

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

UNEDITED

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Friday, September 16, 2005

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The Commission convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C. at 9:30 a.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 (via telephone)
- KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

- TERESA BROOKS
- CHRISTOPHER BYRNES
- DEBRA CARR, ESQ., Associate Deputy Staff Director
- IVY DAVIS, Director ERO/Acting Chief, Regional Programs Coordination Unit

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STAFF PRESENT (Continued):

TERRI DICKERSON, Assistant Staff Director

PAMELA A. DUNSTON, Chief, Administrative Services

Clearinghouse Division

BARBARA FONTANA

LATRICE FOSHEE

DORELLE GRAY

GEORGE M. HARBISON, Director, Human Resources

Division/Acting Chief, Budget and Finance

Division

SETH JAFFE

SOCK-FOON MACDOUGALL

TINA LOUISE MARTIN, Director for Management, Office

of Management

EMMA MONROIG, Solicitor/Parliamentarian

AONGHAS ST. HILAIRE

AUDREY WRIGHT

MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS

LISA NEUDER

KIMBERLY SCHULD

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P R O C E E D I N G S

(9:33 a.m.)

1
2
3 CHAIRPERSON REYNOLDS: Okay. This meeting
4 will come to order.

5 This is a meeting with most of the
6 Commissioners participating here in Washington.
7 There's an exception. Commissioner Yaki is
8 participating by telephone.

9 Commissioner Yaki, are you there?

10 COMMISSIONER YAKI: Yes.

11 I. Approval of Agenda

12 CHAIRPERSON REYNOLDS: Very good. Okay.
13 The first item on the agenda in the approval of the
14 agenda. Section 3 of the agenda should be amended in
15 order to postpone until further notice the briefing on
16 the Patriot Act as it relates to anti-Arab and anti-
17 Muslim intolerance.

18 May I have a motion?

19 VICE CHAIRPERSON THERNSTROM: So moved.

20 COMMISSIONER KIRSANOW: Second.

21 CHAIRPERSON REYNOLDS: Discussion.

22 COMMISSIONER YAKI: I just want to thank
23 the rest of the Commission for allowing this to be
24 postponed so that I could participate in person when
25 I am actually in Washington, D.C. So thank you very

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1 much.

2 CHAIRPERSON REYNOLDS: Okay. Let's vote.
3 All in favor, please indicate by saying aye.

4 (Chorus of ayes.)

5 CHAIRPERSON REYNOLDS: Any in opposition?
6 (No response.)

7 CHAIRPERSON REYNOLDS: Okay.

8 VICE CHAIRPERSON THERNSTROM: I was just
9 going to say if there were what would happen.

10 CHAIRPERSON REYNOLDS: Well, we just want
11 to have it on the record.

12 Okay. The motion passes unanimously.

13 **II. Approval of Minutes**

14 CHAIRPERSON REYNOLDS: Now, the agenda.
15 We have some additional amendments. There is a most
16 to postpone a vote on the state advisory report so
17 that the SAC working group can continue its work.

18 VICE CHAIRPERSON THERNSTROM: So moved.

19 CHAIRPERSON REYNOLDS: Thank you.

20 Second?

21 COMMISSIONER TAYLOR: Second.

22 CHAIRPERSON REYNOLDS: Thank you.

23 Discussion?

24 (No response.)

25 CHAIRPERSON REYNOLDS: All in favor please

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1 say aye.

2 (Chorus of ayes.)

3 CHAIRPERSON REYNOLDS: Any in opposition?

4 (No response.)

5 CHAIRPERSON REYNOLDS: Okay. The motion
6 passes unanimously.

7 Please let the record reflect that
8 Commissioner Braceras has joined us.

9 The second item is the approval of the
10 minutes of the July 22nd and August 26th meetings.
11 May I have a motion?

12 COMMISSIONER TAYLOR: So moved.

13 CHAIRPERSON REYNOLDS: May I have a
14 second?

15 COMMISSIONER KIRSANOW: Second.

16 CHAIRPERSON REYNOLDS: Any discussion?

17 (No response.)

18 CHAIRPERSON REYNOLDS: All in favor,
19 please say aye.

20 (Chorus of ayes.)

21 CHAIRPERSON REYNOLDS: Any in opposition?

22 (No response.)

23 CHAIRPERSON REYNOLDS: The motion passes
24 unanimously.

25

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III. Announcements

1
2 Okay. At this point next up are
3 announcements. I'd like to take a minute on behalf of
4 the Commission to acknowledge the victims of Hurricane
5 Katrina in Louisiana, Mississippi, and Alabama.
6 Although these people have experienced unbearable
7 hardships and may continue to do so for some time, we
8 all can take solace in the amazing outpouring of
9 support these individuals have received from their
10 fellow citizens in surrounding states and from all
11 over the United States.

12 On behalf of the U.S. Commission on Civil
13 Rights, I encourage all who are here today, as well as
14 all people, to contribute to Katrina relief efforts in
15 any way you see fit.

16 Finally, on February -- September 2nd, a
17 special message was sent to SAC members in Alabama,
18 Louisiana, and Mississippi expressing the Commission's
19 best wishes on behalf of the Commissioners, Staff
20 Directors and staff, as well as asking that they
21 report to the central regional office any allegations
22 of discrimination in the recovery efforts.

23 This week is National Historical Black
24 Colleges and Universities Week. HBCUs have educated
25 many American leaders and continue to play an

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1 instrumental role in providing educational
2 opportunities for all people.

3 This Commission is dedicated to insuring
4 that these valued institutions continue to maximize
5 their ability to contribute to our intellectual and
6 cultural progress, and we'll conduct a briefing in the
7 coming year to investigate the best ways to achieve
8 this goal.

9 Yesterday marked the beginning of Hispanic
10 Heritage Month. This is a month which we celebrate
11 the tremendous contributions of Latinos to our
12 country. On behalf of the U.S. Commission on Civil
13 Rights, I call upon all people of the United States to
14 observe the month with appropriate ceremonies and
15 activities.

16 Yesterday, September 15th, marked the 42nd
17 anniversary of the 1963 bombing of the 16th Street
18 Baptist Church in Birmingham, Alabama by the Klu Klux
19 Klan. This tragic bombing carried out by cowardly
20 racists killed four young black girls. Events such as
21 this one hopefully can teach us to remain ever
22 vigilant to assure that those who attempt to impose
23 their will on their fellow Americans by force or
24 coercion are never allowed to do so.

25 Next up we will discuss some personnel

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1 matters. First I'd like to announce that Jenny Park,
2 an attorney advisor at the Commission for over five
3 years, left the Commission earlier this week to accept
4 a position with the Patent and Trademark Office. On
5 behalf of the Commission, I want to acknowledge her
6 excellent contributions to the Commission over these
7 past years. We all wish her the best in her new
8 position.

9 Cecilia Towns who cannot be here today
10 began an internship with the Office of Civil Rights
11 Evaluation earlier this week. Cecilia is a senior at
12 Howard University majoring in African American
13 studies. She will be with the Commission through
14 December 6th.

15 And at this point we'll hear from the
16 Staff Director.

17 COMMISSIONER KIRSANOW: Mr. Chair.

18 CHAIRPERSON REYNOLDS: Yes.

19 COMMISSIONER KIRSANOW: I just wanted to
20 make one brief note that the Roberts civil rights
21 record that my assistant had prepared and we
22 distributed at the last meeting was introduced into
23 the record of the Roberts confirmation hearing, and I
24 think that's a good thing. It, I think, fleshes out
25 the record of Judge Roberts. I think it's good for

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1 the Commission to have weighed in in some fashion
2 without, you know, an opinion.

3 And, again, I appeared in my personal
4 capacity yesterday, and we may want to think at some
5 point about, as part of our clearing house function,
6 making that report available generally to the public.

7 CHAIRPERSON REYNOLDS: Okay. I think that
8 we should prepare a motion and at our next meeting
9 have discussions on -- Commissioner Braceras?

10 COMMISSIONER BRACERAS: I haven't received
11 a copy of it yet.

12 CHAIRPERSON REYNOLDS: That's amazing.

13 COMMISSIONER BRACERAS: I've asked several
14 people several times. Remember I E-mailed you back
15 that I couldn't open it and could I have a hard copy?
16 It's okay.

17 And I mentioned it to Chairman Reynolds.

18 CHAIRPERSON REYNOLDS: And I asked someone
19 to do it. Okay, okay.

20 COMMISSIONER BRACERAS: So I have --

21 CHAIRPERSON REYNOLDS: Let's do magic.

22 COMMISSIONER BRACERAS: Thank you. I
23 will do so now.

24 CHAIRPERSON REYNOLDS: Vice Chair
25 Thernstrom.

1 VICE CHAIRPERSON THERNSTROM: Neither
2 Commissioner Braceras nor Commissioner Kirsanow
3 testified yesterday speaking for the Commission. They
4 went there speaking for themselves, but I want to
5 commend both of them on the superb job that they did,
6 and it was nice to see two faces of the Commission
7 even in an unofficial capacity do as well as both of
8 them did.

9
10 COMMISSIONER KIRSANOW: Thank you.

11 CHAIRPERSON REYNOLDS: Okay. At this
12 point we'll hear from the Staff Director.

13 IV. Staff Director's Report

14 MR. MARCUS: Thank you, Mr. Chairman,
15 Madam Vice Chairman, Commissioners.

16 If it please the Commission I'd like to
17 extend my written Staff Director's report with brief
18 additional remarks regarding agency reform and
19 Hurricane Katrina.

20 I'll begin with agency reforms. We
21 continue to work toward meeting the goal of
22 implementing all pending GAO recommendations,
23 resources permitting, by mid-January 2005.
24 Considerable progress has been made over the course of
25 the summer.

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1 For example, we have recently issued
2 administrative instructions establishing new controls
3 for procurement management. These AIs address general
4 GAO concerns regarding over centralization of
5 contracting functions within the office of the Staff
6 Director and the specific recommendation regarding
7 greater controls over contracting activities.

8 We plan to provide more agency reforms
9 regarding procurement over the coming months.

10 We've also recently submitted our budget
11 estimate to OMB based on the figures recently approved
12 by the Commission. The budget estimate incorporates
13 new proposed strategic goals that have been
14 distributed to the Commissioners and on which we are
15 now seeking stakeholder input.

16 The inclusion of strategic goals reflects
17 the work that we are doing to revamp the agency's
18 strategic planning.

19 We currently are preparing both a five-
20 year strategic plan and a human capital strategic plan
21 which we plan to have available in proposed final form
22 in time for the December meeting. This also responds
23 to a series of GAO recommendations.

24 We have also recently established a formal
25 policy on telework. Our new telework policy is part

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1 of a general federal program designed to reduce
2 traffic and improve the environment, improve employee
3 morale and commitment, improve productivity and
4 quality of work, help hire and retain employees, and
5 enable employees to better arrange their use of leave.
6 It is also required by federal law.

7 Yesterday, we submitted a report to
8 Congress describing the significant steps that the
9 agency has undertaken to reform our financial
10 operational project planning, strategic planning, and
11 communications processes. In this report we describe
12 both the significant progress that we have made over
13 the last nine months, as well as significant reform
14 activities still underway.

15 This report is required by House
16 appropriations bill committee report. A similar
17 report will be required by the end of this month to
18 the Senate appropriations committee.

19 I'd also like to say a few words about
20 Hurricane Katrina. As the Chairman has indicated, our
21 regional office coordinator at my request sent a
22 special message to State Advisory Committee members in
23 Alabama, Louisiana, and Mississippi shortly after
24 Hurricane Katrina, and then additional messages were
25 sent to other State Advisory Committees around the

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1 country.

2 These messages expressed best wishes on
3 behalf of the Commissioners, the Staff Director and
4 staff of the agency. They also requested that State
5 Advisory Committee members report to the central
6 regional office any allegations of discrimination in
7 the recovery effort. We have received only a few
8 responses from State Advisory Committee members,
9 although our regional offices are tracking media
10 reports.

11 Last week Louisiana and Alabama SAC
12 members emphasized the following concerns.

13 One, that needed assistance is not getting
14 to the rural areas; and

15 Two, that there are reports that Southern
16 Baptist Convention churches are restricting their
17 efforts to affiliates only.

18 This week our central regional office
19 received two additional messages from SAC members.
20 First, one SAC member in Baton Rouge, Louisiana said
21 the following: "I'm volunteering with the Red Cross
22 here. We have one parish that is known for being very
23 segregated, and that is putting it politely. They
24 have essentially told the Red Cross that they do not
25 want 'those people' in their parish. They have made

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1 us consolidate our evacuees to one location and
2 indicated that they did not want any new evacuees once
3 those were gone."

4 Another SAC member in Jackson, Mississippi
5 said the following: "The generosity and support for
6 Katrina victims within Jackson has been amazing.
7 Fortunately, I am unable to report any racial
8 problems."

9 Those are the responses that we've gotten
10 from SAC members. To the extent that we get
11 additional reports over the coming weeks and months we
12 will continue to pass them along to the Commission
13 members. That is my report.

14 CHAIRPERSON REYNOLDS: Okay. Could you
15 shed some additional light on this move in the Senate
16 to reduce our budget by \$96,000?

17 MR. MARCUS: Yes, Mr. Chairman. The House
18 of Representatives had recently passed an
19 appropriations bill which provided funding for this
20 agency for fiscal year 2006 at a level of \$9.096
21 billion, which is consistent with our 2005 funding and
22 is also consistent with the amount requested in the
23 President's budget.

24 Recently the Senate has been debating an
25 appropriations bill that would provide funding to the

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1 agency of only \$9 million even, which is a \$96,000
2 reduction from our current budget.

3 CHAIRPERSON REYNOLDS: And it's my
4 understanding that the folks in the Senate believe
5 that this is not a reduction in our budget; is that
6 correct?

7 MR. MARCUS: The language in the committee
8 report indicated that the \$9 million even would
9 represent a slight increase of, I believe, \$25,000
10 over 2005 levels. We're trying to determine why they
11 believe that it would be an increase when it appears
12 to be a decrease in the amount of \$96,000, and we'll
13 be communicating appropriately with congressional
14 staff.

15 CHAIRPERSON REYNOLDS: Okay. Any other
16 questions or concerns?

17 COMMISSIONER KIRSANOW: Yes. Mr. Staff
18 Director, a couple of things. One is where are we
19 right now with respect to getting on line for the
20 audit or can we implement an audit at this point?

21 MR. MARCUS: We have now issued two
22 requests for proposals. The first time we issued a
23 request for proposal there were a number of responses
24 by outside accounting firms who were interested in
25 submitting a bid, but in the end none of them did.

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1 We then went back to them to ask why they
2 did not submit a bid. They had various reasons. Some
3 of them indicated that they simply did not have enough
4 time. Others indicated that they didn't think they
5 would have enough resources to do it. At least one
6 indicated that they did not think that we would be
7 auditable for the 2005 fiscal year.

8 Based on the fact that some of the
9 accountants suggested that they might have submitted
10 a bid if they had had more time to do so, we then
11 issued a second RFP. The deadline for responding to
12 that RFP passed approximately a week ago.

13 We received three bids and a few non-bid
14 responses. We have contacted at least one of the
15 nonbidders to find out why they hadn't bid, and we
16 found out that it was not based on a concern that we
17 were not auditable.

18 So we now have three bids to choose among,
19 and we are currently in the process of assembling a
20 technical panel to review them, including making
21 contacts to persons outside the agency who have
22 sufficient technical expertise that they could assist
23 us in choose among the panelists in determining to
24 what extent the bids are appropriate and could provide
25 the services we require.

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1 COMMISSIONER KIRSANOW: Mr. Chair, just a
2 suggestion. You know, for a while we have suspended
3 the regular meetings of the Budget Committee mainly
4 because there wasn't a whole lot to report. We may
5 want to revisit whether or not we should have a couple
6 of meetings as matters develop so that we don't take
7 up time here talking about it.

8 CHAIRPERSON REYNOLDS: Okay. Did you have
9 any conversations? My concern is that we have at
10 least one firm that has concluded that because of our
11 lack of documentation we cannot be audited. I don't
12 want to spend money and then at the end of the process
13 have whichever firm that is selected reach the same
14 conclusion.

15 I don't know if this is possible, but on
16 the front end could we ask the three companies that
17 have submitted bids to render an opinion as to whether
18 it's possible to audit our books if we were to provide
19 them with a description of the type of documentation
20 we have in our possession?

21 Based on that information, they could give
22 us an indication whether they were confident that at
23 the end of the process, you know, that they would not
24 tell us that an audit is not possible.

25 MR. MARCUS: We can certainly review both

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1 with our legal staff and also with our outside
2 procurement consultant, to the extent that's
3 permissible within the rules, and if it is, then we
4 can certainly speak to them about it.

5 It is my understanding that those three
6 bidders did believe that we were auditable, and at
7 least one of the non-bidders did explicitly state that
8 they believed that we are auditable. They're just not
9 sure the amount of time and resources that would be
10 required to audit us.

11 We have heard from some outsiders that the
12 issue in their mind is not so much whether we were
13 auditable as the amount of time and resources
14 necessary to complete the job, but we'll be happy to
15 consult with legal and procurement consultants to
16 determine whether we can seek additional statements
17 from the bidders.

18 CHAIRPERSON REYNOLDS: Okay. Commissioner
19 Kirsanow.

20 COMMISSIONER KIRSANOW: Thank you.

21 Mr. Staff Director, I don't know if you
22 know this. With respect to the Senate appropriations,
23 do we have any kind of a timetable for when this all
24 goes to conference?

25 MR. MARCUS: We've not heard a timetable,

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1 but we can certainly make inquiries and pass the
2 information along to the Commissioners.

3 COMMISSIONER KIRSANOW: I mean, as we all
4 know, we spoke with a number of people on the
5 congressional side several months ago, and it may be
6 a good idea to revisit that procedure.

7 MR. MARCUS: The matter was still being
8 debated by the Senate yesterday. They may have passed
9 it yesterday. If not, I expect it imminently and we
10 can find out when it will go to conference.

11 CHAIRPERSON REYNOLDS: Any other
12 questions, concerns, comments?

13 (No response.)

14 V. State Advisory Committee Issues

15 CHAIRPERSON REYNOLDS: Okay. We have some
16 additional motions. Here I'll read the next motion.
17 It reads:

18 "I move that the Commission request that
19 the State Advisory Committees in the regions and
20 states to be identified by the General Counsel take up
21 the desegregation status of public school districts
22 within their jurisdiction as a research project. This
23 project will support the work of the Office of General
24 Counsel in producing the 2007 statutory enforcement
25 report on the same topic.

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1 "As of 2001, there were 400 school
2 districts still under federal supervision with respect
3 to desegregation. The Commission's statutory
4 enforcement report on the desegregation status of
5 elementary and secondary schools would examine the
6 unitary status of the schools and possibly others to
7 determine the success or failure of desegregation. It
8 would be helpful to have State Advisory Committees in
9 all states affected by court desegregation orders
10 collect data on the relevant school districts within
11 their respective jurisdictions."

12 May I have a motion?

13 COMMISSIONER KIRSANOW: So moved.

14 CHAIRPERSON REYNOLDS: A second?

15 COMMISSIONER TAYLOR: Second.

16 CHAIRPERSON REYNOLDS: Discussion?

17 VICE CHAIRPERSON THERNSTROM: Go ahead,
18 Jen.

19 COMMISSIONER BRACERAS: No. You, Madam
20 Vice Chair.

21 VICE CHAIRPERSON THERNSTROM: Give us a
22 little background on this. Has there been a
23 conversation with the regional offices, the State
24 Advisory Committees as to their capacity to do exactly
25 what?

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1 MR. MARCUS: Mr. Chairman, if I may.

2 CHAIRPERSON REYNOLDS: Yes.

3 MR. MARCUS: There have been a few
4 conversations in some regions, but not with all
5 potentially affected regions. The southern regional
6 office has already developed a number of ideas about
7 how this can be done and, in fact, has been
8 communicating with State Advisory Committees in their
9 region and has done a considerable amount of work on
10 some states to look into the current status of
11 desegregation efforts in their states.

12 Within the central regional office, there
13 has been some discussion at a preliminary level,
14 although I don't believe that there has been work
15 done.

16 There are other regional offices that are
17 potentially implicated around the country where I
18 don't believe work has been done.

19 We are now at a point where I expect that
20 there would be work by some State Advisory Committees,
21 but this is certainly something where we could profit
22 from having views of a larger number, and if so, have
23 nationwide coordination to insure that the data is as
24 consistent as possible.

25 There are precedents for requests by the

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1 Commission that State Advisory Committees look into
2 matters. Since under FACA they are independent
3 entities, they can look at issues that they choose to,
4 but the Commission has, for instance, after September
5 11 recommended that State Advisory Committees look
6 into post 9/11 issues, and State Advisory Committees
7 have done so.

8 This is already an issue that is being
9 looked into by some SACs, and the question is whether
10 it would be helpful to urge that a greater number of
11 them look into it.

12 Currently, as the Commissioners recall,
13 there is a project that has been approved for the
14 Office of General Counsel for 2007 regarding
15 elementary and secondary desegregation. It will be
16 the statutory enforcement report for this year.

17 The Office of General Counsel, of course,
18 is far smaller now than it was a few years ago. It
19 was only a few years ago that there were more than ten
20 attorneys in the Office of General Counsel. We
21 currently have two attorneys. So they are now under
22 a challenge to be able to do meaningful analyses at
23 the same time they are doing the legal work of the
24 agency.

25 By having the State Advisory Committees

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1 look at things first and then provide that by way of
2 support to the Office of General Counsel, we could
3 satisfy a few different goals. One is we could insure
4 or at least recommend that State Advisory Committees
5 are working on issues that have been identified as
6 national priorities by this Commission when it votes
7 on these projects.

8 Second, it can be a way of compensating
9 for a lack of resources both at a regional level and
10 at the Office of General Counsel by having a greater
11 degree of cooperation between the Office of General
12 Counsel, the regional offices, and the State Advisory
13 Committees.

14 Third, it can enrich both the work of the
15 State Advisory Committees and the Office of General
16 Counsel by having an interchange between the two.

17 With respect to the State Advisory
18 Committees, they have a capacity to bring a great deal
19 of local information and knowledge to issues that
20 really are local in nature, and when it comes to these
21 desegregation agreements, we see a great deal of local
22 variations even within particular states.

23 At the same time, our regional staff did
24 not include any attorneys so that by involving the
25 regional offices with the Office of General Counsel,

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1 we have a natural way to combine the local information
2 in connection with the State Advisory Committee, the
3 social scientific expertise that we have at the
4 regional level, as well as the legal expertise within
5 the Office of General Counsel.

6 VICE CHAIRPERSON THERNSTROM: You know, I
7 appreciate everything that you're saying, but -- there
8 is a "but" here -- before I am willing to urge a large
9 number of SACs to work on this, I'd like to see
10 something of the work that the SACs that area already
11 engaged in this issue have done so that I have some
12 sense of whether I think the questions they're asking
13 are the right ones, the way they're collecting data is
14 correct, what we're likely to get at the end of the
15 day.

16 I wonder if this can't be done in stages
17 so that we have a little bit more information before
18 we sign onto a kind of blanket request here.

19 MR. MARCUS: What I would propose is as
20 follows. I have already asked the Office of General
21 Counsel to expedite their work in developing the
22 discovery plan in conceptual phase for the elementary
23 and secondary projects. Since it's a 2007 project,
24 they would normally not be doing that for a
25 considerable length of time, but I would like to get

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1 at a national level a model working with the regional
2 offices so that we can get Commissioner input at an
3 early stage that can guide the State Advisory
4 Committees.

5 What I'm concerned about is that if we
6 don't do that and the State Advisory Committees go too
7 far too quickly, since some of them are already
8 looking at the issue, we may be deprived of the
9 opportunity to get SAC input on the issues and
10 methodologies that the Commissioners choose to have.

11 VICE CHAIRPERSON THERNSTROM: Okay, but if
12 we were to give those SACs that are already working on
13 the issue input rather than extending the invitation
14 for everybody to join in the effort, then we would be
15 developing guidelines for SACs that will subsequently
16 be looking at the issue.

17 I mean, you know, I would just like to see
18 up front what's been done so far, again, what the
19 questions being asked, et cetera, are and so that they
20 get our input at this stage before we've got an awful
21 lot of SACs working on the same issue.

22 CHAIRPERSON REYNOLDS: Vice Chair
23 Thernstrom, so you don't think there will be
24 sufficient time to revise or redirect the efforts
25 after we have prepared a document that lays out the

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1 process and the questions, the methodology?

2 VICE CHAIRPERSON THERNSTROM: It just
3 seems to me the earlier we deliver messages about how
4 we would like to see the issue framed, obviously they
5 are independent, but how we would like to see the
6 issue framed, the better off we are, and the best way
7 to do that is to look at the work of SACs who have
8 already started down this road.

9 CHAIRPERSON REYNOLDS: Okay. Any other
10 comments?

11 (No response.)

12 CHAIRPERSON REYNOLDS: All right. So,
13 Ken, at this point who started work on the project?

14 MR. MARCUS: Work has been started and
15 considerable work has been done within the Southern
16 Regional Office.

17 VICE CHAIRPERSON THERNSTROM: Good. Can
18 we look at that? Is there anything to look at?

19 MR. MARCUS: I can certainly provide a
20 description of the methodology that they're following,
21 certainly.

22 CHAIRPERSON REYNOLDS: Have they collected
23 any data at this point?

24 MR. MARCUS: Yes.

25 CHAIRPERSON REYNOLDS: Okay. All right.

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1 So if I understand, Vice Chair Thernstrom, the
2 concerns that you've just expressed, that what you
3 would like to do is to table this issue until we've
4 had an opportunity to review the work or at least some
5 of the work that has been done.

6 VICE CHAIRPERSON THERNSTROM: That's
7 correct. I would like to table the motion as
8 currently written, yes, until we've had an opportunity
9 to get our arms around what's been done.

10 CHAIRPERSON REYNOLDS: Okay. This would
11 not affect our timetable; is that correct?

12 MR. MARCUS: If we postpone it, then the
13 soonest we could vote on this is a month from now, and
14 the only issue is whether in the intervening months
15 there are State Advisory Committees that would vote to
16 undertake different projects for the incoming year and
17 so they wouldn't be looking at that. That's the only
18 clarification.

19 CHAIRPERSON REYNOLDS: Okay. We have what
20 I will treat as a motion to table.

21 VICE CHAIRPERSON THERNSTROM: Yes. Let me
22 just ask a question about that. Is there some way of
23 communicating to the SACs that we will be in a month
24 taking up this issue and they might keep in mind that
25 we have a particular interest, but we have not yet

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1 voted on the matter?

2 MR. MARCUS: I suppose we could, although
3 at this point I think that we wouldn't be asking them
4 to look at elementary and secondary. All that I could
5 tell them at this point without further guidance is
6 that the Commissioners are considering whether or not
7 to make a recommendation that --

8 VICE CHAIRPERSON THERNSTROM: Okay. Well,
9 that's fine. At least it alerts them that this is an
10 issue of potential interest to us.

11 MR. MARCUS: We could certainly pass that
12 along.

13 CHAIRPERSON REYNOLDS: Okay. Is there a
14 second?

15 COMMISSIONER BRACERAS: Second.

16 CHAIRPERSON REYNOLDS: Additional
17 discussion?

18 COMMISSIONER YAKI: I have a question.
19 Did we have (unintelligible) Voting Rights Act?

20 CHAIRPERSON REYNOLDS: I'm sorry,
21 Commissioner Yaki. I didn't understand you.

22 VICE CHAIRPERSON THERNSTROM: It's not
23 because you ---

24 COMMISSIONER YAKI: Am I incomprehensible
25 or you --

1 VICE CHAIRPERSON THERNSTROM: No, no, no.

2 CHAIRPERSON REYNOLDS: Okay. That's much
3 better.

4 VICE CHAIRPERSON THERNSTROM: It's purely
5 an electronic problem.

6 COMMISSIONER YAKI: I've heard that excuse
7 before.

8 Just asking did we ever ask the SACs to do
9 anything similar with regard to the Voting Rights Act.

10 CHAIRPERSON REYNOLDS: Does anyone recall?

11 MR. MARCUS: I don't believe so. We had
12 not done this very frequently in the past, although
13 this is a model that, if successful, I think we should
14 consider doing for projects in the future.

15 COMMISSIONER YAKI: Well, obviously the
16 VRA is the big project for next year and probably the
17 member states that would be looking at this would be
18 limited by (unintelligible) to consider that as well.
19 I would, for the purposes of comity -- c-o-m-i-t-y,
20 not comedy -- acquiesce with Commissioner Thernstrom's
21 request for, I guess, a stay of this forum. I will in
22 the end be supporting the Staff Director
23 recommendation.

24 CHAIRPERSON REYNOLDS: Additional
25 comments?

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1 (No response.)

2 CHAIRPERSON REYNOLDS: Okay. All in
3 support of Vice Chair Thernstrom's motion please say
4 aye.

5 (Chorus of ayes.)

6 CHAIRPERSON REYNOLDS: Any in opposition?

7 (No response.)

8 CHAIRPERSON REYNOLDS: Okay. The motion
9 passes unanimously.

10 Next step. Here's the motion.

11 "I move that the Commission approve the
12 report produced by the Office of the Staff Director on
13 the briefing the Commission held on July 15th, 2005,
14 on the stagnation of the black middle class. The
15 report as distributed in draft form to Commissioners
16 includes an executive summary of the panelists'
17 testimony, their written statements and statements
18 from the Chairman" -- that's me -- "and Commissioner
19 Yaki."

20 May I have a motion?

21 VICE CHAIRPERSON THERNSTROM: So moved.

22 CHAIRPERSON REYNOLDS: A second?

23 COMMISSIONER BRACERAS: Second.

24 CHAIRPERSON REYNOLDS: Discussion?

25 (No response.)

1 CHAIRPERSON REYNOLDS: All in favor please
2 indicate by saying aye.

3 (Chorus of ayes.)

4 CHAIRPERSON REYNOLDS: Any in opposition?

5 (No response.)

6 CHAIRPERSON REYNOLDS: The motion passes
7 unanimously.

8 Okay. Let's see what we have left.

9 Okay. I believe this is the last motion.

10 "In Adarand v. Peña, the Supreme Court
11 quoting Richmond v. Croson stated that 'absent
12 searching judicial inquiry into the justification for
13 such race based measures, there is simply no way of
14 determining what classifications are benign or
15 remedial and what classifications are, in fact,
16 motivated by illegitimate notions of racial
17 inferiority or simple racial politics.' The Court
18 went on to hold that federal programs that use racial
19 classification are subject to strict judicial
20 scrutiny.

21 "While the Court has not provided clear
22 guidance on the contours of the strict scrutiny
23 standard, it is clear that any state or federal agency
24 that uses racial preferences must provide a strong
25 basis in evidence for the conclusion that the use of

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1 racial preferences is necessary.

2 "In an attempt to comply with this
3 constitutional requirement, federal and state agencies
4 and contractors have commissioned disparity studies to
5 demonstrate discrimination with the statistical
6 analysis showing under representation of minorities or
7 women among federal contractors. The briefing would
8 feature academic experts, and the subject matter, who
9 can provide a wide range of viewpoints about the
10 methodological and empirical strength and quality of
11 disparity studies conducted since 1995 and the
12 relationship of these studies to federal agencies'
13 procurement activities."

14 May I have a motion in support?

15 VICE CHAIRPERSON THERNSTROM: So moved,
16 but because I don't know my Robert's Rules the way I
17 should --

18 CHAIRPERSON REYNOLDS: We're pretty
19 informal around here.

20 VICE CHAIRPERSON THERNSTROM: -- it seems
21 to me the sentence "in an attempt to comply" should
22 include or it should read "federal and state agencies,
23 municipalities, and contractors." A lot of these
24 disparity studies have been commissioned by
25 municipalities.

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1 CHAIRPERSON REYNOLDS: Okay. I will take
2 that as an amendment. Is there a second to the
3 amended motion?

4 COMMISSIONER BRACERAS: Second.

5 CHAIRPERSON REYNOLDS: Thank you.
6 Discussion?

7 COMMISSIONER YAKI: Discussion. What
8 would be the timing?

9 CHAIRPERSON REYNOLDS: Staff Director
10 Marcus?

11 MR. MARCUS: I would recommend December
12 for it, the advantage being that it would be in the
13 same calendar year as two important studies. First,
14 the Adarand report that we're doing, and second, a
15 report by the National Academy of Science dealing with
16 disparity studies, and I would think that it would be
17 useful to have this briefing close in time and
18 preferably in the same calendar year as those two, as
19 the reports come out.

20 COMMISSIONER YAKI: Okay. Thank you.

21 CHAIRPERSON REYNOLDS: Vice Chair
22 Thernstrom.

23 VICE CHAIRPERSON THERNSTROM: I'm just
24 looking at this same sentence again. I don't think
25 contractors themselves, but I could be wrong, have

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1 commissioned disparity studies. It's really federal
2 and state agencies as well as municipalities. I don't
3 believe contractors are commissioning these, but I
4 could be wrong again. Other people here probably know
5 better.

6 CHAIRPERSON REYNOLDS: Well, I don't know.
7 Out of an abundance of caution, how about if we just
8 leave that in. I don't think anything would turn on
9 it if we turn out to be wrong or if you turn out to be
10 right, I should say.

11 Commissioner Taylor.

12 COMMISSIONER TAYLOR: I just have a
13 question as to the direction. It seems rather narrow,
14 and I just want to make sure. Is that intentional?
15 We're going to focus on really the debate as to the
16 quality of the study. Is that what we're really
17 focusing on here rather than this third bullet point,
18 which to me personally is probably more important
19 relative to Adarand in the sense that even if you have
20 a study that is properly done and you demonstrate the
21 disparities, I mean, that's just the first question.

22 So are we intentionally being this narrow
23 or maybe it's just me that thinks it. I'm more
24 concerned about the second question than I am, quite
25 frankly, about the first.

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1 CHAIRPERSON REYNOLDS: Okay. Let me
2 catch up with you. I'm trying to find that bullet
3 point that you're referring to.

4 COMMISSIONER BRACERAS: Yeah, me, too.

5 VICE CHAIRPERSON THERNSTROM: What bullet
6 point? What are you looking at?

7 COMMISSIONER TAYLOR: The scope.

8 CHAIRPERSON REYNOLDS: Are you in Section
9 7?

10 COMMISSIONER TAYLOR: No. I'm sorry.
11 Mine is maybe numbered a little differently than you
12 all.

13 VICE CHAIRPERSON THERNSTROM: I don't have
14 any numbers at all. That's the problem.

15 COMMISSIONER TAYLOR: Lisa is going to
16 help here.

17 CHAIRPERSON REYNOLDS: Okay. Does
18 everyone have the document?

19 COMMISSIONER BRACERAS: I don't have the
20 document.

21 CHAIRPERSON REYNOLDS: Okay. Would you
22 mind reading the particular bullet that you're
23 concerned about?

24 COMMISSIONER TAYLOR: This relates to the
25 scope of the study, and the third bullet point reads,

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1 "The relationship of these studies to federal
2 agencies' procurement activities," which is something
3 I agree with.

4 CHAIRPERSON REYNOLDS: Okay, and your
5 concern?

6 COMMISSIONER BRACERAS: I'm sorry. Just
7 to clarify, is this the document that was prepared
8 just for your personal use?

9 CHAIRPERSON REYNOLDS: No, it's in the
10 briefing book.

11 VICE CHAIRPERSON THERNSTROM: It is in the
12 briefing book.

13 COMMISSIONER BRACERAS: I don't have that.

14 VICE CHAIRPERSON THERNSTROM: It's at the
15 very end, Jennifer, very end. In fact, it's the last
16 page.

17 COMMISSIONER BRACERAS: I didn't receive
18 it.

19 CHAIRPERSON REYNOLDS: Did you look in
20 Section 8?

21 COMMISSIONER BRACERAS: I don't think I
22 have that section for some reason.

23 Okay. That's fine. I think for some
24 reason we either didn't receive that one or just
25 missed it. Okay. Thank you very much.

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1 MR. MARCUS: Let me say that there was not
2 intended to be a discrepancy between the concept paper
3 and motion. The idea is that the briefing will look
4 primarily at the methodologies used in the disparities
5 studies, but that the briefing may be broad enough to
6 include not just the narrow methodological question,
7 but also as the bullet point points out, the
8 relationship of these studies to federal agencies'
9 procurement.

10 CHAIRPERSON REYNOLDS: Yes, but that was
11 a part of the motion also.

12 COMMISSIONER TAYLOR: It was. I just
13 wanted to get a sense of the body as to what folks
14 were most interested in and as we identified potential
15 panelists and speakers.

16 CHAIRPERSON REYNOLDS: Okay.

17 COMMISSIONER TAYLOR: It was more of a
18 question than anything else.

19 CHAIRPERSON REYNOLDS: Well, you have
20 kicked up all of this dust here.

21 COMMISSIONER TAYLOR: Yeah, it was just a
22 general question. I mean, I'm just personally -- and
23 even if we agree that the study, again, has been
24 properly done and demonstrates disparities, I mean, I
25 just tend to be more focused on the next question.

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1 CHAIRPERSON REYNOLDS: Okay, and please
2 articulate that.

3 COMMISSIONER TAYLOR: From my perspective
4 at least the next question is rather simple, and
5 again, this is how I frame the issue. I tend not to
6 be as focused on whether or not there are disparities
7 sine I can agree that there's a disparity and then
8 start to focus on the important policy issue, that is,
9 whether or not, again, as we addressed in our Adarand
10 report, whether or not we ask the agencies to do the
11 hard work of identifying the hurdles in place that are
12 creating the disparities.

13 And then the second question is whether or
14 not they're really focusing whether in a race neutral
15 way or race conscious way on addressing those issues.

16 As it was read, at least, this sounded
17 narrowly crafted to address methodology, which is
18 important because we've also had discussions about
19 disparity generally, and if it's intended to touch
20 upon that for those studies, then I wanted to know
21 that versus that broader question.

22 CHAIRPERSON REYNOLDS: Okay. I'm just
23 going to jump in here quickly. At least my view of
24 this proposal, it's first to assess the factual
25 predicate for using racial preferences, and also I

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1 hope that this proposal would also look into whether -
2 - well, you may have a statistical disparity that has
3 nothing to do with discriminatory conduct, and for
4 example, do they disaggregate those types of
5 statistical -- well, that type of under representation
6 versus under representation that could be traced back
7 to discriminatory conduct.

8 So that's what I was thinking, and the
9 rest of the Commission will speak for themselves.

10 Vice Chair Thernstrom?

11 VICE CHAIRPERSON THERNSTROM: Yeah.
12 Commissioner Taylor, it seems to me we're not simply
13 examining methodology here. I think we're also
14 looking at the underlying assumptions, and this is
15 really piggybacking on what the Chair just said.

16 And on the same page that you're looking
17 at, one of the sentences says here the critiques point
18 to a number of questions are listed, but the last one
19 is the lack of a theory of discrimination underlying
20 the study.

21 And I would hope that as we look at this
22 issue we would talk precisely about that, that is,
23 precisely about the relationship between disparities
24 and discrimination.

25 COMMISSIONER TAYLOR: Okay, okay.

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1 VICE CHAIRPERSON THERNSTROM: And how you
2 know when there's a close connection and where the
3 questions lie when the connection seems more tenuous.

4 CHAIRPERSON REYNOLDS: Commissioner
5 Taylor, thank you for kicking up the dust. It has
6 helped clarify the issue.

7 COMMISSIONER TAYLOR: I just wondered what
8 our other folks were reading. That's all.

9 MR. MARCUS: Mr. Chairman, if I may, I
10 think there is one point where it would be useful to
11 have some clarity. While the issues that Vice
12 Chairman Thernstrom indicated are part of this scope,
13 as it was written the scope does not include and was
14 not intended to include the question as to whether
15 agencies assure us they're assuring race neutral
16 alternatives.

17 That, of course, is the main subject of
18 the report, but it is not intended to be part of the
19 briefing. I suppose it could be but that was not part
20 of the scope. If Commissioners wanted a change, then
21 we could make the change.

22 VICE CHAIRPERSON THERNSTROM: No, no. I
23 did not mean to indicate that that become part of the
24 scope, but simply that we flesh out the underlying
25 assumptions.

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1 COMMISSIONER TAYLOR: I know our language
2 has become rather loose. We now equate disparity with
3 discrimination, and we're --

4 VICE CHAIRPERSON THERNSTROM: Right,
5 right.

6 COMMISSIONER TAYLOR: -- the issue.

7 VICE CHAIRPERSON THERNSTROM: Exactly.
8 This report should raise questions about the
9 legitimacy of doing so, and if legitimate, in what
10 context?

11 CHAIRPERSON REYNOLDS: Okay. Any other
12 questions or comments?

13 (No response.)

14 CHAIRPERSON REYNOLDS: Okay. At this
15 point we'll vote. All in favor please indicate by
16 saying aye.

17 (Chorus of ayes.)

18 CHAIRPERSON REYNOLDS: All in opposition?

19 (No response.)

20 COMMISSIONER YAKI: I'll abstain.

21 CHAIRPERSON REYNOLDS: Okay. Please let
22 the record reflect that Commissioner Yaki abstained.
23 The motion passes.

24 All right. Well, we're at a close. Oh,
25 I'm sorry. Commissioner Braceras.

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1 COMMISSIONER BRACERAS: Just before we
2 adjourn I wanted to ask about the status of the
3 Patriot Act briefing, if that was going to go forward
4 in November. What is the briefing schedule generally
5 for the next several months?

6 MR. MARCUS: October we are planning a
7 briefing on the Voting Rights Act.

8 COMMISSIONER BRACERAS: Okay.

9 MR. MARCUS: November we're trying to put
10 together the campus anti-Semitism briefing. December
11 I would anticipate being the disparity studies issues.

12 COMMISSIONER BRACERAS: So what did we
13 decide to do with the Patriot Act?

14 CHAIRPERSON REYNOLDS: We haven't decided
15 yet on a date. First we're going to have to circle
16 around and see if we can get the witnesses who we
17 initially secured. We have to check with their
18 schedules, and if everything goes according to plan,
19 they'll be able to participate. If not, we'll have to
20 seek other witnesses of the same caliber.

21 COMMISSIONER BRACERAS: Well, but we can't
22 see if they're available unless we have a date.

23 VICE CHAIRPERSON THERNSTROM: Or some
24 alternative dates.

25 COMMISSIONER BRACERAS: Okay.

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1 Commissioner Yaki, do you still want to go forward
2 with the Patriot Act briefing?

3 COMMISSIONER YAKI: Yes, I do.

4 COMMISSIONER BRACERAS: And what is your
5 sense of when it would be a good time to hold it?

6 COMMISSIONER YAKI: Ideally as soon as
7 possible, but I would hope as was suggested we give a
8 range of a couple of dates and see which ones best fit
9 the best panel that we can put together. I'll leave
10 that up to the Staff Director's discretion.

11 CHAIRPERSON REYNOLDS: Do we have anything
12 planned for January? Do we have any briefings
13 scheduled?

14 MR. MARCUS: The Commissioners voted to do
15 a briefing on the question of discrimination or racial
16 preferences at law schools, the subject of the
17 Professor Richard Sanders' article in either January
18 or February or March, and we've been talking with him
19 about availability, but we haven't specifically fixed
20 something for January.

21 CHAIRPERSON REYNOLDS: Okay. Is there
22 a -- Vice Chair Thernstrom.

23 VI. Future Scheduling

24 VICE CHAIRPERSON THERNSTROM: I have one
25 other matter to bring up before we adjourn. The

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1 practice of this Commission is to set the dates of
2 Commission meetings the following year very late in
3 the calendar year, that is, to set the meeting dates
4 for '06 very late in '05.

5 I find this very difficult since, you
6 know, I've got a calendar that's filling up. Can we
7 by the next Commission meeting put together a schedule
8 of meeting dates and in the future I hope do it
9 earlier?

10 CHAIRPERSON REYNOLDS: There's no
11 reason -- correct me if I'm wrong -- there isn't any
12 reason that we wouldn't be able to do it by the next
13 meeting.

14 MR. MARCUS: We certainly can, and in
15 fact, staff were planning to propose some dates during
16 the October meeting.

17 VICE CHAIRPERSON THERNSTROM: Thanks. I
18 think that's because I already asked before, but we
19 usually do it very late, and that's fine. Good.

20 CHAIRPERSON REYNOLDS: Okay. So,
21 Commissioner Braceras, would you be comfortable if Ken
22 were to work on selecting a date so that at our next
23 meeting he could inform us where we stand with respect
24 to the briefing relating to the Patriot Act?

25 COMMISSIONER BRACERAS: Oh, yes. I was

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1 just curious as to what had happened because I knew
2 that we needed to cancel it, and I had just never
3 heard anything further. So that's why I just wanted
4 the status update.

5 MR. MARCUS: Okay. So I can go ahead, and
6 I want to make sure that it's clear, and see whether
7 the panelist or people that are equivalent expertise
8 are available for January or February of 2006.

9 CHAIRPERSON REYNOLDS: Yes.

10 VICE CHAIRPERSON THERNSTROM: And I would
11 like to note that we had put together an excellent
12 panel, and the quality of that panel is our standard.

13 CHAIRPERSON REYNOLDS: Okay. All right.
14 We are adjourned.

15 (Whereupon, at 10:23 a.m., the Commission
16 meeting was concluded.)

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