

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING
TELECONFERENCE

UNEDITED

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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, Chairperson,
presiding,

PRESENT:

- GERALD A REYNOLDS, Chairperson
- ABIGAIL THERNSTROM, Vice Chairperson
- JENNIFER C. BRACERAS, Commissioner
- PETER N. KIRSANOW, Commissioner
- ASHLEY L. TAYLOR, JR., Commissioner
- MICHAEL YAKI, Commissioner
- KENNETH L. MARCUS, Staff Director

ORIGINAL

STAFF PRESENT:

TERESA BROOKS

MARGARET BUTLER

CHRISTOPHER BYRNES

TERRI DICKERSON, Assistant Staff Director

PAMELA A DUNSTON, Chief, Administrative Services and
Clearinghouse Division

SETH JAFFE

SOCK-FOON MACDOUGALL

EMMA MONROIG, Solicitor/Parliamentarian

ANNA MARIA ORTIZ

AUDREY WRIGHT

MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS

LISA NEUDER

KIMBERLY SCHULD

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A-G-E-N-D-A

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Adjourn

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

1
2 CHAIRPERSON 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 CHAIRPERSON THERNSTROM: I'm here.

12 CHAIRPERSON REYNOLDS: Commissioner
13 Taylor. Commissioner Taylor.

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

16 CHAIRPERSON REYNOLDS: Yes.

17 COMMISSIONER TAYLOR: Okay.

18 CHAIRPERSON REYNOLDS: Commissioner
19 Braceras.

20 (No response.)

21 CHAIRPERSON REYNOLDS: Commissioner
22 Braceras?

23 (No response.)

24 CHAIRPERSON REYNOLDS: Ken Marcus, are you
25 - is Ken Marcus on the line?

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1 STAFF DIRECTOR MARCUS: Yes, this is Ken
2 Marcus.

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

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

8 CHAIRPERSON REYNOLDS: Commissioner
9 Braceras?

10 COMMISSIONER BRACERAS: Yes.

11 CHAIRPERSON REYNOLDS: Thank you.

12 Commissioner Yaki.

13 COMMISSIONER YAKI: Present.

14 CHAIRPERSON REYNOLDS: Commissioner
15 Kirsanaw?

16 (No response.)

17 CHAIRPERSON REYNOLDS: Commissioner
18 Kirsanow?

19 (No response.)

20 CHAIRPERSON REYNOLDS: Last time,
21 Commissioner Kirsanow?

22 (No response.)

23 CHAIRPERSON REYNOLDS: Okay, well,
24 Commissioner Kirsanow indicated that he would - that
25 he might be joining us later in the conversation. And

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1 I do believe that that's the case.

2 Okay, the meeting will come to order.

3 VICE CHAIRPERSON THERNSTROM: Mr.

4 Chairman, is someone going to keep trying to get him?

5 I'm obviously eager that he do join us.

6 How is this going to work?

7 CHAIRPERSON REYNOLDS: Ken, please have

8 someone continue to try to track down Commissioner

9 Kirsanow.

10 STAFF DIRECTOR MARCUS: Mr. Chairman, this

11 is Ken Marcus, and since we're on the phone, we'll

12 make an effort to identify ourselves when we speak.

13 We do have someone who is trying to get

14 Commissioner Kirsanow on the line.

15 I might ask, Mr. Chairman, if you also

16 verified that the court reporter is on the line?

17 CHAIRPERSON REYNOLDS: Is the court

18 reporter on the line?

19 COURT REPORTER: Yes, we are on line.

20 CHAIRPERSON REYNOLDS: Okay.

21 Okay, whenever a commissioner wants to

22 make a statement, please identify yourself first by

23 name so that the transcriber can know who is talking.

24 And whenever it's necessary to take a

25 vote, the following procedure will be followed: I

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1 will call out the names of each commissioner. The
2 commissioner should then answer yes, no, or abstain.

3 After the voting has concluded, I will
4 read out how each one of you has voted in order to
5 ensure that the tally is correct.

6 If we are unable to conclude the meeting
7 today, the meeting will be recessed and continued
8 until a date in August to be determined after proper
9 consultation with the commissioners.

10 **I. Approval of Agenda**

11 The first item on the agenda is the
12 approval of the agenda.

13 May I have a motion to approve the agenda?

14 VICE CHAIRPERSON THERNSTROM: So moved.

15 This is Abigail Thernstrom.

16 CHAIRPERSON REYNOLDS: Okay, Jennifer.

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

19 CHAIRPERSON REYNOLDS: Commissioner
20 Braceras indicated that she wanted to rearrange the
21 order of the agenda.

22 COMMISSIONER BRACERAS: Yes, I'd like to
23 move that we move up this Adarand discussion so that
24 it immediately follows the announcement and goes
25 before the staff director's report.

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1 CHAIRPERSON REYNOLDS: Okay.

2 VICE CHAIRPERSON THERNSTROM: Commissioner
3 Braceras, are you willing to alter that slightly so
4 that both Adarand and the federal funding report be
5 discussed before the staff director's report?

6 COMMISSIONER BRACERAS: Yes, that's fine.

7 CHAIRPERSON REYNOLDS: Okay, is there a
8 second? Is there a second?

9 COMMISSIONER TAYLOR: This is Commissioner
10 Taylor.

11 CHAIRPERSON REYNOLDS: Okay, do you second
12 Jennifer's motion?

13 COMMISSIONER TAYLOR: I do.

14 CHAIRPERSON REYNOLDS: Okay, discussion?

15 COMMISSIONER YAKI: Yes, this is
16 Commissioner Yaki.

17 The purpose of it is what?

18 VICE CHAIRPERSON THERNSTROM: Is to make
19 sure that everybody is on there. People are having to
20 drop off.

21 CHAIRPERSON REYNOLDS: The purpose as I
22 understand it is to make sure that these two important
23 items be discussed when as many commissioners are on
24 the line as possible.

25 Any additional comments? Okay, when I

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1 call your name, please indicate how you vote.

2 Vice Chair Thernstrom.

3 VICE CHAIRPERSON THERNSTROM: Yes.

4 CHAIRPERSON REYNOLDS: Commissioner

5 Taylor?

6 COMMISSIONER TAYLOR: Yes.

7 CHAIRPERSON REYNOLDS: Commissioner

8 Braceras?

9 COMMISSIONER BRACERAS: Yes.

10 CHAIRPERSON REYNOLDS: Commissioner Yaki?

11 COMMISSIONER YAKI: Aye.

12 CHAIRPERSON REYNOLDS: And I also support

13 the motion.

14 The tally is as follows. There are --

15 COMMISSIONER KIRSANOW: Kirsanow here.

16 Mr. Chairman?

17 CHAIRPERSON REYNOLDS: Oh, okay.

18 COMMISSIONER KIRSANOW: What was the vote

19 about?

20 COMMISSIONER KIRSANOW: Okay, Jennifer

21 moved that we move the Adarand report and the federal

22 funding of civil rights report, that we move that

23 discussion right after the announcement and before the

24 staff director's report.

25 COMMISSIONER KIRSANOW: Okay.

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1 CHAIRPERSON REYNOLDS: And so you support
2 - you're supporting it?

3 COMMISSIONER KIRSANOW: Yes.

4 CHAIRPERSON REYNOLDS: Okay. The tally is
5 six in the affirmative.

6 There are no votes against the motion, and
7 there are no abstentions.

8 So the motion is approved.

9 **II. Approval of Minutes**

10 Next up is the approval of the minutes of
11 the minutes of a June 17th, 2005, meeting.

12 May I have a motion to approve the minutes
13 of a June 17th meeting?

14 VICE CHAIRPERSON THERNSTROM: So moved.
15 This is Commissioner Thernstrom.

16 CHAIRPERSON REYNOLDS: Is there a second?

17 COMMISSIONER YAKI: Second by Commissioner
18 Yaki.

19 CHAIRPERSON REYNOLDS: I'm sorry?

20 COMMISSIONER YAKI: Second by Commissioner
21 Yaki.

22 CHAIRPERSON REYNOLDS: Any discussion?

23 Okay, at that point, Vice Chair
24 Thernstrom, how do you vote?

25 VICE CHAIRPERSON THERNSTROM: Yes.

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1 CHAIRPERSON REYNOLDS: Commissioner
2 Taylor?

3 COMMISSIONER TAYLOR: Aye.

4 CHAIRPERSON REYNOLDS: Commissioner
5 Braceras?

6 COMMISSIONER BRACERAS: Aye.

7 CHAIRPERSON REYNOLDS: Commissioner Yaki?

8 COMMISSIONER YAKI: Aye.

9 CHAIRPERSON REYNOLDS: Commissioner
10 Kirsanow?

11 COMMISSIONER KIRSANOW: Yes.

12 CHAIRPERSON REYNOLDS: Okay. And I also
13 vote in the affirmative.

14 Okay, six in favor, none against, no
15 abstentions.

16 **III. Announcements**

17 At this point I'd like to read some
18 announcements.

19 I'm saddened to announce that earlier this
20 month Arthur Abe Fletcher, a former chairman of this
21 commission, died:

22 Dr. Fletcher served in the Nixon
23 Administration as the Assistant Secretary of Wage and
24 Labor Standards.

25 He advised Presidents Ford, Reagan and

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1 George H.W. Bush.

2 Dr. Fletcher was an ardent spokesman for
3 civil rights, especially in employment and
4 contracting. In 1972, as executive director for the
5 United Negro College Fund, he coined the now familiar
6 phrase, quote, "a mind is a terrible thing to waste,"
7 close quote.

8 President George H.W. Bush appointed Dr.
9 Fletcher to the commission in 1990, where he served
10 until 1993 as chairman. At the time of his death he
11 was an active teacher and speaker.

12 Dr. Fletcher will be missed.

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

18 The sweeping success of the act can be
19 measured by how many of its major features are taken
20 for granted today including voter registration
21 requirements that are free of racial classifications;
22 rules that prohibit racial discrimination in public
23 accommodations; and rules against discrimination in
24 employment on the base of race, national origin, sex
25 or religion.

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1 All commission staff and the members of
2 the commission should be proud as I am to serve on a
3 commission that helped to put this law on the books,
4 and continues to serve the stated goal of the act - to
5 protect all Americans regardless of race from
6 discriminatory conduct.

7 I would also like to announce that on July
8 25th, 1990, President George H.W. Bush signed into law
9 the Americans with Disabilities Act. This law
10 protects individuals with disabilities from
11 discrimination in public accommodations, commercial
12 facilities, employment, transportation, and government
13 services.

14 By striving to ensure that no American is
15 denied access to employment, education or other vital
16 activities because of a disability, we strengthen our
17 nation.

18 On behalf of the U.S. Commission on Civil
19 Rights I applaud this goal.

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

24 Christopher is a third-year law student at
25 the University of Tulsa College of Law. Last summer,

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1 Christopher interned in the House Majority Whip's
2 Office of Congressman Roy Blunt.

3 The Department of Employment Services,
4 Office of Youth Programs, office D.C.'s teenage youth
5 an opportunity to explore the working world. This
6 summer the Commission is hosting five high school
7 students under the auspices of this program.

8 Ashley Menkins will serve in the Eastern
9 regional office.

10 Stefan Suber will work in the library.

11 And Talia Edwards will be in the budget
12 and finance division.

13 And finally, Nicholas White will be in
14 OCRE.

15 Okay, we have switched the - oh, I'm
16 sorry, I'm sorry, I left one individual out. Leonard
17 Harding will work in the administrative services and
18 clearinghouse division.

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

22 And so at this point, Abbey, will you take
23 care of the motions?

24 VICE CHAIRPERSON THERNSTROM: I will
25 indeed. Just let me get the first one here.

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

4 CHAIRPERSON REYNOLDS: That's correct.

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

6 VICE CHAIRPERSON THERNSTROM: All right.

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

9 In order to make the project more
10 manageable, I move that the scope of the OCRE Adarand
11 study and its resulting proposed final report, Federal
12 Procurement After Adarand, focus on evaluating
13 government compliance with the requirement in Adarand
14 v. Pena that agencies consider race-neutral
15 alternatives in their procurement activities.

16 In Adarand v. Pena the Supreme Court held
17 that when a government actor imposes any racial
18 classification, the classification must serve a
19 compelling government interest and be narrowly
20 tailored to further that interest.

21 Specifically under this proposed scope the
22 project would ask, one, whether agencies seriously
23 consider workable race-neutral alternatives in their
24 procurement activities as required by Adarand.

25 Two, whether federal agencies sufficiently

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1 promote and participate in practices such as
2 Mentor/Protégé programs, outreach, and financial and
3 technical assistance.

4 Three, let federal agencies employ and
5 disclose to each other the specific best practices for
6 consideration of race-neutral alternatives.

7 Four, how federal agencies measure the
8 effects of race-neutral programs on federal
9 contracting.

10 And five, what mechanisms exist to ensure
11 federal contracting is not discriminatory?

12 Under this proposed scope, the project
13 would not evaluate the existing disparity study, or
14 whether or which aspects of the federal contracting
15 process disparately affects minority-owned firms.

16 I understand that this would substantially
17 alter the scope that was approved during our May
18 meeting on April 8th, 2005, and bring us closer to the
19 project that Commissioner Braceras suggested in your
20 motion on March 18th, 2005.

21 We have now seen various draft reports
22 prepared to comply with different project scopes and
23 concept papers. In general our attempts to cover too
24 much ground in too little time have not been
25 successful.

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

5 CHAIRPERSON REYNOLDS: Is there a second?

6 COMMISSIONER BRACERAS: Second.

7 CHAIRPERSON REYNOLDS: Discussion?

8 COMMISSIONER YAKI: This is Commissioner
9 Yaki.

10 I have some serious issues with this
11 proposed motion. First and obviously is the fact that
12 I'm trying to grapple with the fact that we are now
13 changing the scope of a project to fit the results
14 that came out of the project rather than trying to
15 adhere to the original scope of the project that was
16 approved.

17 I think a little history for those people
18 on the line would be useful.

19 In 2004, the Commission unanimously
20 approved for its 2005 statutorily mandated enforcement
21 report. Ten years after Adarand, the title was The
22 Effective Change of Federal Procurement Standards on
23 Women and Minority Owned Businesses.

24 There was some concern that in the
25 aftermath of Adarand what impact did it have on some

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1 of the federal programs that called for federal
2 contracting and procurement with minority and
3 disadvantaged businesses.

4 And then what happened is that in March of
5 2005, we found out that the scope had been changed.
6 And we don't need to go over the history of how the
7 scope had changed, but interrogatories were sent out
8 with a different project scope in mind.
9 Coincidentally? I think not. The same project scope
10 that we are approving here today. But what bothers me
11 is that in April of 2005, on a motion by Commissioner
12 Braceras, we did allow for the change in scope of the
13 Adarand enforcement study to include information,
14 quote, on federal agencies' use of residential
15 contracting vehicles in addition to elements of the
16 original project proposal.

17 The resulting study will, one, report the
18 amount of federal procurement funds going to small,
19 disadvantaged, and (hot zone 3;25:46) businesses.

20 Two, analyze continuing barriers facing
21 socially and economically disadvantaged firms.

22 Three, examine the role of federal
23 agencies including SBA in implementing procurement
24 programs for these firms following the Supreme Court
25 decision.

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1 And finally, specifically, OCRE research
2 into how federal contracts or federal agencies change
3 procurement practices to fulfill the compelling
4 interest and narrow tailoring components of the
5 Adarand decision.

6 This was a motion brought by Commissioner
7 Braceras. It was passed unanimously by us. At that
8 time we asked questions of the OCRE director who
9 indicated that this scope was achievable. And in fact
10 that scope was achieved in the very first draft of
11 this report.

12 It is only through subsequent drafts when
13 entire sections have been eliminated that went toward
14 the original scope of this project that we come before
15 us now with a considerably slimmed down report that is
16 now going to be changed to conform to what was
17 initially tried, without Commission consent, in
18 February of 2005.

19 I object strenuously to the fact that we
20 are - that we are essentially reshaping the scope of
21 this project.

22 I think that in terms of what we have
23 represented to the public, and represented to
24 Congress, this report does not track to that. It does
25 not include the data that was mentioned in the

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1 original scope.

2 And I will talk more about the merits of
3 the report later, but I think that it is a disservice
4 to the public for us to attempt to simply change the
5 scope to fit - change the scope after the fact to fit
6 the conclusion that we're already foreseen in February
7 of 2003.

8 I object strenuously to this motion, and
9 those are my views.

10 VICE CHAIRPERSON THERNSTROM: May I speak
11 to that, Mr. Chairman?

12 CHAIRPERSON REYNOLDS: Yes, Vice Chair
13 Thernstrom, please.

14 VICE CHAIRPERSON THERNSTROM: Unless you
15 want to do so first.

16 CHAIRPERSON REYNOLDS: You go firth.

17 VICE CHAIRPERSON THERNSTROM: Look,
18 Commissioner Yaki, I'm sympathetic to what you're
19 saying. I understand it. And it's not - I don't
20 dismiss it casually.

21 But the fact is, I think you misconstrue
22 this history when you say that the scope was changed
23 in order for us - it was reshaped as it were for a
24 political agenda.

25 That was your implication unless I

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1 misunderstood.

2 COMMISSIONER YAKI: I never used the word,
3 political agenda. I simply said that it was changed
4 to fit the - I think - preordained conclusions.
5 That's not political. That has nothing to do with
6 political.

7 VICE CHAIRPERSON THERNSTROM: Okay,
8 illogical or whatever. But it amounts to the same
9 thing it seems to me.

10 And I think a more accurate telling of
11 this story is that once the entire report came to us,
12 in a draft I should say, the entire report came to us,
13 it was the chapters that we eventually deleted were in
14 my view in such poor shape that given the time
15 constraints they could not be fixed.

16 And I guess there is a lesson here, that
17 we really need to define these topics in a more
18 manageable way.

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

21 But I think what was driving this was a
22 concern about quality, and not a concern about shaping
23 this to fit an agenda.

24 I would have been delighted to have had
25 those chapters if I could have signed on to their

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1 quality.

2 COMMISSIONER YAKI: Well, with all due
3 respect, Commissioner Thernstrom, I appreciate
4 everything that you're saying. And certainly, I am
5 not impugning anyone's motives here.

6 But my concern, you brought up one of my
7 concerns. And that is, a decision was made to
8 eliminate sections from one of the drafts, a decision
9 by the way of which I was told after the fact.

10 There was no notational vote. There was
11 no telephone conference about that. It was simply -
12 by fiat they were removed. I don't know how. I was
13 simply told they were gone.

14 No one enunciated the reason why. No one
15 told me what the purposes were for the elimination of
16 those chapters.

17 I was not afforded the opportunity to
18 confer with the staff director of the head of OCRE as
19 to what were the issues. So perhaps no argument could
20 be made as to why they would be put in, they were
21 simply gone, and they have been gone for quite a long
22 time.

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

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1 And I think that, you know, from reading
2 some of what you went through under a prior regime,
3 you would understand my frustration.

4 VICE CHAIRPERSON THERNSTROM: Does anybody
5 else want to speak to this?

6 COMMISSIONER BRACERAS: Yes, this is
7 Commissioner Braceras.

8 CHAIRPERSON REYNOLDS: Yes, Commissioner
9 Braceras.

10 COMMISSIONER BRACERAS: I, too, want to
11 echo Vice Chair Thernstrom's comments that this was
12 done for reasons of quality, not ideology.

13 When I received the report, I felt that
14 the chapters that were ultimately removed needed a
15 substantial amount of work. And given the time
16 constraints, I realized that there was no way we would
17 be able to turn them around in time to get a report to
18 meet our statutory obligations in terms of submitting
19 a report by the end of the fiscal year.

20 So in my mind it came down to a question
21 of not having a report that was able to garner
22 majority support, or having a trimmed down report.
23 And I felt that in this situation it'd be better to
24 have a smaller report than no report at all.

25 So I do appreciate Commissioner Yaki's

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1 concerns. I think, and the staff director can speak
2 to this more fully, the reason that the chapters were
3 omitted without any type of vote is that I believe the
4 staff director realized that in its original form it
5 didn't have the votes to pass, and therefore, the
6 edits were made by the staff, and in fact it garnered
7 majority support for the report.

8 Some of the problems, just for the record,
9 that I found in the chapters that were ultimately
10 deleted were both problems of accuracy, as well as
11 problems that I thought were problems of tone and
12 bias. Those chapters were filled with assumptions and
13 unsupported premises that I could not buy onto.

14 The data, the raw data that was contained
15 in those reports, I'm happy to have that in the public
16 domain. And indeed, if you would like to include them
17 in a dissenting statement, Commissioner Yaki, I'd be
18 happy to have the data in the public domain.

19 But I personally did not feel I could sign
20 on to those chapters as they were written, including
21 the assumptions and the premises that were in the
22 narrative of those chapters.

23 CHAIRPERSON REYNOLDS: This is Chairman
24 Reynolds. I just want to make two quick points.

25 The first is, when we agreed to try to

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1 accommodate both approaches, at the time we thought
2 that it was possible.

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

6 But looking at the amount of time we have
7 to complete our statutory report, and looking at the
8 amount of work that would have been required, it just
9 wasn't possible.

10 And finally, I just want to respond to the
11 statement that we changed it to - so in order to
12 guarantee a particular outcome - well, at the time we
13 didn't have data. At the time we didn't know what the
14 agencies were going to provide us in terms of the
15 response to the interrogatories that eventually went
16 out.

17 So I guess those are my two points.

18 STAFF DIRECTOR MARCUS: Mr. Chairman, this
19 is Staff Director Marcus.

20 CHAIRPERSON REYNOLDS: Yes.

21 STAFF DIRECTOR MARCUS: By way of context
22 I'd like to point out that this report is the
23 statutory enforcement report. That means it is the
24 one report which we are statutorily required to not
25 only produce but to approve and to publish and

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1 distribute to Congress and the White House by the end
2 of the fiscal year.

3 While efforts were made to produce a
4 report that complied with the scope approved in the
5 spring, it became clear from the commissioners
6 comments that that report would not garner a majority
7 of the votes, if indeed it would garner any votes at
8 all.

9 Now the commissioners recall that
10 distributing this draft was essentially a new process
11 . We were trying to get as much input from
12 commissioners as possible, and to do so to a greater
13 extent than the Commission has done in the past.

14 When we distributed an early version that
15 complied with the former scope, no commissioner
16 expressed that they appreciated the scope or thought
17 that it was successful, and several commissioners
18 indicated that they intended to dissent.

19 In fact, there were so many commissioners
20 indicating that they intended to dissent that it
21 became clear that if we continued to pursue the
22 previously approved scope we would not have a report
23 by the end of the fiscal year that would garner a
24 majority of the votes.

25 I did speak with a number of commissioners

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1 to explain to them the input that I was getting from
2 the Commission.

3 For instance I personally called
4 Commissioner Yaki to let him know that I had been
5 hearing concerns from other commissioners including in
6 particular about Chapter 2.

7 I might also mention concerns about
8 Chapter 3.

9 And I indicated that there might have to
10 be cuts or other changes.

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

14 Through a process of communicating with
15 various commissioners on both parties, we were able to
16 determine that altering the scope of the report would
17 enable us to get to the point at which there were at
18 least several commissioners who would be comfortable
19 with the direction in which we were going.

20 And that is how we got to the version that
21 we're looking at today.

22 COMMISSIONER KIRSANOW: Mr. Chairman, this
23 is Commissioner Kirsanow.

24 CHAIRPERSON REYNOLDS: Yes, Commissioner
25 Kirsanaw.

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1 COMMISSIONER KIRSANOW: I want to echo
2 what the staff director articulated when asked how he
3 got to this particular pass.

4 We frankly didn't have much choice or much
5 recourse. And I think that all of the appropriate
6 due process measures were taken into account in making
7 sure that we crafted the best possible report given
8 the constraints that we obviously faced.

9 I think we were at a point - and again,
10 I'm repeating what the staff director said - but I
11 think we were at a point where the time constraints
12 would dictate that we would either violate our
13 statutory obligation to issue a statutory report or
14 because we wouldn't have the consensus of
15 commissioners necessary and we wouldn't be issuing a
16 statutory report, or we'd be issuing a fundamentally
17 flawed report.

18 I appreciate what Commissioner Yaki had to
19 say with respect to experience in a prior composition
20 of the Commission.

21 I will say that despite the fact that
22 we're under enormous time constraints, and despite the
23 fact that we've had to edit certain portions of the
24 report, and this report went through various
25 iterations, and I think the staff did a remarkable job

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1 in trying to accommodate the wishes or needs
2 pertaining to this particular report.

3 In spite of that, this particular process
4 was preferable and was better than the process we've
5 seen in previous reports when reports would be
6 presented to us as a fait accompli without any kind of
7 comment on the part of commissioners.

8 And in fact, despite the fact that this
9 particular report has a sense of having - where
10 sausage is being made, you don't want to see it done
11 - it was nonetheless superior in the process to
12 previous reports where we didn't have any kind of
13 heads up, and there wasn't as much input, and there
14 wasn't as much commissioner involvement.

15 So I think this will be avoided in the
16 future, because we won't have the similar time
17 constraints. Was this a perfect process? Probably
18 not. But it was still superior to processes that I've
19 been involved with - actually, haven't been involved
20 with, have observed at the Commission in my three
21 years.

22 COMMISSIONER BRACERAS: This is
23 Commissioner Braceras.

24 I'm just wondering if we could move the
25 discussion along to the substance and call the

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1 question, because I'm going to need to get off the
2 phone soon.

3 VICE CHAIRPERSON THERNSTROM: I do call
4 the question. I do, but before I do so just want to
5 underscore the fact that I think this is really going
6 to be a unique experience in that it was driven by the
7 time constraints here.

8 But I call the question.

9 CHAIRPERSON REYNOLDS: Okay, at this
10 point, Vice Chair Thernstrom, how do you vote?

11 VICE CHAIRPERSON THERNSTROM: Aye.

12 CHAIRPERSON REYNOLDS: Commissioner Ashley
13 - I'm sorry, Commissioner Taylor.

14 (No response.)

15 CHAIRPERSON REYNOLDS: Commissioner
16 Taylor.

17 (No response.)

18 CHAIRPERSON REYNOLDS: Commissioner
19 Braceras.

20 COMMISSIONER BRACERAS: Aye.

21 CHAIRPERSON REYNOLDS: Commissioner Yaki.

22 COMMISSIONER YAKI: No.

23 CHAIRPERSON REYNOLDS: Commissioner
24 Kirsanaw.

25 COMMISSIONER KIRSANOW: Abstain.

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1 CHAIRPERSON REYNOLDS: I'm sorry?

2 COMMISSIONER KIRSANOW: Abstain.

3 CHAIRPERSON REYNOLDS: Okay, and I vote in
4 favor of the change.

5 Staff Director Marcus, please have someone
6 try to contact Mr. Taylor.

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

9 CHAIRPERSON REYNOLDS: Okay, this is how
10 it shakes out.

11 Commissioners Thernstrom, Braceras, and
12 Reynolds voted in favor; Commissioner Yaki voted
13 against; and Commissioner Kirsanow abstained.

14 The motion passes.

15 Commissioner Thernstrom, please read the
16 next motion.

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

18 VICE CHAIRPERSON THERNSTROM: The next
19 motion is approval of federal procurement after
20 Adarand for publication, very simple.

21 Simply reads, I move that the Commission
22 approve --

23 CHAIRPERSON REYNOLDS: Commissioner
24 Thernstrom, we voted just now to alter the scope. Now
25 we have to vote to approve the publication of the

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1 Adarand report.

2 VICE CHAIRPERSON THERNSTROM: That is what
3 I'm doing.

4 CHAIRPERSON REYNOLDS: Oh, okay. Sorry.

5 VICE CHAIRPERSON THERNSTROM: That's how
6 it reads.

7 I'm simply reading the motion as written.

8 I move the Commission approve the proposed
9 - we have done that already - for publication as our
10 statutory enforcement report for FY 2005 in the form
11 presented by the staff director.

12 CHAIRPERSON REYNOLDS: Okay, I'm with you
13 now. Sorry about that.

14 Is there a second?

15 COMMISSIONER BRACERAS: Second.

16 CHAIRPERSON REYNOLDS: Discussion?

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

19 VICE CHAIRPERSON THERNSTROM: Aye.

20 CHAIRPERSON REYNOLDS: Commissioner
21 Taylor?

22 (No response.)

23 CHAIRPERSON REYNOLDS: Okay, Commissioner
24 Braceras?

25 COMMISSIONER BRACERAS: Aye.

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1 COMMISSIONER YAKI: Wait, wait wait.
2 Point of information.

3 This is the motion to approve the report,
4 right?

5 VICE CHAIRPERSON THERNSTROM: No, it's a
6 motion simply to put it up for publication, to post
7 it. And it's just badly worded, frankly.

8 CHAIRPERSON REYNOLDS: It is my
9 understanding that it is a motion to approve the
10 proposed final report.

11 VICE CHAIRPERSON THERNSTROM: For
12 publication.

13 CHAIRPERSON REYNOLDS: Yes.

14 COMMISSIONER YAKI: No, but it's to
15 approve the report, which therefore, I would want
16 discussion on.

17 STAFF DIRECTOR MARCUS: Mr. Chairman, this
18 is Staff Director Marcus.

19 It would be appropriate at this time if
20 there were a motion to approve the report not only for
21 publication but for all purposes, and to consider this
22 to be an approved report.

23 CHAIRPERSON REYNOLDS: Okay.

24 COMMISSIONER BRACERAS: This is
25 Commissioner Braceras.

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1 I just think there was some confusion. I
2 believe that called for a discussion, and no one said
3 anything. And we've happy to have a discussion.

4 CHAIRPERSON REYNOLDS: That is correct.
5 But Commissioner Yaki expressed his desire to have
6 some discussion.

7 So at this point, Commissioner Yaki,
8 please start the discussion.

9 COMMISSIONER YAKI: I have a couple of
10 points of information first on this motion.

11 Is this the - are we voting on the draft
12 that we just received this morning with the last
13 changes of the red line version?

14 CHAIRPERSON REYNOLDS: I'm not exactly
15 sure which version you're talking about. But yes, we
16 are voting to approve --

17 COMMISSIONER YAKI: Not for release
18 7/22/05 redline version, Mr. Staff Director, is that
19 what we're voting on?

20 CHAIRPERSON REYNOLDS: I suspect that
21 there have been some amendments to that document. I
22 know that I faxed some documents to the staff
23 director, which were distributed to the commissioners.

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

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1 COMMISSIONER YAKI: Well, I just - one of
2 the reasons why I have an issue with the process, and
3 I appreciate the fact that it is - at least from
4 reports I have been receiving - light years ahead of
5 what used to be the process.

6 But I am just coming from my own point of
7 view, which was, as a former elected official and
8 former congressional staffer who had to respect
9 process and transparency as much as possible, my
10 concern is that now I am being asked to vote, this is
11 a matter of principle, because I definitely am not
12 going to be voting to support this project.

13 But as a matter of principle and
14 transparency, how can we be voting on a final version
15 if the last version that I received on this was sent,
16 let's see, at 10:35 a.m. your time, if there are
17 versions or red lines subsequent to 10:35 a.m. our
18 time, I believe that all the commissioners should be
19 entitled to see it.

20 This also goes to the point that I raised
21 in correspondence earlier in the week, and that is,
22 for the public who is listening in, notwithstanding
23 the fact that they don't have access to the report to
24 even look at or follow along to understand what the
25 heck we're talking about, even if they did, it would

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1 be compounded by the fact that apparently changes are
2 made up to the very last minute, if there have been
3 anything since past 10:35 a.m., I may be unaware of
4 it, and other commissioners may be unaware of it.

5 And I think for a transparency issue,
6 there is a significant issue. So I pose as a point of
7 information, not to speak on the main motion yet, but
8 as a point of information, is what we're voting on the
9 10:35 or 10:19 a.m. draft, or a subsequent draft with
10 subsequent revisions?

11 CHAIRPERSON REYNOLDS: It is the red line
12 version that was sent this morning, plus my handful of
13 edits that were I believe faxed to all the
14 commissioners.

15 COMMISSIONER YAKI: I did not receive a
16 fax.

17 VICE CHAIRPERSON THERNSTROM: Mr.
18 Chairman, I'd like to hear the staff director on this.
19 I think that Commissioner Yaki brings up a serious
20 issue here, I'm afraid to say.

21 STAFF DIRECTOR MARCUS: Mr. Chairman, this
22 is Staff Director Marcus.

23 The only proposed changes that we have
24 received from any commissioner since the red line
25 version was distributed this morning were the proposed

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1 changes from Chairman Reynolds.

2 It is my understanding that those proposed
3 changes were faxed to all commissioners earlier today.
4 Since I've just heard that Commissioner Yaki doesn't
5 believe that he's received the chairman's recent
6 proposed changes, we'll confirm to make sure that they
7 are faxed around.

8 Just as a reminder to the commissioners,
9 the only changes that were in the red line version
10 this morning as compared to the version distributed a
11 week ago consisted of comments received from the Small
12 Business Administration as an affected agency, or
13 comments suggested by an expert, Dr. George LaNoue,
14 who we retained to review the proposed final draft for
15 quality purposes.

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

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

21 COMMISSIONER BRACERAS: Excuse me, this is
22 Jennifer Braceras again.

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

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1 I apologize for that. I do have a family
2 situation that I need to attend to. So in light of
3 Commissioner Yaki's concern and my need to depart, I
4 would just ask the chairman what he thinks is the best
5 course of action.

6 CHAIRPERSON REYNOLDS: Okay, Commissioner
7 Yaki, if we were to discuss my changes right now,
8 would that be sufficient?

9 COMMISSIONER YAKI: I think that would be
10 sufficient. I still reserve the right to comment on
11 the entire report, though, which I have not had the
12 opportunity to do.

13 CHAIRPERSON REYNOLDS: Sure.

14 Okay, if that is the case then, I will
15 just discuss my changes.

16 COMMISSIONER BRACERAS: Excuse me, Mr.
17 Chairman.

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

22 CHAIRPERSON REYNOLDS: I understand.

23 COMMISSIONER BRACERAS: So I want to
24 apologize to the other commissioners, and I want to
25 apologize to the public, but I have a family

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1 obligation I need to attend to. I was hoping we could
2 have voted on this report and wrapped it up before
3 4:00 o'clock.

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

6 CHAIRPERSON REYNOLDS: Okay.

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

10 As I said, I had many concerns with it at
11 the beginning. But I think that in its current form
12 it is a high quality work product of which we can be
13 proud, and I look forward to seeing Commissioner
14 Yaki's dissenting statement, because I do encourage a
15 robust debate on this and every other issue upon which
16 this Commission will decide.

17 CHAIRPERSON REYNOLDS: Okay.

18 COMMISSIONER BRACERAS: So thanks, and
19 have a good weekend.

20 CHAIRPERSON REYNOLDS: Okay, Michael,
21 would you like to discuss your concerns, or my edits
22 first?

23 COMMISSIONER YAKI: Your edits first.

24 CHAIRPERSON REYNOLDS: Okay, just turning
25 to Chapter 3, Findings and Recommendations. The

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1 second paragraph, first sentence, it reads, prior to
2 my edit it reads: Ten years ago in the landmark case
3 of Adarand Constructors, Inc. v. Pena, the Supreme
4 Court held that programs that use racial criteria must
5 be subject - well, I deleted criteria and inserted
6 classifications.

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

10 COMMISSIONER YAKI: Do you carry Adarand
11 around in your back pocket?

12 CHAIRPERSON REYNOLDS: It's near and dear
13 to me. It's always close.

14 Now going to page two of Chapter 3, the
15 third full paragraph, last sentence, it reads: Lack
16 of data collection rendered impossible the efforts
17 this study made to measure the effectiveness of race
18 neutral and race conscious programs independently.

19 In general, agencies do not seriously
20 consider whether new race-neutral initiatives could
21 provide adequate alternatives to current programs. I
22 changed that to current race-conscious programs.

23 The following paragraph, the sentence that
24 I changed reads, effective race-neutral procurement
25 systems would include elements that ensure equal

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1 access, comma. I changed that to ensure access on a
2 nondiscriminatory basis.

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

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

10 Flipping to page four of Chapter 3, the
11 third paragraph, it reads, DOJ and SBA should without
12 delay facilitate agency development and implementation
13 of prominent civil rights enforcement policy.

14 I deleted the word, prominent.

15 The next sentence reads, agencies must
16 establish strong enforcement systems to provide a
17 means for victims of discrimination to file and
18 resolve complaints.

19 I changed that to, agencies must establish
20 strong enforcement systems to provide individuals a
21 means to file and resolve complaints of discriminatory
22 conduct.

23 That same paragraph, last sentence, it
24 reads: Doing so will help ensure that potential
25 contractors and subcontractors have equal opportunity

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1 to compete for federal funds.

2 I changed it to: Doing so will help
3 ensure that potential contractors and subcontractors
4 have an opportunity to compete for federal funds
5 without fear of discrimination.

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

11 I changed it to read, Agencies have not
12 established procedures to re-assess presumptions of
13 disadvantage, period.

14 Finally, turning to page eight of
15 paragraph - I'm sorry, of Chapter 3, the last sentence
16 of the conclusion that reads: To achieve that goal
17 federal agencies should demonstrate sincere efforts to
18 equalize outcomes through race-neutral procedures.

19 I changed it to read, to achieve that goal
20 federal agencies should demonstrate sincere efforts to
21 expand minority-owned firms' access to federal
22 contracts through race-neutral procedures.

23 Those are all of my edits.

24 COMMISSIONER YAKI: I have another point
25 of information for the staff director.

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1 Staff Director Marcus, are you there?

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

4 COMMISSIONER YAKI: In the last set of
5 documents there is reference to the fact that we have,
6 or the Commission had retained George LaNoue as a
7 technical expert.

8 For what reason was he retained, and how
9 was that done?

10 STAFF DIRECTOR MARCUS: Commissioner Yaki,
11 he was retained in order to review the proposed final
12 document, and to provide us quality assurance to
13 review the technical aspects of the document and let
14 us know whether there were flaws that he saw, and
15 provide comments to us about whether there were
16 problems with the document.

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

20 STAFF DIRECTOR MARCUS: This was at my
21 direction, I believe the term is a micro purchase. It
22 is well below the dollar requirement on competitive
23 bidding. He was hired based on his reputation for
24 experience in the area of federal procurement and on
25 issues relating to Adarand v. Pena. Because the

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1 amount at issue was well below - I believe the amount
2 is \$2,500 - because it was well below that amount,
3 this process did not require competitive bidding.

4 COMMISSIONER YAKI: Mr. Chair?

5 CHAIRPERSON REYNOLDS: Yes?

6 COMMISSIONER YAKI: May I speak to the
7 main motion, then?

8 CHAIRPERSON REYNOLDS: Yes.

9 COMMISSIONER YAKI: Mr. Chair, just to
10 follow up from what the staff director said, I am
11 disturbed that a technical expert who has written
12 extensively on the need to abolish all use of race in
13 public contracting was brought in to determine the
14 sufficiency of our report.

15 And indeed, if I believe - if some of
16 those last-minute changes that I saw in the draft were
17 attributable to him, I would say that they seem to be
18 in violation of the proposed altered scope that we
19 just approved, that the majority just approved, in
20 which it said that the project would not evaluate
21 existing disparity studies, or whether or which aspect
22 of the federal contracting process disparately affects
23 minority-owned firms since in Chapter 1 a new sentence
24 has been added that basically questions the disparity
25 studies and the benchmark studies done by the

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1 Department of Commerce, and recommends the National
2 Academy of Sciences to conduct one, which Mr. LaNoue
3 has published in before.

4 That to me sets the tone and the framework
5 for my concerns about this report. I was supportive
6 of the original report, because I believe that the
7 data we would receive, and certainly the - everyone
8 brings their own experiences to this. I - when I was
9 a member of the Board of Supervisors in San Francisco,
10 I helped author and shepherd through our MBE/WBE
11 contracting program through, which has survived legal
12 challenges. We did disparity studies. We collected
13 anecdotal evidence.

14 What I see here today in this
15 reconstituted study is a step backwards from what we
16 have been doing for the last half century as a
17 commission and as a nation. And under the cloak of
18 the term, race neutrality, this report I believe seeks
19 the termination of all race-conscious programs and
20 remedies from federal contracting and procurement.

21 I have a problem with that, given that in
22 our hearing last week both Dr. Besharov and Harry
23 Holzer said, from the left and from the right, or from
24 the conservative and the liberal point of view, that
25 discrimination persists in our society; that it has

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1 not gone away.

2 And I believe that the challenge of the
3 Commission has been, and always should be, to engage
4 in fact finding, in figuring out ways how best to
5 combat invidious discrete intention discrimination in
6 our country.

7 And I believe that this has been our
8 challenge. And with this report today we failed in
9 that challenge.

10 It is so ironic that when we mentioned
11 today in the beginning, that in the announcements
12 about Dr. Arthur Fletcher, who was called the father
13 of affirmative action, who helped put together the
14 revised Philadelphia plan, that withstood court
15 challenge, that did goals and timetables and created
16 racial categories; that today is the anniversary of
17 the 64 Civil Rights Act; that at this time, we would
18 present a report that basically tells the federal
19 government to put a halt to race-conscious programs,
20 and to instead engage in a race-neutral analysis that
21 I think actually has no foundation in the cases that
22 are cited in the report.

23 CHAIRPERSON REYNOLDS: Commissioner Yaki,
24 this is Chairman Reynolds. I have a different read of
25 the report. I must say that my view is radically

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1 different from yours.

2 I believe that the theme that you object
3 is the notion that the - that there is an
4 interpretation through the document of Adarand that -
5 the document states that Adarand stands for the
6 proposition that you must consider race-neutral
7 alternatives; that that is a part of the process; that
8 is what judges must look to to determine the
9 constitutionality of the use of racial
10 classifications.

11 Now that is my read of not just Adarand
12 but Paradise and a long line of other cases that
13 discuss this notion of race neutrality - I'm sorry,
14 race-neutral alternatives.

15 And by citing George LaNoue's work, George
16 LaNoue's did not make many edits of the document. So
17 his personal views on the legality or appropriateness
18 of the use of racial classifications, that's one
19 thing. But in this document, the few comments that he
20 made did not address that particular issue.

21 COMMISSIONER YAKI: Well, I was about to
22 address that.

23 CHAIRPERSON REYNOLDS: Okay.

24 COMMISSIONER YAKI: And yes, I have read,
25 and I understand - I may not have it in my back

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1 pocket, the Adarand decision, but I believe that the
2 report, as it is drafted, seriously misconstrues what
3 the mandate of Adarand is.

4 The report for example page - Chapter 1,
5 I believe it's still page 17, it may have changed -
6 states that Adarand requires the agency to consider an
7 employee race-neutral strategy before resorting to a
8 race-conscious one.

9 That is simply a reading of Adarand that
10 does not exist in the text. To the contrary, when you
11 read Adarand, you see that Justice O'Connor wrote that
12 when race-based action is necessary to further a
13 compelling interest, such action is within
14 constitutional constraints if it satisfies the narrow
15 tailoring test.

16 I don't - I do not believe that we can
17 simply take and lift examples, for example, let me
18 just go to the methodology, I do not think that we can
19 simply lift for example what the Department of
20 Education does in applying Grutter, which is not -
21 which is not a contract discrimination case, but has
22 to do with law school admissions - or university
23 admission - and apply that to the complexities of
24 federal procurement and contracting, especially when
25 the Department of Education in a relative scale is not

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1 a large player in the contracting arena.

2 Yet the majority report seems to indicate,
3 seems to lift verbatim, Department of Education
4 policies that I believe have no - that A, I think take
5 an absurd reading of Grutter, must narrower than I
6 think anyone could reasonably interpret it, and then
7 from there, apply it to the instances of contracting.

8 I don't believe - I think that is flawed
9 from the beginning, and because of that flaw, I think
10 that this report is fatally flawed.

11 I mean they talk about the six practices,
12 and if that's a talisman for determining whether
13 federal agencies meet or engage on the serious
14 consideration test. And you know, when I objected to
15 the removal of the two chapters that had data in it,
16 I did not see much data put back in to it from other
17 sources, much less whether or not anything that DOED
18 has done has resulted in any actual data collection
19 that would show that those six practices have any
20 application in the real world, much less application
21 to multi-year, multi-employer, multi-contract
22 procurements that DOT or DOD do.

23 It's one thing to talk about university
24 admissions on a yearly scale done by individual
25 universities, than it is to say, we're going to

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1 analyze what procurement was on the big dig, multi-
2 year, multi-year funding, several levels of contractor
3 levels.

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

6 And when it comes right down to it, I
7 think that the fact that we have omitted substantial
8 amounts of data from this report, data that suggests
9 that African-American businesses, for example, lag
10 substantially well behind all others in terms of
11 revenue, in terms of growth, in terms of
12 survivability, those are issues that I think the
13 Commission needs to address.

14 But by eliminating that data, it's as if
15 it's never there. Instead, we're talking about
16 application of criteria that is theoretical only, and
17 criticizing the Clinton post-Adarand reforms, which
18 the majority says, well, the agencies haven't followed
19 them.

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

25 VICE CHAIRPERSON THERNSTROM: Can I jump

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1 in here?

2 COMMISSIONER YAKI: I just want - these
3 are just - this is just --

4 VICE CHAIRPERSON THERNSTROM: I didn't
5 realize you weren't finished; I'm sorry.

6 COMMISSIONER YAKI: This is just touching
7 the surface of what I think are serious substantive
8 flaws in how this report is produced; the methodology
9 upon which it relies; the legal theories upon which it
10 stands; and why I cannot in any way, shape or form
11 subscribe to it.

12 I appreciate that we are going to differ
13 on this, and I'm not saying that I am right and you
14 are wrong, or you are right and I am wrong. What I am
15 saying though is, I think from my own point of view,
16 there are serious methodological and legal - legal
17 underpinnings of this that are fundamentally flawed
18 and I think lead to the wrong conclusions.

19 And finally, I fail to see how this is a
20 civil rights enforcement report. We are talking about
21 - to me an enforcement report, and maybe this is just
22 my point of view - is one that says, how can we do
23 better to ensure - to ensure the promotion of economic
24 opportunity to end racial discrimination, what have
25 you?

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1 And while that may be the intent of the
2 report, as written, I think the practical application
3 of the report, especially in its recommendation of an
4 acting nondiscrimination legislation for contracting
5 would have the absolute contrary result. Because all
6 that will do is create a private right of action for
7 people who feel that there should be no race-conscious
8 programs in SBA, in DOG, in DOD. They should have a
9 prior right of action to kill it.

10 I do not think - I would not think that's
11 what the majority intended. But that to me is the
12 natural result of nondiscrimination legislation
13 specifically on federal procurement.

14 CHAIRPERSON REYNOLDS: Commissioner Yaki,
15 this is Commissioner Reynolds.

16 You've made some points there that I think
17 are good, and I look forward to reading your dissent.
18 But I guess I just want to go back to the
19 constitutional question.

20 Is it your position that the Constitution
21 does not require federal agencies to use race-neutral
22 approaches when they are available and just as
23 effective as race-conscious approaches?

24 COMMISSIONER YAKI: I think that what the
25 Constitution says, as interpreted by the Supreme

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1 Court, is that the government agencies must give
2 serious consideration to the use of workable race-
3 neutral alternatives. However, it does not require
4 exhaustion of every alternative that could be there,
5 and it does not certainly not accommodate for what has
6 been certainly Supreme Court at least dicta in three
7 or four different cases, which is the relevant
8 differences between individual programs.

9 I just don't see this - I don't see a
10 cookie cutter working on this.

11 CHAIRPERSON REYNOLDS: Well --

12 COMMISSIONER YAKI: What we've created is
13 a cookie cutter --

14 CHAIRPERSON REYNOLDS: Do you believe that
15 the report requires an exhaustion of race neutral
16 remedies before race conscious remedies could be used?

17 COMMISSIONER YAKI: I think that the word,
18 exhaustion, may not be used. But I would certainly
19 say that the six practices that are enunciated, put
20 together a process that is unwieldy, cumbersome, and
21 in the end destructive to the ability of many of these
22 agencies, particularly the SBA, to continue its
23 mission and fulfill its statutory mandate.

24 And it may be that this report is very
25 careful not to say, we have to exhaust everything,

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1 because they know that it can't stand under the
2 Adarand or the Grutter test. And by the way, I still
3 wonder how you're going to apply education standards
4 to contracting.

5 But nevertheless, the standards put forth,
6 the kind of burdens that agencies must assume, the
7 mere fact that it said rather blithely that you could
8 do it by annual review of your programs because the
9 Department of Education says you can, well, that might
10 be okay for Harvard University. I doubt it's okay or
11 workable for DOD or DOT.

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

16 But I also believe that the procedures,
17 the recommendations that have been put forth create
18 such a burden for federal agencies who are working,
19 one, with statutory mandates like Congress to fulfill;
20 two, have been working with - who have experience in
21 their own measure. And may I - and I might add that
22 the report continually rips the Department of
23 Transportation as being - well, they tried, but they
24 are only partially successful. Yet DOT has survived,
25 at least so far, a challenge all the way up to the

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1 Supreme Court once, and many of the other DBE programs
2 have survived facial challenges in other circuits as
3 well.

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

8 CHAIRPERSON REYNOLDS: Now, did the court
9 take up the case, or did it just deny cert?

10 COMMISSIONER YAKI: Denied cert, but it
11 let stand a lower court ruling. And other circuits
12 have let - have allowed - have disallowed facial
13 challenges on DBE programs post- Adarand.

14 So maybe John Roberts might change all
15 that. But the fact is that I think that this report
16 takes Adarand and Grutter, and takes part of them, and
17 then puts the threshold bar so high that it's
18 inconceivable that federal agencies are going to be
19 able to meet it without a massive reallocation of
20 resources that should go toward ensuring that they're
21 doing what they can to promote equal opportunity and
22 economic opportunity in procurement and contracting.

23 CHAIRPERSON REYNOLDS: Commissioner
24 Thernstrom, you were about to say something?

25 VICE CHAIRPERSON THERNSTROM: Yeah. All

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1 of this, much of what Commissioner Yaki has to say
2 can't be dismissed; let's put it that way.

3 The whole problem here, we're back to the
4 problem of this report being the time constraint that
5 we were under. And I don't think, or I hope not - I
6 hope - that with respect to the Adarand decision
7 specifically that no one would disagree that all that
8 decision said was that federal racial classifications
9 have to serve a compelling government interest and be
10 narrowly tailored.

11 Okay, it was remanded to determine whether
12 that test had been met. Adarand itself, as I remember
13 it, did not go beyond that.

14 So as Commissioner Yaki suggests, we are
15 cobbling together here Clozen (phonetic) and other
16 decisions.

17 I would like a really good report. I do
18 not know how, on a really careful report, I don't know
19 how to do that.

20 CHAIRPERSON REYNOLDS: This is Chairman
21 Reynolds. We don't have time to produce the type of
22 report that I would like.

23 VICE CHAIRPERSON THERNSTROM: Yeah, well,
24 that's what I was about to say.

25 CHAIRPERSON REYNOLDS: Yes, and

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1 Commissioner Yaki raises some good points. I think
2 that his points on what Adarand means, I think that he
3 made some legitimate points. Whether it's appropriate
4 now, after Adarand, to look at Crozen and Paradise and
5 other cases, interpreting what strict scrutiny means,
6 whether that is appropriate or not.

7 I would like to have a fully fleshed out
8 conversation about that issue and many others. But I
9 don't have time.

10 VICE CHAIRPERSON THERNSTROM: Let me make
11 a suggestion here if I may, which is, that we at least
12 hold a briefing on this whole issue such that we can
13 further explore with more care and nuance the
14 complexities that Commissioner Yaki rightfully pointed
15 to.

16 CHAIRPERSON REYNOLDS: Well, I agree, I
17 think that that would be a great idea.

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

20 Are there any other comments from other
21 commissioners?

22 (No response.)

23 CHAIRPERSON REYNOLDS: Okay. I take that
24 as a no.

25 So at this point then I would like to call

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1 a vote.

2 Commissioner Thernstrom?

3 VICE CHAIRPERSON THERNSTROM: Well, I will
4 vote aye on it because of the time constraints. But
5 I very much appreciate what Commissioner Yaki has
6 said.

7 CHAIRPERSON REYNOLDS: Commissioner
8 Taylor.

9 COMMISSIONER TAYLOR: This is Commissioner
10 Taylor. I am going to vote aye and the debate that -
11 I apologize for the background noise.

12 CHAIRPERSON REYNOLDS: Are you ordering
13 lunch?

14 COMMISSIONER TAYLOR: No, I'm traveling
15 with my family, so I apologize. But I wanted to make
16 one brief comment. Because I do think it's important
17 that we discuss the issues raised by Commissioner
18 Yaki.

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

25 And I think it is too easy for a

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1 governmental agency - too difficult. It requires us
2 to re-shift our resources to accomplish that task.

3 It would be much easier if we could simply
4 establish racial categories.

5 So I have no problem particularly given
6 our time constraints with standing behind this report
7 in its current form for that reason.

8 CHAIRPERSON REYNOLDS: Okay.

9 Commissioner Yaki, shall I mark you down
10 for a no?

11 COMMISSIONER YAKI: No.

12 CHAIRPERSON REYNOLDS: Commissioner
13 Kirsanow?

14 COMMISSIONER KIRSANOW: Yes, Mr.
15 Chairman. I would like to echo what Commissioner
16 Taylor had to say. But toward a very narrow point, I
17 do think that when it comes to race-neutral
18 alternatives, there is a little bit of gamesmanship,
19 it strikes me.

20 And I'm not sure that those alternatives
21 are adequately explored.

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

24 CHAIRPERSON REYNOLDS: Okay, and I vote in
25 favor of it.

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1 So what we have is we have three votes
2 from Commissioner Thernstrom, Taylor and the Chairman
3 in favor.

4 One abstention, and one no vote.

5 So the motion carries.

6 At this point Vice Chair Thernstrom, would
7 you please read the next motion.

8 VICE CHAIRPERSON THERNSTROM: The next
9 motion involves approving the funding of federal civil
10 rights enforcement report.

11 And I move that the Commission approve the
12 proposed final report funding the federal civil rights
13 enforcement, the president's 2006 request, for
14 publication in the form presented by the staff
15 director.

16 COMMISSIONER YAKI: Commissioner Yaki,
17 second.

18 CHAIRPERSON REYNOLDS: Okay, discussion.

19 COMMISSIONER YAKI: Commissioner Yaki
20 here.

21 I would just like to say, to follow up on
22 comments that I made at the last meeting, I think this
23 is a very valuable report. It is one of the few means
24 of collating data from all the federal agencies with
25 regard to their civil rights enforcement budgets and

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1 activities that can be made available to the public
2 for review.

3 I would hope that we would consider doing
4 this, as it has been a practice every year, and urge
5 its passage.

6 VICE CHAIRPERSON THERNSTROM: I have a
7 point of order here.

8 I have made the motion because you have
9 asked me to make this series of motions. In fact I'm
10 going to abstain on this, and I wonder if I was the
11 appropriate person to make the motion given the fact
12 that I'm going to abstain.

13 CHAIRPERSON REYNOLDS: I don't see a
14 problem.

15 Staff Director Marcus, does that pose a
16 problem?

17 STAFF DIRECTOR MARCUS: Mr. Chairman, I
18 see no problems in the rules. I might defer to our
19 parliamentarian, on Roy, to advise as to whether there
20 is any parliamentary problem would arise in the event
21 that the commissioner who advances a motion then
22 abstains on the vote.

23 I don't know if the court reporter was
24 able to hear that?

25 MS. MORNING: As far s I can tell, there

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1 is no problem.

2 CHAIRPERSON REYNOLDS: Okay, any other
3 comments?

4 COMMISSIONER KIRSANOW: Mr. Chair, I just
5 want to say, I think I made this comment last time
6 around, a comment that I believe was consistent that
7 something that Commissioner Yaki - I just want to
8 commend the staff on this particular report.

9 One of the things that we always I think
10 must keep in mind is, we've got a number of
11 commissioners, we have a number of different points of
12 view on this particular commission.

13 The topics we address, the topics we
14 attempt to tackle, are sometimes enormous, very
15 important topics, topics that are likely to cause a
16 great amount of friction and disagreement.

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

20 And I think that while no report can be
21 perfect obviously, the staff goes to great lengths to
22 try to come up with a report that will serve the
23 nation.

24 And I think that this report, while not
25 perfect, is a remarkable improvement over the caliber

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1 of reports of the same ilk that I've seen in the past.

2 And I just want to commend staff for their
3 vigorous efforts, their attention to detail, in
4 putting together this report.

5 CHAIRPERSON REYNOLDS: Hear, hear.

6 Okay, Commissioner Kirsanow, is that a
7 yea?

8 COMMISSIONER KIRSANOW: Yes.

9 CHAIRPERSON REYNOLDS: Okay.

10 All right, Commissioner Taylor?

11 (No response)

12 CHAIRPERSON REYNOLDS: Commissioner
13 Taylor?

14 COMMISSIONER TAYLOR: That's an aye.

15 CHAIRPERSON REYNOLDS: Okay.

16 COMMISSIONER TAYLOR: A hamburger to go.

17 CHAIRPERSON REYNOLDS: Commissioner Yaki.

18 COMMISSIONER YAKI: Aye.

19 CHAIRPERSON REYNOLDS: Okay, and initially
20 I was going to abstain from voting on this. I too
21 agree that the staff has done a very good under the
22 circumstances. But the type of document I'm looking
23 for is not merely a collection of data points.

24 I think that ultimately once we have the
25 appropriate benchmarks, we should judge I believe any

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1 administration and Congresses in terms of the amount
2 of money that is provided to federal civil rights
3 enforcement.

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

12 But after saying that, though, I vote in
13 favor of it.

14 So there is one abstention, and four votes
15 in favor of the report: Commissioners Taylor, Yaki,
16 Kirsanow, and the Chairman voted in favor.

17 The motion carries.

18 Okay, could someone tell me, where are we
19 now?

20 VI. Motion on FY 2007 Federal Civil

21 Rights Enforcement Report

22 VICE CHAIRPERSON THERNSTROM: We're at
23 the motion to approve the FY 2007 budget request of
24 OMB.

25 COMMISSIONER YAKI: No, no, according to

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1 the motion, we're back to the staff director's report.

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

4 VICE CHAIRPERSON THERNSTROM: I'm sorry,
5 you are perfectly right.

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

7 CHAIRPERSON REYNOLDS: Okay, Staff
8 Director Marcus.

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

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

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

24 During our May meeting I reported that
25 our budgetary condition had improved due to staff

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

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

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

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

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

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1 should be able to defer closure of the Denver and
2 Kansas City offices through fiscal year 206 pending
3 our appropriation for fiscal year 2007, and we would
4 still be able to fill a few key vacancies over the
5 coming months.

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

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

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

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

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

24 During the March 2005 commission meeting
25 the commissioners asked the staff director to hire

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1 auditors to conduct a full scope audit for fiscal year
2 2004 if financial feasible.

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

9 Recently, the commission placed a
10 statement of work on Fed. Bis. Ops. In an attempt to
11 retain auditing services. The statement of work
12 includes requests for bids for full scope audits for
13 fiscal year 2004 as well as fiscal year 2005.

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

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

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

24 Booz Management currently provides the
25 commission with accounting services. Booz was hired

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

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

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

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

24 Fourth, I'd like to say just a few words
25 about human capital management. In its 1999 oversight

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1 review of the commission's human capital management,
2 the Office of Personnel Management identified a number
3 of recommended human capital improvement actions.

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

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

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

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

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1 undertaken, will position us well for the upcoming OPM
2 review.

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

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

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

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

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

24 The process was also established by the
25 SAC process task force.

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

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

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

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

20 I would be please to respond to any
21 questions that any of the commissioners should have.

22 CHAIRPERSON REYNOLDS: This is Chairman
23 Reynolds.

24 Can - we've managed to stave off risks,
25 office closures, and other painful acts.

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

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

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

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

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

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1 costs have been increasing.

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

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

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

19 CHAIRPERSON REYNOLDS: Any other comments?

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

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

24 Vice Chair Thernstrom, do you have a
25 motion for me?

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VIII. Motion to Approve the OMBFY 2007 Budget

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

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

CHAIRPERSON REYNOLDS: Is there a second?

COMMISSIONER KIRSANOW: Kirsanow seconds.

CHAIRPERSON REYNOLDS: Discussion?

(No response.)

CHAIRPERSON REYNOLDS: Okay, well, let's vote.

Vice Chair Thernstrom, how do you vote?

VICE CHAIRPERSON THERNSTROM: Aye.

CHAIRPERSON REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Aye.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Aye.

CHAIRPERSON REYNOLDS: Commissioner

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1 Kirsanow?

2 COMMISSIONER KIRSANOW: Yes.

3 CHAIRPERSON REYNOLDS: Okay. And I vote
4 in favor of it also.

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

9 The motion passes.

10 What's next, Abby? Which motion?

11 VICE CHAIRPERSON THERNSTROM: Next is -
12 sorry about this --

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

19 CHAIRPERSON REYNOLDS: Commissioner
20 Kirsanow, are you carrying a cell phone?

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

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1 CHAIRPERSON REYNOLDS: Got you.

2 COMMISSIONER KIRSANOW: So I'll try to re-
3 up if possible, but I don't think it's likely.

4 CHAIRPERSON REYNOLDS: Okay, thank you.

5 COMMISSIONER KIRSANOW: Okay.

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

10 And I believe that is next; is that
11 correct?

12 CHAIRPERSON REYNOLDS: I think we have a
13 problem.

14 Staff Director Marcus?

15 STAFF DIRECTOR MARCUS: Mr. Chairman, this
16 is Staff Director Marcus.

17 CHAIRPERSON REYNOLDS: How many do we need
18 for a quorum?

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

21 CHAIRPERSON REYNOLDS: Yes. How many
22 commissioners are required for a quorum?

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

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1 have four.

2 CHAIRPERSON REYNOLDS: Okay.

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

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

12 CHAIRPERSON REYNOLDS: Okay, that's my
13 understanding.

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

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

21 I would say that there are two items under
22 management and operations that we haven't yet gone to.
23 If Commissioner Kirsanow can be contacted, they would
24 be appropriate for a vote. If he cannot be contacted,
25 I think it would be appropriate at least to get a

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1 sense of the commissioners.

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

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

17 But does - are there any comments or
18 questions or concerns that need to be discussed?

19 (No response.)

20 CHAIRPERSON REYNOLDS: Okay.

21 (Tape changed.)

22 COMMISSIONER YAKI: Move to adjourn?

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

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1 to adjourn.

2 Hard to do a quorum call via
3 teleconference. Can't exactly send the sergeant at
4 arms to track them down.

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

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

10 CHAIRPERSON REYNOLDS: Oh, no, he's gone
11 too.

12 VICE CHAIRPERSON THERNSTROM: I would just
13 comment here. I think that we should do everything we
14 can in the future to avoid meetings by conference
15 call.

16 CHAIRPERSON REYNOLDS: I agree.

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

20 VICE CHAIRPERSON THERNSTROM: So move.

21 CHAIRPERSON REYNOLDS: Second?

22 COMMISSIONER YAKI: Second.

23 CHAIRPERSON REYNOLDS: All right.

24 All in favor?

25 (Several ayes.)

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1 CHAIRPERSON REYNOLDS: Okay, that was two.
2 Am I missing someone? Commissioner Taylor?

3 COMMISSIONER TAYLOR: Oh, I said aye.

4 CHAIRPERSON REYNOLDS: Okay, well, it's
5 unanimous.

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

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

11 STAFF DIRECTOR MARCUS: Yes, Commissioner
12 Yaki, this is Staff Director Marcus.

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

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

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

24 It will not of course be formally
25 published until the month of September, at which point

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1 it will be formally delivered to the Congress and the
2 President.

3 I believe the formal delivery will
4 probably be toward the end of the month of September.

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

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

10 COMMISSIONER YAKI: That's all I wanted to
11 know.

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

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

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

25 There are a new cast of characters at the

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1 commission. We're still trying to learn how to work
2 with each other, and also, we came in midstream. So
3 for example, the statutory report, we've had to rush
4 the job, but I think that staff has done a good job of
5 pulling this thing together under these circumstances.

6 So on that note, we will adjourn. Thank
7 you, everyone, for joining us.

8 (Whereupon at 4:50 p.m. the aforementioned
9 meeting adjourned.)

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