
19 condition, let me say this. As the Commissioners are  
20 aware, we have inherited an exceptionally difficult  
21 budgetary situation for this fiscal year. In prior  
22 meetings I have described the challenges that we face  
23 as an agency and you have voted to adopt various  
24 financial corrections.

25 During our May meeting I reported that our

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1 budgetary condition had approved due to staff  
2 attrition, commissioner vacancies, significant cost-  
3 cutting measures, the decision by commissioners to not  
4 to fill vacancies for commissioners' special  
5 assistants, and the decision by certain staff members  
6 to take leave without pay in order to strengthen the  
7 condition for the agency.

8 At that time, the Commission voted to  
9 defer reductions in force and the furlough that had  
10 been projected for this fiscal year.

11 Since that time, the agency has  
12 experienced significant additional attrition, and has  
13 also benefited for continued cost cutting measures and  
14 leave without pay.

15 Needless to say, the loss of staff has  
16 challenged our ability to maintain production levels,  
17 but it has also significantly ameliorated our  
18 financial status.

19 We have now reached the point where I can  
20 say the following: if the commissioners should forego  
21 from hiring new special assistants for just one  
22 additional year until the start of fiscal year 2007,  
23 we should be able to avoid reductions in force or a  
24 furlough during this fiscal year. And provided that  
25 we receive approximately the appropriation recently

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1 approved by the U.S. House of Representatives, we  
2 should be able to defer closure of the Denver and  
3 Kansas City offices through fiscal year 2006 pending  
4 our appropriation for fiscal year 2007, and we would  
5 still be able to fill a few key vacancies over the  
6 coming months.

7 This subject is appropriate for a vote of  
8 the Commission, and a pertinent item appears on the  
9 agenda under management and operations.

10 Second, I'd like to say a few words about  
11 auditor-provider issues.

12 As the Commissioners may recall, the  
13 accounting firm of Parker-Whitfield is conducting a  
14 limited scope audit of the Commission for fiscal year  
15 2004.

16 Parker began the audit during the end of  
17 fiscal year 2004 approximately ten months ago and has  
18 yet to complete the partial audit.

19 The audit was initially schedule for  
20 completion by November 15, 2004. The completion of  
21 this audit, however, will not fulfill the Commission's  
22 statutory obligation under the accountability and tax  
23 dollars act requiring full scope audits annually  
24 beginning with fiscal year 2004.

25 During the March 2005 commission meeting

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1 the commissioners asked the staff director to hire  
2 auditors to conduct a full scope audit for fiscal year  
3 2004 if financially feasible.

4 After certain auditing firms were  
5 contacted, it became a concern whether the commission  
6 was currently auditable, and that the commission might  
7 want to hire an auditing consultant during fiscal year  
8 2005 to help the commission receive a clean audit for  
9 fiscal year 2006.

10 Recently, the commission placed a  
11 statement of work on [www.Fedbizopps.gov](http://www.Fedbizopps.gov). In an attempt  
12 to retain auditing services. The statement of work  
13 includes requests for bids for full scope audits for  
14 fiscal year 2004 as well as fiscal year 2005.

15 In addition, the statement of work  
16 includes a request for bids for consulting services to  
17 begin this fiscal year to help prepare the commission  
18 to receive a clean audit for fiscal year 2006.

19 A portion of the money to pay for these  
20 services will consist of fiscal year 2005 funds, while  
21 a majority of the money will consist of fiscal year  
22 2006 funds.

23 Third, I'd like to say a word about  
24 accounting services provider issues.

25 Booth Management currently provides the

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1 commission with accounting services. Booth was hired  
2 during fiscal year 2004 after the Bureau of the Public  
3 Debt, the commission's previous accounting services  
4 provider, dropped our account after expressing  
5 concerns about the lack of internal financial controls  
6 then present at the commission.

7 As a result of our subsequent experiences  
8 with a small private accounting services provider, the  
9 commission has sought a more experienced federal  
10 agency based accounting services provider beginning  
11 for fiscal year 2006.

12 The Bureau of the Public Debt, the  
13 National Finance Center, and the Veterans  
14 Administration, all indicated that they would be  
15 unable to provide accounting services to the  
16 commission beginning at that point in time, or prior  
17 to fiscal year 2007.

18 However, the General Services  
19 Administration has provided a proposal which would  
20 comply with our substantive accounting needs and  
21 timing requirements. On July 15 the commission  
22 executed a letter of intent with GSA, initiating GSA's  
23 preconversion and implementation activities. And we  
24 are now having discussions with GSA about that.

25 Fourth, I'd like to say just a few words

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1 about human capital management. In its 1999 oversight  
2 review of the commission's human capital management,  
3 the Office of Personnel Management identified a number  
4 of recommended human capital improvement actions.

5 Of these the GAO selected six that it  
6 viewed as broader systemic human capital  
7 recommendations.

8 Of these recommendations, one has been  
9 fully implemented concerning timely performance  
10 appraisals. And efforts are underway to fully  
11 implement three others.

12 Following a recent internal review, under  
13 the leadership of an OPM manager who is now detailed  
14 to this agency, and in ensuing discussions with OPM,  
15 we have concluded, and OPM has concurred, that no  
16 additional action is required for the two additional  
17 recommendations which relate to the delegation of  
18 human resources management authority to commission  
19 managers, and the establishment of an annual survey to  
20 provide for the collection of employee feedback.

21 As part of its regular oversight cycle,  
22 OPM is again scheduled to review the commission's  
23 human capital management during the fourth quarter.  
24 We anticipate that our efforts to date to address  
25 previous OPM and GAO recommendations, coupled with

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1 other human capital reform initiatives we have  
2 undertaken, will position us well for the upcoming OPM  
3 review.

4 I think that this is an example of the  
5 substantial work that is currently going forward in  
6 order to implement GAO and OPM recommendations.

7 Fifth, I'd like to say a few words about  
8 commissioner review of State Advisory Committee, or  
9 SAC, reports, to amplify on responses that were made  
10 to commissioner questions during the last meeting.

11 There has been some confusion as to what  
12 the commissioners are allowed to consider when voting  
13 on whether or not to accept the SAC report for  
14 publication and requests were made to staff for  
15 clarification.

16 On March 4, 1994, the commission voted, 7  
17 in favor, 0 opposed, 1 abstaining, to implement a  
18 recommendation of the SAC process task force, chaired  
19 by Commissioner Redenbaugh, to have commissioners vote  
20 to accept SAC reports for publication without  
21 considering whether or not they agree or disagree with  
22 the content.

23 To vote to accept the report only reflects  
24 that the process was followed correctly.

25 The process was also established by the

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1 SAC process task force.

2 The commissioners at that meeting, in  
3 1994, explicitly indicated that they could, if they  
4 decided, they could take a separate vote on whether  
5 they agreed with the conclusions or recommendations  
6 after they voted to accept the report for publication.

7 However, even if a majority of the  
8 commissioners voted to disagree with the conclusions  
9 or recommendations, this vote would not stop  
10 publication of the report.

11 This is an issue, I know, that  
12 commissioners have expressed some concern about. I'm  
13 also aware that there is a pending motion with respect  
14 to the establishment of a working group on State  
15 Advisory Committees.

16 If there are concerns about the  
17 appropriateness of this policy, they could be  
18 appropriate for discussion by a SAC working group,  
19 should one be established pursuant to the motion which  
20 was circulated today.

21 I would be pleased to respond to any  
22 questions that any of the commissioners should have.

23 CHAIRMAN REYNOLDS: This is Chairman  
24 Reynolds.

25 Can " we've managed to stave off risks,

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1 office closures, and other painful acts.

2 But the manner in which we've done this  
3 though is primarily through shrinking the agency. And  
4 that has been the vehicle we've used over the last  
5 decade or more to deal with this structural deficit  
6 that we have at the commission.

7 Now on the one hand I think that it's  
8 great, that between a decision by certain  
9 commissioners to refrain from hiring special  
10 assistants, and also the savings that resulted from  
11 attrition, I think that's a good thing in part.

12 But long term, though, long term it seems  
13 to me that we're in the same situation that we were in  
14 last year; we still have that structural deficit.  
15 We've bought some time. We bought a year basically by  
16 refraining from hiring special assistants, and through  
17 the savings that resulted from attrition.

18 But would you care to comment on my view  
19 that our fate really depends on either a significant  
20 reduction in our expenses, and most of our expenses  
21 are fixed costs so that's highly unlikely, or an  
22 increase in our appropriations.

23 STAFF DIRECTOR MARCUS: Mr. Chairman, this  
24 is Staff Director Marcus again. I don't see how one  
25 could disagree with that point, given the fact that

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1 our appropriations have been essentially flat while  
2 costs have been increasing.

3 This has meant that the only way we've  
4 been able to meet our budget has been through  
5 shrinkage together with cost cutting. And the fact is  
6 that we have cut costs to the point where the only  
7 significant savings that we can achieve are through  
8 attrition.

9 Now there has been sufficient voluntary  
10 attrition recently to enable us to continue throughout  
11 the next year without involuntary layoffs, provided  
12 that we get approximately the same \$9 million a year.

13 However, each time we have additional  
14 attrition we have a loss in the ability to produce the  
15 important products that we do. So at some point we  
16 will need either to receive further appropriations, or  
17 else we will see that our level of staffing will  
18 shrink to the point where it is extremely difficult to  
19 achieve our mission.

20 CHAIRMAN REYNOLDS: Any other comments?

21 Okay. Well, in that case, thank you Staff  
22 Director Marcus.

23 At this point we're going to move on to  
24 management and operations.

25 Vice Chair Thernstrom, do you have a

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1 motion for me?

2 **VIII. Motion to Approve the OMBFY 2007 Budget**

3 VICE CHAIRMAN THERNSTROM: I do, and this  
4 is a motion I started to read before. This is a vote  
5 to approve the FY 2007 budget request to OMB.

6 I move that the commission approve this  
7 submission to the Office of Management and Budget,  
8 OMB, for fiscal year 2007, budget request, consistent  
9 with the budget presented to commissioners in advance  
10 of this meeting in the amount of approximately \$12  
11 million.

12 CHAIRMAN REYNOLDS: Is there a second?

13 COMMISSIONER KIRSANOW: Kirsanow seconds.

14 CHAIRMAN REYNOLDS: Discussion?

15 (No response.)

16 CHAIRMAN REYNOLDS: Okay, well, let's  
17 vote.

18 Vice Chair Thernstrom, how do you vote?

19 VICE CHAIRMAN THERNSTROM: Aye.

20 CHAIRMAN REYNOLDS: Commissioner Taylor?

21 COMMISSIONER TAYLOR: Aye.

22 CHAIRMAN REYNOLDS: Commissioner Yaki?

23 COMMISSIONER YAKI: Aye.

24 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

25 COMMISSIONER KIRSANOW: Yes.

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1 CHAIRMAN REYNOLDS: Okay. And I vote in  
2 favor of it also.

3 So this is how the vote breaks down.  
4 There were no votes against the motion. Commissioners  
5 Thernstrom, Taylor, Yaki, Kirsanow and the Chairman  
6 voted in favor.

7 The motion passes.

8 What's next, Abby? Which motion?

9 VICE CHAIRMAN THERNSTROM: Next is " sorry  
10 about this --

11 COMMISSIONER KIRSANOW: While Abby's  
12 looking, Mr. Chairman, I apologize, I am going to have  
13 to leave to catch a flight. If it's all possible I  
14 can rejoin at some point, I'll try to make  
15 arrangements with my assistant to do so, although I  
16 think that's highly unlikely.

17 CHAIRMAN REYNOLDS: Commissioner Kirsanow,  
18 are you carrying a cell phone?

19 COMMISSIONER KIRSANOW: Yes, I am, and  
20 that's how I'm going to try and re-up with you guys.  
21 The problem is that I noted at certain places where  
22 I'm currently at I'm having difficulty receiving a  
23 signal.

24 CHAIRMAN REYNOLDS: Got you.

25 COMMISSIONER KIRSANOW: So I'll try to re-

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1 up if possible, but I don't think it's likely.

2 CHAIRMAN REYNOLDS: Okay, thank you.

3 COMMISSIONER KIRSANOW: Okay.

4 VICE CHAIRMAN THERNSTROM: Mr. Chairman,  
5 there seems to be a motion in my binder, a motion for  
6 7/22/05 commission meeting with regard to SAC  
7 membership criteria.

8 And I believe that is next; is that  
9 correct?

10 CHAIRMAN REYNOLDS: I think we have a  
11 problem.

12 Staff Director Marcus?

13 STAFF DIRECTOR MARCUS: Mr. Chairman, this  
14 is Staff Director Marcus.

15 CHAIRMAN REYNOLDS: How many do we need  
16 for a quorum?

17 STAFF DIRECTOR MARCUS: Mr. Chairman, do  
18 you hear me? This is Staff Director Marcus?

19 CHAIRMAN REYNOLDS: Yes. How many  
20 commissioners are required for a quorum?

21 STAFF DIRECTOR MARCUS: Five are required  
22 for a quorum, and I believe we have four currently on,  
23 if Commissioner Kirsanow has left, I think we only  
24 have four.

25 CHAIRMAN REYNOLDS: Okay.

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1                   STAFF DIRECTOR MARCUS: Under our rules,  
2 it is my understanding, and parliamentarian Monroig  
3 could commend that we have the ability to vote on  
4 matters relating to adjournment or postponement or  
5 rescheduling.

6                   But I do not believe that there is any  
7 other subject to which we may conduct a formal vote.  
8 There may be discussion, but I don't believe a formal  
9 vote.

10                   CHAIRMAN REYNOLDS: Okay, that's my  
11 understanding.

12                   At this point, let's stay on the phone  
13 awhile, and Staff Director Marcus, please try to  
14 contact Commissioner Kirsanow on his cell phone. And  
15 in the event we are unable to reach him, we will have  
16 to adjourn.

17                   STAFF DIRECTOR MARCUS: We are in the  
18 process of doing that, Mr. Chairman.

19                   I would say that there are two items under  
20 management and operations that we haven't yet gone to.

21                   If Commissioner Kirsanow can be contacted, they would  
22 be appropriate for a vote. If he cannot be contacted,  
23 I think it would be appropriate at least to get a  
24 sense of the commissioners.

25                   They refer to first, the question as to

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1 whether commissioners would be willing to forbear  
2 from hiring special assistants through the end of  
3 fiscal year 2006; and second, whether it is the intent  
4 of the commission, given the new changes in the  
5 financial condition given attrition, to forbear from  
6 closing either the Denver or Kansas City office  
7 through the end of fiscal year 2006 pending  
8 appropriations for 2007.

9 CHAIRMAN REYNOLDS: Well, it will be a  
10 short conversation, at least according to my count.  
11 I've spoken with several commissioners on both of  
12 these issues, and there seems to be a consensus that  
13 we would vote in favor of these motions provided we  
14 have a quorum.

15 But does " are there any comments or  
16 questions or concerns that need to be discussed?

17 (No response.)

18 CHAIRMAN REYNOLDS: Okay.

19 (Tape changed.)

20 COMMISSIONER YAKI: Move to adjourn?

21 CHAIRMAN REYNOLDS: Well, why don't we  
22 just wait say three minutes to see if we can locate  
23 Commissioner Kirsanow, then if now, yes, we would move  
24 to adjourn.

25 Hard to do a quorum call via

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1 teleconference. Can't exactly send the sergeant at  
2 arms to track them down.

3 The sergeant at arms, he quit last year.  
4 And because of our shrinking agency, because of budget  
5 constraints, we weren't able to back that position.

6 COMMISSIONER YAKI: We have a corporal  
7 grade now, is that what you're talking about?

8 CHAIRMAN REYNOLDS: Oh, no, he's gone too.

9  
10 VICE CHAIRMAN THERNSTROM: I would just  
11 comment here. I think that we should do everything we  
12 can in the future to avoid meetings by conference  
13 call.

14 CHAIRMAN REYNOLDS: I agree.

15 All right, may I have a motion to adjourn  
16 with the understanding that we will reconvene this  
17 meeting at a date to be determined in August.

18 VICE CHAIRMAN THERNSTROM: So move.

19 CHAIRMAN REYNOLDS: Second?

20 COMMISSIONER YAKI: Second.

21 CHAIRMAN REYNOLDS: All right.

22 All in favor?

23 (Several ayes.)

24 CHAIRMAN REYNOLDS: Okay, that was two.

25 Am I missing someone? Commissioner Taylor?

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1 COMMISSIONER TAYLOR: Oh, I said aye.

2 CHAIRMAN REYNOLDS: Okay, well, it's  
3 unanimous.

4 This meeting will adjourn until we select  
5 a date in August, at which point we will cover the  
6 remaining items on the agenda.

7 COMMISSIONER YAKI: I have a point of  
8 information for the staff director.

9 STAFF DIRECTOR MARCUS: Yes, Commissioner  
10 Yaki, this is Staff Director Marcus.

11 COMMISSIONER YAKI: When does the Adarand  
12 Report become public, so the public can review it?

13 STAFF DIRECTOR MARCUS: Well, we will need  
14 to receive any dissenting or concurring comments or  
15 statements, and the deadline for that is the 29th.  
16 You are the only commissioner has so far indicated to  
17 me an intent to provide a statement of that sort.

18 After that, we have a copy editor who is  
19 doing one last review immediately after the 29th, and  
20 I expect that we could be able to make the document  
21 public in " during the month of August.

22 It will not of course be formally  
23 published until the month of September, at which point  
24 it will be formally delivered to the Congress and the  
25 President.

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1 I believe the formal delivery will  
2 probably be toward the end of the month of September.

3 COMMISSIONER YAKI: But the ability of the  
4 public to have access to the document before delivery,  
5 do you see that happening?

6 STAFF DIRECTOR MARCUS: I see that as  
7 something that we can do during the month of August.

8 COMMISSIONER YAKI: That's all I wanted to  
9 know.

10 VICE CHAIRMAN THERNSTROM: I would just  
11 like to make one closing remark that is directed to  
12 the staff. In abstaining on the federal funding  
13 report, I do not in any way mean to suggest that the  
14 staff did not do good work.

15 I've got some basic problems with the  
16 formulation of the entire question focusing on funding  
17 levels. But the staff did do a very good job given  
18 how the question was posed.

19 CHAIRMAN REYNOLDS: Well, in a similar  
20 vein, I think that the staff has done an excellent job  
21 when you take into account the conditions under which  
22 they have to work.

23 There are a new cast of characters at the  
24 commission. We're still trying to learn how to work  
25 with each other, and also, we came in midstream. So

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1 for example, the statutory report, we've had to rush  
2 the job, but I think that staff has done a good job of  
3 pulling this thing together under these circumstances.

4 So on that note, we will adjourn. Thank  
5 you, everyone, for joining us.

6 (Whereupon at 4:50 p.m. the aforementioned  
7 meeting recessed.)

8

9

10

11

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