

## U.S. COMMISSION ON CIVIL RIGHTS

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## COMMISSION MEETING

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FRIDAY, OCTOBER 7, 2005

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WASHINGTON, D.C.

+ + + + +

The Commission convened at 9:30 a.m. in Room 2226 of the Rayburn House Office Building, Washington, D.C., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, CHAIRMAN

ABIGAIL THERNSTROM, VICE CHAIRMAN

JENNIFER C. BRACERAS, COMMISSIONER

PETER N. KIRSANOW, COMMISSIONER

ARLAN D. MELENDEZ, COMMISSIONER

ASHLEY L. TAYLOR, JR., COMMISSIONER

MICHAEL YAKI, COMMISSIONER

KENNETH L. MARCUS, STAFF DIRECTOR

STAFF PRESENT:

JOHN BLAKELEY

TERESA BROOKS

MARGARET BUTLER

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STAFF PRESENT (continued):

CHRISTOPHER BYRNES

DEBRA CARR, Associate Deputy Staff Director

IVY DAVIS, Chief, Regional Programs Coordination  
Unit

TERRI DICKERSON, Assistant Staff Director

PAMELA DUNSTON, Chief, Administrative Services  
and Clearinghouse division

SETH JAFFE

SOCK-FOON MACDOUGALL

AONGHAS ST. HILAIRE

AUDREY WRIGHT

MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS

LISA NEUDER

KIMBERLY SCHULD

PANELISTS:

EDWARD BLUM, Visiting Fellow, American Enterprise  
Institute

ROGER CLEGG, Vice President and General Counsel,  
Center for Equal Opportunity

RONALD KEITH GADDIE, Professor of Political Science,  
University of Oklahoma

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PANELISTS (Continued):

JON M. GREENBAUM, Director, Voting Rights Project,  
Lawyers' Committee for Civil Rights Under Law  
and Director, National Commission on the Voting  
Rights Act

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P R O C E E D I N G S

(9:37 a.m.)

CHAIRPERSON REYNOLDS: Okay. We can get started now.

This is a meeting with most of the Commissioners participating by being present at the Rayburn House Office Building.

**I. Approval of Agenda**

The first item on the agenda is the approval of the agenda, and I understand that we have a motion with respect to this item. Commissioner Braceras.

COMMISSIONER BRACERAS: Yes. I would just like to move that the items we need to vote on under management and operations be moved up to the start of the briefing so that we make sure everybody is present for voting on those, with the exception of the SAC reform motion, which is a little more complicated and might require more discussion.

CHAIRPERSON REYNOLDS: A second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRPERSON REYNOLDS: Discussion?

(No response.)

CHAIRPERSON REYNOLDS: No discussion. All right. All in favor?

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1 (Chorus of ayes.)

2 CHAIRPERSON REYNOLDS: All in opposition?

3 (Show of hands.)

4 CHAIRPERSON REYNOLDS: Commissioner Yaki  
5 opposes. Would you like to comment, provide a little  
6 information as to your --

7 COMMISSIONER YAKI: If we're going to move  
8 everything up, I want to move the SAC reform up, too.

9 COMMISSIONER BRACERAS: Well, I have no  
10 objection to that. I know we had originally put it  
11 all later so that we didn't have to keep our witnesses  
12 here any longer than they had to be, but I think  
13 because of calendars and flights --

14 CHAIRPERSON REYNOLDS: Okay. We do have  
15 an issue. Some of our panelists have to leave early,  
16 and this may result in one of our panelists not being  
17 able to present.

18 VICE CHAIRPERSON THERNSTROM: If we  
19 included the SAC reports in that motion?

20 CHAIRPERSON REYNOLDS: Well, actually, I  
21 don't know. Even if we exclude the SAC issue it's  
22 possible, depending on how long the other issues take.  
23 We could run into the same problem.

24 VICE CHAIRPERSON THERNSTROM: The other  
25 issues shouldn't take long.

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1                   COMMISSIONER YAKI:    Well, I would move  
2                   that there is weather moving in, as you know, and it  
3                   will have an impact probably upon my flight plans to  
4                   get out of here as well.  If we were going to have  
5                   lengthy debate on this at the end, I may not be able  
6                   to attend all of it.

7                   I'd be willing to shorten the amount of  
8                   time that we would use on some of the motions before  
9                   us, but in that case I would like to have the SAC  
10                  material tabled until the November meeting.

11                  CHAIRPERSON REYNOLDS:  Comments?

12                  VICE CHAIRPERSON THERNSTROM:  That's fine  
13                  with me.

14                  CHAIRPERSON REYNOLDS:     Jennifer, Pete,  
15                  Commissioner Melendez actually.

16                  COMMISSIONER TAYLOR:  Will that present us  
17                  with any timing problems?

18                  MR. MARCUS:  Commissioner Taylor, I think  
19                  it would.  As the Commissioners know, we have had a  
20                  significant number of advisory committees that have  
21                  not been ordered for a significant period of time.  A  
22                  one month tabling of the motion would delay by an  
23                  additional month period time before we could get the  
24                  state advisory committees up and running.

25                  That would also have an impact on the

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1 question of whether some SACs would be due, projects  
2 that can be completed this year, which, of course, is  
3 the period during which we're being audited by GAO  
4 with respect to the state advisory committees.

5 COMMISSIONER BRACERAS: I think we  
6 probably addressed that.

7 CHAIRPERSON REYNOLDS: Okay. We are just  
8 chewing through time here. Another approach is to go  
9 back to the original order.

10 VICE CHAIRPERSON THERNSTROM: There is a  
11 motion on the table, however, and there was only one  
12 dissent from it. We did have a vote.

13 COMMISSIONER BRACERAS: We did.

14 CHAIRPERSON REYNOLDS: All right. Let the  
15 record reflect that Commissioner Yaki opposes, that I  
16 abstain, and that the remaining Commissioners voted in  
17 favor.

18 Okay. If that is the case, give me a  
19 moment so I can reorder my notes.

20 VICE CHAIRPERSON THERNSTROM: Why don't  
21 you go to the announcements?

22 CHAIRPERSON REYNOLDS: Management and  
23 Operations sits where?

24 COMMISSIONER BRACERAS: After  
25 announcements.

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1 CHAIRPERSON REYNOLDS: Okay. Thanks for  
2 getting me organized.

3 **II. Approval of Minutes**

4 Okay. The second item is the approval of  
5 the minutes of the September 16th, 2005 meeting. May  
6 I have a motion?

7 VICE CHAIRPERSON THERNSTROM: So moved.

8 CHAIRPERSON REYNOLDS: Is there a second?

9 COMMISSIONER BRACERAS: Second.

10 CHAIRPERSON REYNOLDS: Discussion.

11 (No response.)

12 CHAIRPERSON REYNOLDS: All in favor?

13 (Chorus of ayes.)

14 CHAIRPERSON REYNOLDS: All in opposition?

15 (No response.)

16 CHAIRPERSON REYNOLDS: The motion passes  
17 unanimously.

18 **III. Announcements**

19 Next up we have announcements. I am  
20 pleased to announce the appointment of Arlan D.  
21 Melendez of Nevada to the Commission. Commissioner  
22 Melendez's appointment was put forth by Senate  
23 Minority Leader Harry Reid and approved by Senate  
24 President Pro Tempore of the Senate in September.

25 Commissioner Melendez is currently the

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1 Chairman of the Reno-Sparks Indian Colony, and he has  
2 held that position for the past 14 years.

3 On behalf of the Commission, I welcome  
4 Commissioner Melendez, and I know that we all look  
5 forward working with you. Commissioner Melendez,  
6 would you like to say a few words?

7 COMMISSIONER MELENDEZ: Mr. Chairman and  
8 members of the committee, I'm just glad to be here,  
9 and I'm still catching up. I was just sworn in  
10 yesterday. So hopefully I'll catch up to speed.

11 I touched base with our state advisory  
12 committee. So I still need to learn what his issues  
13 are, and so I'm happy to be here and I'll do my very  
14 best.

15 CHAIRPERSON REYNOLDS: Excellent. Well,  
16 welcome aboard.

17 Okay. October is National Disability  
18 Employment Awareness Month. National Disability  
19 Employment Month was created by Congress in 1988 to  
20 acknowledge the employment needs and the contributions  
21 of individuals with all types of disabilities.  
22 Currently there still exists a significant barriers to  
23 full access and participation in the work force for  
24 over 54 million disabled Americans.

25 On behalf of the U.S. Commission on Civil

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1 Rights, I encourage government officials, employers,  
2 and all people to observe this month with appropriate  
3 programs and activities aimed at reducing these  
4 remaining barriers.

#### 5 IV. Commission Meeting Dates

6 Okay. Next up will be the Commission's  
7 meeting dates for calendar year 2006. Okay. The  
8 Staff Director sent the Commissioners a memo on  
9 September 27th, 2005 with proposed meeting dates for  
10 the meetings to be held in 2006. The proposed meeting  
11 dates were January 20th, and that would be a planning  
12 meeting.

13 VICE CHAIRPERSON THERNSTROM: I don't  
14 think you have to read them all, do you? No. We've  
15 all got them.

16 CHAIRPERSON REYNOLDS: Very good. Are  
17 there any questions? Yes.

18 COMMISSIONER BRACERAS: I have two issues,  
19 and I'm wondering if the Commissioners might  
20 accommodate me and maybe switch dates on two months.  
21 The first Friday, December 15th, which I believe is  
22 the first night of Hanukkah. So anyway, I'd like to  
23 request that be changed.

24 CHAIRPERSON REYNOLDS: Would you be able  
25 to propose --

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1 COMMISSIONER BRACERAS: Oh, it doesn't  
2 matter, but I just thought that that would be  
3 inconvenient to some staff members as it would be for  
4 me.

5 I guess earlier in the month is better.

6 VICE CHAIRPERSON THERNSTROM: Jennifer,  
7 this is the December 15th?

8 COMMISSIONER BRACERAS: Correct. December  
9 8th? How is December 8th?

10 VICE CHAIRPERSON THERNSTROM: I'll just  
11 look.

12 COMMISSIONER YAKI: That won't work for  
13 me.

14 COMMISSIONER BRACERAS: Okay. Well, we  
15 can leave it where it is, and I'll just come in by  
16 phone.

17 COMMISSIONER YAKI: The question is do we  
18 have to meet on a Friday. What if we moved it?

19 COMMISSIONER BRACERAS: I think that would  
20 be fine.

21 VICE CHAIRPERSON THERNSTROM: What are you  
22 suggesting?

23 CHAIRPERSON REYNOLDS: Thursday, the 14th?

24 COMMISSIONER BRACERAS: Thursday, the  
25 14th.

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1 VICE CHAIRPERSON THERNSTROM: That's fine.

2 CHAIRPERSON REYNOLDS: Okay. My calendar  
3 has frozen up on me, but I'm fairly confident that  
4 that date is fine with me. All right. So we'll make  
5 that change, the 14th.

6 COMMISSIONER BRACERAS: And the second one  
7 is I have a conflict on Friday, June 9th. So I was  
8 wondering if that one might be switched.

9 CHAIRPERSON REYNOLDS: Okay. How does  
10 that work with everyone else?

11 VICE CHAIRPERSON THERNSTROM: I'm sorry.  
12 Say it again. I'm just dealing with this one.

13 Which one?

14 COMMISSIONER BRACERAS: Friday, June 9th.

15 CHAIRPERSON REYNOLDS: Okay. Let's --

16 COMMISSIONER BRACERAS: Is the 16th a  
17 possibility?

18 COMMISSIONER YAKI: The 16th is good for  
19 me.

20 CHAIRPERSON REYNOLDS: It works for me.

21 COMMISSIONER BRACERAS: Okay. If you need  
22 a formal motion, I'd like to move that the June  
23 meeting be established for Friday, June 16th, and the  
24 December meeting be held on Thursday, December 14th.

25 VICE CHAIRPERSON THERNSTROM: So moved.

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1 COMMISSIONER YAKI: Second.

2 CHAIRPERSON REYNOLDS: Okay. All in favor  
3 please say aye.

4 (Chorus of ayes.)

5 CHAIRPERSON REYNOLDS: Anyone in  
6 opposition?

7 (No response.)

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

10 **V. Report on John G. Roberts, Jr.**

11 **Civil Rights Record**

12 Okay. Next up we have -- Commissioner  
13 Kirsanow, do you want me to read this into the record  
14 or would you like to?

15 Okay. The motion is to -- it reads, "I  
16 move that the Commission post on its Web site the  
17 civil rights record of John G. Roberts as a report  
18 prepared by Commissioner Kirsanow and circulated to  
19 the Commission at its August meeting.

20 Is there a second?

21 COMMISSIONER: Second.

22 CHAIRPERSON REYNOLDS: Okay. Discussion.

23 (No response.)

24 CHAIRPERSON REYNOLDS: No discussion?

25 COMMISSIONER BRACERAS: Sure. I'll be

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1 heard.

2 CHAIRPERSON REYNOLDS: Yes.

3 COMMISSIONER BRACERAS: I'm going to vote  
4 against this motion for two reasons, one procedural  
5 and one substantive. As a matter of procedure, I do  
6 not think that we should be posting the work of  
7 individual Commissioners on our Web site. I think  
8 that the rules we established for vetting Commission  
9 documents needs to be applied to all of the  
10 substantive documents that go on our Web site or that  
11 are published by the Commission.

12 And this particular document was not  
13 authorized by the Commission in the first instance,  
14 and it didn't go through the process that we  
15 established in the Working Group on Reform in terms of  
16 periodic updates and, you know, updates to the  
17 Commission and contributions from the Commissioners.

18 So as a procedural matter, I don't think  
19 that we should go after the fact to post a document on  
20 the Web site that's really the work of a single  
21 Commissioner. It is a collaborative body, and we meet  
22 in January to address our agenda and to plan what  
23 projects we wish to undertake, and this simply wasn't  
24 one of them.

25 So that's my procedural objection.

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1 Substantively, it's my view that the Commission as a  
2 body shouldn't be taking a position of nominations to  
3 the Supreme Court. I know this document doesn't do  
4 that. It simply examines the record of a nominee to  
5 the Supreme Court, but I would argue that it comes a  
6 little too close to the line.

7 And, frankly, I would also argue that as  
8 interesting as the document is and as helpful as it  
9 was during the confirmation process, the day John  
10 Roberts became Chief Justice, all of this became  
11 irrelevant. The only record that matters now is what  
12 he does from here on forward.

13 So, as a substantive matter, I wouldn't  
14 have voted for it in the first instance. So I'm going  
15 to oppose putting it on our Web site and giving the  
16 impression that this is a document of the federal  
17 government which the entire Commission approved.

18 CHAIRPERSON REYNOLDS: Peter.

19 COMMISSIONER KIRSANOW: I respect what  
20 Commissioner Braceras has to say about this. However,  
21 I'd make a couple of points. First of all, this was  
22 not an advocacy document. It was completely neutral,  
23 and it's probably the greatest compendium of  
24 information related to John Roberts' advocacy and also  
25 his decisions before the D.C. Circuit Court of Appeals

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1 that have been produced to date.

2 It was used by the Senate Judiciary  
3 Committee. Comments pertaining thereto were made  
4 during the floor debate. It is probably the single  
5 greatest repository of information related to John  
6 Roberts' jurisprudence that's ever been created.

7 And it was done for me, but also in  
8 furtherance of the clearing house function of the  
9 Commission. It is after the fact, and that is  
10 precisely what this is all about. It's informational.

11 It was not intended to be advocacy, and there's  
12 nothing in there that's opinion. There was no  
13 editorial comment made therein. It was simply raw,  
14 hard data.

15 And I think it's simply informative. It's  
16 out there in the public sphere already. I guess it  
17 was good enough for the Senate Judiciary Committee.  
18 The White House has it and just about everybody else  
19 has it, and it was simply a matter of information.

20 If the Commission decides not to post it,  
21 I don't have any great dog in this fight, but I do  
22 think it's extremely useful. I also think it's one of  
23 the most informative pieces of information created by  
24 this Commission since its inception. I think it would  
25 be very helpful.

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1           Again, it's not a document that reflects  
2 the position of the Commission, and in that regard I  
3 think it's different from those things contemplated by  
4 the Working Group on Reform initially.

5           COMMISSIONER BRACERAS: I just want to be  
6 perfectly clear. It's not that I don't think that  
7 it's a useful document. It's not that I don't think  
8 that it's a well written document or, you know, as you  
9 said, not good enough, quote, unquote, for the  
10 Commission.

11           You know, I'm glad that you submitted it  
12 to the Senate Judiciary Committee. I'm glad that they  
13 relied upon it in the floor debate. That was the  
14 proper use of it and the proper function of it, but  
15 this Commission, you know, it was not established to  
16 review the so-called records of nominees to the  
17 Supreme Court, and frankly, you know, again, getting  
18 back to the process point, there are a lot of things  
19 that I write that I work on that are related to civil  
20 right, Law Review articles, op-eds, what have you, and  
21 I just don't want to set a precedent that individual  
22 Commissioners can take their work on civil rights on  
23 any topic and then come to the Commission and ask that  
24 it be posted on the Web site or published by the  
25 federal government. I just don't think that's an

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1 appropriate use of the Commission.

2 COMMISSIONER KIRSANOW: One final point.  
3 I agree with that in substance, and again, I would  
4 make a distinction between this one, this particular  
5 report, and things that are prepared by individuals in  
6 their personal capacity.

7 This was not done for me for just my  
8 personal reading. The selection was done for me as a  
9 Commissioner, and I think it's completely different  
10 from something that contains opinion, the editorial  
11 posture of a particular newspaper, for example, or  
12 editorial position of an individual Commissioner.

13 That being said, I think that these kinds  
14 of things can be open for debate and voted on by the  
15 Commission. If the majority of the Commission doesn't  
16 see fit to post it, it's fine with me.

17 CHAIRPERSON REYNOLDS: Vice Chair  
18 Thernstrom.

19 VICE CHAIRPERSON THERNSTROM: Commissioner  
20 Kirsanow, it was done for you as a Commissioner, but  
21 it was not done for the Commission, and I think that  
22 that's a very important distinction. I think we  
23 really need to draw a clear and bright line here.  
24 Maybe someone on the Commission would like to compile  
25 the record if there is a record of Harriet Miers, the

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1 President's current nominee.

2 But, again, if an individual Commissioner  
3 asked for that, that is not Commission work. It is  
4 work done for an individual Commissioner.

5 I think this is a classic slippery slope,  
6 and we should adhere very closely to the rules that we  
7 set up which require as Commissioner Braceras said,  
8 that we have input at every stage in the production of  
9 official Commission work.

10 CHAIRPERSON REYNOLDS: Commissioner  
11 Braceras' recitation of the rules is correct. We do  
12 have a process in place, but my view is that there is  
13 no reason why that we couldn't vote on this if a  
14 majority of Commissioners decided to deviate from our  
15 rules so long as everyone had an opportunity to weigh  
16 in and to vote.

17 I see nothing wrong with deviating from  
18 our rules where appropriate. As to the document  
19 itself, it's a fine document. Most of the arguments  
20 that I've heard are technical arguments. Everyone who  
21 has read the document believes that it has a lot of  
22 value, and this is not about John Roberts' record as  
23 an advocate. This is about John Roberts' record as an  
24 advocate on civil rights issues, and that's what we do  
25 here.

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1           We have a responsibility to disseminate  
2 information about civil rights and the idea that a  
3 Supreme Court nominee's record on civil rights is  
4 beyond our purview I don't agree with.

5           Vice Chair Thernstrom.

6           VICE CHAIRPERSON THERNSTROM: I think we  
7 can close this out. I just want one more word from me  
8 on this.

9           Look. If we establish a precedent of  
10 deviations, there will be other instances down the  
11 road in which there will be proposed deviations that  
12 will be voted on for political reasons of one sort or  
13 another. I think if we do not stick closely to the  
14 rules that we voted on, we are going to be wading in a  
15 political thicket here in the future that, frankly,  
16 would concern me.

17           This very worthy enterprise, none of us  
18 have any doubts about that, is available in the public  
19 record, and anybody who wants to look at it has full  
20 access to it. But it is really not Commission  
21 business. It is with the business of a Commissioner.  
22 That is different.

23           COMMISSIONER KIRSANOW: Mr. Chairman,  
24 let's move the question. We've got witnesses here.

25           COMMISSIONER TAYLOR: Mr. Chairman, I have

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1 one question.

2 CHAIRPERSON REYNOLDS: Commissioner  
3 Taylor.

4 COMMISSIONER TAYLOR: I saw the value of  
5 this document during the confirmation process. Would  
6 you just speak, Commissioner Kirsanow, to her last  
7 point, that is, the value of the document now that he  
8 is a member of the court because I'm just unclear as  
9 to value at this point.

10 COMMISSIONER KIRSANOW: Very briefly, its  
11 got, I think significant historical value if nothing  
12 else.

13 COMMISSIONER TAYLOR: Okay.

14 COMMISSIONER KIRSANOW: We have a Chief  
15 Justice of the Supreme Court. We have one place or  
16 repository of everything he did prior to, in a legal  
17 capacity, prior to coming onto the Supreme Court. To  
18 the extent scholars want to divine how he has grown, I  
19 hope not, but to the extent scholars want to see how  
20 this may have informed his performance on the Court, I  
21 think it's a valuable piece of information, but again,  
22 I'm not trying to make an argument that that's why it  
23 should be posted. I just think it has got an  
24 intrinsic value consistent with our clearing house  
25 function.

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1 CHAIRPERSON REYNOLDS: Okay. At this  
2 point let's vote. All in favor say aye.

3 (Chorus of ayes.)

4 CHAIRPERSON REYNOLDS: Okay. So we have  
5 two in favor. All in opposition?

6 (Chorus of ayes.)

7 CHAIRPERSON REYNOLDS: Okay.

8 COMMISSIONER MELENDEZ: I have not yet had  
9 a chance to look at this document.

10 CHAIRPERSON REYNOLDS: Okay. Please let  
11 the record reflect that Commissioners Yaki, Braceras,  
12 and Vice Chair Thernstrom, and also Commissioner  
13 Taylor oppose the motion. Commissioner Mendez  
14 (phonetic) abstains.

15 VICE CHAIRPERSON THERNSTROM: Melendez.

16 CHAIRPERSON REYNOLDS: What did I say?

17 VICE CHAIRPERSON THERNSTROM: Mendez.

18 CHAIRPERSON REYNOLDS: Oh, I'm sorry.

19 VICE CHAIRPERSON THERNSTROM: Melendez.

20 Let's get his name right.

21 CHAIRPERSON REYNOLDS: And Commissioners  
22 Reynolds and Kirsanow vote in favor.

23 **VI. September 15th Report to Congress on**

24 **Commission Reforms**

25 Okay. Next up would be the report to

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1 Congress on Commission reforms; is that right?

2 Okay. The motion reads: this is a motion  
3 supporting the posting of a document on the  
4 Commission's Web site. I move that the Commission's  
5 September 15th, 2005 report detailing the recent  
6 Commission reforms and issued to the House Committee  
7 on Appropriations, pursuant to a report and bill on  
8 appropriations for science, the Departments of State,  
9 Justice, Commerce, and related federal agencies for  
10 2006 be posted on the Commission's Web site at the  
11 earliest possible time.

12 COMMISSIONER YAKI: Second.

13 VICE CHAIRPERSON THERNSTROM: Call the  
14 question. There's not going to be any dissent.

15 CHAIRPERSON REYNOLDS: May I have a  
16 second?

17 COMMISSIONER YAKI: You have a second.

18 CHAIRPERSON REYNOLDS: All in favor?

19 (Chorus of ayes.)

20 CHAIRPERSON REYNOLDS: Okay. The motion  
21 passes unanimously.

22 Okay. Gentlemen.

23 VICE CHAIRPERSON THERNSTROM: Let's go.

24 **VII. Commission Briefing: The Voting Rights Act**

25 CHAIRPERSON REYNOLDS: Gentlemen, I

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1 apologize for the delay.

2 Okay. The Voting Rights Act has been  
3 declared by many as the single most important piece of  
4 civil rights legislation in the nation's history.  
5 Thousands who believe. Thousands who believe that the  
6 Constitution's guarantee to vote unfettered by racism,  
7 intimidation, and discrimination extended to all  
8 Americans with courage, determination, and  
9 selflessness to bring it about. The act dramatically  
10 increased the number of minorities, particularly  
11 blacks, who registered to vote and relatedly, the  
12 number of minorities elected to office.

13 Most of the Voting Rights Act provisions  
14 are permanent, but among those that will expire in  
15 2007, Section 5, which established the requirement  
16 that any changed to voting practice or procedures and  
17 jurisdiction with a history of discrimination be  
18 approved or precleared by the Department of Justice is  
19 perhaps the most controversial. In the coming months,  
20 Congress will hold hearings to determine whether the  
21 expiring sections should be renewed.

22 In keeping with the Commission's duty to  
23 discover facts and offer recommendation and in  
24 observance of the 40th anniversary of the act, the  
25 Commission over the next year will examine whether the

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1 preclearance process and other temporary requirements  
2 remain necessary.

3 We will begin our examination with today's  
4 briefing. This morning we are pleased to welcome  
5 three experts on various aspects of the Voting Rights  
6 Act.

7 MR. CLEGG: Four.

8 CHAIRPERSON REYNOLDS: Oh, that's right.  
9 Thank you. I forgot about you, Mr. Clegg.

10 COMMISSIONER YAKI: Which one didn't  
11 recommend Trident?

12 CHAIRPERSON REYNOLDS: Okay. I welcome  
13 all of you on behalf of the Commission. I will  
14 introduce everyone and describe their activities, and  
15 then I will call on you according to the order you  
16 have been given for the record.

17 First we have Mr. Edward Blum, a Visiting  
18 Fellow at the American Enterprise Institute here in  
19 Washington.

20 COMMISSIONER YAKI: Mr. Chairman, as a  
21 matter of procedure, is the procedure going to be hear  
22 from all the witnesses and then have questions or are  
23 we going to --

24 CHAIRPERSON REYNOLDS: Yes.

25 COMMISSIONER YAKI: Okay. So everyone

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1 does their presentation.

2 CHAIRPERSON REYNOLDS: Yes.

3 COMMISSIONER YAKI: And then we do  
4 questions.

5 CHAIRPERSON REYNOLDS: Yes.

6 VICE CHAIRPERSON THERNSTROM: Mr.  
7 Chairman, I also have a recommendation that we hear if  
8 there's a time problem from Mr. Clegg, that we hear  
9 from him first, unless Mr. Clegg tells us, you know,  
10 that he's okay with not going first.

11 How squeezed are you in terms of time?

12 MR. CLEGG: I would like to leave between  
13 11 and 11:15, but --

14 VICE CHAIRPERSON THERNSTROM: Okay. So  
15 we're all right. We're all right sticking to the  
16 order, whatever.

17 CHAIRPERSON REYNOLDS: Okay. Mr. Blum, as  
18 I said earlier, he's at the American Enterprise  
19 Institute in Washington where he studies civil rights  
20 policies and co-directs the Project on Fair  
21 Representation.

22 Prior to joining AEI, Mr. Blum was  
23 Chairman of the Campaign for a Colorblind America,  
24 specifically their Legal Defense and Education  
25 Foundation. In that capacity, he challenged numerous

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1 racially gerrymandered voting districts, race based  
2 school admissions policies, and municipal contracting  
3 programs throughout the country.

4 Thank you for being with us, Mr. Blum.  
5 Mr. Blum. I'm sorry.

6 Okay, and next we will have - Dr. Ronald  
7 Gaddie, who is a Professor of Political Science at the  
8 University of Oklahoma. Professor Gaddie has written  
9 numerous books and articles on politics, elections,  
10 and race. He is currently working on two books, one  
11 entitled Delayed Democracy, the Texas Redistricting  
12 War of 2001 through 2004, and also Battle Lines:  
13 Power Plays, Redistricting and Election Law.

14 In another project for the American  
15 Enterprise Institute, Dr. Gaddie is developing a  
16 method to assess progress in voting rights. Professor  
17 Gaddie also works as a litigation consultant in voting  
18 rights and redistricting cases in nine states, mostly  
19 in the South and Midwest.

20 And next up we will have Jon Greenbaum,  
21 who is the Director of the Voting Rights Project at  
22 the Lawyers Committee for Civil Rights under Law. He  
23 is responsible for directing the committee's voting  
24 rights litigation, which challenges all forms of  
25 voting rights discrimination against minority groups

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1 in the United States.

2 Mr. Greenbaum also directs other  
3 activities, including efforts to maintain and expand  
4 the voting rights of minority citizens through  
5 legislation and outreach efforts.

6 Prior to joining the Lawyers Committee,  
7 Mr. Greenbaum was a trial attorney in the voting  
8 section of the U.S. Department of Justice for seven  
9 years, which is where he tried several significant  
10 phases involving minority vote dilution.

11 And finally, I didn't forget you this  
12 time. We have Roger Clegg, who is the Vice President  
13 and General Counsel of the Center for Equal  
14 Opportunity. He focuses on legal issues arising from  
15 civil rights laws, including the regulatory impact on  
16 business and the problems in higher education created  
17 by affirmative action.

18 A former Deputy Assistant Attorney General  
19 in the Reagan and Bush I administrations, Clegg held  
20 the second highest position in both the Civil Rights  
21 Division and the Environment and Natural Resources  
22 Division. He had held several other positions in the  
23 U.S. Justice Department, including Assistant to the  
24 Solicitor General, Associate/Deputy Associate General,  
25 and Acting Assistant Attorney General in the Office of

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1 Legal Policy.

2 Mr. Clegg is a graduate of Yale University  
3 Law School.

4 Gentlemen, thank you.

5 First up, we will hear from Mr. Blum.

6 **VII(a). Presentation of Edward Blum**

7 MR. BLUM: Thank you, Mr. Chairman,  
8 Commissioners, Mr. Marcus.

9 My presentation today is divided into  
10 three parts. I will review the historical background  
11 of the two basic elements of the Voting Rights Act  
12 that will be discussed throughout this briefing.

13 Second, I'll briefly discuss the state of  
14 the law regarding Section 5 of the Voting Rights Act.

15 And finally, I will discuss the reasons I  
16 believe Section 5 of the Act, the most important  
17 provision up for reauthorization in August of 2007,  
18 should be allowed to expire.

19 Let me begin by giving a brief explanation  
20 and history of the two most critical sections of the  
21 Act, Section 5 and Section 2. As everyone knows,  
22 blacks in the deep South were massively  
23 disenfranchised until the passage of the Voting Rights  
24 Act in 1965. President Johnson ordered his staff to  
25 write, quote, the goddamdest and toughest, end quote,

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1 voting rights bill they could devise.

2 The President was wise in asking for such  
3 a draconian statute at the time since the opportunity  
4 of blacks in the deep South to register to vote and  
5 participate in elections had been successfully foiled  
6 by southern jurisdictions since reconstruction. By  
7 every measure, Johnson got what he asked for.

8 Less than three years after the VRA's  
9 passage, voter registration among blacks in Georgia,  
10 for instance, had jumped from 15 percent to 51  
11 percent.

12 In Mississippi, registrations swelled from  
13 less than seven percent to nearly 60 percent. This  
14 remarkable outcome was largely due to Section 4 of the  
15 act, which provided a five-year suspension of a test  
16 or device, such as a literacy test as a prerequisite  
17 to register to vote. It was sustained by Section 5 of  
18 the act, which required that any changes to voting  
19 procedures in the jurisdictions covered by the law be  
20 precleared by the U.S. Attorney General or the U.S.  
21 District Court for the District of Columbia before  
22 being implemented.

23 Section 5 in 1965 applied to Alabama,  
24 Georgia, Louisiana, Mississippi, South Carolina, and  
25 Virginia, and to most counties of North Carolina.

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1 Section 5 was not a major concern during congressional  
2 debate in 1965. Its inclusion in the bill was  
3 designed to trump any new contrivances jurisdictions  
4 might impose to slow the growth of black voting.

5 Given the massive resistance to school  
6 desegregation and other civil rights actions by the  
7 federal government at the time, it was not an  
8 unreasonable addition to the law.

9 It is most noteworthy, however, that  
10 Congress recognized that the preclearance provision  
11 was a unique infringement on traditional separation of  
12 power prerogatives and, therefore, limited Section  
13 56's life to five years. It was tended by Congress in  
14 1970, '75, and finally in 1982.

15 Section 2 of the act was little more than  
16 a clone of the 15th Amendment's prohibition to deny or  
17 abridge the right to vote on account of race, color,  
18 or previous conditions of servitude. Originally this  
19 section allowed no qualification or prerequisite to  
20 voting to be imposed by any state or jurisdiction on  
21 account of race.

22 Yet unlike Section 5, this section applied  
23 to the nation as a whole, and most importantly, unlike  
24 Section 5, this section was and is permanent. The  
25 case law that is developed over the years under

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1 Section 5 and Section 2, frankly, is quite muddled,  
2 some would say illogical. Since Congress is faced  
3 with only the reauthorization of Section 5, let's  
4 focus today on the legal evolution of that principle  
5 or provision.

6 As a result of the passage of Section 5  
7 and subsequent litigation, hundreds of jurisdictions  
8 began going hat in hand to the Department of Justice  
9 asking permission to annex land, change voting  
10 district lines, expand the numbers of representatives  
11 to an elected body, and so forth.

12 Beginning with the case Allen v. State  
13 Board of Elections in 1969, the courts expanded  
14 Section 5 from guaranteeing black access to the polls  
15 to guaranteeing, quote, the effectiveness, end quote,  
16 of their vote. Not only blatant and obvious, but also  
17 subtle and even unintentional actions were held to  
18 violate the law.

19 Again, much of this was understandable in  
20 the years immediately following the passage of the VRA  
21 since southern chicanery in the past required the  
22 Department of Justice to keep a close eye on unusual  
23 developments in voting procedures, and as judges and  
24 bureaucrats got in the habit of stretching the meaning  
25 of the VRA to reach any and all ends they considered

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1 desirable, the ground work was laid for abuses.

2 What started out as a tool to prevent  
3 anyone from being turned away at the ballot box  
4 because of skin color, turned into a means of second  
5 guessing perfectly legitimate non-racial policies, for  
6 example, ballot security and absentee ballots.

7 The pinnacle of Section 5 abuses occurred  
8 after the 1990 census, and the cycle of redistricting  
9 that followed in the now expanded covered  
10 jurisdictions, due to amendments passed in the 1970s,  
11 jurisdictions such as Manhattan and Brooklyn and the  
12 entire States of Texas, Arizona, and Alaska were now  
13 covered by Section 5. The Justice Department, cheered  
14 on by the old line racial advocacy groups and some in  
15 the Republican Party, began to extort the VRA to  
16 require a max black redistricting outcome.

17 In other words, the preclearance provision  
18 of Section 5 became a sword rather than a shield in  
19 the hands of government commissars, whose single  
20 minded goal was not ending racial discrimination, but  
21 guaranteeing racial and ethnic proportionality in  
22 every legislative body for which they had control.

23 The result was the creation of dozens of  
24 racial gerrymanders, rorschach tests like bug splats  
25 that systematically harvested blacks and Hispanics out

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1 of multi-racial communities to form safe minority  
2 districts.

3 In a series of cases beginning with Shaw  
4 v. Reno and culminating in Georgia v. Ashcroft, the  
5 Supreme Court has marginally attempted to bring some  
6 sanity back to the law. In Shaw in 1993, the Court  
7 found that, quote, a reapportionment plan that  
8 includes in one district individuals who belong to the  
9 same race but who are otherwise widely separated by  
10 geographical and political boundaries and who have  
11 little in common with one another but the color of  
12 their skins, bears an uncomfortable resemblance to  
13 political apartheid. It reinforces the perception  
14 that members of the same racial group, regardless of  
15 their age, education, economic status, or the  
16 communities in which they live, think alike, share the  
17 same political interests, and prefer the same  
18 candidates at the polls, end quote.

19 Ten years later, the Court issued a rather  
20 murky opinion in Georgia v. Ashcroft, finding that the  
21 retrogression standard that had been used by DOJ to  
22 force the strict maintenance of minority percentages  
23 in newly redrawn voting districts were wrong, noting  
24 that, quote, the Voting Rights Act as properly  
25 interpreted should encourage the transition to a

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1 society where race no longer matters, end quote.

2 This barely scratches the surface of the  
3 current state of the law. It is important now to  
4 examine what Section 5 has wrought outside of the law  
5 today. The central question Congress will be forced  
6 to consider by August 6th, 2007 is whether Section 5  
7 should be reauthorized in its current form, a  
8 reconstituted form, or finally allowed to expire  
9 altogether.

10 In my opinion, Section 5 has degenerated  
11 into an unworkable, unfair, and unconstitutional  
12 mandate that is bad for our two political parties, bad  
13 for race relations, and bad for our body politic. I  
14 encourage this Commission to recommend formally to  
15 Congress and the Bush administration that Section 5 be  
16 allowed to expire. Here are some of the reasons why I  
17 support that.

18 Number one, Bull Connor is dead, and so is  
19 nearly every Jim Crow era segregationist intent on  
20 keeping blacks from the polls. The emergency has  
21 passed. Blacks throughout the covered jurisdictions  
22 register to vote and participate at the polls in  
23 numbers nearly identical to whites, in some instances,  
24 in some states exceeding those of whites.

25 Number two, the worst abuses of the Jim

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1 Crow era, such as poll taxes, literacy tests, and  
2 grandfather clauses, are permanently banned in other  
3 sections already. Moreover, any voter can challenge  
4 any discriminating election policy or statute using  
5 Section 2 of the act. It is permanent, and it applies  
6 to every state in the nation.

7 Number three, section five has contributed  
8 to the ever growing lack of election competitiveness  
9 resulting in safe seats for life for incumbents of  
10 both parties. The inability of a newly created  
11 bipartisan, independent redistricting commission in  
12 Arizona to create competitive districts is a direct  
13 result of Section 5's requirements. This, in turn,  
14 has led to the creation of ideologically polarized  
15 voting districts.

16 Number four, Section 5 has evolved into a  
17 gerrymandering tool used by Democrats and Republicans  
18 to further their party's election prospects. It is  
19 nearly impossible today under Section 5 to tease out  
20 the racial electoral issues from the partisan  
21 electoral issues, as we have recently witnessed in a  
22 handful of redistricting lawsuits from Texas to  
23 Boston.

24 Number five, Section 5 is unfairly  
25 directed at the South and Southwest. Its application

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1 to these areas is unwarranted today. It may have made  
2 sense to cover Virginia in 1965, but it makes no sense  
3 to cover Virginia today and not West Virginia, just as  
4 it makes no sense to cover Arizona but not New Mexico,  
5 Texas but not Arkansas, Manhattan, the Bronx and  
6 Brooklyn but not Staten Island and Queens.

7 Election data gathered during litigation  
8 during the last ten years or so suggests that whites  
9 in states like Texas, Virginia and Georgia cross over  
10 to support black and Hispanic candidates in ever  
11 increasing numbers. In fact, the crossover support in  
12 these states is often higher than in noncovered  
13 jurisdictions, such as New York, Missouri, Tennessee,  
14 and Oklahoma.

15 This body of national election data makes  
16 reauthorization of Section 5 in the currently covered  
17 jurisdictions constitutionally problematic.

18 Number six, this provision has had the  
19 effect of insulating white Republican office holders  
20 from minority voters and issues specific to minority  
21 communities, and in turn, it insulates minority  
22 elected officials from white voters and acts as a  
23 glass ceiling for higher statewide or at large  
24 minority election office seekers.

25 Finally, number seven. Section 5 does not

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1 address in any way the long list of election issues  
2 that have surfaced during the last five years or so.  
3 Hanging chads in Florida, long lines of voters in  
4 Ohio, too few polling places on college campuses in  
5 Wisconsin, none of that is affected by continuing  
6 Section 5.

7 Finally, I want to address a special  
8 concern I have about the reauthorization. The nation  
9 deserves a debate on the necessity of ending these  
10 provisions once and for all. It is my hope that  
11 Congress will allow and encourage testimony and data  
12 to be presented from a wide group of voices. Shutting  
13 out anyone in the process would be wrong, and it  
14 shouldn't be tolerated.

15 Furthermore, it would be a cynical mistake  
16 for Congress to use the reauthorization as an  
17 opportunity to turn the Voting Rights Act into the  
18 "leave no gerrymander behind" act by overturning the  
19 Supreme Court's last Section 5 case, Georgia v.  
20 Ashcroft. This would result in blacks and Hispanics  
21 being cordoned off in densely packed legislative  
22 enclaves safe from the need to hall hole (phonetic)  
23 and compromise with whites in order to achieve  
24 election success, all in a shameless attempt to create  
25 leeches out Republican districts surrounding them.

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1 Mr. Chairman, Commissioners, Mr. Marcus,  
2 thank you for allowing me to testify today.

3 CHAIRPERSON REYNOLDS: Thank you.

4 At this point I want to announce that at  
5 least one of the panelists asked for additional time.

6 I granted that request, and the same rule would apply  
7 to the remaining panelists. So you have approximately  
8 three extra minutes to make your presentations.

9 Next up we have Dr. Gaddie.

10 **VII(b) . Presentation of Dr. Ronald Keith Gaddie**

11 DR. GADDIE: Mr. Chairman, Commissioners,  
12 I appreciate the invitation to come out from fly-over  
13 country and have enjoyed the hospitality of the  
14 Commission very much here in Washington.

15 One of the reasons I'm here is that I have  
16 been working in litigation on Section 5 as an expert  
17 witness, on Section 2 and Section 5 as an expert  
18 witness for the last four years, and I was involved in  
19 the Texas redistricting and had conducted analysis  
20 related to its preclearance, the 2003 congressional  
21 redistricting.

22 Today what I want to do though is really  
23 talk about what I've termed the problem, the  
24 opportunity, and some thoughts for discussion with  
25 regard to the rule of the Voting Rights Act.

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1           In my brief presentation what I hope to do  
2 is, first of all, attempt to define the problem,  
3 describe the opportunity, and then point out four  
4 elements of an informed conversation that needs to be  
5 had in the process of considering the reauthorization  
6 of the elements of the Voting Rights Act that are  
7 about to expire.

8           The Voting Rights Act has framed American  
9 electoral politics for 40 years. The act stands as  
10 the enforcement mechanism of one of the two superior  
11 principles of voting rights, that of racial fairness.

12          The most proactive tools of the act are up for  
13 renewal.

14          Now, this periodic review of the renewal  
15 of legislation gives us the chance to ask what have we  
16 done and how far have we come.

17          Now, to do justice to the impact of the  
18 Voting Rights Act and specifically to Section 5 on  
19 voting rights and minority political empowerment would  
20 take days, not minutes to recount and volumes rather  
21 than pages to record. My brief statement, therefore,  
22 is at best a thumbnail sketch, a superficial social  
23 history of the impact of the act with an emphasis on  
24 those jurisdictions that have been continuously  
25 covered since 1965.

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1           This will be followed by the framing of  
2 some topics for discussion as we move forward to  
3 consider the renewal of the act.

4           Let's state the problem. The initial  
5 concern of the Voting Rights Act was access to the  
6 political process. Political scientist V.O. Key  
7 writing over a half century ago in his classic work  
8 Southern Politics observed that the South may not be  
9 the nation's number one political problem, but  
10 politics is the South's number one problem.  
11 Participation for Key was necessary to a functioning  
12 democracy, and he observed that the problem of  
13 participation in the South like every other problem  
14 could be traced to the status of African Americans.

15           What was the status of the African  
16 American in the South at mid-century? Well, depending  
17 upon where you went in the South, variations were in  
18 evidence, but southern blacks were generally  
19 disfranchised, general discriminated against, and  
20 generally held at distance from white society,  
21 specifically the prosperous parts of white society, by  
22 virtue of public policy.

23           Key observed at the time that, quote,  
24 whites govern and win for themselves the benefits of  
25 discriminatory public policy, and further he noted

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1 that, again, quote, discrimination in favor of whites  
2 tends to increase roughly as Negroes are more  
3 completely excluded from the suffrage, close quote.

4 Exclusion from the vote did not cause  
5 discriminatory treatment, but it most certainly  
6 reinforced the status of southern blacks. Key  
7 observed in a very clinical fashion what Martin Luther  
8 King argued passionately 40 years ago: give us the  
9 vote and we will change the South.

10 It was only by the exercise of political  
11 power through ballots that politicians would change  
12 policy in the long run.

13 As to the opportunity, we have the  
14 opportunity at this stage, after 25 years of  
15 implementation of the Voting Rights Act since its most  
16 recent renewal, for a frank, informed conversation  
17 about the shape of the Voting Rights Act for the  
18 future.

19 What does this mean? Well, I see four  
20 elements to this opportunity, four areas of  
21 discussion.

22 One, we should consider the context of the  
23 adoption of Section 5 and examine the modern  
24 circumstances of the renewal of the debate. My  
25 colleague, Mr. Blum, has recounted some of these

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1 circumstances at great length. So I will attempt to  
2 summarize, but in 1964, there was one black state  
3 legislator in the seven states originally covered by  
4 Section 5. The South lumbered under an archaic and  
5 outdated political and social culture that clung to  
6 the past at the possible cost of the future. There  
7 was no viable competition to the Democratic party,  
8 which was a locally contrary adjunct to the national  
9 party opposed to the Democrats and the rest of the  
10 nation on most every dimension of politics.

11 The contemporary South is vibrant, the  
12 largest and fastest growing region of the nation.  
13 Southern children are more likely to attend integrated  
14 schools than in the rest of the nation, and a black  
15 person is more likely to have a black representative  
16 in the South than anywhere else in the United States.

17 Education and income differences across  
18 the races are matters of degree rather than orders of  
19 magnitude witnessed four decades ago. Southern blacks  
20 are registered and voting at rates comparable to black  
21 voters in the rest of the nation, if not in excess of  
22 the rates of black voters in the rest of the nation.

23 There is now a vibrant two-party system in  
24 the South which fosters black political empowerment  
25 and office holding. Now, race still divides the

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1 South. No one can deny this, but southern blacks are  
2 not helpless in the pursuit of political, social, and  
3 economic goals, especially when compared to  
4 circumstances at mid-century.

5 Second, we must examine data on minority  
6 participation in the political process and ascertain  
7 how Section 5 advanced that cause. I'm a social  
8 scientist. I love data. I like to have a number for  
9 every fact that I will assert, and currently I am  
10 engaged with my colleague, Charles Bullock, of the  
11 University of Georgia in a study of these 16 Section 5  
12 states in the United States examining advancements in  
13 minority participation and political empowerment.

14 This project has had to move on to a fast  
15 track, given the expedient movement of hearings  
16 regarding Section 5. So I will not be able to recount  
17 summary findings at this time, but these reports will  
18 be making themselves known and available in the coming  
19 month.

20 Well, what are we doing? We are  
21 attempting to understand increases in minority voter  
22 registration, participation, and electoral  
23 opportunities.

24 To that end, let me briefly summarize just  
25 a thumbnail sketch of evidence that we see coming out

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1 of the South today.

2 Do you have my graphic? Okay. That's  
3 right. We did not get the PowerPoints in.

4 If you look at the handout that has been  
5 made available that goes with my prepared testimony,  
6 Table 1 summarizes information from Earl and Merle  
7 Black's Politics and Society in the South. This table  
8 shows the growth of black voters in the South.

9 South Carolina and Mississippi rank at the  
10 top of proportion black electorate as of 1984, while  
11 Mississippi and Alabama register the largest  
12 proportional gain of size in the black electorate.  
13 Georgia and Louisiana rank near the bottom of  
14 proportional gain in part because they had relatively  
15 high rates of black registration at the time that  
16 Section 5 was enacted and adopted.

17 By 1984, the black percentage among  
18 registrants tracks closely with the black percentage  
19 with the voting age population in these states.  
20 Generally speaking, the states with the largest  
21 potential black electorate, indeed, had the most  
22 heavily African American voter registration rolls.

23 Now, the Black Brothers' analysis informs  
24 us as to the proportionally largest black electorates  
25 in the South. Tables 2 and 3, which I will not go

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1 through in any great detail indicate the differences  
2 in black voter registration and participation since  
3 1980 for six of the seven states originally covered by  
4 Section 5. Alabama is left out because the file that  
5 contained the Alabama data was corrupted at the time  
6 that I prepared this report for you. I'll make this  
7 data available for you as soon as I can uncorrupt the  
8 file.

9 Black registration lags white registration  
10 for most of the time period in the six covered states  
11 that are analyzed in this table, as it does in non-  
12 southern states throughout the entire time series.  
13 But for the last four elections for which there are  
14 comparative data, black registration in five of the  
15 six states, all but Virginia, exceeds black  
16 registration rates in the non-southern states. In  
17 three of the states, Georgia, South Carolina,  
18 Mississippi, black registration rates exceed white  
19 registration rates for at least two of the last four  
20 elections.

21 Black turnout rates are less consistently  
22 above the national average, however, as indicated in  
23 Table 3. Two of the original Section 5 states,  
24 Mississippi and Louisiana, have black turnout  
25 consistently above the national average. Every

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1 covered state except Virginia reports higher black  
2 turnout than white turnout at least once in the last  
3 15 years, and Georgia reports higher black turnout in  
4 three of the last four general elections.

5 Differences of racial registration and  
6 participation have become differences of degree rather  
7 than of magnitude and are variable by state. Now,  
8 these votes translate themselves into seats in the  
9 legislatures.

10 If you look at Figure 1, Figure 1 present  
11 time lines since 1964 of the percentage of state  
12 legislative seats held by black incumbents in the  
13 state legislatures for the seven original Section 5  
14 states.

15 While none of these states have achieved  
16 absolute proportionality in their legislatures,  
17 Alabama, Mississippi and North Carolina are  
18 approaching proportionality. The data for these  
19 tables also appear in Table 4 in the handout that you  
20 have been provided.

21 At the congressional level, 1990 saw  
22 significant advancement of descriptive African  
23 American representation in the covered states.  
24 Southern African American members of Congress from the  
25 South tripled. In the states covered by Section 5

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1 originally, the number increased from three to a  
2 current 11, one from Virginia, two from North  
3 Carolina, one from South Carolina, four from Georgia,  
4 one from Alabama, one from Mississippi, one from South  
5 Carolina.

6 Eighteen percent of all Congressmen from  
7 the original Section 5 states were African American  
8 compared to 25 percent of the African American citizen  
9 voting age population. If we include the other two  
10 southern Section 5 states, Texas and Florida, we count  
11 17 black members of Congress or 15 percent of all  
12 members of Congress from the nine southern states  
13 covered by Section 5 compared to an 18.9 percent black  
14 citizen voting age population.

15 Black representation in Congress in the  
16 Section 5 states is not proportional the black citizen  
17 voting age population, but black descriptive  
18 representation is as high as it has ever been in  
19 southern legislatures and in Congress and is  
20 approaching proportionality to the extent that  
21 geographic placement of black voters and the  
22 tendencies of electorates in general to elect black  
23 candidates who seek legislative office can be  
24 satisfied.

25 Indeed, part of what we're dealing with is

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1 the dispersion of voters and the ability to create  
2 constituencies that elect black candidates.

3 There is much more analysis required than  
4 this cursory treatment of black descriptive  
5 advancement. We need to examine elections using  
6 appropriate methods. --Can black voters elect their  
7 candidates of choice?

8 These methods, ecological inference,  
9 technique developed by Gary King, ecological  
10 regression, modulus precinct analysis, the careful  
11 examination of existing polling and exit polling data.

12 Allow us to ascertain when the references  
13 of minority voters do prevail in legislative  
14 elections, and they are important to ascertaining  
15 whether or not nonretrogression is satisfied under  
16 Section 5.

17 The same analysis though tells us the  
18 extent to which racial coalitions appear in support of  
19 candidates regardless of race of the respective  
20 parties. Our initial analysis is revealing that black  
21 candidates for Congress, black candidates for major  
22 office in the covered states are often polling the  
23 same proportion of the white vote in their general  
24 election opportunities as other Democrats; that a  
25 black Democratic candidate is simply a democratic

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1 candidate in most of these Section 5 states.

2 Third, the political issue. The political  
3 use of Section 5 should be frankly and openly  
4 discussed. Republican administrations have  
5 historically used the Voting Rights Act as a lever to  
6 encourage the creation of majority-minority districts  
7 and to limit opportunities to create cross-racial  
8 coalitions in support of Democrats.

9 White Democrats, in turn, have preferred  
10 districts with sizable but not majority-minority  
11 populations because of the biracial coalitions that  
12 could command more seats. In the 1980 and 1990 rounds  
13 of redistricting, African American Democrats preferred  
14 districts with black majorities sufficient to elect an  
15 African American candidate.

16 The aggressive use of the Voting Rights  
17 Act to create majority-minority districts in the early  
18 1990s resulted in an electoral map that shifted one-  
19 third of all southern congressional districts from the  
20 Democratic party to the Republican party in a three  
21 election period from 1992 to 1996.

22 CHAIRPERSON REYNOLDS: Excuse me, Dr.  
23 Gaddie.

24 DR. GADDIE: Yes, sir.

25 CHAIRPERSON REYNOLDS: You have two

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1 minutes left.

2 DR. GADDIE: I can sum up. I'm coming to  
3 the end.

4 That these districts were largely bereft  
5 of minority voters and next door to majority-minority  
6 districts is more than a coincidence. They were urged  
7 by the Justice Department as part of the maximization  
8 strategy using pre-clearance as a policy lever. State  
9 legislative or congressional plans or both, many of  
10 which were approved by the Justice Department, were  
11 subsequently overturned by courts in several southern  
12 states because of the use of race as a primary  
13 condition in the crafting of the districts.

14 More recently we have seen the States of  
15 Georgia and Texas offering opposite perspectives on  
16 the efforts to seize electoral advantage while playing  
17 politics with the Voting Rights Act. In Texas, new,  
18 safe Democratic congressional districts were crafted  
19 in the South Alley of Texas and in Houston, which also  
20 resulted in an effective black majority district in  
21 Houston and a majority Hispanic district in south  
22 Texas.

23 Both of these districts did perform on  
24 behalf of the minority electorate based upon the best  
25 analysis available, but in the process they eliminated

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1 a variety of competitive districts that had been held  
2 by Democrats throughout the State of Texas.

3           Meanwhile in Georgia the Democratic party  
4 in an effort to hold onto political power resorted to  
5 a variety of creative redistricting strategies,  
6 including the very careful spreading of African  
7 American voters in a fashion to maximize Democratic  
8 electoral opportunities while pulling down black voter  
9 shares in several state Senate districts.

10           This map, the state Senate map, was the  
11 foundation for the Georgia v. Ashcroft lawsuit.  
12 Depending upon the political goals of political  
13 players, they move minority voters around and treat  
14 them as a building block in the crafting of  
15 legislative districts. Minority constituencies are  
16 packed. They are cracked. They are spread. They are  
17 treated as a building block in politics, and in the  
18 process, what we have done is we have taken Section 5  
19 for being a lever to guarantee minority access to the  
20 process and turned it into a political tool with which  
21 one party bludgeons the other.

22           Finally, we need to revisit the need to  
23 continue Section 5 in all covered jurisdictions.  
24 Virginia offers evidence that covered jurisdictions  
25 can bail out. Nine counties or independent cities

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1 have bailed out from under Section 5, but there are  
2 states where there is substantial progress with  
3 African American representation where bailout is not  
4 possible.

5 In the State of Georgia, I will simply  
6 quote the African American elected Attorney General of  
7 Georgia Thurburt Baker. The state's racial and  
8 political experience in recent years is radically  
9 different from that which it was ten or 20 years ago,  
10 and that is exemplified on every level of politics  
11 from statewide elections on down.

12 The election history for legislative  
13 offices in Georgia, house, senate and congress,  
14 reflect a high level of success by African American  
15 candidates. Under the current rules, because of  
16 objections under Section 5 to changes in Georgia  
17 election law, Georgia cannot even consider bailing out  
18 despite the fact that it has the only extra  
19 proportional African American congressional delegation  
20 in the United States. It has a Democratic party  
21 legislative caucus in the state house that has more  
22 black than white members. It has black political  
23 leadership in the legislature in the Democratic party,  
24 and two statewide African American officials.

25 CHAIRPERSON REYNOLDS: Dr. Gaddie --

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1 DR. GADDIE: And that is where I will end  
2 my statement. Thank you for your time.

3 CHAIRPERSON REYNOLDS: Okay. I hope you  
4 don't mind, Mr. Greenbaum, but I would like to go to  
5 Roger Clegg.

6 Well, Roger, do you believe you're still  
7 on track in terms of leaving here?

8 MR. CLEGG: Well, I don't want to mess it  
9 up. If that a problem for you if I go?

10 MR. GREENBAUM: It is not a problem. Go  
11 ahead.

12 CHAIRPERSON REYNOLDS: Okay.

13 **VII(c). Presentation of Roger B. Clegg**

14 MR. CLEGG: I'll try to be very, very  
15 brief and stick around as long as I can in case there  
16 are some questions for the panelists. I'm sure there  
17 will be.

18 And actually, I think it will be easy for  
19 me to give an abbreviated version of my written  
20 testimony, which will be included in the record, I  
21 assume, because a lot of the ground has already been  
22 covered by other members of the panel.

23 Section 5 is a very straightforward  
24 statute to describe. What it does is require  
25 political agencies in certain covered jurisdictions to

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1 get permission from the federal government, either the  
2 Justice Department or a three-judge district court in  
3 the District of Columbia, before they make any changes  
4 that have to do with voting. And that permission can  
5 be given only if it's determined that the change does  
6 not have the purpose and will not have the effect of  
7 disadvantaging one racial group or another.

8 There are two constitutional problems with  
9 that, two tensions are created by that. There is a  
10 federalism problem because the statute says that  
11 activities which are historically and in some cases  
12 constitutionally committed to state and local  
13 governments cannot be taken without getting permission  
14 from the federal government first. So that creates a  
15 constitutional tension.

16 And the standard that has to be met before  
17 permission can be given is not simply whether the  
18 change treats people differently on account of race,  
19 but whether those changes have a disparate impact on  
20 the basis of race, and that is problematic because  
21 it's clear from the Supreme Court's jurisprudence that  
22 the 14th and 15th Amendments do not make state actions  
23 with a mere disparate impact illegal. They make only  
24 state actions that treat people differently because of  
25 race illegal. So Congress may be exceeding its

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1 authority..

2 Now, it's a fair question why the  
3 Commission should be focusing on this now, because  
4 those provisions under Section 5 have been around for  
5 40 years. And, of course, the answer is that Congress  
6 will need to reauthorize Section 5 in 2007 because  
7 that's when it's going to expire. So it's a good time  
8 for the Commission to be looking at this issue, and  
9 obviously it's an essential time for Congress to be  
10 looking at this issue, too.

11 The Supreme Court's jurisprudence in both  
12 of the areas that I've identified -- both the  
13 federalism area and the disparate impact versus  
14 disparate treatment -- area, has developed a great  
15 deal since 1965. And I think it's fair to say that  
16 both the tensions that I've identified are much more  
17 in evidence and are much more likely to concern courts  
18 now than they did in 1965. I go through the  
19 development of the case law in my testimony.

20 My bottom line is that the Congress -- and  
21 this may be something that all of us agree on,  
22 actually -- really needs to have thorough hearings on  
23 Section 5 and to have those hearings not in the spirit  
24 of "verdict first, trial afterwards," but in the  
25 spirit of really determining whether we need Section 5

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1 anymore at all -- and whether there are changes that  
2 ought to be made in Section 5, addressing the  
3 constitutional problems that I have identified;  
4 determining whether the whole preclearance mechanism  
5 makes sense; determining whether the jurisdictions  
6 that are covered now by Section 5 are the  
7 jurisdictions that ought to be covered; whether there  
8 are better ways to identify the jurisdictions that  
9 ought to be covered; whether there are better  
10 mechanisms than the present preclearance mechanism;  
11 whether the relevant kinds of voting changes are being  
12 accurately identified; whether a narrower  
13 identification of voting changes would be possible;  
14 and, finally, and I think most critically, whether it  
15 makes sense to deny preclearance to changes which do  
16 not have a disparate treatment on the basis of race.

17 CHAIRPERSON REYNOLDS: Okay. Thank you.

18 Mr. Greenbaum.

19 **VII(d) . Presentation of Jon M. Greenbaum**

20 MR. GREENBAUM: Thank you, Chair Reynolds.

21 It's a great honor and pleasure to be addressing the  
22 Commission this morning.

23 Since 1957, the Commission has been out  
24 front in documenting the degree of discrimination and  
25 voting and really served as an aid helping Congress

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1 define what it should do about that problem, and in  
2 fact, I have the 1981 Commission report on my desk,  
3 and it's just packed with information that I know  
4 aided Congress when it was considering reauthorization  
5 of the 1981-1982 time period.

6 As you mentioned earlier, Chair Reynolds,  
7 the Voting Rights Act is generally considered to be  
8 the most effective piece of civil rights legislation  
9 passed by Congress, and we've seen that positive  
10 impact. In fact, some of Professor Gaddie's tables  
11 reflect the positive impact that the Voting Rights Act  
12 had on minority participation.

13 What we need to consider is how much of  
14 that is attributable to the Voting Rights Act and, in  
15 particular, how much of that is attributable to  
16 Section 5 as it exists today and as it has been  
17 operating for the last 40 years.

18 And the facts actually suggest that  
19 Section 5 has a tremendous impact on what is happening  
20 today, and I'll get into that in a minute. What I'm  
21 trying to state in terms of voting discrimination is  
22 I'll agree with Mr. Blum that we don't have a lot of  
23 Bull Connors riding around today, but instead, what we  
24 have are situations where you have people that are in  
25 power that are trying to manipulate the process,

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1 change the rules to work to their benefit, and often  
2 that happens at the expense of minorities, and that is  
3 what Section 5 protects against.

4 I'm going to be using a PowerPoint during  
5 much of my presentation today to use as background as  
6 I'm talking, and I'm also going to be submitting a  
7 written statement in the record. I'm going to skip  
8 the background on me because you discussed it.

9 And I'm from the Lawyers Committee. I  
10 want to briefly say that one of the things the Lawyers  
11 Committee has done on behalf of the civil rights  
12 community is related to the situation of creating a  
13 record, and I agree with Mr. Clegg that it is  
14 important for Congress to create a record of what is  
15 the existence of voting discrimination today.

16 What we've done is we've formed a  
17 nonpartisan commission of eight members that are  
18 looking -- that is looking specifically at the  
19 existence of voting rights discrimination today.  
20 We're doing independent research. We're having ten  
21 hearings across the country. In fact, we have a  
22 hearing next Friday here in Washington, D.C., and I  
23 would invite everybody to attend that hearing. It's  
24 going to be at Arnold & Porter.

25 And the main purpose is to look at the

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1 current degree of discrimination in voting and educate  
2 the public on VRA issues. Through these ten hearings  
3 we will probably have 100 people testify, and they are  
4 election officials, elected officials, lawyers who  
5 have been involved in cases, experts that have been  
6 involved in cases, spanning the entire country.

7 As other panelists have mentioned, there  
8 are permanent and temporary provisions of the act, and  
9 really the focus in terms of the reauthorization is on  
10 the temporary provisions, preclearance, minority  
11 language provisions, and Department of Justice  
12 examiners and observers.

13 My written materials will go more into the  
14 minority language and to the Department of Justice  
15 examiners and observers. Because the other panelists  
16 have talked mostly about Section 5, my oral comments  
17 will be restricted mostly to talking about Section 5.

18 One of the things to note is that Congress  
19 has consistently updated the act in each  
20 reauthorization, 1965, '70, '75, '82, '92. And for  
21 the most part, the update has been to expand as  
22 they've learned more about discrimination going on  
23 across the country.

24 For example, the ban on tests and devices,  
25 which I think Mr. Blum referred to earlier was

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1 originally for five years and what he would consider  
2 to be an emergency provision.

3 Well, what Congress decided along the way  
4 is, well, this ban on tested devices shouldn't be,  
5 first of all, restricted to Section 5 covered  
6 jurisdictions but should be nationwide, and secondly,  
7 that it should be permanent.

8 So along the way Congress has seen what it  
9 needs to do based on what's happened in the real  
10 world, and in the course of Section 5, as Mr. Gaddie's  
11 charts describe, there's been an increase in black  
12 registration and turnout in the South. No doubt about  
13 that. And the ban on tested devices had a lot to do  
14 with that.

15 But then what happened immediately after  
16 '65, and there's documentation as to this, reports  
17 that were done and Congress discussed this in the '70  
18 reauthorization, is new methods were devised to make  
19 sure that although minorities technically could vote,  
20 that vote wouldn't mean anything.

21 So what did jurisdictions do? They moved  
22 from single member districts to at large to minimize  
23 the impact of minority voting. They took elected  
24 positions and turned them to appointed positions.  
25 They manipulated district lines. They moved polling

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1 places. They instituted majority vote requirements,  
2 and where minorities were becoming close to being a  
3 majority, they annexed whites but not minorities into  
4 new jurisdictions.

5 So all these devices and others were  
6 implemented and that's why the Supreme Court in the  
7 Allen case in 1969 said Section 5 has to cover all  
8 actions necessary to make a vote effective, because  
9 giving a person the right to vote but then changing  
10 the rules to make sure that that vote doesn't mean  
11 anything takes away the whole impact of eliminating  
12 discrimination in voting.

13 The power of Section 5 is that it shifts  
14 the time and inertia to the jurisdictions, and this is  
15 what I mean by that. In a Section 2 lawsuit, what do  
16 you have to do to prevail? You've got to file the  
17 lawsuit. You have to have a lawyer who's willing to  
18 take it, take the time, the cost, the expense, and  
19 you've got limited resources out there.

20 Section 5 turns that process around and  
21 tells the jurisdictions you've got 60 days. You have  
22 to prove why this change isn't discriminatory, and the  
23 fact of the matter is most of the times jurisdictions  
24 do. Over 99 percent of the voting changes are  
25 precleared.

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1           But what happens in terms of trying to  
2 bring a lawsuit, and let me give you a quick example.  
3 My case that I brought on behalf of the Department of  
4 Justice against Charleston County.

5           Charleston County, the county council was  
6 elected at large, and blacks couldn't get elected to  
7 the county council. It took us four years, but now  
8 they have single member districts, and we had to go  
9 through a Section 2 case. There were private  
10 plaintiffs involved. The county spent \$2 million  
11 defending the case. The private plaintiffs spent  
12 \$700,000. We prevailed at the district court. We  
13 prevailed in front of the Fourth Circuit in an opinion  
14 by Judge Wilkinson, and the Supreme Court denied cert.

15           So what did Charleston County do? They  
16 had to change their county council. Well, the county  
17 school board early in 2000 had five black members.  
18 Well, what did they decide to do? They changed the  
19 method of the election to the school board exactly to  
20 that of the county council method of election that we  
21 challenged and have prevailed upon at the district  
22 court. They did this after the district court found  
23 in our favor.

24           Under Section 5, the solution was simple:  
25 denied preclearance.

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1 Under Section 2, it would have required  
2 going through the same process; take several years,  
3 cost millions of dollars just to end up in the same  
4 result.

5 Another example, since I've been at the  
6 Lawyers Committee, in Waller County, Texas. The  
7 District Attorney, two months before the primary  
8 election with black candidates running in the  
9 Republican primary, says -- Waller County has a  
10 predominantly black school, Prairie View A&M  
11 University -- the District Attorney tells the  
12 students, "If you vote, I'm going to arrest you and  
13 you can get thrown in jail." Says this publicly. We  
14 file a lawsuit to tell them you're out of bounds.

15 So he backs off. What's the next thing  
16 they do? Well, they limit the number of early voting  
17 hours where the students vote on campus. They go from  
18 17 to six. And why does that matter so much? Because  
19 the students were going to be on spring break during  
20 the election. So they were all going to vote early.

21 Because of Section 5 we were able to block  
22 that at the last minute. It prevents these last  
23 minute changes from occurring.

24 The other thing it does is it makes racial  
25 fairness a consideration when elected officials or

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1 election officials are deciding what their procedures  
2 are going to be; they have to account for Section 5 up  
3 front, and they have to make sure that the process is  
4 racially fair as opposed to going ahead and making the  
5 change and forcing somebody to sue you.

6 Because the fact of the matter is there  
7 are not enough lawyers who are willing to do this work  
8 out there to stop all of these changes happening at  
9 once. Section 5 cuts a lot of that off.

10 The next slide will tell you a little bit  
11 about the statistics and the effectiveness of Section  
12 5. Over 600 objections since 1982, over 2,200 changes  
13 objected to, massive impact.

14 Over on the right it talks about  
15 declaratory judgment actions where Section 5 made a  
16 difference. Louisiana this past redistricting cycle  
17 tried to eliminate a black majority district in  
18 Orleans Parish, and instead of going to DOJ, they went  
19 directly to the District Court.

20 The District Court made it clear that that  
21 wasn't going to fly, and Louisiana backed off, redrew  
22 the plan in a way that was racially fair.

23 I have three slides briefly showing the  
24 breadth of objections in three southern states since  
25 1982, and you'll see that for the most part where you

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1 have a substantial minority population, you have one  
2 or more objections, and in fact, the last state, South  
3 Carolina, you have objections in almost every state.

4 I want to briefly address the issue of  
5 racially polarized voting and why this issue matters  
6 regarding the issue of majority and minority  
7 districts.

8 The reason why majority-minority districts  
9 are necessary is because of racially polarized voting.

10 In the last ten years in cases in Louisiana, Georgia,  
11 South Carolina, and South Dakota, statewide  
12 redistricting plans, the courts have said there's  
13 racially polarized voting in these states.

14 In the Texas case which Mr. Gaddie is  
15 familiar with, the District Court said the following:  
16 "this court recognizes that plaintiffs have  
17 established racially polarized voting and a political,  
18 social, and economic legacy of past discrimination."

19 Well, what does "racially polarized  
20 voting" mean? "Racially polarized voting" means that  
21 generally black preferred candidates and particular  
22 black candidates who are preferred by black voters  
23 can't get elected unless they're in a majority  
24 minority district.

25 One of the attachments I provided you

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1 having to do with Georgia comes from the Georgia v.  
2 Ashcroft case, and it's an attachment to the  
3 Department of Justice's brief on remand. What that  
4 attachment demonstrates is out of all the senate  
5 districts in Georgia, the only districts in which  
6 blacks were able to get elected -- and this is as of  
7 2002 -- were districts in which blacks constituted a  
8 majority of the black voting age population.

9 Interestingly enough, some of those  
10 districts in which blacks constitute a majority  
11 population, you have either white or Latino  
12 representatives, but in none of the districts where  
13 blacks were a minority of the voting age population  
14 was there a black representative.

15 Racially polarized voting is what kind of  
16 binds this all together. We'd love to have a color  
17 blind society in terms of the way things operate, but  
18 in terms of voting it just doesn't operate that way.  
19 And so majority-minority districts are a response to  
20 that.

21 And going to Mr. Gaddie's Table 4 and what  
22 he handed out this morning, his various tables, you'll  
23 see that in Table 3 in 1984, blacks participated at a  
24 higher rate than whites in Mississippi, and their  
25 registration level was higher, but yet there were only

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1 20 blacks elected to the Mississippi legislature.

2 Today there is 47. It's not because  
3 there's been an increase in black turnout and black  
4 registration compared to 1984. It's because of  
5 litigation and because of Section 5 and majority black  
6 districts that that's happened, because it's happening  
7 in a context of racially polarized voting.

8 Really briefly, I want to address a couple  
9 of the constitutional issues that Mr. Clegg had raised  
10 talking about Section 5 and the federalism concerns as  
11 well as Section 5 in terms of the disparate treatment  
12 versus impact concerns.

13 The Supreme Court in recent years has  
14 adopted a much tougher standard in terms of these  
15 types of legislative enactments, but one thing to note  
16 is in the context of Section 5 in several of these  
17 cases where other federal legislation has been struck  
18 down, the Court has said positive things about Section  
19 5. The fact that it is limited to particular  
20 jurisdictions, the fact that there is a specific time  
21 frame to it, those have been positives.

22 And in terms of Section 2, even this year  
23 the Court denied cert. in a case where the Ninth  
24 Circuit had held that Section 2 was constitutional.  
25 So these issues have come before the Court in recent

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1 years.

2 And one other thing to note. In the case  
3 where federal statutes have been struck down under the  
4 so-called Boone line of cases, in most of those  
5 situations you were dealing with a relatively sparse  
6 record of discrimination in those particular areas,  
7 and in the ones that were struck down, you were also  
8 talking about groups of people that don't get special  
9 protection under the law.

10 And what I mean by that is laws against  
11 them are not subject to strict scrutiny.

12 When it comes to voting and the Voting  
13 Rights Act, look at the record in terms of the number  
14 of objections and that's just one piece of it. The  
15 number of times observers have been sent, the number  
16 of successful, affirmative litigation that had been  
17 brought in these jurisdictions, et cetera, and the  
18 record is really overwhelming when you look at the two  
19 decades since 1982.

20 And then the other thing is where the  
21 Court has dealt with congressional legislation  
22 involving people deserving of higher protection,  
23 access to the courts and gender discrimination, the  
24 Court has actually upheld those statutes on the ground  
25 with records that are nowhere near as strong as we

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1 have in terms of the Voting Rights Act.

2 I look forward to your questions, and  
3 thanks for your time.

4 CHAIRPERSON REYNOLDS: Okay, gentlemen.  
5 Thank you for those fine presentations, and I am sure  
6 that we have some questions for you.

7 Commissioner Braceras.

8 COMMISSIONER BRACERAS: I have a few  
9 questions. The first is I'm sure you're familiar with  
10 Heather Gerkin's article in the New Republic where she  
11 recommends, I guess, what she sees as a compromise  
12 position on reauthorization. She calls it an opt in  
13 option, and I'm wondering what your thoughts are,  
14 particularly Mr. Blum's thoughts, on that proposal.

15 MR. BLUM: I not only read the article in  
16 New Republic, but went and read the Law Review article  
17 that that distilled piece came from. As I said  
18 yesterday in another panel discussion, I'm willing to  
19 keep my options open on every legitimate proposal to  
20 find a way to solve the legal problems of Section 5  
21 and then solve what I think are terrible political  
22 problems with it.

23 I must tell you I think she has a kernel  
24 of an idea, but I've rejected that idea. I think  
25 there's a possibility that if -- and I think the

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1 congressional findings are going to be at the heart of  
2 this debate going forward -- if there is a finding  
3 jurisdiction by jurisdiction that racial  
4 discrimination still exists, not only in these covered  
5 jurisdictions, but as importantly, outside of these  
6 jurisdictions because the black population and  
7 Hispanic population has migrated throughout the  
8 country; if there is a finding, a hard data analysis,  
9 not two anecdotes, not three anecdotes, hard data  
10 finding that racial discrimination exists in a  
11 prevalent way, then if Congress makes the finding,  
12 wants to wipe the slate clean, bail out everyone  
13 currently covered by Section 5 and bail in specific  
14 jurisdictions after each finding has been made, then,  
15 you know, depending on what the statute looked like, I  
16 think that's the beginning of a discussion.

17 But Gerkin's idea relies upon the sort of  
18 goodwill of the racial advocacy groups throughout the  
19 country, NAACP, MALDEF and others, and I don't think  
20 that public interest law firms, racial advocacy groups  
21 should be in a position as a driver in determining  
22 what goes up to the Justice Department and what  
23 doesn't go up to the Justice Department.

24 MR. GREENBAUM: May I respond to that as  
25 well?

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1 COMMISSIONER BRACERAS: Sure. That would  
2 be great.

3 MR. GREENBAUM: I know Professor Gerkin  
4 and I like her, but frankly, I don't think her article  
5 or the procedure outlined in her article is workable  
6 in the real world. I mean, what she essentially would  
7 require is she would -- remember I talked about how  
8 Section 5 takes the advantages of time and inertia and  
9 puts that burden on the jurisdiction. She would  
10 switch that. She would have that switched back and  
11 put it on minorities to say to the Justice Department,  
12 "We've got a problem here."

13 The problem with a lot of changes that  
14 happen in the real world is that they go on without  
15 minorities necessarily knowing about it. There's a  
16 notice in the newspaper. "We're going to have a  
17 meeting on X." The next thing you know the rules are  
18 changes.

19 What Section 5 does is it brings all of  
20 that up to the Justice Department. The Justice  
21 Department then calls somebody from the minority  
22 community and says, "Hey, do you know about this? Is  
23 this a problem?"

24 But the opt in process basically allows  
25 for things to be done in secret without minorities

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1 ever knowing about it and, once again, puts the burden  
2 on the people that have been discriminated against.

3 COMMISSIONER BRACERAS: May I ask one more  
4 question?

5 CHAIRPERSON REYNOLDS: Sure.

6 COMMISSIONER BRACERAS: It seems that  
7 there is -- well, there obviously is -- a difference  
8 between procedural changes that affect access to the  
9 ballot box and those changes that deal with  
10 redistricting and gerrymandering. And is there any  
11 way or would you in any way support a reauthorized  
12 Section 5 that preserved preclearance for procedures  
13 that limit access but dealt with redistricting and  
14 gerrymandering and issues of raw political power  
15 differently or not at all?

16 MR. GREENBAUM: Well, the thing is the two  
17 things are linked. If you go back to 1960 -- if you  
18 looked at the '65 to '70 period, access improved  
19 tremendously during that period of time, but then all  
20 of these other devices were created to minimize the  
21 effect of minorities being able to vote.

22 If in a jurisdiction there was a threat  
23 that it would go majority black, well, annex some more  
24 white people so that stays majority white. Change  
25 from districts to being at large. If there was a

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1 threat that a black person was going to get elected,  
2 go to appointed positions instead of elected  
3 positions.

4 COMMISSIONER BRACERAS: Changes in  
5 election versus appointment or changes in the method  
6 of election, if those were put with, on the one side,  
7 changes that affect access and you just looked at and  
8 you just sort of carved out in Section 5 a pure  
9 districting decision, I'm just wondering how the  
10 panelists would feel about that.

11 MR. GREENBAUM: How I feel specifically  
12 about redistricting? I would not exempt redistricting  
13 from Section 5 coverage, and it relates to the fact  
14 that, you know, once again, take Georgia, for example,  
15 in the early 1990s when they were redistricting there.

16 The person that was in charge of redistricting for  
17 Georgia, the legislature, said, "I'm not going to draw  
18 any black districts for Congress," except he didn't  
19 use the word "black." And this is actually in the  
20 federal opinion Busby v. Smith.

21 And there's actually a sentence in there  
22 saying, "Joe Mack Wilson is a racist," and when you  
23 look at -- and I agree with some of the panelists that  
24 the political parties are trying to manipulate the  
25 process in terms of redistricting.

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1 COMMISSIONER BRACERAS: Right.

2 MR. GREENBAUM: But don't blame it on  
3 Section 5. That manipulation is taking place in a lot  
4 of jurisdictions not covered by Section 5, and that's  
5 why in states not covered by Section 5 like Ohio you  
6 have -- or marginally covered by Section 5, only four  
7 counties in California -- you have propositions on the  
8 ballot that would try to take redistricting out of the  
9 political sphere.

10 So I think it's a mistake to blame Section  
11 5 for the politicalization of redistricting. It's  
12 simply a tool as any other tool that's out there that  
13 the political parties would use.

14 And one other quick thing. At the local  
15 level, political parties don't play such a role. A  
16 very small percentage of the redistrictings that are  
17 done are statewide redistrictings. At the political  
18 level, you might be the only minority on a county  
19 commission of five. You're not going to have somebody  
20 protecting you in the way that sometimes in state  
21 redistrictings white Democrats will protect black  
22 Democrats, white Republicans will protect Latino  
23 Republicans. That doesn't happen at the local level.

24 COMMISSIONER BRACERAS: I certainly don't  
25 blame Section 5 for being the sole cause of our

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1 redistricting problem, but to the extent that it's one  
2 of the causes, you know, I just wonder whether if you  
3 break this down into smaller pieces whether that might  
4 not be an area where compromise can be reached.

5 But I'd be interested in Mr. Clegg's views  
6 on that.

7 MR. CLEGG: Well, I think that that's  
8 exactly the kind of question that Congress should  
9 explore in its hearings and ask whether there are  
10 certain kinds of changes that are more likely to  
11 reward invocation of the preclearance process than  
12 others.

13 I'm not sure. It may turn out that the  
14 line you're suggesting is a good place to draw the  
15 line. It may not. I mean, you know, the fact of the  
16 matter is I think that some redistricting can be done  
17 in very ugly, racist ways. A lot of it is not done  
18 that way, but it may still have a, quote, disparate  
19 impact, end quote.

20 Conversely, there are a lot of non-  
21 redistricting changes that are perfectly innocent, and  
22 there are some that are not. So I don't know. You  
23 know, to me I think that the critical distinction is  
24 the one that the Supreme Court has already drawn  
25 between actions that are taken with the idea of

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1 treating voters differently because of race and those  
2 that are not. And I think that the focus that  
3 Congress should have during its hearings is -- and I  
4 think this is partly just to make sure that whatever  
5 they end up passing doesn't get struck down as  
6 unconstitutional -- needs to be on whether whatever  
7 law Congress has on the books, chooses to have on the  
8 books really is enforcing the 15th Amendment, which  
9 means insuring that, you know, not proportional  
10 results, not the absence of disparate impact, but the  
11 insurance that not state is denying the right to vote  
12 on the basis of race.

13 CHAIRPERSON REYNOLDS: Okay.

14 DR. GADDIE: If I might add an additional  
15 comment, we have to remember the context of history  
16 and change. The people in these jurisdictions, white  
17 and black, Latino, Asian, do not exist in a vacuum.  
18 In 1982, Georgia, a case I'm very familiar with, in  
19 1982, the Georgia legislature had 180 members in the  
20 house. One hundred and forty of those members were  
21 white Democrats, many of whom were rural Democrats.  
22 The current George House of Representatives has 79  
23 Democrats of 180 members, 38 of whom are white  
24 Democrats, very few of whom come from rural areas.

25 Change occurs. Partisan change occurs;

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1 racial representation change occurs. And Section 5  
2 has been a powerful influence on exacting change.  
3 That's what us political scientists like about policy  
4 that's successfully implemented. It's powerful. It  
5 has strong provisions to compel change. It has  
6 oversight.

7 The question is should it still continue  
8 to function in the form that it does because if we  
9 also look at the Georgia maps that were ultimately  
10 precleared in Georgia v. Ashcroft, those maps which  
11 were upheld under Section 5 ultimately by federal  
12 courts and the house maps that were approved by the  
13 Justice Department were nonetheless thrown out by the  
14 federal courts for having a constitutional defect.  
15 They violated the one person, one vote provision in  
16 Larios v. Georgia.

17 So even a map precleared under Section 5  
18 may still have problems. We have voting rights issues  
19 that arise in this country that are in jurisdictions  
20 that are not covered by a Section 5 that are very  
21 real. We need to consider the full scope of our  
22 options, but also recognize that as much as Section 5  
23 has brought us progress, it still lets through maps  
24 and plans and procedures that are still potentially  
25 illegal.

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1 CHAIRPERSON REYNOLDS: Commissioner  
2 Kirsanow.

3 COMMISSIONER KIRSANOW: Thank you, Mr.  
4 Chairman.

5 First I'd like to commend all of the  
6 panelists and the staff for putting together a very  
7 fine panel. I know staff does a great job in trying  
8 to find the best people possible, and I think they've  
9 done a good job here.

10 In the past we've urged staff to try to  
11 balance the presentations as much as possible, and I  
12 know that's a difficult thing to do. You don't always  
13 get the same numbers, but I would again urge staff to  
14 try to provide as much balance as possible.

15 A couple of questions based on review of  
16 your written testimony, and I don't know who would  
17 want to answer this, but I think it's probably Mr.  
18 Greenbaum. Just in terms of information,  
19 approximately if you know, per year how many  
20 preclearance submissions there are.

21 MR. GREENBAUM: You know, I can get that  
22 data to you, Commissioner. It's usually in an average  
23 year there might be 5,000 voting submissions that the  
24 Department of Justice gets, and I'm just doing that  
25 based on my experiences that I don't have a hard

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1 number for you.

2 Doing the redistricting cycle there's a  
3 bit more because jurisdictions are not only  
4 redistricting, but they're also because of census data  
5 that comes out, they're changing precinct lines and  
6 moving around polling places more often than they  
7 might do later in the decade.

8 But roughly five to 6,000, and a  
9 particular submission may include a whole bunch of  
10 voting changes, like, for example, the submission that  
11 included Georgia's election reform bill had numerous  
12 changes to it, one of which was the Georgia photo ID  
13 requirement. So it's about five to 6,000 submissions,  
14 and then some multiple of that in terms of number of  
15 voting changes.

16 COMMISSIONER KIRSANOW: I hope this isn't  
17 necessarily the case, but if you try to read the tea  
18 leaves from written reports about what the  
19 reauthorization process is likely to yield, it seems  
20 as if that there may be kind of a defined result  
21 already. I'm not suggesting that there is, but it  
22 seems that there's considerable momentum toward not  
23 simply reauthorization of Section 5, but possibly even  
24 expansion of Section 5, and I think that's a  
25 bipartisan approach to such reauthorization. I think

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1 both parties are equally invested in doing so.

2 Maybe I'm wrong, but that's where the  
3 track seems to go, and I'm hopeful as I think everyone  
4 here has suggested that nonetheless there are open  
5 minded hearings to adduce certain data related to  
6 whether or not there should be a full blown  
7 reauthorization or maybe there needs to be some  
8 tempering.

9 But let's presume for a moment that the  
10 tea leaves contained -- at least that I read are  
11 correct, that is, there's going to be a  
12 reauthorization of Section 5 as currently constituted  
13 with maybe even something that's more encompassing.

14 If there is a drive toward reauthorization  
15 at this particular point, and I guess I would direct  
16 this to Mr. Blum.

17 If there is some form of reauthorization,  
18 what do you hope to see as a potential compromise, if  
19 you will, in terms of an outcome that might be in your  
20 estimation more salutary than the current status of  
21 the law?

22 MR. BLUM: That's a good question. Let me  
23 address your basic premise, and that is the train has  
24 left the station and it's building a head of steam,  
25 and I would agree with that. Judiciary Committee,

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1 Chairman Sensenbrenner is on the record as favoring  
2 reauthorization for another 25 years. As you may  
3 recall in the Senate, Senator Frist and Senator  
4 McConnell attempted a few years ago to attach a  
5 permanent reauthorization of Section 5 to a handgun  
6 liability bill that failed.

7 However, I think that as hearings such as  
8 these expand and as the political discussion in this  
9 town starts to build to a head, there may not be the  
10 certainty that the Voting Rights Act, Section 5, you  
11 know, is going to be reauthorized pretty much as it  
12 stands.

13 Circumstantial evidence, I think, is in  
14 your analysis and not in mine, but the jury is not out  
15 until I think Congress has had a good, hard look at  
16 this.

17 Politically I think Section 5 has turned  
18 into an absolute nightmare for our body politic. So I  
19 can't see anything to be gained, and much of the harm  
20 that I think we all agree has been laid at the feet of  
21 Section 5 will continue.

22 You know, in terms of if the train has  
23 left the station, and it is reauthorized as is for  
24 another period of time and if my worst fears are right  
25 and the Republicans are able to overturn Georgia v.

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1 Ashcroft and find a way to sort of repack majority-  
2 minority districts, then I think it is going to the  
3 courts, and I think the only thing that would probably  
4 save it there is if it applied nationwide. If it  
5 morphed from a statute that targets, I think, unfairly  
6 these jurisdictions and applied nationally, I think  
7 that's the only thing that would probably save it,  
8 Commissioner.

9 MR. GREENBAUM: Commissioner Kirsanow, can  
10 I respond really briefly to that nationwide comment?

11 COMMISSIONER KIRSANOW: Certainly.

12 MR. GREENBAUM: Nationwide coverage of  
13 Section 5 would be a disaster constitutionally.  
14 Section 5 in the Voting Rights Act is designed to  
15 remedy racial discrimination. You have a lot of  
16 jurisdictions across this country. It would be very  
17 hard constitutionally to support having Section 5  
18 apply to Iowa, Maine to Vermont to places that don't  
19 have minority population because you wouldn't have a  
20 history of discrimination in this.

21 COMMISSIONER KIRSANOW: Understood.  
22 However, I think we've heard some testimony and based  
23 on some of the written material we're not frozen in  
24 1965. So even though there's historical bases for it,  
25 if that bases no longer exists in present time, then

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1 I'm wondering whether certain jurisdictions currently  
2 subject to the preclearance provisions would be  
3 saying, "Well, wait a minute. It seems that we're  
4 being treated differently than other jurisdictions  
5 where the data, the statistics show that there's just  
6 as much discrimination going on as there are in the  
7 current one, but I understand what you're saying.

8 But I have one other question, if I could,  
9 Mr. Chairman, for you.

10 CHAIRPERSON REYNOLDS: Sure.

11 COMMISSIONER KIRSANOW: I think you made  
12 reference to -- and I'm curious about this because it  
13 was very interesting -- you made reference to racial  
14 polarization in voting, and you cited certain data,  
15 and it was in conjunction with the data provided by  
16 Professor Gaddie, I believe. It was Table 3, and I'm  
17 wondering if it's really racial polarization, and I  
18 think that it probably is, but if you disaggregate the  
19 data some more, it may be more party polarization  
20 rather than racial polarization.

21 MR. GREENBAUM: Let me address that in two  
22 different contexts. The main citations for the racial  
23 polarization are taken from decisions made by federal  
24 courts having to do with redistricting the last ten  
25 years. It's not my opinion. It's the opinion of

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1 those three judges' district courts.

2 I referred to the Charleston County case a  
3 little while ago that I worked on when I was at the  
4 Department of Justice. The main defense in that case  
5 was it's not race. It's party because they had party  
6 elections.

7 We actually looked at the data to see what  
8 effect party had as opposed to race, and the data show  
9 that white Democrats got greater crossover voting from  
10 white -- more white voters were willing to vote for  
11 white Democrats than for black Democrats, and that had  
12 a tremendous difference in terms of who was actually  
13 getting elected to office.

14 And if you look at the Fourth Circuit  
15 opinion in that case and two of the judges on the  
16 Fourth Circuit on that panel are very conservative,  
17 and the panel found three to zero. They actually  
18 cited some of the racial difference in the way that  
19 people voted, separating out partisanship.

20 CHAIRPERSON REYNOLDS: Thank you.

21 Vice Chair Thernstrom.

22 VICE CHAIRPERSON THERNSTROM: I'm going to  
23 go last. I've got a whole bunch of questions.

24 CHAIRPERSON REYNOLDS: Okay.

25 VICE CHAIRPERSON THERNSTROM: As to be

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1 expected.

2 CHAIRPERSON REYNOLDS: Voter polarization.

3 It seems to me that that's not limited to the South,  
4 and this goes back to Commissioner Kirsanow's question  
5 about the jurisdictions that are not covered.

6 We had a factual predicate that justified  
7 Section 5. Now, for me the question becomes is that  
8 factual predicate still in place. Should we have  
9 metrics, and Dr. Gaddie mentioned this; should we have  
10 metrics in place so that we can in an objective  
11 fashion determine when things have -- not when racist  
12 attitudes disappear because in my view that will never  
13 happen, but when discriminatory conduct has dissipated  
14 to the point where Section 5 is no longer justified in  
15 a constitutional sense.

16 MR. GREENBAUM: Well, and the thing is  
17 that you have a record, and that record, it's more  
18 easy to determine that record in jurisdictions  
19 currently covered by Section 5, and that record is,  
20 well, what's the enforcement record. Has there been  
21 objections? Have there been times that DOJ has had to  
22 send observers?

23 When DOJ is sending observers, they're  
24 doing that to protect against violations of the 14th  
25 and 15th amendment. That's what the statute says.

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1 Have there been voting rights cases that have been  
2 brought that have been successful in those  
3 jurisdictions so that you have something to measure it  
4 by?

5 In the jurisdictions not currently  
6 covered, you could look at things like what has the  
7 enforcement record been and as well as other  
8 information that Congress could consider.

9 CHAIRPERSON REYNOLDS: Well, let me ask  
10 the question another way. If the facts that are on  
11 the ground today, if they had existed in 1965, do you  
12 think that the Voting Rights Act, Section 5  
13 specifically, could have survived a constitutional  
14 challenge?

15 MR. GREENBAUM: Yes.

16 CHAIRPERSON REYNOLDS: Today, today's  
17 facts?

18 MR. GREENBAUM: Today's facts, can Section  
19 5? Well, as I mentioned before, if you look at a lot  
20 of the recent Supreme Court cases where they've struck  
21 down other federal statutes on constitutional grounds,  
22 the one example that the Supreme Court has used over  
23 and over again in these cases say this is where  
24 Congress did it right, has actually be the Voting  
25 Rights Act in Section 5.

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1 CHAIRPERSON REYNOLDS: Okay.

2 VICE CHAIRPERSON THERNSTROM: In '65, with  
3 the '65 fact, that's different than what the Chair is  
4 saying.

5 MR. GREENBAUM: They've included the facts  
6 as of '82 because --

7 CHAIRPERSON REYNOLDS: Let me try to  
8 rephrase this.

9 MR. GREENBAUM: Sure.

10 CHAIRPERSON REYNOLDS: It seems to me that  
11 we all agree that in 1965 some horrible things were  
12 going on in the South, that there was massive  
13 disenfranchisement for blacks, and because of this  
14 glaring constitutional violation, I think that there  
15 is a consensus across the board that in 1965,  
16 preclearance was justified, but for those egregious  
17 facts, I'm suggesting that the Voting Rights Section 5  
18 would not have survived constitutionally.

19 And if I understand you correctly, you  
20 disagree with the analysis.

21 MR. GREENBAUM: That's correct, Chair  
22 Reynolds. I believe, in fact, that -- and if you look  
23 at the statutes that have been struck down by the  
24 Supreme Court, they involve discrimination against  
25 people who are not entitled to higher levels of

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1 scrutiny, like people who are disabled, and if you  
2 look at the record that Congress has compiled in those  
3 individual cases, they didn't have much evidence on  
4 the record in those individual cases.

5 When it comes to the Voting Rights Act,  
6 because we have this enforcement record over the last  
7 20 years, we can actually look at things like Court  
8 cases and Section 5 objections and timed observers  
9 have been spent, as well as in addition to that, what  
10 people from the field tell us, but it's not just  
11 anecdotes. We have hard data facts that I believe  
12 that that record is substantially stronger than that  
13 with the net of the statutes which got struck down by  
14 the Supreme Court.

15 CHAIRPERSON REYNOLDS: Dr. Gaddie.

16 DR. GADDIE: Mr. Chairman, the existing  
17 bailout provision for Section 4 includes a variety of  
18 indicators that Mr. Greenbaum has noted, and at least  
19 one of these metrics is available nationwide, which is  
20 the existence of Section 2 challenges and judgments  
21 against the jurisdiction. So if you're looking to  
22 craft a new trigger, one thing you can consider is  
23 evidence outside the Section 5 states of lawsuits  
24 brought against the state under Section 2, the  
25 application of the Jingles criteria, the crafting of

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1 new districts.

2 So there is evidence out there that will  
3 exist in the legal record. But another consideration  
4 in bailing out is preclearance objections, and I  
5 happen to have a table with me that was not in my  
6 presentation that indicates the number of Section 5  
7 preclearance objections since 1965 in ten-year  
8 increments.

9 And I would just briefly note to you that  
10 in the 1975 to 1984, there were roughly 400 objections  
11 in states covered by Section 5. From 1985 to 1994,  
12 there were roughly 400 objections under Section 5.  
13 Since 1995, January of 1995, there have been 87 total  
14 objections lodged by the Justice Department under  
15 Section 5.

16 To give you a comparative perspective, in  
17 the decade before 1995, 97 objections were lodged in  
18 Texas alone. Texas objections fall from '79 -- excuse  
19 me -- fell from '79 in their first year of coverage to  
20 13. Alabama fell from 35 objections to two from the  
21 decade of the '80s to the most recent decade, Georgia  
22 from 52 to ten, Mississippi from 66 to 11, Louisiana  
23 62 to 19.

24 Overall most of these states were  
25 exhibiting at least a two-thirds to 90 percent fall-

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1 off in objections. Now, again, causally, is this  
2 because the states have learned their lesson and know  
3 they will be covered by Section 5 and, therefore, they  
4 want to avoid objection or is it that they have simply  
5 learned their lesson? You know, it's the chicken and  
6 the egg problem.

7 But the one thing we can't do is we cannot  
8 completely discount the idea that maybe things are  
9 changing in the South. This is a different South, and  
10 evidently the policy is working. So as we go to shape  
11 a bailout/bail-in or a new trigger, we have a variety  
12 of evidence out there that we can look at that can be  
13 looked at nationwide, including information on  
14 racially polarized voting versus partisan voting that  
15 simply has a racial dimension. We're capable of  
16 gathering the data and doing the analysis. It can be  
17 expensive, but it can be done.

18 MR. BLUM: If I could, I think Professor  
19 Gaddie for the most part made my point. going back to  
20 Mr. Greenbaum's answer to your hypothetical, Mr.  
21 Chairman, and that is if Congress today were  
22 considering Section 5 based on the racial landscape  
23 and all the various arguments that both of them have  
24 made.

25 The one thing I know that Congress would

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1 have to do and that is include every jurisdiction in  
2 the country rather than just the ones that have been  
3 identified here. The trigger dates back to the 1964  
4 election. I cannot imagine Congress deciding to have  
5 a -- I'm sorry. It's the --

6 VICE CHAIRPERSON THERNSTROM: '72.

7 MR. BLUM: -- the '72 election. I can't  
8 imagine congress sticking with that particular year  
9 and not updating it to something much more  
10 contemporaneous.

11 If they do that, then they're going to  
12 have to not only consider the facts on the ground in  
13 Georgia, Texas and Arizona, but also the facts on the  
14 ground in Michigan, Ohio, and Minnesota.

15 Thank you.

16 DR. GADDIE: If I might follow that  
17 briefly, this brings in a dimension we've not  
18 considered and talked about, which is the South is  
19 growing and changing. If you look at the electorate  
20 in Georgia, 75 percent of the voters in Georgia either  
21 were not alive in Georgia or did not live in Georgia  
22 the last time that the trigger was set. Seventy-five  
23 percent of the electorate in Texas was not alive in  
24 Texas or did not live in Texas at the time the trigger  
25 was set.

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1           This is a fundamentally new electorate  
2 with a different socialization experience.

3           MR. GREENBAUM: But quickly to respond,  
4 but though in federal courts in both Texas, looking at  
5 both the Texas and Georgia redistricting in the last  
6 redistricting cycle, found racially polarized voting.

7           In the Texas court -- and you have to understand the  
8 judge who wrote the opinion in the Texas case is Judge  
9 Higginbotham, who is certainly no liberal, not only  
10 found racially polarized voting, but found a legacy of  
11 discrimination related to political, social, and  
12 economic factors.

13           DR. GADDIE: If I might respond, I  
14 provided that analysis, and that was in the context of  
15 Democratic party primaries.

16           MR. GREENBAUM: It's in the opinion. What  
17 can I say?

18           CHAIRPERSON REYNOLDS: I encourage all  
19 fights as long as there are no fist fights. No, I  
20 appreciate the robust exchanges.

21           Commissioner Yaki.

22           COMMISSIONER YAKI: Yes. I don't know if  
23 I have so many questions. Actually I do have a couple  
24 of questions, but more I want to start off with a  
25 statement, and that is this is, as you know, a

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1 Commission that in one of its very first reports that  
2 came out it documented the horrendous disparity in  
3 registration and voting in the South, and that report  
4 became and it was cited as the factual basis for the  
5 1965 Voting Rights Act.

6 I speak only for myself when I say this,  
7 but I think it would be a very sad day if this  
8 Commission were to contemplate or even recommend to  
9 the Congress that Section 5 no longer be reauthorized.

10 I can understand that there are people in this  
11 audience and even amongst this panel who believe that  
12 the nation has and should have risen above itself in  
13 those very evil days of segregation and Jim Crow.

14 I would say that just based on recent  
15 experiences and what we have seen on television in  
16 parts of the southern parts of the United States; that  
17 there is still a great divide between the races; and  
18 that for us to ignore that and to think that somehow  
19 that everything is okay and that we've fixed it all  
20 and the federal government need not be involved I  
21 think is naive at best.

22 One of the questions that I had had to go  
23 with one of the last statements made by Professor  
24 Gaddie having to do with the description that, well, a  
25 number of Section 5 preclearances are starting to

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1 drop. Perhaps that's a sign that everything is going  
2 great and we should all be singing together.

3 The question I have is whether or not, Mr.  
4 Gaddie and other panelists, are there are other  
5 factors that could be involved, for example, the  
6 Supreme Court changing the standard in the Bossier  
7 Parish case, other kinds of instances where the  
8 Supreme Court has ratcheted back a little bit what the  
9 intent of Section 5 was meant to do by taking away  
10 discriminatory purpose versus a sole look at whether  
11 there's retrogression or not.

12 Before you answer that, I just want to  
13 state that one of the things that I commend groups  
14 like the Lawyers Committee and the National Voting  
15 Rights Commission for doing is by going out and doing  
16 hearings and trying to provide Congress with the  
17 factual background and needs to survive the threaten  
18 legal challenges that we've been hearing being  
19 postured here today to any renewal of Section 5.

20 There are undoubtedly at the places that  
21 you can talk about in these United States where a  
22 Section 5 type preclearance mechanism would probably  
23 be worth expanding to. We are, after all, a nation  
24 that should be encouraging national voting rights, not  
25 just local voting, and the mechanism of the federal

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1 government with its ability to allocate resources in  
2 order to insure that those rights are not abrogated or  
3 lessened or the content of that vote diminished in any  
4 way is, I think, the appropriate place to put the  
5 burden rather than on localities or on individuals or  
6 on individual groups.

7 I would just hope that as we go through  
8 this we understand that things are not as perfect as  
9 they should be. We are a more perfect union, but we  
10 are not the perfect union that we would like to have  
11 in the future.

12 So, again, that's just my statement. I  
13 would just like to throw it open to the panelists  
14 because certainly this is one of the things that the  
15 Congress is looking at, is whether or not to reinstate  
16 some of the intent standards that the Supreme Court  
17 took away in Bossier Parish and some of the other  
18 cases and whether or not that has any reflection on  
19 the diminished number of preclearance challenges in  
20 the past ten years.

21 MR. GREENBAUM: I can answer that one. No  
22 doubt, it's an excellent question. One of the things  
23 that we'd like to do to improve Section 5 is to bring  
24 back the standard that existed before Bossier Parish,  
25 and let me briefly explain what that was.

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1 Prior to 2000, both the Department of  
2 Justice and the Supreme Court in the lower courts had  
3 interpreted the word "purpose" under Section 5 to mean  
4 intentional purpose, unconstitutional purpose.

5 In the Bossier II case, the Supreme Court  
6 said, no, the purpose means only a purpose to make  
7 things worse.

8 That example I gave you earlier in Busby  
9 v. Smith in 1982 where Joe Mack Wilson said, "I don't  
10 want to draw any black districts," under the current  
11 standard DOJ would have had to preclear that or the  
12 district court would have had to preclear that.  
13 Because what happened there is Georgia had one  
14 majority black congressional district, had the  
15 population to draw at least a second. Joe Mack Wilson  
16 refused to do that.

17 Under the current standard DOJ has got to  
18 preclear that because it's not making things worse.

19 The Bossier Parish case, which I worked on  
20 personally, was a situation where you had no majority  
21 black districts and a 20 percent black jurisdiction  
22 had had 13 school board members, never had had a black  
23 sit on it. It was racially polarized voting, and what  
24 had happened is there was a new head of the local  
25 NAACP who was from outside of Bossier Parish, and he

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1 said, you know, "What's going on here?"

2 So he started bringing proposals to the  
3 school board saying as you're redistricting, you've  
4 got to put some majority black districts in here.

5 The school board rushed past a plan that  
6 kept the status quo at zero. Basically what the  
7 Supreme Court said is during that they did things  
8 inconsistent with their own procedures in order to  
9 come to that result.

10 The Supreme Court said, "Well, you were at  
11 zero before. Still being at zero, not retrogressive  
12 doesn't violate Section 5 because Section 5 only  
13 protects against a purpose to make things worse than  
14 they were before.

15 Subsequent to that, I -- and this goes  
16 back to the problem of relying on Section 2. St.  
17 Landry Parish, Louisiana, a 40 percent black  
18 jurisdiction, 13 members on their police, jury and  
19 school board, and they had traditionally had three  
20 blacks on each of those bodies.

21 And one of the things that happened is  
22 that there had been some population shifts, and when  
23 they went to go redistrict for the post 2000  
24 districting, they had three black districts. The  
25 black population had actually gone off. You had

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1 another district. That was a 50-50 district, and you  
2 had a fifth district that was about 47 percent black  
3 in VAV.

4 It would have been very easy for them to  
5 take that 47 percent black district and to increase  
6 the population. Instead, they went the other way.  
7 They took the three districts that were already  
8 predominantly blank in the '60s in the black  
9 population. They jacked one up to 75 percent black  
10 VAP and the other 72 percent, in a third to 68  
11 percent; took black population out of 47 percent  
12 district, and they let the black community know about  
13 the plan 15 minutes before the meeting in which they  
14 voted on it, and they voted on it over the objection  
15 of the black members of the school board.

16 DOJ had to preclear it. In past  
17 circumstances, it probably would have been objected to  
18 for having a discriminatory purpose. So we had to  
19 file a lawsuit.

20 COMMISSIONER YAKI: And how long ago was  
21 this?

22 MR. GREENBAUM: The lawsuit was actually  
23 filed by a predecessor, and it was filed in 2003, and  
24 we settled the lawsuit this spring, and what did they  
25 end up with. They ended up with that 46 percent

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1 district is now 52 percent black voting age  
2 population, but it took another four-year election  
3 cycle. It took them spending money defending the  
4 case, us spending money bringing the case. We can get  
5 some of our money back on attorney's fees, but \$40,000  
6 in expert fees, and we can't get compensated from the  
7 court.

8 And you can't bring those cases  
9 everywhere. There's just not the resources to do  
10 that.

11 Oh, and one other quick fact. There's a  
12 study that's going to be coming out soon by Rick  
13 Valley, Peg McCrary, and Chris Seamen, and it goes  
14 through all of the Section 5 objections to the history  
15 of time, and here's the impact of purpose, and this  
16 was actually my last slide.

17 Purpose was a part of 74 percent of the  
18 objections in the 1990s, and the sole basis of 43  
19 percent of the objections. So there's no doubt that  
20 it has had an impact.

21 I also think jurisdictions have gotten  
22 better in terms of making sure that they comply with  
23 the law, which is something that we would expect. I  
24 mean, for example, Mr. Blum was involved. He  
25 mentioned the so-call racial gerrymandering cases. He

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1 was a plaintiff in one of those, Bush v. Vera, and it  
2 led to the Supreme Court saying you can't have race be  
3 the overriding factor unless you have a really good  
4 reason for doing so in redistricting.

5 It had a significant impact. You don't  
6 see districts that don't pass the Rorschach test  
7 anymore, to use his phrase, because of that decision.

8 I'm not aware of in the post 2000  
9 redistricting a single plan that has been struck down  
10 on that basis, but you know that every time a  
11 demographer goes to do a redistricting, that they are  
12 aware that they cannot violate the Shaw v. Reno  
13 principle.

14 And so the mere fact that you have a  
15 decreased number doesn't mean the current effect  
16 doesn't exist.

17 CHAIRPERSON REYNOLDS: Okay. Commissioner  
18 Taylor, do you have any questions?

19 COMMISSIONER TAYLOR: One or two.

20 And thank you all for coming. This has  
21 been helpful as I try to get my mind around some of  
22 these very difficult issues.

23 My questions, I hope, will be somewhat  
24 straightforward. I'd like all of you all to comment  
25 on as many of these as time will allow.

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1           Setting aside the constitutional concerns,  
2           which I think would be clear at least in my mind if  
3           coverage was made national tomorrow, I'd like you all  
4           to address just the policy implications of making  
5           Section 5 apply to every state and every jurisdiction;  
6           whether you think it would be good policy for us to do  
7           so.

8           MR. GREENBAUM: All right. I don't.

9           COMMISSIONER TAYLOR: Okay.

10          MR. GREENBAUM: Not just for the  
11          constitutional reasons, but because Section 5 has a  
12          limited purpose to remedy and protect against racial  
13          discrimination in voting.

14          On the other hand, there are a lot of  
15          problems in the voting process that are not based on  
16          race, and we would like to see some substantial  
17          election reform separate and apart from the Voting  
18          Rights Act process. We don't want that process to  
19          involve general election reform issues.

20          I mean, for example, my organization and  
21          others filed a lawsuit on behalf of the League of  
22          Women Voters in Ohio having to do with problems in the  
23          elections process. It's not we're not going back and  
24          trying to change the 2004 elections. Instead we're  
25          saying going forward there are a whole bunch of things

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1 that you need to fix.

2 Love to see Congress pass some form of  
3 national election reform, but it's probably not going  
4 to happen any time soon. Like with a lot of  
5 legislation, what's probably going to happen is you're  
6 going to see improvements in the states first and then  
7 it will percolate up to Congress.

8 So that's how I would deal with those  
9 problems, including a lot of the ones that Mr. Blum  
10 mentioned in his statement.

11 DR. GADDIE: I will answer your question  
12 with a simple set of facts. If you implement Section  
13 5 nationwide it will create a lot more work because  
14 there are 87,000 governments in the United States that  
15 elect 585,000 public officials, and we will be  
16 reviewing the election procedures and districts of  
17 every one of these.

18 CHAIRPERSON REYNOLDS: Well, I get the  
19 impression that if you are black and you don't live in  
20 -- what I'm sensing is two different layers of  
21 protection, two levels of protection. If you're in a  
22 covered jurisdiction, you have enhanced protections  
23 and if you happen to live in a jurisdiction that's not  
24 covered, you have less protection.

25 Does that make sense? Shouldn't Americans

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1 have the same legal protections across the country  
2 regardless of the jurisdiction that you decide to live  
3 in?

4 DR. GADDIE: I would agree with that  
5 statement, yes, and I think that is the crux of the  
6 problem here, is exceptional coverage required  
7 elsewhere or do we require general coverage  
8 everywhere.

9 When I give these numbers, I am simply  
10 stating it will be a difficult and demanding task.

11 CHAIRPERSON REYNOLDS: No, I understand.

12 DR. GADDIE: But, you know, the thing is  
13 we have a bureaucracy in place that has 40 years of  
14 experience doing this, but all individuals in the  
15 country should have the same protections. If you are  
16 a member of a minority group that has been subject to  
17 discrimination, you would hope that your protection  
18 from that discrimination wouldn't vary based upon  
19 where you reside, especially in a highly mobile  
20 population.

21 MR. BLUM: Let me just quickly answer  
22 that, and again, Professor Gaddie has, I think, hit  
23 the points that I wanted to make, but, Commissioner  
24 Taylor, it seems to me unfair to everyone, unfair to  
25 minority communities in Cincinnati and unfair to

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1 minority communities in St. Louis not to have the same  
2 protection that minority communities in Atlanta and in  
3 Houston and in Phoenix have.

4 So it really isn't a question of is it  
5 good policy or bad policy. I think there's room for  
6 debate and points that can be made on both sides.

7 The bigger question is: is it fair? And  
8 it's only going to be fair if Section 5 applies to  
9 jurisdictions nationally as opposed to just focusing  
10 in on these jurisdictions that were targeted back in  
11 the mid-'60s.

12 COMMISSIONER TAYLOR: Along those lines,  
13 if I may, Mr. Chairman.

14 CHAIRPERSON REYNOLDS: Yes.

15 COMMISSIONER TAYLOR: Would you all agree  
16 that we should start this process by wiping the slate  
17 clean? We can disagree on how we judge covered  
18 jurisdictions, going to Mr. Greenbaum's point, covered  
19 jurisdictions and what information may be relevant and  
20 using different information for non-covered  
21 jurisdictions, but could be all agree that we should  
22 start by wiping the slate clean and starting with no  
23 presumptions?

24 Is that fair or unfair?

25 MR. GREENBAUM: I actually wouldn't agree.

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1 just because in the covered jurisdictions, you have  
2 such a record already.

3 COMMISSIONER TAYLOR: And that's what I  
4 mean.

5 MR. GREENBAUM: Once we have a clean  
6 slate, I'm not suggesting that the information that  
7 you describe relative to covered jurisdictions and  
8 their history should not be relevant to determining  
9 whether or not they should be placed back into the  
10 category of the covered jurisdiction. I guess I'm  
11 starting from what I thought would be a simple  
12 proposition.

13 That is, you start by not assuming  
14 anything. You start by assuming that you are going to  
15 start with a blank slate and then make a jurisdiction-  
16 by-jurisdiction analysis using different information  
17 in history depending on what you have available to you  
18 at the time.

19 I mean, it kind of depends on how you  
20 define it. I mean, in most of the jurisdictions that  
21 are currently covered, you do have a substantial  
22 record of discrimination. So I don't know what comes  
23 first there, the chicken or the egg because, like I  
24 said, in most of the covered jurisdictions you do have  
25 a substantial record that already exists.

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1           And on a more general point, I mean, one  
2 of the key things about the Voting Rights Act is it's  
3 a racial remedy. It needs to be narrowly tailored,  
4 and so that is why in terms of making determinations  
5 as to what should be covered and what isn't, you don't  
6 just do it nationwide and say that's okay. You have  
7 to look at what the history has been in the  
8 jurisdictions.

9           Now, the one thing about the jurisdictions  
10 that are currently covered now is that there was some  
11 history, and that there is a record. You know, I  
12 think it's an open question as to what you look at  
13 beyond that, and as Mr. Gaddie mentioned, for those  
14 jurisdictions that are covered, you have a bailout  
15 system that exists now.

16           CHAIRPERSON REYNOLDS: Okay.

17           MR. BLUM: Let me just answer that. He  
18 asked each panel member.

19           I would agree with you, you know, in terms  
20 of unlike Mr. Greenbaum, if we're going to have an  
21 inquiry, wipe the slate clean. I think if Congress  
22 wishes to include a history of discrimination the way  
23 blacks were treated in South Carolina and Georgia,  
24 fine, but let's move forward.

25           We cannot create public policy solely

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1 looking at a rear view mirror. We've got to look at a  
2 windshield. We've got to look forward, and if we're  
3 going to do it looking in a forward manner, then we  
4 ought to do it for Ohio, and we ought to do it for New  
5 Mexico, and we ought to do it for Missouri.

6 CHAIRPERSON REYNOLDS: Okay. At this  
7 point we've saved the best for last. Abigail  
8 Thernstrom has done some scholarly work in this area,  
9 and I'm sure that she will pose the most insightful  
10 questions.

11 VICE CHAIRPERSON THERNSTROM: Never set  
12 somebody else up like that. They're bound not to meet  
13 that standard.

14 And you know, I hope I can even read my  
15 own scribbles as I've gone along. I obviously do have  
16 a lot to say on the Voting Rights Act. I wrote a book  
17 that came out in 1987 called Whose Votes Count,  
18 Affirmative Action in the '90s Voting Rights Act, kind  
19 of dropped out of the whole field for many years, but  
20 I'm back in it and extremely interested in the issues  
21 that have been debated.

22 And I want to, like others, thank all of  
23 you for coming today. I think this has been  
24 incredibly worthwhile.

25 I also sign onto the notion that I think

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1 everybody agrees that Congress should be exploring  
2 thoroughly the history of Section 5, its ongoing need,  
3 the amendments that are now being proposed, and so  
4 forth.

5 But my understanding as of today is that  
6 it is very unlikely that, in fact, experts like Dr.  
7 Gaddie will be called as witnesses, and I do hope that  
8 the briefings today or that this briefing today might  
9 encourage Congress to really have a debate with some  
10 integrity on this issue instead of simply some theater  
11 that really does not explore very difficult issues.

12 And the issues involve not only the data,  
13 which Professor Gaddie would bring to the table, but  
14 there are basic questions, basic large questions  
15 involving assumptions that have lain behind the  
16 enforcement of the Voting Rights Act that have to be  
17 out on the table and that have been a bit skirted  
18 around today.

19 The largest of the elephants in the room,  
20 as it were, is the question of the standard  
21 proportional, ethnic, and racial representation as  
22 what is fair in redistricting, and as numerous voices  
23 on the Supreme Court as well as scholars over the  
24 years have said, once you talk about vote dilution,  
25 there really is no other standard but a PR standard,

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1 and that is, indeed, the standard that the Justice  
2 Department has been working with. It is, indeed, the  
3 standard that the D.C. District Court has been working  
4 with, and it's the standard that the Supreme Court has  
5 faded in and out of using.

6 The Supreme Court's decisions are  
7 incoherent. They have one standard in the annexation  
8 cases, another standard in Bier and other Section 5  
9 cases. They've been lost.

10 The D.C. court has paid no attention to  
11 what the Supreme Court has said. It has been on a  
12 road of its own and so has the Justice Department had  
13 the sense that -- you know, basically asked how many  
14 divisions does the Supreme Court have.

15 This is an area of law that is a mess, and  
16 Congress needs to address the messiness of it all.  
17 Let me make a couple of other comments, along with  
18 some questions. Let me put them all together and  
19 people just respond to them as they wish.

20 You know, it's a kind of short list in the  
21 sense that I have a lot of others, but I'm going to  
22 reserve those for another time.

23 The first one to Mr. Greenbaum. It has  
24 been raised implicitly in some of the discussion. I  
25 can't understand what can possibly justify the use of

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1 1972 turnout figures, turnout figures that are 30  
2 years old, in determining coverage by the special  
3 emergency provisions of the Voting Rights Act today,  
4 provisions that everyone agreed at the time, that is,  
5 in 1965, could not have a life longer than five years.

6 there were proposals that it have a ten-year life,  
7 and the consensus was that that would be  
8 unconstitutional.

9 If that trigger was updated to rest on the  
10 2004 turnout figures, I believe it would only be  
11 Hawaii that was covered. In 2000, I believe it was  
12 Hawaii and California. I cannot, again, think of a  
13 single reason why we're resting on turnout figures 30  
14 years old.

15 Again, Mr. Greenbaum, you said, look,  
16 switches to at large voting from single member  
17 districts, and that's, of course, what Allen was all  
18 about, would mean that blacks were -- the vote simply  
19 meant nothing.

20 I agree with the Allen decision. I think  
21 it was the right decision in the context, but I think  
22 one should be very careful about saying that, and  
23 particularly as the years have passed, about saying  
24 that the black vote or the Hispanic vote would mean  
25 nothing in an at large jurisdiction; that, in fact,

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1 elections amount to simply a racial census because  
2 that is no longer true in America.

3 If you can find some remote, rural  
4 jurisdiction, rural county in Georgia where that's  
5 true, fine. But it is basically not the rule of  
6 American elections anymore..

7 You talked about the limited resources of  
8 jurisdictions in bringing Section 2 suits. Limited  
9 resources have also affected Section 5 preclearance  
10 procedures. That is, you have, again, an impoverished  
11 rural county in a covered jurisdiction. It's not  
12 going to go to the D.C. District Court, which of  
13 course is one of its options, where it would have to  
14 hire attorneys in Washington to pursue that. It  
15 simply has gone -- and I used to have access to the  
16 internal records. At least in the 1980s, all  
17 indications were the internal memos made this very  
18 clear. Somebody would come up from a county council  
19 or a school board or whatever the body was where there  
20 was a preclearance question to the Justice Department  
21 to discuss it.

22 A Justice Department attorney would say,  
23 "Well, I'm not supposed to draw a map, and of course  
24 you don't have to follow this map, but let me tell you  
25 this map here -- I'll show you -- would be acceptable

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1 to us."

2 And that was the map that was adopted  
3 because it was both financially and politically  
4 impossible for jurisdictions -- and politically  
5 impossible because there was a significant black vote  
6 -- to fight the Justice Department.

7 So the resources argument applies to  
8 Section 5, as well.

9 You said that Section 5 blocks last minute  
10 changes. Well, again, as other people have said, why  
11 not in the noncovered jurisdictions, too? Why not in  
12 Queens, not only Manhattan? Why not in New Mexico you  
13 know, not only Arizona, et cetera?

14 I mean, you can extend this. You people  
15 talk about hanging chads in certain counties in  
16 Florida, problems in Ohio, et cetera. The counties in  
17 Florida that had those problems were not covered by  
18 Section 5. There are only five Florida counties  
19 covered. Those weren't the counties. Ohio, of  
20 course, is not covered at all.

21 In terms of the number of objections, just  
22 looking at raw numbers of the voting section, the  
23 number of objections tells you nothing. You need to  
24 break those objections down into categories.

25 Two things. One, you know, some are to

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1 the most trivial things.

2 Second place, it depends how seriously you  
3 take it. An objection depends on whether you agree  
4 with the standards that the voting section of the  
5 Justice Department is using. They object to a  
6 particular redistricting plan on the basis that  
7 another majority-minority district can be drawn.

8 Well, I don't think that's the Section 5  
9 standard, but it is the standard that the voting  
10 section was using. So looking at the number of  
11 objections, that doesn't tell me anything.

12 I think somebody here has mentioned the  
13 Burney case, the whole question of when we look at the  
14 constitutionality of Section 5 going forward, whether  
15 you still have congruity and proportionality between  
16 the facts and the draconian law that is by all  
17 consensus extremely intrusive on established  
18 constitutional prerogatives of state and local  
19 governments to settle actual rules.

20 I think that intrusiveness was justified  
21 in '65. I think it was justified in 1970, but as the  
22 years have gone on there are certainly legitimate  
23 questions, and we are 40 years down the road in an era  
24 of unbelievable racial change in this country.

25 You talked about annexation cases.

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1 Annexations are often for economic reasons. They're  
2 almost all for economic reasons, and of course the  
3 Justice Department never nor a court never told a  
4 jurisdiction to de-annex the territory because it was  
5 racially motivated because by the time the annexation  
6 cases reached the end of the road, Petersburg,  
7 Virginia, whatever, and the Supreme Court, the  
8 annexation was four years old.

9 But in any case, those annexations that  
10 have triggered a movement from at large voting to  
11 single member districts, the insistence of the Justice  
12 Department on single member districts that fairly  
13 reflect the minority population so that you've got a  
14 PR standard there; those annexations sometimes dropped  
15 the minority population .02 percent or something like  
16 that. They didn't seriously impact the minority vote,  
17 the weight of the minority vote.

18 And in fact, by the time the new voting  
19 kicked in, you would have had births; you would have  
20 had deaths. I mean, the whole thing has made zero  
21 sense, aside from the fact that, of course, the  
22 annexation decisions have a PR standard built into  
23 them.

24 Again, the Bier decision has a  
25 retrogression standard. Those two sets of decisions

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1 are at war with one another. The Supreme Court has  
2 never been able to get its lines straight.

3 You said Section 5 has brought the level  
4 of black office holding we now have. To some extent,  
5 yes, but there's no way of knowing to what extent  
6 because there has been such a great deal of racial  
7 change in America and, arguably, indeed, these race  
8 based districts, these overwhelmingly majority-  
9 minority districts have worked as a ceiling on black  
10 and Hispanic office holding, aside from the fact, of  
11 course, that black and Hispanic candidates lose for  
12 reasons other than race.

13 The Supreme Court did realize that in one  
14 decision, namely Whitcomb v. Chavez in 1971. Somehow  
15 that decision has been airbrushed out of the picture.

16 You said more white Democrats are willing  
17 to vote for white Democrats than black Democrats.  
18 Yes, but you have to factor into that the political  
19 profile of black Democrats which by and large has been  
20 way to the left of the mainstream of the Democratic  
21 party.

22 You said the statistical trigger in 1965  
23 the courts have said was justified; that Congress go  
24 it right. Yeah, but Section 5 at the time was simply  
25 a prophylactic measure to make sure that Section 4

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1 stuck. In other words, to make sure that there was no  
2 backsliding with ingenious southern racist methods of  
3 once again disfranchising blacks, keeping them from  
4 the polls, keeping them from registering and getting  
5 to the polls.

6 Section 5 at the time had a completely  
7 different meaning. Yes, it was justified, but in a  
8 completely different context.

9 Your Bossier Parish II. The first place,  
10 it really blows my mind that the civil rights  
11 community is now waving the intense standard when in  
12 1982 the whole argument was you couldn't prove intent.

13 It required showing of a smoking gun. That was an  
14 impossible standard, et cetera, et cetera.

15 Second place, it seems to me totally  
16 inappropriate to an administrative preclearance  
17 process by federal bureaucrats sitting remote from the  
18 local scene to begin to sort out the questions that  
19 require what the court has called, what the Supreme  
20 Court has called an intensely local appraisal.

21 Questions that require a trial, a full  
22 fledged trial and every federal court in the nation is  
23 open to 14th Amendment and Section 2 litigation.

24 The fact is that what Bossier Parish II is  
25 all about and the effort to overturn it, if there is

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1 an effort to overturn it in Congress, is the fact that  
2 the civil rights community has never liked the  
3 retrogression standard, has never liked the  
4 backsliding standard. It wants to insist on what it  
5 calls racially fair districting which once again  
6 brings us back to a proportional racial and ethnic  
7 representation standard since there is no other  
8 standard that one can come up with.

9 And finally, and I'll stop after this, you  
10 say that the history or that Section 5 covers only  
11 jurisdictions with a history of disfranchisement. Not  
12 true after '72 and '75, and look. Let's just take  
13 Texas.

14 Texas never had a literacy test. It never  
15 screened voters on the basis of literacy, which was  
16 the main method of disfranchising for blacks in the  
17 Jim Crow South, literacy intimidation/violence, but  
18 you know, the literacy test was absolutely essential  
19 to the trigger. Texas never had a literacy test.

20 It got covered by, in my view, an absurd  
21 equation between English only ballots and a fraudulent  
22 literacy test, the literacy test that asked potential  
23 black voters how many bubbles are in a soap bar and  
24 can you read the Beijing Daily, equating a literacy  
25 test, equating English only ballots with a literacy

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1 test in Mississippi in 1964, equating it with racist  
2 registrars and the KKK.

3 This is my last comment. Aside from two  
4 things, one, if there was a problem with English only  
5 ballots, there was a simple solution: bilingual  
6 ballots. I don't have any problem with bilingual  
7 ballots.

8 Second, Hispanics were not a racial group  
9 according to the U.S. Census. This was legislation  
10 resting on the 15th Amendment, and they had to stop  
11 fooling around with resting it on the 14th Amendment.

12 My bottom line, I think there are a host  
13 of questions here. I want Congress to address them,  
14 and I am appalled that all indications are that  
15 Congress is just going to put on a show that raises  
16 none of these questions.

17 Thanks.

18 CHAIRPERSON REYNOLDS: Okay. Would any of  
19 you like to address --

20 (Laughter.)

21 CHAIRPERSON REYNOLDS: That's a lot.

22 MR. GREENBAUM: How much time will you  
23 give me, Commissioner?

24 CHAIRPERSON REYNOLDS: Not as much as you  
25 need.

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1 (Laughter.)

2 CHAIRPERSON REYNOLDS: Take a whack at it.

3 MR. GREENBAUM: I will try to be brief.

4 Vice Chairman Thernstrom, thanks very much  
5 for your questions and putting this all out there, and  
6 I will try to go through the different points you've  
7 raised as expediently as possible.

8 I guess I disagree with you about the  
9 standard being proportional ethnic representation  
10 because if, in fact, it was, I mean, we've probably  
11 failed as a civil rights community in terms of doing  
12 it.

13 VICE CHAIRPERSON THERNSTROM: Well,  
14 there's a limit to what you can do with a tool of  
15 districting rather than a true PR system.

16 MR. GREENBAUM: I will say that, you know,  
17 one of the things as a civil rights community we tell  
18 jurisdictions that they need to do is if you have a  
19 geographically compact community of a particular  
20 racial ethnic group, they need to be kept together and  
21 not split apart.

22 I think one of the things, you know,  
23 people talk a lot about the statewide redistricting  
24 cases, and basically anything that's bad that's ever  
25 happened in this area has been in the statewide

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1 redistricting cases because, among other things, to  
2 draw majority-minority districts in some cases, you  
3 have to go way out and you have to draw population  
4 from this county and that county, et cetera.

5 But people ignore what happens at the  
6 local level, which I said is most of the  
7 redistrictings, and there you're mostly dealing with a  
8 population that's very compact.

9 I mean, in fact, unfortunately the degree  
10 of residential segregation is still very high in this  
11 country, particularly among African Americans, kind of  
12 less so among Latinos. You know, for example, in the  
13 Charleston case, no problem drawing three compact  
14 black majority districts out of nine because the  
15 population was already segregated to begin with.

16 In terms of the trigger issues, I'll start  
17 off by saying that I don't have any opposition to  
18 Congress deciding that there needs to be additional  
19 jurisdictions that need to be covered. And you are  
20 right to state that if you use the 50 percent turnout  
21 and registration figures in 1972, only Hawaii would  
22 fall --

23 VICE CHAIRPERSON THERNSTROM: No, in 2004.

24 MR. GREENBAUM: 2004. If you used it in  
25 2004, only Hawaii would be covered. Back then there

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1 wasn't -- the difference between now and back then is  
2 we do have a record, and it's easier to see that  
3 record in the jurisdictions that are covered, and you  
4 know, that's something that needs to be accounted for  
5 as Congress goes forward.

6 In my view, from what I've seen, most of  
7 the jurisdictions that are covered have had some sort  
8 of racial discrimination problems related to voting.  
9 I understand that you may disagree about whether some  
10 of those objections are well founded.

11 I disagree about the Department of Justice  
12 preclearing the Georgia photo ID requirement, and we  
13 and others have filed suit about it, but you have to  
14 have something that you kind of use as a baseline.

15 You mentioned that you also have to look  
16 at the different categories of objections. The  
17 Valley-McCrary-Seaman study that I mentioned that's  
18 going to be coming out actually goes into that in a  
19 great degree of detail, and I would be happy to share  
20 that with you when that comes out.

21 You mentioned the limited resources that  
22 jurisdictions have, and I agree that there are  
23 jurisdictions out there that have limited resources.  
24 One of the things -- and this applies mostly to  
25 redistricting, but to other voting matters -- is a lot

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1 of these jurisdictions don't have to just rely on  
2 themselves.

3 For example, as you know, in many of the  
4 southern states, South Carolina and Georgia and  
5 others, there are statewide experts that are there  
6 that can help these local jurisdictions, and in  
7 addition to that, you have a lot of knowledge within  
8 the local secretary state's offices.

9 When I was at DOJ, I spent a lot of time  
10 on the phone with the state and the local election  
11 officials, and those statewide officials were often a  
12 very good resource for the localities.

13 Let's see. You talked a little bit about  
14 the annexation issues. I'm not aware of the case  
15 where the minority population decreased by .02  
16 percent. You might be. Let me know what that is.

17 The Richmond case which this came about  
18 was the typical example where you had a jurisdiction  
19 that was on the verge of becoming a majority black and  
20 they annexed whites into that, and they may have said  
21 that there were economic reasons. It's very hard to  
22 determine whether they are economic probably racial,  
23 some combination of the two. I'm not aware of enough  
24 of the facts to know.

25 But one of the clear results of that was

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1 it was going to have a major impact on the ability of  
2 African Americans to elect their candidates of choice  
3 to office.

4 You're a little bit critical in terms of  
5 what I was talking about, the Charleston County case  
6 and the difference between black Democrats and white  
7 Democrats. There may be some policy related reasons  
8 as to whites would tend to vote more for white  
9 Democrats.

10 One of the things that we did is we looked  
11 at the school board elections in that case which were  
12 nonpartisan. They were at the end of the ballot, and  
13 do you know what? We saw racially polarized voting  
14 there, and in fact, it's written up in the opinion in  
15 that case.

16 And I don't know how the voters even knew  
17 what race the candidates were because I went back. I  
18 looked at the newspapers. Very little coverage on  
19 these races, but yet it was amazing the degree of  
20 racially polarized voting that existed in these  
21 nonpartisan elections.

22 VICE CHAIRPERSON THERNSTROM: Look. There  
23 can be one case of that sort. I think you and  
24 Professor Gaddie would probably disagree, however, on  
25 how to assess racial polarization in voting. There

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1 are very tough methodological questions here, and you  
2 know, that goes to my point about I'm not sure I would  
3 agree with your objections often because they use  
4 definitions of racial polarization I won't sign onto.

5 But anyway, go on.

6 MR. GREENBAUM: But how are your views  
7 compared to Dr. Webber's on that?

8 VICE CHAIRPERSON THERNSTROM: You know, we  
9 shouldn't get into discussing the time.

10 MR. GREENBAUM: All right. Dr. Webbers  
11 was the defense expert in that case, and we actually  
12 got partial summary judgment on the second and third  
13 general preconditions. It didn't even come down to  
14 getting into going to trial on those issues.

15 Section 5 as a prophylactic measure. You  
16 know, we may disagree as to what Section 5's original  
17 intent was, but the Supreme Court in the Allen case,  
18 going back to 1965, they came up with a determination  
19 of what that meant, which you may disagree with.

20 VICE CHAIRPERSON THERNSTROM: No, I agree  
21 with the Allen case.

22 MR. GREENBAUM: Yeah, but they said that  
23 it was everything designed to make a vote effective.

24 VICE CHAIRPERSON THERNSTROM: Yeah, I  
25 think they were forced to come down on the side they

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1 did, given the mischief that the state was up to.

2 MR. GREENBAUM: You raised the issue of  
3 discriminatory intent and having local courts make  
4 that determination. I think it's a very difficult  
5 determination for local courts to make. It's very  
6 difficult for a local judge to find that his  
7 particular jurisdiction engaged in discriminatory  
8 intent.

9 In the Charleston case, the private  
10 plaintiffs actually brought what I thought was a  
11 pretty strong intent claim. The judge didn't want to  
12 touch it. I mean, he lives in that community and  
13 found in favor of the plaintiffs on the Section 2 and  
14 against the plaintiffs on intent.

15 In the case that was mentioned before, St.  
16 Landry Parish, I thought there was very strong intent  
17 evidence in that case. I had a status conference in  
18 front of the judge down there, and I kind of played it  
19 out for him, that we were thinking about adding an  
20 intent claim.

21 It was very clear to me that adding that  
22 intent claim was not going to help my overall case. I  
23 think it is very difficult for people in the community  
24 that they're in -- and this judge, this was a school  
25 board case, and this judge was supervising the

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1 desegregation of the schools. So he knew the  
2 superintendent well. He knew all of the members of  
3 the school board well. Hard for somebody in that  
4 position to find that these people acted with  
5 discriminatory intent.

6 And criticize the expansion of Section 5  
7 to Texas and Arizona and some other jurisdictions  
8 based on the fact that they had English only ballots.

9 My written remarks will get more into Section 203,  
10 but I will tell you that one of the things that the  
11 ability to get assistance in your language of choice  
12 has an enormous impact on those voters' ability to  
13 participate.

14 VICE CHAIRPERSON THERNSTROM: I don't have  
15 any problem with getting assistance. I was just  
16 answering your point that these were jurisdictions  
17 with histories equivalent to Mississippi in '64.

18 They weren't. I don't have any problem  
19 with bilingual balance.

20 MR... GREENBAUM: And, you know, it's a  
21 judgment call as to whether they were or they weren't.

22 I mean, certainly Congress in 1975 in the committee  
23 reports had in my mind a very detailed record of  
24 discrimination against Latinos in Texas.

25 I guess we disagree on that.

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1 VICE CHAIRPERSON THERNSTROM: Oh, they had  
2 such a hard time coming up with making -- little  
3 anecdotes and one of their key witnesses said, "Look.  
4 We don't have the Fannie Lou Hamers. We can't make  
5 the same case."

6 It was a completely different record than  
7 in '65, anyway.

8 CHAIRPERSON REYNOLDS: Okay. I think that  
9 at this point we need to wrap up. I'd like to thank  
10 the panelists. You've all done an excellent job, but  
11 I'd like to wrap up.

12 Actually I'd like the Staff Director to  
13 offer some brief remarks.

14 MR. MARCUS: Okay. Thank you, Mr.  
15 Chairman.

16 In light of the time I don't have any  
17 questions or substantive remarks for the panel. I  
18 would like to thank all of the panelists for taking  
19 their time to come here. I'd also like to  
20 specifically thank the staff members who work so hard  
21 to put this on.

22 Mireille, from OCRE, has worked tirelessly  
23 to put this together. Pam Dunston, handling the  
24 administrative aspects has been terrific. And Chris  
25 Byrnes in coordinating among the various offices and

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1 our host here at the Judiciary Committee.

2 Thanks also to the Judiciary Committee  
3 staff for helping us put this together and graciously  
4 offering the room.

5 I'd also like to mention that we will be  
6 putting together a written form of this briefing,  
7 including written statements by the witnesses. We  
8 appreciate the witnesses providing written statements,  
9 and we also encourage Commissioners to provide any  
10 statements that they would like to have included for  
11 the document which will be distributed both in hard  
12 copy and posted on our Web site as well.

13 CHAIRPERSON REYNOLDS: After a vote. We  
14 have to follow our procedures.

15 (Laughter.)

16 VICE CHAIRPERSON THERNSTROM: I have a  
17 question. I assume that the witnesses can expand.

18 MR. GREENBAUM: Revise and extend their  
19 remarks?

20 VICE CHAIRPERSON THERNSTROM: Revise and  
21 extend their remarks.

22 MR. MARCUS: Yes, that's right, and I've  
23 spoke to some, if not all, but we will follow up with  
24 the witnesses to talk about any changes that would be  
25 appropriate to prepare the written remarks for the

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1 published version.

2 CHAIRPERSON REYNOLDS: Okay. At this  
3 point we're going to take a ten minute break.

4 (Whereupon, the foregoing matter went off  
5 the record at 12:24 p.m. and went back on  
6 the record at 12:35 p.m.)

7 CHAIRPERSON REYNOLDS: Okay. We are going  
8 to reconvene the meeting, and at this point we'll have  
9 the Staff Director's report.

10 COMMISSIONER YAKI: Don't we have motions  
11 to vote on and stuff like that?

12 CHAIRPERSON REYNOLDS: Most of them are  
13 covered.

14 COMMISSIONER BRACERAS: We have the SAC.

15 CHAIRPERSON REYNOLDS: Didn't we vote to  
16 move --

17 COMMISSIONER YAKI: No, you voted to do  
18 them today.

19 CHAIRPERSON REYNOLDS: Jesus. All right.

20 (Laughter.)

21 COMMISSIONER YAKI: If you want to  
22 reconsider the motion.

23 COMMISSIONER YAKI: No, no, no. I mean, I  
24 had my hopes up of getting out of here in 20 minutes.

25 That's all.

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1 COMMISSIONER BRACERAS: We all do.

2 CHAIRPERSON REYNOLDS: Okay.

3 MR. MARCUS: I think the Staff Director's  
4 report is still next, Commissioner Yaki, unless you  
5 had a different understanding of the prior motion to  
6 approve the agenda.

7 COMMISSIONER BRACERAS: It's still on.

8 CHAIRPERSON REYNOLDS: Okay. Well, let's.

9 **VIII. State Director's Report**

10 MR. MARCUS: Okay. Thank you, Mr.  
11 Chairman, Madam Vice Chairman, Commissioners.

12 If it pleases the commission, I'd like to  
13 extend my written Staff Director's report with brief  
14 additional remarks regarding Commission reports,  
15 briefing, and management and operations.

16 With respect to reports, I am happy to say  
17 that the Commission's 2005 statutory enforcement  
18 report, "Federal Enforcement After Adarand," has been  
19 published and issued to the president, the vice  
20 president, all members of Congress, and the Controller  
21 General last week by the end of the fiscal year.

22 We've also complete revisions to the  
23 federal funding report, incorporating the changes  
24 distributed to the Commissioners last week, and the  
25 final report will be posted to the Web site, printed,

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1 and distributed shortly.

2 We're also in the process of publishing  
3 the briefing report on stagnation of the black middle  
4 class. This report will be printed by the Government  
5 Printing Office, posted to the Commission's Web site,  
6 and distributed later in the fall.

7 We're also now in the process of putting  
8 together several additional briefings for the next few  
9 months. Next month we will present a briefing on  
10 campus anti-Semitism. Garry Tobin, president of the  
11 Institute for Jewish and Community Research, has  
12 already accepted our invitation. We've also invited  
13 Susan Tuckman, Director of the Center for Law and  
14 Justice, a Zionist organization in America.

15 We are in the process of inviting  
16 additional experts in the topics of campus anti-  
17 Semitism as provided in the concept paper previously  
18 adopted by the Commission, as well as an expert on  
19 related First Amendment issues and representatives of  
20 specific campuses likely to be discussed during the  
21 briefing.

22 In December we will present a briefing on  
23 disparity studies. We've invited Professor George  
24 Lanoue of the University of Maryland and will invite  
25 John Wainwright of NERA, Roger Clegg of the Center for

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1 Equal Opportunity, and a representation of the  
2 National Academy of Science.

3 Now that we have adopted a calendar for  
4 next year, we will attempt to reschedule the Patriot  
5 Act briefing for early in the next calendar year.

6 With respect to budget and finance, let me  
7 say that we have had a few very important developments  
8 over the last couple of weeks. Earlier this week, GSA  
9 has taken over as the Commission's full service  
10 accounting services provider. Given the challenges  
11 we've had in this area, we were delighted to have them  
12 on board.

13 GSA understands the extent of the problems  
14 that we have inherited, but they have indicated to us  
15 that they have been impressed by the high priority  
16 which agency leadership is placing on reform, and that  
17 this has convinced them to take on the job. They will  
18 be a significant partner with us as we work on turning  
19 around in the budget and finance area and  
20 strengthening management within the agency.

21 Last week we selected William Adley &  
22 Company to conduct a full scope audit of the  
23 Commission's books for fiscal year 2005. They will  
24 also provide consulting services to the agency to  
25 prepare us for a strong fiscal year 2006.

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1 As you know, Parker Whitfield has not yet  
2 completed work on the agency's fiscal year 2004 audit  
3 which is now nearly 11 months overdue. We have  
4 reminded them, however, that the term of performance  
5 for their work ends on November 30, 2005.

6 Finally, the week after next Patricia  
7 Jackson will join the Commission as our new chief  
8 budget and finance officer. She is currently the  
9 controller of the Naval Medical Information Management  
10 Center. Before that she served as Chief of the  
11 Financial Services Division at the Defense Logistic  
12 Agency.

13 So I believe that while we still have very  
14 significant challenges to face regarding our budget,  
15 finances and internal controls of the agency, we are  
16 beginning now to turn the corner on that.

17 I would be pleased to take any questions  
18 that you may have.

19 CHAIRPERSON REYNOLDS: Okay.

20 (Laughter.)

21 CHAIRPERSON REYNOLDS: Next time I will  
22 pass the gavel.

23 Commissioner Kirsanow.

24 COMMISSIONER KIRSANOW: One question.  
25 When do we expect that the audit for 2005 will be

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1 done?

2 MR. MARCUS: We've been in communication  
3 with the agency and hope that they'll be working on it  
4 soon. Let me ask whether Ms. Dunston has any update  
5 on that.

6 MS. DUNSTON: I'm sorry. I think you  
7 wanted to know when it was going to be completed?

8 COMMISSIONER KIRSANOW: No, when it was  
9 going to begin. That's all.

10 MS. DUNSTON: We're in the process of  
11 beginning as we speak. They're going to pick up a  
12 date to have the initial meeting, and they will have  
13 that shortly.

14 COMMISSIONER KIRSANOW: Good.

15 CHAIRPERSON REYNOLDS: Any other questions  
16 for the Staff Director?

17 (No response.)

18 **IX. State Advisory Committee Issues,**  
19 **Working Group on SAC Reform**

20 CHAIRPERSON REYNOLDS: Okay. Next is a  
21 motion to amend the Commission's regulations  
22 concerning membership criteria of state advisory  
23 committees.

24 Commissioner Taylor.

25 COMMISSIONER BRACERAS: I'm sorry. May I

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1 have a written copy of the motion?

2 Thank you.

3 CHAIRPERSON REYNOLDS: Okay. Commissioner  
4 Taylor as the presiding commissioner on the task force  
5 on SACs, would you like to make this motion?

6 COMMISSIONER TAYLOR: I'd like to make the  
7 motion, but I'd like to fill in the gap for a few  
8 minutes to give folks a chance to read it to the  
9 extent they haven't read it.

10 And by filling in the gaps I mean that a  
11 working committee was asked to at least for the  
12 purposes of raising the issue at this meeting address  
13 three specific issues, one being the membership  
14 criteria, the second being term limits, and the third  
15 relating to the status of the SACs and a potential  
16 rechartering.

17 With respect to this first issue, that is,  
18 the membership criteria, concerns have been raised  
19 over the past several months regarding a concern that  
20 current membership criteria may contain quotas, may be  
21 constitutionally suspect, and there have been some  
22 moral concerns raised as well.

23 And so what we've tried to do is to  
24 increase the overall diversity both with respect to  
25 political affiliation, geographic coverage, et cetera

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1 of the SACs to increase the number of voices in the  
2 discussion at the state level rather than limit those  
3 voices.

4 And with that, Mr. Chairman, I would make  
5 the formal motion.

6 CHAIRPERSON REYNOLDS: Yes, yes.

7 COMMISSIONER TAYLOR: I move that the  
8 Commission approve the following changes to the  
9 regulatory language revising the existing provision  
10 regarding SAC membership requirements.

11 I also move that the Commission approve  
12 the following regulatory language to be published in  
13 the Federal Register for notice and public comment,  
14 and that all necessary background information be  
15 inserted in the notice as required by the Federal  
16 Register and, again, by way of further explanation,  
17 this proposed regulation would replace 45 CFR 703.5.

18 COMMISSIONER MELENDEZ: Mr. Chairman.

19 CHAIRPERSON REYNOLDS: Yes.

20 COMMISSIONER MELENDEZ: Could we ask a  
21 question on this?

22 CHAIRPERSON REYNOLDS: Sure.

23 COMMISSIONER MELENDEZ: Since I'm new and  
24 I've just touched base with our state advisory  
25 committee, I'm not sure exactly how long this has been

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1 on the table, whether it has just come up now or the  
2 Commission has been dealing with this for a number of  
3 years. I'd like to have the opportunity, unless we're  
4 saying that we make the decision on this state  
5 advisory, that the existing advisory committee,  
6 especially in Nevada where I've talked with Mr.  
7 Sanchez there. I have no idea whether or not that  
8 advisory committee even knows about this or even  
9 supports what's being presented here today.

10 But I would ask that if it would be  
11 possible to have another month to defer this so that  
12 we could at least discuss it a little more in depth  
13 with the people that it's affecting.

14 CHAIRPERSON REYNOLDS: Okay. Comments.

15 COMMISSIONER YAKI: I would second that  
16 motion.

17 COMMISSIONER TAYLOR: Just by way of  
18 procedure, I don't think we had a second on my motion.

19 COMMISSIONER KIRSANOW: Yeah, we still  
20 have a motion and there's no second. We had  
21 discussion, then some type of a motion with a second.  
22 So I think we need to disassemble this.

23 CHAIRPERSON REYNOLDS: Okay. Is there a  
24 second for Commissioner Taylor's motion?

25 COMMISSIONER BRACERAS: Second.

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1 CHAIRPERSON REYNOLDS: Okay, and do we  
2 have a second for Commissioner Melendez's motion?

3 COMMISSIONER YAKI: Yes.

4 COMMISSIONER KIRSANOW: I think we have to  
5 consider the one motion first and move on to this one.

6 PARTICIPANT: We can substitute motions.  
7 Okay.

8 CHAIRPERSON REYNOLDS: We can substitute  
9 on, but I don't think there's been a motion to  
10 substitute. I think we just have two motions out  
11 there.

12 COMMISSIONER YAKI: No, no, the motion was  
13 postponed. Okay. The technical term is that  
14 Commissioner Melendez offered a subsequent motion to  
15 postpone the vote for a month to consult with Nevada  
16 State Advisory Committee.

17 COMMISSIONER MELENDEZ: The reason is I  
18 don't even have the idea here as to what I think the  
19 outcome might be, whether or not it has to do with the  
20 idea of the Commission or why I even sit here today  
21 is, you know, a diversity in being a Native American,  
22 and I'm not sure. I don't even think there's any  
23 Native Americans on our state board in the State of  
24 Nevada.

25 So in my mind I'm not really sure exactly

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1 what I predict the outcome to be or what it is  
2 actually intended to do. For example, if for some  
3 reason it decreases minorities on any of the state  
4 boards and really replaces them with some of the think  
5 tank people that we had here today, I have no idea  
6 whether we're heading in that direction or not.

7 So before we vote on this, I'd hope that  
8 somebody would discuss where we're heading with this  
9 or what their reasons.

10 CHAIRPERSON REYNOLDS: Okay. If I  
11 understand you, well, you want basically 30 days to  
12 have an opportunity to study the issue and to consult  
13 with --

14 COMMISSIONER MELENDEZ: This is the first  
15 time I have heard the issue.

16 CHAIRPERSON REYNOLDS: Okay. My view on  
17 the request is that we've done something similar in  
18 the past for Commissioner Yaki. I think that despite  
19 the fact that it's going to cause some operational  
20 difficulties and also to prolong this issue that's  
21 been pending for quite some time, I'm supportive of  
22 the motion just as a courtesy for a new Commissioner.

23 Commissioner Braceras.

24 COMMISSIONER BRACERAS: Ordinarily I would  
25 be supportive of your request for additional time, but

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1 in this case, this is something that has been floating  
2 around for many months now, and we've had lengthy  
3 discussions with each other and with the SACs. We've  
4 received input from them, and I think, to be perfectly  
5 honest with you, I think we pretty much know that we  
6 have the votes for this.

7 And while I'd love to give you the  
8 opportunity to study the issue further, it's  
9 ultimately going to pass, and I'd rather not impose  
10 the operational difficulties on the Staff Director  
11 that I think postponing it and additional month would  
12 do.

13 But as I said, ordinarily, I would be very  
14 much in favor of making that accommodation, but  
15 depending on the views of the rest of the Commission I  
16 preference would obviously be to vote today and to  
17 move on with this.

18 CHAIRPERSON REYNOLDS: Commissioner Yaki.

19 COMMISSIONER YAKI: While I appreciate  
20 Commissioner Bracer's remarks, I do remember the  
21 courtesy that was extended to me when faced with an  
22 issue that I was just relatively new to. I would like  
23 the same courtesy to be extended to this new  
24 Commissioner.

25 Through no fault, I think, of anyone's

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1 own, I was unable to figure out a way to contact him  
2 beforehand to talk about some of these issues  
3 beforehand, and I think that given -- I mean, it sort  
4 of cuts two ways. Given how long we have been dealing  
5 with this issue, I think that it would be much more --  
6 while I understand where the votes may come out on  
7 this, I think it would be done procedurally with much  
8 more of a sounder foundation than if we had one member  
9 of the minority objecting because he or she had not  
10 had the opportunity to study it prior to the eventual  
11 vote.

12 And given the fact that, like I said, we  
13 have been sort of waiting on this for quite some time,  
14 I don't think an additional 30 days would unduly  
15 prejudice the eventual action since the eventual  
16 action is to go back to the drawing board anyway.

17 CHAIRPERSON REYNOLDS: Commissioner  
18 Kirsanow.

19 COMMISSIONER KIRSANOW: Mr. Chairman, I  
20 agree with everything that Commissioner Braceras had  
21 to say on this particular issue.

22 Having said that, I think that it's  
23 important for this Commission to accord the new  
24 Commissioner, Commissioner Melendez, the opportunity  
25 to explore this issue further. I would wish that such

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1 type of accommodation or comity would be extended to  
2 me, and I am prepared to vote in favor of the  
3 substitute motion proposed by Commissioner Melendez.

4 CHAIRPERSON REYNOLDS: Commissioner  
5 Taylor.

6 COMMISSIONER TAYLOR: I generally would be  
7 in favor of an accommodation of this nature. I fear  
8 and the fear I've had all along relative to everything  
9 we have done with the SACs has been just this, that we  
10 continue to delay what we need to do, and every time  
11 we delay it builds in more time into the system, which  
12 will prevent us from moving forward and actually  
13 putting the SACs in a position to do the work I think  
14 they should do.

15 The SACs, generally that's an issue I'm  
16 very interested in because I think they're an  
17 underutilized source of the Commission, but we can't  
18 put them into the position to do the work they should  
19 be doing until we move forward on these administrative  
20 issues.

21 And I would be more inclined to make this  
22 accommodation if this change in membership criteria  
23 were directed at a particular person or an issue, but  
24 it's a systemic issue. There are concerns raised  
25 regarding whether, again, there were quotas in this,

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1 moral objections, and in that context I would be more  
2 inclined to move forward with a vote today,  
3 particularly since, candidly, this is watered down  
4 language that we have before us. This is not the  
5 original language that was circulated months ago.  
6 This language is considerably watered down.

7 So that would be the reason I would not be  
8 in favor of that accommodation that I generally would  
9 be in favor of, and quite frankly, most cases would  
10 expect to receive.

11 CHAIRPERSON REYNOLDS: Okay. I'm in the  
12 uncomfortable position of agreeing with everyone,  
13 although I've made my decision. I mean everyone has  
14 made very good points.

15 Would a possible compromise be that -- and  
16 I know that everyone hates to do this -- but to have a  
17 vote via teleconference, have a poll vote on the issue  
18 in two weeks instead of 30 days?

19 You know, I don't know if I have to make a  
20 motion, but I just want to get some reaction to see if  
21 that's a viable --

22 COMMISSIONER BRACERAS: Again, I would  
23 prefer to vote today for the reasons stated by  
24 Commissioner Taylor and by myself earlier, but your  
25 suggestion would also allow us the benefit of having

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1 the Vice Chair's vote as well. So if that's something  
2 that our newest Commissioner would feel comfortable  
3 with, then I'd be happy to get on board with that.

4 CHAIRPERSON REYNOLDS: Commissioner  
5 Taylor?

6 COMMISSIONER TAYLOR: No.

7 COMMISSIONER MELENDEZ: That would be  
8 fine. I just want to run it by the Advisory Board in  
9 the State of Nevada with Mr. Sanchez, and so that I  
10 don't take part in something until I get my input on  
11 it.

12 CHAIRPERSON REYNOLDS: Commissioner  
13 Taylor.

14 COMMISSIONER TAYLOR: If I may then, I  
15 would expand that to include, I assume, the same  
16 concerns Commissioner Melendez will be raised relative  
17 to the other motions as well.

18 CHAIRPERSON REYNOLDS: Everything that's  
19 on the table today.

20 COMMISSIONER TAYLOR: Right. So if that  
21 is the --

22 CHAIRPERSON REYNOLDS: All of the SAC  
23 motions.

24 COMMISSIONER TAYLOR: Right. So I would  
25 ask then that we include to the extent this view

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1 prevails all of the motions included in our packet for  
2 today, membership criteria, term limits, and the  
3 rechartering issue, and we do it by way of a poll  
4 vote.

5 CHAIRPERSON REYNOLDS: Okay. So I  
6 guess --

7 MR. MARCUS: If I may, considering that  
8 this is a serious substantive matter, I would remind  
9 the Commissioners cannot include any form of  
10 deliberation. It's not clear to me. I think the  
11 Chairman used the term "teleconference," and  
12 Commissioner Taylor used the term "poll vote," and so  
13 I guess it's worth making --

14 COMMISSIONER TAYLOR: My recollection  
15 would be that -- help me understand operationally how  
16 a poll vote would work. I would have in mind  
17 circulating the three motions and then having folks --  
18 as I recall our last poll vote, I checked a box yes or  
19 no like in third grade when some girl asked me if I  
20 liked her to check.

21 (Laughter.)

22 COMMISSIONER TAYLOR: That's what I have  
23 in mind by way of a poll vote. Is that true?

24 MR. MARCUS: Yes. With a poll vote we  
25 would circulate the matter to be voted on, and we

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1 would get a response to it. There could not be  
2 deliberation to it.

3 The advantage to a poll vote is that it is  
4 not a public matter. So we don't have to wait any  
5 particular amount of time.

6 COMMISSIONER TAYLOR: In my view that's  
7 sufficient given the significant involvement and input  
8 the SACs have had in this process to date.

9 CHAIRPERSON REYNOLDS: Commissioner  
10 Braceras?

11 COMMISSIONER BRACERAS: I personally don't  
12 have any problem with a poll vote, but I would just  
13 remind Commissioners that even when tried to discuss  
14 this topic by teleconference before, which is a more  
15 open process than a poll vote, there was some degree  
16 of criticism that it wasn't open enough to the public.

17 It was they had to phone in to listen and there were  
18 technical complications that made the process at least  
19 have the appearance of some sort of back room deal.

20 And one of the reasons we postponed things  
21 until now was so that we could do it face to face in  
22 an open forum with deliberation. So I'm just raising  
23 those issues because they're bound to come up again,  
24 and I personally feel that we've given everybody a  
25 significant amount of time for input, and we've taken

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1 everybody's views into consideration, and so I think  
2 the time is now to move on.

3 But those issues are bound to come up  
4 again, and I just wanted to raise that.

5 CHAIRPERSON REYNOLDS: Okay. Commissioner  
6 Yaki.

7 COMMISSIONER YAKI: Yeah, I just wanted to  
8 say that the one point brought up about the poll vote  
9 having no discussion does have some -- does concern me  
10 a little bit mainly because of the lack of the  
11 deliberative process.

12 For example, I think in reading this and  
13 going over this I actually have thought of one  
14 possible compromise motion that might deal with this  
15 that I would like to circulate in the next week for  
16 people to take a look at.

17 CHAIRPERSON REYNOLDS: Okay. So it sounds  
18 like my notion of shaving two weeks off as a  
19 compromise, that there's not support for that. I'm  
20 sorry. Commissioner Braceras, you were about to say  
21 something?

22 COMMISSIONER BRACERAS: I wasn't  
23 suggesting that I didn't support it. I just wanted  
24 people to be aware of some of the criticisms we are  
25 bound to receive and to suggest that maybe in the

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1 spirit of openness, maybe a telephonic meeting might  
2 better address some of those concerns.

3 CHAIRPERSON REYNOLDS: Okay. And at the  
4 end of that meeting we would have a vote.

5 COMMISSIONER BRACERAS: Correct.

6 CHAIRPERSON REYNOLDS: Commissioner Yaki,  
7 does that address your concerns?

8 COMMISSIONER YAKI: It's fine with me. I  
9 just wonder about the cost of staging the telephonic  
10 meeting versus just bringing it up during the normal  
11 course of the November meeting.

12 CHAIRPERSON REYNOLDS: Well, I guess at  
13 this point the concern that's been expressed here  
14 today by most of us is that this has dragged on, and  
15 the only reason that we are entertaining this  
16 compromise, this postponement is it's because we have  
17 a new Commissioner, and I think that I'm comfortable  
18 under these circumstances with extending that courtesy  
19 to Commissioner Melendez.

20 COMMISSIONER YAKI: So a two week  
21 telephonic meeting?

22 CHAIRPERSON REYNOLDS: Yes. So the  
23 substitute motion would be a teleconference two weeks  
24 -- well, the Staff Director will pick the exact date,  
25 and during that meeting we will have a discussion of

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1 all the issues with respect to the SAC issues that  
2 we've discussed in the past, and at the end, we would  
3 vote.

4 COMMISSIONER YAKI: I will draft another  
5 substitute motion that will be circulated at least a  
6 week prior to that meeting.

7 COMMISSIONER TAYLOR: Question regarding  
8 criteria, membership criteria.

9 COMMISSIONER YAKI: You'll see.

10 (Laughter.)

11 COMMISSIONER TAYLOR: You're leaving  
12 yourself enough room to have multiple versions. I  
13 know what you're doing.

14 COMMISSIONER YAKI: I don't know what  
15 you're talking about.

16 COMMISSIONER TAYLOR: I know exactly what  
17 you're doing. So I'll try to get you nailed down to  
18 one issue.

19 COMMISSIONER BRACERAS: Can I just request  
20 that prior to our discussion of this that hard copies  
21 of all the competing motions be circulated to the  
22 Commissioners?

23 CHAIRPERSON REYNOLDS: Yes.

24 COMMISSIONER BRACERAS: E-mail is not  
25 always the most reliable way for me to get documents.

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1 So specifically when we're voting on something, if I  
2 could have a hard copy of all the competing motions  
3 that would be --

4 COMMISSIONER YAKI: E-mail is fine for me.  
5 Let me just say E-mail is fine.

6 COMMISSIONER MELENDEZ: I think we need to  
7 mail them also because I wasn't getting -- I didn't  
8 even get this packet for today. In fact, they gave it  
9 to me yesterday because with the E-mail we were having  
10 a problem.

11 CHAIRPERSON REYNOLDS: All right. Well,  
12 the Staff Director's office will see to it that hard  
13 copies are sent to Commissioners Melendez and  
14 Braceras, and I believe that's it.

15 MR. MARCUS: And, of course, we would ask  
16 that we be provided with those bills to be able to  
17 circulate so that we can get them out.

18 CHAIRPERSON REYNOLDS: I'm sorry.

19 Yes. All in favor of the substitute  
20 motion, please say aye.

21 (Chorus of ayes.)

22 CHAIRPERSON REYNOLDS: All in opposition?

23 (No response.)

24 CHAIRPERSON REYNOLDS: The substitute  
25 motion passes unanimously.

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1           **X: Elementary and Secondary School**

2                   **Desegregation Project**

3                   Next up, actually the last substantive  
4           issue concerns elementary and secondary school  
5           desegregation.

6                   We are going to have Chris Byrnes. Chris  
7           Byrnes will explain what are the contributions to the  
8           elementary and secondary school desegregation project  
9           that have been done up to now by the Southern Regional  
10          Office.

11                   Mr. Byrnes.

12                   MR. BYRNES: Thank you, Mr. Chairman.

13                   The Southern Regional Office is actively  
14          engaged in gathering of research for the fiscal year  
15          2007 elementary and secondary school desegregation  
16          national report. It has completed work in South  
17          Carolina and work in the three states, Georgia,  
18          Florida, and Kentucky is now underway in our plans to  
19          become active in North Carolina and Tennessee for  
20          fiscal year 2006.

21                   Now, it is estimated that there may be as  
22          many as 400 school districts nationwide whose  
23          desegregation efforts are still under federal court  
24          supervision.

25                   In addition to that, the Office for Civil

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1 Rights and the U.S. Department of Education is  
2 responsible for insuring that school districts that  
3 receive federal financial assistance comply with Title  
4 6 of the Civil Rights Act of 1964, and this is often  
5 done through the use of 441(b) desegregation plans.

6 Now, under these plans which were  
7 voluntary compliance agreements, local school  
8 districts file assurances that the district is in full  
9 compliance with anti-discrimination statutes and  
10 regulations and that it commits to an action plan to  
11 achieve and maintain desegregation status.

12 Now, the problem is that no definitive  
13 source of information or central repository of  
14 information exists with respect to those districts  
15 that are under federal court supervision with respect  
16 to their desegregation efforts or with respect to the  
17 Office for Civil Rights' 441(b) desegregation plans.

18 And often the state education agency is  
19 unsure of the precise number within their  
20 jurisdiction, and as a starting point, the Southern  
21 Regional Office has conducted research to obtain an  
22 accurate assessment of those school districts in South  
23 Carolina that were at one point under federal court  
24 supervision with respect to desegregation, as well as  
25 those that have since achieved unitary or desegregated

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1 status.

2 And SRO first obtained from the state  
3 officials a status report on the desegregation status  
4 of all school districts in the state.

5 Now, for those districts that were  
6 identified as unitary or desegregated- but were  
7 previously under federal court supervision, the  
8 Southern Regional Office conducted research on and  
9 listed the court case that initiated the desegregation  
10 action.

11 The final decision that granted unitary  
12 status, as well as district demographics which at this  
13 point have included total student enrollment in  
14 absolute terms and the percentage of that enrollment  
15 that are minority.

16 Now, for the district whose desegregation  
17 efforts are still under court supervision that have  
18 not been declared unitary, SRO conducted research on  
19 and initiating court case.

20 The most recent court action, the same  
21 district demographics I mentioned earlier. An index  
22 of dissimilarity which is a statistical tool used to  
23 measure the extent of segregation or desegregation,  
24 and an explanation from school officials as to why the  
25 district has failed to achieve unitary status.

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1 Now, based on this preliminary research,  
2 SRO found that 34 of the 85 local school districts in  
3 South Carolina had been under federal court  
4 supervision with respect to their desegregation  
5 efforts at one point. The 51 remaining local school  
6 districts in South Carolina have voluntary compliance  
7 agreements with the U.S. Department of Education.

8 And courts have since declared 17 of that  
9 original 34 that I mentioned unitary. These findings  
10 are still undergoing additional verification and site  
11 checking and the revised corrected findings are  
12 expected fairly soon, within the next couple of weeks.

13 Similar research for Florida is nearing  
14 completion, hopefully for some time in November, and  
15 data collection has begun for Georgia and Kentucky.  
16 And SRO hopes to begin work on North Carolina and  
17 Tennessee in 2006 as well.

18 CHAIRPERSON REYNOLDS: Okay. Thank you,  
19 Mr. Byrnes.

20 Are there any questions for Mr. Byrnes?

21 (No response.)

22 CHAIRPERSON REYNOLDS: Okay. Thank you.

23 All right. We have a motion, and it  
24 reads: "I move that the Commission request that the  
25 State Advisory Committees in the regions and states to

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1 be identified by the Office of General Counsel take up  
2 the desegregation status of public school districts  
3 within their jurisdiction as a research project. This  
4 project will support the work of the Office of General  
5 Counsel in producing the 2007 statutory enforcement  
6 report on the same topic.

7 "As of 2001, there were 400 school  
8 districts still under federal court supervision with  
9 respect to desegregation. The Commission's statutory  
10 enforcement report on the desegregation status of  
11 elementary and secondary schools would examine the  
12 unitary status of these schools and possibly others to  
13 determine the success or failure of desegregation.

14 "It would be helpful to have State  
15 Advisory Committees in all states affected by court  
16 desegregation orders collect data on the relevant  
17 school districts within their respective  
18 jurisdictions."

19 Is there a second?

20 COMMISSIONER BRACERAS: Second.

21 CHAIRPERSON REYNOLDS: Discussion?

22 COMMISSIONER KIRSANOW: Just one question.

23 Is there a cost estimate associated with that?

24 MR. MARCUS: Commissioner, I don't believe  
25 there's a cost estimate. I think perhaps you're

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1 asking what the cost would be in the event that the  
2 State Advisory Committee should accept this  
3 recommendation from the Commission and do the work.

4 COMMISSIONER KIRSANOW: yes.

5 MR. MARCUS: Now, as a general rule we've  
6 not gotten cost estimates from the State Advisory  
7 Committee, and we haven't in this case. I guess I  
8 would have to say we haven't done it.

9 I can say that for those states that have  
10 been looking at this issue, there have been some out-  
11 of-pockets. In other words, the work has not just  
12 been a matter of staff time. And the out-of-pockets  
13 at least so far have primarily consisted of staff  
14 travel, which has been minimal to date, and I would  
15 also say that when those states took the project up,  
16 it was with the understanding that they might not be  
17 able to do any staff travel at all.

18 So in other words, these were projects  
19 that were developed in the southern states as being  
20 projects that were doable with essentially no out-of-  
21 pockets and were done with just a little bit of out-  
22 of-pocket when the money was available.

23 COMMISSIONER KIRSANOW: Thank you.

24 CHAIRPERSON REYNOLDS: Any other  
25 questions, comments?

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1 All in favor?

2 (Chorus of ayes.)

3 CHAIRPERSON REYNOLDS: All in opposition?

4 (No response.)

5 CHAIRPERSON REYNOLDS: The motion passes  
6 unanimously.

7 The last motion reads, "I move to have  
8 staff arrange a briefing before the Commission on the  
9 Native Hawaiian Government Reorganization Act of 2005,  
10 Senate Bill 147, which was introduced in the Senate by  
11 Senator Daniel" -- I'm sorry. Someone help me with  
12 the pronunciation -- "Akaka.

13 "Senator Daniel Akaka has introduced  
14 Senate Bill 147, the Native Hawaiian Government  
15 Reorganization Act. This proposed legislation would  
16 recognize the right of the native Hawaiian people to  
17 reorganize the native Hawaiian governing entity to  
18 provide for their commonwealth there and to adopt  
19 appropriate organic governing documents.

20 "A commission would be established to  
21 prepare and maintain a roll of adult members of the  
22 native Hawaiian community who elect to participate in  
23 this reorganization and to certify that the adult  
24 members of the native Hawaiian community proposed for  
25 inclusion on the roll meet the definition of native

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1 Hawaiian.

2 "The proposed legislation defines the  
3 native Hawaiians as the 'direct lineal descendants of  
4 the aboriginal indigenous native people of Hawaii.'  
5 The federal government would negotiate with this  
6 reorganized governing entity-over specified matters,  
7 such as the transfer of lands, natural resources and  
8 other assets and the protection of the existing rights  
9 related to such lands or resources.

10 "The proposed legislation comes five years  
11 after the Supreme Court's decision in Rice v. Cayetano,  
12 which held that a policy allowing on native Hawaiians  
13 to vote for trustees of the state's Office of Hawaiian  
14 Affairs violated the 15th Amendment of the  
15 Constitution which prohibits race based exclusion from  
16 voting.

17 "The Commission would host a briefing to  
18 address the constitutional, legal, and civil rights  
19 policy aspects of the proposed legislation. The  
20 briefing would last approximately two hours with four  
21 to five speakers allotted ten minutes each and the  
22 remaining time allotted for the questions and answers.  
23 The projected cost would range from approximately  
24 \$1,400 to \$3,200."

25 Is there a second?

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1 COMMISSIONER BRACERAS: Second.

2 CHAIRPERSON REYNOLDS: Discussion?

3 COMMISSIONER MELENDEZ: As far as is there  
4 going to be something similar to having presenters  
5 like this in that hearing?

6 CHAIRPERSON REYNOLDS: Yes.

7 COMMISSIONER MELENDEZ: I was wondering if  
8 it's possible ~~we~~ -- how do we pick those? Do the  
9 Commissioners actually have a hand in --

10 CHAIRPERSON REYNOLDS: All Commissioners  
11 submit recommendations.

12 COMMISSIONER MELENDEZ: Okay.

13 CHAIRPERSON REYNOLDS: And then the office  
14 of the Staff Director will make the ultimate  
15 selection.

16 COMMISSIONER MELENDEZ: Okay. I had a  
17 recommendation of a person that's worked with Senator  
18 Inouye, a lady by the name of Patricia Zell, who is  
19 with the Senate Indian Affairs and also works with the  
20 Office of I believe it's Hawaiian Affairs right now.  
21 That might be a good speaker who has worked on and  
22 knows everything about the legislation.

23 CHAIRPERSON REYNOLDS: Okay. Any other  
24 comments or questions?

25 (No response.)

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1 CHAIRPERSON REYNOLDS: Okay. All in  
2 favor.

3 (Chorus of ayes.)

4 CHAIRPERSON REYNOLDS: Any in opposition?

5 (No response.)

6 CHAIRPERSON REYNOLDS: The motion passes  
7 unanimously.

8 That concludes this meeting.

9 (Whereupon, at 1:09 p.m., the meeting in  
10 the above-entitled matter was concluded.)

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